EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100010/2023

Held in Edinburgh on 15, 16 & 17 May 2023

Employment Judge: J McCluskey

Robert Reid	**Claimant** **Represented by:** **Mr M Banks** **Non-practising Barrister**
Scottish Borders Council	**Respondent** **Represented by:** **Mr I Davidson** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:

1. the claimant's claim for unfair dismissal is not well founded and is dismissed.

2. the claimant's claims for a statutory redundancy payment, breach of contract and holiday pay having been withdrawn by the claimant, are dismissed.

REASONS

Introduction

1. The claimant brought claims for unfair dismissal, a statutory redundancy payment, breach of contract and holiday pay. These claims were resisted by the respondent.

2. At the outset of the hearing the claimant advised that a statutory redundancy payment had been received and he no longer insisted upon this claim. He also advised that his claims for breach of contract and holiday pay were withdrawn.

3. His outstanding claim was for unfair dismissal. The respondent asserted that the reason for the dismissal was redundancy and that this was a potentially fair reason for dismissal of the claimant. The claimant asserted that redundancy was not the reason or principal reason for his dismissal and that there was no potentially fair reason for dismissal. He asserted that the reason for his dismissal was because he refused a change to his employment contract or in the alternative that he had been constructively dismissed.

4. There was a joint bundle of documents. It was not paginated but the documents were grouped in sections, from section 1 - section 52. There was an additional bundle of documents lodged by the claimant at the outset of the hearing, which extended to fourteen pages. The Tribunal advised parties that only pages in the two bundles to which the Tribunal was directed during evidence in the hearing would be considered by the Tribunal.

5. The claimant led evidence on his own account. It had been agreed by the Tribunal at the case management hearing on 27 March 2023 that the claimant could lead evidence from his representative Mr Michael Banks, but he chose not to do so. The respondent led evidence from (1) Charlotte Walsh Area Cleaning Manager; (2) John Gray Facilities Manager; (3) Michael Rogerson HR Advisor; (4) Catriona Degnan Cleaning Co-ordinator; (5) Tracey Biggs Cleaning Co-ordinator.

Issues

6. At the outset of the hearing the Tribunal asked the parties to clarify the issues to be decided. The parties agreed the following issues to be determined by the Tribunal:

Redundancy

a. What was the reason or principal reason for dismissal?

b. 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:

i. the respondent adequately warned and consulted the claimant;

ii. the respondent adopted a reasonable selection decision, including its approach to a selection pool;

iii. the respondent took reasonable steps to find alternative employment for the claimant; and

iv. dismissal was within the range of reasonable responses.

Constructive dismissal

c. *breach of an express term to pay wages',* did the respondent do the following thing:

i. During consultation process tell the claimant that his wages would be reduced?

d. Did the above breach the claimant's contract of employment?

e. If so, was the breach a material one, such that the claimant was entitled to treat the contract as being at an end?

f. *breach of implied term trust and confidence:* did the respondent do the following things:

i. 16 August 2022 meeting - told the claimant he was at risk of redundancy;

ii. 1 September 2022 letter- gave the claimant an indication that his hours / wages were to be reduced;

iii. 14 September 2022 meeting- confirmation to claimant of reduction in hours/wages;

iv. 27 September 2022 - sent claimant undated letter received on 27 September 2022 with confirmation of reduction in hours/wages;

v. 4 October 2022 email - gave claimant further confirmation of reduction in hours/wages.

g. Did i - v above breach the implied term of trust and confidence?

h. For both breach of an express term to pay wages and breach of the implied term of trust and confidence:

i. did the claimant resign in response to the breach;

ii. did the claimant affirm the contract before resigning.

i. If the dismissal is unfair, how much compensation should be awarded. The Tribunal will need to decide:

i. What financial losses has the dismissal caused the claimant;

ii. Has the claimant taken reasonable steps to replace his lost earnings by looking for another job;

iii. If not, for what period of loss should the claimant be compensated;

iv. Is there a chance the claimant would have been fairly dismissed anyway if a fair procedure had been followed;

v. If so, should the claimant's compensation be reduced.

Findings in fact

7. The Tribunal has only made findings in fact necessary to determine the issues. All references to page numbers are to the paginated joint bundle of documents provided to the Tribunal.

