# EMPLOYMENT TRIBUNALS

**Claimant:** Mr E Holt

**Respondent:** Network Plus Service Limited

**HELD AT:** Liverpool **ON:** 17 and 18 October 2022

**BEFORE:** Employment Judge Horne

**REPRESENTATION:**

**Claimant:** In person
**Respondent:** Mr McNaughton, Solicitor

**JUDGMENT** having been sent to the parties on 27 October 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

**Introduction**

1. By a claim form presented on 13 April 2021, the claimant raised a single complaint of unfair dismissal.
2. We identified the issues at the start of the hearing.
3. There was a lot of common ground. The claimant had been the respondent's employee. He was employed as a grab driver. The respondent dismissed him. By that time, he had been continuously employed for more than two years. At the time the claimant was dismissed, the requirements of the respondent's business for employees to do the work of grab drivers in the North West of England had diminished. What the tribunal had to decide was:
   3.1. Why was the claimant dismissed? Can the respondent prove the sole or principal reason? In particular, can the respondent prove that the reason was the diminished requirement for employees to do the work of grab driving?
   3.2. If so, did the respondent act reasonably or unreasonably in treating that reason as sufficient to dismiss the claimant?

4. The parties agreed that these were the issues. But the claimant added that I could not satisfactorily address these issues until I had considered the history. In particular, various things happened in 2019 and early 2020 that caused the claimant to be working for a client (Severn Trent) for whom he had not previously been working. The claimant told me that this "led to this precarious situation and me not being chosen under TUPE that led to the action that they took".

5. The claimant also produced a document headed, "Grounds of Claim for Unfair Dismissal" in which he made the following five points:

   "

   (1) Removed from my position, duties and role after I returned from holiday.

   (2) Breach of contract without consent and/or agreement.

   (3) Failure to comply into 'TUPE' legislation under my employment rights.

   (4) Classed as a 'spareman' with derogatory comments.

   (5) Failure to comply with pool selection processes under redundancy legislation."

6. I did not limit my remit to considering these five points, but I found them a helpful guide to understanding why the claimant considered that the respondent had acted unreasonably in treating redundancy as a sufficient reason to dismiss him.

**Evidence**

7. I considered evidence in an agreed bundle which ran to 324 pages.

8. The respondent called Mr Hall, Mr Coventry, Mr McLaughlin and Mr Rice as witnesses. The claimant gave oral evidence on his own behalf. All five witnesses confirmed the truth of their written statements and then answered questions. The impression I got from all of them was that they were doing their best to tell me the truth about what happened.

**Facts**

9. The respondent is a large utility and infrastructure contracting company. The size of its workforce fluctuates, but at the time of presenting its response it had about 2,000 employees.

10. The claimant is a grab driver by trade. A "grab" is an open-backed vehicle fitted with a hydraulic lifting arm. One of its uses is for moving loose road materials and waste.

11. In 2014, the claimant began employment with a company which is well known as "Amey". His role was described as "Back-fill/Reinstatement Operative".

12. The claimant signed written statements of terms of employment in 2014 and 2017.

13. On the front page of the statement of terms, the claimant's "Work location/base" was stated to be: "Fazakerley WWTW".

14. "Fazakerley WWTW" stands for "Fazakerley Waste Water Treatment Works". It is owned and operated by United Utilities. I call it "the Fazakerley site" for short.

15. The claimant lived about 30 minutes' walk away from the Fazakerley site.

16. Paragraph 5 of the statement of terms read:

> "Your normal place of work shall be at the location as specified on the front page of this Contract…"

17. The rubric in paragraph 5 included provisions for varying the contractual base and requiring the claimant to work elsewhere than his "normal place of work". I have not set out these provisions, because neither party relies on them. The respondent does not suggest that these provisions were invoked to change the claimant's contractual base. The claimant's positive case is that the same provisions could not have been used to change his base.

18. In 2019, Amey's contract with United Utilities for repair and maintenance came to an end. United Utilities entered into a new contract with the respondent for the same work. When the respondent took over the contract, the claimant's employment transferred from Amey to the respondent.

19. United Utilities was not the respondent's only customer. The respondent also had a contract with Severn Trent Water to carry out work in the North Wales and Chester area.

