Case No: 1307432/2020

EMPLOYMENT TRIBUNALS

Claimant: Ms E Horsley

Respondents: (1) Hi-spec Facilities Services Limited
(2) Colin Stirling
(3) Gintautas Morkunas

Heard: Remotely (by Cloud Video Platform) – Midlands West

On: 19, 20 and 21 July 2022

Before: Employment Judge Faulkner (sitting alone)

Representation: **Claimant** - Mr J Singh (Solicitor)
Respondents - Mr S Forde (Support Services Director)

JUDGMENT

1. The Claimant's complaints of direct disability discrimination, discrimination arising from disability and failure to make reasonable adjustments are dismissed upon withdrawal.

2. As a result, all complaints against the Second and Third Respondents are dismissed.

3. The Claimant was dismissed by reason of redundancy but her dismissal was unfair. Her complaint of unfair dismissal was therefore well-founded.

4. The Claimant was awarded the sum of £7,264.91 by way of a compensatory award for unfair dismissal.

5. The above amount was payable by the Respondent within 14 days of the date of the original Judgment sent to the parties on 22 July 2022.

6. The Employment Protection (Recoupment of Benefits) Regulations 1996 did not apply.

REASONS

1. The signed Judgment in this case having been sent to the parties on 22 July 2022, these Reasons are provided pursuant to the request from the Claimant's solicitors made on 26 July 2022.

Complaint

2. The only complaint to be considered was that of unfair dismissal, given that the Claimant had withdrawn her complaints of disability discrimination before this Hearing. It was agreed that those complaints, which were the only complaints against the Second and Third Respondents, should be dismissed on withdrawal.

Issues

3. It was agreed on day 1 of this Hearing that the issues to be decided on liability were as follows.

4. The first question was whether the Respondent had shown the reason for dismissal.

5. If so, the second question was whether it was a fair reason within the meaning of section 98 of the Employment Rights Act 1996 ("ERA")? The Respondent contended that the reason was redundancy; the Claimant contended that it was her sickness absence and/or the need for her to shield and thus work from home in response to the Covid-19 pandemic.

6. If dismissal was for a fair reason, the final question was whether dismissal for that reason was fair and reasonable as defined by section 98(4) ERA. In the context of a dismissal said to be by reason of redundancy, that entailed consideration of the following:

6.1. Did the Respondent adequately warn and consult the Claimant?

6.2. Did it properly apply its mind to the selection pool for the redundancy and was the pool reasonable in all the circumstances?

6.3. If relevant, did it adopt reasonable selection criteria?

6.4. Did it reasonably apply those criteria?

6.5. Did it take reasonable steps to find alternatives to dismissing the Claimant?

6.6. Did it otherwise adopt a reasonable procedure in dismissing the Claimant, which may involve consideration of the right of appeal?

6.7. Overall, was the decision to dismiss her within the range of reasonable responses?

Hearing

7. The parties agreed a bundle of around 300 pages. I made clear at the outset that I would only read documents I was expressly taken to. I read any documents referred to in the witness statements. The parties also identified a number of other documents they wished me to read before hearing evidence, although in the end the bundle was barely referred to at all. The Respondent adduced some additional documents without objection; they too were hardly referred to.

8. I read the statements of and heard evidence from Colin Stirling (the Respondent's Managing Director and principal shareholder), Gintautas Morkunas (the Claimant's line manager and the Respondent's IT and Systems Director), Steven Forde (the Respondent's Support Services Director), Lisa Pascoe (the Respondent's Payroll Manager) and James Amos-Staples (the Respondent's IT Helpdesk Co-ordinator). The statement of Lee Gannon (Purchase Ledger Clerk) was agreed. I also read the statement of and heard evidence from the Claimant. It was to Mr Forde's credit, as he had not appeared as a representative at a hearing before, that he conducted a competent cross-examination of the Claimant. Mr Singh's cross-examination of the Respondent's witnesses was also well-structured and to the point.

Facts

9. The findings of fact that now follow were made on the balance of probabilities, based on the evidence to which I was taken as indicated above. Most, though not all, factual matters were not in dispute. Page numbers refer of course to the bundle. Alphanumeric references are to the statements, for example EH4 is paragraph 4 of the Claimant's statement, and CS3 is paragraph 3 of Mr Stirling's statement. Some of the Respondent's statements did not have paragraph numbers.

10. The Respondent provides multiple services to clients throughout the UK, in cleaning, gardening, window cleaning and the like. It had, shortly before the Claimant was dismissed, around 838 employees. At the end of March 2021, a year later, it had 878. Mr Stirling's unopposed evidence was that employee numbers depend on the Respondent's contract portfolio; TUPE transfers in and out of the business can make a significant difference. At the time of the Claimant's dismissal there were around thirty managerial and other non-operational staff, mainly at the head office in Dartford. Most operational staff were and are paid at the National Living Wage ("NLW") or just above. The Senior Management Team consisted of Mr Stirling, Mr Forde, Mr Morkunas, another colleague and three or four Operational Managers. Around 70% of the Respondent's costs are related to staff.

11. The Respondent employed the Claimant in Nuneaton from 5 May 2015 to 14 April 2020, to work in one of its subsidiaries, known as Goulds, latterly as Office Co-ordinator. Around seventy employees were employed to work in that business. The Claimant's administrative responsibilities covered the Respondent's gardening maintenance teams and contracts in Nuneaton and other places across the north, east and Midlands. EH4 sets out her detailed description of her duties. I return to her more detailed oral evidence on this point below, but in summary her role included tasks related to wages and invoices, preparing monthly billing information for all teams, dealing with customer queries, maintaining staff records, risk assessments, ordering supplies, assisting with recruitment, and locking up and

cleaning the office. The Respondent accepts the list is a fair summary, but says that many of the tasks were very limited, for example because invoices are prepared at Head Office, the Claimant's role was just to provide details of any changes. The Respondent had no concerns about her work. Mr Morkunas describes her as skilful and competent.

12. The other Office Co-Ordinator was David Ward, based in Derby. Whereas the Claimant worked on the garden side of the business, Mr Ward worked on cleaning contracts. Mr Stirling says Mr Ward's role was basically the same role as the Claimant's but on a much bigger scale, so that he therefore had to spend more time on invoices and staff information because of a greater volume of work. I return to the details of the comparison of the two roles below.

