EMPLOYMENT TRIBUNALS

Claimant: Mrs. M Harkin

Respondent: Laniwyn Care Services Ltd

Final Hearing
Heard at: Cambridge by Cloud Video Platform **On:** 17 March 2023

Before: Employment Judge Boyes

Appearances
For the claimant: In person

For the respondent: Mr S. Laniyan, Director

RESERVED JUDGMENT

By consent, the respondent's name is amended to Laniwyn Care Services Ltd.

The claimant's claim of unfair dismissal is well founded. The claimant was unfairly dismissed.

The claimant was entitled to a payment in lieu of untaken holiday pay. Subsequent to the claim being issued, the respondent made such a payment. The claimant's claim for holiday pay is therefore dismissed.

The claimant's claim for redundancy pay is not well founded and is dismissed. Subsequent to the claim being issued, the respondent paid redundancy pay. The Tribunal has found that there was not a redundancy situation. The claimant's claim for redundancy pay is therefore dismissed. The redundancy payment already made to the claimant will be taken in to account when assessing compensation for unfair dismissal.

The claimant's claim for notice pay is not well founded and is dismissed.

There will be a further hearing (1 day) to determine remedy.

REASONS

1. The claimant was employed as the registered manager by the respondent. The respondent's position is that the claimant was dismissed by reason of redundancy.

2. The claimant stated in her claim form that she was unfairly dismissed and was owed redundancy pay, holiday pay and arrears of pay. The respondent denies the unfair dismissal claim and asserts that it has paid all other sums owed.

The Proceedings/Hearing

3. After a period of early conciliation through ACAS from 8 March 2022 to 19 April 2022, the claim form (ET1) was lodged with Tribunal on the 19 May 2022. The respondent filed a response to the claim (ET3) on the 21 June 2022.

4. The case was initially listed for a final hearing on the 8 February 2023. However, the final hearing was adjourned. Disclosure of documents had not taken place prior to the hearing nor had the respondent's witness provided a witness statement. The claimant sought an adjournment and the respondent did not oppose this. It was in the interests of justice and the overriding objective to adjourn. The hearing was therefore used to undertake case management and case management orders were made.

5. The parties had included, in the papers that were provided to the Tribunal on 8 February 2023, copies of email correspondence relating to negotiations via ACAS. I informed the parties that the Tribunal could not take in to account any attempts to negotiate a settlement when reaching its conclusions.

6. Despite the previous hearing having been adjourned because of the lack of preparedness on the part of the parties, on the morning of the final hearing further time was spent resolving issues relating to witness statements and documentary evidence.

7. At the final hearing, I clarified the Respondent's full name, which Mr Laniyan confirmed was Laniwyn Care Services Ltd. Both parties agreed that the respondent be amended to Laniwyn Care Services Ltd. I ordered that the respondent's name be amended as such.

8. On the morning of the final hearing, the respondent applied to rely upon further documentary evidence, that is an email from Gareth Page, CQC, London and East Operations. The email concerned is dated 7.36 am on the 17 March 2023. The email contained feedback from a recent CQC inspection in relation to the quality of the service provided by the respondent over the prior 12 month period.

9. I refused permission for the respondent to adduce that further evidence. This was because the Tribunal is required to look at the position as it was at the date of dismissal. The inspection and consequent feedback cannot have been in the respondent's mind at the date of dismissal. Further, the respondent's position, as confirmed at the hearing on the 8 February 2023, and again at the final hearing, is that the claimant was dismissed by reason of redundancy not capability or conduct. I say more about this below.

10. Further, I considered that it would be prejudicial to the claimant for the document concerned to be introduced at such a late stage in proceedings, particularly as what is said in the email is only a brief summary and provides no details as to the reasons for the feedback given by the CQC. If that document were to be relied upon, fairness would have required that proceedings be adjourned to enable the full CQC report to be adduced (once available) to enable the claimant to consider and respond to what is said in that report. Given that the evidence concerned postdates the termination of the claimant's employment by over 12 months, it was not proportionate or in accordance with the overriding objective to adjourn proceedings in order to enable that further evidence to be relied upon.

11. At the final hearing, the claimant gave evidence. She adopted her witness statement. She was cross examined by the respondent and asked questions by me.

12. Segun Laniyan gave evidence for the respondent. He adopted his witness statement. He was cross examined by the claimant and asked questions by me.

