EMPLOYMENT TRIBUNALS

Claimant: Miss Katy Evans

Respondent: Northern Belle Limited

RECORD OF A PRELIMINARY HEARING

Heard at: by CVP **On:** **1 June 2023 (and 12 June 2023) in Chambers**

Before: Employment Judge Britton

Appearances
For the claimant: In person
For the respondent: Mr S Profitt, Counsel

JUDGMENT

The Reserved Judgment of the Employment Tribunal is that the claimant was unfairly dismissed and that the claim for a further redundancy payment fails and is dismissed.

REASONS

Introduction

1. The claimant presented her ET1 Claim Form in this case to the Tribunal on 18 May 2021, following Acas early conciliation between 4 March 2021 and 12 April 2021. The claimant made complaints of unfair dismissal and a failure to pay a redundancy payment. In relation to remedy, in the event that her claim were successful, the claimant stated that she sought an award of compensation against the respondent.

2. In the ET3 Response that was entered on 14 July 2021, the respondent's defended the claim on the basis of the attached paper apart Grounds of Response.

3. By consent, at the start of the hearing, the name of the respondent was amended to Northern Belle Limited. The claims and issues were also identified and agreed. The unfair dismissal claim includes a claim that the dismissal was automatically unfair

because it was by reason of a transfer of an undertaking, but otherwise, the claimant contends that her dismissal by reason of redundancy was unreasonable and therefore unfair. The redundancy payment claim concerns an alleged underpayment on the grounds that the respondent had incorrectly calculated the statutory redundancy payment to which the claimant was entitled by disregarding the claimant's alleged period of employment between 2002 and 2006.

4. It was also agreed at the outset of the hearing that it would be a hearing confined solely to liability and that remedy would be dealt with at a separate hearing if the claim is successful. It was also agreed that at this hearing I would hear evidence and argument in order to make a determination whether the claimant would have been dismissed even if a fair procedure had been followed, in the event that I make a finding that the dismissal was procedurally unfair.

5. The issues that the Tribunal has to determine are as follows:

5.1 Whether there was a relevant transfer for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 2006;

5.2 Whether the claimant was dismissed by reason of the transfer (if there was one);

5.3 If not, the parties agree that the reason must be redundancy, which is a potentially fair reason. Whether the claimant's dismissal was fair in all the circumstances, including whether it was procedurally fair;

5.4 If the reason for dismissal was redundancy, whether the claimant is entitled to an additional redundancy payment.

Findings of Fact

6. The claimant gave evidence in support of her own case and the respondent relied on the evidence of Ian Susans, Acting Managing Director of the respondent. All of the witnesses produced written witness statements which were presented as their evidence in chief. I also listened to an audio recording and had to hand an agreed Hearing Bundle containing 106 documents.

7. I have not sought to set out every detail of evidence which I heard in order to resolve every difference between the parties, but only those which appear to me to be material. My material findings, relevant to the issues, either as agreed between the parties or where there is a dispute, based on the balance of probability, are set out below.

8. The business of the respondent is the operation of the "Northern Belle" train which provides luxury recreational rail travel and trips throughout the United Kingdom. The respondent was owned by Belmond (UK) Limited until 2017. The train is based at the depot in Carnforth, Lancashire. There is a travel centre in Nantwich, Cheshire, and the train crew, including the train manager, are based at the depot in Carnforth. The respondent also operates from its office in Wakefield, West Yorkshire.

9. The termination of the claimant's employment, and other redundancies, were handled by Mr Susans. However, until her employment was terminated by reason of redundancy in 2020, the day to day management and operation of the respondent had been undertaken by Jeanette Snape who had been the General Manager and latterly the respondent's Managing Director.

10. Although the claimant's most recent Particulars of Employment is dated 25 February 2013, the claimant had been the Accounts Manager, based in Nantwich, since 2018 and at all material times. The claimant's gross annual salary as at the date of termination of her employment was £29,614.92.

11. According to the most recent version of the claimant's Particulars of Employment, her continuous employment with the respondent commenced on 1 July 2006. Mr Susans had no direct knowledge of whether the claimant worked for one or more of the respondent's predecessors "Northern Belle" before 1 July 2006 and his evidence was that it was possible that the claimant had done so from time to time, on a casual basis.

12. The claimant's evidence was that she started work with Orient Express Limited (predecessor of Belmond Limited and then the respondent). The claimant asserted that she started working for the respondent in November 2002 as a Steward serving the customers in the train carriages. The claimant referred me to correspondence that she had received from HMRC dated 20 August 2021 and the Employment Schedule attached to that letter which showed her earnings, tax paid and NI paid whilst working for Northern Belle Orient Express Limited for the tax year 2002/2003 to tax year 2013/2014 and from tax year 2014/2015 onwards from Belmond (UK) Limited and earnings from the respondent part way through the tax year 2017/2018.

