EMPLOYMENT TRIBUNALS

Claimant Mrs E Stamp

Respondent OHM Clothing Limited

Heard at: Exeter (remotely) **On:** 13 & 14 June 2022

Before:
Employment Judge Goraj

Representation
The claimant: in person
The respondent: Mr A Bourke, HR Consultant

RESERVED JUDGMENT

THE JUDGMENT OF THE TRIBUNAL IS THAT: -

1. The claimant was unfairly dismissed by the respondent in breach of section 98 (4) of the Employment Rights Act 1996.

2. There was however an 80 per cent chance that the claimant would have been fairly dismissed if a fair procedure had been followed and any compensatory award is therefore reduced by such percentage pursuant to section 123 (1) of the Employment Rights Act 1996.

3. The claimant is awarded a compensatory award of £2,919.73 (£2,419.73 loss of earnings and £500 loss of statutory rights) which sum the respondent is ordered to pay to the claimant.

4. The Employment Protection (Recoupment of Benefits) Regulations 1996 ("the Regulations") apply in this case. For the purposes of the Regulations the total monetary award is £2,919.73, the amount of the prescribed element is £2,419.73, the dates of the period to which the prescribed element is attributable are I July 2020 to 7 July 2022 and the total monetary award exceeds the prescribed element by £500.

5. The claimant's complaint of unlawful deductions/ breach of contract for arrears of pay is dismissed upon withdrawal by the claimant.

6. The claimant's complaint of breach of contract (for notice) is dismissed.

REASONS

Background

1. The claimant was employed by the respondent from 1 August 2016 until 30 June 2020.

2. By a claim form presented on 7 October 2020, the claimant brought complaints of unfair dismissal, unlawful deductions/ breach of contract for arrears of pay and breach of contract for alleged outstanding notice pay. The claimant's claim form is at pages 119-134 of the bundle.

3. The claimant's ACAS Early Conciliation Certificate records that: - (a) the claimant's EC notification was received by ACAS on 26 August 2020 and (b) the ACAS EC certificate was issued on 8 September (by email) (page 32 of the bundle).

4. The respondent's response form is at pages 3- 17 of the bundle. The respondent denied the allegations and contended that the claimant had been fairly and lawfully dismissed by reason of redundancy and was not entitled to any outstanding monies.

Background

5. This matter has been the subject of two case management and a preliminary hearing (to determine the respondent's unsuccessful strike out application). In the light of the ongoing difficult working relationship between the parties they produced their own bundle of documents. Most of the key documents are contained in both bundles. For ease of reference, the Tribunal primarily worked from the respondent's bundle which is referred to as "the bundle". The Tribunal however also referred to the claimant's bundle as appropriate as identified below.

The witness statements

6. The Tribunal received witness statements (which were incorporated in the respective bundles) and heard oral evidence from: -

    6.1 The claimant.

    6.2 On behalf of the respondent: - (a) Mr Anthony Brown, Managing Director of the respondent and (b) his wife, Mrs Jemma Brown also a director of the respondent.

The conduct of the matter

7. The hearing was conducted as a remote hearing (initially VH and subsequently by CVP). There were significant technical issues on day one of the hearing. The principal problem was that the respondent's representative was unable to establish an internet connection to the hearing which he informed the Tribunal was because of unexpected work outside his house by an internet provider. Following unsuccessful attempts to secure an internet connection, the respondent's representative joined the hearing by telephone. The respondent's representative informed the Tribunal that he was unable to participate from any other location because of his medical conditions including sciatica. The Tribunal gave the respondent's representative an opportunity to take instructions from the respondent as to whether they wished to proceed with the matter on the basis that the respondent's representative would participate in the hearing that day by telephone, with the Tribunal confining itself to the respondent's evidence, or whether they wished to make a formal application to postpone the matter to which the claimant would be entitled to respond. Having taken instructions, the respondent wished to continue with the hearing on the basis set out above. The claimant also wished to proceed with the matter. Having given consideration to the wishes of the parties and also having regard to the fact that this matter related to events going back to 2020 and which had been the subject of 3 previous preliminary hearings the Tribunal determined that it was in the interests of justice to proceed as outlined above and the hearing proceeded accordingly. The Tribunal however made it clear to the respondent's representative that it was incumbent upon him to ensure that he had the necessary internet connection the following day so that he could cross examine the claimant. The respondent was subsequently able to re- establish an internet connection on day two of the hearing.

Other matters

8. The pre-hearing correspondence which was before the Tribunal included a further strike out application by the respondent for alleged non- compliance with directions by the claimant. Having discussed the matter further with the parties, the respondent's representative confirmed, on instructions from the respondent, that it was no longer pursuing the strike out application.

9. This Judgment was reserved as, in the light of the above events, there was insufficient time on the second day for the Tribunal to make/ deliver its judgment. The Tribunal heard evidence from the parties on liability and remedy The Tribunal heard evidence on remedy so as to avoid the necessity of a further hearing if the claimant succeeded in any of her claims.

10. The Tribunal identified with the respondent's representative at the commencement of the hearing his requirement for regular breaks by reason of his medical conditions.

The Issues

11. At the commencement of the hearing, the Tribunal confirmed with the parties, the issues which the Tribunal is required to determine.

12. The issues were initially identified at paragraphs 26.1 – 3 of the Order of Employment Judge Gray dated 14 May 2021 (pages 183- 184 of the bundle) as subsequently confirmed at paragraph 1 of the Preliminary Judgment of Employment Judge Cadney dated 22 December 2021(pages 160 – 161 of the bundle) as clarified further as follows:-

    12.1 The claimant does not accept that there was a redundancy situation – the claimant's position is that there was no need/ financial imperative to reduce the number of embroiderers at the relevant time. The claimant also asserted in her claim form that the reason for her redundancy was that she had been subjected to an unfair disciplinary process in February 2020.

    12.2 Further the claimant contends that the respondent should, in any event, have asked for volunteers and /or introduced part time working and/or retained employees on furlough as an alternative to dismissal and refers to the fact that the respondent took on new staff in the summer/ autumn of 2020.

12.3 Selection criteria – the claimant contends that notwithstanding that the selection criteria of performance, skills and attendance were potentially fair criteria for selection, the respondent should have also taken LIFO into account.

