EMPLOYMENT TRIBUNALS

Claimant: Ms G Warren

Respondent: Cube Design Ltd

Heard at: **Bristol (via VHS)** **On: 21 and 22 November 2022**

Before: **Employment Judge Belton**

Representation
Claimant: In person
Respondent: Mr Mugliston, counsel

JUDGMENT

JUDGMENT having been sent to the parties on 2 December 2022 and written reasons having been requested by the Claimant on 30 November 2022 in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claim

1.1 By a Claim Form dated 5 February 2022, the Claimant brought complaints of unfair dismissal, holiday pay and unlawful deduction from wages.

2. The evidence

2.1 I heard oral evidence from the Claimant and, for the Respondent, I heard from Ms Lock-Smith, Mr Roldan and Mr Hudson.

2.2 The following documents were produced at the commencement of the hearing;

a) Hearing bundle comprising of 303 pages (including index);

b) Three Respondent's witness statements of 5, 4 and 4 pages respectively;

c) Claimant's witness statement comprising of 6 pages, 59

paragraphs;

d) Email between the parties dated 25 May 2020; and

e) Updated statement of remedy.

2.3 I also heard oral submissions from both parties.

3. The issues

3.1 The issues in this case were as follows:

Unfair dismissal

a. Was the Claimant dismissed?

b. What was the reason for dismissal? The Respondent asserts that it was a reason related to redundancy, which is a potentially fair reason for dismissal under s. 98 (2) of the Employment Rights Act 1996.

c. Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts? The Claimant contends that she was unfairly dismissed as no consultation took place, other Architectural Assistants were not made redundant, there was work available and new staff had been taken on.

d. Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant. The Respondent admits that the dismissal is procedurally unfair.

e. If it did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when? The Respondent relies upon Polkey to say that the Claimant would have been dismissed for redundancy in any event as she was in a stand-alone position and in a pool of one unqualified Architectural Assistants.

Unfair Dismissal Remedy

a. The Claimant does not wish to be reinstated and/or re-engaged

b. If there is a compensatory award, how much should it be? The Tribunal will decide:

i. What financial losses has the dismissal caused the Claimant?

ii. Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

iii. If not, for what period of loss should the Claimant be compensated?

iv. 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?

v. If so, should the Claimant's compensation be reduced? By how much?

Holiday Pay (Working Time Regulations 1998)

a. Did the Respondent breach the Working Time Regulations 1998? The Claimant contends that annual leave had been deducted in October 2020 which she was unaware of and that there was a delay in her holiday pay after termination of employment.

b. If so, what remedy is due? The Respondent contends that there was a contractual term entitling it to require staff to take holiday without any notice and that in any event all holiday pay had been paid and the Claimant has suffered no financial loss.

Unauthorised deductions (Part II of the Employment Rights Act 1996)

a. Did the Respondent make unauthorised deductions from the Claimant's wages which were properly payable and if so, how much was deducted? The Claimant contends that there was work available for her to do between April 2020 and September 2021 and therefore she should not have been furloughed and seeks the 20% difference in pay she would have earned had she worked, rather than been furloughed.

b. Was any deduction required or authorised by statute?

c. Was any deduction required or authorised by a written term of the contract?

d. Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?

e. Did the Claimant agree in writing to the deduction before it was made? The Respondent states that there was no unlawful deduction from wages as the Claimant consented to being placed on furlough and understood that this would be paid at 80% pay.

f. If there has been an unlawful deduction from wages, how much is the Claimant owed?

4. Findings of fact

4.1. I find the relevant findings of fact on the balance of probabilities. I attempted to restrict my findings to matters which were relevant to a determination of the issues. Page numbers of the bundle have been cited in this Judgment in square brackets.

4.2. The Claimant commenced employment on 5 January 2015 and her employment ended on 22 October 2021.

4.3. The Claimant was employed as an Architectural Assistant however held no qualifications.

4.4. The Claimant's contract of employment [25-30] contains a clause which states that:

> *"The Company may require you to take all or part of any outstanding holiday entitlement and reserves the right not to provide you with advance notice of this requirement".*

4.5. The Claimant commenced furlough in April 2020 [51] and consented to this and consented to receive 80% pay. The Claimant did not return to work for the Respondent from furlough.

4.6. During furlough, the Respondent recruited other Architectural Assistants who held qualifications.

4.7. During furlough, the Claimant undertook secondary employment (which she was permitted to do).

4.8. In September 2020, the Respondent emailed the Claimant and asked her *"are you ok for us to agree a week off in September"* [52]?