13. The Claimant has a number of health challenges. The Respondent purchased equipment for her on several occasions, for example, an ergonomic chair, a humidifier and computer monitor stands; her colleagues did various particular tasks they knew she could not do, for example if something required lifting. The Claimant provided Mr Morkunas with appointment and other medical details when needing time off and the tenor of his responses appears to have been to agree to such requests without question. The Claimant accepts that was the case. The Respondent says that she had an average sickness record for the business, never exceeding the twenty days of company sick pay per year, and catching up quickly after any absences.

14. The Respondent made operating losses in each of financial years ending March 2019 and March 2020. It had made a number of administrative staff at Head Office redundant in September 2019, sharing out their duties amongst remaining staff, and also decided not to replace Senior Operational Managers who left voluntarily. In quarter 1 of 2020, the Respondent owed VAT of around £500,000 and was trying to negotiate with HMRC to repay it over time.

15. The difficulties of the Respondent's financial position were, like for many businesses, compounded by the Covid-19 lockdown from March 2020. Many customers closed immediately and either terminated or suspended their use of the Respondent's services. The Respondent was already dependent on invoice financing – namely being financed by the bank based on invoiced work – and Mr Stirling describes its cashflow position at that time as precarious, saying that without swift action there was a risk of it going out of business. It was only HMRC agreeing to deferral of the VAT debt that avoided that happening. I will return to the cashflow position below, but accept his evidence on these points, which understandably the Claimant was unable to meaningfully challenge.

16. The Claimant was on annual leave in week commencing 16 March 2020, then reported sick on 23 March 2020 – page 125. On 25 March 2020 she spoke with Mr Morkunas who told her he would be setting up a laptop for her to work from home. The Claimant says (EH15) that there was no reason her work could not be done remotely. The Respondent seems to accept that, although it also says there was no reason for the Claimant not to work in the office, as she was the only person there and so social distancing could have been maintained.

17. On 30 March 2020 the Claimant spoke with Mr Morkunas again and informed him she was still unwell and that her son had Covid symptoms – page 126. Her GP issued a week's sick note. She then received a letter instructing her to stay at home for 12 weeks (pages 200-203) in line with government advice because of an

underlying health condition – known as shielding. She informed Mr Morkunas of this (page 127) and said she would be able to work from home once she had the laptop, later emailing him the letter – page 199.

18. The Claimant says she had spoken to Eyan Harrison, the manager at Nuneaton, before sending the shielding letter to Mr Morkunas and that he had told her to hold off doing so because Mr Stirling had said he was not happy with staff "jumping on the bandwagon" and being off work due to Covid-19. Mr Stirling denies any such comment and says he had spoken to Mr Harrison about the alleged comment and that Mr Harrison could not recollect making it. Whilst, as Mr Singh says that was not an outright denial by Mr Harrison, in his reported discussion with Mr Stirling he was commenting on what he allegedly said to the Claimant, not on what Mr Stirling had or had not said. On balance, I conclude that the comment was not made, preferring Mr Stirling's direct evidence on the point with what it must be recognised is hearsay evidence from the Claimant. Mr Ward was also shielding, though he was able to work in the Derby office.

19. Mr Morkunas spoke with the Claimant after her emails and asked her to report back when she recovered, to make further arrangements. That was backed up by an email he sent to her on 31 March 2020 saying that as she was off sick the Respondent would wait for her to fully recover and return to work before making any other arrangements – page 199.

20. On 2 April 2020, the Claimant sent Mr Morkunas her latest sick note (pages 204 to 207). On 6 April 2020 she informed him that she was still unwell, page 129, being signed off for another week with a suspected viral infection. She said her GP was unsure whether she had Covid-19.

21. In the first week in April (CS2), Mr Stirling asked the senior team for ideas on how to reduce as many costs as possible whilst making sure not to compromise the Respondent's ability to operate. Mr Morkunas says the meeting was between 16th and 20th March. His explanation of the date difference between his evidence and that of Mr Stirling was that they were discussing such matters nearly every day; he says he believes there was a meeting in April as well. Mr Forde records that in early April he had "a brief discussion" in the office with Mr Stirling about the work activities of administrative support functions and which roles could more easily be absorbed and cause least disruption. I regard the differences in evidence in regard to the date of these discussions as inconsequential to the issues I had to decide.

22. At some point after these discussions with his team, Mr Stirling decided to freeze recruitment, freeze capital expenditure, and freeze stock purchases for a month. He decided that they could not remove staff who were directly involved in any ongoing services (CS3), but where services were not ongoing, anyone with less than two years' service was given a week's notice of dismissal, because the Respondent could not afford any further pay that would have been due to them beyond their notice. This helped it gain some certainty as regards cash flow.

23. Mr Stirling says he also looked at all operational management and administrative staff, what they actually did and the volume of their work. As the Claimant effectively accepts, each person at Head Office had an aspect of their role that no-one else could perform, particularly given the 2019 reductions in staff. An example is Mr Amos-Staples, who ran the IT helpline and could also fix IT and other equipment. No-one else could do that. Mr Stirling decided as a result that

there was no-one in Head Office who could be removed. He decided in respect of the Claimant however that she was not fully occupied and that her work could be absorbed in Head Office. When asked to explain this conclusion in evidence, he said that when the Claimant was on leave, there were very few calls or new orders that colleagues had to cover for her and also that she was no longer supporting Ian Gould, a salesman who originally owned Goulds and who had left some time previously. Mr Ward's work on the other hand was, in Mr Stirling's view, too much to be absorbed either in addition or as an alternative to the Claimant's. He thus instructed Mr Morkunas to inform the Claimant that her role was redundant with immediate effect. Any and all redundancies were Mr Stirling's decision. He felt it better to reduce costs as far as possible, adversely affecting a few employees, for the benefit of the larger whole.

24. Mr Stirling was also at pains to point out that his eye was on the Respondent's cashflow situation for May and June 2020, which depended on the level of its invoicing for April and May respectively. Whilst he knew the Respondent could cover its outgoings for April, even if the Claimant was dismissed later in the month, he was not sure how people would be paid in May, given an anticipated 25% drop in income and a rise in the NLW. This was what drove the need to cut costs in April. Things turned out as he feared, with cash available in May being significantly reduced.

25. Mr Stirling says at CS4 that Mr Morkunas told him the Claimant was ill – he says he did not know before then – so "I said for him to let her know as soon as she was back to work and to be sensitive". Mr Morkunas agrees that was said. Of course, Mr Stirling could not know how long the Claimant would be off, but he says that in the past she had never been off for longer than two weeks, and there was nothing indicating that this would be a long absence out of kilter with her past record. He also points out that as it happened, Mr Morkunas informed him by mid-April that the Claimant was ready to return to work – see below.

