EMPLOYMENT TRIBUNALS

Claimant:	**Mr G Wade**
Respondent:	**Loomis UK Limited**
Heard at:	Tribunals Hearing Centre, 50 Carrington Street, Nottingham, NG1 7FG
On:	14, 15, 16 November 2022
Before:	Employment Judge Adkinson sitting alone
Appearances	
For the claimant:	Mr J Howlett, Counsel
For the respondent:	Ms A Niaz-Dickinson, Counsel

JUDGMENT

UPON hearing from Counsel for the claimant and Counsel for the respondent

AND UPON considering the evidence and submissions of each party

AND UPON the claimant having withdrawn his claims for age discrimination but noting that they have not yet been dismissed

AND for the reasons set out below

IT IS DECLARED AND ORDERED THAT

1. The respondent unfairly dismissed the claimant. However there is a 67% chance the respondent would have dismissed the claimant anyway had it followed a fair procedure or that the employment would have ended for some other reason. Therefore any compensatory award will be reduced by that percentage.

2. The claimant's claim that the respondent breached the claimant's contract by failing to pay him an enhanced redundancy payment fails and is dismissed.

3. The claimant's claims for age discrimination are dismissed.

REASONS

4. The claimant (Mr Wade) claims that he was unfairly dismissed and, further, claims entitlement to enhanced redundancy payment because the

respondent (Loomis) dismissed him for redundancy. Loomis denies these claims.

Hearing

5. The hearing took place in person, except for one witness (as indicated below) who gave evidence by video link.

6. The claimant was represented by Mr J Howlett, Counsel, and the respondent by Ms A Niaz-Dickinson, Counsel. Both conducted their cross-examinations with courtesy and efficiency and throughout co-operated with each other and the Tribunal to enable the hearing to proceed with efficiency and clarity. I am grateful to them.

7. I heard oral evidence from the following people on Mr Wade's behalf:

   7.1. The claimant himself;

   7.2. Mr Eddie Tarrant (who gave evidence by video link), a former employee of Loomis from 1973 to 2015, latterly National Operations Director;

   7.3. Mr Tony McNamara, a former employee of Loomis from 1988 to 2008, latterly National Coin Operations Director;

8. I heard oral evidence from the following people on Loomis's behalf:

   8.1. Mrs Beverly Adams, Human Resources (HR) business partner;

   8.2. Mr Craig Sherriff, former Director of Customer Experience – he is no longer an employee of the respondent;

   8.3. Mr Tim Gibbs, Loomis's finance director;

   8.4. Mr Pieter De Beer, Loomis's Head of Information Technology (IT);

   8.5. Mr John McGlade, Loomis's Head of Risk and Security;

   8.6. Mr Mike Ketteringham, a former branch manager and former employee of Loomis;

9. I have taken all of that oral evidence into account when making my decision.

10. I also took into account the written evidence of Mr Shaun Hurst, a former employee of Loomis from 1993 to 2012, latterly a general manager in Edinburgh on Mr Wade's behalf.

11. There was an agreed bundle of about 1,200 pages. As I indicated to the parties at the start, I have taken into account all those pages to which the parties have referred me either in evidence or submissions.

12. Each party made oral submissions and the respondent also produced written submissions. The parties' arguments were brief and were focused on the parties' key points and allowed me easily to see the areas of agreement and disagreement. I found them most helpful and have taken them into account in the decision to which I have come.

13. No party has complained the hearing was unfair. I am satisfied it was a fair hearing.

14. By agreement, I dealt with liability first. Because of the balanced arguments and the volume of material, I reserved my decision. This is that decision. I indicated I would give separate directions on remedy if appropriate.

Issues

15. The claimant conceded in closing that the respondent had established a potentially fair reason for dismissal: redundancy. The concession was, in my respectful view, properly made. As will be seen, it was clear there was a redundancy situation.

16. At my direction, I have dealt with the question of what might have happened if the claimant had been fairly dismissed by this respondent ('the **Polkey** argument) as part of the liability hearing.

17. The respondent does not allege there is any element of contributory fault. Therefore I have not considered it further since there is nothing in my view that justifies the Tribunal raising the issue itself.

18. The issues therefore that remained are:

Unfair dismissal (Employment Rights Act 1996 Part X)

19. Given the reason for dismissal was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. In particular, whether:

    19.1. The respondent adequately warned and consulted the claimant;

    19.2. The respondent adopted a reasonable selection decision, including its approach to a selection pool;

    19.3. The respondent took reasonable steps to find the claimant suitable alternative employment;

    19.4. Dismissal was within the range of reasonable responses.

20.

    20.1. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

    20.2. If so, should the claimant's compensation be reduced? By how much?

Breach of contract for failure to pay enhanced redundancy payment

21. Did the claimant's contract entitle him to an enhanced redundancy payment (ERP) of 3 weeks' pay for every year of employment, capped at 20 years?

Findings of fact

22. I begin with the witnesses and general state of the evidence.

23. Firstly I have been unable to detect anything in the manner that each witness gave evidence that suggests dishonesty to me. I am satisfied each has done their best to tell me the truth as they believe it to be, and to assist the Tribunal to the best of their recollection and ability. Nothing that I am about to say should be seen as detracting from that.

24. The fact is however there are however difficulties with relying on the witnesses to establish the facts.

    24.1. Each witness has significant gaps in their evidence:

        24.1.1. The respondent's witnesses for example were not in post when Mr Wade's contract was allegedly varied to allow for ERP, which they conceded. They rely in short on the integrity of their records and belief they can only have gained from those who preceded them. The problem is that their evidence is basically supposition. Their own records are in any event incomplete. There is no signed current contract. There is no record of the criteria used to decide who was eligible for ERP, or who had been awarded ERP. Mr McNamara was denied ERP because they had no record of his entitlement. He had a letter confirming he was entitled to ERP – it was not in his file. Loomis did honour that letter. However it shows that records on which Loomis's witnesses rely are incomplete.

        24.1.2. Mr Wade's recollection of matters many years ago surrounding the contract is vague and imprecise.

        24.1.3. Mr Wade's witnesses cannot confirm that Mr Wade was actually told he was entitled to ERP. In short their evidence was based on supposition that he must have been because he was a manager.

25. The incompleteness of the records also undermines Loomis's case somewhat.

26. As for the redundancy, my overall impression was that the claimant was reluctant to concede many obvious points, like the one that his position had become redundant. It is understandable: He is clearly angry and upsent about what he perceives happened him. However it obstructed gaining a clear understanding of the case. In addition he also was unable to provide a satisfactory explanation in my opinion about why he did not attend a consultation meeting. He said that HR had not answered his questions, but they were not relevant to the potential loss of his job. He also was unable to explain to me why, when he received updated terms and conditions, which on his case incorrectly stated both his place of work and entitlement to redundancy pay, he queried only the former and not the latter. These undermine his credibility in my view.

