EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr E Hrabal	**v**	Great British Confectionary Group Limited

Heard at: Cambridge **On:** 4 and 5 May 2023

Before: Employment Judge L Brown

Appearances:

For the Claimant: Mr H Dhorajiwala, Counsel
For the Respondent: Did not attend.

JUDGMENT having been sent to the parties on the 11 July 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Postponement Applications

1. At the outset of the hearing, I had to determine an Application for a postponement of the Hearing made by the Respondent.

2. Prior to this Application various repeated Applications had been made by the Respondents. Mr Ravi Sharma on behalf of the Respondent had first applied to the Tribunal on 26 April 2023 for a postponement of the Hearing listed on 4 and 5 May 2023. The Application was not copied to the Claimant in accordance with Rule 30 of the Employment Tribunal Rules of Procedure 2013, or Rule 92 and so the Tribunal was unable to consider the Application until it had been copied.

3. Mr Sharma then repeated his Application for an adjournment of the Hearing on 4 May 2023, by way of email to the Tribunal on 3 May 2023 stating for the first time that he had a medical appointment on 4 May 2023 at 2.50 pm at a hospital in Leeds for investigations into a serious suspected medical condition and he attached a letter showing the appointment date. Again, this Application was not copied to the Claimant.

4. The Tribunal, by way of Order of Employment Judge Tynan on 3 May 2023, said that since it was not clear that the Respondent had sent a copy to the other party notifying them that any objections to the Application must be sent to the Tribunal as soon as possible, their Application could not be considered. Employment Judge Tynan stated that if Mr Sharma did not wish his sensitive medical information to be shared with the Claimant, he could share it with the Claimant's Solicitors but request that the Solicitors for the Claimant did not disclose his letter to the Claimant, but that it was important at the very least that they had sight of the letter in order to advise their client as to the Application that had been made, but went on to say that in the meantime, the Hearing for the next day remained listed.

5. The day before the Hearing, the Tribunal advised Mr Sharma that the Hearing had been converted to a Hybrid Hearing by way of the Cloud Video Platform (CVP), to be heard on 4 May 2023 so that he could attend remotely. This was done on the Order of myself, the Judge hearing this claim and so that the Respondent could attend remotely and, if he wished, then renew his Application for a postponement on medical grounds.

6. By the outset of the Hearing the next day, Mr Sharma had still not sent the Application for a postponement to the Claimant's Solicitors.

7. Mr Sharma then responded by making a third Application for a postponement on 3 May 2023 and again failed to copy it to the Claimant. He advised he could not attend the CVP Hearing and attached a text purporting to show he now had to attend an appointment at 11.00am on 4 May 2023 and so could not attend the CVP Hearing. No mention had been made of this earlier appointment at 11.00am on 4 May 2023 in his earlier Application to the Tribunal on 3 May 2023. He did not attend the Hearing on 4 May 2023.

8. At the outset of the Hearing on 4 May 2023, the Claimant and his Counsel attended in person, and I explained to Counsel that these Applications had been made, on what basis they were being made and what the attachments evidenced, i.e., medical appointments. I said I was considering the Application pursuant to Rule 30(a) of the Tribunal Rules of Procedure 2013.

9. After considering the submissions of Counsel for the Claimant, I dismissed the Application for Postponement. The Hearing commenced in the Respondent's absence.

10. On the morning of 5 May 2023, and after the Hearing had concluded on 4 May 2023, when I was due to deliver oral Judgment at 12 noon, the Respondent, by way of Mr Sharma, applied for the fourth time for an adjournment and sent a copy of a screenshot of data from a hospital computer screen that showed a suspected serious medical condition. He also asserted he was coughing up blood and was too unwell to attend the Hearing. The screenshot had no identifying data on it as relating to Mr Sharma.

11. I explained to Counsel when the Hearing commenced that pursuant to Rule 29, I was giving consideration to whether it might be necessary in the interests of justice to vary my previous Case Management Order which had dismissed the previous postponement Application. I stated that it was open to me to postpone giving oral Judgment and to list it for a further Hearing where the Respondent could attend and make submissions as to why the Hearing should not have proceeded in his absence on 4 May 2023. I added that I could then, if I was satisfied that the Respondent had been too unwell to attend, order that the Hearing take place again, on that date or another date to be listed.

