Case Number: 3334670/2018

THE EMPLOYMENT TRIBUNAL

Claimant: **Miss L. Klimaite**

Respondent: **GFK Retail & Technology UK Limited**

Heard at: London South Employment Tribunal

On: 19 – 20 April 2022

Before: Employment Judge A. Beale
Dr R. Fernando
Mrs J. Jerram

Representation
Claimant: In person
Respondent: Mr A. Ohringer, Counsel

RESERVED JUDGMENT

The Claimant's claims of:

(1) unfair dismissal;

(2) less favourable treatment on the ground that she was a part-time worker;

(3) and breach of contract in respect of unpaid expenses

fail and are dismissed.

REASONS

1. By a claim submitted on 9 November 2018, the Claimant claimed unfair dismissal, less favourable treatment on the ground of her part-time worker status and that she was owed redundancy pay, unpaid expenses and wages and holiday pay in respect of the time spent processing her unpaid expenses.

2. Following a case management hearing on 23 August 2019 before EJ Anstis, the Claimant's claims for an enhanced severance/redundancy payment, wages and holiday pay in relation to time spent processing her expenses claims, and any other claim for "compensation for time" were struck out on the basis that they had no reasonable prospect of success (p. 37 – 41).

3. The Claimant's claim that the Respondent had breached her contract of employment by failing to pay expenses was made the subject of a deposit order in the sum of £100 dated 20 September 2019, on the basis that it had little reasonable prospect of success (p. 34). EJ Anstis's reasons for this decision were set out in his judgment and reasons sent to the parties on 20 September 2019 at paragraph 22 (p. 40 – 41) in which he noted that there were a number of points in the Respondent's materials at which it was said that expenses needed to be claimed as soon as possible and in any event within three months, strongly suggesting that the Claimant had no contractual entitlement to claim expenses beyond a three month period.

4. The Claimant complied with the deposit order, but lodged an appeal against the amount, which was allowed, and the sum payable was reduced to £1.

The Hearing

5. The full hearing of this claim was conducted in person on 19 – 20 April 2022.

6. Before the hearing, the Claimant had requested a postponement, on the basis that she had a Universal Credit appointment on 19 April which could not be moved. The postponement was refused in writing. She renewed her request for a postponement by email prior to the hearing. However, the Claimant attended the hearing, and following discussions with the parties, it was agreed to adjourn the hearing at 1:30 p.m. on the first day, to allow the Claimant to attend her appointment. It was possible to conclude the evidence and submissions in the time available, but the Tribunal reserved its judgment.

7. The Claimant and her witness, Ms Standfield gave evidence, and Mrs Roberson, HR Business Partner, gave evidence on behalf of the Respondent. The Tribunal was provided with witness statements prepared for each of these witnesses, and an agreed bundle prepared by the Respondent, running to 791 pages.

The Issues

8. At the start of the hearing, the issues were clarified with the parties as follows:

9. Was the Claimant unfairly dismissed? In particular:

9.1 What was the reason for the Claimant's dismissal? The Respondent contends that the reason was redundancy. The Claimant did not accept that this was the genuine reason and felt her status as a part-time worker had played a part.

9.2 If the reason for dismissal was redundancy, was the Claimant given adequate warning of redundancy?

9.3 Was there adequate consultation with the Claimant?

9.4 Did the Respondent follow a fair selection process?

9.5 Was adequate consideration given to suitable alternative employment for the Claimant?

10. Did the Claimant's dismissal amount to less favourable treatment than that of a comparable full-time worker?

11. Did the Respondent breach the Claimant's contract of employment by failing to pay her expenses?

Findings of Fact

12. The Claimant was employed by the Respondent from December 2006 in the role of "Field Researcher". The job title was later changed to "Field Executive". The Claimant's role involved going to visit certain retailers and auditing what was on the shelves of the retailers. The information would then be collated by the Respondent and sold on to clients to provide consumer and market insight.

13. The Claimant was one of a team of 12 part-time Field Executives, who were managed by a Local Operations Coordinator, Szymon Cichocki. Mr Cichocki worked full-time.

Contract and Expenses

14. There are two versions of the Claimant's contract of employment in the bundle, one dating from 28 March 2008 (p. 42 – 46) and one from 19 November 2008 (p. 47 – 50).

15. Both contracts state that the Claimant will work from home and will attend at those retail outlets notified to her by the Respondent for the purpose of conducting her duties (clause 5).

16. Both contain identical terms as to expenses and allowances as follows:

Clause 8(2): A lunch allowance of up to £5.00 per day for a minimum of 4 hours worked on that day will be paid to you subject to the Employer's receipt of relevant receipts.

