EMPLOYMENT TRIBUNALS

Claimant: Mr M Gibson

Respondent: Delice de France Limited

Heard at: **Watford (by CVP)**

On: **5,7 October 2022 and 27 March 2023**

Before: EJ Price

Representation
Claimant: In person
Respondent: Mr Uduje, Counsel

JUDGMENT

1. The claimant's claim for holiday pay is agreed in the sum of £654.
2. The claimant's claim for redundancy pay is not well founded.
3. The claimant claim for unlawful deduction from wages is not well founded.
4. The claimant's claim for a protective award under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 is not well founded.
5. The claimant's claim for breach of contract is dismissed.

REASONS

Introduction and issues

1. There is no dispute that the claimant was employed by the respondent, a baked goods sale and distribution company working nationally, from 11 July 2016 until 29 December 2020. From August 2018 until at least the 18 May 2020 it is agreed his job title was National Account Executive. ACAS early conciliation started on 15

February 2021 and ended on 23 March 2021. The claim form was presented on 14 April 2021.

2. The claims before the Employment Tribunal are:

   2.1. Failure to pay redundancy pay;
   2.2. Failure to pay holiday pay;
   2.3. Protective award; and
   2.4. Breach of contract (notice pay)/unlawful deduction from wages.

3. The issues on liability were defined at a case management hearing on 15 May 2022 as follows:

The Complaints

1. **Time limits**

   1.1 The Respondent accepts that the claim for unlawful deduction from wages and breach of contract are in time.

   1.2 Was the claim for a protective award brought with before the end of the period of three months beginning with the date on which the last of the dismissals to which the complaint arises takes effect (in this case the Claimant's dismissal is said to be the last and have taken effect on 29.12.20)?

   1.3 Did the Claimant, before the end of the period of six months beginning with the date on which the Claimant's notice period expired make a claim for the payment by notice in writing to his employer or refer to the tribunal his right to a redundancy payment in the employment tribunal in accordance with section 164 (1) of ERA 1996?

   1.4 Or did the Clamant within the following six months make a claim for the payment in writing to his employer or refer to the tribunal the question as to his right to a redundancy payment in accordance with section 164 (2) of ERA 1996?

   1.5 If so, does it appear to the tribunal to be just and equitable for the employee to receive a redundancy payment in accordance with section 164 (2) of ERA 1996?

2. **Redundancy payment**

   2.1 Was the Claimant dismissed by reason of redundancy? within the meaning of section 135 of the Employment Rights Act 1996?

2.2 Was the Claimant renewed or reengaged under a new contract of employment in pursuance of an offer made before the end of his employment under the previous contract in accordance with section 138 of the Employment Rights Act 1996 ('ERA 1996')?

2.3 Did the Claimant unreasonably refuse an offer of renewal or re-engagement where the terms of the new contract as to the capacity and place in which the employee would be employed and the other terms and conditions of his employment would not differ from the corresponding provision or the previous contract in accordance with section 141 (3) (a) of the ERA 1996?

2.4 Or did the Claimant unreasonably refuse an offer or renewal or re-engagement where the terms of the new contract did differ but the offer constituted an offer of suitable employment in relation to the employee in accordance with section 141 (3) (b) of the ERA 1996?

2.5 Or did the Claimant unreasonably terminate the contract or gave notice to terminate the contract (and it was consequently terminated) where the contract of employment was renewed, or he was reengaged under a new contract of employment, the provision of which differed from the previous contract's provisions, and the employment was suitable in relation to him (in accordance with section 141 (4) of the ERA 1996)?

3. **Unauthorised deductions**

3.1 Were the wages paid to the claimant at the termination of his contract less than the wages he should have been paid as they did not include:
- 3.1.1 five days of holiday?
- 3.1.2 2 months of notice pay?
- 3.1.3 employer pension contributions for a period of two months?
- 3.1.4 provision of the benefit of a car for a period of two months?

3.2 Was any deduction required or authorised by statute?

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

3.4 Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?