12. We adjourned the hearing for half an hour so that Counsel could take instructions.

13. The Hearing recommenced at around 1.00pm and Counsel made the following submissions to me:

    13.1 He stated that the Claimant was self-funding and that it was not in the interests of justice for me to consider varying my Order and that I should refuse the Application for a postponement.

    13.2 He stated that he had done a search at Companies House and there was another Director of the company who could have dealt with matters on behalf of the Respondent, and it appeared the Respondent also had other employees.

    13.3 He stated that even though I had described the medical evidence to him they had not seen it and to order that the matter be listed for another Hearing when they had not even seen the medical evidence supporting the Application was unfair and highly prejudicial to the Claimant and was not in the interests of justice; and

    13.4 He also stated that the medical evidence I had described to him had no data identifying it as belonging to Mr Sharma and so the medical evidence relied on was flimsy.

14. I reviewed my previous Case Management Order. No independent medical evidence had been provided at any stage that Mr Sharma was too unwell to attend, aside from his assertion in an email, but with no supporting evidence, that he was coughing up blood, and in accordance with Rule 30(a) I did not consider there were exceptional circumstances justifying a postponement of the Hearing and I decided that it was not in the interests of justice for my previous Order to be varied.

15. For these reasons, the Applications for postponement made on 3 May 2023 and Ordered as dismissed by me on 4 May 2023 were not varied and all Applications for Postponement were dismissed. I then gave oral judgment in favour of the Claimant.

Issues

16. The Claimant brought the following claims: -
    16.1 Unfair Dismissal by reason of redundancy.
    16.2 Unlawful Deduction of Wages for 2 days holiday payment due.
    16.4 Notice pay.
    16.5 Failure to comply with collective redundancy consultation obligations pursuant to ss 188 – 188A Trade Union and Labour Relations (Consolidation) Act 1992 (TULCRA) 1992.

17. In relation to Unfair Dismissal these were the following issues to be determined:

Unfair dismissal

17.1 Was the Claimant dismissed?

17.2 If the Claimant was dismissed, what was the reason or principal reason for dismissal?

17.3 Was it a potentially fair reason?

17.4 Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

17.5 What was the reason or principal reason for dismissal?

17.6 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 usually decide, in particular, whether:

17.6.1 The Respondent adequately warned and consulted the Claimant;
17.6.2 The Respondent adopted a reasonable selection decision, including its approach to a selection pool;
17.6.3 The Respondent took reasonable steps to find the Claimant suitable alternative employment;
17.6.4 Dismissal was within the range of reasonable responses.

Remedy for unfair dismissal

18. Does the Claimant wish to be reinstated to their previous employment?

18.1 Does the Claimant wish to be re-engaged to comparable employment or other suitable employment?

18.2 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

18.3 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

18.4 What should the terms of the re-engagement order be?

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

18.5.1 What financial losses has the dismissal caused the Claimant?
18.5.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
18.5.3 If not, for what period of loss should the Claimant be compensated?
18.5.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
18.5.5 If so, should the Claimant's compensation be reduced? By how much?
18.5.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
18.5.7 Did the Respondent or the Claimant unreasonably fail to comply with it?
18.5.8 If so, is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?
18.5.9 If the Claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
18.5.10 If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

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

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

19 Redundancy Payment

19.1 Was the Claimant dismissed by reason of redundancy in accordance with s.139 of the ERA in that his employer ceased or intended to cease to carry on that business in the place where the Claimant was employed?

19.2 Is the Claimant entitled to be paid a redundancy payment as defined in s.135 of the ERA?

20. **Wrongful dismissal / Notice pay**

    a. What was the Claimant's notice period?

    b. Was the Claimant paid for that notice period?

    c. If not, was the Claimant guilty of gross misconduct? / did the Claimant do something so serious that the Respondent was entitled to dismiss without notice?