Clause 9: On condition that you hold an appropriate driving licence the Employer will contribute towards the costs of you using your own car to perform your duties at the rate of £0.40p per mile and any parking fees incurred, subject to it receiving a duly completed Expense Form. You are responsible for ensuring that the car is taxed, insured and roadworthy. You will pay all penalties incurred by way of road traffic/highway violations.

Clause 10: The Employer will reimburse you in respect of travel expenses reasonably incurred by you in performing your duties following the production of relevant receipts.

17. There is no specific provision in the contract stating any time frame within which expense claims must be made.

18. There is an email in the bundle said to have been sent to the Claimant by her manager, Mr Cichocki, dated 21 August 2015, attaching a September newsletter. We have also seen a newsletter (p. 314 – 315) said by the Respondent to be the attachment, which refers to changes in the expense claiming process. It contains a table which states that expenses older than 3 months are not claimable, and that expenses must be submitted monthly. There is a second line in the table referring to three-month old expenses, which are stated to be claimable "in exceptional circumstances", approved by an executive team member.

19. A further email in the bundle dated 24 September 2015, addressed to the Claimant, again from Mr Cichocki, sets out in the body of the email the changes to the expenses claiming process detailed above. The email states that Mr Cichocki is missing receipts for the Claimant's July and September expenses claims and that the expenses claimed are "on hold".

20. The Claimant says that these emails have been copied and pasted into an email sent to her by Catherine Roberson on 31 August 2018, and that they are not forwarded original emails. The Claimant says she did not receive these emails in August/September 2015.

21. We confirmed with the Claimant that the email address to which these emails were sent was the correct email address for her. On the balance of probabilities, we find that these emails informing the Claimant of the changes to the expenses claiming process were sent to her in August and September 2015 and that she received them. It seems to us very unlikely that the Respondent would have fabricated these emails, and the Claimant did not suggest that they had done so. The Claimant's evidence was that she would have seen any emails that came to this address. However, we accept that the Claimant did not, at the time, absorb the new policy under which expense claims should be submitted within three months. We also note that the Claimant was a home worker, and did not attend the office, or come into contact with her fellow team members. Insofar as it is the Respondent's case that the newsletter was also sent to the Claimant by post, we accept the Claimant's evidence that there was confusion at the Respondent as to her postal address at the time, and that on the balance of probabilities, she did not receive the newsletter by this means.

22. We were also referred to a document entitled "GfK UK Travel and Entertainment Guideline" and subtitled "Instructions and procedures for all business trips and entertainment" (p. 65 – 85; 'the Guideline'). This document is dated December 2015, with the last update in October 2017. In its definition section (p. 69) it states at clause 2.1 that "Business Trip" means travel by any GfK employee while on assignment by or at the direction of GfK for the purpose of carrying out the business of GfK. It continues:

"Home to office commuting expenses are not reimbursable, unless home is employees contractual base location. However in the event that an employee is required to commute from home to either a client or alternative GfK office; an airport or train station, the distance traveled is reimbursable."

23. Clause 2.2 at p. 70 states that Travel expenses are expenses incurred while on a Business Trip as defined.

24. Clause 7.1 (p. 79) provides that *"the cost of meals incurred while on a Business Trip is reimbursable. Original receipts must support these expenses unless the GfK Company reimburses a per-diem allowance."* Clause 7.2 states that receipts must record the cost, including tax and tip, the date, the name and location of restaurant, the names, titles and business relations of all persons attending and the business purpose.

25. Clause 8.1 states that travel expense claim reports must be submitted immediately but at the latest within 3 months after the trip. Clause 8.3.1 states that travel expenses reported later than 3 months after the expense was incurred may not be reimbursed (p. 80).

26. The Claimant's evidence, which we accept, is that she had not seen the Guideline prior to the Tribunal proceedings. There was no evidence that this document was drawn to her attention by the Respondent. Our view is also that, although this document contains a broad definition of business trip which might include daily journeys to sites as part of an individual's usual role, to the casual reader it appears to relate primarily to trips outside of the daily routine.

27. The Claimant said in her oral evidence, and we accept, that she had sent in timesheets to the Respondent on a monthly basis through the electronic device she used for her work. Those timesheets appear at p. 334 – 370, and some include claims for travel expenses and food costs. In these timesheets, the Claimant claimed between £9.20 and £9.50 for daily travel, stated to be the cost of a travelcard, and £5 daily for food.