3.5 Did the claimant agree in writing to the deduction before it was made?

3.6 How much is the claimant owed?

4. **Breach of Contract**

4.1 Did this claim arise or was it outstanding when the claimant's employment ended?

4.2 Did the respondent do the following:

4.2.1 Fail to pay the Claimant 5 days of holiday pay;
4.2.2 2 months of notice pay;
4.2.3 employer pension contributions for a period of two months;
4.2.4 provision of the benefit of a car;

4.3 Was each or any of these matters (individually or cumulatively) a breach of contract?

4.4 How much should the claimant be awarded as damages? The damages sought include:

4.4.1 2 months of notice pay;
4.4.2 employer pension contributions for a period of two months;
4.4.3 provision of the benefit of a car;

5. **Protective award**

6. Did the Respondent fail to comply with section 188 or 188A of the Trade Union and Labour Relations (Consolidation) Act 1992 in that:
6.1.1 They failed to elect an employee representative in a timely manner;
6.1.2 Failed to begin the consultation period in good time;
6.1.3 Proposed to make over 100 employees redundant and failed to have a minimum consultation period of 45 days;
6.1.4 Held an ineffective consultation.

7. If so, is the Claimant entitled to a protective award?

8. Section 191 is not being relied upon by the Respondent.

Agreements and withdrawals

4. During the hearing it was agreed that the claimant's claim for holiday pay has been agreed in the sum of £654.

5. The claimant also stated that he no longer pursued the claims for any loss arising from his contractual entitlement to a car and also accepts that his pension contributions were made in the period he claims notice for. Therefore both of these claims are withdrawn.

6. The claimant also clarified that his claim was for 3 months notice pay as he was dismissed due to the operation of section 138 of the ERA 1996. Therefore following section 138 (4) the dismissal took effect on 9 June 2020 when the terms of his contract provided that he was due three months notice. He accepts however that he was paid for 80% of his wages for these three months and that he was given a full months pay for notice. Therefore the value of his claim is limited to the difference between 80% and 100% of his wages for two months.

Specific disclosure order

7. The claimant prior to the hearing had requested disclosure of the relevant HR1 form. This is a form employers must complete and provide to the Insolvency Service when making over a certain number of employees redundant. Three copies of this were duly disclosed by the respondent.

8. During the October 2022 hearing, the claimant sought specific disclosure of a 'leavers form' which would show the dates of the dismissals of the employees who were made redundant following the collective consultation in 2020. I made an order for disclosure of the same.

9. The respondent produced part of an excel spreadsheet (with the employee names removed) which set out the leaving dates of various employees in the relevant period. The dates for dismissal set out commenced on 2/8/20. Ms Chia explained in her evidence she had obtained this document from the company's payroll system. The claimant challenged the evidence provided by the respondent as being inaccurate and suggested that it may be that the date recorded is the date of last pay and not date of leaving. He requested a PDF document which had the date of leaving marked on it as a 'search field'. This was based on what he understood could be obtained from most HR software and the particular software the respondent used. He accepted however when I asked him that he was not able to say that the respondent's version of the software could in fact produce the type of report he was seeking to have disclosed. The respondent submitted that it could not and that it could not disclose what it did not have. Given that the claimant was not able to say that the document he was requesting existed and given that the respondent made clear submissions it did not, I made no further order for specific disclosure.

Procedure, documents, and evidence heard

10. This was a remote CVP hearing which had not been objected to by the parties. The form of remote hearing was video. A full face-to-face hearing was not held because

it was not practicable and no-one requested the same and all issues could be determined in a remote hearing.

11. I was assisted by written outline submissions prepared by the Respondent, a cast list, an agreed bundle of documents of 495 pages and witness statements. Further documentation was provided by the Respondent in March 2023 which consisted of a further 14-page bundle and some additional documentation, namely documentation pertaining to a sample of 13 anonymised employee redundancies, that included the schedule of redundancy calculation and some terms of their redundancy offer.

12. The claimant provided a witness statement and gave oral evidence. Ms Jenny Bayliss (Sales Operation Director), Ms Anthea Chia (Chief Finance Officer), Mr Matthew Spencer (Regional Operations Manager- South) and Mr Nick Wilkes (National Field Sales Manager – Retail) all provided witness statements and gave oral evidence on behalf of the Respondent.

13. I heard oral submissions from both parties and the respondent provided outline written submissions.

Findings of fact

14. Much of the factual background of this claim is agreed. The claimant was employed by the respondent as a National Account Executive. He commenced employment on the 11 July 2016.