12.4 Selection – the claimant contends that selection criteria were not, in any event, fairly applied including as (a) the respondent consciously or subconsciously took her disciplinary warning into account and/or (b) the job sheets were incomplete/ inaccurate and/or (c) the respondent failed to take proper account of the claimant's range of skills and difficulties with the Barudan machine and (d) as a result of such failings the claimant was unfairly selected for redundancy in preference to Cristina.

12.5 Consultation – the claimant contends that there was no proper consultation regarding the reasons for her selection in preference to Cristina / consideration for alternative employment which thereby rendered her selection/ dismissal unfair.

12.6 The claimant confirmed that, in the event that there was a genuine redundancy situation, she did not contend that she should have been retained in preference to Sandra – her case is that she should have been retained in preference to Cristina who had shorter service and made more mistakes.

12.7 The claim for notice – the claimant appears to bring her claim for alleged outstanding notice pay on the grounds that she was told in her letter of dismissal that she would be paid in lieu which means that she is entitled to be paid for a further two week's pay for the period after the termination of her employment.

13 The respondent denies the allegations and contends that the claimant was fairly and lawfully dismissed and that she has been paid all outstanding monies. The respondent also contends, that if the claimant is found to have been unfairly dismissed for procedural reasons (which is denied) she would, in any event, have been fairly dismissed if a fair procedure had been followed. The respondent further contends for the for the purposes of remedy (if relevant) that the claimant failed to take reasonable steps to mitigate her losses. The respondent has not however produced any evidence in support of such contention.

Findings of fact

14 The claimant was employed by the respondent as an embroiderer from 1 August 2016 until 30 June 2020, the latter date is the effective date of termination for the purposes of the Employment Rights Act 1996 ("the Act").

15 The respondent produces custom made embroidered clothing and workwear. The business is owned by Mr A and Mrs J Brown who are shareholders and directors in the business. Mr Brown is the Managing Director.

16 Immediately prior to the events in question, the respondent operated out of a retail outlet in Devizes and a workshop in Swindon. At that time the respondent had a total of 7 staff including Mr and Mrs Brown. The respondent employed 3 full time embroiderers namely, the claimant, Sandra, and Cristina. Sandra and the claimant had been employed by the respondent for more than 2 years. Cristina had less than 2 years' service.

17 The embroiderers worked in the workshop in Swindon where Mr Brown is also based. Mr Brown has an office adjoining the workshop and, at all material times, worked closely with the embroiderers. The respondent also employed an administrative assistant, who was based in the workshop in Swindon who had less than 2 years' service.

18 Mrs Brown is based in the respondent's retail outlet in Devizes at which location the respondent also employed a sales assistant for approximately 30 hours per week. The sales assistant, who lived locally, had been employed by the respondent for more than 2 years at the time of the events in question.

19 The respondent has no internal HR function and took advice during the relevant period from their accountants together with other organisations including ACAS and the Confederation of Small Businesses. The respondent also consulted government websites.

The claimant's terms and conditions of employment

20 The claimant's terms and conditions of employment dated 16 October 2019 are at pages 104 -112 of the bundle. The Tribunal has noted in particular, paragraphs 2 (duties) 6 (place of work and mobility clause) 12 (termination of employment – the claimant was stated to be entitled to one week's notice during the first two years' continuous employment and thereafter, a week for each additional year of service up to a maximum of twelve weeks' notice).

21 On 26 February 2020, the claimant was issued with what was described by the respondent as a first and final written warning for a 2-year period regarding her conduct, by the respondent. This letter is at page 100 of the bundle.

22 The claimant appealed against the warning by a letter dated 1 March 2020 which is at page 99 of the bundle. The claimant was subsequently invited to an appeal meeting. On 23 March 2020 (page 97 of the bundle), the respondent, however, wrote to the claimant stating that the claimant had verbally withdrawn her appeal due to the covid crisis. The respondent further stated that if the claimant wished to continue with her appeal after things had returned to normal, she could do so. The claimant denied that she had withdrawn her appeal. The Tribunal is however satisfied that it was the respondent's understanding that the claimant had indicated that she was not pursuing an appeal further at that time. When reaching this conclusion, the Tribunal has taken into account the contents of the respondent's letter dated 23 March 2020 to which the claimant did not respond until 31 May 2020 following the notification of her redundancy.

The pandemic and associated matters

23 In March 2020, the respondent closed its shop in Devizes and, soon afterwards, its workshop in Swindon. The respondent lost most of its orders at this including a contract from its largest customer which was projected to generate around £45,000 of business from the local air tattoo. On 23 March 2020 the respondent had only one remaining contract which Mr Brown worked on in his garage at home. At this time the respondent had approximately £30,000 of outstanding debtors and had an outstanding tax bill of around £20,000.

24 On 31 March 2020, Mr Brown wrote to staff explaining the respondent's position relating to furlough and the financial difficulties of the business. This letter is at page 96 of the bundle. The letter stated that all staff apart from Mr Brown were being placed on furlough and that they had been advised by their business advisers to undertake a review of the business before considering how to return staff to work.

25 The respondent provided employees with a further update on 20 April 2020 (page 20 of the claimant's bundle) including that although they had managed to secure a contract in April the outlook remained uncertain and that they did not expect much further revenue from the contract. The respondent also stated that as part of the furlough advice and procedures he had been advised to keep the business under review including whether any changes to the workforce such as redundancies were required. The respondent further advised that they would be starting a

review but that in the meantime staff would continue to be furloughed until further notice.

26 The respondent applied for / obtained a number of grants around this time. The respondent received a grant of £10,000 from the local council around 31 March 2020 and a further grant from the government of around £50,000 around mid-May 2020. The respondent also made an unsuccessful application for a CBIL loan in April 2020 (page 93 of the bundle).

27 Following advice from their accountants, Mr and Mrs Brown undertook a business review of the respondent. The respondent's Clothing Business Review document dated 1 May 2020 is at pages 89 – 92 of the bundle. The Review document identified concerns with regard to orders and finances, proposed a phased return to work together with the review of the administration and 3rd embroiderer role / role for trimming/ packing/ despatch. The review also identified potential issues including with regard to lack of funding, the uncertain length of the furlough scheme and potential redundancies.