13. The Employment Schedule included the following relevant information regarding the claimant's earnings:-

2002/2003	Earnings	£500.00	Tax Paid	£110.00
			NI Paid	£ 32.20
2003/2004	Earnings	£5,015.00	Tax Paid	£ 89.50
			NI Paid	£254.21
2004/2005	Earnings	£6,707.00	Tax Paid	£195.70
			NI Paid	£357.39
2005/2006	Earnings	£8,564.33	Tax Paid	£581.00
			NI Paid	£569.83
2006/2007	Earnings	£3,132.00	Tax Paid	£163.22
			NI Paid	£184.87
2006/2007 Orient Express (Services Limited)	Earnings	£13,251.04	Tax Paid	£2,074.46
			NI Paid	£1,041.78

14. It was the claimant's evidence that when she started working for Northern Belle Orient Express Limited in 2002 she was issued with a Contract of Employment for a casual employee and to the best of her recollection she regularly worked 16 hours each week. Although the train did not run in January each year, it was the claimant's evidence that she would come into work each January in order to clean and perform other ad hoc duties. The claimant stated that she was provided with wage slips prior to 2006 and that she received holiday pay that was paid every 3 or 6 months. The claimant agreed with Mr Susans assertion that the respondent uses one off contracts for causal stewards which relate to each assignment but her evidence was that she had been provided with a Contract of Employment for an indefinite term in 2002, that she had worked variable hours, up to 16 hours, each week, between 2002 and 2006. The train did not run every week but when the train was running there was a mutual expectation on both sides that she would be provided with work as a Steward and that she would ensure that she was available to perform the work, such was the regularity of the arrangement.

15. I only heard evidence from the claimant, as the only witness to her working arrangements prior to 2006. I have had to take good care when assessing that evidence both generally and by reference to the employment schedule produced by HMRC. Overall, I am satisfied that the claimant was giving an honest recollection of events, as best she could remember them.

16. In July 2006 the claimant became the Manager of the Boutique on board the train. In 2011 she moved to the Operations and Reservations Department, as Operations Assistant, organising the off board, operational side of the business, liaising with passengers, and answering their enquiries. On 1 February 2013 the claimant became the Accounts Assistant for the respondent's predecessor, at that time Orient Express Services Limited, before becoming the Accounts Manager in 2018. It was not in issue, therefore, that the claimant had experience across multiple roles. The Statement which set out her Particulars of Employment that was issued in 2013 and was signed by the claimant on 29 April 2013 stated that the claimant's period of continuous employment commenced on 1 July 2006.

17. Unfortunately, the Covid pandemic had a significant impact on the business of the respondent. From March 2020, the respondent had to cancel all trips and all employees (save for a few members of the Reservation Team who need to deal with customer service issues) were placed on furlough. This included the claimant and Ellie Payne, who was the claimant's assistant at that time. During the claimant's furlough period, which did not end prior to her dismissal, Ms Snape left the respondent's employment (in June 2020) as she volunteered for redundancy and from the summer of 2020 it was evident to the respondent that further serious cost reductions, including reductions in staff, were likely to be required.

18. In October 2020 the respondent explored making further redundancies. At the time it was expected that the furlough scheme would end at the end of October 2020 and, with this in mind, on 23 October 2020 the respondent wrote to all employees at the Nantwich office in order to offer voluntary redundancy. At that time, the claimant's immediate response was that she would like to be considered for voluntary redundancy. The claimant's request was given serious consideration because of the potential cost saving and the respondent's experience of being able to manage without the claimant

throughout the lockdown period up until that point. However, the redundancy payment on offer was not attractive to the claimant and on 30 October 2020 the claimant was informed that the respondent had decided not to proceed with her voluntary redundancy. At that time, the furlough scheme was to be continued and the respondent felt that the position was looking brighter, in view of the expected vaccinations against COVID being available. Nevertheless, Mr Susans had given careful consideration to how the respondent could manage if they had agreed to the claimant's request for voluntary redundancy and had formed the view that it could be facilitated.

19. Prior to her redundancy, Ms Snape, who was a qualified accountant, had overall oversight of the accounts. The claimant's main responsibilities were stock management, to assist with payroll, revenue, balance sheet, profit and loss reporting, assisting with purchase ledger, budget forecasting, costs control and bank reconciliation. The claimant also had responsibility for petty cash and the operation of the Sage accounting software. In her role the claimant worked closely with staff based in Wakefield, who were employed by DP Publicity Limited (a Group Company) ("DPP") and also Harrisons, who are the respondent's accountants.

20. There were a number of accounts functions that were not performed by the claimant. The overall oversight had been the responsibility of Ms Snape, and this responsibility passed to Mr Susans following her redundancy. In addition, bank payments (including payroll payments and customer refunds) were undertaken by DPP accounts staff and payroll, management accounts and annual accounts, stock checks, and other aspects were undertaken by Harrisons. Even prior to the departure of Ms Snape, Mr Susans had also performed some of the accounts duties. He produced all the forecasting tools for the trips, all the trip reports (profit and loss), and all forecast/actual reports. Mr Susans also supplied the spreadsheets for the claimant and Ms Snape to enter a summary trip cost on each month. The DPP accounts staff would also enter each invoice onto a spreadsheet before paying them in order to minimise the risk of duplicate payments being mistakenly made.

