EMPLOYMENT TRIBUNALS

Claimant: Mr Mark Edwards

Respondent: Sowga Ltd

Heard at: London South Employment Tribunal (hybrid by CVP)

On: 14 March 2022

Before: Employment Judge Hutchings (sitting alone)

Representation
Claimant: in person
Respondent: Ms Gyane of Counsel

RESERVED JUDGMENT

1. The complaint of unfair dismissal is well founded. The claimant was unfairly dismissed.

1. The claimant's complaint that there was an unlawful deduction from his wages is not well founded. This means that the respondent did not deduct any amounts for overtime pay and does not owe the claimant any amounts for overtime.

2. The Tribunal will decide the remedy for unfair dismissal at a further hearing listed for 1 day. This will include the question of whether any adjustment should be made in the compensatory award for unfair dismissal under the principles set out in Polkey v A E Dayton Services Limited 1998 ICR 142.

REASONS

Introduction

1. The claimant, Mr Mark Edwards, was employed by the respondent, Sowga Ltd, as an estimator from 20 February 2017 until his dismissal with four weeks' notice on 30 September 2020.

2. By a claim form dated 24 October 2020 the claimant claims that his dismissal was unfair within section 98 of the Employment Rights Act 1996. He suggests

that there was a reason other than redundancy for his dismissal and that the redundancy procedure the respondent followed was unfair.

3. The respondent contests the claim. It says that the claimant was fairly dismissed for redundancy following a commercial decision by management to absorb the company's quoting process within existing manager and administrator roles due to a downturn in business.

Preliminary matters

1. By direction of the Tribunal the hearing had been converted to CVP. The claimant attended the Tribunal in person. Arrangements were made for the claimant to attend the hearing in a Tribunal hearing room and the hearing was converted to hybrid. These arrangements resulted in a short delay to the hearing, which started at 10.30am. Therefore, the hearing was a remote public hearing, conducted using the cloud video platform (CVP) under rule 46 of the Employment Tribunals Rules of Procedure. The Tribunal considered it just and equitable to conduct the hearing in this way.

4. At the beginning of the hearing, before I heard any evidence, I had to deal with a preliminary application. Counsel made a request for submission of late evidence: at 20:59 on 13 March the respondent had sent the following documents to the tribunal and the claimant by email:

   4.1. A supplementary witness statement from Mrs Paula Weller;
   4.2. An excel spreadsheet containing an analysis of overtime discrepancies for the period 5 April 2019 to 29 October 2019; and
   4.3. An email of resignation to the respondent from Mr Paul Soares dated 10 December 2019.

5. The claimant confirmed he had received the documents by email the previous night but had not had the opportunity to read them. A short recess was taken to allow the claimant and the Tribunal to read the documents.

6. In deciding whether to admit this late evidence I considered the timeline for exchange of documents and witness statements set out in a case management order dated 25 October 2021 (the 'Order'). There had been delays on the part of both parties. The respondent's position was, in the context of on-going delays, that there was no prejudice to the claimant in admitting these documents. I disagree. Mindful of the overriding objective of the Tribunal to ensure that the parties are on an equal footing and to avoid delay, there was no reason before the Tribunal to justify the submission of these documents on a Sunday evening before a hearing on a Monday morning, given a timeline for disclosure was set in October. The witness statement and spreadsheet cover evidence from 2019. The claimant is a litigant in person and had had not opportunity, not even a day, to consider the evidence, other than a short time to read the documents through at the beginning of the hearing. I concluded it was neither fair nor proportionate to delay the hearing further. The supplementary witness statement and spreadsheet were not admitted.

7. As to the resignation letter of Mr Paul Soares. At the start of the hearing the claimant was unable to confirm whether Mr Soares would be attending to give evidence. Mindful the claimant was representing himself I explained the process of giving evidence and agreed that the claimant could contact Mr

Soares in the lunch break to confirm his attendance. Mr Soares did not attend, meaning Counsel did not have the opportunity to cross examine him. I admitted the letter of resignation to place Mr Soares evidence on an equal footing, noting that the Tribunal would consider Mr Soares evidence (his witness statement and letter of resignation) with less weight, given his non-attendance.

8. The issues for the Tribunal to decide were set out in the Order as follows:

Issues for the Tribunal to decide - Unfair dismissal

9. What was the reason or principal reason for dismissal? The respondent says the reason was redundancy.

10. If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will usually decide, in particular, whether:

    10.1. The respondent adequately warned and consulted the claimant;
    10.2. The respondent adopted a reasonable selection decision, including its approach to a selection pool;
    10.3. The respondent took reasonable steps to find the claimant suitable alternative employment; and
    10.4. Dismissal was within the range of reasonable responses.

Unpaid Overtime - Issues for the Tribunal to decide

11. How much overtime did the C work and in what period?

12. Was that time authorised?

13. If so, how much is the claimant owed?

14. If owed, how much of the amount owed has been paid?

15. Are the claims for unpaid overtime part of a continuing series of deductions or has any such series been broken?

Procedure, documents, and evidence

16. The claimant represented himself and gave sworn evidence. He also provided a witness statement from Mr Paul Soares, a former colleague who had worked for the respondent until December 2019. Mr Soares did not attend the hearing. The respondent was represented by Ms Gyane of counsel, who called sworn evidence from Mrs Paula Spicer, the respondent's HR administrator, and Mrs Paula Weller, the respondent's finance and office manager.