27. None of Loomis's witnesses however can properly explain to me a letter written by Operations Director, Mr Stefan Wikman, from whom I have not heard. He identified 4 people in a list as redundant – 3 to be made redundant and 1 to retire on completion of an IT project. 3 of them were made redundant. The 4th retired once the IT project was abandoned. This was written before consultation began. The temporal nexus to the actual redundancies, striking similarity between the people it identified as exiting the business and how they would leave and what in fact happened, all

require explanation of the factual matrix in which it was written. There is no reliable evidence about that. It undermines the respondent's case.

28. With those observations in mind, I have made the following findings of fact on the balance of probabilities that I believe are necessary for me to resolve the issues in this case.

About the Claimant

29. Mr Wade's employment began on 5 April 1982, albeit with a different company. Through a series of transfers, takeovers and mergers (the details of which do not matter), he eventually ended up in employment with Loomis UK Ltd. There is no suggestion that his continuous employment began on 5 April 1982. For simplicity I will refer to them as the respondent throughout.

30. Mr Wade began as an Accountant. After a while a moved into the operations side of the business. His latter employment was as Systems Manager. The role involved in particular a task of having to deal with the repairs to Personal Digital Assistants (PDAs). These are devices that the delivery staff would use to record deliveries going onto and off their vehicles and provide a place for customers to sign.

31. From time to time the PDAs would break. They would be returned to the manufacturer or supplier for physical repair. They were returned from there to Mr Wade. Mr Wade's task was to recommission them so they would have the right software and could connect to the network. He then returned them to the branches who provided them to the employees who needed them.

32. In evidence, Mr De Beer said he too would have had some knowledge of how to do this. I cannot accept that. He was never involved in the recommissioning of the PDAs. Moreover, as will be seen, when Mr Wade was on furlough, Loomis had to ask him to write out the process for recommissioning the returned PDAs recommissioning. If Mr De Beer had known, the enquiry would have been unnecessary. It was also suggested the guide would have been on the knowledge base – an intranet with technical resources. I conclude it was not because, again, if it were then there would be no need to ask Mr Wade to provide instructions. No one else in Loomis could do the work at the time. Mr Wade's role therefore was unique. It also tallies with the fact that, in reality, none of the witnesses appear to contest his position within Loomis was unique. He worked in the operations stream of the business.

33. Mr Wade gained the right to a company car in 1987 and in May 1996 he was entitled to a higher specification of company car. Mr Wade has set out quite lengthy details of his career history in his evidence in chief. For my part I do not think its relevant to the issues I have to determine, so I put it to one side.

About the Respondent

34. The Respondent is a Company whose job is to distribute to various premises, such as shops and offices, cash and to collect cash and take it from them to the banks. The business is described in detail by Ms Addams in her witness statement which she adopted as her evidence in chief. She says as follows:

"Loomis is one of the UK's premier cash management specialists and they provide cash management solutions to services and organisations and businesses that includes transporting cash security, eliminating opportunities for fraud and analysing and understanding a companies' cash flow in detail. Loomis is divided into three areas, operations which covers the cash and valuables in transit where they employ armoured guards. Cash management services where they have cash processes managing the cash that the guards collect and deliver and support services which includes teams such as finance, information technology (IT) and general commercial. The employment profile of the Respondent has changed. In January 2020 the Respondent's head count was 1410 staff in operations, 230 in cash management services and 174 in support. By the end of October 2020 the number following a series of redundancies, the number of people in operations had reduced to 1179, the number people in cash management services had reduced to 220 and the number of people in support services had reduced to 165. By end of August 2022 the head count has reduced to 775 in operations, 137 in cash management services and 121 in support services".

Ignoring the marketing language, no-one contests the accuracy of that statement.

Those latter figures of August 2022 are only relevant in so far as they lend support to what the Respondent says about their being a redundancy situation.

35. In the run up to the start of 2020, Loomis was already going through business restructuring. Cash was becoming less popular as a payment method amongst consumers. Instead people were turning more to the use of methods of payments such as debit and credit cards.

36. As I will come back to, in about late 2019 to early 2020, the Covid-19 virus arrived in the UK and caused a pandemic. The Government introduced a number of restrictions in which resulted in the requirement of people to stay at home except in very limited circumstances. They were required to work from home again except in certain particular circumstances. It resulted in the closure of many shops and premises where people would otherwise use cash to purchase things. Many businesses that did stay open switched to only accepting methods of payment such as debit and credit cards. This had, to use Ms Adams words, a "devastating impact" on Loomis's business because customers stopped requiring their services as much, or at all in some cases.

The alleged entitlement to enhanced redundancy payment

Background

37. In 1996 the respondent was two business known as Armaguard and Security Express. It is not clear to me whether they were two companies or one or how they worked together. However nothing seemed to turn on resolution of that issue so I will ignore it. Armaguard and Security Express were in financial difficulties. To resolve it, their business was sold by their ultimate owner to a Swedish company called Securitas AG.

38. Before Securitas took over, there was a concern amongst the management before the merger and it seems with the new purchasers that there would be an exodus of experienced staff who were needed to ensure that the business could remain a viable and going concern and could grow. Therefore Mr I Whitmore, Chief Executive Officer held a meeting in St Albans in 1996 to which he invited various people. Those invited were definitely managers of the respondent's branches. It is not clear from Mr Wade's evidence whether he was actually there or not. In cross-examination insisted that he was present, but in his evidence-in-chief he never said he was at the meeting, in contrast all the other first-person evidence he gave. I found his evidence vague on this issue, and it seemed only as time went on he became convinced he was there. That in my view is not good enough. Loomis's witnesses cannot assist either way. Mr Wade's own witnesses in my view do not help him. They are unable to confirm that he was present and appear to contradict each other on whether he would have been within the pool of people invited. They seem instead to work on the assumption that he must have been there because he was a manager, ignoring that he was not a branch manager or in that side of the business.

39. Mr Wade says that at that meeting, letters were handed out to employees to confirm that they would receive an enhanced redundancy payment (ERP) in the event that they were made redundant. He cannot however tell me whether or not he received a letter, how they were distributed at that meeting. He also cannot tell me what was written in the letter except that it provided that he would receive 3 weeks' pay for every year that he had been an employee capped at 20 years. He does not otherwise remember the text. Mr Wade's witnesses also do not help. The tenor of their evidence was that he must have received the letter and base their belief also on vague recollections of what appear to be generic discussions people had about the enhanced rights.

40. Neither Mr Wade nor Loomis have a copy of this letter.

41. A draft of the letter does appear in the bundle as a generic template. For reasons that are not known, it is dated 20 April 1999. Mr Wade does not suggest he received a second copy on that date or around that date. The letter confirms that in January 1996, the respondent wrote to its then senior management team individually. It then sets out the enhanced redundancy terms as follows:

    "As a member of our current management team you will be aware of the subsequent acquisition … I would therefore like to take this opportunity to offer the terms and conditions detailed below as continued provisions they are no longer specific to circumstances that existed in January 1996 and therefore currently no longer applicable".