28 In early May 2020, the respondent decided to pursue reductions in the workforce. The respondent decided that it no longer required an administration assistant as any such work could be absorbed by the directors who had previously undertaken such duties. The respondent also decided that the shop assistant role in Devizes needed to be remodelled. Further, in the light of what the respondent considered to be the ongoing challenging business conditions, the reduced and uncertain order book and difficulties in maintaining social distancing within the workshop the respondent concluded that the embroidery team should be reduced to two.

29 Having consulted ACAS and other websites, the respondent decided to adopt a selection matrix to identify which of the embroiderers should be selected for redundancy. The directors decided to use the following criteria namely:- (1) performance (2) skills, competencies and qualifications (3) attendance record and (4) relevant work experience. The directors also considered including disciplinary records but decided not to include it as a criterion as they believed that it might disadvantage the claimant in the light of the recent disciplinary matter.

30 On or around 11 May 2020, Mr Brown started preparing the redundancy selection matrices for the three embroiderers. The information referred to below was subsequently collated by the respondent between the meetings on 12 and 21 May 2020.

31 The embroiderers were scored out of 10 in respect of each of the above categories. The claimant's redundancy selection matrix is at page 50 of

the bundle. The claimant scored 8 in all categories save for her attendance record in respect of which she scored 10. In respect of the criterion of performance the claimant is described as, "A good embroiderer" without any further explanation of why she scored 8. In respect of the criterion of skills etc the claimant was described as having "Very good skills as an embroiderer and a good knowledge of the processes involved". In respect of the criterion of relevant work experience the claimant was described as having "No experience on the Happy machine, and training is limited at the moment due to social distancing concerns".

32 The Tribunal has not been provided with a copy of the redundancy matrices which were prepared for the remaining embroiderers Sandra and Cristina. The Tribunal has however, been provided with a document entitled "Summary of Analysis of Jobsheets" which was prepared by the respondent for the purposes of the claimant's appeal. This document is at page 52 of the bundle.

33 The respondent sets out in the Analysis sheet the scores allocated to each of the embroiderers, including its analysis of the jobsheets recording embroideries produced and the associated profit generated, for the purposes of ranking their performance. In summary, Sandra received an overall score of 38 out of 40 having a deduction of 2 points in respect of relevant work experience as she had no experience of the Happy Machine. Cristina scored 36 points out of 40. Cristina had a deduction of 2 points for performance – 1 for language related mistakes when she first started her employment with the respondent and one for coming second in the respondent's analysis of the number of embroideries produced/profit generated for the business. The remaining two-point deduction for relevant work experience was because she had no experience of the Tajma Machine.

34 The claimant had a total of six points deducted from her scores. The claimant was deducted two points for performance because she had come last in the respondent's analysis of the number of embroideries produced/ profit generated for the business. The claimant also had 2 points deducted for skills on the grounds that although she had good knowledge and experience, she was considered to be a slower operator than Cristina and Sandra.

35 For the purposes of assessing performance the respondent undertook an analysis of the latest 10 days of available job sheets for each of the embroiderers using the methodology stated in the document (pages 52 – 53 of the bundle). The associated daily job sheets are at pages 64 – 83 of the bundle. The document stated that having analysed the job sheets, the respondent calculated that the claimant had produced during the relevant period 388 embroideries in comparison to 581 from Cristina and

650 from Sandra. The respondent further calculated that the associated profit generated from such embroideries was - £1,229.07 (the claimant), £1,942.36 (Cristina) and £2,074 (Sandra). The respondent stated in the Analysis sheet the analysis demonstrated what they already knew to be the case.

36 On or around 11 May 2020, the respondent sent an email to staff informing them that the respondent anticipated having to make a number of redundancies. The associated letter to the claimant is at page 88 of the bundle. In this letter the respondent stated that redundancies were being considered in the light of the effect of the pandemic including the loss of the Air Tattoo work as a result of which it had to look to restructure to enable it to be in a more profitable position going forward. The claimant was advised that her position of embroiderer was at risk of redundancy however no decision had been taken and that the respondent would meet with her to consult and discuss any alternatives whereby her employment could be protected. The claimant was invited to put forward any proposals to avoid her redundancy including with regard to any alternative employment. The claimant was advised that the respondent would aim to confirm by no later than 26 May 2020 whether her job would be made redundant. The claimant was further informed that the first consultation meeting would be by telephone on 12 May 2020.

37 Mr Brown conducted individual meetings with the embroiderers by telephone on 12 May 2020. Mr Brown read from a prepared script which is at pages 86 – 87 of the bundle. Mr Brown's pro- forma brief notes of the meeting on 12 May 2020 (and the subsequent meeting on 21 May 2020) are at page 85 of the bundle. In summary, Mr Brown informed the claimant of the respondent's stated business case for redundancies including that it was having to restructure as the pandemic had hit the business hard and that it had restricted space in the workshop in which to operate social distancing measures. The respondent further stated that it would be operating with two embroiderers and one sales assistant as the respondent no longer required a shop assistant or an administration assistant. The respondent read out the selection criteria and stated that the respondent would be able to show the claimant how she had scored against these factors but could not share how other individuals in the group had scored. There was however no discussion at this meeting regarding the claimant's scores. Mr Brown asked the claimant whether she had any suggestions to make as to how redundancies could be avoided. The claimant suggested that the respondent should consider part time working until work picked up.

38 On 15 May 2020 Mr Brown sent a copy of the script which he had used at the meetings on 12 May 2020 to the three embroiderers. Mr Brown did not provide the embroiderers with a copy of their selection matrices.

39 Mr Brown conducted further individual telephone meetings with the embroiderers on 21 May 2020. At the meeting with the claimant Mr Brown gave the claimant her scores from the redundancy matrix. Mr Brown told the claimant that the embroiderers' scores were very similar but did not disclose the scores of the remaining embroiderers or explain why the claimant had received the lowest score. Mr Brown gave the claimant an update on the business and gave the claimant an opportunity to ask questions (page 85 of the bundle).

40 Mr Brown discussed the claimant's proposal for part time shared working at his meeting with the remaining embroiderers who indicated that they did not want to work on such a basis because of the consequential reduction in wages.