8. The claimant was employed by the respondent as a cleaner from 26 November 2018 until 12 October 2022.

9. The claimant's contract of employment is dated 12 November 2018. His contract stated that his place of work was Kyowa Kirin International pic (KKI) "*but you may be required to work at any other location within Scottish Borders as necessary".* In practice the claimant only worked at KKI premises apart from a short period early in the coronavirus pandemic when KKI was closed and he worked elsewhere before the national lockdown. KKI is a pharmaceutical company in Galashiels.

10. In practice the respondent's cleaners would not be asked to work more than a five-mile radius from their usual place of work. Some of the respondent's cleaners, but not the claimant, were employed as relief cleaners and were asked to work across a wider geographical area. The claimant did not have such a contract and had not been required to work across the Borders region.

11. The claimant was contracted to work 25 hours per week. His contract stated that the arrangement of those hours of work were to be advised by the respondent and could be altered to meet service need. The contract also stated that hours worked between 10pm and 6am would attract a single enhancement rate of 15% above the base hourly rate.

12. In practice the claimant worked from 6pm to 11pm, He received the enhanced rate above the base hourly rate for the hour worked between 10pm - 11pm.

13. The claimant's contract provided for a notice period from the respondent of one week for each year of continuous service, subject to a minimum of four weeks' notice.

14. The respondent is Scottish Borders Council. The respondent has a cleaning contract with KKI. This is one of only two cleaning contracts which the

respondent has with a third party. Most of the cleaning work carried out by the respondent is at offices and buildings operated by the respondent.

15. The respondent's contract with KKI started on 7 July 2007. The contract was formed by way of exchange of correspondence between the respondent and KKI. The correspondence set out the cleaning services required. The cleaning services required by KKI varied from time to time over the years. Changes to the services required by KKI were recorded in correspondence between the parties.

16. On 29 June 2022 the facilities manager of KKI met with John Gray, Head of Facility Services and Charlotte Walsh, Area Team Manager, both of the respondent. At that time at the KKI premises there were two cleaners, referred to by KKI as 'standard cleaners' and one cleaning supervisor, who were all employed by the respondent. They each worked 25 hours per week. The claimant was a 'standard cleaner'. All three carried out cleaning duties.

17. After the meeting on 29 June 2022 the KKI facilities manager sent an email to Mr Gray and Ms Walsh to confirm what had been discussed. The email included a paragraph which said "I/l/e *agreed that KKI only requires 2 standard cleaners (4 hours each per day over 5 days = 40 hours) from 6pm to 10pm".*

18. The respondent has a redundancy policy and procedure. It sets out the dismissal process for the respondent to follow, including when no selection criteria apply. The respondent determined that none of the three cleaning posts would remain, therefore selection criteria did not apply. The respondent determined that two new posts were being created. The respondent determined that the new posts were redeployment roles for which interviews would be required.

19. The respondent's redundancy policy and procedure sets out a minimum three step process when no selection criteria apply. Step 1 requires the respondent to give written notice of the reason why redundancy is being contemplated and invite the employee to a meeting to discuss it. Step 2 requires a further meeting with the employee to advise of the decision. Following the meeting

the employee is to be given written notice of any decision to dismiss by reason of redundancy. Step 3 requires an appeal meeting if the employee wishes to appeal.

20. The respondent wrote to the claimant by letter dated 10 August 2022 to invite him to attend a meeting. The letter stated that the purpose of the meeting was *"to begin consulting with you on the situation and how your role is affected as the client has expressed a wish to reduce the level of service they receive from us".* The claimant was advised of his right to be accompanied at the meeting by at trade union representative or a work colleague. As the level of service was to be reduced the claimant understood this to mean a reduction in hours of work.

21. The letter dated 10 August 2022 did not specifically refer to a redundancy situation. The claimant understood before attending the meeting that it was to discuss reducing his hours of work as the service was being reduced.