13. Several times whilst giving evidence Segun Laniyan (who was in his office as this was a video hearing) stated that he needed to look for certain documents or began to look for documents or information on his computer whilst giving oral evidence. This included looking for a document he said existed relating to redundancy policy and/or procedures that were not in the staff handbook and also to check on the system whether the claimant was given a warning. I refused him permission to look for information and further documents whilst he was giving evidence. I was satisfied that the respondent was fully aware prior to the hearing of the need to provide any evidence that it sought to rely upon in good time. It would not have been fair, or in accordance with the overriding objective, to allow Mr Laniyan to search for further information and evidence during the course of the final hearing. This was particularly so given that the parties were informed at the hearing on the 8 February 2022 that any evidence that the parties wished to rely upon must be before the Tribunal prior to oral evidence being given. On that occasion I warned the parties that permission may be refused if attempts are made to introduce evidence at the last minute.

14. Both parties made brief oral closing submissions.

15. I reserved Judgment.

Documents

16. As well as the documents held on the Tribunal file, the Tribunal had before it a bundle prepared by the claimant containing 14 sections. On the morning of the hearing, the respondent raised the concern that not all of the documents that it intended to rely upon were contained in the bundle prepared by the claimant. I therefore permitted the respondent to provide its own bundle on the morning of the hearing. The respondent's bundle contains 9 sections. I have taken in to account all of the documents in both bundles.

Issues to be determined

17. At section 9.1 of the claim form, the claimant makes reference to discrimination. However, she confirmed at the hearing on the 8 February 2023 that she was not

asserting that she was discriminated against because of any protected characteristic and did not seek to pursue a discrimination claim.

18. At the hearing on the 8 February 2023, and again at the hearing on the 17 March 2023, I checked with Mr Laniyan that the potentially fair reason for dismissal being relied upon by the respondent was redundancy. He confirmed that it was. I asked this, in particular, because the respondent had provided numerous documents that appeared to relate to conduct and/or capability. Mr Laniyan stated that reference to conduct and capability issues was made only in order to provide the Tribunal with context and what happened in the lead up to the redundancy. No alternative reason for dismissal has been pleaded by the respondent.

19. The issues in dispute in this matter were agreed at the hearing on the 8 February 2023 and confirmed to the parties with the subsequent written case management orders. The issues are as follows:

    19.1 Unfair dismissal

        19.1.1 What was the reason or principal reason for dismissal? The respondent says the reason was redundancy. Did a redundancy situation exist?

        19.1.2 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 decide, in particular, whether:

            19.1.2.1 The respondent adequately warned and consulted the claimant;

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

            19.1.2.3 Dismissal was within the range of reasonable responses.

    19.2 Remedy for unfair dismissal

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

            19.2.1.1 What financial losses has the dismissal caused the claimant?

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

            19.2.1.3 If not, for what period of loss should the claimant be compensated?

            19.2.1.4 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?

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

            19.2.1.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

19.2.1.7 Did the respondent or the claimant unreasonably fail to comply with it?

19.2.1.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

19.2.1.9 If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?

19.2.1.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

19.2.1.11 Does the statutory cap of fifty-two weeks' pay or £86,444 apply?

19.2.2 What basic award is payable to the claimant, if any?

19.2.3 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

19.3 Wrongful dismissal / Notice pay

19.3.1 What was the claimant's notice period?

19.3.2 Was the claimant paid for that notice period?

19.4 Holiday Pay (Working Time Regulations 1998)

19.4.1 Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when her employment ended?

19.5 Unauthorised deductions

19.5.1 Were the wages paid to the claimant on the termination of her employment less than the wages she should have been paid?

19.5.2 How much is the claimant owed?

19.6 Redundancy Pay

19.6.1 Is the claimant entitled to redundancy pay. If so, how much is the claimant owed?

Findings of Fact

20. Where there is no dispute between the parties as to a particular fact, my findings of fact are recorded below without any further explanation. Where the facts are not agreed by both parties, I have explained why I prefer one party's account over the other. Where the facts are not clear, I have explained why I have made the finding of fact concerned.

21. My findings of fact are as follows:

The Claimant

22. The claimant was employed by the respondent from the 1 January 2020 to the 1 March 2022. She was the registered manager for the business. Her gross salary was £32,100 per annum at the date of dismissal according to what is said in the ET3.

The Respondent

23. The respondent provides domiciliary care services to people in their own homes as well as supplying staff to residential care homes. There are two directors Segum Laniyan and Abisola Thomas. They are a married couple. At the time that the claimant was dismissed there were four office based employees: the claimant, the compliance manager, the coordinator (who also dealt with human resources) and a marketing person. There were also around 15-20 care staff.

24. Mr Laniyan confirmed in live evidence that the registered manager's position still exists within the business and continues to be a full time position.