26. Mr Morkunas's evidence was that he could not be clear as to which conversation happened when, given all that was going on for the business at that time and because he himself was quite unwell. Usually, he would not tell Mr Stirling about sickness absences, and he does not accept that a shielding letter was at all unusual at that time. I accept both of those points: it would be impractical for Mr Stirling to be told the attendance situation of all of the Respondent's large number of employees, and there is uncontested evidence that Ms Pascoe and Mr Ward had received shielding letters. Mr Morkunas said in oral evidence that he had a conversation with Mr Stirling about the Claimant's absence in early April, when Mr Stirling said that the Claimant should be made redundant, but his statement arguably indicates something different. He agrees that the statement is an ordered account of events. Within the statement, he says that Mr Stirling had weekly updates regarding his work, including regarding staff and that the Claimant's sickness "was not an exception, and in one of the conversations, [he] asked me to let him know when [she] returned". The next paragraph of his statement speaks about the Senior Management Team meeting at which the idea of absorbing the Claimant's work into Head Office was discussed, suggesting it came next. He then adds, "Soon after, Colin Stirling instructed me to let Elaine know that her role was going to be made redundant". In his oral evidence he said that this was at the start of April. I will come back to Mr Morkunas's evidence on this point in my conclusions.

27. Mr Stirling sets out in his statement a table comparing the work done by Mr Ward and the Claimant respectively against various headings, namely: Managers supporting, 5 and 2; operational staff in area, 460 and 50; vehicles in area 62 and 27; turnover £5.8m and £2.2m; customers 130 and 63; suppliers 51 and 26. Mr Stirling says he spoke with Mr Morkunas about this analysis. He says that it gave the Respondent a measure of the scale of the two roles, for example because reviewing timesheets for 460 staff would take far longer than for 50, there would be more customer contact with double the number of customers and so on. His conclusion was "It was clear that Dave's volume of work was at least twice the level of that of Elaine, and that if there was scope to absorb any of the work, it would be Elaine's" (CS4).

28. There is no contemporaneous evidence of the discussion of these specific differences in the two roles or of Mr Stirling carrying out this kind of analysis. Mr Stirling says this is because he knew the information "off the top of his head", only made his own notes on bits of paper and the discussions with his team were verbal for which, like all of their meetings, there were no minutes. Mr Morkunas and Mr Forde said in their evidence that they also knew the information without it being written down. Mr Forde said that the Claimant "had the lightest volume of work to process" (SF3), but his statement does not refer to any comparative analysis of this nature being done at the time. He went further in oral evidence and said that the Claimant could have been dismissed years previously, her role being "a bit of a luxury", but she was retained because she was liked and was a presence in the office. All that Mr Morkunas says in his statement about this is that "there was a conversation about the staff working across our offices and their roles including David Ward and Elaine Horsley. We looked at their workload and whether the head office staff could absorb additional work". I return to whether this analysis was carried out at the time in my conclusions.

29. The Claimant says the comparison between her and Mr Ward is unfair. She supported four managers, sometimes a fifth, in different parts of the country and she did not experience a high volume of additional work when covering for Mr Ward. She also said the following about her duties, which whilst challenged by Mr Forde as best he could, I accept as a genuine reflection of her role:

29.1. Emails kept her busy until around 11.00 am each day, dealing with enquiries from customers or colleagues. Of course, she had to liaise with Mr Harrison regarding any customer enquiries, but would then send a quote, and once a purchase order was raised obtain a date for the work from Mr Harrison and confirm this with the customer.

29.2. She had to prompt Mr Harrison about many matters, for example relating to gritting work, for which she would source supplies and liaise with customers.

29.3. She would action customers' requests for additional work, for example contacting a tree surgeon, liaising with customers about it and raising purchase order numbers.

29.4. She worked out wages for some staff, which Mr Ward was not required to do.

29.5. She checked and updated billing information – the job description at page 219 refers to producing monthly financial management reports.

29.6. She completed the details on around a hundred invoices per month, which took her about three days, though she agrees that Head Office sent them out – the job description at page 219 says that the role entails dealing with "all aspects of invoicing".

29.7. Mr Ward may have had more staff that he was ultimately responsible for, but his managers did most of the work for him, whereas she was doing a lot of work for the managers, particularly those at Nuneaton and Liverpool.

29.8. She had to chase for timesheets from around 26 staff, for Nuneaton and Liverpool, give them to the managers to sign, adjust and complete them and check them with managers, which took about three hours per week.

30. No-one spoke with her, or the managers she worked with, about her role and the level of work she was undertaking – whether comparatively to Mr Ward or otherwise – prior to the decision to dismiss her.

31. On 14 April 2020 the Claimant informed Mr Morkunas that she was a little better and able to return to work. She asked about arrangements for working from home as she still needed to self-isolate – see page 208. Mr Morkunas and the Claimant then spoke by phone. Mr Morkunas told her that Mr Stirling wanted to know when she would be returning to work; he would therefore speak with Mr Stirling and revert to her. He did this both to check with Mr Stirling that nothing had changed and because he wanted to prepare for the conversation. He says in his statement that Mr Stirling "confirmed that due to the ongoing pandemic, tight budget, and business sense, he is making cuts and that the Nuneaton Office Co-ordinator's position was no longer needed/redundant". Mr Stirling asked him to give the Claimant one month's notice and explain the situation.

32. Accordingly, later that day Mr Morkunas called the Claimant. What she says is that he told her he had bad news, the Respondent had done a cost-cutting exercise and no longer needed an Office Co-ordinator in Nuneaton as her work was being absorbed into Dartford, so that she was redundant as of that date. In his statement, Mr Morkunas refers to apologising for doing it over the phone, assuring her he would help her as much as he could and saying he would give her a glowing personal recommendation. He also says he made clear it was not his decision. He did not like it, but says he accepts it was right for the business.
In his oral evidence, an account denied by the Claimant, Mr Morkunas said he also explained why her role was to go and not Mr Ward's, comparing the two, and that there was nothing else the Respondent could give her as the administrative team was very small. Neither of those points is mentioned in his statement, in the Respondent's ET3 or in the dismissal letter. On balance, I find therefore that this was not said. Mr Morkunas's explanation that it would have been in his statement had he not been focused on defending the discrimination complaints against him personally is unsatisfactory, given the other details he shares about the dismissal conversation in the statement. The Claimant may have been in shock at the news, but her account is more reliable for these reasons.