15. As a consequence of the government directed lockdown due to the covid 19 pandemic the claimant agreed to go to on to the government funded furlough scheme. The claimant had to internally apply for this, which he did so. He agreed in oral evidence that he agreed as part of that for his wages to drop to 80% for the period in which furlough applied. This commenced on 3 April 2020.

16. During the period of furlough, the respondent started a redundancy exercise. There was no dispute that this was a genuine redundancy situation. The reason for this was a downturn in business caused by the impact of the covid-19 pandemic and the consequent government restrictions.

17. The company started the individual consultation process on 18 May 2020. On 19 May 2020, the first one to one consultation meeting occurred with the claimant. At this meeting the claimant was notified that his role was at risk of redundancy.

18. At this point over 100 employees may have been made redundant and employee representatives were elected. The representatives were elected on 26 May 2020

and the election poll results for this were announced on 27 May 2020. This was set out by Jenny Wilkes in her evidence and was not disputed by the claimant.

19. On 27 May 2020 the claimant received an email telling him that employee representatives had been elected. The first elected employee representative meeting was due to happen on 29 May 2020. The claimant entered into email correspondence with Mr Wilkes, his employee representative to ask questions about the process and in particular his concerns.

20. Mr Wilkes attended the representative meetings, and sent out emails to the employees he was representing after those meeting updating them on what had been discussed. On the 8 June 2020 he sent an email to the affected employees he was representing. This informed them of the outcome of the first collective consultation meeting, and also that the next meeting was dated 11 June 2020. To this email he attached amongst other matters, information concerning the selection process and how it was going to work.

21. A selection exercise duly took place and the claimant was informed on 9 June 2020 that he had been selected for one of the forward moving roles and he was no longer at risk of redundancy. The selection matrix used for the scoring of the claimant was dated 25 May 2020.

22. On 8 July 2020, the claimant was sent a letter confirming that he was not at risk of redundancy any more and that it 'confirmed' the following changes to his role. He had a new job title of Regional Account Manager and a new line manager. These changes were said to be effective from 2 July 2020.

23. The role the claimant accepted following the redundancy exercise was Regional Account Manager. The respondent's case was that this role was the same as the previous role, however it had a different job title.

24. However, in her evidence Ms Bayliss agreed that it involved the claimant travelling over a different geographic location, that it was a different client base from the previous clients the claimant had relationships with and a different type of client. And also that it required the claimant to have knowledge of a new product range, although some of these the claimant would already be familiar with from his previous role. It was also agreed that the tasks required were different to some degree, they were said to be a 'development of' tasks the claimant was already undertaking.

25. In addition to the responsibilities the task involved, the terms of the role were different in that the notice period changed from three month's notice to a month's notice.

26. Given these differences I find that the role offered to the claimant was a new one, on new terms and conditions and it was not simply a continuation of his previous role. He was therefore reengaged on new terms and conditions from the date he was offered and accepted the new post which was 2 July 2020.

27. There was a factual dispute over which date the first of the redundancy dismissals took effect. The claimant sought copies of the HR1 forms, a form that companies must complete and provide to the insolvency service when significant numbers of redundancies are proposed. The first HR1 labelled in handwriting 'draft' said the first date of dismissal was 1 July 2020. The second HR1 on 15 May 2020 said the date of the first dismissal was 1 July 2020. The third HR 1 submitted on 9 July 2020 said that the first date of dismissal was 2 August 2020. Ms Chia was asked about these in her evidence and explained that they had been completed by the external HR company the respondent had hired in order to assist them with the complex redundancy process as the respondent did not have experience internally of such a large redundancy exercise. She accepted that some of the information in the HR1 forms was inaccurate and that she signed them.

28. There was little documentation concerning when other employee were dismissed provided to the tribunal in the original bundle. The final collective consultation meeting was held on 30 June 2020. The notes of this show that the final outcome of the consultation was still not clear in terms of exact numbers of employees to be dismissed. There was some evidence that there was an intention for the redundancy dismissals to occur in July 2020. This was set out in the draft and original HR1 form. There was also an email sent by the respondent that referred to saying goodbye to colleagues 'next week', which would have been in July. And Mr Spencer, gave evidence that the first employee left in July, however he could not say exactly when this was.