The Chronology of Events

25. At 11.18 am on the 1 March 2022, the claimant received a text from Segun Laniyan in which she told to attend a meeting at 12 noon by Zoom. The text does not explain what the meeting is about. Abisola Thomas, director, and Segun Laniyan, director, were present at the meeting.

26. Segun Laniyan's oral evidence was that he did not send the claimant an agenda for the meeting because there was no reason to do so: it was not the aim of the meeting to make the claimant redundant, it was to consult.

27. It is said that the meeting was recorded although no recording has been provided by the respondent. Segun Laniyan stated in live evidence that the Zoom recording facility has a maximum capacity so old recordings have to be deleted to allow new ones. The recording was deleted to allow more recordings to be made. I have no reason to doubt the respondent's explanation as to why the recording no longer exists, although it is surprising that the respondent did not take steps to save the recording elsewhere given its potential importance.

28. The claimant states that the meeting lasted 10 minutes. I have no reason to doubt what she says in that respect.

29. The claimant's evidence is that Mr Lanyon opened the meeting by saying that he did not know how to say what he wanted to say but that the company was struggling financially so he had no choice but to give her two weeks' notice as they could not pay her wages and did not need a registered manager. He also said that if she could think of any way to improve the finances in the next two weeks she might keep her job. She was told that she had to work her notice. The claimant stated in live evidence that she asked if he was suggesting that she should take a pay cut and he said he would not accept that or suggest it.

30. There is a dispute as to whether or not the claimant was told in the meeting that the respondent did not need a registered manager. Segun Lanyan's evidence was that he did not say that the business did not need a registered manager.

31. There is a dispute as to whether or not the claimant referred to the possibility of taking a pay cut in the meeting.

32. There is also a dispute as to whether the claimant said in the meeting that she was not going to work during her notice period. The respondent states that she did say this. The claimant states that she did not say this in the meeting. In the meeting she said that she was only going to work office hours.

33. The claimant texted Segun Laniyan after the meeting (see below) to say that she wanted to leave straight away. She also confirmed her understanding of what was said at the hearing in an email sent the next day (see below).

34. The respondent has produced what are referred to as minutes of the meeting (see below). Mr Laniyan's oral evidence was that Abisola Thomas took a note of what was said during the meeting and then he prepared the minutes afterwards. The notes taken by Abisola Thomas have not been provided. The recording that was taken was not saved. The 'minutes' document does not appear to be a contemporaneous record of what was said. Rather it appears to be a summary of what happened from the perspective of the respondent. Further, it was not provided to the claimant until the 11 March 2022.

35. I prefer the claimant's account of what was said at the meeting. She summarised her understanding of what was said by email on the day after the meeting. She has been consistent throughout as to what was said. Having considered all of the evidence before me in the round, I have formed the view that the claimant has provided a more reliable account of events. Further, in an email to the claimant on 8 March 2022, Segun Laniyan, referred to the claimant later sending him a message saying that she wanted to leave that day, which entirely supports the claimant's version of events in this respect.

36. I therefore find that the claimant was told in the meeting that the respondent did not need a registered manager, that the respondent would not consider a salary reduction as an alternative to redundancy and that it was later in the day, after the meeting, that the claimant stated that she wanted to leave immediately rather than working her notice.

37. At 12.46pm on the same date the claimant sent a text to Segun Laniyan in which she said "*I think that I would like to leave with immediate effect Segun*" …"*As of now*".

38. At 9.43am on the 2 March 2022 the claimant sent an email to Segun Laniyan and Abisola Thomas. The email included the following:

    "Following yesterday's meeting whereby you informed me that you are unable to keep me employed as the registered manager due to the cost of my salary you stated that my role was no longer required and you had made this decision based on the company not being financially viable to continue to pay my wages.

    You made it clear that the decision made was not related to my performance as the registered manager and was based merely on a financial implication needed to be made to keep your company afloat.

    My understanding from the decision made is that you have made me redundant as my post longer exists within Laniwyn care services as such Laniwyn will need to pay redundancy pay to me as I have been employed by Laniwyn for over 2 years.

    Also I was not able to take all holidays owing last year due to the needs of the service and lack of staff on the field and the fact that the same thing happened the year before therefore I believe that the holiday pay for last year should be paid alongside my salary and any holiday entitlement for this year. […]

    Please acknowledge my email with clear indication with your intent going forward."

39. The claimant sent further email at 10.50am on the 2 March 2022 as follows:

"I would like to clarify that the reason I stepped away from my role yesterday as opposed to 2 weeks time was because I was placed into an untenable situation by laniwyn.