4.9. In October 2020 5 days annual leave was paid to the Claimant. The Claimant had not requested this nor had received notice of it [54].

4.10. On 27 September 2021, Ms Lock-Smith of the Respondent notified the Claimant in a telephone call that her role was redundant [64]. No previous consultation or discussions had taken place and the Claimant had not been informed of any risk of redundancy prior to this telephone call.

4.11. The Claimant admitted in oral evidence that during the telephone call Ms Lock-Smith explained that the industry was changing, there was a need for trained staff and that projects required qualified staff.

4.12. After the Claimant's termination of employment, the Respondent recruited other Architectural Assistants who were all qualified.

4.13. The Claimant was dismissed with one month's notice but was not required to work her notice period [65].

4.14. On 29 October 2021, the Claimant appealed against her redundancy [72-76].

4.15. A meeting was held on 8 November 2021 [79-85] and an outcome provided to the Claimant on 14 November 2021 [86-89].

4.16. In that outcome the Respondent confirmed that:

4.16.1. With hindsight it should have been made clear to the Claimant that her role was at risk as being in effect a "stand-alone" role of an unqualified Architectural Assistant and therefore a selection pool was not required.

4.16.2. The Claimant was entitled to be consulted.

4.16.3. That the Respondent did not follow due process.

4.16.4. That said, ultimately the redundancy situation was inevitable.

4.17. The Respondent also provided the Claimant with a four page redundancy business case dated 25 September 2021 documenting the decision to make the Claimant's role redundant [90-93]. In summary, the reasons were due to:

4.17.1. The profession having changed due to Covid;

4.17.2. Clients looking for qualified staff as part of the requirements to deliver projects;

4.17.3. The outcome of Covid and budget constraints necessitated more qualified architectural staff to undertake projects;

4.17.4. Two of the projects the Claimant had been working on pre-Covid now required qualified Architectural staff;

4.17.5. Without a qualification the Respondent had not been able to allocate roles into project resources;

4.17.6. This had been driven by client requirements, increase in market standards, the profession's regulatory body requirements and an escalating cost for professional indemnity insurance for non-trained staff and subsequently the impact that on risk profile; and

4.17.7. The order book had decreased significantly in addition to the volatile hospitality market.

4.18. I am not persuaded by the Claimant's argument that the four-page redundancy business case was post-dated [94]. If that were the case the document would have taken only 4 minutes to create. In any event, I heard oral evidence from all three of the Respondent's witnesses that discussions regarding the Claimant's position as the only unqualified Architectural Assistant, and the impact this had on the business, had taken place before she was informed that her position was being made redundant on 27 September 2021.

4.19. The Claimant admitted in evidence that she was the only non-qualified Architectural Assistant before the pandemic, at the time she was furloughed, throughout furlough and at the point of termination and during her notice period.

4.20. The Claimant provided evidence that she had been unable to complete her formal qualification (which commenced in 2015) in part because she was not working on projects with the criteria needed for her qualification to gain the experience [37-40].

4.21. The Claimant stated that she trained other staff (including Architectural Assistants) who had formal qualifications, colleagues who had been to University and/or those who had more experience than her. I believe this to be true. Other than her incomplete qualification, there was no negative reference by the Respondent of the Claimant's performance.

4.22. However, the Respondent had frequently urged the Claimant to complete her qualifications pre-Covid [41-50] but this unfortunately was not accomplished and by her own admission if the Claimant was not working on projects with the criteria needed to complete qualifications she was not therefore as qualified in practice or theory as her qualified Architectural Assistant colleagues who already held such qualifications.

4.23. Acas Early Conciliation was entered into on 29 November 2021 and ended on 7 January 2022.

4.24. For six months after termination, the Claimant sought new employment in her chosen profession but had been unsuccessful notwithstanding she had been shortlisted and invited to interviews and second interviews.

4.25. The Claimant obtained permanent full-time employment in May 2022.

5. The Law

Unfair Dismissal

5.1. An employee has the right under Section 94 Employment Rights Act 1996 not to be unfairly dismissed.

5.2. Where a complaint of unfair dismissal is made, it is for the employer to show that it dismissed the Claimant for a potentially fair reason i.e. one of those within Section 98(2) Employment Rights Act 1996, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position the Claimant held. If the Respondent fails to do that the dismissal will be unfair.