22. The claimant attended a first consultation meeting on 16 August 2022. He was accompanied by Mr Michael Banks, who is the claimant's representative in these Tribunal proceedings. Catriona Degnan, Tracey Biggs and Michael Rogerson were in attendance. Ms Degnan discussed with the claimant and his representative that KKI were reducing the cleaning requirement at their premises and that the reduction in cleaning hours required by the client was from 75 hours to 40 hours per week Ms Degnan discussed with the claimant and his representative that going forward KKI would require two cleaners to work four hours each per day over five days. She explained that KKI no longer required a cleaning supervisor. The claimant said that he would be interested in one of the cleaning positions working 20 hours per week. The claimant was asked if he was interested in anything else apart from the 20 hours per week post at KKI. He said he could not work more than 25 hours per week. He said that he could not work a split shift over a working day because of his family caring commitments.

23. Immediately after the meeting on 16 August 2022 the respondent discussed a move to Galashiels Academy with one of the other employees who was at risk of redundancy.

24. On 16 August 2022, following the meeting, Ms Degnan sent the claimanta list of current suitable vacancies with the respondent. The following day Ms Biggs sent the claimant details of an additional vacancy with the respondent.

25. None of the vacancies were of interest to the claimant due to the hours of work required or the location.

26. The claimant was also asked to complete a redeployment form which he did. The completed redeployment form did not alert the respondent to any other suitable vacancies which the claimant could have carried out.

27. The claimant was invited to attend a second consultation meeting on 14 September 2022. The meeting was chaired by Ms Biggs. Ms Walsh and Mr Rogerson were also in attendance. The claimant was unable to attend. With the parties' agreement, Mr Banks attended the meeting on behalf of the claimant. At that meeting the respondent confirmed all three of the posts working 25 hours per week, over 5 days were to be removed. In their place there would be two cleaning posts of 20 hours per week, over 5 days. She explained that there would be no cleaning supervisor. Mr Banks confirmed that the claimant was interested in one of the two cleaning posts, working 20 hours per week. The respondent told Mr Banks that interviews for those posts would take place the following week.

28. On 14 September 2022, following the meeting the respondent wrote to the claimant. The letter confirmed the claimant's dismissal, with notice, due to redundancy. The letter stated *"This letter serves to give you formal notice of termination of employment due to redundancy.* In *accordance with your contract of employment you are entitled to 4 weeks' notice. If no alternative is found within this period your last day of service will be 12 October 2022".*

29. On 27 September 2022 the claimant received a letter from Ms Biggs. The letter was undated. The letter was headed "End of Redundancy Period". It stated that a post had been identified for the claimant within the KKI service, that the post was an alternative to redundancy and in line with the respondent's redundancy policy. It confirmed that the new post would commence on 3 October 2022.

30. The post referred to in the letter of 27 September 2022 was one of the two cleaning posts at KKI, working 20 hours per week. The respondent had not needed to carry out interviews for the posts as only the claimant and one other employee were interested in these posts.

31. The claimant queried the start date of 3 October 2022 for the new post with Ms Biggs. This was because the letter of 14 September 2022 terminated his employment with notice and stated that his last day of service would be 12 October 2022. Ms Biggs acknowledged the query and said she would take advice from HR. She did not reply to the claimant after that.

32. The date of 3 October 2022 in the letter was an error on the part of the respondent The letter should have said that the new post would start after 12 October 2022.

33. In the period from 3 October to 12 October 2022 the claimant continued to work at KKI and was paid for working 25 hours per week.

34. The claimant decided that he did not wish to take up the cleaning post at KKI working 20 hours per week, 4 hours per day. His employment ended on 12 October 2022 in accordance with the notice of termination given to him on 14 September 2022.

35. The claimant was paid a statutory redundancy payment based on his age and length of service.

36. The claimant did not appeal against the decision to terminate his employment.

Observations on the evidence

37. It is not the function of the Tribunal to record all of the evidence presented to it and the Tribunal has not attempted to do so. The Tribunal has focused on those parts of the evidence which it considered most relevant to the issues it had to decide.

38. The Tribunal found that the claimant and the witnesses all sought to give their evidence to the Tribunal as best they could. There was no real dispute between the parties, in relation to essential facts, about what was discussed at the consultation meetings on 16 August 2022 and 14 September 2022 or in relation to the steps taken by the respondent to terminate employment.

39. The dispute between the parties was essentially whether the dismissal was by reason of redundancy as asserted by the respondent. The claimant asserted that redundancy was not the reason or principal reason for his dismissal and that there was no potentially fair reason for dismissal. He asserted that the reason for his dismissal was because he refused a change to his employment contract or in the alternative that he had been constructively dismissed.