20. The respondent had a system of allocating numerical codes to particular areas of work within the business. The codes I heard about all related to United Utilities. Repair and maintenance work was given the umbrella Code 415. That code covered the whole of the North West of England. The respondent also contracted with United Utilities to provide other services. One of these services was coded 480 and called "Connections".

21. The 415 United Utilities North-West repair and maintenance service was split into geographical areas. Each had its own Operations Manager and area code. Amongst these area codes were:

    - Code 251 for the Wigan, Ormskirk, Bolton and Southport areas. Workers aligned to Code 251 were generally based at the respondent's own site near Preston.
    - Code 253 contract, covering Cheshire East, Cheshire West, Warrington and Ellesmere Port.
    - Other geographical codes (also under the 415 umbrella) for some Liverpool postcodes.

22. The Severn Trent work in North Wales and Cheshire was coded 620.

23. The work coding system was not completely rigid. Teams could be cross-deployed between work codes. For example, a team who worked under Code 251 might be asked to do some work on a Liverpool code if the two areas were near to each other and it would save a wagon driving from a more distant location. Sometimes, cross-deployment was used to cover absences. Nevertheless, the respondent considered the work codes to be important, and cross-deployment was the exception rather than the rule.

24. The Fazakerley site was the main base for the Code 253 work. It was shared with a relatively small number of workers in different areas of the business. In particular:

24.1. A small number of workers used the Fazakerley site as their contractual base for work in the Code 251 area. One of these was Mr Jones, who also worked as a grab driver.

24.2. The Fazakerley site was also used as the base for the 480 Connections part of the business.

25. The respondent also used another United Utilities site at Ellesmere Port. The respondent's main use of the Ellesmere Port site was as a car park. Workers would park their vehicles there and then drive, or be driven, to the location where street works would be carried out. The Ellesmere Port site was also used for storing some equipment, such as road signs, but it did not have a dedicated store keeper. I accepted the respondent's evidence that most of the people who worked on the 253 contract actually had their contractual base at the Fazakerley site.

26. The claimant was one of those workers. His contractual base was Fazakerley. His work was aligned to the Code 253 area.

27. Day-to-day, his work consisted of driving to locations in these parts of Cheshire where there were road works and street works. He would then use the grab to move road materials, for example, by backfilling holes that had been dug in roads to work on water pipes. The work had to be done in teams of two operatives – one being the driver, or team leader, the second being known as the "second man" or "second operative".

28. For a number of years, the second operative who worked with the claimant was Mr DR. In 2019, Mr DR went on sick leave. There was a discussion during the autumn of 2019 about Mr DR's return to work. During that discussion, Mr DR indicated that he would prefer to work with a different driver. That request was granted. That meant that there was no long-term second operative working with the claimant.

29. In mid-December 2019, the claimant went on holiday. When he returned, he found that his usual grab wagon had been sent to Salford. Now, not only had the claimant lost his regular second man, but he no longer had his usual vehicle. A short-term solution was put in place, to which he agreed. The claimant agreed to work on the Severn Trent 620 workstream for a few days as a second operative. He then took a further period of leave during the holiday period. When he came back to work in January, for about four days, he worked on the 253 contract.

30. In early January, the claimant was asked to work as a driver on the Severn Trent 620 work again. He was told that he was needed to cover a driver who was in difficulty with his driver's licence. He agreed to "help out".

31. There is a dispute about what was said at the time of this January request. In particular:

31.1. It is disputed what the claimant was told about how long he would have to be working for.

31.2. There is also a dispute about whether this driver's licence actually had been revoked or suspended or neither.

32. There is also a dispute about whether a driver could have been taken from another location, for example a driver who worked on the 253 contract who

frequently used the Ellesmere Port site – whether the driver could have been taken to work on 620 Severn Trent instead, and whether that would have involved breaking up a team and whether that would have been important.

33. I have not made findings about any of those things as, for reasons I am going to explain, I do not think it is necessary. I did accept the claimant's evidence that he genuinely believed that he was only being temporarily deployed to the Severn Trent 620 work.

34. From early January onwards until April 2020, the claimant worked continuously on the Severn Trent 620 operations in the Chester area. During that period of approximately three months, the Fazakerley site continued to be his contractual base. The claimant walked or drove to Fazakerley in his own time. Having arrived at his contractual base, he then travelled from North Liverpool to Ellesmere Port during his paid working hours. The claimant used transport provided by the company, either the grab wagon or a van that had been provided for him. He then used the grab wagon either picked up from Ellesmere Port or driven directly from Fazakerley to do his work in the Chester area. There was never any written confirmation of this arrangement. The claimant, I accept, believed that at some point he would return and do his work nearer to the Fazakerley area.