28. At one point in her oral evidence, the Claimant suggested that she had also sent pictures of her receipts in this way between 2015 and 2018. However, the Claimant subsequently accepted that she had not sent any receipts to the Respondent until July 2018 in respect of the claims now made for the period 2015 – 2018. The Claimant explained that she was reluctant to send in her receipts because the Respondent had erroneously taxed employees on their expenses (see p. 109 – 110, which confirm that this occurred at some point, although the documents are not dated, and the Claimant was unable to tell us when this had occurred). The Claimant confirmed that she had received no payment in respect of any of the expenses she now claims in these proceedings.

29. The Claimant's witness, Ms Standfield, who was employed by the Respondent between 2015 and January 2017 in the same role as the Claimant, gave evidence that she was not aware of the "three month" rule

for claiming expenses. She said she had claimed expenses by filling out timesheets and sending them electronically (as the Claimant did) and also sending in her physical receipts, often in a pre-paid envelope sent by the Respondent. She was paid promptly when she submitted her receipts. She said at one point the Respondent operated a trial whereby she could photograph and upload her receipts on her electronic device, and she had been paid in respect of those receipts. She said in general she would send in her receipts whenever she got an envelope, which could be a couple of months after the expenses were incurred, but had been four months and once (after the tax issues referred to above) it was eight months later. She said she had been paid her expenses on each of these occasions. We found Ms Standfield to be a credible witness and accepted her evidence.

30. On 8 August 2017, Mr Cichocki emailed the Claimant to inform her that in September the Respondent would be moving from its then current system of handling expenses into a GfK online system. Under the new system, receipts would not have to be sent back to the office, but should be scanned/photographed and uploaded to the website. The Claimant was informed that all public transport, mileage claims and parking ticket would need to be claimed through the GfK expenses portal. Login details were provided (p. 110).

31. On 23 November 2017, Mr Cichocki confirmed, in an email that all of his team (which, it appears, would include the Claimant) were set up on the company expenses tool and would be using the online portal for expenses from December 2017 onwards (p. 117).

32. In her oral evidence, the Claimant said she had experienced difficulty in setting herself up on the system. She said she had asked her manager if she could delay setting herself up and that he had agreed. She agreed that she had not in fact set herself up on the system until after her redundancy, although she said she had tried to set herself up before, as we address further below. She also said, and we accept, that she received no training on the new system.

Redundancy

33. On 31 August 2017, the Respondent's CEO announced the launch of a "comprehensive transformation and investment program" called 'Accelerate'. The letter announcing the launch (see p. 111 – 116) stated that the proposed program would include *"simplifying our structures and establishing selective standardisation and automation to achieve more effective processes".* It was anticipated that the new set-up and the automation would result in cost reductions of around 200 million Euros and that employee representatives would need to be consulted. It appears from this letter that redundancies were envisaged.

34. Mrs Roberson gave evidence that, as a result of this review and the Respondent's desire to focus on profitable products, the in-store data collection operation of the IFR business in which the Claimant was employed was identified as an area of the business that was not making

any money, and therefore would not be viable in future. We have no reason to doubt this evidence.

35. Mrs Roberson wrote to the Claimant inviting her to a formal consultation telephone call on 6 March 2018. The Claimant was informed of her right to be accompanied (p. 120). The Claimant attended the call with her chosen companion on 6 March (p. 121 – 122). The notes of the call state that the Claimant was informed that her role and that of all her IFR team members was under threat of redundancy, because the IFR portfolio was not profitable, and did not fit with the Respondent's strategy. The Claimant was informed that delivery of data would be wound down and would cease from June 2018. She was told there would be a consultation period of 30 days, during which she could challenge the proposal and ask for further relevant information. She was also provided with a vacancy list, and told that she could find vacancies advertised on the Respondent's intranet. Mrs Roberson told the Claimant to inform her if she found any roles of interest. The Claimant was sent a letter confirming the contents of the meeting on 8 March 2018 (p. 127 – 128).

36. A second consultation meeting took place on Friday 23 March 2018 (p. 129 – 131). During this meeting, the Claimant said that she felt the decision to make her redundant had already been made. Mrs Roberson said that the purpose of the 30 day consultation period was for individuals to ask questions, request further information and challenge the Respondent's thought process, as well as to look for other opportunities in the company. Mrs Roberson confirmed that all 12 members of the team were affected. The Claimant raised the point that the vacancy lists did not tell her a great deal about the job responsibilities, and Mrs Roberson said she would pass on job descriptions if the Claimant required any more information. The Claimant asked about a "mystery shopper" role and Mrs Roberson said she would send on the job specification.