    It then sets out the enhanced redundancy payment terms (3 weeks' pay per year of employment, capped at 20 years).

42. Mr Wade is unable to tell me when he last had the letter. He suggested that he had lost it in their move in 1994. That cannot be correct since it was not until 1996 that the letter was produced in the first place. He has also

suggested that it might have been lost as a consequence of his divorce, although he is not able to satisfactorily explain why a substantial number of other personal records that he has maintained survived. He asserts they would probably have been in a folder he did keep, and important documents were in a folder that was lost. That came across to me as no more than a supposition rather than a clear recollection. I do not accept it.

43. What is clear from the documents I have seen is that it was definitely the branch managers and upwards who got ERP. I base that on the evidence from Mr Wade's witnesses who would have been in the branch managers' side of the business. It is also apparent from Mr Wade's texts with Mr Ketteringham in which Mr Wade asks him about the ERP. He identified a number of people who he believed would have had ERP. Each of them, unlike him, is a branch manager or above in that side of the business.

44. One serious allegation that was made was this. The respondent in cross-examination suggested that Mr Wade had asked for a copy of the letter from Mr Ketteringham in order that he might forge or formulate his own copy of the letter to claim ERP. That was not pursued in closing, and in my view quite rightly so. There is no evidence that I have seen, and nothing has given me any reason to believe that Mr Wade was setting out to forge a letter in order to claim ERP. As far as the suggestion is relevant, I find that it was not the case.

45. There is, however, no evidence that I have seen that anybody in the operational side of the business, yet alone at Mr Wade's level of seniority was offered these ERP terms. The only evidence I have been given that might point to it is from Mr Tarrant. However that is based on his belief that all managers had been included. It is an assertion, not a report of fact.

46. I note the words "current management team" in the draft letter of 1999. That letter does not offer any indication as to which managers did or did not receive entitlement to ERP or which members of the current management team it was referring to. It is as consistent with the current management team of, for example, the branches as with the current management team across the whole businesses or across two of the three divisions as the case may be.

Respondent's review of ERP entitlement in 2002

47. At some point (what it appears to be 4 December 2002 though it is not entirely clear) somebody in the respondent's business tried to compile a list of what various people were entitled to. The document is typed and has then been completed by hand.

    47.1. Under the sub-heading "Also look at All Other National Account Managers", it says "Gary Wade".

    47.2. Under "redundancy terms" it says, "statutory terms".

    47.3. It also says, "All of the branch managers they should have the enhanced redundancy but not notice".

48. Mr Wade had never seen this document before disclosure, and never had a chance to comment upon it until this hearing. It is notable, as the Claimant

points out, that his job description is incorrect since he has never been a National Accounts Manager.

49. However I have seen nothing to suggest that the document is anything but a genuine attempt to record the entitlements accurately. It noted that some people were entitled to ERP, and some to enhanced notice pay too. I am satisfied that I can infer from it that there existed no record that Mr Wade was entitled to ERP because of the willingness to record the entitlement of others, and the lack of any reason to have singled out Mr Wade to deny him his entitlement.

New job in 1994

50. His job description was updated in 1994. He was now "Systems Project Manager, Operation and Sales" and he reported to the "Manager of Information Technology."

51. The job description describes how he has responsibilities for managing systems and how he also has to support day to day activities for smooth and successful operation of the business. He was as part of that role accountable for allocating expenditure up to £50 million per year on external computer resourcing. There was debate about whether it was a support role or a management role. I cannot see logically why it could not be both, which is what it appears to be. What is important to me is whether it fell within the scope of those offered ERP in 1996. Resolving the issues about management or support does not help me, because I cannot assess how senior or junior it was within the respondent. I therefore do not decide the issue the parties raised.

Terms in 1997

52. The Respondents allege that in April 1997 he was sent updated terms and conditions of employment, clause 17 of those updated terms and conditions provides as follows:

"Redundancy….. Redundancy payment will be calculated as per current legislation".

53. The Claimant denies ever receiving a copy of these terms. I note that there is no evidence that they were ever formally sent to him. I note that they have never been signed by him and returned. I therefore find as a fact that these documents were never sent to him. They therefore shed no light on the issue.

Terms in 1998

54. In May 1998, Mr Wade's salary changed. The respondent told him that all his other terms and conditions would remain as they were. Mr Wade signed that letter accepting the variation in June 1998.

Terms in 2007

55. In February 2007 his salary was reviewed and varied. Again he was told all the terms and conditions of employment remained unchanged.

Warning of risk of redundancy in 2010

56. On 10 August 2010 the Claimant was sent a letter warning him that he was at risk of redundancy, sets out the redundancy payment and says as follows:

"In the unfortunate event that your employment is terminated for reasons of redundancy you would be entitled to receive a redundancy payment calculated as in your terms and conditions of employment. Please note that the calculation would be reviewed once a formal decision has been made and a date agreed."

It then goes on to provide a calculation of redundancy pay:

"[Mr Wade] Age 52, years of service 28 equals 25.5 weeks at £380, statutory redundancy pay equals £9690. A week's pay is defined by statutory legislation that is average basic pay including any guaranteed allowances to a maximum of £380 per week".

57. The Claimant did of course query his potential redundancy. At no time did he query the calculation of the redundancy payment. He says it was because he was not going to be made redundant.

58. In the event he was not made redundant but issued with a new job description and his role was changed slightly to that of "Systems Manager" with effect from 16 September 2010 or thereabouts. A similar debate was had between the parties about whether it was management or support. Again I cannot see why it cannot be both. Again resolution of that debate gives me no help to understand whether he would have been within or without the group awarded ERP because it sheds no light on where he was in the hierarchy or whether he would have been eligible. I therefore take it no further.

The change in role was confirmed in a letter on 30 September which said,

"in addition all other terms and conditions of employment remain unchanged".

Updated terms in 2020

59. On 16 January or thereabouts the respondent issued Mr Wade with a new statement of terms and conditions of employment. It contained in it two clauses of relevance

59.1. At paragraph 3 they said:

"Place of work. Your normal place of work will be Unit 1, Alder Court, Rennie Hogg Road, Nottingham NG2 1RX but the Company reserves the right to change this place within the United Kingdom as the Company as from time to time reasonably nominate".

59.2. Under clause 17 "Redundancy", they said:

"Redundancy payment will be calculated as per current legislation".

I observe that this text is exactly the same as the documents that the Respondents alleged were sent to the Claimant 1997.

60. Mr Wade in fact worked from home. He had a letter to confirm he could work from home. Mr Wade concedes he received it. He did not sign it, because of the error about the place of work. He queried the clause providing for his place of work. He did not query the provision under redundancy payment that said that he had only received statutory redundancy pay.