33. The Claimant chased for confirmation of the decision on 24 April 2020. She received Mr Morkunas's letter dated 22 April 2020 on 29 April (page 210). It told her she was redundant because of the closure of a number of contracts, which had led to a costs review and the decision to reduce administrative staff. She was not given the opportunity to appeal. Mr Stirling says at CS5 that if she had appealed, her role would still have been made redundant, because of the need to reduce cost

and protect cash flow. He says it may only have changed when she was dismissed – though it is not clear to me how, given that she had been dismissed with immediate effect.

34. Furlough under the government's Coronavirus Job Retention Scheme ("CJRS") was not offered to the Claimant as an alternative to dismissal. Mr Stirling said a number of things about this:

34.1. That at this early stage, the Respondent did not know the details of how the CJRS would work.

34.2. That the Respondent could not afford to make up the 20% of pay that would not be paid under the CJRS – though he later confirmed it did not do so for any of those who were furloughed, adding that there were still on-costs.

34.3. There was some uncertainty over the timing of when the government would pay employers, as of course furlough payments were made by employers first and then reclaimed.

34.4. It was not fair or appropriate to put someone on furlough where the Respondent knew that their job would not be required going forwards.

34.5. Where employees worked on customer contracts that had been terminated, they were dismissed rather than being furloughed.

35. Mr Morkunas does not recall a management discussion specifically about furloughing the Claimant. Mr Forde confirms in his statement that in April 2020 a third of the workforce was affected by sickness, furlough or shielding. The Respondent claimed about £600,000 under the CJRS in total. His evidence as to why the Claimant was not furloughed was to say the least unclear. He said it was initially because she was off sick, then said if she was eligible, she would have been furloughed, then said he did not know why she was not furloughed instead of being dismissed.

36. Mr Stirling says that at the time of the Claimant's dismissal the Respondent had no vacancies for full time staff of any kind; there were some vacancies he did not want filled because of the situation. He says he considered lay off and short-time working but none of the staff were prepared not to be paid. As for the Claimant, he knew, he says, that she was often short of money and so thought that giving her the payments due on redundancy would enable her to fund things better in the short term. For the same reason he did not consider a deferred wages option. The Claimant denies ever discussing her finances with Mr Stirling. For reasons I will come back to in my conclusions I have not found it necessary to resolve this particular factual dispute. Mr Stirling says that if the Claimant had raised furlough in her appeal, he would have considered it but it is unlikely he would have agreed it because the Respondent could do without the role and needed to save money in the long-term.

37. The Claimant is not aware of any suitable alternative employment that she could have been given, though she could have worked from home on things being done out of Dartford. She says she might have accepted lay off or short time or reduced hours working and would certainly have accepted furlough as a better alternative to dismissal. She has eventually obtained a full-time role.

38. The Claimant contends that the reason for her dismissal was her health, her absences and/or the requirement to self-isolate. Her role has not been replaced (CS5) and the Respondent has not employed any additional administrative or management staff in the last two years. It has also reduced operational management by two further full-time employees whose duties were spread amongst those remaining.

39. Mr Forde says in his statement that in 20 years with the Respondent, he cannot recall any employee having their employment terminated for absence due to illness – "it is our preference to work with the individual to actively encourage them back into work irrespective of the period of time it may take for them to recover". He gives the example of an operative who was off work for 1,065 days having been employed for 8 years.

40. Mr Amos-Staples worked from home for 6 months as he lived with two at-risk grandparents. Ms Pascoe also received a letter from the NHS saying she was identified as at severe risk. She regarded the letter as advisory. Mr Forde knew she had received it. She voluntarily decided to go into work because she could not work from home; no-one else was in the office in the early stages of her doing so.

41. There is also the example of Mr Gannon who has only just returned to the Respondent's premises after working from home since March 2020 because of mental health concerns. He says in his statement that he disclosed his mental health needs at interview and it sparked a positive conversation. Time at hospital appointments he has attended has been paid for by the Respondent and he has felt no pressure to return to the office. He describes the Respondent's support in these respects as faultless. Adjustments have been put in place to ensure his wellbeing on his return to the office, without his requesting them.

42. In total, but not including those dismissed with less than two years' service of whom there were fifty, the Respondent dismissed twelve employees between March and May 2020. The Claimant was the only person dismissed from an administrative or managerial role. Mr Stirling says this reflects the proportion of such roles to the overall total. Two staff from Head Office and three Operational Managers had been dismissed in September 2019. Two more such Managers have been dismissed since the Claimant. None have been replaced. Mr Stirling says Mr Amos-Staples has absorbed most of the work the Claimant had been doing, resulting in about a 10 to 15% difference in his role. His main duties, as indicated above, relate to IT and equipment; he also orders stock for Goulds and a cleaning business. Mr Ward has absorbed staff recruitment but that has not materially changed his work profile. Mr Amos-Staples's own evidence was that he picked up helpdesk and other calls from Nuneaton, and that he still does that work; he says that initially this increased his workload by 10%. He only had to look at one work report initially.

Law

43. Section 98 ERA says:

"*(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) [which includes that the employee was redundant] or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends 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

(b) shall be determined in accordance with equity and the substantial merits of the case".

44. As Section 98(1) ERA puts it, it is for the employer to show the reason, or if more than one, the principal reason for the dismissal. The question to be considered is what reason the Respondent relied upon. The case of **Abernethy v Mott, Hay and Anderson [1974] IRLR 2013** is long-established authority to the effect that the reason for dismissal is "a set of facts known to the employer or as it may be of beliefs held by him, which cause him to dismiss the employee". That case also made clear that the reason given by an employer does not necessarily constitute the real reason for dismissal. The reason or principal reason is to be determined by assessing the facts and beliefs which operated on the minds of the decision-makers, leading them to act as they did in effecting the Claimant's dismissal. If and when the employer shows the reason for dismissal as above, it must then be established by the employer that it falls within one of the fair categories of dismissal set out by section 98(2) ERA (here the Respondent relies on redundancy).

45. Section 139 ERA defines redundancy. As far as relevant to this case, the cases of **Safeway Stores plc v Burrell [1997] ICR 523** and **Murray v Foyle Meats Ltd [1999] ICR 827** establish that there are three questions to consider in determining whether the Claimant was dismissed by reason of redundancy. First, was she dismissed? Secondly, had the requirements of the Respondent's business for employees to carry out work of a particular kind ceased or diminished? Thirdly, was the Claimant's dismissal wholly or mainly attributable to that state of affairs?