35. On 6 January 2020, Ms Fottles of the respondent circulated an audit spreadsheet. It appeared to show the claimant alongside the work code "415 R&M North". Mr Liam Hall, Operations Manager, read the spreadsheet and replied,

> "Please can you remove Eddie [the claimant] .. Eddie is a Spare Man…"

36. The following day, Mr Hall added,

> "Eddie Holt has now been transferred to 620 Severn Trent R/M … Please can this be reflected on time sheets and HR.
>
> Eddie has become a spare man in Faz due to Nobody wanting to work with him. He has had no grab since the start of December and has only been slotting in covering Holidays."

37. The claimant was unaware of the e-mail at the time. He has become aware of it since his dismissal. With some justification he regards the description of him as derogatory.

38. In early 2020, whilst the claimant was working on the Severn Trent 620 workstream, the respondent subcontracted its Code 253 work in the Cheshire area. The subcontractor was a company trading as Kings Construction. There was a written subcontracting agreement. That agreement listed the employees who the respondent believed would transfer under TUPE to Kings Construction as a result of the subcontracting arrangement. They were listed by role. The claimant was not amongst their number. As part of the subcontracting agreement, the respondent paid Kings Construction for the cost of redundancies which it expected that Kings Construction would have to make. Redundancies were then made by the respondent in the tarmacking team.

39. The claimant says that he was deliberately moved to the 620 Code to avoid him appearing to be assigned to the 253 work. As the claimant sees it, this move was a sweetener to make the 253 sub-contract more attractive to Kings Construction. Kings Construction would inherit one fewer grab drivers. That would avoid the need to pool the claimant alongside their own employees in a redundancy exercise which would inevitably have to be carried out. I have not made a finding as to whether this happened or not. The reason why I have not done that is it was never suggested that any of the people who actually made the decisions to dismiss the claimant for redundancy either knew about that subterfuge or were involved in it in the first place. If I had to make a finding as to whether they knew or not I would find that they did not. As far as Mr McLaughlin and Mr Rice were concerned, they believed that the claimant was genuinely to be treated as somebody who was aligned to the Severn Trent workstream at the time of the transfer.

40. In late March 2020, as is well known, the United Kingdom went into lockdown as a response to the COVID-19 pandemic. The claimant was placed on furlough leave with his agreement. He did not return to work.

41. During the summer of 2020, the Severn Trent contract suddenly terminated, resulting in the disappearance of the Code 620 workstream. That was an abrupt decision about which the respondent had little or no warning. A decision was taken amongst others by Mr McLaughlin, the Reinstatement Manager, that the claimant should remain on furlough leave and not instantly be put through a redundancy process. This was to see if further work materialised.

42. At the time of Mr McLaughlin's decision, England was emerging from the first national lockdown, but the pandemic still posed significant challenges to employers and employees alike. Nobody had been vaccinated. Employers were having to react very quickly to changing rules and economic circumstances. They were also having to make dynamic safety decisions and implement new safety measures. In the case of the respondent, one of these measures included keeping teams together in bubbles as far as possible.

43. In November 2020, Mr McLaughlin decided to put the claimant at risk or redundancy. The way Mr McLaughlin saw it was that the respondent had more grab drivers than they needed. That state of affairs had been brought about by the termination of the Severn Trent Water contract.

44. Mr McLaughlin decided that the claimant was the only person who should be considered for redundancy selection. His rationale was that selection for redundancy should be based on the coded workstream to which an employee was aligned.

45. The respondent had three reasons for adopting this method of selection:

    45.1. *Harmonisation with criteria for TUPE transfers.* The respondent operated in a sector where contracts and sub-contracts were won and lost. Teams of employees frequently followed the workstream under a particular contract code. It made sense for redundancy pooling decisions to follow the same criterion.

    *45.2. Client relationships.* Grab teams built relationships with client managers on particular workstreams. Creating redundancy selection pools

across different workstreams risked interfering with those relationships. It would mean that, if the respondent lost a contract, say, with Severn Trent, a grab driver for United Utilities might be made redundant so that the Severn Trent driver could keep their job. That would impose a new working relationship on United Utilities, who might consider the change to be disruptive.