37. We accept the Claimant's evidence that, during this meeting, Mr Cichocki initially said that the Claimant could inform the shops where she worked that she would not be doing the work any more, and that Mrs Roberson then intervened to say the Claimant could not say this yet, as the redundancy would be decided later. Mrs Roberson had no independent recollection of the meeting and we consider that the Claimant's memory is likely to be more reliable.

38. Following the meeting on 23 March 2018, Mrs Roberson sent the Claimant the notes, the list of vacancies (p. 131 – 137) and the job description for the mystery shopper role (p. 138). The job description attachment does not appear in the bundle; however, it appears from the thumbnail attachment that the name of the role was in fact "Account Executive – Automotive".

39. The Claimant attended a further consultation call on 6 April 2018 at 14:00. She was again accompanied by her chosen companion and the meeting was conducted by Mrs Roberson and Mr Cichocki. There was a discussion around whether any ideas had been put forward to avoid redundancies; Mrs Roberson said there had not and the Claimant did not put forward any

ideas. The Claimant asked whether the clients had been informed, and Mr Cichocki said the sales team were advising clients about the situation. There was a discussion about a role in Edinburgh, which was a Point of Sale role being covered by a member of the IFR team. Mrs Roberson told the Claimant that once the vacancy had been approved, she would let the Claimant have the details. Mrs Roberson says, and we accept, that this was one of the Data Collection roles referred to in the email at p. 141 – 143.

40. There was also a discussion of the mystery shopper role, the job description for which had been sent to the Claimant after the 23 March 2018 meeting. The note records that Mrs Roberson explained the role was more of a project-based rather than a field role. Having checked the job specification, she said it was an opportunity to work on high profile mystery shopping projects for clients in the Automotive and Retail sectors, with candidates expected to help set up projects, carry out general project administration, evaluate fieldwork quality, liaise with internal departments and carry out data checking and reporting, as well as liaising with clients and handling their queries. There is no record of any further discussion about this role, and the Claimant accepted in her oral evidence that she was not qualified to do a role of this kind. The remainder of the meeting was taken up with a discussion of how the Claimant could access her payslips.

41. On 9 April 2018, Mrs Roberson emailed the Claimant to confirm that two vacancies had been approved for part-time Data Collection Executives in North London, Herts, Essex and Norfolk, and in Scotland (p. 141). The bundle contains a job description for the role. This was not apparently attached to the email of 9 April, and the Claimant could not recall seeing it, although there was no dispute that this was the job description for the advertised roles. The job description states that the role involved collating sales data from independent retailers via a stocktake methodology and using in-house software on a tablet; obtaining electronically transmitted sales data direct from independent retailers (rather than via a store visit) and presenting market trends and GfK reports to manually audited retailers (p. 142 – 143). We accept Mrs Roberson's evidence, which was not disputed by the Claimant, that whilst the collation of data from store visits was part of the Claimant's existing role, the other aspects of this Data Collection role were not. On the same day, the Claimant was informed that the best location for the Scotland-based role would be Edinburgh (p. 145).

42. On 13 April 2018, Mrs Roberson wrote to the Claimant to confirm the termination of her employment on grounds of redundancy following her notice period, on12 June 2018. She was informed of her financial entitlements and of her right to appeal. The Claimant did not in fact appeal against her dismissal. The letter also stated that any outstanding expenses could be claimed via the online expenses portal, and that such expenses should be submitted within 14 days of the end of the month, and subject to the Claimant's compliance with the Respondent's rules and policies relating to expenses (p. 150 – 152).

43. On 23 April 2018, the Claimant applied for the role of Data Collection Executive in North London, Herts, Essex and Norfolk (p. 153). She did not apply for the Scottish role. On receiving the application, Jane Hills, the responsible manager, pointed out to Mrs Roberson that she was looking for Essex-based candidates, and that the Claimant was based in South London. She asked if the Claimant had expressed willingness to relocate. Mrs Roberson said that the Claimant had said this, and that whilst she was not sure how realistic this was, she felt the Claimant should be given the opportunity to discuss the role and decide for herself (p. 155). An interview was arranged for 1 p.m. on 1 May (p. 165).

44. On 26 April 2018, Mrs Roberson informed the Claimant of a temporary cover opportunity in the Data-In Team in Woking, working 4 days per week but which could be split between two people, and which had the potential to be extended on a rolling basis. The Claimant did not express an interest in this role (p. 159 – 161).