41 Mr Brown conducted a further telephone meeting with the claimant on 26 May 2020 during which he informed the claimant of the respondent's decision to make her redundant. This was a difficult meeting during which the claimant became very upset and said that she did not understand how the respondent had scored her lower than the other embroiderers. Mr Brown ended the conversation when he believed he heard someone in the background being abusive to him. Mr Brown told the claimant that he would write to her later that day (page 84 of the bundle).

42 The respondent's letter to the claimant dated 26 May 2020, to which it attached the claimant's completed redundancy selection matrix, is at page 49 of the bundle. In summary, Mr Brown confirmed that having applied the respondent's selection criteria the claimant had been selected for redundancy because of the effects of covid and the essential changes which were necessary for the business. Mr Brown responded to the proposals which he stated that the claimant had made concerning part time working and deferring any decision to make redundancies by retaining staff on furlough. Mr Brown stated that having considered the proposal for part time working, the respondent felt that it would be difficult to maintain social distancing with such an arrangement, that the business would work more efficiently with two full time embroiderers and that it was unreasonable to ask staff to take a 33% pay cut. In response to the claimant's proposal to defer any redundancies at that time by retaining staff on furlough, Mr Brown stated that although the claimant's role as an embroiderer was redundant the respondent was going to use the next few weeks to see whether they could find alternative employment for her in the business. Mr Brown confirmed that the claimant was contractually

entitled to 4 weeks' notice to terminate her employment, that her employment would end on 30 June 2020 unless an alternative job could be identified in that time, that she would not be required to work her notice and that the respondent would make a payment in lieu of notice. The claimant was also advised of her right to a statutory redundancy payment of £1,505.75 (with attached calculations – page 28 of the claimant's bundle) and of her right of appeal. The claimant was further advised that in the light of the stated aggressive comments in the background during their conversation that afternoon the respondent would only accept written communications going forward.

43 The claimant appealed against her dismissal by a letter dated 31 May 2020 which is at pages 47 – 48 of the bundle. The claimant raised nine grounds of appeal including the failure to ask for volunteers, that it would have been fairer for the respondent to have selected for redundancy on the basis of last in first out, the lack of consultation regarding the selection criteria, the lack of transparency in the application of the selection criteria (including that the respondent had not explained how it had arrived at the scores and that the claimant was not afforded an opportunity to respond before the decision to dismiss was made) and that the claimant performed additional duties that the other embroiderers did not undertake of which the respondent was aware but did not take into account in the scoring.

44 The claimant sent a further letter to the respondent dated 31 May 2020 asking about what was happening about her disciplinary appeal hearing and other concerns regarding her treatment by the respondent. This letter is at page 46 of the bundle.

45 Mr Brown conducted an appeal hearing with the claimant by telephone on or around 3 June 2020. The respondent's notes of the meeting are at page 45 of the bundle. The claimant told Mr Brown that she did not understand how Cristina had scored higher than her – Mr Brown told the claimant that he could not discuss other peoples' scores however, hers were not bad and that they had looked across the business to review the numbers. Mr Brown told the claimant that the Barudan machine would have to be sold or scraped as there was a part that could not be replaced. The hearing concluded on the basis that the respondent stated that it would provide its decision in writing.

46 The claimant sent a further email to the respondent dated 5 June 2022 in which she raised further grounds of appeal. This letter is at page 44 of the bundle. In summary, the claimant contended that the respondent was dismissing her before the end of July in order to avoid paying her a further year's redundancy money, that she could not understand how she had scored lower than the remaining embroiderers as she made fewer mistakes and that she believed that the respondent had failed to take into

account that her machine did not perform properly which had slowed her down. The claimant also stated that she believed that her disciplinary had been taken into account in the decision making.

47 Mr Brown wrote to the claimant by email dated 5 June 2020 rejecting the claimant's appeal and advising the claimant that she had no further right of appeal. This letter is at pages 42-43 of the bundle.

48 In summary, the respondent rejected the claimant's appeal on all grounds including that it disputed that it had a legal responsibility to ask for volunteers, rejected the use of LIFO as it could be indirectly discriminatory and did not focus on the skills required by the business going forward, contended that scores were done fairly by Mr Brown in his capacity as managing director having considered recent job sheets, work experience and how to take the business forward and the claimant had an opportunity to talk through the scores in the first consultation and appeal conversations and that disciplinary matters were removed from the process in order to make it fairer to the claimant. The respondent also stated that it was unable to retain an employee on furlough where a job no longer existed and that two redundancies were necessary because of the significant drop in revenues and low expectations of returning work. The respondent further stated that the claimant's position on furlough had been extended to the end of June 2020 in order to ensure that there was no other employment that could be offered to her in the business and that she had received an additional month's pay.

49 There was further correspondence between the parties at the end of June/ beginning of July 2020. In the claimant's email dated 30 June 2020 (page 40 of the bundle) the claimant raised further concerns including that she had noticed from her pay slip that she had only been paid one week's notice although she was entitled to 3 weeks as she had worked for the respondent for 3 years. The claimant also questioned why she had not been offered/ considered for the sales assistant's job as she had previously prepared reports, spread sheets and undertaken data entry.

50 The respondent replied by email dated 2 July 2020 (page 39 of the bundle). In respect of the claimant's pay, the respondent acknowledged that the claimant's pay slip was incorrect. The respondent stated that having reviewed the claimant's contract and payslip she had been paid 3 week's furlough pay and one week's notice in full whereas she should have been paid 2 week's furlough and 2 weeks' notice as she was entitled to entitled to one week's notice for the first two years of employment and then one week for every year thereafter in accordance with her contract of employment. The respondent further stated that it would recalculate the monies reissue the payslip accordingly. The

respondent stated that it considered the consultation period and appeal process to be concluded.

51 The respondent sent a further email to the claimant dated 7 July 2020 which is at page 33 of the bundle. The respondent further clarified its position with regard to the claimant's final pay. The respondent stated that its accountants had wrongly paid the claimant in June for 4 weeks of furlough and one week's notice making a total of 5 weeks when the claimant should have been paid one week of furlough and 3 weeks' notice pay giving an overpayment of £149.69 which the claimant was not required to repay. The respondent also confirmed its position with regard to the other queries raised by the claimant including regarding the sales assistant role which it disputed was a job opportunity. The respondent stated that the role was 80 per cent of the existing shop assistant role in Devizes which had been redesigned to meet the respondent's changing business needs in response to covid.