46. If the Respondent shows the reason and establishes that it was a reason falling within section 98, the Tribunal must then go on to consider section 98(4) ERA in order to determine whether the dismissal was fair. The burden is no longer on the Respondent at this point. Rather, having regard to the reason or principal reason for dismissal, whether the dismissal is fair or unfair requires an overall assessment by the Tribunal, and depends on whether in the circumstances, including the size and administrative resources of the business, the Respondent acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the Claimant. This is something which is to be determined in accordance with equity and the substantial merits of the case. This overall assessment is in part concerned with the steps taken by the Respondent to effect dismissal and certainly requires an assessment of

the reasonableness of the decision to dismiss. In all respects, the question is whether what the employer did was within the band of reasonable responses of a reasonable employer.

47. In a redundancy situation, that will entail a number of issues being considered. The decisions of the House of Lords in **Polkey v AE Dayton Services Ltd [1988] ICR 142** and the Employment Appeal Tribunal ("EAT") in **Williams v Compair Maxam Ltd [1982] IRLR 83** identified some of the key issues as objective selection criteria fairly applied; whether employees were warned and consulted; whether the trade union was consulted; and whether any alternative work was available. The EAT in **Williams** confirmed that in relation to each issue the focus should not be what the Employment Tribunal would have done but what the Respondent did, asking whether this was within the range of conduct a reasonable employer could have adopted. It is also well known, since **Polkey**, that in most cases it is not open to a Tribunal to say that failing to act reasonably in a particular respect would have made no difference to whether the Claimant would have been dismissed; that will normally go to the question of remedy only.

48. In relation to the pool for selection, an employer has considerable flexibility. The question is whether the employer applied its mind to it and determined a pool that was reasonable in the circumstances. As the EAT said in **Taymech Limited v Ryan [1994] EAT/663/94**, the question of how the pool should be defined is primarily a matter for the employer to determine. It added, "It would be difficult for the employee to challenge it where the employer has genuinely applied his mind to the problem". Of course, who carried out the work that was ceasing or diminishing is relevant as is interchangeability of roles and the fact that other employees not placed in the pool were doing similar work to the dismissed employee. **Capita Hartshead Ltd v Byard [2012] ICR 1256** held that it was not the function of the tribunal to decide whether it would have thought it fairer to act in some other way: the question was whether the dismissal lay within the range of conduct which a reasonable employer could have adopted.

49. As to selection criteria and their application, it was held in **British Aerospace plc v Green 1995 ICR 1006**:

The industrial tribunal must, in short, be satisfied that redundancy selection has been achieved by adopting a fair and reasonable system and applying it fairly and reasonably as between one employee and another; and must judge that question objectively by asking whether the system and its application fall within the range of fairness and reason (regardless of whether they would have chosen to adopt such a system or apply it in that way themselves) …

… in general, the employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt sign of conduct which mars its fairness will have done all that the law requires of him.
Every system has to be examined for its own inherent fairness, judging the criteria employed and the methods of marking in conjunction with any factors relevant to its fair application, including the degree of consultation which accompanied it. One thing, however, is clear: if such a system is to function effectively, its workings are not to be scrutinised officiously.

… The tribunal is not entitled to embark upon a reassessment exercise … it is sufficient for the employer to show that he set up a good system of selection and that it was fairly administered, and that ordinarily there is no need for the employer to justify all the assessments on which the selection for redundancy was based.

50. It is well-established that consultation means the employer being open to hear the views of the union and affected employee and giving them time to make their views known before final decisions are taken. In particular, there should be opportunity for such consultation regarding the employee's selection for redundancy (before it is confirmed) and ways in which redundancy might be avoided such as by redeployment, as well as an opportunity to address other matters which may be of concern to the employee. Consultation does not oblige agreement but requires openness to change and therefore at a time when change is at least possible.

51. An employer should give consideration to alternatives to dismissal. The search for alternative employment in particular should be such as is reasonable in all the circumstances and should continue until the termination of the employee's employment.

52. Finally, the Tribunal should consider the process followed by the employer generally, including the appeal. **West Midlands Co-Operative Society Ltd v Tipton [1986] ICR 192** is well-known authority for the principle that unfairness in connection with an appeal against dismissal can of itself render that dismissal unfair. The EAT in **Taskforce Finishing and Handling Ltd v Love 2005** said however that in the absence of special facts, an appeal procedure was not required before a dismissal for redundancy could be found to be fair. The absence of an appeal or review procedure does not of itself make a dismissal unfair; it is just one of the many factors to be considered in determining fairness. Accordingly, it would be wrong to find that a dismissal on grounds of redundancy was unfair because of the failure to provide an employee with an appeal hearing. This was effectively confirmed by the Court of Appeal in **Gwynedd Council v Barratt [2021] IRLR 1028** which stressed the importance of consultation and employees being able to challenge redundancy selections.

53. I had regard to a number of employment tribunal decisions regarding the relationship of furlough to the fairness of a redundancy dismissal. In **Mhindurwa v Lovingangels Care 3311636/2020**, the tribunal held that it was unreasonable not to consider furlough (my emphasis) as an alternative to redundancy, saying that the whole purpose of the CJRS was to avoid laying employees off. The employment judge said, "I am of the view that in July 2020 [when that particular claimant was dismissed] a reasonable employer would have given consideration to whether the claimant should be furloughed to avoid being dismissed on the grounds of redundancy". He went on to state that why it was not considered or not considered suitable in this case was not explained by the respondent. Another case is **Handley v Tatenhill Aviation 2603087/2020** where the employee was dismissed in mid-May 2020. In that case, the respondent said it did not keep the claimant on furlough due to the uncertainty about the scheme and how long it would be in place. EJ Ayre concluded, "Whilst another employer may have taken a different approach and chosen to leave the claimant on furlough for longer, it cannot be said that it was unfair of the respondent not to do so. It is for an employer, not the Employment Tribunal, to decide how to structure its business and whether to

make redundancies. I accept the respondent's evidence that it needed to cut costs irrespective of the furlough scheme, and that it wanted to use the furlough scheme to pay some of the costs of making the redundancy". In a further case (doubtless there are others), **Lewis v Cognita Schools Limited 3200714/2021**, EJ Henderson followed the **Handley** approach and specifically accepted that it would not be appropriate to use the furlough scheme to retain employees who would otherwise be redundant.