61. I struggle with his explanation about why he did not query the clause on redundancy. He said he had a letter confirm he was entitled to ERP, and therefore he felt he was protected and did not need the clause to be amended. However the same is true of the place of work. Therefore by his reasoning there was no basis to query this either. On balance I do not accept it.

Findings of fact about the entitlement to ERP

62. Taking into account the above, on balance of probabilities I find as a fact that

    62.1. The respondent never gave Mr Wade a letter, the effect of which was he was entitled to ERP in 1996,

    62.2. Therefore Mr Wade was not part of the group entitled to ERP, and

    62.3. Mr Wade's contract at all times provided only that:

    "Redundancy payment will be calculated as per current legislation" or words to that effect.

63. My reasons are as follows, drawing on the above:

    63.1. The evidence about his attendance at the meeting in 1996 is poor. His own evidence-in-chief was ambiguous on the issue, in comparison to his other evidence. His witnesses lend no support to the allegation he was present.

    63.2. He cannot remember what the letter said.

    63.3. He does not have a copy of the letter, and so cannot produce it to show his entitlement.

    63.4. The respondent's own assessment in 2002 suggests he was not entitled to ERP. I do not believe the fact his job title is incorrect undermines that, because the document shows they did acknowledge entitlement where they found evidence of it, and there is no reason to believe they deliberately excluded Mr Wade from what he was entitled to.

    63.5. He did not query the redundancy calculation in 2010. His explanation makes no sense. There was no guarantee he would not be made redundant when what he alleges was the erroneous calculation was sent. Knowing what one might receive is an important part of the consultation because it enables staff to make an informed decision. If he then believed he was entitled to ERP I believe he would have raised it.

63.6. He did not query the change in his terms in 2020. His explanation makes no sense. If he were protected by letters in relation to both ERP and place of work, I think it more likely he would have queried the change to both.

63.7. Every person he cited in texts with Mr Ketteringham as being entitled to ERP is from the branch management side of the business. He was not. There are no examples of anyone from the business stream that Mr Wade worked in being awarded ERP.

63.8. His witnesses' evidence is belief and assertion and does not undermine the above.

63.9. I also reflect on the fact that when Mr Wade was sent the calculation of potential redundancy pay in September 2020, which I refer to below, he did not query the method of calculation then.

64. The only factor is that there is evidence of one person whose personnel file lacked the ERP letter. He was initially offered statutory pay only. On production of the letter the respondent paid ERP. It shows the records are not necessarily perfect. I do not believe however this possibility of existence of a letter neither side has is enough to undermine the other factors that point to the factual conclusion the respondent did not give Mr Wade an entitlement to ERP.

The redundancy situation

Appraisal in 2018

65. On 27 February 2018 the Claimant had a meeting as an annual appraisal or review under a development plan to be completed by the employee in consultation with his manager.

66. For the future, it says as follows:

"Streamline repair procedure, comments on the plans progress, try and incorporate repair processes into Sunrise Platform, currently Gary has to use external portals, review the process to streamline".

It is agreed that that is a referral to the repair procedure for the PDAs. I find as a fact therefore that as early as February 2018 the respondent was considering making the changes it eventually came to make, and that Mr Wade was aware of the plan.

Furlough

67. I have already alluded to the Covid 19. In response introduced a scheme called the "Coronavirus Job Retention Scheme" (CJRS). This enabled employers who put their employees on furlough to receive from the Government a sum of money equal to 80% of that employees' wages subject to a cap of £2500 per month, and provided the employee provided "no meaningful work" to the employer. Many employers agreed with their employees that the employees would be able to stay at home on furlough and many employees equally accepted a reduction in wages to 80% of what they would normally be entitled to. Loomis was such an employer.

68. It fell to Mr De Beer to decide who had to be put on furlough and with guidance from Human Resources (HR), he marked various employees as to whether or not they should or should not be furloughed. He used a template to mark Mr Wade. For some reason the template is dated May 2016. The inspiration for it had come from another source like for example a previous redundancy exercise. I am quite satisfied that Mr De Beer marked Mr Wade and others in as honest and as fair way as he could. There is nothing to suggest that the marks awarded were unreasonable.

69. So when the Mr Wade suggests he was singled out for furlough, I reject that. Many people in Loomis were furloughed. Mr Wade happened to be just one of them. There is no evidence he was singled out.

70. Mr Wade was not put on furlough straightaway. On 26 March 2020 or thereabouts (the exact timings do not matter) Mr Stephens agreed with various people that the PDAs that Mr Wade was responsible for recommissioning would be sent to Mr Wade's home address so that he could do the work from there. Thus an email was then sent about that time to the suppliers of PDAs telling them to return any repaired PDAs to Mr Wade at his home address.

71. At about the same time Mr Wade was alerted to the fact that he was going to be put on furlough. The Company produced a detailed document of frequently asked questions. Under the subheading:

"What If I don't want to be put on Furlough?"

It says:

"Loomis UK Ltd is committed to preserving the employment of as many colleagues and the use of furlough as recognised as the way of preventing redundancies. The selection criteria used to determine the roles covered by the furlough have been chosen and applied in a fair and consistent way to ensure equal treatment for all employees who did not voluntarily request to be furloughed. We hope that our workforce understands this unprecedented circumstances which have led to the need to use furloughing. However, where colleagues do not agree to be placed on furlough and we have no work for them to do they will be sent home and paid as though they have agreed to be put on furlough".

Under, "Does being put on furlough mean my role has been identified for potential redundant?", Loomis wrote:

"Definitely not colleagues have been placed on furlough for a variety of both personal and work related reasons. Loomis would like to reassure all colleagues that even if you have been placed on furlough, we are determined to reintroduce your role as soon as circumstances permit. No decisions as to making any roles redundant have been made".

72. On 1 April 2020 at 07.06, Mr Wade wrote to Mr De Beer following on from the conversation about furlough as follows:

"Quick question re last nights conversation as not being able to sleep all night are all members of the IT Department being offered furlough?"

73. Mr De Beer replied, same date 09.46,

"It's across the whole of Loomis as per HR's guidance IT is being considered where there is a concentration of function".

74. The phrase "concentration of function" has attracted a lot of attention.

75. I conclude that what was meant by it was reducing the number of people who continued to work in Loomis to the bare minimum necessary to enable the business to function and to continue to be able to trade lawfully. This tallies with the evidence that it was Loomis's aim – need even – to do so lest it became insolvent. "Concentration of function" thus refers to the allocation or reduction of the number of people who may take on extra duties where they now have free time because of the reduction in workload. It simply did not need as many staff, and without CJRS could not afford them. It means that fewer employees are physically needed to be in the office and the remainder could be furloughed. This makes, it seems to me, perfect sense and is something that a reasonable employer could have done. It clearly reduces cost since the employer only now has to pay the wages of the employees who are actually working. The interpretation fits with the factual matrix of what was taking place at the time. It is also compatible with the natural meaning of the words "concentration of function". In addition, as the respondent's witnesses said, it also reduces the risk of spread of Covid 19, since at the time proximity was seen as something that could cause spread.

