EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mrs A Czerwionka	Mario Cleaning Services Ltd

Heard at: **By CVP** **On: 3 April 2023**
Before: **Employment Judge P Morgan**

Appearances
For the Claimant: **In person**
For the Respondent: **Mr Markowski (Director)**

Polish interpreter (assisting both parties): Mr Walas

RESERVED JUDGMENT

1. The complaint of unfair dismissal is well-founded and succeeds.

2. No deduction will be made to the compensatory award under the principles in *Polkey v A E Dayton Services Ltd* [1988] A.C. 344.

3. The complaint for non-payment of statutory redundancy pay is well-founded and succeeds.

4. The amount of compensation to be awarded will be decided at a separate remedy hearing.

REASONS

Technology

1. This hearing was conducted by CVP (V - video). The parties did not object. A face to face hearing was not held because it was not practicable and all the issues could be dealt with by CVP.

Introduction

2. These were complaints of unfair dismissal, and for non-payment of statutory redundancy pay brought by the Claimant, Mrs Czerwionka, against her former

employer, Mario Cleaning Services Ltd. The Claimant represented herself, and the Respondent was represented by Mr Mariusz Markowski who is the sole director of the Respondent company. This hearing dealt only with liability and the question of whether the Tribunal considers that, if the Claimant was unfairly dismissed, there is a chance that she would have been fairly dismissed in any event, and if so whether the compensation awarded may be reduced accordingly (*Polkey v A E Dayton Services Ltd* [1988] A.C. 344).

3. On 22 November 2022 the Claimant brought proceedings against Mr Mariusz Markowski. On 13 January 2023, by the Tribunal's own initiative and having considered any representations made by the parties, Employment Judge Maidment ordered under Rule 34 that Mario Cleaning Services Ltd was to be substituted as the Respondent for Mr Mariusz Markowski. An application to adjourn was made by the Respondent on 31 March 2023 in reply to the directions of Employment Judge Davies dated 31 March 2023. The application was made on the basis that Mr Markowski was on holiday on the day of the hearing. This application was rejected by Employment Judge Davies on 31 March 2023.

4. There was no agreed file of documents or bundle available for the hearing. The parties did not comply with the orders contained within the case management order dated 12 December 2022, or the directions of Employment Judge Davies dated 31 March 2023. No witness statements were provided by either party. Notwithstanding this failure to provide witness statements or an agreed bundle of documents the Tribunal decided that a fair hearing was possible. During the initial case discussion it became clear to the Tribunal that it was unlikely that written witness statements would further assist the Tribunal, and that a fair and just hearing was best achieved by the parties giving evidence orally, expanding on their ET1 and ET3 forms in oral evidence with the assistance of the interpreter Mr Walas.

5. In the absence of witness statements the ET1 and ET3 forms were used as the witnesses' evidence in chief, and everybody had a copy. Applying Rule 2 and Rule 41 the Tribunal admitted a small number of additional documents by agreement during the course of the hearing, namely four text messages, and an email, sent between the Claimant and Mr Markowski. Since the text messages were written in Polish, these were read aloud in oral evidence by the parties, which was then translated by the Interpreter Mr Walas. This translation was agreed by the parties. The determination of this case does not turn on the exact wording of the messages. The Tribunal heard evidence from the Claimant and from Mr Markowski for the Respondent. Given delays caused by initial problems with the CVP connection (which were then resolved), the incorrect language interpreter (Greek) initially attending the hearing, and the need to adjourn the hearing to source a Polish interpreter at the start of the hearing, judgment was reserved.

The Claims and Issues

6. The issues for the Tribunal to determine were:

Unfair Dismissal

6.1 What was the reason or principal reason for the Claimant's dismissal? The Respondent says the reason was redundancy.
6.2 If the reason was redundancy, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant. The Tribunal will consider, in particular, whether:
6.2.1 The Respondent adequately warned and consulted the claimant;
6.2.2 The Respondent adopted a reasonable selection decision, including its approach to a selection pool;
6.2.3 The Respondent took reasonable steps to find the claimant suitable alternative employment;
6.2.4 Dismissal was within the range of reasonable responses.