54. In summary, what is important is to answer the question posed by section 98(4), as summarised above, and in doing so to make an overall assessment of the facts as I have found them to be. The size and administrative resources of the Respondent are an explicitly relevant consideration.

Analysis

Reason for dismissal

55. The burden of showing the reason for dismissal was on the Respondent. I was satisfied on the balance of the evidence that it had shown that the reason it dismissed the Claimant was to cut costs. I reached that conclusion for the following reasons.

56. Although Mr Singh drew attention to the fact that the Respondent is a large employer, the size of the business was not relevant to my analysis of this particular question; businesses of all shapes and sizes may, and do, embark on cost-cutting exercises. Similarly, the fact that the Respondent grew the number of its employees in the year after the Claimant's dismissal and ended up in a better financial position than it expected was also of little relevance. This is because it is what was in Mr Stirling's mind – as the decision-maker – in April 2020 that matters, not what transpired later. Growth in the workforce may not improve cashflow or profitability; and crucially it is not for the Tribunal to tell the Respondent what its financial position should be. Even in the absence of a financial issue, an employer can still cut costs should it choose to do so and this can amount to a fair reason for dismissal.

57. This Respondent made operating losses for the two years to March 2020; it owed a significant sum to HMRC; and a challenging situation was inevitably made worse by lockdown. I was satisfied that Mr Stirling believed he was in a position where he needed to take steps to keep the business afloat, given that it was clear and unsurprising that staff costs were a major part of the Respondent's overheads. I accepted that the Respondent had made a small number of redundancies in late 2019, that fifty staff with less than two years' service were dismissed early in lockdown; and that there were other redundancies after the Claimant's dismissal. The Respondent also took other measures such as freezing recruitment and stock purchases. That was all important context leading up to the Claimant's dismissal that had to be taken into account in determining what was in Mr Stirling's mind.

58. It is correct, as Mr Singh submitted, that the Claimant was not dismissed before and that the Respondent said she could have been dismissed sooner given that it says she was under-utilised. I will come back to that in a different context, but in terms of the reason for dismissal, it is clear that lockdown made a challenging situation more difficult.

59. The Claimant says that her sickness absence and/or her need to shield were the true reason for dismissal. It is correct that Mr Morkunas's evidence about when he told Mr Stirling of the Claimant's absence was unclear and unconvincing, but I was satisfied that these were not in Mr Stirling's mind in giving the instruction to dismiss the Claimant, for the following reasons:

59.1. It is accepted that Mr Morkunas was always supportive of the Claimant's health needs. He was not the decision-maker of course but his approach is indicative of how the Respondent treated its staff generally in relation to health issues, and he had some discussion with Mr Stirling about such matters generally.

59.2. The Respondent viewed the Claimant's sickness record as unremarkable – she had average absence levels and any absences were not unduly disruptive. In other words, it saw no reason to dismiss her for health or absence reasons.

59.3. Shielding letters were nothing unusual within the Respondent's workforce. It is true that Mr Ward and Ms Pascoe nevertheless attended work, but equally clear that Ms Pascoe did not do so under compulsion but because she wished to do so and felt she could do safely.

59.4. The Respondent believed the Claimant could also have attended her office safely, but I am also satisfied that it was content she could have worked from home once she was well. The evidence of Mr Gannon and Mr Amos-Staples makes clear that this is not something the Respondent had any objection to at all.

59.5. The Respondent's position was that it did not regard the Claimant as someone who would be absent from work for more than a couple of weeks and it did not regard shielding as a barrier to her working, once she was sufficiently well enough to do so.

60. In the light of the evidence summarised above, I did not regard the Respondent as an employer that was careless about the health of its employees as Mr Singh sought to suggest. For all of the reasons I have given, the evidence led very firmly to the conclusion that the Claimant was dismissed as part of a cost-cutting exercise by the Respondent. That is what drove Mr Stirling's decision. He decided the Claimant's work should be absorbed by staff at Head Office and she has not been replaced. That satisfies the definition of redundancy in section 139 ERA. The Respondent decided that it could do without her role; it had a reduced need for employees to carry out work of a particular kind, namely that of Office Co-Ordinator. That is what led it to dismiss her.

61. Whether or not it followed a fair procedure, including whether furlough was an alternative to dismissal, are matters which go to the fairness of the dismissal for redundancy reasons, but on the question of the reason for dismissal, I note that many redundancy dismissals are unfair procedurally whilst still being redundancy dismissals, and having the option to cover employment costs by furlough plainly does not mean that an employer does not have a reduced need for employees to carry out a particular kind of work as section 139 requires. The dismissal was by reason of redundancy. I then turned to the entirely separate question of whether dismissal for that reason was fair.

General points on fairness

62. I reminded myself that I must not substitute for what the Respondent did what I would have done were I the employer. Instead, I was required to assess the Respondent's actions in dismissing the Claimant by reason of redundancy against the range of reasonable responses of a reasonable employer. Equally, as Mr Singh submitted, it is rare to be able to say that any unfairness made no difference so that the dismissal was fair despite it. That would be permissible only when plain that a particular step would have been futile.

Warning/consultation

63. Quite obviously, there was no warning of dismissal. The first the Claimant knew of the risk of a redundancy dismissal was in the short conversation with Mr Morkunas when she was told she was dismissed.

64. Mr Stirling had instructed Mr Morkunas to tell the Claimant she was dismissed, and once she had indicated she was ready to start working after her sickness absence, that is what happened when Mr Stirling confirmed to Mr Morkunas that nothing had changed. No explanation of the Respondent's decision was provided to the Claimant beyond that there was a need to cut costs and that her duties were to be absorbed into Head Office. There was no opportunity, either in terms of time allowed or information given, for her to consider what was said to her, to assess the situation, to question and challenge the Respondent's decision-making process or to offer suggestions of other ways forward. Mr Morkunas may have invited her to call him, but by the time he made that offer, the Claimant had been dismissed. There was therefore no consultation either.

65. That was plainly unfair. Warning and consultation are well-recognised features of any fair dismissal, including in relation to redundancy and can be dispensed with only in the most pressing of circumstances. Here, there was of course significant financial pressure on the Respondent, but I noted the following:

65.1. Mr Stirling himself said that the decision could have waited until later in April.

65.2. There is no reason why a consultation could not have started whilst the Claimant was off sick. The Respondent has not suggested that it could not.