45. The interview for the Data Collection role went ahead as planned (p. 173), and Ms Hills subsequently emailed Mrs Roberson. It is clear from her email that she had some doubts about whether the Claimant would relocate or whether she would want to travel from her existing location. However, she also stated that she and Sarah Rhodes, the Operations Director, were considering an alternative possibility for dealing with the vacancy, using existing staff coverage. On 9 May, Ms Rhodes contacted Mrs Roberson to say that she and Ms Hills had indeed decided to reorganise the way in which the GfK field team worked to cover these manual audits, driven primarily by the fact that the team had lost a number of audits due to the closure of the bike panel in the UK. The Respondent was therefore no longer looking to fill the vacancy for which the Claimant had applied (p. 172). Mrs Roberson communicated this to the Claimant on the same date (p. 174).

46. On 22 May 2018, the Claimant emailed Mrs Roberson expressing disappointment about the Data Collection role, and stating that she had not applied for the other permanent role Mrs Roberson had sent as she had been hopeful about the Data Collection role. The Claimant said in the same email that the vacancy link Mrs Roberson had sent did not work, and that she was unable to access her payslips and her expenses page. She said she had a “lot of outstanding expenses” (p. 181). Mrs Roberson responded the same day to say that she would look into these matters and would find out if the other vacancy had been filled, and let the Claimant know (p. 183).

47. Subsequent correspondence demonstrates that Mrs Roberson made efforts to deal with the points raised by the Claimant, contacting UK Payroll regarding the payslips (p. 190). She sent a further list of vacancies on 23 May 2018 (p. 197) and offered to send a full job description for any posts that might be of interest. She told the Claimant the permanent position in the Data-In team had now been filled. She asked the Claimant to update her on the payslip/expenses position.

48. On 22 May 2018, Mr Cichocki provided the Claimant with login details for the online expenses portal (p. 195), and asked her to complete a bank

details form to complete her registration (p. 196). The Claimant returned the bank details form on 6 June 2018 (p. 206). It was confirmed by UK Expenses that her account had been set up on 27 June 2018 (p. 224).

49. The Claimant's employment ended on 12 June 2018.

50. On 14 June 2018, the Claimant emailed Mr Cichocki to say that she was having difficulties in uploading her outstanding expenses to the new system. She asked whether she could send her receipts without processing them through the system. Mr Cichocki responded on the same day to say that the Claimant should not send her receipts as there was no-one in the office to deal with them for her, but that she could contact him until the end of June if she needed help.

51. Although he was conducting the Claimant's consultation process alongside Mrs Roberson and dealing with the Claimant's expenses, Mr Cichocki was also made redundant from his managerial role. His termination date was confirmed as 6 July 2018 on 13 April 2018 (p. 148 – 149). There are documents in the bundle showing that he left on that date (p. 232 – 234).

52. On 30 July 2018, the Claimant submitted claims for travel expenses totalling £1,949.20 dating back to June 2015 (p. 237 – 239). On 31 July 2018, the Claimant submitted a further claim for food expenses, also dating back to June 2015, totalling £970 (p. 243 – 246). The full claims are at bundle pages 251 – 258. Photographs of the relevant receipts were uploaded with the claims (see p. 371 – 754).

53. The Claimant's claims for travel expenses were all in the sum of £10, loaded onto a pay-as-you-go Oyster account. These claims are at odds with the claims on the timesheets, which were for the cost of a travelcard, recorded as between £9.20 and £9.50 over the relevant period. The Claimant told us, and we accept, that she was authorised by her manager Mr Cichocki, to claim £10 in respect of her daily travel. Sometimes her travel would cost more than this and sometimes less, but she was not permitted to claim more than £10.

54. Mrs Roberson and Ms Rhodes discussed the Claimant's claims extensively with the Respondent's Finance Director. He agreed to authorise payment of the Claimant's claims dating back to the beginning of 2018 (the point from which he understood that the IFR team had migrated onto the online portal, Myexpenses) (p. 268). The Claimant was informed that the Respondent would not in general pay expenses older than three months, in line with the 2015 newsletters as set out above. She was asked to re-submit the 2018 expenses, clearly identifying what each expense related to (p. 275).

55. The Claimant did resubmit her 2018 expenses (p. 323 – 324) and these were approved on 11 September 2018, and paid to the Claimant on or around 25 September 2018 (p. 325). The other expenses were not paid.

Submissions

56. We heard submissions from the Claimant and from the Respondent, who also produced short written submissions. Those submissions are referred to where appropriate in our findings below.

57. During the course of the hearing, we invited submissions from both parties on a point that had arisen during the evidence, namely, whether the Tribunal had jurisdiction to hear the Claimant's breach of contract claim for expenses in circumstances where (a) it appeared that the contract required the submission/production of receipts in order to claim expenses; and (b) the Claimant accepted that she had not submitted such receipts in relation to the claims made until July 2018, after the termination of her contract. Both parties did address us on this point, and the Respondent's counsel helpfully located two relevant cases, which we have considered.