21. When investigating the claimant's request for voluntary redundancy in October 2020, Mr Susans formed the view that the claimant's request for voluntary redundancy could potentially have been facilitated by:

> Harrisons continuing with their current work, but increasing the checks made on the DPP staff to ensure accuracy and to increase the stock checks on wet stock and boutique stock. Harrisons to also enter all non-purchase ledger payments into the sage accounts;
>
> DPP accounts staff to continue with the current payments, but instead of entering the supplier invoices on a spreadsheet, they could enter them directly onto the Sage accounts package;
>
> Mr Susans to continue with the work that he had been doing instead of supplying the accounts department in Nantwich with the details and forecast, who would supply them to Harrisons;
>
> Any ad hoc duties carried out by the claimant would be spread around the reservations and accounts teams;

Updating the purchase order systems, which would include processing customer refunds, but with less time required due to the new processers.

22. The assessment of the accounts function that had been made by Mr Susans had identified a number of problems, that largely related to the duplication of work, for example, the generation of supplier invoices that were then sent to Wakefield for payment, the collation of payroll information from the "On board Team" each trip being put into spreadsheets for Harrisons to run the payroll and then sent by Harrisons to DPP to make the payments and the checking of information input into the Sage accounting system and the checking of invoices against the Purchase Ledger and the payments received from agents and bookings by DPP staff.

23. In January 2021 the respondent assessed the losses made in 2020, along with the fact that they were again in lockdown and could not run on any trips. The respondent was surviving on cash reserves but it had become clear that they had to reduce costs further and each department was assessed for savings. With the staffing levels already low in the Nantwich office, the respondent decided to only look at three positions, namely, those that had been assessed for redundancy in October 2020. It was agreed that to go forward, they should retain Howard Barclay as Sales Director, as they did not have a work plan in place to split his work and it was also agreed that the Reservations Teams would need to remain in Nantwich, in a reduced sized office.

24. The introduction of automated processes had reduced the need for regular stock management/stock checks and non-post ledger payments such as employee expenses and the operation of petty cash, which had been taken on by Harrisons had been working smoothly. The purchase order systems had been updated and customer refunds could be done through an automated booking system. The claimant and Sue McNamee, the Operations Manager, were the two employees under consideration for redundancy.

25. On 10 February 2020, Mr Susans wrote to the claimant regarding the fact that she was at risk of redundancy and to arrange a consultation meeting on 12 February 2020. At the request of the claimant and Ms McNamee, they both attended a joint consultation meeting with Mr Susans. The meeting was originally scheduled at short notice and was therefore re-arranged, at the claimant's request, to 17 February 2021. It was held via Zoom and an audio recording was made, save for the first 47 minutes that did not record due to human error on the part of Mr Susans. This part of the meeting was largely devoted to discussing the claimant's circumstances.

26. The correspondence that was sent to the claimant on 10 February 2020 did indicate that the respondent had provisionally formed a view that it no longer required an in house accountant because those duties could be shared between Mr Susans and Harrisons accountants. However it went on to state that no final decision had been made, and would not be made until the respondent had had a consultation meeting her. The letter went on to provide some explanation as to how the respondent proposed to deal with the notice period, furlough pay and holidays, but this was stated to be, quite specifically, "if we were to decide to proceed".

27. The meeting was not attended by a note taker because Mr Susans intended to record the whole of the meeting. Having heard the recording, it is noteworthy that Mr Susans does state that "I know exactly where we are going on that side" which appears to relate to the claimant's position as Accounts Manager. However, this comment has been heard by me completely out of context and without the benefit of the preceding dialogue that the parties agree was largely related to the claimant's situation. However, I did have the benefit of listening to the remainder of the recording and I accept that Mr Susans went to great lengths to explain to the claimant and Ms McNamee the precise business case for making their respective roles redundant and dispersing their duties elsewhere.

28. The dialogue throughout the meeting was open and transparent. Consistent with this approach when asked whether Mr Susans knew "exactly" what the Claimant did, Mr Susans candidly replied "not fully". It was common ground that the Claimant did assist with other duties beyond the accounts duties that she performed and sometimes assisted the Reservations Team, such was the breadth of her experience and commitment. I accept that Mr Susans understood the claimant's duties assigned to her role as Accounts Manager in detail and had properly analysed how those duties could be performed in the most efficient way for the benefit of the respondent.