65.3. I was not told or given evidence to show that, once fifty staff with less than two years' service had been removed, having to pay the Claimant's wages for a meaningful consultation period would have made the difference to the Respondent staying afloat.

66. Accordingly, whilst I do not for one moment descry the pressures the Respondent faced, they could not in these circumstances outweigh the obvious need for consultation before a decision to dismiss was taken.

Did the Respondent apply its mind to the selection pool and was it reasonable?

67. The Respondent's case is that the pool for selection was Mr Ward and the Claimant – it did not use the terminology of "selection pool" in presenting its case, but it does not have to in order to show that it applied its mind to the issue and selected a pool within the range of reasonable responses.

68. As I will come to further, I was not satisfied that there was any conscious, let alone formal, process of putting the Claimant and Mr Ward in a pool, assessing them against criteria and deciding who should stay on that basis. That said, establishing that it applied its mind to the selection pool is not a high burden for a respondent, and I was satisfied on balance that this Respondent did apply its mind, however fleetingly, to the question of dismissing the Claimant as opposed to Mr Ward. It had clearly decided that it needed to remove an Office Co-Ordinator, it was obviously aware that it had two people in that role – albeit it seems with differences between them in terms of how the work was carried out – and it decided that the Claimant should be the casualty.

69. The parties were effectively agreed that there was no substantial crossover between the Claimant and any other employee and it was not suggested that any other employee should have been in the pool. I was satisfied that the pool of the Claimant and Mr Ward was reasonable in all the circumstances.

Were there reasonable criteria reasonably applied?

70. As Mr Singh pointed out, there is no contemporaneous evidence at all that Mr Stirling and his colleagues applied their minds to the selection of the Claimant for redundancy over Mr Ward in the way set out in Mr Stirling's statement. I accepted that the Respondent does its management business very informally, and it cannot be fairly criticised for that, but the comparative exercise was not – I found – mentioned at all by Mr Morkunas when he dismissed the Claimant on 14 April 2020, it was not mentioned in the dismissal letter and it was not hinted at in the Respondent's ET3 either. Moreover, Mr Forde and Mr Morkunas say no more in their statements than that the Senior Management Team discussed workloads.

71. Even if the analysis was carried out – and I make clear, I concluded that it was only done as set out in Mr Stirling's statement post-event – the decision essentially came down to the Claimant not being as busy as Mr Ward so that her work could be absorbed at Head Office and his could not, in relation to which I noted the following:

71.1. There was no evidence that the managers for whom the Claimant (or Mr Ward for that matter) worked were consulted to get a proper assessment of what was being done on the ground.

71. 2. There was no evidence before me that Mr Morkunas gave a view to his colleagues, as the Claimant's line manager, that she was not fully occupied.

71.3. The Claimant herself, as she points out, was not consulted about the assessment either – nor, apparently, was Mr Ward.

71.4. The Respondent's witnesses say that the Claimant was substantially under-utilised; she says she was not; there was no evidence that her being under-utilised had been raised with her or by management previously and thus her evidence was to be preferred on this point.

71.5. It seems inconceivable, given the Respondent's need to reduce costs – which it had been conscious of for some months before the Claimant's dismissal – that it would not have acted sooner if she was under-utilised as it says she was. It is not a sufficient answer to that point to say that the Respondent liked the Claimant and

disliked having to make redundancies. I do not doubt that at all, but that would have been the case for staff who had been made redundant in 2019 as well.

71.6. Mr Stirling seems to have based his view on the calls the Respondent received when the Claimant was on leave, but her unchallenged evidence was that she encountered little interruption when Mr Ward was on leave and she was not asked about that at the time. Mr Gould's departure was some distance in the past.

71.7. As Mr Singh pointed out in cross-examination, both employees were working full-time.

72. In short, and having regard to the importance of tribunals taking an overall view, assessing what an employer does against the range of reasonable responses and not being pernickety in its assessment nor embarking on an assessment of its own – which of course I could not do anyway – I agreed with Mr Singh that if the process set out in Mr Stirling's statement was adopted at the time, it was not a suitable process if the end was to determine volumes of work, not least because of the lack of consultation about it which the assessment process serves to underline.

Alternatives to dismissal

73. I was satisfied that there was no suitable alternative employment. The Claimant could not identify any, and there was a recruitment freeze.

74. Mr Singh mentioned in submissions the possibility of part-time hours or permanent working from home. Neither of those matters were put to Mr Stirling as decision-maker during his evidence, nor mentioned in the Claimant's evidence and so it would not be fair to say anything further about them.

75. As to short-time working or lay-off, I think it unlikely the Claimant would have accepted them as alternatives given that she clearly needed to work and has since her dismissal, albeit after some time, taken up a full-time role. In any event, it is not a requirement of fairness for an employer to consider, still less embark upon, such steps, when its perfectly acceptable aim, however regrettable, is to reduce employment costs permanently.

76. The Respondent's evidence as to its reasons for not putting the Claimant on furlough were, as I have said, unclear and somewhat confused. It also seems clear to me that it was not positively considered at all in relation to the Claimant. That again highlights the unfairness of the complete absence of consultation in this case.

77. That said, in my judgment, this was a failure on the Respondent's part to take a step that would have been futile. I am not bound by any of the other employment tribunal decisions I have mentioned on the subject of furlough, but I note that the balance of those decisions seems to be that it is not unfair not to continue to furlough (or, therefore, it must be the case, furlough in the first place) an employee whose role an employer deems to be no longer required. What is clear is that this cannot be said to be outside the range of reasonable responses. The CJRS was about saving jobs of course, but the government did not in introducing it say that employers should not make redundancies. That very obviously could not be the case, and tribunals should be similarly careful not to fetter employers' power to make commercial decisions that they deem appropriate for their businesses, as long as to do so is reasonable. In short, there was no obligation on employers to

furlough staff and the Respondent was entitled to have regard to the uncertainties about the scheme in the long-term.

Appeal

78. Case law makes clear that a fair appeal process is not a stand-alone requirement of a fair redundancy dismissal, but it is a factor to take into account in the overall assessment of fairness. The Claimant was not offered any right to appeal. I agree with Mr Singh that this cannot be said to have been ameliorated by the Claimant's failure to lodge a grievance after her dismissal. If the Respondent is interested in my thoughts about its future handling of such matters, I would add that it is not good practice to have Mr Stirling dismiss an employee for any reason, if any appeal would either be heard by him or by someone to whom he is more senior.