76. The Claimant complains that he had no real choice but to agree to furlough which he did on 1 April at 14.24. He was right. I do not, however, think that Loomis can be criticised for this. One must remember that furlough was a new concept to the United Kingdom, that this was certainly in modern times unprecedented and businesses were doing their best to keep up. Loomis had the tricky situation and challenge of not just having to keep up with the changes and the health requirements to ensure health and safety, but also to deal with the fact that their business model had in essence come on the verge of collapse because the customer base simply was no longer there.

77. On 7 April 2021 Mr De Beer wrote to the Claimant to confirm that he was on furlough and explain the processes and how to stay connected.

Enquiry about the PDA recommissioning process

78. One of the other employees in IT was Mr P Smith who was a Technical Analyst. On 2 April 2020 at 13.41 he wrote:

"Hi Gary, what do you do with the PDAs when you get them is there a process anywhere? Can you speak to PR to have them delivered to me instead for the time being?"

79. On 2 April at 13.53 Mr Smith provided Mr Wade with his address to which PDAs should now be sent and updated suppliers accordingly.

80. Mr Wade replied on 30 April 2020 at 09.31 with the instructions for configuring the newly repaired PDAs. Mr Wade alleges this was "meaningful work". It does not matter for the purposes of this claim if that is correct because resolution of the issue sheds no light on the issues before me.

81. The effect of these changes is summarised quite succinctly by Mr Wade in his evidence-in-chief.

81.1. He told me the original process was that the branch would ring or email him with the issue, that he would try and resolve and fix the issue remotely either over the phone or by branch visit if he could then the branch would carry on as normal, if he could not then the branch was informed to send the PDA to the supplier for physical repair and wipe, the device would then be returned to him at Nottingham from the repair centre and he would reload software and configure the device and then enrol it onto the PDA Management System.

81.2. The new process was identical for the first steps save that the device was now returned directly to the originating branch and it was the branch's job to reload the software and configure the device. They did so by using the instructions that Mr Wade had provided to Mr Smith at the beginning of furlough.

82. Because Mr Wade's role was unique, but could and was now done by a number of people across Loomis without the need to involve either Mr Wade or anyone else having taken over his role, it is clear in my opinion that from the beginning of April or thereabouts that his task, his unique work, had been allocated elsewhere. He was no longer required for the role. In short, applying the definition of redundancy in the **Employment Rights Act 1996 section 136**, the need for him to do work of a particular kind had ceased. He was redundant from this point.

Loomis considers redundancies

83. On 21 July 2020 or thereabouts the respondent discussed amongst its leadership the need for redundancies. It was decided that redundancies were needed to keep the business viable. It decided to approach redundancies in 2 phases. Phase 1 did not relate to the Claimant's work and therefore can be put to one side.

84. Phase 2 commenced on 7 September 2020 and affected the Operations Team which included Mr Wade.

85. On 30 July 2020 Mr De Beer completed a redundancy selection matrix. There was no consultation with the Claimant or indeed with anybody else about the criteria that was being used or how they would be weighted.

86. There is no good reason provided for the matrix being completed then, since the phase 2 (involving Mr Wade) was not commencing until 7 September 2020. The job title that was used in the selection matrix is incorrect. It describes Mr Wade as being Technical Analyst Support.

Permanent change in arrangement that removes Mr Wade's role of recommissioning PDAs

87. On 10 August 2020 Mr Ellis confirmed that branches will now receive scanners directly after they have been fixed and it was for them to reload the software on themselves.

88. Mr Ellis wrote to branch managers on 12 August 2020 saying there had been a change in how repairs to PDAs would be processed:

"The most important change from the old form is the return address this is now you branch address this should improve the turnaround time for PDA repairs and saving costs of sending the PDA back to the branch from Nottingham. The process of installing [the software] is very straightforward".

89. Mr Wade wrote some issues as to whether this was actually going to save money or not. I am unable to make a finding of fact on this. However I am satisfied that there is nothing to suggest the new arrangement was a sham or so unusual that I ought to consider it further to make detailed findings. I am satisfied it was introduced for genuine reasons in good faith.

90. Mr Stefan Wikman, Loomis's operations director, wrote a document on about 15 August 2020 that was sent to all branches, and entitled

"New Procedure for all PDA Repairs as from 15 August 2020".

He wrote:

"The invoice address is still the same and its prefilled as before the most important change from the old form is the return address this is now your branch address its to improve a turnaround time for PDA repairs saving the cost of sending the PDA back to branch from Nottingham".

It is then headed, "The process will temporarily be. While new procedure documents are being written".

91. The grammatical error of the verb "be" at the end reflects the writers first language not being English but instead being Swedish.

In my view having heard the evidence this temporary process is not temporary in the sense that the work would return to Mr Wade, but in the sense that it is what is to be followed until the new or formal document and procedure is completed. The changes had already been made. There does not seem to be any evidence of suggestion or any obvious reason as to why to would be returned at the end of furlough to either Mr Wade or someone in his position. Further, the words

"while new procedure documents are being written"

is clearly an indication that it is the temporariness of this arrangement is for the duration of preparing new documents, and not otherwise.

Events leading to Loomis notifying Mr Wade he was at risk of redundancy

92. On 12 August 2020 Loomis informed staff that there were risks of redundancy and inviting voluntary redundancies.

93. On 3 September 2020 Stefan Wikman the Operations Director wrote to Mr De Beer. The email was prompted by an email that Mr De Beer had sent where he had suggested four names for possible redundancy. Mr De Beer's email is not in the bundle. Mr Wikman's reply is. He replied as follow [sic.]

"Subject: reduncies next week. Hi just got a list to verify reduncies next week.

"Dave Alexander - to rentier befor or test when ISA7 is rolled out.

"Peter Smith

"Gary Wade

"Tim Stevens".

94. ISA7 is a reference to a software package that in fact was not rolled out in the end but abandoned. It is common ground that the context shows that the word "reduncies" is clearly intended to mean redundancies. I agree.

95. The reference to Mr Alexander "rentier" is a reference to Mr Alexander retiring. I come to that conclusion because Mr Alexander was close to what would have been retirement age and that is in fact what happened. So, Mr Alexander retired when the Company abandoned the progress on software package ISA7 and therefore it pretty much followed Mr Wikman's view, Peter Smith, Gary Wade and Tim Stephens were all made redundant. I recognise that Mr Wikman's first language is not English, and I have tried as far as possible to make allowances for that. I appreciate that when one is writing in a language that is not one's own spelling mistakes and grammatical errors will inevitably creep in. I also recognise that quite often there are nuances which can amount to mis-translations or give the wrong impression between different languages and therefore whilst a particular word may according the dictionary be a suitable translation of the original say Swedish word when actually read in context by a native English speaker it takes on a different quality.