Remedy

6.3 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?
6.4 If so, should the Claimant's compensation be reduced? By how much?
6.5 When these proceedings were begun, was the Respondent in breach of its duty to give the Claimant a written statement of employment particulars or of a change to those particulars?

Agreed Issues

7. The Respondent accepts that the Claimant was an employee of the Respondent within the meaning of Section 230 of the Employment Rights Act 1996. The distinction between an employee, worker, and independent contractor was explained to the parties, along with the test in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 1 All ER 433. The Respondent accepts that the Claimant had a contract of service with the Respondent, (albeit not in writing), and that there was control, a requirement for personal performance, and mutuality of obligation between the parties, in that the Respondent was obliged to provide work and that the Claimant was obliged to do it. Notwithstanding the ET3 the Respondent confirmed orally that the verbal agreement was that the Claimant would work for 16 hours a week. She was also provided with holiday pay.

8. The Respondent further accepts that the Claimant was dismissed, and that since it does not dispute that the Claimant was an employee with two or more years' service, and since the grounds for dismissal were redundancy, that statutory redundancy pay under Part XI of the Employment Rights Act 1996 is due. The Claimant was paid her wages and holiday entitlement. In this case the dispute relates to the amount of redundancy pay due. The Respondent also accepts that there was no written statement of employment particulars. The dispute concerns the fairness of the dismissal, and also the heads of damages, and level of damages claimed. In particular the Respondent disputes the amount of money claimed by the Claimant. Mr Markowski is to be commended for his clarity and honesty on these points.

Overseas Evidence

9. During submissions, and prior to giving evidence Mr Markowski informed the Tribunal that he was currently on holiday in Poland. Following the Presidential Guidance on Taking Oral Evidence by Video or Telephone of Persons Located Abroad (2022), the hearing was briefly adjourned to ascertain the position of the Polish Government on giving evidence abroad. Since the Polish Government has granted permission the hearing was continued.

Applications

10. At the start of the hearing the Respondent made an application to call an additional five witnesses. This was the first time that the application was made, and also the first notice to the Tribunal or the Claimant that the Respondent asserted that further witnesses were required. Mr Markowski stated that the witnesses would all confirm the Claimant's duties, the date of her dismissal, and that there was not enough work. He confirmed that the witnesses would all make the same points.

11. The Respondent said that these witnesses were necessary in order for the case to be determined fairly. Since the Respondent alleged that the witnesses would make the same points, given the overriding objective in Rule 2, the Respondent was asked if a single witness would suffice to deal with these points. The Respondent accepted this, and the application was amended to adduce one additional witness. The Claimant did not object. Given the materiality of the downturn in work to the Respondent's defence to the claim, and considering the overriding objective in Rule 2, the Respondent's application to adduce one additional witness to deal with these points was granted.

12. The Respondent then made an application to adjourn the hearing on the basis that he was unable to call any witnesses today, as the witnesses were in the United Kingdom, and he was on holiday in Poland. Mr Markowski informed the Tribunal that he did not know if the witness would be at work or home, and thus available. He informed the Tribunal that he had not informed any witness in advance that they may need to attend to give evidence today. He explained that he had not informed them in advance of the hearing as the hearing was a new situation for him, and he had no idea previously what it looked like. A short adjournment was granted to enable the Respondent to phone one of the five potential witnesses to arrange for one of them to give evidence. The Respondent made contact with a witness, and confirmed that they would be available to give evidence.

13. When the time came for the Respondent's additional witness to give evidence, Mr Markowski informed the Tribunal that the witness was no longer available, as their work shift had started. Since the Tribunal had already heard evidence on the downturn in work, the Respondent was happy to proceed without calling this additional witness. The application to adjourn was withdrawn.