40. In relation to the constructive dismissal complaint there was a dispute between the parties, at least on the pleadings, in relation to whether the claimant had resigned. The respondent said there was no resignation. The claimant's pleadings indicated that he resigned. The date of resignation asserted by the claimant was not clear but appeared to be on or around 12 October 2022, as he did not return to work after this date. In evidence, however, the claimant said that he had not resigned. As set out in further detail below the Tribunal found that the claimant did not resign but rather was dismissed on notice by the respondent by letter dated 14 September 2022.

Relevant law

41. Section 94 Employment Rights Act 1996 (ERA) provides for a right not to be unfairly dismissed, which is determined having regard to the terms of section 98 ERA.

42. Section 95(1) ERA states provides for three circumstances in which an employee is dismissed: (a) the contract under which he is employed is terminated by the employer (whether with or without notice), (b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

43. Section 95(2) ERA provides that An employee shall be taken to be dismissed by his employer for the purposes of this Part if (a)the employer gives notice to the employee to terminate his contract of employment, and (b)at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire; and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.

44. Section 139(1) ERA states (in relevant part) that for the purpose of that 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.

45. Section 98 ERA states that where an employee has been dismissed for redundancy, the determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer, 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 shall be determined in accordance with equity and the substantial merits of the case.

46. Case law has established that save in unusual circumstances consultation with the employee is required before there can be a fair dismissal for redundancy, including in **Polkey v AE Dayton Services [1988] ICR 142.**

47. In **Polkey,** Lord Bridge set out the features of fairness in the context of dismissal for redundancy: *"In the case of redundancy, the employer will not normally act reasonably unless he warns and consults any employee 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."*

48. The Tribunal is not permitted to substitute its view for that of the respondent. **Williams v Compair Maxam [1982] ICR 156** at 161: *"[It] is not the function of the industrial tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted."*

49. There is a line of cases which holds that in certain circumstances the unilateral imposition of new terms and conditions can result in the dismissal of an employee from the old contract and an entry into a new contract on different terms (for example: **Morgan v Wolverhampton Borough Council EAT 636/79; Hogg v Dover College [1990] ICR 39; Alcan Extrusions v Yates and ors 1996 IRLR 327, EAT.)** For example, in **Hogg v Dover College** the EAT found that where the new contract was on *"wholly different terms"* this could amount to an unfair dismissal from the first contract.

50. Section 123(1) ERA states that if a tribunal decides that an employee has been unfairly dismissed, it will award such compensation as is just and equitable in all the circumstances, having regard to the loss sustained by the employee in consequence of the employer's actions.

Submissions

51. Both parties made oral submissions and the respondent provided a copy of his submissions in writing. For brevity, these are not recorded here. The Tribunal carefully considered the submissions of both parties during its deliberations and has dealt with the points made in submissions, where relevant, when setting out the facts, the law and the application of the law to those facts. It should not be taken that a submission was not considered because it is not part of the discussion and decision recorded.

Discussions and decision

Constructive dismissal

52. The claimant pleads his case as unfair dismissal or in the alternative constructive dismissal. Considering first the claim of constructive dismissal. The claimant was given notice of termination of his employment by the respondent in the letter to him dated 14 September 2022. The letter gave four weeks' notice in accordance with his contractual entitlement. The letter stated that is employment would end on 12 October 2022.

53. The claimant did not lead any evidence that he had resigned, either before or after notice of termination of employment was given to him on 14 September 2022. The claimant also said in evidence that he had not resigned. The Tribunal concluded on the evidence that the claimant did not resign. The Tribunal was satisfied that the letter of 14 September 2022 was a notice of termination of employment by the respondent and that it was the respondent who had terminated the employment.

54. Section 95(2) ERA provides that an employee shall be taken to be dismissed by his employer if the employer gives notice to the employee to terminate his contract of employment, and at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire.

55. Therefore, in any event, any purported resignation after the claimant received notice of termination of employment on 14 September 2022 could not change the dismissal to one which could fall within the terms of section 95(1)(c) ERA (constructive dismissal) as opposed to section 95 (1)(a) ERA.