29. However, Ms Chia gave oral evidence that in fact although it was initially planned that some employees would leave in July, in the event, the first dismissal actually took place on 2 August 2020 and that the process was a rolling one which was fluid due to the fact that the respondent was a. trying to save as many roles as possible and b. the uncertainty of the context generally concerning trading and what would be likely to happen as a consequence of vocid-19. However she told the tribunal clearly that having looked at the information on the payroll system in order to comply with the tribunal's specific disclosure order the first date the redundancy dismissals in fact took effect was on the 2 August 2020.

30. I found Ms Chia to be a credible and honest witnesses. Although some of the information on the HR1 forms appeared to be inaccurate I accepted her evidence

that this was completed with assistance from external HR firm due to a lack of experience of collective consultations within the firm and she couldn't say why some of the figures, for example regarding the number of redundancies made were not correct. She told the tribunal that as the process was fluid the numbers changed a lot and this may be why the HR1 was wrong, and that as the number of redundancies made was in fact smaller than anticipated on the form she understood it did not need correcting. I found this was a credible explanation given by Ms Chia for the inaccuracies. Further, I accepted her more general point that the redundancy process was a rolling one in which the company were trying to change their plans to save as many jobs as possible and also due to the changing nature of the workplace and the immediate plans in light of the legal restrictions in place due to covid and the unknown quantity of what would happened next.

31. Although Mr Spencer no doubt tried to assist the tribunal when he stated that the first person left due to redundancy was in July 2020, he could not recall the exact date this happened. I find that his evidence on this point was mistaken, no doubt through both the passage of time that has passed and the fact he was not as closely involved in the redundancy consultation process as Ms Chia, who was involved in overseeing it.

32. Therefore, on this point, I prefer the evidence of Ms Chia on the basis that as CFO she was very closely connected with the redundancy process and involved in overseeing it, and therefore is more likely to know the detail of the dates of redundancies. And further because her evidence was supported by the documentary evidence before the tribunal:

    32.1. The excel spreadsheet provided by the respondent showed that the first dismissal date was 2 August 2020.

    32.2. 13 sample redundancy schedules were provided that also showed that the first date of notice being given was 2 July 2020 but that the employees were being paid in lieu of notice and that the notice ended on 2 August 2020.

    32.3. This was also verified by the final HR1 form submitted to the insolvency service which stated that the first date of proposed dismissal was 2 August 2020. This was submitted on 9 July 2020. At this stage, there was no reason for the respondent not to accurately represent the position to the insolvency service. The claimant's claim had not been lodged and there is no evidence before the tribunal that any other employee was expressing dissatisfaction with the redundancy process.

33. For these reasons, I find that the first of the dismissals took effect on 2 August 2020, which was 45 days after the employee representatives were elected.

34. Thirteen schedules of redundancy were provided to the tribunal by the respondent. These included a redundancy calculation and some terms of the redundancy offer. Each offer referred to the notice pay being made at 100% of pre furlough wages for any employee on furlough at the time of redundancy. I find that this demonstrated that it was the respondent's practice when employees were made redundant in 2020 after the introduction of furlough, they were paid notice pay calculated on the basis of 100% of their pre-furlough wages. I find that this was the custom and practice of the respondent at this time. It follows that it was a term of the claimant's contract of employment in June 2020 that his notice pay would be paid at the amount of 100% of his pre-furlough wages.

35. The claimant was placed on furlough until November 2020. On the 28 October 2020 the claimant was asked to recommence work on 2 November 2020. He was informed he would be paid at his ordinary rate of pay for periods of work done. It was not disputed that the claimant usually worked from home or visiting customer sites, so he did not usually come into the respondent's office physically. However, on 2 November 2020 the claimant travelled to a company office to pick up his company car having been told he had to collect his car by his line manager. The claimant's told the tribunal in evidence that he did not work between 2 November and 5 November 2020 as he did not have access to the company systems. However in an email he sent on 5 November 2020, he referenced a conference call he had with his new line manager Mr Wilkes on both the 2 November 2020 and the 3 November 2020. I find that therefore the claimant did start work in the week commencing 2 November 2020, as at the very least he was ready for work and he undertook three work tasks (collecting his company car as directed by his line manager, and two conference calls).