14. Shortly before the hearing the Claimant sent to the Tribunal a screenshot of a handwritten letter from a proposed additional witness, a former colleague and friend of the Claimant, written in Polish. This was not sent to the Respondent. The Claimant made an application to call the author of the letter as an additional witness. The Claimant informed the Tribunal that the witness would not be able to give evidence via CVP, but might be able to join over the phone. The Tribunal was informed that the witness would give evidence to the effect that the Claimant was always diligently ready for work, and always turned up to work. The Respondent submitted that it did not dispute that the Claimant was ready for work or alleged that she refused work. The Respondent submitted that if the witness was to speak to the Claimant's ability that it never denied that the Claimant was a good worker, and always maintained that she was a good worker.

15. The Claimant's application was refused. It would not be proportionate in accordance with the overriding objective (Rule 2) to accept this application. This is since the Respondent accepted that the Claimant was an employee not a worker, further, notwithstanding the Respondent's email of the 30 June 2022, the grounds for dismissal that the Respondent was relying on was redundancy, and not the Claimant's conduct or ability. This witness' evidence would not address the issues material to the case of whether there was a redundancy situation, the selection and consultation process, and the fairness of the dismissal. Additionally given the time limitations admitting this witness would also require the hearing to be adjourned.

The Facts

16. The Respondent is a cleaning company in York. Its sole director is Mr M Markowski. As of April 2023 it employs five employees. All of its employees, both now, and at the material time are cleaners. Its business concerns the cleaning of short term rental apartments in York. Its work is particularly dependant on the demand for holiday lettings in York.

17. All of the cleaners employed by the Respondent are on the same contract (although their hours may differ), and whilst they may work in different parts of the city, the specifics of their employment are the same. The Claimant was employed by the Respondent as a cleaner from 1 December 2019 to 30 June 2022. The Claimant's role included cleaning apartments, driving to pick up her colleagues, and picking up equipment from the store. She would often work in a team of 2-3 other cleaners, and in carrying out their work they would move from one apartment to the next. The Claimant purchased a car due to the Respondent's need for drivers. The Respondent paid for petrol for the car and also for the car's repairs, but subsequently provided the Claimant with a company car so as to control maintenance costs. The Claimant was not provided with a written statement of employment particulars at any stage.

18. During May 2022 the Claimant and Mr Markowski had a conversation in relation to a holiday request made by the Claimant. The Claimant had already used up her holiday entitlement at this point in time. The parties have slightly different

understandings of this conversation. Mr Markowski states that during this conversation the Claimant requested six weeks' leave during the summer to care for her ill mother in Poland. Mr Markowski states that he rejected this request as it would be unfair to other employees. Further, the Claimant proposed someone might replace her or cover her work for this period, but Mr Markowski disagreed with this suggestion as he would not be able to register them as an employee, and it would be seasonal work. He alleges that he informed the Claimant that if she went on holiday that there might not be work on her return. He states that the Claimant intimated that if this were the case she would find another job.

19. The Claimant states that she met with Mr Markowski in the warehouse and explained to him that her mother was unwell, and requested unpaid holiday. Mr Markowski informed her that this would be difficult, and asked her to send him an email with the dates she would like to take as holiday. She stated in cross-examination that the request was "more like a question, if I could take 6 weeks holiday (unpaid) as my siblings and parent unwell". She also states that the "[h]oliday was going to be in August was going to be a month, not six weeks." The Claimant did not send an email to Mr Markowski as she came to the conclusion that it would be better to stay in the United Kingdom, and her aunt in Poland would be able to look after her mother.

20. Recall of a short conversation almost a year ago is difficult for parties, and recollections may differ. However, I am satisfied on the balance of probabilities that a conversation took place in relation to six weeks' unpaid leave. The Claimant herself referred to six weeks at one point in giving evidence. I am also satisfied that whilst the Claimant intended it as an in-principle question, Mr Markowski interpreted it as an actual request. I am also satisfied on the balance of probabilities that Mr Markowski intimated that the request would be likely to be refused, but that exact dates should be sent in an email. I am not satisfied that the Claimant threatened to work elsewhere if the request was refused, but I am satisfied on the balance of probabilities that the Claimant intimated dissatisfaction with Mr Markowski's suggestion that taking leave during this period would be difficult. In reaching this conclusion I took into account the fact that the Claimant is able to recall the exact location of the conversation, and that it is more likely than not that an employer would wish to know the requested holiday dates.