56. The Tribunal is however bound to say that it understands the claimant's confusion on receiving the undated letter from the respondent on 27 September 2022. Firstly, the letter sets out a start date in the new post of 3 October 2022. This is entirely at odds with the earlier letter of 14 September 2022 which confirmed that employment in the original post would end on 12 October 2022. The respondent conceded in evidence before this Tribunal that the date of 3 October 2022 was wrong and should have been a date after 12 October 2022. The respondent was unable to clarify matters when the claimant made an enquiry on 4 October 2022, although in practice the claimant did continue to work in the original post until 12 October 2022.

57. More importantly, in the letter received on 27 September 2022 the respondent sought to unilaterally withdraw the notice of termination of employment given to the claimant on 14 September 2022 It is the view of the Tribunal that the respondent was not able to do that. Once notice had been served by the respondent it could not unilaterally withdraw that notice **Harris and Russell Ltd v Slingsby 1973 ICR 454, NIRC.** Notice may only be rescinded if both parties agree, and the claimant did not agree to notice being rescinded.

58. This may be where the claimant's assertion of constructive dismissal arises from in the pleadings. Namely, a belief by him that his notice of dismissal had been withdrawn and that in choosing not to commence work in the new post of 20 hours per week he was resigning. Crucially, however, that is not evidence which he gave to the Tribunal or which accords with section 95(2) ERA.

59. The Tribunal was mindful that at the outset of the hearing it had spent some time with professional representatives in agreeing the issues to be determined by the Tribunal. This had included issues regarding constructive dismissal. In

the agreed issues, the claimant asserted that he had been told that his wages would be reduced, and that this was a breach which entitled him to resign from his employment. He also asserted that there had been a breach of the implied term of trust and confidence. But he must also in fact have resigned from his employment in response to the purported breach. The Tribunal heard no evidence from the claimant that he had resigned, indeed he conceded in evidence that he had not resigned, and the Tribunal has therefore found that there was no resignation. The Tribunal has therefore concluded that there is no requirement to consider whether there was a breach or breaches which entitled the claimant to resign, when the Tribunal has found that he did not resign.

60. For all of the above reasons the Tribunal was satisfied that the letter of 14 September 2022 was a notice of dismissal by the respondent, the claimant had not resigned prior to the notice of dismissal being served on the claimant and the respondent was not able to unilaterally withdraw the notice of dismissal once served.

61. The claimant's claim of constructive unfair dismissal therefore fails and is dismissed.

Reason for dismissal

62. By section 139(1)(b) ERA, an employee is dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that the requirements of that business for employees to carry out work of a particular kind, or 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. This requires consideration of the work that the employee actually did.

63. The Tribunal accepted the respondent's evidence that there had been a diminution in the cleaning work required by their client KKI at their premises from 75 hours per week to 40 hours per week and with a required reduction

in head count from three to two employees carrying out cleaning. This was set out by KKI in their email to the respondent dated 29 June 2022.

64. The Tribunal accepted that whereas the cleaning work was being carried out by three of the respondent's employees (two cleaners and one cleaning supervisor), KKI's requirement moving forward was for cleaning work to be carried out at their premises by two employees only. Again, this was set out in the email from KKI to the respondent dated 29 June 2022. It appeared clear to the Tribunal from the correspondence from KKI that KKI's requirement for cleaning work at their premises had diminished. The Tribunal was satisfied that this was, in turn, the focus of the respondent, in its consultation with the claimant. The Tribunal was satisfied that the work of a particular kind which had diminished was cleaning work in the place where the claimant was employed by the respondent, namely KKI premises.

65. It was suggested by the claimant's representative in cross examination that the correct test to apply was whether there was a diminished requirement to carry out cleaning work across the respondent's business and not at the place where the claimant was employed by the respondent, namely KKI premises. The claimant's representative suggested that looking at the respondent's cleaning staff across the whole Borders region covered by the respondent, there was no diminished requirement for cleaning work as there were cleaning vacancies available elsewhere in the Borders.