45.3. *Ease of accounting.* The respondent's accounting system attributed the redundancy costs to a particular work code. This reflected the costs of operating that contract with the client.

46. As Mr McLaughlin saw it, there was only one person who could be affected by cessation of the Severn Trent 620 workstream, and that was the claimant. There was no need therefore to pool him alongside anybody else. The claimant was informed on 14 January 2021 that he was at risk of redundancy

47. At the time of Mr McLaughlin's decision, there were two other grab drivers whose contractual base was the Fazakerley site. These were Mr Jones, who by that stage had stopped working on the 451 contract and had moved over the 480 connections contract. There was also another two-person grab team that was also working on the 480 Connections workstream. There were, of course, no grab drivers working on 253 from Fazakerley any more, because they had all transferred to Kings Construction.

48. The first redundancy consultation meeting happened on 18 January 2021. In broad outline, the claimant said:

48.1. that he did not regard himself as being aligned to the Severn Trent Water contract;

48.2. that he had not been consulted at the time that the TUPE exercise had been carried out; and

48.3. that he should therefore be pooled alongside the other people who were based at Fazakerley.

49. Mr McLaughlin explained to the claimant that the decision on who to select for redundancy had been based on the work code to which a person had been aligned.

50. Mr McLaughlin did say that the contract had transferred to Kings Construction in December 2019, but by the time of the second consultation meeting it was pointed out to him, correctly, that that was a mistake.

51. There is a clash of evidence over one disputed remark allegedly made by Mr McLaughlin at this meeting. Did Mr McLaughlin say that the claimant had been "overlooked for a TUPE transfer"? The claimant's case is that Mr McLaughlin did make that remark and that it is important. Its significance, according to the claimant, is that it shows that Mr McLaughlin recognised that the claimant had missed out on a transfer to Kings Construction due to an error on the respondent's part. Having heard the conflicting evidence, I declined to make a finding either way. It is not necessary. There was no suggestion that Mr

McLaughlin knew of any deliberate plan to exclude the claimant from transferring to Kings Construction. As I later explain, even if Mr McLaughlin thought that the claimant had had a legitimate expectation of transferring to Kings Construction with the 253 work, it would not be reasonable to expect Mr McLaughlin to have altered his pooling decision.

52. The second consultation meeting happened on 21 January 2021. Essentially the same arguments were put forward. Mr McLaughlin still believed that alignment to a work code was the best way of selecting an employee for redundancy. He did not change his mind. There were no vacancies for grab drivers. Mr McLaughlin therefore decided that the claimant should be dismissed.

53. On 22 January 2021, the claimant was informed by letter that his employment was being terminated with effect the same day by reason of redundancy.

54. The claimant appealed. His appeal was considered by Mr Rice, but Mr Rice chose to uphold the decision.

55. Some weeks after the redundancy exercise was complete, and the claimant's employment had been terminated, Kings Construction company went into administration. That meant that Kings Construction could no longer operate the 253 sub-contract. The Code 253 work came back in-house to the respondent. That meant that the respondent's employees who had transferred out to Kings Construction – if they were still working for Kings Construction on the 253 work - also transferred back back in house. At the time of the decision to make the claimant redundant, the respondent did not know that this would happen.

**Relevant law**

56. Section 98 of the Employment Rights Act 1996 ("ERA") provides, relevantly:

> "(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 … a reason falling within subsection (2)…
>
> (2) A reason falls within this subsection if it-
>
> …
>
> (c) is that the employee was redundant…
>
> (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 employees 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.

57. By section 139 of ERA,

> "(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to:
>
> …
>
> (b) the fact that the requirements of that business-
>
> (i) for employees to carry out work of a particular kind, or
>
> (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
>
> have … diminished.

58. In *Williams v Compair Maxam Ltd* [1982] IRLR 83, Browne-Wilkinson J provided the following guidelines intended to help tribunals decide whether an employer has acted reasonably or unreasonably in treating redundancy as a sufficient reason for dismissal. Much of the guidance is tailored to a case where the employer recognised an independent trade union and some criticism is made that the union was not adequately consulted. But the following guidance is also important even where it not suggested that a trade union should have been involved:

> "The employer will seek to give as much warning as possible of impending redundancies"
>
> "The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment."
>
> "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'.'