I believe that my decission was best for laniwyn as it allows laniwyn to fuction without me having to explain or discuss any questions asked about my leaving the company.

If you would like me to answer any queries or calls in this period up until the end of the 2 week period I am happy to do so but will only be available between my working hrs.

Having said the above I note that the phone has already been blocked." [sic]

40. The respondent sent an email to the claimant on the 4 March 2022 relating to her P45. Segun Laniyan sent the claimant an email on the 8 March 2022. This was headed 'Accepting your resignation' and continued:

"Apologies for what may have seemed as we ignoring your emails, we just didn't want to act irrationally; considering your actions (which was against the company's policy) by informing Nicola Fisher (a key stake holder) and forwarding the company's data to your personal email. Your actions could be a security risk and we are looking into this.

Now, as you are no more the Registered Manager of Laniwyn Care you are to deregister yourself as the manager with immediate effect. We are expecting this to be done before the ending of this week.

Your termination letter and other details would follow." [sic]

41. The claimant replied. I do not have the email header but the text that I have been provided with includes the following:

[…] *In the meantime I am very confused with the fact that you have addressed this communication as you accepting my resignation...*

To make it very clear ...you gave me 2 weeks notice that you did not need a registered manager stating that you could not afford to keep me on ..you made it clear that this was not anything to do with my performance as the registered manager therefore you have ended my employment...

You made me redundant.

Your actions placed me in an untenable position leaving me no choice but to step away from the front line I had offered to continue to answer queries and calls but you had already blocked access all round

You did not answer my emails for 6 days and even now how turned this into something

Emails sent by me to me are not a data breach as no other person is included in the email it is of a personal nature. […] [sic]

42. Segun Laniyan emailed the claimant on the 8 March 2022. The email included the following:

Your email below is false (we have a recording)!

We had a meeting on 1st of March around noon time. We gave you 2 weeks notice due to the financial situation of the company and frankly speaking we didn't see much of your effort to help grow the business as would you weren't even interested to discuss ideas for growth (when it was suggested in the meeting) which may mean you staying; but don't let go down that rabbit hole.

Then sent me a message you wanted to leave from that day…

That's your message to me so I don't understand what you mean by:

In the meantime I'm very confused with the fact that you have addressed communication as accepting my resignation…

… I had offered to continue to answer queries and calls but you had already blocked access all round (YOU NEVER DID!) […]"

43. The respondent wrote to the claimant on the 11 March 2022. The letter is signed by Segun Laniyan. In that letter it states that a consultation meeting was held on the 1 March 2022 regarding the claimant's proposed redundancy and that a copy of the minutes taken at the meeting were enclosed with the letter. The letter continues:

As explained in the meeting the Company has had consider a range of cost-cutting measures. Although we have looked at a number of options, this has led to a requirement to reduce the workforce in order to ensure the continuing viability of the business and in the absence of any alternatives.

As a consequence, I am writing to confirm that you are to be made redundant, notice of this dismissal being given within the meeting on the 01 March 2022. You are entitled to two weeks' notice, which in order to be paid you are required to work therefore your employment will end on Tuesday, 15th March 2022. Within the meeting you stated your intention to resign with immediate effect. I further understand that on the 01 March 2022 you have also notified the local authority that you are no longer the registered manager and have left our employment.

As you have subsequently failed to attend work since the above date then please be aware any part of your notice period not worked, without good reason, will be unpaid.

You have the right to appeal against this decision and if you wish to do so you should write to Segun Laniyan; Director and Chief Admin officer of Laniwyn Care, within five working days from receipt of this letter.

44. A document was included with the letter which is headed 'Minutes' which included the following information:

"Discuss 1:

Registered Manager given 2 weeks notice because of the financial situation of the company. She was also asked to offer any solution (within the 2 weeks notice) that could help the company. If this is viable, she wouldn't be made redundant.

Manager:

She was disappointed. She also expressed that she is no more loyal to the company and wasn't interested in giving any ideas that could help the company financially.

Outcome:

Manager gave back her work and resigned immediately."

45. The claimant replied by email on the 11 March 2023. Her email included the following information:

"Firstly your minutes are false and were not shared for agreement to me at any stage after the meeting.

I did not resign with imediate effect at any time during the meeting however I advised you that I would work my contracted hrs only thus following my contract commitments within the meeting.

You did not offer any suitable alternative employment to me even when I asked you whether you wanted me to take a pay cut to keep my job… in fact you said you would not want or expect that.

I will be sharing this content with ACAS as I believe that you have not followed a fair process for Redundancy as my role still exists in other words you can only fairly make me redundant if my role no longer exists...