29. It is common ground that the claimant's duties as Accounts Manager were to be split going forward between Mr Susans and Harrisons Accountants. However, those duties were being reduced significantly by the steps that were being taken by Mr Susans to remove unnecessary tasks and duplication of work that could be done by accounts staff at DPP. In fact, only a small part of the duties previously performed by the claimant were to be taken on by Harrison's Accountants, in addition to the accounting role that they had performed prior to the claimant's redundancy. The additional cost of this in Accountant's fees to the respondent is only £200 per month.

30. Unfortunately, at the time of the consultation meeting on 17 February 2021 the respondent were severely impacted by the COVID pandemic and had reduced their staffing levels. There were no vacancies. Following a short period of consideration of the points made by the claimant and Ms McNamee, Mr Susans remained of the view that the claimant's role would be split in the way proposed, which would ensure that there was a significant costs saving to the respondent and would not impact on the provision of the accounting duties. In the absence of any alternative roles, he concluded that the claimant should be made redundant.

31. Much of the discussion during the meeting on 17 February 2021 centred upon the assertion by not only the claimant but also Ms McNamee regarding their long service and versatility. The primary focus of the claimant's resistance to the proposal to make her redundant was the fact that she had performed such a multitude of roles and had a significant amount of experience, insight and knowledge of the business such that the respondent ought to retain her. The audio recording suggests that the claimant fully understood the need to cut costs and the way in which Mr Susans had proposed that this be achieved. Whilst she did not agree that she should be made redundant, and stressed that she was a single mother and the sole "bread winner", she did not challenge the workability, logic or reasonableness of Mr Susan's proposal to split her role in various ways. At the conclusion of the consultation meeting Mr Susans made it clear

that he had not made a decision and that it would be a decision that would finally be made by the Board.

32. There was a short meeting via Zoom between the claimant and Ms McNamee and Mr Susans on 25 February 2021 to enable the decision to be communicated "in person". The decision was then confirmed to the claimant in writing by letter dated 25 February 2021. It was acknowledged within that letter by Mr Susans that the claimant had a great deal of knowledge and skill which would be impossible to replace. However, Mr Susan emphasised that at the time it was imperative to substantially reduce overheads. The claimant was informed that she was entitled to 12 weeks' notice, which she would not be required to work, and that her employment would officially terminate on 21 May 2021. It was Mr Susan's intention that the claimant would remain on furlough during her notice period. The claimant was informed that she would be paid a statutory redundancy payment of £8,070 (£538 x 15) together with any outstanding holiday pay.

33. The claimant appealed against the decision to terminate her employment by reason of redundancy by email to Mr Susans sent on 2 March 2021. The reply from Mr Susans dated 3 March 2021 stated that the claimant did not have a right of appeal against the decision, but he undertook to carry out a review of his decision. This review was in the form of a response to the claimant's Grounds of Appeal as set out within the letter from Mr Susans dated 3 March 2021.

34. The claimant was informed that Mr Susans had considered whether her skills could be used in other positions within the business, including working part time or even job share. He also explained that it was not the case that the claimant's accounting duties were being outsourced. It was only the entry of payments and the supervision of purchase ledger that was taken by Harrisons going forward, in addition to the existing accounting duties that they performed. The letter therefore confirmed to the claimant that her redundancy dismissal would "stand".

35. Shortly after the letter dated 25 February 2021 was sent to the claimant, as a result of illness to staff in Nantwich and unexpected increase in bookings, the respondent required a part time Reservations Executive to join their Reservations Department. The role was advertised at a salary of £17,000 per annum which when reduced on a pro rata basis to reflect that the role was part time (3 days a week) equated to £10,200 per annum. The role was advertised in early March 2021. The claimant saw the advertisement but did not apply.

36. The respondent was aware that the claimant was on furlough in her notice period and had informed them that she would consider a part time role during the consultation process, as confirmed by her within her email to Mr Susans on 4 March 2021. The availability of this part time vacancy was not directly brought to her attention. Indeed, the respondent assumed that the claimant would not be interested in the role because of the significant salary reduction. When giving evidence, however, Mr Susans accepted that the claimant had the necessary skills to be able to perform the reservations role. Mr Susans said that he had some concern about the suitability of the claimant for the role because they were looking for a junior employee and the Trainee Manager in charge of the Reservations Team might have felt undermined if the claimant had been appointed as part of her team. However, the reason the vacancy was not offered to the claimant was the fact that the position was only part time and minimum wage, so his

expectation was that the claimant would not be interested. It was Mr Susans understanding that the claimant's offer to reduce her hours to part time was specifically in relation to reducing the hours that she performed as Accounts Manager and not that she would be interested in any part time role that became available.

37. When giving evidence the claimant stated that she did not apply, or even enquire about the role, because she did not believe that she was able to do so because she had already been given notice of redundancy. I do not find this explanation plausible. The claimant is both intelligent and articulate. If the claimant genuinely had a strong interest in accepting the role of Part time Reservations Executive I believe she would have at least made an enquiry of Mr Susans. Indeed, the claimant's colleague, Ms McNamee, made just such an enquiry and was informed that she would be considered. I think it is unlikely that the claimant would not have been aware of the interaction between Ms McNamee and Mr Susans on the point, as their approach to their respective redundancies was very much aligned.