21. The Respondent's business is dependent on guests coming to York and renting apartments, and it is common for the Respondent to gain and lose work. During a period in 2023 Mr Markowski states that the Respondent nearly had to shut up business due to a downturn. In June 2022 the Respondent alleges that, although the summer time is usually busy since York is a tourist town, there was little work. After a conversation with a major supplier he discovered that there was not enough work. Mr Markowski states that the Respondent lost a significant number of apartments as the landlords decided to rent them out for a longer period of time. However, several months later the Respondent gained some more work. He states that "this is specifics of this kind of business, you gain/lose work". I am satisfied on the balance of probabilities that there was a downturn in the Respondent's business in June 2022.

22. Mr Markowski and the Claimant give different evidence on the number of employees at the time of the Claimant's dismissal. Mr Markowski states that whilst he is not 100% sure, his recollection is that there were eight employees (including the Claimant) at the time, and after her dismissal seven. Two of these employees left the Respondent's employment soon after the Claimant, but they were not dismissed. The Respondent subsequently employed two seasonal workers later in the summer. The Claimant states that there were five other employees at the time, but gives the names of six fellow employees at the time (P, E, M, D, K, and 'new' K). On the balance of probabilities I find that there were seven employees at the time, and six after the Claimant's dismissal. Some of these employees had worked for the Respondent for less than two years. Two were recent employees, and at least one (M) was a recent recruit still on her probation period.

23. On 12 June 2022 Mr Markowski sent the Claimant the following message: "Hi, I'm sorry but beginning on Monday will have a slight downturn and I might not have enough work. So if you have a possibility to work more hours with your other employment please do." The Claimant replied "OK". This was not intended by the Respondent to be a dismissal as Mr Markowski believed that he might have work for her in the near future. Prior to 12 June 2022 the Claimant was not aware of the downturn in work. She also did not understand the message to mean that her employment was over. Instead she understood the message to mean that there was a slight downturn, and was happy as she would get a day or three off work. After this point she was available to work, and waiting for a message to return to work, but never received one. No other communication was received from the Respondent except for the messages of the 28 June and 30 June, and the email of 30 June 2022 (see below).

24. At some point between 12-30 June 2022 due to the downturn in work Mr Markowski decided that somebody had to be dismissed and decided to make the Claimant redundant. He did not consult with the Claimant about redundancy, but did consult with two or three other employees about the downturn, that there might not be enough work in the future to employ them all, and the need to reduce their hours due to the downturn in business.

25. The Respondent dismissed the Claimant. It did not dismiss any other employee. The reason for the Claimant's dismissal was redundancy (see below). In selecting for redundancy, the main reason the Claimant was selected was that Mr Markowski understood that she was planning to go to Poland for six weeks. In the initial case discussion at the start of the hearing Mr Markowski had said that he also took into account the fact that she only worked 16 hours a week for the Respondent, but this point was not restated in Mr Markowski's evidence. Mr Markowski stated: "If she didn't ask for 6 weeks holiday, I'm pretty sure we would be co-operating today". When questioned if he would have selected the Claimant for redundancy if she had not requested six weeks' holiday, he stated "Not entirely, during time, as really had a small amount of work. But we could have found a mutual solution. I can't afford to send someone for 6 weeks holiday." Mr Markowski chose not to instead dismiss one of two recently employed employees since they would be available to work during this period. He considered their recent employment irrelevant since he considered that the Claimant was going to Poland. He did not consider any alternatives to

redundancy due to his perception that the Claimant was planning to go to Poland for 6 weeks. He considered that she would probably leave the Respondent's employment anyway following the refusal of leave. He also considered that it was impossible to find alternative work for the Claimant, because there was a shortage of guests, and the company only deals with cleaning.