36. On the 5 November 2020, it was agreed that from 6 November 2020 he would be put back on furlough. This was because the government unexpectedly extended in the furlough scheme at short notice and in light of that the respondent sought the claimant's agreement to be put back on to furlough. The claimant then remained on furlough until 1 December 2020. At 7.30am on 1 December 2020 on the day the claimant was due to return to work he resigned by email. The claimant was paid his final pay on 5 January 2021.

The law

Redundancy payment

37. Section 139 (1) (b) defines redundancy as follows,

'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'.

38. Section 138 deals with the particular circumstances where the employee has been offered a new role following a redundancy situation. It provides,

'(1) Where—
(a) an employee's contract of employment is renewed, or he is re-engaged under a new contract of employment in pursuance of an offer (whether in writing or not) made before the end of his employment under the previous contract, and
(b) the renewal or re-engagement takes effect either immediately on, or after an interval of not more than four weeks after, the end of that employment,
the employee shall not be regarded for the purposes of this Part as dismissed by his employer by reason of the ending of his employment under the previous contract.

(2) Subsection (1) does not apply if—
(a) the provisions of the contract as renewed, or of the new contract, as to—
(i) the capacity and place in which the employee is employed, and
(ii) the other terms and conditions of his employment,
differ (wholly or in part) from the corresponding provisions of the previous contract, and
(b) during the period specified in subsection (3)—
(i) the employee (for whatever reason) terminates the renewed or new contract, or gives notice to terminate it and it is in consequence terminated, or
(ii) the employer, for a reason connected with or arising out of any difference between the renewed or new contract and the previous contract, terminates the renewed or new contract, or gives notice to terminate it and it is in consequence terminated.

(3) The period referred to in subsection (2)(b) is the period beginning at the end of the employee's employment under the previous contract, and ending with

(i) the period of four weeks beginning with the date on which the employee starts work under the renewed or new contract, or
(ii) such longer period as may be agreed in accordance with subsection (6) for the purpose of retraining the employee for employment under that contract; and is in this Part referred to as the *"trial period"* .

(4) Where subsection (2) applies, for the purposes of this Part

(a) the employee shall be regarded as dismissed on the date on which his employment under the previous contract (or, if there has been more than one trial period, the original contract) ended, and

(b) the reason for the dismissal shall be taken to be the reason for which the employee was then dismissed, or would have been dismissed had the offer (or

original offer) of renewed or new employment not been made, or the reason which resulted in that offer being made.

39. The statutory requires for collective consultation are set out in section 188 and 188A of the Trade Union and Labour Relations (Consolidation) Act 1992. They provide,

188.— Duty of employer to consult representatives

(1) Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals.

(1A) The consultation shall begin in good time and in any event
(a) where the employer is proposing to dismiss 100 or more employees as mentioned in subsection (1) , at least 45 days, and
(b) otherwise, at least 30 days, before the first of the dismissals takes effect.

(2) The consultation shall include consultation about ways of
(a) avoiding the dismissals,
(b) reducing the numbers of employees to be dismissed, and
(c) mitigating the consequences of the dismissals,
and shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives.

(3) In determining how many employees an employer is proposing to dismiss as redundant no account shall be taken of employees in respect of whose proposed dismissals consultation has already begun.

(4) For the purposes of the consultation the employer shall disclose in writing to the appropriate representatives—
(a) the reasons for his proposals,
(b) the numbers and description of employees whom it is proposed to dismiss as redundant,
(c) the total number of employees of any such description employed by the employer at the establishment in question,
(d) the proposed method of selecting the employees who may be dismissed,
(e) the proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take effect
(f) the proposed method of calculating the amount of any redundancy payments to be made (otherwise than in compliance with an obligation imposed by or by virtue of any enactment) to employees who may be dismissed
(g) the number of agency workers working temporarily for and under the supervision and direction of the employer,

(h) the parts of the employer's undertaking in which those agency workers are working, and
(i) the type of work those agency workers are carrying out.