59. In *Capita Hartshead Ltd v Byard* UKEAT 0445/11, at paragraph 31, Silber J said this on the subject of redundancy selection pools:

> "Pulling the threads together, the applicable principles where the issue in an unfair dismissal claim is whether an employer has selected a correct pool of candidates who are candidates for redundancy are that
>
> (a) "It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted" (per Browne-Wilkinson J in *Williams v Compair Maxam Limited [1982] IRLR 83*);
>
> (b) "…the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn" (per Judge Reid QC in *Hendy Banks City Print Limited v Fairbrother and Others* (*UKEAT/0691/04/TM*);
>
> (c) "There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to

determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem" (per Mummery J in *Taymech v Ryan* EAT/663/94);

(d) the Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has "*genuinely applied*" his mind to the issue of who should be in the pool for consideration for redundancy; and that

(e) even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it."

**Conclusions**

Preliminary – contractual base

60. Before turning to the issues, I address two points of disagreement between the parties, in case it is considered to be of relevance to the issues themselves.

61. The claimant believes that his base was moved away from Fazakerley in breach of contract. It was not. His contractual base remained at the Fazakerley site throughout. He continued to use paid working time to travel from Fazakerley to the place where he was actually carrying out his work. He was provided with a vehicle to use to get him from Fazakerley to the Chester area.

62. The claimant also believes that his redeployment to the 620 Severn Trent work from the United Utilities 253 work was in breach of his contract. That was not a breach of contract either. The contract of employment left it to the respondent to decide what workstream he should work under. The terms of the contract relating to his work location and work base simply meant that his paid working hours started when he arrived at Fazakerley and that he would be given the means to travel to the place where he did his work.

Reason for dismissal

63. The sole or principal reason for the claimant's dismissal was the reason in Mr McLaughlin's mind. His reason was that the requirements of the respondent's business for employees to do the work of grab driving had ceased or diminished. If it is important to include a geographical component to Mr McLaughlin's thinking (see section 139(1)(b)(ii) of ERA), I would find that he believed that the requirements of the business for employees to do grab driving in the North West had diminished, and had ceased in the location of the 620 Severn Trent work. That was why the claimant was dismissed. That reason falls within the statutory definition of redundancy.

Reasonableness

64. What I now have to do is decide whether the respondent acted reasonably or unreasonably in treating that as a sufficient reason to dismiss.

65. In considering this question, I have borne in mind that the respondent is a large business. It could reasonably be expected to devote considerable administrative resources to consulting over redundancies and to looking for alternative roles for its employees who are at risk of redundancy.

66. The claimant argues that the respondent did not act reasonably, because it failed to inform him of the need to make redundancies sufficiently far in advance redundancy decision. The Severn Trent Water contract came to an end in the summer of 2020. The claimant was not told that he was going to be at risk of redundancy until 14 January 2021. That is a long delay. I must consider how it affected the reasonableness of the redundancy decision.

67. In my view, it was not unreasonable of the respondent to wait that long before informing the claimant he was at risk of redundancy. I have reached this conclusion for two reasons:

    67.1. The delay did not adversely affect the claimant's ability to participate in the consultation. The claimant frankly said in his evidence that, had be been told in the summer of 2020 that he was at risk or redundancy, the argument that he would have made at that time would have been the same as the argument that he in fact made in the consultation process in January 2021. He would have argued that he should not have been treated as aligned to the Severn Trent 620 work and rather should have been pooled alongside the employees who worked from the Fazakerley base. It was not any more difficult for him to make that argument in January 2021 than it was in August 2020.

    67.2. In any case, any adverse impact has to be balanced against the difficulties that employers were facing at that time when they had employees on furlough leave. If they placed furloughed employees at risk of redundancy too soon, they could be accused of making an unreasonable decision because the purpose of the furlough scheme was to buy employers and employees time to see if work would re-emerge.

68. The claimant's next argument is that he should have been transferred to Kings Construction under TUPE instead of being made redundant. The problem with this argument is that it bites on the wrong decision. The issue at hand is not the reasonableness in February 2020 of deciding to treat the claimant as having been assigned to Severn Trent 620. What I must determine is whether the respondent acted reasonably or unreasonably in January 2021 in deciding to treat redundancy as a sufficient reason for dismissal. By January 2021, the transfer was long in the past. Rightly or wrongly, it had been established between the respondent and Kings Construction who was transferring and who was not. The claimant had not transferred and the work in the meantime had gone down.