17. I considered the documents from 2 agreed Bundles of Documents which the parties introduced in evidence: a 637-page bundle with evidence relating to the claim for unfair dismissal and a 548-page bundle relating to the claim for overtime pay. The number of pages refers to virtual version of the bundle received by the Tribunal.

18. The hearing was listed for 1 day. Given the delay at the beginning of the hearing, request to admit late evidence and the volume of evidence the Tribunal

only had time consider issues on liability. There was insufficient time for parties to make oral submissions, so the Tribunal made an order for written submissions by no later than 28 March 2022.

Findings of fact

19. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed Bundle of Documents.

20. There are two elements to the claim; as such I have set out below the Tribunal's findings of fact by reference to each.

Unfair dismissal by reason of redundancy

21. There was no dispute as to the primary facts in relation to the way in which employment was terminated. These can be summarised as follows. The claimant, Mr Mark Edwards, was employed by the respondent, Sowga Ltd, as an estimator from 20 February 2017 until he was made redundant, with 4 weeks' pay in lieu of notice on 30 September 2020. The respondent, a building services and engineering company, undertakes commercial property projects and maintenance work.

22. The claimant's role involved providing estimates to existing and potential clients, focusing on electrical work, as well as assisting contract managers in doing the same. Mr Edwards had a written employment contract with the respondent dated 20 February 2017 (the 'Contract') which he had signed. It states the claimant's role as an *'estimator'*, a role he described as assisting contract managers with estimating various works. While Mr Edwards spoke of other tasks he did for the respondent, occasionally transporting materials to sites and sometimes working on site during project work for example driving a crane lift, he said these were done *'as and when'* to support colleagues. This work was outside his job description and not part of the role for which he was employed. There was no evidence that his role was changed or extended by the respondent during his employment. Indeed, Mr Edwards accepted in cross examination that he was not employed as an electrician, CAD engineer or a forklift truck driver. He also confirmed that he was the only estimator working for the respondent.

23. The respondent's business was impacted by the Covid-19 pandemic. Turnover in May 2019 was £245,000, reducing to £22,000 in May 2019. The evidence before the Tribunal, including a spreadsheet showing the monthly financial performance for the respondent from January to July 2020, confirms it experienced a financial downturn. This was reflected in the respondent's decision to place staff on furlough.

24. In his witness evidence Mr Edwards questions why there is no financial information about the respondent after August 2020 and challenges the financial health of the respondent at that time, saying *'Looking at Companies House, the respondent improved from previous years to the extent of making profit despite showing the directors were still able to take £66,308 in loans.'* In cross examination Mr Edwards challenged the respondent's financial position from March 2020 to his dismissal in September.

25. The initial redundancy decision was taken in August 2020 based on the commercial, business, and financial situation of the company in a period leading up to that. Therefore, financial evidence after August 2020 is not relevant to the matters in issue. I find Mrs Weller, as the respondent's finance and office manager, best placed to understand and provide evidence as to the financial health of the business. Her explanation of the figures was clear and consistent; there had been a downturn in the respondent's business in 2020. Mrs Weller said the respondent's business had been affected financially by the covid-19 pandemic and the number of quotes the respondent was doing reduced over this time. This was clearly stated in the 2 letters to Mr Edwards informing him that, for these reasons, he was being placed on furlough. Having received the letters Mr Edwards queried some of the contents, he did not query these explanations either time.

26. As a result, the respondent by letter dated 6 April 2020 notified Mr Edwards he would be placed on furlough from 7 April. The letter notes *'as discussed, in the light of the current downturn in the business caused by the coronavirus, we do not have sufficient work within the business to maintain current staffing levels.'* On receipt Mr Edwards queried some wording in the letter relating to the mechanics of furlough: the queries were addressed by the Mrs Weller in an email. He did not question the respondent's reasons for putting him on furlough. Throughout the furlough process the respondent made it clear that the reason for furlough was a downturn in business and employees were at a risk of *'layoffs.'*

27. The respondent dismissed the claimant by reason of redundancy on 24 August 2020. The claimant disputes that it was a genuine redundancy situation. In his witness statement and on several occasions when addressing the Tribunal Mr Edwards refers to a disciplinary matter in May 2020. The Tribunal had the letter dated 18 May 2020 inviting Mr Edwards to a disciplinary hearing and notes of the meeting on 19 May 2020, as well as the notes of an appeal hearing held on 2 June 2020 and outcome letter dated 5 June 2020. The appeal downgraded the written warning to a verbal one, recorded on file for 6 months. There is no substantive evidence from Mr Edwards about this disciplinary matter, other than he says he agreed to go on furlough as a means of diffusing the situation. Mrs Weller spoke with the claimant on 3 June 2020 about a second furlough; this was confirmed by letter on 5 June 2020, which states Mr Edwards is being placed on furlough *'due to the downturn in business caused by the coronavirus, we do not have sufficient work within the business to maintain current staffing levels.'* Mr Edwards did not question this reason at the time.