66. The Tribunal did not agree with this assertion. The Tribunal considered that the claimant's contract specified his place of work as KKI premises. The Tribunal noted that his contract also had a mobility clause which specified that the claimant could "be required to work at any other location within Scottish Borders as necessary". In practice, however, the claimant only worked at KKI premises apart from a short period during the coronavirus pandemic. The claimant agreed in cross examination that his place of work was KKI premises. He stated that only if there was an extreme need could he be required to work elsewhere. Further, the evidence of Mr Gray, which was accepted by the Tribunal, was that in practice employees would not be asked

to work more than about a five-mile radius from their usual place of work. As such, the claimant had not been required to work across the Borders region or beyond a close proximity to his home. This was not challenged by the respondent.

67. The Tribunal was satisfied that when considering whether a redundancy situation arose the respondent was entitled to look at whether there was a diminished requirement for cleaning work at KKI premises and not across a wider area. This was consistent with the decision in **High Table Ltd v Horst and others [1998] ICR 409 CA,** referred to by the respondent's representative in submissions. In **High Table** the Court of Appeal held that the 'place' where an employee is employed should be determined primarily by a consideration of the factual circumstances pertaining prior to the dismissal. The contract of employment and any mobility clause were one factor to take into account, but it was not the sole determinant.

68. The Tribunal was satisfied on the facts found that the respondent was entitled to consider whether there was a diminished requirement for cleaning work at the KKI premises where the claimant worked. The respondent concluded that there was such a diminished requirement as KKI required a reduction in cleaning work from 75 hours to 50 hours per week and a reduction in employees who carried out cleaning from three staff to two staff. The Tribunal was satisfied that the respondent was entitled to treat that as a redundancy situation for the purpose of S.139(1)(b)(ii) ERA.

69. A key aspect of the claimant's claim was that the reason or principal reason for his dismissal was not redundancy, or any other potentially fair reason as set out in section 98 ERA. He asserted that terminating the claimant's cleaning post of 25 hours per week and then offering him a cleaning post of 20 hours per week was a unilateral change of contract terms. In paragraph 3 of the paper apart to his claim form, the claimant asserts as follows; "The respondent sought unilaterally to change the claimant's terms of contract by ending the claimant's original contract and re-engaging him under a new contract. The change in his contract terms was sufficiently fundamental to

amount to a repudiation of the original contract so as to amount to an actual dismissal; **Hogg v Dover College [1990] ICR 39 ".**

70. The Tribunal directed itself to the line of cases which holds that in certain circumstances the unilateral imposition of new terms and conditions can result in the dismissal of an employee from the old contract and an entry into a new contract on different terms (for example: **Hogg v Dover College [1990] ICR 39; Alcan Extrusions v Yates and ors 1996 IRLR 327, EAT.** In particular in **Hogg v Dover College** the EAT found that where the new contract was on "wholly different terms" this could amount to an unfair dismissal from the first contract.

71. The important difference for the claimant from that in **Hogg** is that the new contract working 20 hours per week rather than 25 hours per week arose because the respondent had concluded that there was a diminished requirement for cleaning work and employees to carry out that cleaning work at KKI premises. The respondent had identified that a redundancy situation arose and had consulted with the claimant on that basis. The consultation process is dealt with further below. As already stated the Tribunal is satisfied that there was a potential redundancy situation and what then followed was a redundancy consultation.

72. The Tribunal was therefore satisfied that the reason or principal reason for the claimant's dismissal was redundancy and not the unilateral imposition of new terms and conditions of employment amounting to an actual dismissal.

Redundancy dismissal procedure

73. Having determined that the reason for dismissal was redundancy, the Tribunal considered whether the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. As set out in the agreed list of issues, the Tribunal considered whether the respondent: (i) adequately warned and consulted the claimant; (ii) adopted a reasonable selection decision, including its approach to a selection pool; (iii) took

reasonable steps to find alternative employment for the claimant; and (iv) whether dismissal was within the range of reasonable responses.

Warning and consultation

74. The Tribunal was satisfied that there was an adequate warning and consultation process adopted by the respondent which fell within the range of responses of a reasonable employer. The claimant was invited to a consultation meeting on 16 August 2022 to consult on his potential redundancy. He was told of his right to bring a work colleague or trade union representative as a companion. He elected to bring Mr Banks as a companion. Mr Banks is not a work colleague or trade union representative. The respondent allowed Mr Banks to attend. The redundancy situation was discussed with the claimant and his representative, given the changed cleaning requirements of KKL The proposal to create two new cleaning posts of 20 hours per week was discussed with the claimant. He indicated that he would be interested in one of those posts.