52 There is a payslip for the claimant dated 30 June 2020 at page 35 of the bundle. The payslip records that in addition to holiday and redundancy pay (the latter of £1,505.75) the claimant was paid (before tax) £ 270.67 in furlough pay and £1,003. 85 in notice pay.

53 The respondent dismissed two employees by reason of alleged redundancy on or around 30 June 2020 – the claimant and the administrative assistant. The respondent operated with 2 embroiderers following the claimant's dismissal. The respondent initiated a phased return to work with Sandra returning in late May/ early June and Cristina returning in late summer. The shop assistant's role in Devizes was redesigned following the closure of the Devizes shop with the focus on online sales. The employee who had previously undertaken the shop assistant's role was retained in the revised role.

54 On or around 5 October 2020, and following an increase in work over the summer, the respondent employed a trimmer working 30 hours per week. The trimmer also undertook packing duties over time. In or around May 2021 the respondent employed a further trimmer for 30 hours per week and moved the existing trimmer into dispatch. The respondent accepted in evidence that the claimant had the necessary skills to undertake trimming and packing duties.

55 The claimant challenged at the hearing the accuracy of the respondent's analysis document including the accuracy and interpretation of the associated job sheets. The claimant contended that some of the embroideries produced by Cristina were incorrectly recorded as having been completed on one day thereby distorting the figures. The claimant also contended that the respondent had failed to give proper consideration to the fact that the Barudan machine which she operated

was an older machine with multiple heads which was slower than the other machines. The respondent contended that the job sheets accurately recorded the work produced by Cristina including that she able to complete a high number of embroideries in one day as recorded in the job sheet as she operated more than one machine. The respondent also contended that the Barudan machine had more heads than the other machines and was therefore able to produce a greater output of work.

56 Having given the matter careful consideration the Tribunal is satisfied on a balance of probabilities that the analysis of job sheets undertaken by the respondent was broadly accurate assessment of the relative productivity/ profitability of the three embroiderers. When reaching this conclusion, the Tribunal has taken into account in particular the contents of the documents and also that Mr Brown was a hands on working manager who was based in the workshop and was familiar with the processes and work practices.

Matters relating to remedy

57 The Tribunal has gone on to make the following findings of fact in case they are required (depending on the conclusions of the Tribunal with regard to liability).

58 There are two payslips relating to the claimant in the respondent's bundle dated 30 April 2020 (page 37 of the bundle) and 30 May 2020 (page 36 of the bundle). The payslip dated 30 April 2020 (for the period between 1 April 2020 and 30 April 2020) records that the claimant was paid (gross) £95.18 in holiday pay and £1,157.41 in furlough leave pay giving total gross and net pay for the month of £1,252.59 and £1,156.32 net respectively. The payslip dated 30 May 2020 (for the period between 1 May 2020 and 31 May 2020) records that the claimant was paid (gross) £20.34 in holiday pay and £1,160 in furlough leave pay giving total gross and net pay for the month of £1,180.34 and £1,107.14 net respectively. In the claimant's claim form, she states that her normal monthly gross pay before tax was £1,450 and net monthly pay was £1,281. The respondent concurred with such figures in its response form.

59 The claimant made unsuccessful applications for alternative employment (directly / via agencies) to a wide range of potential employers between the beginning of July 2020 and April 2021. The applications are at pages 51 – 121 of the claimant's bundle. The claimant claimed jobseeker's allowance in October 2020 (the letter dated 20 October 2020 at page 125 of the claimant's bundle). The claimant attended a number of courses in April 2021 in order to increase her chances of obtaining alternative employment (the certificates at pages 122- 124 of the claimant's bundle). The claimant obtained alternative employment on 20 April 2021 on

comparable terms to those enjoyed at the respondent and does not seek compensation for any period after that date.

CLOSING SUBMISSIONS

60 The Tribunal has given careful consideration to the submissions of the parties (including the brief written submissions provided by the respondent). The respondent relied in its response (if required) on the Judgment in the House of Lords of **Polkey v AE Dayton Services Limited 1988 ICR 142** in respect of any procedural unfairness.

THE LAW

The claimant's complaint of unfair dismissal

61 The Tribunal has had regard in particular to sections 98, 123 and 139 of the Act.

62 The Tribunal has reminded itself in particular that: -

62.1 It is for the respondent to satisfy the Tribunal, on the balance of probabilities, that the reason, or if more than one, the principal reason for the claimant's dismissal was redundancy.

62.2 The statutory definition of redundancy (as defined in section 139 of the Act) includes a situation where the requirements of the business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish.

62.3 If a respondent is able to establish the reason for a claimant's dismissal the Tribunal has to consider whether the respondent acted reasonably in all the circumstances, having regard to its size and administrative resources, in treating it as sufficient reason to dismiss the claimant.

62.4 For such purposes a Tribunal will usually consider in particular, whether :- (a) the respondent adopted a reasonable selection criteria/ decision (b) the respondent took reasonable steps to find the claimant suitable alternative employment and (c) the respondent adopted a reasonable procedure (prior to dismissal and on appeal) including whether it adequately warned and consulted with the claimant.

62.5 The Tribunal is required to consider whether the decision to dismiss and the procedure adopted was within the range of responses open to a reasonable employer faced with the

relevant facts – a Tribunal is not permitted to substitute its own decision.

62.6 Further, if a Tribunal is not satisfied that a respondent has adopted a fair procedure such as to render the dismissal unfair, it is normally appropriate for a Tribunal to consider, for the purposes of remedy, the percentage chance that the claimant would have been fairly dismissed if a fair procedure had been applied and when?

62.7 For the purposes of compensation – a claimant is under a duty to take reasonable steps to mitigate any losses. However, if a respondent contends that a claimant has failed to take reasonable steps to mitigate their losses the onus of showing such a failure lies on the respondent including to show when the claimant would have secured suitable employment if they had taken such steps.