28. On 17 August 2020 Mrs Weller wrote to Mr Edwards notifying him that his job was at risk of redundancy and asking him to attend a formal consultation meeting on 20 September 2022. This date was a typo. In error the letter referred to September not August. As Mrs Weller did not hear back from this letter, she telephoned Mr Edwards on 19 August to confirm attendance. It was in this telephone call that the error came to light. After leaving a message Mrs Weller spoke to Mr Edwards at about 18.30 on the evening of 19 August. She addressed the error, telling the Tribunal that she asked Mr Edwards if he would like to postpone. He said that he would go ahead with the meeting the following day.

29. At the initial consultation on 20 August 2020 Mrs Weller informed Mr Edwards that he was at risk of redundancy due to a 25% reduction in turnover, telling him

    'there has been an identifiable reduction in the demand for our good and services, which means the company has to consider a range of cost cutting measures. Although we are looking at a number of options, there may be a requirement to reduce the workforce in order to ensure the continuing viability of the business'.

30. When asked about redundancy numbers Mrs Weller told Mr Edwards that *'possibly 3-4 over the whole company'.* Mrs Weller explains that Mr Edward's role has been identified due to:

    '*[T]he estimating and quoting have been done by Dave and the contract managers while you have been on Furlough and has been working very well. This is how your job came up as possible redundancy. We have no project works coming through and this is also affecting the company turnover. Clients are unwilling to spend money in the current climate. We are also worried that with people working from home we may lose more buildings/contracts as our clients may get rid of these overheads'.*

31. Mrs Weller told the Tribunal that at this meeting she discussed alternative roles with Mr Edwards. The minutes of the meeting record her asking Mr Edwards

    'Have you any suggestions/alternatives to offer regarding your potential redundancy?'

32. Mr Edwards refers to the possibility of an administrative role or as an electrician but concludes neither would be suitable. Mr Weller responds *'[s]o you are not really offering any suggestions or alternatives for your position'* before asking Mr Edwards his availability for the next meeting. Mr Edward's then comments '*if the package was attractive then he would just go'.* This is confirmed by the meeting minutes.

33. On 24 August 2020 Mr Edwards attended a further consultation meeting, at which there was another conversation about alternative positions; Mrs Weller asks the claimant if he has thought about another alternative work he could do. Mr Edwards talks of being *'versatile'* suggesting *'estimating, CAD drawings, Forklift, electrical work'.* Mrs Weller dismisses all roles except CAD as being done by someone who had been made redundant as a role for which the company is not willing to pay. No reason is given as to why a CAD drawing is not a possibility. Mr Edwards talks around the possibility of being an electrician but concludes it is not viable for him due to start times. Mrs Weller comments *'there is a contract whereby you get half an hour travel each end of the day.'* This option is not explored in any meaningful way. The respondent has not provided any evidence that it actively explored, considered, or suggested alternative employment to Mr Edwards. It adopted an approach of asking Mr Edwards to make suggestions, which were not addressed in any meaningful way.

34. The respondent sent Mr Edwards a letter the same day notifying him of its decision to make him redundant, dismissal effective 31 August 2021, with 4 weeks' pay in lieu of notice; the effective date of termination is 30 September

2020. The letter informs Mr Edwards that he has 5 working dates from receipt of the letter to appeal.

35. On 17 September 2021 Mr Edwards appeals out of time; his letter does not set out specifics of his grounds of appeal, referring to *'new evidence received'* and making an unlinked reference to whistleblowing. The respondent replies the same day stating Mr Edwards is out of time but giving him until 24 September 2022 to provide written reasons for his late appeal. On 25 September, as the respondent has not received a reply, Mrs Weller writes to Mr Edwards confirming the redundancy and that the respondent has transferred his final payment. Mr Edwards writes to the respondent on 30 September 2021 to raise a formal grievance for breach of GDPR. There is nothing in this letter responding to the Mrs Weller's letter of 17 September providing reasons for his delay in seeking an appeal or setting out the grounds of appeal or stating that the final salary payment did not include the overtime monies he is alleging in this claim are outstanding.

Overtime claims

36. Mr Edward's Contract required him to work 40 hours a week, 8am to 5pm Monday to Friday based on a schedule he received each week from the respondent. The Contract provides that the respondent *'may from time to time require [the claimant] to undertake additional or other duties as necessary to meet the needs of the business on a short-term basis e.g., holiday or sickness cover'* and that that Mr Edwards *'may be required to work a reasonable amount of overtime hours as directed by the Company.'* Under his Contract overtime is paid; any hours worked above 40 hours are paid at time and a quarter, based on Mr Edward's annual salary of £35,000.

37. The evidence bundle to support the claim for overtime payment contains 548 pages. The evidence includes: formal overtime sheets which have been approved; overtime sheets which were not approved; emails sent by Mr Edwards to himself recording when and where he had done extra work; and photographs and documents he uses to support this extra work. The claimant has not provided a summary of the different types of claims or a calculation for the overall sum Mr Edwards is claiming for overtime. In deliberation the Tribunal has spent a considerable amount of time analysing these documents.