21. **Unauthorised deductions**

    a. Were the wages paid to the Claimant less than the wages he should have been paid?
    b. Was any deduction required or authorised by statute?
    c. Was any deduction required or authorised by a written term of the contract?
    d. Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?
    e. Did the Claimant agree in writing to the deduction before it was made?
    f. How much is the Claimant owed?

22. **Duty to Consult Under TULCRA**

    22.1 Did the Respondent pursuant to s.188 of TULCRA propose to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less?

    22.2 Did the employer consult about the dismissals with all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals?

Findings of Fact

23. The Claimant was employed as a production manager for the Respondent and worked at its factory based in Thrapston Northamptonshire. By the time of the hearing before this Tribunal the Respondents factory had closed down. The Respondents business was manufacturing sweets under the brand name 'Tilley's Sweets'. The Respondent also operated a sweet factory in Devon.

24. The Respondent employed 23 employees, including the Claimant, and they all worked at the Thrapston factory up until 12 January 2022 just before it then closed.

25. The technical manager of the Respondents company, Nigel Route, on the 12 of January 2022 called the Claimant and the 22 other employees together and notified them all without any warning whatsoever that the Thrapston factory was closing down immediately and that all the tools and machinery in the factory

were being moved to the other factory in Devon. Production would then operate from Devon going forwards.

26. It was asserted by the Claimant, and I found, that the above meeting took place without any individual or collective consultation whatsoever and without any elected employee representatives being appointed and consulted.

27. Despite the fact that the whole factory was closing down only 18 employees out of the 23 employees were told they were being made redundant. One employee had already told the Respondent that he was resigning and was working his notice. This meant that there was the Claimant and three other colleagues from the total of 22 affected employees who were not being made redundant. The Claimant and two others were told they would be required to help out for the time being by clearing out the Thrapston factory and the other employee, Zoe, would be working from home.

28. The 18 employees who were immediately affected were told at the meeting that the Respondent could force them to work out their notice periods at the factory in Devon, or based at one of the Respondents associated companies in the north of England, but they were also told that if they preferred the Respondent would waive their notice periods by signing a document which read as follows:-

"I confirm that I wish to resign from my employment with great British Confectionery Group (Tilly's Thrapston) on the understanding that the Company has agreed to forego me having to work my notice."

29. The Claimant gave evidence, and I found, that all 18 employees, not wishing to work away from home at such short notice, signed this document and they were all paid statutory redundancy payments.

30. I found that the machinery and tools were collected by the Respondent and moved to its Devon factory sometime before the 19 January 2022 and that the Claimant and his two colleagues cleaned out the factory during this time period.

31. I found that on the 19 of January 2022 the Claimant went to the Thrapston factory with his other two colleagues and found that it had been locked and there was no access. He concluded that the factory had been closed for good despite not being warned in advance that this would take place.

32. The Claimant gave evidence that overnight on the 18 January 2022 the landlord had taken possession of the property and the factory had finally been closed for good. Outside of the locked gates were the remains of the Respondents equipment which was a forklift, a pump truck, jet wash and tables. The Claimant spoke to Bindi Sharma, the director of the Respondent, about what they wanted him to do that day and they advised him to wait there until the company property was collected and then he should go home and wait for a phone call from them.

33. The Claimant did not receive a phone call that day. Instead on the 24 of January James Vauxhall, HR advisor for the Respondent, telephoned the Claimant, and

Angela Adams, the executive assistant of the Respondents board, was also on the call.

34. The Claimant was told that he was now being "laid off temporarily" without full contractual pay but that his contract continued, and he could not work for anyone else without the permission of the board. She said he would get the statutory guarantee payment of £30 a day up to a maximum of five days over a three-month period and that he would be contacted if there was any work available at another site. However, there were there were no sites in the travelling distance of where the Claimant lived. The Claimant asked how long it would be before he was given paid work again at his normal contractual salary and he was told by Angela Adams that they had no answer to that question.

35. The Claimant then discovered that his other two colleagues had also been laid off in the same fashion but had not officially been made redundant either. During evidence he stated that one of those, who was a forklift driver, Philip Knighton, started working in Morrisons within around two to three weeks of being laid off on the 24 January 2022.