The claimant's claim of breach of contract (notice)

63 The Tribunal has had regard to the provisions of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

THE CONCLUSIONS OF THE TRIBUNAL

The claimant's complaint of unfair dismissal

64 The Tribunal has considered the issues as identified above.

Paragraph 12.1 - The reason for the claimant's dismissal

65 The Tribunal has considered first the reason/ principal reason for the claimant's dismissal. The respondent asserts that it was a reason related to redundancy which is a potentially fair reason for dismissal for the purposes of section 98 (1) / (2) of the Act. The claimant's position is that there was no need/ financial imperative to reduce the number of embroiderers at the relevant time. The claimant further contended in her claim form that the reason for her redundancy was that she had been subject to an unfair disciplinary process in February 2020.

66 Having given the matter careful consideration, the Tribunal is satisfied that the respondent has established, on the balance of probabilities, that the reason/ principal reason for the claimant's dismissal was redundancy for the purposes of section 98 (1)/ (2) of the Act. When reaching this conclusion the Tribunal is satisfied on the facts that at the time of the claimant's dismissal there was a diminution in the requirements of the business for employees of a particular kind namely embroiderers by

reason of the impact of the covid pandemic and associated loss of business including in particular the loss of the respondent's principal contract relating to the local air tattoo and the closure of the respondent's workshop which precipitated a review of the business and a decision to make reductions in the workforce on financial grounds (paragraphs 23 – 28 above).

67 Further, the Tribunal is satisfied that the respondent has established, on the balance of probabilities, that the claimant was dismissed by reason of redundancy rather by reason of any disciplinary proceedings/ warning. When reaching this conclusion the Tribunal has taken into account in particular that it is satisfied that at the time that the claimant was selected for redundancy the respondent considered the disciplinary proceedings to be concluded (paragraph 22) and further that disciplinary matters were not included in the criteria for selection for redundancy as the respondent recognised that the inclusion of such criterion could disadvantage the claimant (paragraph 29).

The fairness of the claimant's dismissal for the purposes of section 98 (4) of the Act

68 The Tribunal has therefore gone on to consider for the purposes of section 98 (4) of the Act, whether the respondent acted fairly or unfairly having regard to the matters identified in that section in dismissing the claimant for such reason. The Tribunal has reminded itself that it is required to consider whether, having regard to the matters identified in Section 98 (4) of the Act the respondent acted (both with regard to its decision and the procedure adopted) within the range of responses of a reasonable employer and that it is not entitled to substitute its own decision.

69 The Tribunal has considered the issues identified at paragraphs 12.2 onwards above.

Paragraph 12.2 – avoiding redundancies

70 The Tribunal has considered first the matters identified at paragraph 12.2 relating to alternatives to dismissal. The claimant contended that the respondent should have sought volunteers before making compulsory redundancies and/or introduced part time working. The respondent accepts that it did not ask for volunteers which it seeks to justify on the grounds that it had no legal obligation to do so. The Tribunal is satisfied that notwithstanding that there was no legal obligation to do so a reasonable employer acting within the range of reasonable responses would have made enquiries as to whether any of embroideries were prepared to accept voluntary redundancy particularly as their scores were close and the three embroiderers were all considered as satisfactory employees (paragraphs 31 - 35). The Tribunal has considered further

below the effect of such failure on the overall fairness of the claimant's dismissal.

71 The Tribunal has also considered the claimant's contention that the respondent should have implemented part time working as an alternative to redundancies. The respondent disputed that it should have introduced part time working including on the grounds that the remaining employees were not prepared to reduce their hours/ that it would not have addressed the reduced requirement for embroiderers. Having given the matter careful consideration the Tribunal is satisfied that the respondent acted within the range of reasonable responses in declining to introduce part time working in the light of the explanation given by the respondent.

72 The Tribunal has gone on to consider the remaining issue identified at paragraph 12.2 above namely the claimant's contention that the respondent should have retained employees (including the claimant) on furlough in June 2020 as an alternative to dismissal which would have allowed the claimant to remain in the respondent's employment as business increased in the summer and the respondent took on new staff in the summer/ autumn of 2020. In summary, the respondent's position is that having undertaken a business review at the beginning of May 2020 in the light of the impact of the pandemic and in particular the loss of its major contract it was entitled to conclude that it was necessary to make redundancies and that retaining redundant personnel on furlough was not an appropriate solution.

73 Having given the matter careful consideration, the Tribunal is satisfied that the respondent's decision to implement redundancies in June 2020 was within the range of responses of a reasonable employer. The Tribunal has reminded itself that it has to consider the position at the time of the claimant's dismissal and further that it is not entitled to substitute its own decision. When reaching its conclusion, the Tribunal has taken into account in particular that notwithstanding the receipt of grants and the continuance of the furlough scheme, the respondent had significantly reduced levels of business and outstanding debts and had concluded following a business review, that it needed to make reductions in staff / changes to the business on a long term basis (paragraphs 27 and 28). Further, the respondent did not employ any new staff (who were not in any event embroiderers) until October 2020 over 3 months after the claimant's dismissal (paragraph 54).

Paragraphs 12.3 and 12.4 – the selection criteria and application thereof

74 The Tribunal has gone on to consider the issues identified at paragraphs 12.3 and 12.4 above relating to the selection criteria/ the application thereof. The claimant accepted at the hearing that the respondent's selection criteria of performance, skills, work experience and attendance

were potentially fair criteria for selection. The claimant further contended however that the respondent should also have applied LIFO (last in first out). The respondent sought to justify its decision not to apply LIFO on the grounds that it understood that such criterion could be considered to be discriminatory and further that the chosen criteria were more relevant to the respondent's business needs. Having given the matter careful consideration the Tribunal is satisfied that the respondent's decision to apply the selection criteria of performance, skills, work experience and attendance and not to use LIFO, was reasonable and within the range of reasonable responses for the reasons advanced by the respondent above.

75 The Tribunal has gone on to consider the claimant's contentions regarding the application of the selection criteria as identified at paragraph 12.4 above. The Tribunal has considered first the claimant's contention that her selection was unfair as the respondent, consciously or subconsciously, took into account the disciplinary proceedings/ the claimant's disciplinary warning when selecting her for redundancy. This is denied by the respondent. Having given the matter careful consideration, the Tribunal is satisfied, that the disciplinary matter/ warning were not taken into account by the respondent when selecting the claimant for redundancy for the reasons given at paragraph 67 above.