38. To claim overtime payments, the Contract requires Mr Edwards to complete overtime sheets. Mr Edwards accepted that his Contract set out this process for overtime and that he was required to submit overtime forms. Indeed, in evidence there were several examples of overtime forms completed and submitted by Mr Edwards, which were subsequently paid by the respondent. Mr Edwards was aware of the process and had followed it repeatedly. He understood how to correctly complete overtime sheets so that work could be charged to the correct client, and to do this after work was undertaken to ensure timely payment of overtime monies. During his employment Mr Edwards had submitted many overtime forms, which had been approved and paid by the respondent.

39. The overtime bundle included evidence of overtime forms which had not been paid by the defendant. In essence the respondent had 2 explanations for this:

39.1. That the form had not been provided to the respondent after the work had been done; or

39.2. Mr Edwards is seeking payment of overtime for work which had not been undertaken at the direction of the respondent, as required by the Contract.

40. In relation to the first type there were a number of suggestions put to the Tribunal as to why these had not been approved and paid. The claimant submits he did carry out the work. If this is accepted, as they were not submitted the respondent had not had the opportunity to review them and so they could not have been paid even if the respondent accepts it is work carried out by Mr Edwards at its direction. The respondent's position is that a portion of these claims are out of time, or, in the alternative, these claims related to work that it not approved and which Mr Edwards seems to have carried out at his own direction. The respondent also questioned the reason these claims had not been submitted in a timely way, suggesting that the forms had not been completed at the time the work was allegedly undertaken, and this was the reason they had not been submitted at that time. The respondent suggests that the forms were created after Mr Edwards had been made redundant. The respondent suggested there has been some fabrication by the claimant in the work undertaken and the evidence to support this.

41. I find it curious that a significant proportion of the overtime now being claimed was not submitted to the respondent at the time the work was undertaken, nor was it mentioned by Mr Edwards as as monies outstanding when he received his final salary payment. This was paid on 25 September 2020; Mr Edwards letter raising concerns is dated 30 September 2020. He had 5 days to review payment and raise outstanding overtime payments. I ask myself why did not do so. Indeed, there is no evidence before the Tribunal that Mr Edwards complained he had not been paid his overtime in full until after his employment terminated. Some of the claims had never been seen by the respondent. Mr Edwards did not submit any overtime form and did not raise any concerns about outstanding amounts before his employment terminated or as part of the redundancy process. Had these amounts been unpaid I find it is a reasonable conclusion that he would have raised concerns that he was owed money for work undertaken at the direction of the respondent when the amount of his final payment (taking account of notice and holiday pay) was explained to him. Mr Edwards only raised the issue of outstanding overtime payments after he was made redundant.

42. On the balance of probability there is insufficient evidence before the Tribunal to conclude where there has been a fabrication of overtime claims. Mr Edwards has presented himself as very hard working and willing to go above and beyond for his employer. I find this was so. I do not doubt Mr Edwards worked beyond his contractual hours. This is commonplace where employees are conscientious and diligent. However, this does not mean there is an automatic entitlement to be paid for any time worked beyond contractual hours. Payment must have a legal basis. It is for the Tribunal to determine whether Mr Edwards followed the correct process for overtime as set out in his Contract; if he did, he is entitled to overtime payment. The contractual entitlement to overtime and process for claiming it is key to this decision.

43. There is no evidence that the provision in the Contract about overtime had been amended in writing or orally. Therefore, I find that it was a contractual term and the respondent's policy that it would only pay overtime where the work had

been undertaken '*at the direction'* of the respondent's managers. In oral evidence Mr Edwards told the Tribunal that he had received oral instructions. I find there is no record or corroborating evidence that he received oral instructions. Indeed, he accepted in cross-examination that most of the emails he had put before the Tribunal as evidence of work undertaken do not show any direction from anyone in management for him to work the overtime he now claims nor are they copied to any of his managers. The evidence is simply emails he sent to himself. In written submissions the respondent suggested that had this been the case Mr Edwards would have confirmed via email to his managers that he had carried out those instructions. I find this is a reasonable conclusion.

44. As no summary of claims had been provided to assist the Tribunal in identifying the different types of claims Ms Gyane directed the Tribunal to the pages in the bundle where Mr Edwards was claiming overtime and cross referenced these to the pages in the bundle with the corresponding approval and payment evidence. This was a helpful analysis of a significant amount of documentary evidence which was not summarised. I have crossed checked these cross-referenced documents and confirm that these forms were approved and paid and should not form part of the claim. In evidence Mr Edwards accepted that some of the evidence in the bundle related to claims that had been paid. This analysis reduced the portion of claims to only those where there was no evidence of payment. I set out my conclusions in relation to the remaining claims, which have not been paid, below.

45. I find in relation to the overtime claim there is no legal basis for payment other than the contractual term that overtime is at the direction of the respondent. Therefore, only the claims where there is evidence to support this can be considered.

Law – unfair dismissal and redundancy

46. Section 94 of the Employment Rights Act 1996 (the '1996 Act') confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. An unfair dismissal claim can be brought by an employee (section 94) with 2 years continuous employment (section 108) who has been dismissed (section 95).

47. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

48. Here the respondent replies on the reason of Redundancy (section 98(2)(c), which is a potentially fair reason set out on the legislation. In redundancy dismissals in determining if the reason is fair or unfair the Respondent must show that:

    48.1. There has been a reduction in the number of employees needed to carry out the work or a reduction in the amount of work therefore less employees are needed. This is a commercial decision, and the employer must show that this is the case.