26. From 12 June – 30 June 2022 the communications between the Claimant and Mr Markowski were solely by message and email. The Claimant messaged Mr Markowski on 28 June, stating: "I have checked the post the P60 did not arrive. I care for time so please if you could sort this out for me or please send this to the accountant if this is not a problem". Mr Markowski replied: "I've sent it to WhatsApp". On 30 June 2022 Mr Markowski telephoned the Claimant to inform her of her redundancy, but was not able to get through, and he then messaged the Claimant the following message: "Ola [a diminutive of Alexandra] I'm sorry trying to contact, but you are not answering. I'm afraid that we will have to separate. If you find a spare moment please bring back the spare key to the warehouse."

27. As a result of a conversation with his accountant Mr Markowski decided to formalise the dismissal, and also sent an email dated 30 June 2023 (in English) explaining his decision. This email did not mention the downturn in work, or redundancy, instead it referred to the Claimant's lack of availability, poor communication, and low quality and efficiency of work, which required colleagues to correct mistakes. However, the Respondent now accepts that the Claimant was a good worker and states that it has always maintained that she was a good worker, although on occasion work had to be rectified. Mr Markowski states that the failure of the letter to set out the downturn was a mistake.

28. The Claimant states that no-one complained about her performance at work prior to the email of 30 June 2022. She accepts that she occasionally needed to rectify some minor mistakes, but that others did too, and everyone can make minor mistakes. With rectification the rule was that the person who had a driving licence (which she did) had to return to the apartment to rectify the mistakes (not simply the person who had made mistakes). She also states that her communication was not poor, and she responded to each of Mr Markowski's messages which related to work.

29. This Tribunal finds that on balance that there were no prior complaints with the Claimant's work, and that she effectively discharged her duties. It finds that she did not communicate poorly. Each message disclosed to this Tribunal concerning work shows a reply. This conclusion is also supported by the Respondent's retraction of its allegations, and subsequent acceptance that the Claimant was a good worker. Mr Markowski stated that he would like to highlight that he was "very happy with her performance", but that her dismissal was due to the situation on the market.

30. The Claimant sent a sick note to the Respondent on 30 June 2022, which was received by the Respondent after the Respondent had sent the dismissal message. In making the decision to dismiss the Respondent was unaware that the Claimant had injured her hip. No report or complaint of this injury was received by the Respondent prior to receiving the sick note. On the balance of

probabilities I find that this factor was not considered in making the decision to dismiss the Claimant. The Tribunal therefore holds that the reason for the Claimant's dismissal was redundancy. The Tribunal finds on the balance of probabilities that she was selected for redundancy solely on the basis of her previous holiday request.

Legal Principles

31. So far as unfair dismissal is concerned, Section 98 of the Employment Rights Act 1996 provides, so far as material, as follows:

"98 General

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

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

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

(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 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."

32. Redundancy is a potentially fair reason for dismissal. It is defined within Section 139(1) of the Employment Rights Act 1996. It provides, so far as is material, as follows:

"139 Redundancy.

(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—

(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.

33. For a dismissal to be by reason of redundancy a redundancy situation must exist (for the relevant test see *Safeway Stores plc v Burrell* [1997] ICR 523, EAT, and *Murray and anor v Foyle Meats Ltd* [1999] ICR 827, HL). However, if the redundancy situation is genuine, and the decision to dismiss is genuinely based on that of redundancy the Tribunal is not in a position to question the wisdom of the decision to make redundancies itself (*Hollister v National Farmers' Union* [1979] ICR 542, CA, and *James W Cook and Co (Wivenhoe) Ltd v Tipper and ors* [1990] ICR 716, CA).

34. Where a Respondent fails to show a potentially fair reason for dismissal, this leads to a finding of unfair dismissal without the need for any consideration of reasonableness. If the Respondent establishes that the Claimant's dismissal was due to redundancy the Tribunal must consider the issue of the reasonableness of the Claimant's dismissal. The burden of proof in assessing the fairness of a redundancy dismissal is neutral. The Tribunal assesses the fairness following Section 98(4). In this assessment it is not the place of the Tribunal to substitute its opinion for that of the employer. The question is not whether the Respondent's actions were correct. An employer is provided with considerable managerial discretion in the running of its business. The employer's decision to dismiss the Claimant, and the process followed, is thus assessed by whether it falls within the band of reasonable responses (*Iceland Frozen Foods v Jones* [1982] IRLR 439).