5.3. Dismissal for redundancy is a potentially fair reason falling within Section 98(2) Employment Rights Act 1996.

5.4. The definition of redundancy is set out in Section 139 Employment Rights Act 1996 as follows:

> *(1) For the purpose 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 –*
> *(a) the fact that his employer has ceased or intends to cease –*

(i) to carry on the business for the purposes of which the employee was employed by him, or
(ii) to carry on that business in the place where the employee was so employed, or
(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 ceased or diminished or are expected to cease or diminish.

5.5. In *Safeway Stores plc v Burrell* [1997] IRLR 200 the Employment Appeal Tribunal (EAT) indicated a 3-stage test for considering whether an employee is dismissed by reason of redundancy. A Tribunal must decide:

(a) whether the employee was dismissed?
(b) if so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?
(c) if so, was the dismissal of the employee caused wholly or mainly by the cessation or dimunition?

5.6. Once a potentially fair reason is established by the employer as the reason (or main reason) for dismissal, then Section 98(4) Employment Rights Act 1996 must be considered, the burden being neutral at this stage.

5.7. Section 98(4) Employment Rights Act 1996 provides as follows:

Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and
(b) shall be determined in accordance with equity and the substantial merits of the case.

5.8. In applying Section 98(4) Employment Rights Act 1996, the Tribunal must not substitute its own view of the matter for that of the employer but must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer. The range of reasonable responses test applies not only to the decision to dismiss but also to the procedure by which that decision is reached: *J Sainsbury plc v Hitt* 2003 ICR 111 CA; *Whitbread plc (t/a Whitbread Medway Inns) v Hall* 2001 ICR 669 CA.

Holiday pay

5.9. Regulation 15 of Working Time Regulations 1998 provides:

15.—(2) A worker's employer may require the worker—
(a) to take leave to which the worker is entitled under regulation 13(1);

on particular days, by giving notice to the worker in accordance with paragraph (3).
(3) A notice under paragraph (2)—
(a)may relate to all or part of the leave to which a worker is entitled in a leave year;
(b)shall specify the days on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; and
(c)shall be given to the employer or, as the case may be, the worker before the relevant date.
(4) The relevant date, for the purposes of paragraph (3), is the date—
(a)in the case of a notice under paragraph (1) or (2)(a), twice as many days in advance of the earliest day specified in the notice as the number of days or part-days to which the notice relates, and
(5) Any right or obligation under paragraphs (1) to (4) may be varied or excluded by a relevant agreement.

Unlawful deduction from wages

5.10. Section 13(1) of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction.

5.11. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to Section 23 of the Employment Rights Act 1996.

6. Conclusions

Unfair Dismissal

6.1. I find that the Claimant has been unfairly dismissed.

6.2. Although I find that the Respondent had a potentially fair reason to dismiss, that being one of redundancy, I find that it was procedurally unfair as admitted by the Respondent.

6.3. Despite apparently good intentions on behalf of the Respondent to decrease the stress on the Claimant the failure to consult clearly had the very opposite effect.

Holiday pay

6.4. I find that the Respondent has breached Regulation 15 of The Working Time Regulations 1998.

6.5. It is admitted that no notice of annual leave was issued by the Respondent to the Claimant prior to the leave in October 2020 that she was paid for.

6.6. The Respondent seeks to rely on the Claimant's contract of employment entitling it to require the Claimant to take annual leave without notice.

6.7. Although the Working Time Regulations 1998 can be varied by a relevant agreement the wording of the clause in the Claimant's contract, in particular, that the Company "may" require (emphasis added) does not amount to a satisfactory variation of the Working Time Regulations 1998.

6.8. In any event, the Respondent's actions in September 2020 in which it asked the Claimant if she would "agree" (emphasis added) to take a week off, were contrary to the contractual provision it now seeks to rely on.

6.9. I do not find any breach of the Working Time Regulations 1998 in that the Respondent took three months to eventually finalise the Claimant's holiday payments after termination of employment. The Claimant agrees that she has been paid all that was due. It is however not acceptable that a professional Respondent with outsourced payroll at the end of the pandemic took such a long period of time to finalize the matter when it had previously identified that it wanted to in fact reduce stress for the Claimant.

Furlough – unlawful deduction from wages

6.10. I find that the Claimant has not suffered any unlawful deduction from wages in respect of furlough on two grounds:

6.10.1. Firstly, that the Claimant had agreed to be placed on furlough and had consented to receive 80% pay.

6.10.2. Secondly, that for there to be an unlawful deduction, wages have to be properly payable in the first place. There is no contention that the Claimant was in fact working for the Respondent while on furlough and therefore wages at 100% were not properly payable as no work was done.