I will be taking legal advise to determine whether your actions are lawful or if you have unfairly dismissed me so that you can put another member of staff into my role at a lesser wage …something I shared with you and believed would happen." [sic]

46. The claimant did not appeal against the decision to make her redundant. She states that she was not given any opportunity to do so as her termination letter was received on 11 March 2022 and that there was nothing to appeal against as nothing was shared with her.

47. In live evidence, Mr Laniyan initially stated that the claimant was the only person who was considered for redundancy. He said that this was because they had had a lot of complaints about the claimant from clients, key individuals and the NHS and they had had quite a few discussions with her about her attitude, leadership and managerial skills. I asked Mr Laniyan if there was anyone else in the redundancy selection pool. He initially stated that the compliance manager, E Burden, was also in the selection pool. He said that she resigned and left a few weeks after the claimant left. I asked if there was a consultation meeting with her. He stated that they did have a consultation meeting but not to discuss redundancy. Knowing that she was friends with the claimant they had to assess how she felt about the claimant having resigned. Everything went well at the meeting and they were considering retaining her but a few days later she gave her notice.

48. Mr Laniyan initially stated that the claimant was the only person considered for redundancy. Confusingly, he then said that compliance manager was also in the

redundancy selection pool. I find that this was not the case. The respondent did not have any discussion about the possibility of redundancy with any other staff member prior to dismissing the claimant. There is no suggestion anywhere else in the documentary evidence to suggest that any consideration was given by the respondent to the selection pool. I find that the respondent did not apply its mind at all to the appropriate selection pool prior to making the claimant redundant. Further, it is not suggested by the respondent that alternative employment was discussed with the claimant prior to her dismissal. I find that there was no consideration by the respondent as to whether there was any suitable alternative employment.

49. Mr Raphael Adewale Thomas is now the registered manager for the respondent. He is the brother of Abisola Thomas. Segun Laniyan stated in live evidence that he believed that Raphael Adewale Thomas' employment began about six months after the claimant resigned, although he did not specify the exact date on which his employment began. The CQC told the respondent that it was okay that they did not have a registered manager in the meantime as long as they had someone, because an application takes time. Raphael Adewale Thomas works 9-5 Monday to Friday. He is paid £1850 per month as well as separate payments for work carried out in the field outside those hours. He agreed to be paid less until the company gets back on its feet.

50. I asked Segun Laniyan what was in his mind when he dismissed the claimant. He replied, "*When we had meeting, at some point we had plans to bring Raphael in future but did not expect future would be now*". The plan has been for the claimant to manage adult services and Raphael to manage children's services. He said that the situation built up to redundancy but they were having lots of issues with the claimant, just one argument after another.

Capability and conduct issues

51. Segun Laniyan confirmed in oral evidence that there was no mention in the meeting on the 1 March 2022 of capability or conduct. However there he stated that there had been earlier discussions with the claimant about her ability, that is that she is too argumentative and that she never listens.

52. The claimant states that the respondent has never taken any form of disciplinary action against her. Segun Laniyan stated in live evidence that there were conversations. When asked if any disciplinary action had previously been taken against the claimant he initially stated "*No just conversation*". He then said "*Can I take that back. Just remembered one yes disciplinary*".

53. He stated that they had a meeting with the claimant to discuss a situation and a verbal warning was given. This was sometime in 2021. I asked Mr Laniyan if there was anything in the documents before the Tribunal about this. He stated that he believed that there was. He then stated that he was just going to look on the company's systems. I explained to Mr Laniyan that he could not search for further documentary evidence whilst giving evidence to the Tribunal. Mr Laniyan then said that the meeting concerned happened on the 2 December and the reason for the warning was that the claimant had said that he was useless.

54. As this was the first time that the respondent has said that the claimant was given a warning, I gave the claimant the opportunity to respond. Her evidence was that "*It didn't happen*". She said that she had never been given a written or verbal warning. She asked Mr Laniyan to send her everything that he had on file about her and he did not send her anything.

55. I prefer the claimant's evidence in this respect. There has never been any prior mention of the claimant being subject to any form of disciplinary action. There is nothing in the documentary evidence before the Tribunal to indicate that any form of disciplinary proceedings had been taken against the claimant. Mr Laniyan's evidence initially was that the claimant had not been subject to disciplinary proceedings. He then changed that evidence. I therefore do not consider that his evidence in this respect is reliable. I find that the claimant has not been subject previously to disciplinary proceedings.

56. On the basis of the documentary evidence before the Tribunal it is clear that there have been discussions between Segun Laniyan and the claimant regarding day to day matters at work and that this includes some email discussions regarding the approach to be taken regarding potential new work for the business.