35. In redundancy cases a Tribunal will have regard to the guidelines in *Williams v Compare Maxam Ltd* [1982] IRLR 83, EAT. In *Williams* the Employment Appeal Tribunal set out four factors that a reasonable employer might be expected to consider: a. Whether the selection criteria were objectively chosen and fairly applied. b. Whether the employees were warned and consulted about the redundancy. c. If there was a Union, whether the Union's view was sought. d. Whether any alternative work was available. Where an employer departs from

these guidelines this does automatically mean that the dismissal is unfair. However, a Tribunal in dealing with a redundancy unfair dismissal case must consider the issues of selection, consultation, and alternative employment (*Langstone v Cranfield University* [1998] IRLR 172, EAT).

36. In carrying out a redundancy an employer should first identify the pool of employees from which those who are to be made redundant are drawn, and then apply the chosen selection criteria to this pool. The choice of pool is assessed by whether it falls within the range of reasonable responses (*Kvaerner Oil and Gas Limited v Parker* UK EAT 0444/02). Whilst employers are given a wide discretion in choosing the selection criteria, the selection criteria should not be unduly vague or ambiguous (*Odhams-Sun Printers Ltd v Hampton and ors* EAT 776/86, *Graham v ABF Ltd* [1986] IRLR 90, EAT), and should be objective (*Williams and ors v Compair Maxam Ltd* [1982] ICR 156, EAT), but can involve exercises of personal judgment (*Mitchells of Lancaster (Brewers) Ltd v Tattersall* EAT 0605/11; *Swinburne and Jackson LLP v Simpson* EAT 0551/12).

37. In assessing the fairness of the dismissal for redundancy, following the decision of the House of Lords in *Polkey v A E Dayton Services Ltd* [1988] A.C. 344, the Tribunal must also consider procedural fairness. *Polkey* establishes that a failure to follow proper procedure is likely to make the dismissal unfair, unless the employer could reasonably have concluded that to do so was "utterly useless" or "futile". Lord Bridge at P364 stated that: "in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation." Unless excluded by agreement between the parties the Tribunal must consider the issues of fair selection, fair consultation, and alternative employment (*Osinuga v BPP University Ltd Legal Team* [2022] EAT 53; *Langston v Cranfield University* [1998] IRLR 172, EAT). Where there has been a failure to consult the Tribunal must consider whether an employer acting reasonably, could have failed to consult in the circumstances of the case (*Duffy v Yeomans and Partners Ltd* [1995] ICR 1, CA).

38. The Tribunal must also consider the summary of the law on consultation provided by the Employment Appeal Tribunal in *Mugford v Midland Bank plc* [1997] ICR 399, per HHJ Peter Clark, at 406-7:

"Having considered the authorities, we would summarise the position as follows.

(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 industrial 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 industrial 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."

39. Consultation must also be meaningful (*Gwynedd Council v Barratt and anor* EAT 0206/18; *Morgan v Welsh Rugby Union* [2011] IRLR 376, EAT). Where individual consultation is required, the question of whether a fair and proper consultation has taken place is a question of fact. Guidance may be found in *Rowell v Hubbard Group Services Ltd* [1995] IRLR 195, EAT: consultation must be fair and genuine, and normally should include a fair and proper opportunity for the employee to fully understand the matters, and to express their view on it, (see also *Rowall v Hubbard Group Services Ltd* [1998] IRLR 195). The Respondent must also consider the views properly and genuinely (*R v British Coal Corporation and Secretary of State for Trade and Industry, ex parte Price* [1994] IRLR 72). The EAT in *John Brown Engineering Ltd v Brown and ors* [1997] IRLR 90, considered that consultation should be a fair process, which provides the individual employee an opportunity to contest their selection. The employee should also be provided with adequate information to be able to have the opportunity to challenge their selection for redundancy (*Pinewood Repro Ltd t/a County Print v Page* [2011] ICR 508, EAT).