75. Immediately after the meeting on 16 August 2022 the respondent discussed a move to Galashiels Academy with one of the other employees who was at risk of redundancy. The claimant submitted that this meant that the consultation process with all three employees, including the claimant, was concluded then and that at decision on dismissal of the claimant had already been made. The Tribunal could find no basis for this assertion, given the steps followed with the claimant by the respondent on and after 16 August 2022.

76. The claimant was given a period of around one month to consider the potential redundancy of his post. There was no evidence led that he made any proposals to the respondent to avoid redundancy of his post during that period. A second redundancy consultation meeting took place on 14 September 2022. The claimant confirmed that he would not attend that meeting but that Mr Banks, his representative would attend on his behalf. At that meeting the respondent confirmed the redundancy of the claimant's original post. Mr Banks was told that there would be an interview process for

the two new cleaning posts. Mr Banks confirmed that the claimant remained interested in the new cleaning posts.

Reasonable selection decision

77. The Tribunal was satisfied that the selection decision adopted by the respondent fell within the range of responses of a reasonable employer. The respondent decided that none of the three cleaning posts would remain. In other words, all three cleaning posts were being deleted. The respondent decided that two new cleaning posts were being created. It took the view that these new posts were sufficiently different. There was no new cleaning supervisor post. In relation to the others, the differences between the original posts and the new posts were a reduction in the number of hours to be worked each day and a loss of the 15% enhanced rate for the hour worked between 10pm - 11pm. This was because the new posts would finish at 10pm not 11pm, as required by KKL As all three posts were being deleted the respondent decided that no selection criteria applied. This was in accordance with their redundancy policy and procedure. Having carried out a consultation process in relation to redundancy of the original posts, as set out above, notice of dismissal was issued to the claimant.

78. In relation to selection for the new posts the respondent decided that interviews would be required. The claimant said during the consultation process that he would be interested in in one of the new posts and he was told that there would be an interview process. In the event an interview process was not required as one of the new posts was available for the claimant and this was offered to him.

Alternative employment

79. The Tribunal was satisfied that the steps taken by the respondent to find alternative employment fell within the range of responses of a reasonable employer. The claimant was offered a role working 20 hours per week, over 5 days at KKL He decided he did not wish this role.

80. Following the first consultation meeting on 16 August 2022 the claimant was given a list of vacancies with the respondent. The claimant was not able to carry out any of those roles due to the hours of work which were incompatible with his family caring commitments. The claimant was also asked to complete a redeployment form which he did. The completed redeployment form did not alert the respondent to any other vacancies which the claimant could have carried out.

81. At the meeting on 16 August 2022 the claimant was asked if he was interested in anything else apart from the 20 hours per week post at KKI. He had said not if it was a split shift over a working day. He couldn't do that because of his family caring commitments.

82. In cross examination the claimant was asked what he expected in relation to roles after the meeting on 16 August 2022. He said that he expected that he would be working 20 hours per week at KKI and that the respondent would find something else for him to make up the additional 5 hours. There was no evidence that this was something which the claimant had communicated to the respondent at the time.

83. The respondent's vacancies which were available did not include any roles which could be done continuously and immediately before or after the shift at KKI to make up an additional hour or so of work per day. The respondent's witnesses said in evidence that any such additional five hours would have been on an ad hoc and temporary basis, could have been located anywhere in the Borders and would not have been able to run continuously (ie no split shift) from hours of work at KKI. This would not have formed part of a role which could have been offered to the claimant.

84. Having regards to these matters the Tribunal concluded that the offer of alternative employment at KKI on a 20 hours per week contract fell within the range of responses of a reasonable employer.

Conclusion

85. In all the circumstances, the Tribunal was satisfied on the evidence before it that the reason for dismissal was redundancy due to a diminished requirement for employees to do cleaning work at KKI, The Tribunal was also satisfied that dismissal was within the range of reasonable conduct an employer could have adopted in the circumstances, which includes the size and administrative resources of the respondent. Accordingly, the Tribunal concluded that the claimant's claim for unfair dismissal was not well founded and is dismissed.

Employment Judge: **J McCluskey**
Date of Judgment: **13 June 2023**
Entered in register: **03 July 2023**
and copied to parties

Date sent to parties