57. However, in any event, it is clear from the documentary evidence before the Tribunal as well as the respondent's own stated position, that the sole reason given by the respondent for dismissal was redundancy. There was no element of conduct or capability relied upon.

Contract of employment and other documentation

58. The claimant's employment contract includes the following:

> *"Registered Manager status*
>
> *It is a condition of your employment that you are registered with the Care Quality Commission (CQC).*
>
> *You are required to register your Manager status within 60 days of appointment and your position as Manager is subject to continuing approval by the CQC. As the Company cannot function without the approved registration of its Manager your employment is conditional on approval and maintaining registration. You must inform the Company immediately if you are deregistered by the CQC for whatever reason.*
>
> *On termination of employment you are required to deregister your status within seven days of your last working day and it is your responsibility to ensure that this is done. Any fees for deregistration are payable by you."*

59. The contract of employment confirms that the claimant was entitled to one week's notice for each completed year of employment. This equates to her statutory notice entitlement.

60. The staff handbook includes the respondent's redundancy policy which is as follows:

> *"Redundancy policy*
>
> *If a redundancy situation arises, for whatever reason, the Company will take whatever steps are reasonable in an effort to avoid compulsory*

redundancies, for example:

• Analyse overtime requirement.

• Reduce hours.

• Lay off with Statutory Guarantee Pay.

• Ask for voluntary redundancies, whether anyone has plans to retire or is considering a career move.

If compulsory redundancies are necessary, employees will be involved and consulted at various meetings to discuss selection criteria, any alternative positions, and be given every opportunity to put forward any views of their own.

Employees will be given the opportunity to discuss the selection criteria drawn up. The Company reserves the right to reject any voluntary applications for redundancy if it believes that the volunteer has skills and experience that need to be retained for the future viability of the business."

The Relevant Law

Resignation during notice period

61. Under section 136(3) ERA, an employee who has been given notice of dismissal by reason of redundancy is deemed to have been dismissed even when he or she gives 'counter-notice' so as to leave the employment before expiry of the notice period given by the employer. However, for this to apply, the counter-notice has to be given in writing within the 'obligatory period' of the employer's notice, which is equivalent to the statutory notice period or to the employee's contractual notice entitlement, whichever is the longer.

Unfair Dismissal

62. The question of whether a dismissal was fair or unfair is a two stage process. The first stage is that it is for the Respondent to show a potentially fair reason for dismissal, and secondly, if that is done, the question then arises as to whether the dismissal is fair or unfair.

63. The reason for the dismissal and the reasonableness of the dismissal is based on the facts or beliefs known to the employer *at the time of the dismissal* (as per *W Devis and Sons Ltd v Atkins 1977 ICR 662, HL*). However, a Tribunal should consider facts that came to light during the appeal in considering whether the employer's decision to dismiss was reasonable (as per *West Midlands Co-operative Society Ltd v Tipton 1986 ICR 192, HL*).

64. In an unfair dismissal case in which the employee had been employed for two years and no automatically unfair reason is asserted, the burden lies on the employer to show what the reason or principal reason was, and that it was a potentially fair reason under section 98(2) of the Employment Rights Act 1996 ("ERA"). Once that is done there is no burden on either party to prove fairness/unfairness.

Reason for dismissal

65. Section 98(2) ERA identifies a number of potentially fair reasons for dismissal which includes redundancy.

66. The definition of redundancy can be found at section 139(1) of the ERA and is as follows:

> '*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.'*

67. Where there is a redundancy situation which falls within this definition it is not for the Tribunal to investigate the reasons behind the situation. The Tribunal has no jurisdiction to consider the reasonableness of the decision to create a redundancy situation.

Reasonableness of Dismissal

68. Section 98(4) of the ERA specifies the test to be applied by the Tribunal in order to determine whether a dismissal is fair or unfair. It reads 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."*

69. The Tribunal is required to apply a band of reasonable responses test as laid down in *Iceland Frozen Foods Limited v Jones* [1983] ICR 17. This can be summarised as follows:

i. the starting point should always be the words of Section 98 itself;

ii. in applying section 98, the Tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair;

iii. in judging the reasonableness of the employer's conduct, the Tribunal must not substitute its own view as to what the right course of action was for that of the employer;

iv. in many (though not all) cases, there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

v. the function of the Tribunal, is to determine whether, in the particular circumstances of each case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, if a dismissal falls outside the band, it is unfair.