Section 188A
(1) The requirements for the election of employee representatives under section 188(1B)(b)(ii) are that–
(a) the employer shall make such arrangements as are reasonably practical to ensure that the election is fair;
(b) the employer shall determine the number of representatives to be elected so that there are sufficient representatives to represent the interests of all the affected employees having regard to the number and classes of those employees;
(c) the employer shall determine whether the affected employees should be represented either by representatives of all the affected employees or by representatives of particular classes of those employees;
(d) before the election the employer shall determine the term of office as employee representatives so that it is of sufficient length to enable information to be given and consultations under section 188 to be completed;
(e) the candidates for election as employee representatives are affected employees on the date of the election;
(f) no affected employee is unreasonably excluded from standing for election;
(g) all affected employees on the date of the election are entitled to vote for employee representatives;
(h) the employees entitled to vote may vote for as many candidates as there are representatives to be elected to represent them or, if there are to be representatives for particular classes of employees, may vote for as many candidates as there are representatives to be elected to represent their particular class of employee;
(i) the election is conducted so as to secure that–
(i) so far as is reasonably practicable, those voting do so in secret, and
(ii) the votes given at the election are accurately counted.

(2) Where, after an election of employee representatives satisfying the requirements of subsection (1) has been held, one of those elected ceases to act as an employee representative and any of those employees are no longer represented, they shall elect another representative by an election satisfying the requirements of subsection (1)(a), (e), (f) and (i).

40. Under section 189, certain individuals and organisations have the right to bring a complaint before the employment tribunal. It provides,

(1) Where an employer has failed to comply with a requirement of section 188 or section 188A, a complaint may be presented to an employment tribunal on that ground,
(a) in the case of a failure relating to the election of employee representatives, by any of the affected employees or by any of the employees who have been dismissed as redundant;

(b) in the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related,
(c) in the case of failure relating to representatives of a trade union, by the trade union, and
(d) in any other case, by any of the affected employees or by any of the employees who have been dismissed as redundant.

Conclusions

Redundancy payment

41. Under section 164 ERA 1996, the claimant had before the end of the period of six months beginning with the date on which the claimant's notice period expired to write and claim a redundancy payment.

42. The claimant's notice period under his previous terms and conditions was three months and his previous contract of employment came to an end on 9 June 2020. The earliest date that time would run from is therefore 9 June 2020 when his previous contract of employment ended (under section 138 (4) ERA 1996) and the latest date would be 9 September 2020 if the further three months of notice are taken into account in the calculation. I find that nothing turns on this as, as early as, 2 December 2020 the claimant had written to the respondent and said that he wanted to 'take redundancy' and for the respondent to 'confirm a revised redundancy calculation by return'. This is clearly a claim for redundancy payment by notice in writing to his employer within the meaning of section 164 (1) (b) and was made within six months of the earliest possible date from which the six months runs.

43. He then brought his claim for this payment before the tribunal on 14 April 2021, which falls within the six-month period immediately following this. I have to decide it if is just and equitable for the employee to receive a redundancy payment. In making this decision I consider the reason why the claimant did not make a claim for this payment at an earlier point. The circumstances of this claim are unusual in that there was a considerable delay (June to November 2020) between the claimant's previous contract ending and the trial period of the new role commencing due to the introduction of a period of furlough by his employer. There was then a further period of furlough until December 2020. Although this was understandable given the changing circumstances brought about because of covid 19, it did create an unusual level of uncertainty and meant that the commencement of trial period of the role was very delayed. The claimant then worked his notice period until the end of December 2020. A further part of the delay was the period of early conciliation for a period of over a month from mid-February to 23 March

2021. The claimant acted reasonably promptly after this and issued his claim on 14 April 2021. Given, this and all the circumstances of the claim, I consider that it would be just and equitable for the claimant to receive his redundancy payment if one is owing.

44. It was agreed between the parties that there was a redundancy situation in June 2020. It was also agreed that employment was offered as part of the consultation process and accepted by the claimant. On the face of it, it appears the claimant's employment was not terminated within the meaning of section 138 of the ERA 1996, as he was offered and accepted a new role. However, I find that the new terms and conditions of his contract differed from the corresponding provisions of his previous contract and therefore this was a reengagement on different terms and conditions effective from 2 July 2020.

45. It follows from this that section 138 of the ERA 1996 applies and that the claimant was entitled to terminate the renewed contract or give notice to terminate it within the period beginning at the end of the employee's employment under the previous contract and ending with the period of four weeks beginning with the date on which the employee starts work under the renewed or new contract. And if he did so he would be considered to be made redundancy by reason of dismissal following section 136 of the ERA 1996.