Summary

79. In summary, the Claimant was dismissed by reason of redundancy, but the dismissal was unfair because of the lack of any proper consideration of the rationale for her selection, compounded by the complete absence of warning and consultation and any appeal mechanism. The complaint of unfair dismissal was therefore well-founded.

Remedy

80. The Claimant was not entitled to a basic award. Given my decision that she was dismissed because of redundancy, she received from the Respondent what was properly characterised as a statutory redundancy payment.

81. As to the compensatory award:

81.1. The core data was agreed apart from the figure for loss of statutory rights. The Claimant's net loss of salary over ten months, the period for which she claims compensation as set out in her schedule of loss, was £14,748.80 and her net loss of pension contributions over the same period was £390.20.

81.2. The Respondent did not seek to argue that the Claimant unreasonably failed to take any step in mitigating her loss.

81.3. The question of whether the Claimant would have been fairly dismissed, the chances of that being the case and when it would have occurred, fell to be determined.

81.4. There was no uplift for breach of the ACAS Code on Disciplinary and Grievance Procedures given my finding that the reason for dismissal was redundancy.

82. In answering the question summarised at paragraph 81.3 above, the Tribunal must have regard to the case of **Polkey v A E Dayton Services Limited [1988] ICR 142**. As has been made clear in cases such as **Software 2000 Ltd v Andrews [2007] ICR 825**, this entails asking how long the Claimant would have been employed but for the dismissal, or applying a percentage deduction to reflect the possibility that the Claimant would have been fairly dismissed. Either way, the

Tribunal's assessment must be based on the evidence presented to it. As the EAT put it in **Andrews**, the task is for the Tribunal to identify and consider any evidence which it can with some confidence deploy to predict what would have happened had there been no unfair dismissal. The EAT acknowledged that there will be cases where a tribunal may reasonably take the view that reconstructing what might have been is so fraught with uncertainty that no such assessment can be made, but it must be recognised that in any such judgment an element of speculation is involved.

83. In **Hill v Governing Body of Great Tey Primary School [2013] IRLR 274**, the EAT noted that a **Polkey** reduction has the following features: *"First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between the two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done … The Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand ... The potential fairness of any decision is not the issue: it is the chances of a particular decision being made at all.*"

84. I understood Mr Singh to have submitted that where parts of the Respondent's evidence related to selection have not been believed, the reduction should be lower in order to be fair to the Claimant but I do not read that to be a relevant consideration in these matters. What I had to do was consider – and it is always speculative to some extent – based on the evidence I had heard, whether and when the Claimant would have been dismissed by the Respondent had the unfairness been eradicated. The Respondent submitted that this would have been a maximum of two months and the Claimant that she would not have been dismissed at all, either because she would have been furloughed or because she would certainly not have been selected ahead of Mr Ward.

85. I did not think either of those submissions was correct. My conclusion was in two parts. First, it was clear that the Claimant would certainly have been employed for another month to allow a fair consultation to take place; she should clearly be compensated in full therefore for that, but – and this was a point missed by both parties – that is offset by the five weeks' payment in lieu of notice ("PILON") that she received from the Respondent. The gross amount she received as PILON was eventually £2230.77. It was eventually agreed that it was paid to her net of tax and that the net amount, which falls to be deducted from the compensatory award, could sensibly be said to be £1,561.54.

86. The second part of my analysis was that there would have been at that point a 50% chance she would have been dismissed. The following were my key conclusions on liability which led me to that conclusion:

86.1. The Respondent needed to cut costs, and viewed that in April 2020 as an urgent question. I could not take into account a casual comment from a manager who was not before the Tribunal and, I understand not part of the Senior Management Team, that things were looking up a short while later.

86.2. It determined that it would have to do without an Office Co-Ordinator. I cannot substitute my view for that conclusion, as that would be to tell the Respondent how to run its business and I was not led to any evidence that demonstrated that this was an irrational commercial decision.

86.3. The Respondent did apply its mind to the question of the pool for selection. It reasonably identified, fleeting as it may have been, that the choice was between the Claimant and Mr Ward. There is no suggestion anyone else should have been in the pool.

86.4. Whoever it selected, the Respondent would not have agreed to place them on furlough had it considered the point, because its practice, whether with operatives whose contracts were lost, or in relation to other roles it deemed it would have to live without, was to dismiss rather than to furlough.

86.5. I could not accept the Respondent's point that it is obvious Mr Ward would have been retained. I have said already that I had not been led to evidence that made clear any objective basis on which that would certainly have been the case.

86.6. Equally however, I did not agree that it is certain the Claimant would have been retained. She certainly said in her evidence that there were things she was doing that Mr Ward was not, but she did not put forward a case that he was under-utilised or in some way under-performing.

87. On that basis, I was clear that the Respondent would have dismissed one of the Claimant and Mr Ward and could have done so fairly. On the evidence I have heard, I cannot say other than that once it had carried out a proper assessment of the work of both the Claimant and Mr Ward and properly consulted about it, one or other would have been dismissed. The evidence before me did not permit of a conclusion that it was more likely that one would have been dismissed than the other.

88. That is the basis on which I determined that the reduction in the Claimant's compensation should be made. There was then the question of the figure for loss of statutory rights to reflect fact that the Claimant will have to work for two years in a single new job to obtain unfair dismissal protection and other rights connected to length of service. She claimed £1,000. The standard, admittedly nominal, figure – for which the Respondent contended – is £500. Given I had found that there is a 50% chance the Claimant would have been dismissed and could fairly have been dismissed, the £1,000 was too high, and the usual £500 figure more appropriate, reflecting that 50% probability.

89. The sum awarded to the Claimant by way of a compensatory award for unfair dismissal was therefore one month's full net pay, and thereafter for the remaining nine months over which she claims financial losses, 50% of her claimed loss of wages and claimed loss of pension, plus £500 for the claimed loss of statutory rights. Her net PILON was then to be taken away from the total.

90. It was agreed that one month plus half of nine months was 5.5 months of net pay and pension, namely £1,513.90 x 5.5. That totalled £8,326.45. Adding the £500 for loss of statutory rights gave a total of £8,826.45. The PILON of £1,561.54 being deducted from that total gave a compensatory award of £7,264.91. The

Claimant did not receive any State benefits so that the Employment Protection (Recoupment of Benefits) Regulations 1996 did not apply.

Note: This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was video.

Employment Judge Faulkner
4 August 2022

Note

All judgments and written reasons for the judgments (if provided) are published, in full, online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the parties in a case.