70. In *Williams v Compair Maxam Ltd* [1982] IRLR 83, the Employment Appeal Tribunal ("EAT") gave guidance regarding the key factors to be taken in to account when deciding whether a dismissal for redundancy is fair or not under section 98(4) of the ERA. The EAT stated that employers are obliged to consider taking steps to consult with employees regarding their proposals and to mitigate the hardship caused by redundancies including to:

i. give as much warning as possible of impending redundancies in order to enable the employees who may be affected to consider possible alternative solutions and, if necessary, find alternative employment within the business or elsewhere;

ii. seek to agree objective selection criteria to be applied to the pool of employees at risk of redundancy;

iii. seek to ensure that the selection is made fairly in accordance with these criteria and to consider any representations regarding such selection (having first provided employees with sufficient information about the selection process, for example details of their scores against the criteria);

iv. consider suitable alternative employment as an alternative to redundancy dismissals; and

v. provide a right of appeal against dismissal.

71. The guidelines in *Compair Maxam* are not principles of law but rather standards of behaviour that can inform the section 98(4) reasonableness test. A departure from these guidelines on the part of the employer does not lead to the automatic conclusion that a dismissal is unfair. The overriding test is whether the actions of an employer at each stage of the redundancy process was within the band of reasonable responses.

Selection Pool

72. If there is a customary arrangement or pre-agreed procedure that specifies a particular selection pool, the employer will normally be expected to adhere to this unless the employer can show that it was reasonable to depart from it (*Russell v London Borough of Haringey, unreported, 12.6.00, CA)*. If there is no customary arrangement or agreed procedure to be considered, employers have flexibility in defining the pool from which they select employees for redundancy (*Thomas and Betts Manufacturing Co v Harding 1980 IRLR 255, CA)*. The employer needs only to demonstrate that it has applied its mind to the issue and acted from genuine motives.

Reduction of any Compensation

73. Section 123(1) of the ERA provides that:

"Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal so far as that loss is attributable to action taken by the employer."

74. As per *Polkey v AE Dayton Services Ltd*, if a Tribunal finds an unfair dismissal claim to be well founded, it must consider whether the compensatory award should be reduced to reflect the chance that the employee might have been fairly dismissed in any event at a later date if a fair procedure had been used.

75. Section 123(6) of the 1996 Act requires a Tribunal to reduce the amount of the compensatory award by such amount as it considers just and equitable if it concludes that an employee caused or contributed to their dismissal. In addition, section 122(2) requires a Tribunal to reduce the basic award if it considers that it would be just and equitable to do so in light of the employee's conduct prior to dismissal.

My Conclusions

Unfair Dismissal

The claimant's resignation

76. The claimant was given two weeks' notice of dismissal by reason of redundancy on the 1 March 2022. She gave counter-notice on the same date. Her contractual and statutory notice entitlement was two weeks. She gave counter-notice during this period and so, as per 136(3) ERA, she is deemed dismissed by reason of redundancy even though she did not subsequently work her notice.

Was there a potentially fair reason for dismissal?

77. The respondent's position throughout has been that the claimant was made redundant. This was on the basis that it could not afford to pay the claimant her salary. The claimant's case is that it was a sham redundancy because the respondent was required to have a registered manager to conduct its business. Further, she asserts that the respondent's intention at the time was to

subsequently replace her with Raphael Adewale Thomas who is related to the directors and was training to be a registered manager.

78. The respondent unambiguously accepts in its response (ET3) that the registered manager's position is key to the running of the business. Indeed, it is a CQC requirement. The respondent has continued to accept that a registered manager was required in order to run the business.

79. The respondent confirmed in response to direct questions by me on two occasions during the course of proceedings that the reason for dismissal was redundancy. No alternative potentially fair reason was asserted by the respondent at any point.

80. The claimant asked about the possibility of taking a pay cut but the respondent told the claimant that this was not something that would be considered. I therefore do not consider that the respondent was, in terms, without applying the correct legal label, arguing some other substantial reason as an alternative potentially fair reason.

81. Mr Laniyan's evidence as to when the new registered manager's employment began was vague. He said it was about six months after the claimant left, although his evidence in this respect was vague. The new registered manager works full time, as did the claimant, although he is being paid a lessor salary.

82. As the respondent continued to require a registered manager at the date that the claimant was dismissed and as a new person has subsequently been appointed to that post in the same year, it cannot therefore be said that the requirement of the respondent to have a registered manager had ceased or diminished or was expected to cease or diminish. There was therefore not a redundancy situation within the meaning of section 139(1) ERA.