The Law

Unfair Dismissal

58. Redundancy is one of the potentially fair reasons for dismissal set out at s. 98(2) Employment Rights Act ('ERA') 1996. Redundancy is defined in s. 139(1) ERA 1996 (so far as is relevant) as a dismissal which is "*wholly or mainly attributable to...(b) the fact that the requirements of* [a] *business (i) for employees to carry out work of a particular kind or (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished."*

59. It is not the role of the Tribunal to investigate the commercial and economic considerations which led the employer to decide that it requires fewer employees of a particular kind, or of a particular kind in a particular workplace; that strategic decision is a matter for the employer alone (see *James W Cook & Co (Wivenhoe) Ltd v Tipper* [1990] IRLR 386).

60. In general, in redundancy cases, employers should be expected to comply with the guidance set out in *Williams v Compair Maxam Ltd* [1982] IRLR 83, which requires them to:

(a) consult with employees at an early opportunity;
(b) if there is to be a selection of which employees are to be dismissed from a pool, to conduct the pooling and selection fairly and reasonably objectively;
(c) notify the employee of possible alternatives to dismissal, including alternative positions.

61. The question for the Tribunal to decide is whether dismissal fell within the range of reasonable responses open to the employer.

Less favourable treatment of part-time workers

62. Under regulation 5 of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, a part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker on the grounds that s/he is a part-time worker,

either as regards the terms of his/her contract, or by being subjected to any other detriment.

63. In order to be a valid comparable full-time worker for the purposes of regulation 5, the full-time worker must

    (a) be employed by the same employer under the same type of contract as the part-time worker;
    (b) be engaged in the same or broadly similar work to the part-time worker, having regard, where relevant, to whether they have a similar level of qualification, skills and experience; and
    (c) work at the same establishment as the part-time worker, or, where there is no full-time worker at the same establishment who satisfies the above requirements, at a different establishment (see regulation 2(4)).

Breach of Contract

64. Under article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, a breach of contract claim may only be brought by an employee in the Employment Tribunal if it arises or is outstanding on the termination of the employee's employment.

65. In *Peninsula Business Services Ltd v Sweeney* [2004] IRLR 49, the claimant's contract entitled him to commission only when his employer had received at least 25% of the fee for his work from the client. The EAT held that article 3 of the Extension of Jurisdiction Order prevented the claimant from bringing a claim in the Employment Tribunal for commission in circumstances where the employer had not received at least 25% of the fee from the client as at the date on which his employment terminated. At that time he had only a prospective claim for the payment of commission, and the EAT held that this claim would only have been 'outstanding' on the date of termination if it was immediately enforceable but remained unsatisfied (see paragraphs 45 – 54).

66. A term will be implied into a contract under the 'officious bystander' test *"if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common 'oh, of course'"* (*Southern Foundries (1926) Ltd v Shirlaw* [1939] 2 KB 206).

67. A term may be implied by custom and practice if it can be shown that it was "reasonable, certain and notorious" (*Devonald v Rosser & Sons* [1906] 2 KB 728).

68. In *Albion Automotive Ltd v Walker* [2002] EWCA Civ 946, Peter Gibson LJ set out a number of factors to be taken into account when considering whether a unilateral management policy had acquired contractual status, including: (a) whether the policy was drawn to the attention of employees; (b) whether it was followed without exception for a substantial period; (c) the number of occasions on which it was followed;...(e) whether the nature of communication of the policy supported the inference that the employers

intended to be contractually bound; (f) whether the policy was adopted by agreement;...(h) whether terms were incorporated into a written agreement; (i) whether terms were consistently applied.

69. A term may be implied even if it regulates the application of an express term; see *Garratt v Mirror Group Newspapers Ltd* [2011] ICR 880, where the Court of Appeal held that a long-standing and invariably followed practice of requiring employees to enter into a settlement agreement in order to claim enhanced redundancy pay was incorporated into the employees' contracts, even though it was not contained in a supervening contractual collective agreement on entitlement to enhanced redundancy pay.

Conclusions

Unfair Dismissal

70. We find that the reason for the Claimant's dismissal was redundancy. We accept the Respondent's evidence that there was a decision to cease to operate the whole of the in-store data collection arm of what was known as the IFR business, and as a result, that the employment of the whole of the Claimant's team of Field Executives, including the manager, Mr Cichocki, was terminated in June/July 2018. Although the Claimant said in evidence that some of these individuals might not have been dismissed, she produced no evidence in support of her claims. The Respondent's evidence was clear, and we saw documentary evidence both of the proposals and of the dismissal of Mr Cichocki. The Claimant also suggested that Mr Cichocki might have been re-hired, but again there was no evidence to support this suggestion, and we accept Mrs Roberson's evidence that it did not happen. These dismissals were for the sole reason that the Respondent's requirement for employees to carry out work of this kind had ceased.