48.2. That the process was fair and reasonable.
48.3. That the manner in which the claimant was selected was fair and reasonable.
48.4. Whether the employer took any reasonable steps to redeploy the employee whose role was at risk.
48.5. Whether there were any alternatives to dismissal.

49. Section 98(4) of the 1996 Act deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.

50. As part of his witness statement in addition to factual evidence Mr Edwards included written submissions. Both parties were invited to make closing submissions to the Tribunal no later than 28 March 2022. The Respondent provided me with written submissions on 21 March 2022 which I have considered and refer to where necessary when reaching my conclusions. Mr Edwards did not provide further submissions; I have considered the submissions made as part of his Witness Statement dated 10 March 2022 and I refer to them where necessary when reaching my conclusions.

Conclusions – unfair dismissal

51. The respondent has satisfied the requirements of section 95 of the 1996 Act, admitting that it dismissed Mr Edwards (within section 95(1)(a)) on 30 September 2020. The first issue is what was the reason or principal reason for the dismissal. I find that the reason for dismissal was redundancy.

52. Redundancy is a commercial decision; it is for the employer to show to the Tribunal that there has been a reduction in the number of employees needed to carry out the work or a reduction in the amount of work therefore less employees are needed. I have considered the financial evidence from the respondent; there was a downturn in trade, turnover, and profit. This is further evidence by the fact the respondent entered two periods where it furloughed employees. On both occasion Mr Edwards was placed on furlough and the reason explained to him as *' in the light of the current downturn in the business caused by the coronavirus, we do not have sufficient work within the business to maintain current staffing levels'.* Mr Edwards did not challenge this either time. He accepted that there was a downturn, and this was the reason he was placed on furlough.

53. In evidence Mr Edwards states that his role was not redundant as throughout the periods when some staff were on furlough and in August 2020 the respondent did have to continue to issue estimates. As regards continuing estimates Mr Edwards is correct; estimates were and continue to be essential to the respondent establishing a funnel of workflow. In furlough this role was absorbed by the managers, supported by administrative staff. Simply, when facing financial challenges, the respondent devised a way of working more efficiently. As a result of the reduction in work the respondent was able to adjust to undertake estimates in a more efficient way, with the estimates calculated by existing managers supported by the administration team. This enabled the

respondent to make cost savings in that it concluded there was no longer a need for a standalone estimator. As the role of estimator had been absorbed by existing employees, due to a commercial decision to restructure, Mr Edwards position was no longer required. There were changes to people doing administrator roles, with a former employee returning to this role after travelling and another person being recruited. The salary for this position was £22,000 per annum. It was a very different role to that of estimator. The respondent has not employed someone as a standalone estimator

54. Mr Edwards claims there was a reason other than redundancy for his dismissal. There is no evidence that the disciplinary matter influenced the respondent's decision to make Mr Edwards redundant. This was an incident entirely separate to and a period before the redundancy process was started. It was properly dealt with in line with the company's disciplinary policy. Mrs Weller and Mrs Spicer, who handled the redundancy process, were not involved in disciplinary process so there was no crossover. After he was notified of the second furlough Mr Edwards commented that it would reduce friction with the respondent. Any friction from the disciplinary process was not the reason he was placed on furlough or made redundant. There is no evidence that the disciplinary matter influenced the respondent's decision to make Mr Edwards redundant.

55. I conclude that the respondent's management dismissed the claimant by reason of redundancy as there was less work so the commercial decision was taken to absorb estimating tasks into existing roles to make cost savings. As a result of the downturn managers, supported by administrators, were able to take on all estimating and this resulted in the respondent adopting a more cost-efficient approach to estimates going forward.

56. I now consider if the process of redundancy was fair and reasonable. I must decide whether the respondent acted reasonably in all the circumstances. In considering the reasonableness of the respondent's conduct (applying the applying section 98(4) of the Act). Ms Gyane in written submissions reminded me that '*the Tribunal should not substitute its decision as to what was the right course to adopt. The function of the Tribunal is to determine whether, in the particular circumstances of the case, the Respondent's decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have* adopted', noting that *'If a Respondent so demonstrates this, the dismissal is fair (Iceland Frozen Foods v Jones [1982] IRLR 439, paragraph 24)'*

57. First, I consider if the respondent adequately warned and consulted the claimant. I have set out my findings on the timeline already. All communications were in writing. However, there was a typo in the letter asking Mr Edwards to attend a formal consultation. It stated the meeting was on 20 September 2022, when the respondent had scheduled it for 19 August. As Mrs Weller did not hear back from this letter, she telephoned Mr Edwards on 19 August to confirm attendance. In evidence Mrs Weller made it clear that when she recognised the error, she gave Mr Edwards the opportunity to postpone, which she says he declined. In evidence Mr Edwards told the Tribunal:

'Paula explained that was an error and that I was needed to come in tomorrow. I received an email about possible redundancies Tuesday 18th August and could I come in for a meeting 20th September. Telephone call at 18:30 on Wednesday 19th August between PW and myself. PW "just wanted to confirm

you are coming into the office tomorrow". ME "don't plan to, why". PW "the redundancy meeting is tomorrow". ME "no, that's the 20th September".'