Relevant Law

38. TUPE applies on a "relevant transfer", which occurs where either:-

- There is a transfer of a business, undertaking or part of a business or undertaking which is a transfer of an economic entity that retains its identity (a business transfer) (Regulation 3(1)(a));

- A client engages a contractor to do work on its behalf, engages a different contractor to do that work in place of the first contractor, or brings the work "in house" (a service provision change) (Regulation 3(1)(b));

39. While some transfers will only fall within the definition of a service provision change, it is possible for there to be both a business transfer and a service provision change as the two are not mutually exclusive.

40. The full definition of a service provision change (Regulation 3(1)(b)) of TUPE is as follows:

"(i) Activities ceased to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor");

(ii) Activities ceased to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by their client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on a client's behalf; or

(iii) Activities ceased to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf; and in which the conditions set out in paragraph (3) are satisfied."

41. The “activities” that are carried out by another person must be activities which are fundamentally the same as the activities carried out by the person who has ceased to carry them out (Regulation 3(2A)).

42. The conditions in Regulation 3(3) are that:

- Immediately before the change, there must be an organised grouping of employees situated in Great Britain that has as its principal purpose the carrying out of the relevant activities on behalf of the client;

- Immediately before the change, the client intends that the activities will be carried out by the transferee other than in connection with a single specific event or task of short term duration;

- Activities do not consist wholly or mainly of the supply of goods for the client’s use.

43. Where there has been a relevant transfer, the Employment Contracts of the employees employed in the undertaking are automatically transferred from the transferor to the transferee (Regulation 4(1)), together with all the transferor’s rights, powers, duties and liabilities in respect of such contracts (Regulation 4(2)). Where there are express dismissals (Regulation 7(1)) provides that they will be automatically unfair with the sole or principal reason for dismissal is the relevant transfer.

44. Even if not automatically unfair, a redundancy dismissal may still be unreasonable (and therefore unfair) under the general unfair dismissal provisions contained in Section 98(4) of the Employment Rights Act 1996.

45. Section 98(4) states that:

“The determination of the question whether the dismissal is fair or unfair (having regard to the reasons 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.”

46. In Williams v Compair Maxam Limited [1982] ICR 156 EAT, the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. The EAT stressed that in determining the question of reasonableness it was not for the Employment Tribunal to impose its standards and decide whether the employer should have behaved differently instead the Tribunal has to ask whether “the dismissal lay within the range of conduct which a reasonable employer could have adopted”.

47. The factors suggested by the EAT in the Compair Maxam case that a reasonable employer might be expected to consider it were:

- Whether the selection criteria were objectively chosen and fairly applied;
- Whether employees were warned and consulted about the redundancy;
- Whether, if there was a Union, the Union's view was sought, and
- Whether any alternative work was available

48. In Polkey v A E Dayton Services Limited [1988] ICR 142 the House of Lords held that procedural fairness is an integral part of the reasonable test found in Section 98(4) ERA. A failure to follow correct procedures is likely to make a dismissal unfair unless, in exceptional circumstances, the employer could reasonably have concluded that doing so would have been "utterly useless" or "futile". With regard to redundancy dismissals this means that "the employer will not normally 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 deployment within his own organisation."

49. While the question of what constitutes fair and proper consultation in each individual case is a question of fact for the Tribunal, the EAT provided some general guidance in Rowell v Hubbard Group Services Limited [1995] IRLR 195 EAT. In that case the EAT endorsed the approach that consultation "involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely".

50. In Thomas Betts Manufacturing Co v Harding [1980] IRLR 277 CA, the Court of Appeal ruled that an employer should do what it can so far as is reasonable to seek alternative work. Even if an employer considers that an employee would not accept an alternative post, it may be unreasonable to exclude him or her from consideration for it without consulting him or her first – Ward v Mahle Filter Systems UK Limited ET Case No. 3102701/09. However, even if it is found that an employee will not have accepted the alternative position if it had been offered to him or her this will not prevent a finding of unfairness unless the employer could have reasonably decided at the time of the dismissal that consultation with the employee would have been utterly useless – Brown v Gavin Scott t/a Gavin Crawford EAT 149/87.

51. An employer must pay a statutory redundancy payment to an employee who has sufficient qualifying service and is dismissed by reason of redundancy – Section 135 ERA 1996. The amount of a statutory redundancy payment depends upon the employees age, length of service and pay. Only employees are entitled to a statutory redundancy payment and the maximum length of service that may be taken into account in a redundancy claim is 20 years. In calculating service for the purposes of a statutory redundancy payment, only complete years' of continuous service as an employee are taken into account.