96. All of that said, it seems to me that the only reasonable interpretation that can be put on this email is that Mr Wikman is announcing who will be made redundant. I come to that conclusion for the following reasons:

96.1. Firstly, although it is not his first language and has some spelling and grammatical errors in there it is tolerably clear what is being said.

96.2. Secondly, the use of the word "verify" redundancies next week seems to me that it can only mean that he is confirming or checking the redundancies for next week. Whether it is to confirm or to check it clearly indicates these are the people who are going to be targeted. I do not see any other way that the word "structure" and the use of the word "verify" in the way they are used could convey any other meaning in the context in which redundancies were required, and in which Loomis had already reallocated Mr Wade's work and developed a process that meant he was no longer required.

96.3. Thirdly, is the striking similarity between what actually happened and what is said here. Dave Alexander retired when ISA7 was abandoned. Peter Smith, Gary Wade and Tim Stephens was made redundant.

96.4. It is also striking as can be seen from the chronology to which I am about to go in a moment that this email was written before any of the employees concerned had been told formally that they were at risk of redundancy.

97. On 7 September 2020 Mr De Beer wrote to Mr Wade as follows:

"All our customers are reviewing their service requirements reducing service schedules or cancelling contracts altogether as our services are no longer required. We are therefore seeing our workload diminishing and, in some cases, ceasing altogether and in a climate where we have minimal creation of new revenue streams it is considered likely the workload will continue to diminish and the Company is therefore proposing a number of measures across the whole of our business in order to meet the challenges head on. One proposal will be to reduce the number of positions within the IT Department…. As a direct result of the proposal, I must inform you that your position is at risk of redundancy and has been identified as one which will be made redundant should the proposals go ahead. Our consultation period commenced on 7 September 2020 the purpose of consultation is to explore ways of mitigating the number of redundancies. It is also an opportunity for colleagues to make any suggestions or proposals as to how they consider redundancies can be avoided or minimise as well as raising any other concerns or questions. No decisions have yet been taken and will not be made until consultation has concluded for this purpose the Company will be consulting with you on an individual basis… Please be assured that throughout the process the Company will also look at ways of avoiding redundancy or mitigating its consequences and also whether there may be alternative positions for you within Loomis. Your individual meeting with me will be Tuesday 15 September 2020 over Skype".

98. It is a fact, however, that the work had already been removed from him back in April 2020 and his unique role was no longer required. That had been confirmed in August when the new procedure was confirmed and put in place. It follows from that, and I find as a fact, that at this time his position had gone already. Consultation therefore about the possibility of retaining his role in some way was meaningless.

99. On 10 September 2020 Mr De Beer requested calculations of the Claimant's redundancy pay and sent an invite to enable Mr Wade to attend a meeting electronically by Skype.

Mr Wade's query about his contract and grievance policy

100. On 14 September 2020 the Claimant requested from HR a signed copy of his contract of employment and a copy of the Company Grievance Procedure. HR were unable to send him a signed copy of the contract. He replied saying:

"You have not sent me a copy of my signed contract therefore I cannot be expected to attend the consultation meeting tomorrow at 10.00am".

101. Hr replied that they were unable to provide a copy of the contract of employment because it was not on file. Mr Wade said he would therefore not attend the meeting on 15 September 2020. It was therefore cancelled.

102. Mr De Beer rearranged the first consultation meeting this time to Thursday 17 September.

103. On 16 September 2020 Mr Wade sent to Ms Giordano a series of yes or no questions. He wrote:

"However, for clarity, did HR notify Pieter De Beer that the consultation meeting on 15th September 2020 at 10.00am was not going ahead (YES OR NO).

"You also seem to say that HR do not wish to be involved in and or the arrangement of personal one to one consultation meetings. For clarity is this correct? (YES OR NO).

"You also appear confused about my signed contract of employment (which really surprises me).

"It is my understanding that HR are responsible for keeping employees signed contracts of employment. For clarity is this true (YES OR NO).

"Again, you seem confused about which contract I am after.

"It's very simple!

"Can you send me my signed contract, the one immediately prior to the one Charlotte sent me? (YES OR NO).

"If YES please provide the date I will receive it by…..(dd/mm/yy).

"If NO please explain why not…

"I note your comments about the furlough situation. However, as Pieter has already said he is taking guidance from HR (confirmed in an email) he is clearly not qualified or the appropriate person to answer my questions.

"Therefore, could you please advise me who in HR is your designated expert on all aspects relating to furlough and how to arrange an appropriate meeting with them?

"As time is now of the essence could you please advise me if this meeting needs to take place prior to my consultation meeting tomorrow at 12.00pm? (YES OR NO).

"If I have not heard back before 10.00am on Thursday 17 September 2020 whether you expect me to attend the consultation meeting at 12.00pm on 17 September 2020, by default, I will assume that you have cancelled it".

104. I agree with the Loomis's suggestion that the tone of that email is confrontational and aggressive. I also accept and find that nothing in that email has any bearing on his job being at risk for redundancy.

105. Mr Wade was unable to explain to me why he needed his signed contract or a copy of the grievance procedure before he could attend the consultation meeting. Having heard his evidence, I am still none the wiser as to why he needed those documents before he could be in a position to attend. I conclude it was, frankly, bloody-mindedness in the absence of any explanation. More importantly, his non-attendance was clearly a free decision on his part. Loomis cannot be criticised for it. As they said, if they do not have a copy of his signed contract, it is not something that can be "magicked out of thin air."

First consultation meeting 15 September 2020

106. Mr Wade did not attend. Mr De Beer was unaware that Mr Wade told HR he was not attending. He stayed on the line for 36 minutes in case Mr Wade chose to attend.

Rescheduled first consultation meeting on 17 September 2020 and Mr Wade's non-attendance.

107. The meeting was rescheduled 17 September 2020. At that meeting Mr De Beer used a script provided by HR for him to work from. Mr Wade said the interview seemed very wooden. I do not think any criticism can be made of the use of a script. This was a demanding time, and the provision of a script to ensure all the main points were covered is a sensible step. There was nothing to suggest that Mr De Beer forbade Mr Wade to raise matters off script. In fact Mr Wade conceded he could have raised any issues he wanted.

Further correspondence between HR and Mr Wade

108. On 17 September Anne Giordano sent an email to Mr Wade as follows:

"Thank you for your email and clarification over the copy of the contract required your file has been reviewed in HR and the records indicate you were issued with the contract by Security Express Armaguard and you signed and returned a slip to say you had received this on 2 July 1993. I have attached a copy of this acceptance slip for your information. There is not a copy of the contract on file, I am informed there are numerous letters indicating a change of job title since that time, but these letters indicate your terms and conditions were not unchanged. Please let me know if you have a specific query about your terms and conditions from Security Express Armaguard, however, your current terms and conditions as specified at the statement of particulars sent to you earlier this year."