40. In the case of an unfair redundancy dismissal where the Tribunal considers that there is a chance that the employee would have been dismissed in any event, then the Tribunal may reduce the compensation awarded accordingly (*Polkey v A E Dayton Services Ltd* [1988] A.C. 344). In considering this question the Tribunal takes into consideration *Software 2000 Ltd v Andrews and ors* [2007] ICR 825, EAT, and *George v London Borough of Brent* EAT 0233/15.

41. So far as the claim for statutory redundancy pay is concerned, for this claim (unlike the claim for unfair dismissal) there is a presumption of redundancy, Section 163 of the Employment Rights Act 1996 provides, so far as material, as follows:

"163 References to employment tribunals.

(1) Any question arising under this Part as to—

(a) the right of an employee to a redundancy payment, or

(b) the amount of a redundancy payment,

shall be referred to and determined by an employment tribunal.

(2) For the purposes of any such reference, an employee who has been dismissed by his employer shall, unless the contrary is proved, be presumed to have been so dismissed by reason of redundancy."

42. To resist the claim for redundancy payment the Respondent must prove on the balance of probabilities that the dismissal was not for reasons of redundancy. The Tribunal will consider all the evidence to decide if this presumption has been rebutted (*Greater Glasgow Health Board v Lamont* EATS 0019/12; *Willcox and anor v Hastings and anor* [1987] IRLR 298, CA).

Application of the Law to the Facts

43. Applying those principles to the findings of fact above, my conclusions on the issues are as follows.

44. There was a genuine redundancy situation. There was a downturn in the Respondent's work, and the requirements of the Respondent's business for employees to carry out cleaning work had diminished. The Tribunal does not question the Respondent's wisdom in its commercial decision to make redundancies. The reason for the Claimant's dismissal is a question of fact. For the reasons set out in the findings of fact above, I find that the reason for the Claimant's dismissal was that of redundancy: the set of facts operating on Mr Markowski's mind when deciding to dismiss the Claimant was redundancy. This is notwithstanding the contents of the email of 30 June 2022. The Respondent has therefore established a potentially fair reason for dismissal.

45. The next question is whether the Respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant. I find that it did not. It follows that the Claimant's dismissal was unfair. In making this decision I take into account that the Respondent is a small business, with limited administrative resources, and which is not expected to reach the same standards as a large, well-resourced business. However, I find that the redundancy process in this case was outside the range of what a reasonable employer in these circumstances might have done.

46. The Respondent's identification of the pool of employees, that of all of its cleaning employees, was within the range of reasonable responses. The Respondent adopted a single selection criterion to select the Claimant from the pool, that of the Claimant's request for holiday. Although employers are provided with a broad discretion in choosing their selection criteria, and these criteria can include exercises of personal judgment, this criterion was not objective – (for instance availability to work over the busy summer months), and was instead personal to the Claimant – her request for holiday, combined with the Respondent's subjective belief that the Claimant might go on holiday anyway, notwithstanding that the request for leave had not been granted.

47. Whilst the Respondent sent the Claimant a message stating that there was currently a lack of work the Respondent did not warn the Claimant of redundancies, nor did it engage in any consultation with the Claimant. Whilst the Respondent consulted with two other employees, it did not consult the Claimant. Of particular note the Claimant did not have an opportunity to address the selection criteria, and their application to her. The sole criterion applied was based on the Claimant's request for leave. Consultation would have provided the

Claimant with the opportunity to challenge the selection criteria, and the application of the selection criteria to her, explain that she was not in fact taking leave, and would in fact be remaining in the UK, and would be available to work. The Claimant was also not in a position to be able to suggest alternatives, either to redundancies, or alternative selection criteria – the Claimant suggested that the criteria should have been based on length of service. The letter of dismissal also did not include any reference to the redundancy situation, and contained other reasons, which the Respondent does not rely on. This meant that the Claimant was in no meaningful position to challenge the decision at any stage. There was no meaningful consultation.