71. The Claimant gave evidence that Mr Cichocki had suggested to her that the Respondent wished to prioritise full-time workers over part-time workers. She believed this explained the selection of the in-store data collection team for redundancy. We saw and heard no evidence in support of this position. The Respondent retained, and indeed was recruiting at the time of the Claimant's redundancy, part-time Data Collection Executives. Mr Cichocki, who was also dismissed, was a full-time worker. There was no basis on which we could conclude that the decision to cease the in-store data collection function was taken, in whole or in part, because of the part-time status of the workers in the team.

72. Moving on to consider the fairness of the dismissal, we find that the Claimant was given around three months' warning of dismissal by reason of redundancy, which we consider to have been reasonable. The Claimant was invited to and attended three consultation calls/meetings over a period of a month. She was informed of the proposal to cease to operate in the area of in-store data collection and of the fact that this would mean her role was redundant, invited to put forward alternatives to redundancy and ask questions, and given the opportunity to discuss alternative employment. She

was able to attend with her chosen companion. We consider that adequate consultation was undertaken with the Claimant.

73. In this case, there was no selection process, and thus no selection criteria, because the entire in-store data collection team's work was to come to an end, and the Respondent decided that the whole team would be made redundant, subject to finding alternative work. No evidence has been produced to suggest that other teams or employees should have been included in the selection pool, and we find that this decision fell within the range of reasonable responses. As we have already said, there is no evidence to suggest that this decision was taken on the basis of the part-time status of the Field Executives.

74. We note the Claimant's concern that her selection for redundancy was pre-determined, based on the comments made by Mr Cichcocki in her consultation meeting on 23 March 2018, to the effect that she could inform the stores where she worked that she would no longer be attending. We understand the Claimant's concern about these comments, but we accept Mrs Roberson's explanation in her evidence that the Respondent was clear that (subject to any alternative suggestions from employees, which were not forthcoming) the team's work in stores would cease in June 2018. To that extent, as in many redundancy situations, the Claimant's position was already determined. However, the Claimant still had the opportunity to avoid redundancy if she could find suitable alternative employment within the Respondent. We do not consider there to have been anything unfair about the Respondent's conduct of the process in this respect.

75. The principal focus of the Claimant's challenge to her dismissal was in relation to suitable alternative employment. We find that the Respondent in fact made significant efforts to inform the Claimant of alternative roles, not only providing her with a vacancies list, but also pointing her to specific roles that might be suitable for her, namely the Data Collection Executive role, for which the Claimant applied, and the Data In-Team role and the Coding role (for which the Claimant did not apply).

76. We understand the Claimant's disappointment that, after she had been interviewed for the Data Collection Executive role, the post was withdrawn. However, we accept the Respondent's explanation that, because the team had lost a number of audits due to events outside the Respondent's control, it ultimately decided not to fill the post, and to distribute the work amongst the existing team. There was therefore no role available for the Claimant. The Claimant did not apply for any other alternative roles. Her position was that the other roles available at the time were not suitable for her. We again understand the Claimant's disappointment that after twelve years with the Respondent, no suitable alternative roles were available for her. However, there is no obligation on the Respondent to create an alternative role for employees at risk of redundancy.

77. We find that the Respondent did make adequate efforts to notify the Claimant of suitable alternative roles, and indeed that Mrs Roberson did all she could reasonably have been expected to do to assist the Claimant in applying for such roles.

78. We therefore find that the decision to dismiss the Claimant, and the process followed, was within the range of reasonable responses, and was not unfair.

Less favourable treatment of a part-time worker

79. The Claimant claims that she was less favourably treated that Mr Cichocki, who she says was a comparable full-time worker, and who she says may not have been dismissed.

80. As set out above, we have concluded that Mr Cichocki was dismissed and was not re-hired. As a claim may only be made under regulation 5 of the 2000 Regulations where a part-time worker has been treated less favourably than an actual comparable full-time worker, the Claimant's claim must fail. She was not treated less favourably than Mr Cichocki. We also find that Mr Cichocki, as the Claimant's line manager, was not a comparable full-time worker. His role involved managing the Claimant and her fellow Field Executives and he was therefore not engaged in the same or broadly similar work to that carried out by the Claimant.