Calculation of potential redundancy payment

109. After the meeting Mr De Beer sent to Mr Wade a calculation of his potential redundancy pay. It was calculated in accordance with the statutory scheme. At no point did Mr Wade query that calculation like in the most obvious way, for example, of pointing out that it was not calculated in accordance with the ERP to which he says he is entitled.

Second consultation meeting

110. On 18 September 2020 Loomis invited Mr Wade to a second consultation meeting. That took place on 23 September. Mr De Beer followed a script. I do not think any criticism can properly be made of that. Hr had provided a script to aid managers having to carry out this task. There is no evidence that the script affected the ability of anyone to engage properly. The meeting invited any suggestions that might avoid redundancy.

Informal grievance

111. On 28 September 2020, the Claimant raised an informal grievance. He wrote:

"Dear Ann

"I totally refute that the tone of the meeting was in anyway difficult.

"My understanding was that David brought the meeting to a close as both Beverley and yourself seemed to be unprepared and therefore unable to answer any of the questions.

"Thanks for your first answer.

"Are employers allowed to ask employees to carry out work for the company whilst on furlough?"

"In my circumstances you clearly state "…that up to 30 June 2020, employees were not permitted (sic) do any work that makes money for the Company or provides to the Company whilst on furlough…"

"Therefore, why on my first day of furlough was I asked to carry out work that would provide services to the Company by Pieter De Beer?

"Then on my second day of furlough, why was I again asked to carry out work that would provide services to the Company by a direct subordinate of Pieter De Beer (Pete Smith)?

"Please see responses to your answers in relation to my earlier questions.

"Did HR notify Pieter De Beer that the consultation meeting on 15 September 2020 at 10.00am was not going ahead/ (YES OR NO).

"I have read your long and round about answer and it clearly says you did notify Pieter De Beer that I would not be attending.

"It is my understanding that HR are responsible for keeping employee's signed contracts of employment, for clarify is this true? (YES OR NO).

"Again, your answer is somewhat rambling. However, you do so Loomis is responsible for issuing and retaining signed contracts.

"Therefore, please can you locate mine and send it to me.

"Can you send me my signed contract, the one immediately prior to the one Charlotte sent me? (YES OR NO).

"See my response to your answer to the question above. I look forward to receiving my signed contract.

"I await your answers."

112. Mr Sherriff investigated the grievance.

Confirmation of redundancy

113. On 7 October, the Claimant was told that he was going to be made redundant by a letter written by Gaynor Price on behalf of Human Resources. It confirmed that the Claimant's redundancy pay was calculated in accordance with the statutory entitlement again the Claimant did not query that. It advised the Claimant that he had a right to appeal the Claimant did not appeal formally against his dismissal. Although he did raise the query within a formal grievance that he lodged on the same date.

Formal grievance

114. On 13 October 2020, the Claimant lodged that formal grievance. He complained that Loomis had not followed HM Government's furlough guidelines. He made an allegation of discrimination which is of no concern to these proceedings. He also alleged that he had been unfairly selected for a redundancy and that there had been a failure to consult appropriately. He also said:

"Due to my length of service and job role I qualify for enhanced redundancy packaging which was awarded back in 1995 when Mayne Nickless sold out to Securitas. The redundancy letter does not follow the enhanced redundancy package and is also incomplete it does not mention compensation for my current Company benefits including pension, private medical insurance and company car for personal use."

This was the first time Mr Wade suggested he was entitled to ERP.

115. Mr Sherriff did conduct an investigation meeting with Mr De Beer. Mr DeBeer confirmed the updated process for recommissioning PDAs which I have described above. He said it was to be handed over on furlough. The notes also record the following exchange, which, while not verbatim, is I accept sufficiently accurate.

"Q: please explain the mechanism for Mr Wade's selection for redundancy how did Pieter De Beer arrive at Mr Wade being selected Mr De Beer said:

"A: Instruction from [Loomis UK] executive team was received explaining a requirement for a restructuring specifically to Pieter De Beer from Stefan Wikman as his Line Manager. The aim of restructure was to control [Loomis UK] costs without sacrificing service level agreements to the IT Department with reduction in cash in transit routes over the year and therefore the required support levels for the routes Mr Wade was looking after. Discussions were held with Human Resources and Mr Wade advising him his job title was at risk and that no matrix had been used as he was the only person in the role.

"Q: Just to clarify in the first letter Mr Wade was made clear that there was no selection criteria had been used it was just his role at risk.

"A: Yes".

116. On 10 November 2020 Mr Sherriff announced his outcome. He dismissed the Mr Wade's grievance.

Appeal against the outcome of the formal grievance

117. Mr Wade appealed against his grievance. Mr McGlade was appointed to hear the grievance appeal but, due to illness, had to hand over to Mr Gibbs. Mr Gibbs dealt with it

118. The grievance appeal meeting was schedule to take place on 10 December 2020. The Claimant chose not to attend the meeting saying that Loomis were already in possession of all the relevant facts to answer all of his questions. Mr Wade maintained his position on 14 December 2020 that there was no need for him to attend the meeting, writing

"I look forward to receiving your written outcome to the appeal and finally receiving detailed answers to all the questions that Loomis so far failed to answer, I would ask this is done in a timely manner as should I wish to take this further forward my legal representation will need to have this information".

Mr Gibbs conducted the investigation therefore on papers and in his appeal answered the questions that the Claimant had proposed. He dismissed the appeal.

Commencement of the claim

119. The Claimant commenced Early Conciliation on 26 January 2021 it ended on 17 February 2021 he presented his claim to the Tribunal on 16 March 2021.

Law

120. I cite only the law necessary to understand my decision, taking into account the claimant concedes he was dismissed for redundancy and that there was a redundancy situation.

121. The **Employment Rights Act 1996 section 111** entitles a person who has been employed for a sufficient period to bring a claim for unfair dismissal.

122. **The Employment Rights Act 1996 section 98** provides (so far as relevant):

"…

"(4) Where the employer has [shown the claimant was dismissed because of redundancy], 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.

"…"

123. When it comes to reasonableness the burden of proof is neutral. The tribunal should consider all the circumstances including the employer's size and administrative resources.

124. The Tribunal has considered the guidance in **Williams v Compair Maxim Ltd [1982] IRLR 83 EAT**, which set out a number of salient principles, some or all of which are likely to be relevant in a redundancy-based unfair dismissal case. Its guidance is as valid whether or not a trade union was recognised or active in the workplace. The case also reminds me I must not substitute my own view for that of the employer. I am assessing only whether the employer acted reasonably in the circumstances, and should avoid a detailed critique.

125. As to guidance, the Appeal Tribunal said in **Williams**:

"1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

"2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

"3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

"4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

"5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment."

"The lay members stress that not all these factors are present in every case since circumstances may prevent one or more of them being given effect to. But the lay members would expect these principles to be departed from only where some good reason is shown to justify such departure. The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim."