69. Another argument put forward by the claimant is that his dismissal was unfair because of the derogatory remarks made about him by Mr Hall in his e-mail of 7 January 2022. I do not see how it affects the reasonableness of the decision that Mr McLaughlin made. There is no evidence that Mr McLaughlin shared Mr Hall's view that nobody would work with the claimant, or was motivated by it in any way. The problem facing Mr McLaughlin was not in finding a second operative to work with the claimant. It was that there was not enough work for grab drivers, with or without a second operative.

70. The claimant argues that the pooling decision was wrong. He says he should have been pooled alongside the people whose contractual base was the Fazakerley site. I do not accept this argument. It was reasonably open to Mr McLaughlin to choose a different method of selection. The method Mr McLaughlin actually chose was to select employees for redundancy based on the workstream to which they were aligned. The respondent's reasons for that method were genuine and sensible. I cannot substitute my view.

71. As an alternative argument, the claimant says that, even if the respondent's pooling method would generally be reasonable, an exception should have been made in his particular case. His circumstances were exceptional, he argues, because of the way the TUPE situation had been handled.

72. He developed his argument in two ways:

    72.1. *Artificiality* - He had been duped into working on the 620 workstream as a means of sweetening the Code 253 sub-contracting exercise. It would therefore be completely artificial to regard him as aligned to the Severn Trent work when it was just a ruse to prevent him from being transferred under TUPE when the 253 work was sub-contracted to Kings Construction.

    72.2. *Legitimate expectation* - The second argument was that there should have been an exception made for him, because the claimant had genuinely believed when he went to work for Severn Trent that he was only working there as a short-term measure. I have labelled this argument "legitimate expectation".

73. I consider each argument in turn.

*Artificiality*

74. I do not think that it was unreasonable for Mr McLaughlin to regard the claimant as having been aligned to the Severn Trent workstream. The claimant had been doing that work for about three months before he was furloughed. If there had been any artificiality about the claimant's exclusion from the TUPE transfer, Mr McLaughlin did not know of it and could not reasonably have been expected to know of it.

*Legitimate expectation*

75. I have some sympathy with the claimant's argument based on legitimate expectation. He had found himself without work on the 253 workstream for reasons largely outside his control. His vehicle had been moved to Salford and his regular second operative did not want to work with him. He genuinely believed that the Severn Trent work would be temporary and that some Code 253 work would be found for him once a vehicle and second operative were available. That argument would be more attractive if Mr McLaughlin had had to make his decision at a different time. Had, for example, the 253 subcontract with Kings Construction come to an end by the time of the redundancy exercise, the requirements of fairness might have demanded that Mr McLaughlin widen the

pool for selection. There would be an argument to be made that the pool should have included employees who had returned from Kings Construction to the respondent. But the Kings subcontract had not ended at the time of the claimant's dismissal. It was not put to Mr McLaughlin that he should have seen the Kings insolvency coming. Mr McLaughlin did not realistically have the option of pooling the claimant alongside employees doing 253 work, because that work was still sub-contracted out.

76. That still left the possibility of the claimant being pooled, exceptionally, alongside employees who shared his *contractual base.* I do not think it was unreasonable of Mr McLaughlin to ignore that possibility. At the time of the redundancy exercise, there were only two other grab drivers whose contractual base was the Fazakerley site. Both of them worked on the 480 workstream (Connections). Mr Jones had moved from 251 to 480 by that time. Had the 480 grab drivers been pooled alongside the claimant, they would inevitably have complained of unfairness. The respondent would be departing from its usual method of selection. The 480 grab drivers would have been at risk of losing their jobs due to the loss of a different type of work in a different area for a different client.

77. Having considered the claimant's detailed arguments, I finally step back and remind myself of the statutory test. Having done so, I find that the respondent acted reasonably in treating the redundancy situation as a sufficient reason to dismiss the claimant. His dismissal was therefore fair.

Employment Judge Horne
3 January 2023

REASONS SENT TO THE PARTIES ON

10 January 2023

FOR THE TRIBUNAL OFFICE

**Public access to employment tribunal decisions**
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.