83. The respondent has therefore not shown that there was a genuine redundancy situation. The respondent has not shown that the reason or principal reason for dismissal was one of the potentially fair reasons under section 98(2) ERA. As no potentially fair reason for dismissal has been shown, the claimant's dismissal was unfair.

<u>Reasonableness of Dismissal</u>

84. As the respondent has not shown that there was a potentially fair reason for dismissal it was unfair on that basis alone.

85. However, even if I had found that there was a redundancy situation, and hence a potentially fair reason for dismissal, I would still have found that the dismissal was unfair. In forming that view, I have borne in mind the guidance given in *Compair Maxam* as to the standards of behaviour that can inform the section 98(4) reasonableness test.

86. The dismissal of the claimant was unreasonable in the following ways:

    (i) The claimant was given no prior warning of what the meeting of the 1 March 2022 was to be about. She was invited to the meeting at short notice by text and did not know that the meeting related to her being made redundant;

    (ii) There was no consideration of suitable alternative employment;

    (iii) There were other potential roles that may have been suitable to place within the selection pool prior to any decision about redundancy. These roles were

compliance manager, coordinator and marketing. The respondent gave no consideration whatsoever as to what the redundancy selection pool should be prior to making the decision to dismiss the claimant.

(iv) There was no consultation with the claimant prior to the decision to dismiss her. The meeting of the 1 March 2023 lasted for around 10 minutes. The claimant was not asked about alternative employment or the selection pool. She was asked to come up with ideas to improve the business but that is not in itself sufficient to amount to effective consultation where a redundancy is being proposed. I consider that the claimant was asked to do this in order to seek to show that there was some form of consultation. Considering all of the evidence before the Tribunal in the round, it is clear that the respondent had already made a decision prior to that meeting that the claimant was to be made redundant.

87. The respondent is a small business. I have borne this in mind when assessing the reasonableness of the respondent's decision to dismiss. I have also borne in mind that the Tribunal must not substitute its own decision for that of the respondent. The procedure followed by the respondent was, even for a small business, on any view, inadequate and unreasonable. The claimant was not warned of impending redundancy. There was no real effort on the part of the respondent to consult with the claimant or to establish an appropriate selection pool. Consequently, the decision to dismiss the claimant was procedurally unfair and also did not fall within the range of reasonable responses which a reasonable employer might have adopted.

88. The claimant was unfairly dismissed.

Should there be any reduction in compensation

89. I have considered whether there was a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

90. The respondent has not shown a potentially fair reason for dismissal. Consequently, this is not a case in which the dismissal was procedurally unfair but where dismissal may have occurred anyway had a fair procedure been followed.

91. Further, the claimant's post still exists and is being undertaken by another employee who was recruited after the claimant's dismissal. It cannot therefore be said that the claimant would have been dismissed in any even had the respondent followed a fair procedure. I therefore do not consider that it would be just and equitable to make a *Polkey* reduction in this case

Redundancy pay

92. As there was not a redundancy situation in this case the claimant was not entitled to a redundancy payment. The respondent paid the claimant a redundancy payment of £1682.00 gross (this appears to have been subject to income tax and national insurance deductions). The respondent will be entitled to be given credit for this payment when compensation is calculated

Holiday pay

93. The claimant claimed that she was owed holiday pay of 19.5 days in her ET1. The respondent has produced the claimant's payslip for month ending 31 March 2022.

This shows that holiday pay of £3086.55 was paid to the claimant. The respondent has provided a bank statement to show this sum being transferred to the claimant on the 7 June 2022 (after the ET1 was lodged). The claimant has not sought to argue, or provided any evidence to show, that the sum paid to her in lieu of untaken annual leave was incorrect.

Arrears of pay

94. The claimant claimed that she was owed arrears of pay in her ET1. The respondent has produced the claimant's payslip for month ending 31 March 2022. This shows additional pay being paid of £617.31. The respondent has provided a bank statement to show this sum being transferred to the claimant on the 7 June 2022 (after the ET1 was lodged). The claimant has not sought to argue, or provided any evidence to show, that the sum paid to her was incorrect.

Notice pay

95. The claimant was given two weeks' notice by the respondent. The respondent's expectation was that she would work her notice period. On the same date that she was given notice she informed the respondent that she did not intend to work her notice. The contract of employment does not confer such an entitlement upon the claimant. As per 91(4) ERA, in such circumstances, the respondent is not liable to pay the claimant notice pay.

96. I apologise to the parties for the delay in sending out this Judgment and Reasons.

Employment Judge Boyes

Date: 14 June 2023

Reserved Judgment and Reasons Sent to The Parties On

14 June 2023

GDJ
FOR EMPLOYMENT TRIBUNALS

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