126. The "reasonable responses test" applies to selection for the pool **Capita Hartshead Ltd v Byard 2012 ICR 1256 EAT**. **Byard** confirmed that

126.1. It does not need to be limited to employees doing the same or similar work.

126.2. The question of how the pool should be defined is primarily a matter for the employer to determine.

126.3. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem*"*

127. As to consultation generally, **Williams** is instructive. The importance of consultation cannot be overstated and the key principles applicable to disputes about consultation were set out in the case of **Mugford v Midland Bank [1997] IRLR 208 EAT**:

"(1) Where no consultation about redundancy has taken place with either the trade union or the employee the dismissal will normally be unfair, unless the Employment Tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.

"(2) Consultation with the trade union over selection criteria does not of itself release the employer from considering with the employee individually his being identified for redundancy.

"(3) It will be a question of fact and degree for the Employment Tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy."

128. Ultimately each case must turn on its own facts and be broadly assessed in accordance with the equity and substantial merits: **Jefferson (Commercial) LLP v Westgate UKEAT/0128/12 EAT; Bailey v BP Oil Kent Refinery [1980] ICR 642 CA**.

129. In addition, I must not subject the process to overly minute scrutiny. If the process is reasonably describable as fair and there is no evidence of bad faith, then the redundancy dismissal cannot be criticised: **British Aerospace v Green [1995] ICR 1006 CA**;

130. If the Claimant's dismissal is unfair it is necessary for me to consider whether there was a chance that she would have been dismissed in any event (the principle expressed in **Polkey**). The task for the Tribunal has been explained by the EAT in many cases, such as **Hill v Governing Body of Great Tey Primary School [2013] IRLR 274 EAT**, where the Tribunal said:

"'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 been 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."

Conclusions

Was the claimant entitled to ERP pursuant to his contract?

131. I can set this out simply. Above, I found as a fact he was not within the group of people whose contracts were altered to entitle them to ERP. Therefore this claim must fail on the facts of the case.

Unfair dismissal

132. Since there is no dispute that the respondent honestly believed the claimant was redundant, I move to the next issue.

Given the reason for dismissal was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

133. The answer is no, Loomis's dismissal of Mr Wade fell without the range of responses one could expect from the reasonable employer:

133.1. The moment that Loomis removed the PDA recommissioning work from Mr Loomis and transferred it to the branches, Mr Wade became redundant. It was the reason for his unique role and as of this point he was no longer required- in formal terms the need for him to do work of a particular kind had ceased. I am satisfied that at this point the arrangement was permanent. The 2 reasons are that in 2018 Loomis had already indicated that this was the process they were eventually aiming to deploy, and secondly the reality was if the branches could recommission their own PDAs, there was no foreseeable reason to transfer it back to Mr Wade.

133.2. Even if April 2020 were too early a date, the facts above coupled with the announcement of the "temporary" process for recommissioning PDAs by Mr Wikman, which as I have found as a fact was not temporary in the sense it would come to an end and revert back to prior arrangements, but temporary only in the sense that it awaited the writing of the formal policy, shows that that by mid-August 2020, Mr Wade's position, and so Mr Wade, was redundant.

133.3. If therefore Mr Wade's role was being eliminated, the reasonable employer would have commenced the process of meaningful consultation with him before making the permanent change. That would have been in April 2020, or in August 2020 - on any case not in September 2020.

133.4. Commencing it in September 2020 was meaningless. His job had gone. That decision had been taken and implemented. Realistically, no consultation could have therefore resulted in him retaining his role. It was too late. No reasonable employer removes someone's job, and then asks them what they think should happen and what alternatives there may be to their proposals. It should be the other way around. To use Mr Wade's words in closing, it had become a fait accompli.

134. In my view that is enough to answer the question and show that the dismissal was unfair in accordance with the equity and substantial merits of the case.

135. There are however other factors in my view that point to this being an unfair dismissal procedurally.

135.1. The selection matrix this has been completed by Mr De Beer before he had established the pool. A reasonable employer in my view would have approached it the other way round.

135.2. There was no consultation over the pool or selection matrix.

135.3. Finally, based on my findings of fact above, Mr Wikman's email of 3 September disclosed that the decision that Loomis was going to dismiss Mr Wade is one that had already been taken. A reasonable employer would have approached that whole thing with an open mind. Loomis fell into the error of making the decision before the consultation had actually begun and had therefore at least in part closed their mind.

136. That latter conclusion leads to questions about whether Mr De Beer was knowingly just "going through the motions". I do not really need to resolve this question, but for the avoidance of doubt, I believe he was doing the best he could in a situation that was stressful and fast moving, and following the guidance from Mr Wikman and HR. However his innocent actions do not detract from an unfair process. It is perfectly plausible a person simply does what they think is right, even if they are following the wrong procedure.

137. I am conscious that this was a time of the impact of Covid-19, lockdowns and furlough. They created unique challenges. I am not satisfied they justify the decision to make a position redundant before consulting on it or the other factors above. I am conscious the respondent had a pressing business need to do something. However it had the resources and experience that in my view means it cannot justify the failures in this case.

Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

If so, should the claimant's compensation be reduced? By how much?

138. In my view there must be a reduction to reflect the possibility that he could have been fairly dismissed anyway, either under this process or some other substantial reason. There are a number of reasons for this:

138.1. The business was seeing a dramatic downturn in work available to it. It is clear that a redundancy situation existed, and he would therefore be at risk.

138.2. Though he had a unique role, it is quite apparent since at least 2018, Loomis was contemplating the change that was eventually made to recommissioning the PDAs. Therefore there was a clear plan his role would become redundant.

138.3. The downturn in work was clearly going to have an impact on the viability of the business. There is nothing in the evidence to suggest that he would have been immune or could be protected from that downturn

138.4. The procedure that Loomis have adopted of streamlining the recommissioning of the PDAs is a reasonable step for Loomis to have taken.

139. I come to the conclusion thereat in the circumstances there is a significant chance that Loomis could have dismissed Mr Wade even if they followed a fair procedure or for some other substantial reason as part of the business restructuring.

140. Mr Wade suggested it is a speculation too far to come to that conclusion, or to allocate a percentage to it. I disagree. I am satisfied there is sufficient evidence to be able to speculate properly. I do not accept it is so scant that it can be ignored.

141. As to the size of the reduction, I do not believe that it is reasonable for me to conclude that it would have been 100% reduction since that does not reflect the possibility that something could have been found that would have enabled Mr Wade's employment to have continued in some way. It also does not reflect that, whatever the long-term aim, nothing appeared to have been done to implement it.

142. However the circumstances in which the business found itself mean that the chance of a fair dismissal, coupled with the long-term aim for the work of recommissioning the PDAs, means a substantial reduction is apposite. but I do think it needs to be substantial.

143. In my view a reduction in this case of 67% does justice in this case.

Employment Judge Adkinson

Date: 1 December 2022