52. Any week during the whole or part of which an employee's relations with the employer are governed by a Contract of Employment will count in computing the employee's period of employment (Section 212(1) ERA 1996). However, any week during which an employee's relations with his or her employer are not governed by a Contract of Employment breaks continuity (Section 210(4) ERA 1996). This means that a whole week of no work in effect resets the clock on continuous employment. An

umbrella Contract is a Contract which continues to exist through the entire relationship between the employer and the casual employee, even when they are not working. If it can be established that there is such a contract, then there will be a Contract of Employment over all weeks in which the global or umbrella contract existed (Section 212(1) ERA 1996). Alternatively, where there is insufficient mutuality of obligation between periods of work for their to be an umbrella Contract of Employment, an employment relationship may subsist solely during each separate assignment.

Claimant's Submission

53. It was the claimant's submission that her position was not redundant but the only reason the respondent no longer needed an in house accountant was because her duties had been given to Harrisons Accountants. The claimant highlighted the fact that the correspondence that she had received from the respondent dated 30 October 2020 had stated that Harrisons were doing some Sage accounting tasks and that at the meeting on 17 February 2021 Mr Susans had stated that he could not take on any more work. It was the claimant's case, therefore, that her duties had been transferred to Harrisons Accountants and that it may possibly have been the case that she should have been transferred.

54. The claimant's case for unfair redundancy dismissal was largely based upon criticisms of the procedure adopted by the respondent. The claimant was critical of the brief timescale as the first consultation meeting was held on 17 February 2021 and her dismissal by reason of redundancy was confirmed on 21 February 2021. The claimant also complained that 24 hours' notice of the first consultation meeting on 12 February 2021 was too short and that the process had been flawed because Mr Susans had not been accompanied by a note taker at the meeting on 17 February 2021. There was also criticism from the claimant that her part of the meeting had not been properly recorded and that Mr Susans had not carried out a scoring exercise.

55. In addition, the claimant criticised the respondent for allegedly predetermining the decision to terminate her employment prior to any consultation because part way through the consultation meeting Mr Susans had commented that he felt that he knew exactly where the accounts aspect was going. The claimant also felt that Mr Susans had not engaged with the detail sufficiently as he had stated that he did not know exactly what duties she performed. The claimant was critical of the respondent's lack of documented consideration process both in relation to their proposal to make her redundant and the extent to which they had looked at other options to mitigate against her redundancy. However the claimant's primary criticism was the respondent's failure to consider her for suitable alternative employment, in particular the respondent's failure to consider her for the part time Reservations Executive role.

56. It was also the respondent's case that her redundancy payment had been calculated incorrectly because the respondent had treated her start date as 2006, rather than 2002, notwithstanding her assertion that she commenced employment with the respondent's predecessor in 2002 which was supported by the Employment Schedule that had been provided by HMRC.

Respondent's Submission

57. It was the respondent's submission that the Tribunal should assess the fairness of the dismissal by reference to the range of reasonable responses. It was asserted that there was a genuine redundancy by reason of the diminution of the role previously performed by the claimant. It was submitted that the effect of COVID on the respondent's business had been such that there had been a drastic reduction in trade and corresponding reduction in the respondent's requirements for accounting work. I was reminded that the respondent's requirements for an Accounts Manger were under scrutiny as early as October 2020 and that in February 2021 when the claimant was made redundant the respondent had been managing to operate its business without an in house Accountant since the start of the claimant's furlough period in March 2020. It was highlighted that in February 2021 the claimant fully understood the respondent's requirement to reduce cost and that she had been aware that this was the position and the reasons why since October 2020 when there had been very serious consideration on both sides that the claimant might take voluntary redundancy.

58. It was submitted that as the respondent only had one in house Accountant there was no requirement to devise a selection pool or carry out a scoring exercise. I was reminded of the requirement to take into account the size and resources of the respondent, including, in particular, that Mr Susans carried out the redundancy exercise singlehandedly. It was the respondent's submission that in all the circumstances the respondent had clearly and reasonably explained the situation to the claimant and had taken into account her views before coming to any decision.

59. It is the respondent's case that the consultation was at a formative stage and that it was striking that the claimant did not appear to assert during the consultation process that her job role was still needed. The respondent asserts that the process followed by the respondent, taking into account their size and administrative resources, was reasonable.

60. Insofar as the claimant's contentions regarding her potential transfer to Harrisons Accountants, the respondent points out that the claimant was equivocal regarding her pursuit of this claim and that, in any event, in this case there was not a wholesale transfer of her duties (or activities) to the Accountants. The respondent does not accept that there was a transfer.

61. The respondent acknowledges that the role of Reservations Executive became unexpectedly available post the notification of the claimant's dismissal but before the expiration of that notice. However, it is the respondent's case that the claimant did not apply for this position despite it being advertised in early March 2021. The respondent submits that it was a significantly lower paid role on part time hours that was not attractive to the claimant. The respondent asserts that there was no reason for the respondent to consider that the claimant may be interested in the role because of the significant demotion status and reduction in pay. Indeed the respondent submits that the claimant would have turned down the part time Reservations Executive role prior to the expiration of her notice period in the event that it had been offered to her.