81. The Claimant's claim under the 2000 Regulations must therefore fail.

Breach of Contract

82. We considered first whether the Claimant's claims "arose or were outstanding" on the termination of her employment on 12 June 2018.

83. The Claimant's contract provides that a lunch allowance of up to £5 per day will be paid subject to the Employer's receipt of relevant receipts (clause 8(2)), and that travel expenses reasonably incurred in performing her duties will be reimbursed following the production of relevant receipts (clause 10) (emphasis added). We find that the contract is clear that there is no entitlement to a lunch allowance or to reimbursement of travel expenses prior to the provision of receipts. In fact, we did not understand the Claimant to dispute that she needed to provide her receipts in order to receive her lunch allowance/travel expenses.

84. During the course of her evidence, the Claimant accepted that she had not submitted her receipts for the lunch allowance/expenses claims she now makes until 30/31 July 2018, over a month after the termination of her employment. Although the Claimant told us she had asked whether she could submit her receipts by post, rather than through the new electronic system, before the end of her employment, and was refused, we established that this request was in fact made on 14 June 2018, two days after the termination of her employment.

85. As the Claimant had not submitted her receipts prior to the termination of her contract, she was not entitled to be paid her lunch allowance or her travel expenses prior to the termination of her employment. Following the decision in *Sweeney*, the Claimant had only a prospective claim for expenses on the termination of her employment, rather than a claim that was immediately enforceable, and her claim was not, therefore, outstanding on the termination

of her employment. Nor did it arise on termination. This Tribunal therefore has no jurisdiction to hear the Claimant's claim for breach of contract under article 3 of the Extension of Jurisdiction Order, meaning it must fail.

86. Having reached that conclusion, it is not necessary for us to consider whether the Claimant's entitlement to claim expenses was limited by an implied term requiring any such claim to be made within three months, as the Respondent argues.

87. As we heard argument on this point, however, we have considered the issue.

88. We considered first whether a term that any claim for expenses should be made within three months should be implied by custom and practice. We did not think that the existence of such a term was "reasonable, certain and notorious". We noted that Ms Standfield, whose evidence we accepted, was not aware of such a term. Further, we accepted Ms Standfield's evidence that she had been paid her expenses having made a claim four months after the event, and in one instance, eight months after the expenses were incurred. We noted that Mrs Roberson's emails indicated that she was not wholly certain of the period within which expense claims should be made. We do not think, in such circumstances, that a term that expenses should be claimed within any specific period could be said to be "reasonable, certain and notorious". This result also follows from consideration of the relevant factors set out by Peter Gibson LJ in *Albion Automotive Ltd v Walker.*

89. However, we do take the view that the officious bystander would consider that there must be some time limit on making claims for expenses incurred. In the absence of such a limit, it would be extremely difficult to ascertain whether the expenses had been incurred in the course of employment. Furthermore, very significantly delayed expense claims could cause difficulties for the company's accounts. We are only concerned with any term that should be implied prior to the introduction of the Respondent's electronic system, as the Claimant has been paid in respect of all claims that should have been made under that system, in 2018. Our collective view is that the term implied as a result of an intervention by the reasonable bystander would be that expenses should be claimed at the point when the employee was sent the pre-paid envelope for receipts, as Ms Standfield explained was the general practice prior to the introduction of the electronic system, with a backstop date for claims of the end of the financial year.

90. As the outstanding sums claimed by the Claimant were incurred at the latest in the financial year ending in April 2018, had it been necessary, we would have found that the Claimant had fallen foul of this term in failing to make her claims prior to the end of the relevant financial years. Her claim would therefore also have failed on this basis.

91. For completeness, we further record that we do not accept the Respondent's argument that the Claimant should not (if otherwise entitled to claim her expenses) be able to recover the £10 pay-as-you-go top ups claimed in respect of each day of work in her electronic submissions on 30/31 July 2018. This is because we accepted the Claimant's evidence that her manager authorised her to claim £10 pay-as-you-go top ups in respect of her daily

travel, and thus those sums should be regarded as travel expenses reasonably incurred by her within the meaning of her contract. However, the Claimant's breach of contract claim fails for the other reasons already set out above.

92. We further record here that, although the Claimant's claim for breach of contract has failed, it has not failed for the reasons set out in EJ Anstis's judgment, sent to the parties on 20 September 2019, in which he set out his reasons for making the deposit order. The point as to the Tribunal's jurisdiction, which was the primary basis on which we dismissed the claim, was raised by the Tribunal of its own motion during the course of the hearing. We also made no finding that there was a contractual term requiring expenses claims to be made within three months.

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Employment Judge A. Beale
Date: 12 May 2022