58. While Mr Edwards may have agreed to come in, given the clear error and the fact this option was offered out of business hours (the conversation took place at 6.30pm) a reasonable employer with the respondent's resources should have taken the view that a difference of 1 month is significant and rearranged in any event. It was unreasonable for Mrs Weller to expect Mr Edwards to come in on such short notice, or indeed ask him if he was prepared to do so.

59. Mr Edwards submits that the timeline from notification of redundancy to actual dismissal was *'too quick'* and therefore the period of consultation was unreasonable. Ms Gyane referred the Tribunal to the guidance of the EAT in *Mugford v Midland Bank [1997] IRLR 208,41*, that '*it will be a question of fact and degree for the Tribunal to consider whether consultation with the individual …. was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the Tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy.'* I agree there was an accelerated timeline for which the respondent has not presented any reasons. Mr Edwards was notified he was at risk of redundancy on 17 August 2020. The first consultation took place on 20 August 2020, the second 5 working days later on 24 August, after which redundancy was confirmed immediately with a window of 5 working days for appeal. Start to finish the process of consultation took 5 working days. While the respondent gave Mr Edwards additional time to set out the basis on which he wanted to appeal the redundancy decision (which I find he did not do), the process to this point did not allow reasonable time to consider and reflect.

60. Notwithstanding the error the process for consultation was too quick and unnecessarily rushed. This is further evidenced in my conclusions below about the respondent's approach to alternative roles. Had the process been taken in a more considered manner over a longer period, the respondent may have been able to present alternative roles to the respondent, or at the least actual evidence supporting its contention that there were none.

61. I turn now to whether the way the claimant was selected was fair and reasonable; in doing so I consider whether a selection pool was appropriate in the circumstances. There are no written notes of any selection process. Mr Edwards queried why no one else was made redundant. In evidence Mrs Weller explained that in August 2020 the respondent was planning 3 redundancies, but 2 employees left the business just before the process started. One resigned on medical grounds after falling seriously ill and resigned on medical grounds and another person decided to retire. There was no one else doing the same or similar job as Mr Edwards, as estimator. Mr Edwards queried why none of the administrators who had been assisting with the estimates while he was on furlough were not consulted. When asked about their roles in cross examination he answered, *'their main role helping contracts managers with site whereas mine is working with contracts managers in getting costs, it's a demotion, in terms of pay'.* He also confirmed that the administrators always had their quotes checked, while this was not the case for him. The roles were difference; there is no reason that the administrators should have been in same pool.

62. Therefore, there was no one else who could be selected alongside Mr Edwards as a pool. In the case of *Wrexham Golf Club v Ingham UKEAT/0190/12* the EAT confirmed that the selection pool is a matter to be determined by the employer, with intervention by the Tribunal only necessary in exceptional circumstances. This is not such a case; given the explanation by the respondent I conclude that in this situation it is reasonable to have a selection pool of one employee. However, a selection pool of 1 is not a reason to accelerate the consultation process; the consultation period must be reasonable in the circumstances, which it was not.

63. My next consideration is whether the employer took reasonable steps to redeploy the employee whose role was at risk, by finding the claimant suitable alternative employment.

64. At the first consultation meeting on 20 August 2020 meeting Mrs Weller asked Mr Edwards *'Have you any suggestions/alternatives to offer regarding your potential redundancy?* Mr Edwards suggests a role as an electrician; this is not explored in the minutes. In evidence Mrs Weller told the Tribunal that '*Although mark, his expertise in estimating was electrical, he still wasn't an up to date electrician so couldn't have done job like that so I could only think of office job, like a contract administrator*' and explained that, *'I looked around company to see vacancies, only one we had would have been maybe in the office but that was a huge reduction in salary compared to Mark.*'

65. In evidence Mr Edwards suggests he may have been interested in this role sating '*A need for a fourth administrator was identified and so, in September 2020, ….. joined the respondent". My contract of employment did not finish till 30th September 2020.* T

    September whilst I was on "garden leave" another member of staff was employed…... a contracts manager, a role which I had previously applied for. This role included talking to clients, customers, preparing quotes and reporting back to Management / Directors. It now transpires ….was an Admin Assistant. They can produce and send quotes based on someone telling them what to write and how much to charge as well as organise labour, laisie [sic] with clients and contracts managers. The same work I already done but would have saved training up a new employee.'

66. These comments may be hindsight. The administration role was discussed, albeit very briefly, with Mr Edwards at the meeting; he agreed it was not suitable. While an administrative role was explored in outline, on the balance of probability the respondent has not shown it acted reasonably in exploring whether there were suitable alternative roles in the company. In evidence Mr Edwards told the Tribunal:

    'The company paid for 2 further training courses …..This was to take work off ….(Lead Electrical engineer on site) and onto myself in producing the NICEIC test certificates.'

67. There may have been other roles for which Mr Edwards could have been considered. This is not for the determine. The question is whether the respondent acted reasonably in exploring redeployment. It did not. In fact, it placed this burden on Mr Edwards. In the minutes of the 20 August meeting Mrs Weller says, '*so you are not really offering any suggestions or alternatives*

for your position.' It is for the employer not the employee to lead this conversation; the respondent did not act reasonably in doing so.