46. The claimant's previous contract ended on 2 July 2020 when he accepted the new role. I find he started work in this new role on 2 November 2020 when he was asked to return to work and at the very least had to travel to pick up a new company car, and according to the email he sent on 5 November 2020, joined two conference calls with his line manager that week, acts which were clearly part of his contractual duties of his employment.

47. Therefore, when he gave notice to terminate his employment on 1 December 2020 (it being clear under section 138 that the reason for this does not matter) he was not within the required four-week period set out in section 138 (3)(a) ERA 1996 and consequently he did not fall to be dismissed within the meaning of section 136 by reason of redundancy. It follows from this that no redundancy pay is owing.

Breach of contract/deduction from wages

48. This claim solely concerns a portion of notice pay. As section 138 (3) does not apply the claimant is not regarded as having been dismissed on the date on which his employment under the previous contract ended (2 July 2020) under section 138 (4).

49. Consequently, he was due notice pay in accordance with the terms of his contract of employment at the date on which he gave notice which was 1 December 2020. On his own case his terms of employment were varied so by this point, he only had to give one month's notice. He gave that notice and there is no dispute that he was paid for this period of time. For these reasons, this claim is dismissed.

Claim for interest for delay in payment of holiday pay

50. The claimant sought a sum of two weeks wages for the delay in paying his holiday pay, that it was now agreed was owed to him. The exact way in which this claim was formulated was unclear. However it was either a claim for interest owing on the sum due to delay in payment or compensation for a non-specific loss due to the delay in payment. There is no statutory power for the tribunal to award interest in a claim for holiday pay. There was no evidence that there was a contractual entitlement to interest either. The aim and measure of compensatory damages is to put the claimant back in a position as if the breach of contract had not occurred. There is no evidence that the claimant has suffered any loss in addition to the money owing for which the claimant is entitled to be compensated for the breach of contract. For these reasons this claim is dismissed.

Protective award

51. The claim for a protective award must be brought with before the end of the period of three months beginning with the date on which the last of the dismissals to which the complaint arises takes effect. In this case the claimant relies on his dismissal as being the last one, which is said to have taken effect on 29 December 2020. However, the claimant was not dismissed in my finding. And the termination of his contract was not a dismissal that arose from the collective redundancy. The claimant was offered a new role, he accepted that role and started work in that role from 1 November 2020 until he was put back on furlough on 5 November 2020 and then resigned on 1 December 2020.

52. According to the schedule of dates of dismissal provided by Ms Chia (which I accept to be credible and accurate) the last dismissal to which the complaint arises took effect on 7 November 2020.

53. As such the claim for a protective award was not brought within three months of the date on which the last dismissal to which the compliant took effect which was (and early conciliation was not started until after the three months had expired). Therefore the claim is out of time.

54. If even if this analysis were not correct, the claim would be dismissed. A protective award may be awarded where the respondent employer has not met the

requirements of either 188 of 188A of TULCA 1992. The claimant's case was that these were not met in two regards, one the consultation was not meaningful and two that it did not extend over the required 45 days.

55. It was agreed between the parties that on 27 May 2020 the elected employee representatives were in place. I find that the first dismissal took effect on 2 August 2020. On that basis there a consultation period that met the required minimum of 45 days. Further, although the claimant was concerned that the consultation was ineffective and that the scoring exercise was not done correctly. I understood this was based on the scoring matrix for the selection was dated 25 May 2020, one day prior to the election of employee representatives. However, it is quite clear that the proposed method for selecting who was going to be dismissed was discussed with Mr Wilkes, the employee representative, as he set out how the selection process was going to be conducted in an email to the employee he represented on 8 June 2020. I light of this discussion, I do not find that the fact the selection matrix had been drafted one day prior to the elective representatives being elected a breach of section 188 or section 188A. No other criticism was made that was potential breach of section 188 or 188A and therefore there is no ground for a protective award to be made.

Employment Judge Price

Date 17th May 2023

JUDGMENT SENT TO THE PARTIES ON
21 May 2023

FOR THE TRIBUNAL OFFICE GDJ