7. Remedy

7.1. The following orders were made:

Unfair dismissal

Basic award

7.2. By consent the Claimant agreed that this was nil as she had received her statutory redundancy payment from the Respondent.

Compensatory award

7.3. The Claimant claims compensation for loss of earnings, pension and loss of statutory rights.

Relevant law and conclusions - Polkey

7.4. As I have found that the Claimant was unfairly dismissed I should consider whether any adjustment should be made to the compensation on the grounds that that the Claimant would have been dismissed for redundancy in any event in accordance with the principles in *Polkey v AE Dayton Services Ltd* [1987] UKHL 8, *Software 2000 Ltd v Andrews* [2007] ICR 825; *W Devis & Sons Ltd v Atkins* [1977] 3 All ER 40; and *Crédit Agricole Corporate and Investment Bank v Wardle* [2011] IRLR 604.

7.5. The decision in *Polkey-v-AE Dayton Services* [1988] ICR 142 introduced an approach which requires a tribunal to reduce compensation if it finds that there was a possibility that the employee would still have been dismissed even if a fair procedure had been adopted. Compensation can be reduced to reflect the percentage chance of that possibility. Alternatively, a tribunal might conclude that a fair of procedure would have delayed the dismissal, in which case compensation can be tailored to reflect the likely delay. A tribunal had to consider whether a fair procedure would have made a difference, but also what that difference might have been, if any (*Singh-v-Glass Express Midlands Ltd* UKEAT/0071/18/DM).

7.6. It is for the employer to adduce relevant evidence on this issue, although a tribunal should have regards to any relevant evidence when making the assessment. A degree of uncertainty is inevitable, but there may well be circumstances when the nature of the evidence is such as to make a prediction so unreliable that it is unsafe to attempt to reconstruct what might have happened had a fair procedure been used. However, a tribunal should not be reluctant to undertake an examination of a *Polkey* issue simply because it involves some degree of speculation (*Software 2000 Ltd.-v-Andrews* [2007] ICR 825 and *Contract Bottling Ltd-v-Cave* [2014] UKEAT/0100/14).

7.7. The Respondent invites me to find that employment would have ended in any event on 22 October 2021 by reason of redundancy. Having heard evidence regarding the qualifications of the remaining Architectural Assistants (all of whom have professional qualifications) I find in favour of the Respondent.

7.8. I find that had the Respondent carried out the redundancy consultation process correctly and fairly it would have still been the Claimant, being the only non-qualified Architectural Assistant, that would have been selected for redundancy either because she would have been in a pool of one or because she would have scored the lowest in a wider pool as a result of her lack of qualifications. The Claimant was also the only person on furlough which was coming to an end.

7.9. I therefore find that there was a 100% probability that the Claimant's employment would have ended in any event on 22 October 2021. The Respondent had made its mind up on 25 September 2021 [90-93], the furlough scheme ceased on 30 September 2021 and the Claimant had been served with a one-month notice period.

7.10. On that basis I make no compensatory award.

7.11. Having found a 100% Polkey deduction there was no requirement for me to make any findings on the Respondent's proposition that the Claimant failed to mitigate her loss.

Relevant law and conclusions - ACAS Uplift

7.12. I am invited by the Claimant to make a 10% increase to compensation due to the Respondent's failure to follow a correct redundancy procedure under the ACAS Code of Practice.

7.13. Other than for the Acas Code on Disciplinary and Grievances to award an increase for unreasonable failures, I have no jurisdiction to make an equivalent award based on the Acas code for redundancies.

Legal fees

7.14. I have no jurisdiction to order reimbursement of legal fees incurred by the Claimant other than when a costs application is made in the appropriate way.

Working Time Regulations

7.15. Having found there to have been a breach of The Working Time Regulations 1998 and having made a declaration to that effect I must now consider Regulation 30 of The Working Time Regulations 1998 which states:

> *(3) Where an employment tribunal finds a complaint under paragraph (1)(a) well-founded, the tribunal—*
> *(a)shall make a declaration to that effect, and*
> *(b)may make an award of compensation to be paid by the employer to the worker.*
> *(4) The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to—*
> *(b)any loss sustained by the worker which is attributable to the matters complained of.*

7.16. On the basis that the Claimant has admitted all holiday pay has been paid, there is no financial loss evidenced by the Claimant to justify any award of compensation.

Employment Judge Belton
Date: 5 January 2023

REASONS SENT TO THE PARTIES ON
11th January 2023 by Miss J Hopes

FOR THE TRIBUNAL OFFICE