48. There is no evidence to suggest that this was a situation in which consultation would have been futile. In its closing submissions the Respondent expressly acknowledged that in future in such situations it should have had a conversation with the Claimant prior to dismissal. Mr Markowski also accepts that without the holiday request, a "mutual solution" may have been found, and that the Respondent is "pretty sure" that the parties "would be co-operating today". Consultation would have provided an opportunity for the Claimant to address the Respondent's concerns about her availability, and that she would be available to work. The Tribunal therefore holds that this is not a case in which it would be reasonable to consider consultation futile. The failure to consult the Claimant was outside the range of what a reasonable employer in these circumstances might have done.

49. The Respondent nevertheless took reasonable steps to minimise redundancies, for instance by reducing the hours of other employees. The Respondent also took reasonable steps to consider if alternative work was available. The Respondent is a cleaning company, specialising in cleaning short term lets, the Respondent reasonably considered that it was impossible to find alternative work for the Claimant, because there was a shortage of guests, and there was no alternative work carried out by the Respondent.

50. Nevertheless, the Claimant's dismissal was outside the range of what was reasonable. No reasonable employer in the circumstances would select an employee for redundancy based on the flawed criterion used, and also fail to carry out any meaningful consultation with the Claimant, especially when the Respondent did consult with other employees.

51. Since the Tribunal holds that the Claimant was unfairly dismissed, it must now consider if there is a chance that the employee would have been fairly dismissed in any event. There was a downturn in work, and the Respondent reasonably made a commercial decision to make an employee redundant. The Tribunal does not question this decision. At the time the decision was made there were seven employees. However, two of these seven were recent employees, and one was still on their probation period. On the balance of probabilities the Tribunal holds that there was zero chance that the Claimant would have been fairly dismissed. The Tribunal therefore holds that no deduction should be made. This follows from the Respondent's admissions in relation to the fact that if no holiday request had been made the Claimant would still be working for the Respondent. Further, if the Claimant had been given the opportunity to explain

that she was not going on holiday, and that her aunt was looking after her mother on the balance of probabilities the Claimant herself would not have been dismissed. Additionally, as the Claimant was a longer serving employee, who was accepted by the Respondent to be a good worker, Mr Markowski stating that he was "very happy with her performance", there is no suggestion that if other criteria had been applied to the redundancy selection that the Claimant herself would have been selected for redundancy, instead of other employees. No deduction will therefore be made to the compensatory award under the principles in *Polkey v A E Dayton Services Ltd* [1988] A.C. 344.

52. So far as the claim for statutory redundancy pay is concerned, the Tribunal holds that the Claimant's dismissal was for reasons of redundancy. The Respondent accepts that the dismissal was for reasons of redundancy. However, the Claimant is unable to recover both the statutory redundancy payment and also the full basic award for unfair dismissal. Following Section 122(4) of the Employment Rights Act 1996 the basic award for unfair dismissal is reduced by the amount of any redundancy payment awarded by the Tribunal in respect of the same dismissal. This issue will be considered during the remedies hearing.

53. There is no dispute that when the proceedings were begun, the Respondent was in breach of its duty to give the Claimant a written statement of employment particulars.

Issues for the Remedies Hearing

54. The following issues will be considered at the forthcoming remedies hearing:

Remedy

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

54.1.1 What financial losses has the dismissal caused the Claimant?

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

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

54.1.4 Does the statutory cap of fifty-two weeks' pay or £93,878 apply?

54.2 What basic award is payable to the Claimant, if any?

54.3 How much should the Claimant be awarded?

54.4 Since the Respondent was in breach of its duty to give the Claimant a written statement of employment particulars or of a change to those particulars:

54.4.1 are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under

Section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.

54.4.2 Would it be just and equitable to award four weeks' pay?

54.5 What statutory redundancy payment is payable to the Claimant, if any?

55. Since the basic award for unfair dismissal and the statutory redundancy payment compensate for the same loss, the Claimant will not be awarded both. The basic award for unfair dismissal is reduced by the amount of any redundancy payment awarded by the Tribunal in respect of the same dismissal.

56. If the Claimant and Respondent want to agree how much compensation should be paid to the Claimant rather than coming to a remedy hearing, they can do so and must notify the Tribunal.

Employment Judge P Morgan
8 May 2023