62. Insofar as the redundancy pay claim is concerned, the respondent asserts that the claimant was a casual worker, not an employee, prior to 2006 or, in the alternative, employed on a series of short term contracts. Either way, it is the respondent's case that as a casual worker or, alternatively a casual employee, on the balance of

probabilities, it is unlikely that the claimant would have had continuous service between 2002 and 2006. In the absence of evidence which demonstrates a period of continuous service between 2002 and 2006, which is unbroken, the respondent submits that there is no basis upon which to attribute additional years of service prior to 2006. The respondent argues that the claimant is not entitled to a further redundancy payment.

Conclusion

63. I am satisfied that the respondent's requirements for employees to carry out work of a particular kind namely that performed by the claimant as Accounts Manager had ceased as a consequence of their business decision to streamline the function in order to remove elements of duplication and disperse the remaining duties amongst the DPP Accounts staff, the Reservations Team, Mr Susans and Harrisons Accountants. It is not for the Tribunal to attempt to substitute its own view for that of the respondent when exercising judgment regarding the most efficient running of their business. There was a genuine redundancy situation and the claimant's dismissal was by reason of redundancy.

64. The claimant's contentions regarding whether there has been a TUPE transfer to Harrisons have been equivocal. In any event, I accept the respondent's evidence that only a small element of the claimant's duties were given to Harrisons Accountants. As such, therefore, in my judgment there has been no service provision change (ie. no transfer) when Harrisons took on those duties. For there to be a service provision change it is necessary to identify the activities and to be satisfied that those activities have ceased to be carried out by the respondent and are now carried out instead by Harrisons Accountants on the respondent's behalf. The activities performed by the claimant in her role as Accounts Manager were not substantially transferred and have mostly been dispersed within the respondent's organisation. The activities carried out by Harrisons Accountants as a result of their additional engagement by the respondent are not fundamentally the same as the activities that were formerly carried out by the claimant prior to the alleged transfer because they only constitute a small percentile of the activities or duties previously performed by the claimant.

65. In view of the fact that I have found that there was no transfer to Harrisons Accountants, liability for the claimant's dismissal, if any, stays with the respondent.

66. Whilst I accept that the period of consultation carried out by the respondent in February 2021 was short, I think it is important to bear in mind that in many respects the process of consultation had started in October 2020. By February 2021 the claimant was already well aware of the financial difficulties facing the respondent and the fact that making her redundant, voluntarily or otherwise, was under serious consideration. Although the respondent initially provided only 24 hours' notice of the first consultation meeting on 12 February 2021, they accepted that this period of notice was in inadequate and re-arranged the consultation meeting at the claimant's request.

67. I do not feel that the criticism of Mr Susans for not being accompanied by a note taker at the meeting on 17 February 2021 is valid. It would make no sense to have someone present to make a contemporaneous written note if the meeting was to be recorded. It is unfortunate that part of the meeting had not recorded as envisaged, but I do not accept that the human error in failing to ensure that all of the meeting was

recorded had any bearing on the fairness of the process. It would be a different matter, of course, if something had been discussed during the course of the meeting which had not been recorded and was now material to a substantive issue in dispute, but that does not seem to me to be the case. I have noted that the claimant criticises the respondent for not carrying out a scoring exercise. However, this overlooks the fact that the claimant was the only Accounts Manager and as such the only person under consideration for redundancy once the respondent had decided to dispense with that role. It follows therefore that there were no other employees under consideration for redundancy for the claimant to be scored against with a view to determining whether or not she retained her role.

68. There is no evidence to support the claimant's criticism that Mr Susans predetermined the decision to terminate her employment prior to the consultation. His comment that he knew exactly where the Accounts aspect was going seems to me to relate to a potential provisional determination reached part way through the consultation meeting and, significantly, after a period of consultation with the claimant during the first part of the meeting on 17 February 2021. Moreover, Mr Susans was clear that he had not made a final decision at the conclusion of the consultation meeting and that this would be a matter for the Board post that meeting. I accept his evidence on this.

69. The evidence of Mr Susans both orally during the Tribunal hearing and as conveyed by the audio recording did not give the impression that he had not engaged sufficiently with the detail of the claimant's role. Indeed, in my judgment the contrary is the case, especially when considered alongside the business case for the potential redundancy of the claimant in October 2020. In my view, Mr Susans had properly understood the essential elements of the claimant's role as Accounts Manager and had given reasonable and proper consideration to how those functions could be dispersed, in the interests of efficiency and to achieve a costs saving in difficult economic times. I cannot find any basis to criticise the degree of diligence that he applied to this task.