68. In written submissions Ms Gyane suggests that the second consultation meeting on 24 August focused on whether there was suitable alternative work for Mr Edwards. I disagree. On 24 August 2020 there was another conversation about alternative positions; Mrs Weller asks the claimant if he has thought about alternative work he could do. Mr Edwards talks of being *'versatile'* suggesting *'estimating, CAD drawings, Forklift, electrical work'.* Mrs Weller dismisses all roles except CAD as being done by someone who had been made redundant as a role for which the company is not willing to pay. No reason is given as to why a CAD drawing is not a possibility. Mr Edwards talks around the possibility of being an electrician but concludes it is not viable for him due to start times. Mrs Weller comments *'there is a contract whereby you get half an hour travel each end of the day.'* This option is not explored in any meaningful way. The respondent has not provided any evidence that it actively explored, considered, or suggested alternative employment to Mr Edwards. It adopted an approach of asking Mr Edwards to make suggestions, which were not addressed in any meaningful way.

69. Any conversation about redeployment was led by Mr Edwards due to Mrs Weller asking him what he thought he could do. The respondent had a duty to explore redeployment. At the least it would have been reasonable for Mrs Weller to share a list of current vacancies for discussion or inform Mr Edwards that there were no vacancies. There is no evidence it did so. The minutes of the consultation meetings do not support Mrs Weller's oral evidence that alternative options were reasonably investigated, or a fair explanation given as to why there were none.

70. I conclude that the dismissal by reason of redundancy was procedurally unfair for two reasons. The process overall was unreasonably quick notwithstanding the error and Mr Edward's on the spot agreement to proceed with the meeting on 20 August; in not giving Mr Edwards any time to reflect, the error in the letter was not fairly addressed. Notification on 17 August, redundancy confirmed on 24 August left very little time for the respondent to fully consider redeployment options and there is no evidence it did; indeed, the minutes of the meeting evidence the approach the respondent took was to ask Mr Edwards to lead this conversation and put forward suggestions, to which it responded to these. The respondent did not actively or reasonably consider redeployment.

71. Therefore, I find that the claimant was unfairly dismissed by the respondent within section 98 of the Employment Rights Act 1996. As this was a genuine redundancy situation if the procedural error on the timeline was rectified Mr Edwards may have been fairly dismissed anyway. However, it is not possible to be conclusive to this point as the respondent has not shown to the Tribunal that it discharged its duty to fully investigated alternative roles.

Law – overtime pay

72. The claimant's entitlement to overtime pay is contractual; if the work was undertaken at the direction of the respondent, exceeds 40 hours and an overtime form is submitted and approved, then Mr Edwards is legally entitled to be paid the overtime.

73. In written submissions Ms Gyane addressed whether any overtime claims could be considered as a series of deductions. Under section 23 of the Employment Rights Act 1996. If a Tribunal accepts there is a series of deductions any claim has to be brought within three months of the date when the last deduction in the series was made; this would be the date of the last overtime claim which is alleged unpaid.

74. In determining whether there is a series of deductions the case of *Amec Group Ltd v Law [2015] IRLR 15* implied that instances of correct payments could break a series of deductions.

Conclusions – overtime pay

75. The first issue is, how much overtime did the C work and in what period? Mr Edwards has not provided a summary of how much overtime he worked or in what period; the evidence in the bundle covers the entirety of his employment excluding April, June, July, August and September 2020.

76. Next, I address whether all, or any, of the claims in the bundle were authorised (excluding evidence in the bundle relating to overtime forms which Mr Edwards accepted at the hearing had been paid), I find that Mr Edwards outstanding claims were not authorised.

77. Under the terms of Mr Edward's Contract, it is clear that overtime will only be paid if it was undertaken at the '*direction'* of the respondent. There is no evidence this provision was amended either in writing. Mr Edwards claims the extra hours were agreed orally with his managers. There is no evidence of this either. In the evidence bundle there are 400 emails Mr Edwards sent to himself; none of these were copied to management. There are no written directions from managers asking him to do any extra work or that they were aware of this extra work until the claims were submitted to the Tribunal. Mr Edwards told the Tribunal that he '*tried to make Managers / Directors aware….is the only time Dave (MD) said I could go home early due to how much I was working.*' This evidences the hours he was working, not that his managers were aware that he was doing this as overtime.

78. Mr Edwards claims he worked longer hours than his Contract required, saying he: *'reguarly [sic] be the first person in the office working more hours than my contract stated.'* However, he continues *'I put in overtime requests for these hours which were more often than not denied. I would then work my 40 hours plus the extra 5 hours which led to a slower return for quotes.'* This makes it clear that Mr Edwards was aware the overtime was not approved in advance. Further, the fact he had followed the correct process and overtime was paid when he did so, makes it clear he knew that process. The evidence makes it clear this work was not at their direction: Mr Edwards is telling his managers what he is doing, not the other way round. It was not agreed that overtime work could be undertaken because the claimant considered it necessary, or because he had to work beyond his contracted hours to finish work. The Contract is clear; there is no legal basis to claim this overtime. He is not entitled to any of the payments which were not authorised at the direction of the respondent before the work was undertaken.