76 The Tribunal has gone onto consider the claimant's further contentions regarding the application of the selection criteria relating to the use of alleged incomplete / inaccurate job sheets and the respondent's alleged failure to have proper regard to the claimant's range of skills and difficulties with the Barudan machine together with the claimant's alleged consequential alleged unfair selection in preference to Cristina – all of which are denied by the respondent.

77 Having given the matter careful consideration, the Tribunal is not satisfied that the job sheets were incomplete or inaccurate and/or that the respondent failed to have regard to the operational complexities/ difficulties relating to the Barudan machine. When reaching such conclusions, the Tribunal has taken into account its findings at paragraph 56 above regarding the accuracy of the job sheets and Mr Brown's hands on working knowledge of the work processes in the workshop.

78 The Tribunal has also considered the claimant's contention that the respondent failed to take proper account of the claimant's range of skills (including her wider skills such as the preparation of spreadsheets and data entry) which is denied by the respondent.

79 Having given the matter careful consideration the Tribunal is not satisfied that the respondent gave proper consideration to the range of the claimant's skills at the time of her dismissal/ rejection of her appeal. When

reaching this conclusion the Tribunal has taken into account Mr Brown's hands on knowledge of the working practices of the embroiderers in the workshop. The Tribunal has also taken into account however, that on the facts there was no/ limited discussion with the claimant at the meetings on 12/ 21 and/or 26 May 2020 (paragraphs 37, 39 , 41 and 42) or at the subsequent appeal meeting on 3 June 2020 (paragraph 45)/ in the subsequent outcome letter dated 5 June 2020 (paragraph 48) regarding the claimant's range of skills in the context of either her selection for redundancy in preference to Cristina or consideration for any for alternative employment (including in relation to the revised sales assistant role). The Tribunal has considered further below the effect of such failings on the overall fairness of the claimant's dismissal.

Paragraph 12.5 – whether the respondent followed a fair consultation procedure.

80 The claimant contends that in addition to the procedural matters referred to above, the respondent failed to consult with the claimant properly regarding the reasons for her selection for redundancy in preference to Cristina and/or regarding alternative employment. The respondent denies the allegations and contends that the respondent conducted fair and reasonable consultation and appeal hearings (including that the conduct of the appeal hearing was not criticised by the claimant at the hearing).

81 The Tribunal has reminded itself that it has to consider whether the consultation/ appeal procedure adopted by the respondent was (viewed overall) within the range of responses of a reasonable employer. Having given the matter careful consideration, the Tribunal is not satisfied (having regard to the overall procedure) that the consultation procedure was fairly conducted within the range of responses of a reasonable employer in respect of the claimant's selection and/or consideration for alternative employment.

82 When reaching such conclusions, the Tribunal has taken into account that the respondent is a small business without an internal HR function and that the events in question occurred during a national pandemic. The Tribunal has however also taken into account that there was no/ limited discussion with the claimant at the meetings on 12, 21 and 26 May 2020 (paragraphs 37, 39, 41 and 42) and/or during the subsequent appeal process (paragraphs 45 and 48) such as to enable her to understand why she was being selected in preference to Cristina. Further, the claimant was not given access (even in summary/ redacted form) to the job sheets or performance / productivity analysis which has been provided to this Tribunal (paragraphs 32 – 35) in support of the respondent's case notwithstanding that the claimant had identified that she did not understand that why she had been scored lower than the other embroiderers (paragraph 41).

83 Further, although the respondent stated in its letter to the claimant dated 26 May 2020 that it would take the next few weeks to consider whether they could find her alternative employment there was no evidence before the Tribunal to indicate that it had taken any such steps including that the claimant had been considered for the sales assistant job notwithstanding her stated skills/ previous experience preparing reports, spread sheets and involving data entry (paragraphs 49 and 51).

Was the claimant's dismissal fair or unfair for the purposes of section 98 (4) of the Act.

84 The claimant contends that the matters identified above, rendered the claimant's dismissal unfair. The respondent contends that viewed overall the claimant's dismissal for redundancy was fair for the purposes of section 98 (4) of the Act.

85 Having given the matter careful consideration, the Tribunal is satisfied, having regard to the nature of matters identified at paragraphs 70, 79 and 82 - 83 above (failure to ask for volunteers, the issues relating to the claimant's selection for redundancy and the failure to undertake proper consultation) they were collectively serious enough to render the claimant's dismissal unfair for the purposes of section 98 (4) of the Act. The claimant has therefore unfairly dismissed by the respondent.

What would have happened if a fair procedure had been followed?

86 The Tribunal has therefore gone on to consider, for the purposes of determining any compensatory award pursuant to section 123 (1) of the Act, the percentage chance (if any) that the claimant would in any event have been fairly dismissed if the respondent had applied a fair procedure. The respondent contends that having regard to all the circumstances of the case any compensatory award should be reduced by 100 per cent on such grounds.

87 Having given the matter careful consideration, the Tribunal is satisfied on the facts that that there is a high percent chance that the claimant would, in any event, have been fairly dismissed if a fair procedure had been applied by the respondent. When reaching this conclusion, the Tribunal has taken into account in particular the matters referred to below.

88 Firstly, the Tribunal is satisfied that if the respondent had asked for volunteers, it is unlikely that either of the embroiderers would have come forward as neither of them was prepared to agree to part time working because of the consequential loss in earnings. Further, Cristina had less than 2 years' service and would not therefore have been entitled to a redundancy payment.

89 Secondly, as far as the question of selection/ consultation regarding selection is concerned the Tribunal is satisfied having regard in particular to the fact that the claimant does not challenge her selection for redundancy in comparison with Sandra together with the findings of fact at paragraphs 33 – 35 and 56 above regarding the respondent's analysis of the jobsheets and associated assessment of the comparative skills and performance of the claimant and Cristina that there is a high percentage chance that the claimant would still have been selected for redundancy if the respondent had properly consulted with the claimant regarding such information.