70. I also accept that Mr Susans had given proper consideration to whether there were any suitable alternative positions available for which the claimant could be considered at the time of the consultation meeting on 17 February 2021 and shortly thereafter when her dismissal by reason of redundancy was communicated to her on 21 February 2021. I accept the respondent's submission that the obligation upon the employer in the context of "unfair redundancy" is to reach a decision and follow a process when so doing which falls within the band of reasonable responses available to a reasonable employer in all of the circumstances. Overall, my judgment is the procedure followed by the respondent, including the manner in which they handled the claimant's appeal fell within this "band of reasonableness". Nevertheless, in my judgment the dismissal was unfair. The respondent made a fatal error when failing to offer the claimant the role of Part time Reservations Executive at some point in early March 2021 or at all. The respondent should not have assumed that the claimant would not be interested in the role. This assumption took their actions outside of the band of reasonable responses that would have been taken by a reasonable employer. It is for this reason that I have concluded that the claimant's dismissal was unfair.

71. However, I have gone on to consider the "Polkey question". In other words, if offered to her, would the claimant have accepted the Part time Reservations Executive role. In my judgment, and on the balance of probabilities, the claimant would not have

accepted the role even if offered. I have reached this view on the basis of the available contemporaneous evidence. In my view, it is significant that the claimant did not apply for the role. The claimant was aware that it had been advertised and took no step to enquire about the job which suggests to me that she did not really want it.

72. The conclusion that I have reached above is corroborated by the surrounding circumstances, namely, the fact that the claimant is a single mother and the sole bread winner and would have needed to concentrate her efforts on securing a comparable alternative role, notwithstanding her loyalty to the respondent. If the claimant had applied for or accepted when offered the role of Part time Reservations Executive this would have resulted in her having to accept a very significant reduction in pay which I do not believe she would have been willing or able to countenance at that time.

73. Unfortunately, for the claimant, there is a dearth of evidence regarding the employment relationship that she had with the respondent's predecessor prior to 2006. Whilst I have no reason to doubt that the claimant is seeking to put forward an honest account to the best of her recollection I am not satisfied that the claimant was continuously employed without any gaps of a calendar week or more throughout the period of 2002/2006. The evidence from the claimant in relation to this period is too imprecise and lacking in detail to enable me to make a reliable finding that the claimant was continuously employed throughout the 4 year period from 2002 to 2006.

74. Unfortunately, the claimant does not have any documentation to corroborate her recollection, save for some records from HMRC. There is no Contract of Employment or wage slips and nor is there any certainty regarding the claimant's precise start date in 2002. Whilst I am satisfied that the claimant did work for the respondent's predecessor during the period 2002-2006, as evidenced by the HMRC records and the claimant's own oral evidence, I cannot find that this was a period of continuous employment on the material available. The HMRC pay records do not show a level of income that suggests continuous employment of up to 16 hours each week throughout each tax year in question. Therefore, notwithstanding the claimant's best recollection that she worked every week my finding is that the claimant's recollection is flawed, even though it is in good faith. Moreover, the claimant's evidence regarding the payment of holiday pay on a quarterly or six monthly basis actually supports a finding that any employment was not continuous. The claimant would only have been entitled to payment in respect of accrued untaken holiday on the termination of a period of employment. It is not permissible to pay holiday pay during the course of the employment. It was not the claimant's evidence that she actually took periods of annual leave for which she was paid. The claimant's evidence supports a conclusion that there were periods of employment or periods when she was a worker and accrued holiday that was paid at the end of separate assignments or periods of employment/engagement as a worker.

75. In my judgment, there was sufficient mutuality of obligation and control during the periods that the claimant worked for the respondent's predecessor between 2002-2006 for her to have been an employee during those periods. However, notwithstanding the claimant's own recollection that there was continuity, in my judgment her recollection regarding the payment of holiday pay and the HMRC pay records suggest that the claimant's continuity of employment was broken from time to time. I have therefore concluded that the claimant was employed by the respondent's predecessor during the

period 2002-2006 pursuant to a series of short term employment contracts. This is consistent with Mr Susan's account of how the respondent contracts with its casual employees or workers and is in line with the relatively seasonal nature of a business such as the respondent which relies on tourism. The claimant's own evidence was that the train does not run every week and that there is a period in January each year when the train does not run at all.

76. My conclusion therefore is that there were weeks during which the employee's relations with the respondent's predecessor were not governed by a Contract of Employment and that these weeks did break her continuity of service. I have not found that there is sufficient evidence to support a conclusion that there was a global or umbrella Contract in existence throughout the period 2002-2006. My judgment, therefore, for the purpose of calculating her statutory redundancy payment on termination of her employment in 2021 is the respondent were entitled to treat the claimant's period of continuous service as commencing 1 July 2006, as stated within the claimant's Particulars of Employment, that she signed on 29 April 2013. The claimant is therefore not entitled to a further redundancy payment and this claim fails.

Employment Judge Britton
22 June 2023