79. In addition to claims for specific work Mr Edwards claims for an extra hour of overtime daily. I have found that the Contract clearly states that overtime is at the direction of the respondent. There is no evidence to corroborate a written or oral agreement of an hour of overtime each day. Indeed, Mrs Spicer told the Tribunal that Mr Edwards had asked to come in early. In evidence Mrs Weller told the Tribunal *'I was surprised that he had been submitting some claims during 2019 when he came in to work before his normal start time of 8am. I was fully aware that Mark often got to the office early. When I spoke to him about this, he explained to me that he does not sleep well, and he preferred to get in to work early before his kids get up for school as he preferred to be in the office than amongst the chaos at home. He also liked to get in so he would catch the Truffles van, which sold drinks and food and would normally visit the industrial estate where we are based around 7am. I get in at 8am and I have never seen it. I know colleagues saw Mark in the office early in the morning watching TV and eating food, which was fine for us, as it would be before his start time at 8am.'*

80. Mr Edwards told the Tribunal he would come into work early to complete his usual tasks. While there may be a number of reasons why Mr Edwards came into the office early, these were personal, he was not asked to do so; the question is can he claim overtime for that time he was in early? There was no agreement that Mr Edwards could claim a daily extra hour as overtime; this is something he alone decided to do. Any work done in this time was not at the direction of the respondent, as required by his Contract or approved by one of the directors, Dave Howard or Aaron Guidice. I find that there is no legal basis for the daily hour Mr Edwards claims or that he was doing work beyond his normal tasks.

81. I note that in evidence the respondent accepts that it did pay some overtime requests for work it had not directed but submits this was a good will gesture. Mrs Weller's evidence was very clear on this point; some time was paid as goodwill, and it was made clear to Mr Edwards at the time that this was the case as a one-off gesture.

82. There was concern about the level of additional work Mr Edwards was doing and claiming; the respondent's managers discussed with the claimant that this work should have been properly completed in normal working hours. Mrs Weller told the Tribunal that *'Towards the end of 2019 I know that Aaron* [one of the respondent's managers] *wrote to Mark to explain that he would not approve his overtime going forward.* This is confirmed in the evidence: in response to an email from Mr Edwards dated 4 November 2019 submitting overtime forms for October 2019 Aaron Guidice replied that Mr Edwards needed extra work to be authorised either by Mrs Weller or the relevant project manager. It is clear that there was an awareness and concern by the respondent's management as to the amount of extra work Mr Edwards was undertaking. It is outside the jurisdiction of the Tribunal to consider whether Mr Edwards was able to do his work in his contractual hours; this is an internal matter the claimant should have raised with his employer if he felt unable to do so. It did not give him grounds to self-direct overtime.

83. The email of 5 November 2019 also served to remind Mr Edwards that overtime had to be authorised at the direction of the respondent's management. I find that these payments were a good faith gesture, and this was made clear to the claimant at that time.

84. Ms Gyane addressed some authenticity issues with the emails, suggesting that an email sent to himself is not accurate record of work done and that some have been produced before the work was undertaken. The respondent submits that Mr Edwards did not do some of the work for which he is claiming. For example, a claim on 19 September 2019 when the respondent says Mr Edwards was on annual leave. The Tribunal does not have sufficient evidence to determine authenticity. In any event, this would be a second evidential consideration if the Tribunal determines there is a legal basis for the claims. There is not. None of these emails evidence the contractual process for overtime which was clear on the face of the Contract. It was also clear from Mr Edward's oral evidence that he was aware of, understood and had followed this process.

85. There is no evidence before the Tribunal that Mr Edwards complained about overtime not being paid until after his employment terminated. He did not raise any outstanding amounts as part of the redundancy process when the amount of his final payment (taking account of notice and holiday pay) was explained to him. He did not raise it when he received his final payment. Mr Edwards only raised the issue of outstanding overtime payments after he was made redundant.

86. I conclude that Mr Edwards probably did work beyond his contractual hours and that he came into the office before his contractual start time for personal reasons. However, this does not result in an automatic entitlement to be paid, especially where a process for overtime payments is clear, as it is here. Indeed, the evidence shows that the respondent was aware that Mr Edwards was working additional hours and the need to address why he was not completing his tasks in contractual time. None of this provides a legal basis for an overtime claim. The legal basis is clear in the contract; overtime is paid where work is undertaken at the direction of the respondent. On the balance of probability, the claimant has not discharged this burden. The extra work he did, which had not been paid, was at his own direction; the respondent was not involved in any decision that the claimant needed to do this work, nor did it direct him to do so.

87. The hours Mr Edwards claims were not authorised. Therefore, the respondent does not owe the respondent any overtime monies.

88. In the Order the Tribunal identified the issue of overtime payments as part of a continuing series of deductions. I note that in written submissions the respondent contends that all deductions alleged to be unpaid prior to 1 June 2020 of the claims are out of time as the claim form is dated 24 October 2020. I disagree; the Contract covers the period of employment, and the overtime claims all relate to the same role and employment contract. Therefore, all claims contained in the overtime bundle are in time. I have found that the claims were not authorised and, therefore, there is no legal basis for the claim.

Employment Judge **Hutchings**

10 April 2022