90 Finally, as far as the consideration for alternative employment in the role of sales assistant is concerned the Tribunal is satisfied that, notwithstanding the claimant's administrative skills relating to the preparation of spreadsheets and data capture, there is a high percentage chance that if there had been proper consideration of and consultation with the claimant regarding such matters the respondent would, in any event, have retained the employee who was previously employed as the shop assistant in Devizes. When reaching this conclusion, the Tribunal has taken into account in particular that the sales assistant role continued to include around 80 per cent of the duties previously undertaken by the shop assistant (paragraph 51) and who continued to be based locally in Devizes.

91 Having regard to all of the above the Tribunal is satisfied that if the respondent had applied a fair procedure with regard to the above there is an 80 per cent chance that the claimant would, in any event, have been fairly dismissed by 30 June 2020 and that any compensatory award should be reduced accordingly. The Tribunal does not consider it appropriate to award compensation for any further period of consultation as it is satisfied that a fair procedure could have completed during June 2020.

The claimant's breach of contract claim for notice pay

92 The claimant contends that the respondent has failed (in breach of contract) to pay her 2 week's outstanding notice pay. The claimant's claim appears to be pursued on the basis set out at paragraph 12.7 above namely, that as she was told in her letter of dismissal that she would be paid in lieu she is entitled to a further two week's pay for the period after the termination of her employment.

93 The respondent accepts that it initially made errors with regard to the calculation/ notification of the claimant's notice pay but contends the position was corrected and that claimant has received 3 weeks' notice

pay (at full not furloughed rate) in accordance with her contract of employment.

94 The claimant's contract of employment provides for her to receive notice to terminate her employment as stated at paragraph 20 above. The claimant's letter of dismissal dated 26 May 2020 (page 49 of the bundle) incorrectly states that she is contractually entitled to receive 4 weeks' notice to terminate her employment. The claimant was informed in that letter that her employment would terminate on 30 June 2020. The claimant remained on furlough/ was not required to attend for work during June 2020.

95 The Tribunal is satisfied on the facts (paragraphs 51 and 52) that the claimant has received (following correction by the respondent) three weeks' notice pay at full, not furloughed, rate in accordance with her contractual entitlement and that she is therefore not entitled to any further notice monies. For the avoidance of doubt, the Tribunal is also satisfied that the reference in the letter of dismissal to the claimant receiving pay in lieu of notice does entitle the claimant to any further monies as it merely confirms that the claimant was not required to attend for work during her notice period. This claim is therefore dismissed,

Remedy

96 Finally, the Tribunal has gone on to consider remedy. The claimant seeks compensation if successful. The Tribunal has had regard to the claimant's schedule of loss (pages 126 – 127 of the claimant's bundle) and the respondent's response (pages 170 – 173 of the bundle). The claimant accepted, after discussion at the commencement of the hearing, that she was not entitled to receive any compensation in respect of the disciplinary proceedings in February 2020. The claimant further accepts that she is not entitled to any ACAS uplift if the Tribunal is satisfied that this was a genuine redundancy situation.

Basic award

97 It is agreed that the claimant has received her statutory redundancy entitlement of £1,505.75 (4.5 weeks x £334.61 gross per week) (paragraph 52). The claimant is therefore not entitled to receive any basic award.

Compensatory Award

98 It is agreed between the parties that the claimant is entitled to compensation for loss of statutory rights in the sum of £500.

99 The claimant seeks compensation for loss of earnings from 1 July 2020 to 20 April 2021 when she obtained comparable employment. It is agreed

between the parties that the claimant's normal monthly net pay was £1,281.68.

100 The respondent disputes that the claimant is entitled to any compensatory award as it contends that the claimant failed to take reasonable steps to mitigate her losses. In summary, the respondent contends that the claimant only made a limited number of job applications during the relevant period and did not apply for job seeker's allowance until October 2020. The respondent accepted however that it had failed to adduce any evidence to demonstrate that the claimant has failed to mitigate her losses.

101 Having given the matter careful consideration, the Tribunal is satisfied that the claimant has made reasonable attempts to mitigate her losses. When reaching this conclusion, the Tribunal has taken into account in particular its findings of fact at paragraph 59 including that the claimant made a wide range of unsuccessful applications for employment (directly and via agencies) between the beginning of July 2020 and April 2021. The Tribunal has also noted that the claimant attended a number of courses in April 2021 in order to improve her chances of obtaining alternative employment. The Tribunal has further taken into account the ongoing effect of the pandemic at the relevant time and that the respondent has failed to produce any evidence of any positions for which it says that claimant could and should have applied.

102 In all the circumstances, the Tribunal is satisfied that the claimant has taken reasonable steps to mitigate her losses and that it is appropriate to award her compensation for loss of earnings (subject to the reduction of 80 per cent pursuant to section 123 (1) of the Act and the application of recoupment) for the period between 1 July 2020 and 20 April 2021.

103 The Tribunal is satisfied that it is appropriate to award the claimant compensation for loss of earnings in the sum of £1,107.14 net for the month of July 2020 when the claimant was likely, on the balance of probabilities, to have remained on furlough (using the May 2020 figure at paragraph 58) and thereafter the (agreed) normal monthly net rate of pay of £1,281.68.

104 The Tribunal calculates that this gives a total net loss of earnings (before adjustments) of £12,098.63 calculated as follows- (1) £1,107.14 for July 2020 (2) thereafter £1,281.68 for 8 months and 2 ½ weeks (8 x £1,281.68 (£10, 253.44) plus 2 ½ weeks x £295.22 (£738.05) = £10,991.49 (3) £1,107.14 plus £10,991.49 =£12,098.63.

105 The award is thereafter reduced by 80 per cent pursuant to section 123 (1) of the Act giving an adjusted compensatory award for loss of earnings of £2,419.73.

106 The total compensatory award, which the respondent is ordered to pay to the claimant (subject to recoupment) is £2,419.73 plus £500 (loss of statutory rights = **£2,919.73.**

107 For the purposes of the Regulations, the total monetary award is £2,919.73, the amount of the prescribed element is £2,419.73, the dates of the period to which the prescribed element are attributable are 1 July 2020 to 7 July 2022 and the total monetary award exceeds the prescribed element by £500.

Employment Judge Goraj
Date: 7 July 2022

Judgment sent to the parties: 13 July 2022

FOR THE TRIBUNAL OFFICE

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