36. In addition, the Claimant gave evidence another employee, Patrick Swift, was also forced to obtain other employment soon after being told he was being laid off in the same time period.

37. The Claimant gave evidence that this was not a temporary reduction in work causing a temporary layoff of him and his two colleagues, but a permanent closure of his place of work with all work moving to the Respondents factory in Devon and he considered what he had been told was a sham.

38. I found that the explanation given by the Respondent to the Claimant was lacking in any credibility. In reality the Respondent had no further work for the Claimant or his two other colleagues to do and the real number of employees affected by the proposals announced on the 12 January 2022 was at least 21 employees this being the initial 18 employees, and then also the Claimant and his two colleagues Patrick Swift and Philip Knighton.

39. The remaining employee out of the 22 employees, Zoe, was working at home throughout this period but I did not have sufficient evidence about her to make a finding, but nothing turned on this in any event.

40. By the 31st of January 2022 the Claimant had heard nothing further from the Respondent company and was under increasing financial pressure with a mortgage and bills to pay and became very distressed. He wrote to the Respondent pointing out his situation and stated that his layoff could not be temporary as the factory had closed and all operations had moved to the company's factory in Devon.

41. He set out in his email that he had no doubt that as he was one of the longest serving employees, and taking into account that the three staff that had been laid off and who were not made redundant, but were the longest serving employees, that he believed this had been done to avoid collective consultation

obligations so that the number of affected employees did not go above 20 employees and that in effect he had been dismissed. He said if he had not then they were to treat his e-mail as a resignation with immediate effect. The Claimant received no immediate response to this e-mail.

42. I found that on the day that the Claimant discovered the factory had closed and then heard nothing further from the Respondent, until receiving a call on the 24 of January 2022 being told that he was simply being laid off temporarily, that this was in reality an actual dismissal of the Claimant and I found that he was dismissed on the 24 January 2022.

43. I found that on the evidence before me, the Respondent, as at the date of the announcement on the 12 January 2022, was proposing to dismiss 20 or more employees within a 90-day period. In reality they knew over 20 employees would be dismissed within that 90-day period and they were in effect massaging the figures to keep the figure artificially at 18 employees and I found they were effecting dismissals in batches in order to avoid their obligations under TULCRA.

44. My finding that they were proposing to dismiss 20 or more employees as at the 12 January 2022 was supported by the evidence before me, and while the evidence was not perfect on what happened to the other two employees, I found on the balance of probabilities they were also dismissed by the Respondent in the same manner that the Claimant was dismissed. Judged by the actions of the Respondent towards all three of them where an employer tells employees they are 'laid off' indefinitely with no work for them to do at any location in a reasonable travelling distance of their homes then I find this is a de facto actual dismissal of all of those employees.

45. In particular as 18 employees had initially been told they were being made redundant on the 12 January 2022, then adding to this total the Claimant, and his two other colleagues similarly laid off, I found by around the time of the Claimants email on the 31 January 2022, stating that he considered himself dismissed and if he wasn't he was resigning [P82], that shortly thereafter, but in any event by no later than the period of 90 days from the 12 January 2022 21 employees had been effectively dismissed by reason of redundancy within a period of 90 days and that the Respondent knew this would be the case when they called the meeting on the 12 January 2022.

46. The evidence suggests that the initial 18 employees were dismissed by reason of redundancy a few days after the announcement on the 12 January 2022 and on the 14 January 2022 and so I found this was the correct date for the start of the reference period for any protective award under TULCRA, i.e., 90 days from the start of the reference period of the 14 January 2022 which then expired on the 14 April 2022.

47. Thereafter some emails were exchanged between the Claimant and Elizabeth Harris on behalf of the Respondent. In short they denied that there had been a sham layoff and they asserted that the machinery which had been purchased at Crediton in Devon would be operating in the next three to four weeks

following which the Claimant would be asked to return to work along with his colleagues but there would then be a consultation meeting regarding the proposed change of workplace and he could raise any concerns that he had. The Respondent refused to accept the Claimants resignation and in effect denied that they had dismissed him.

48. On the 18th of February 2022 Ravi Sharma on behalf of the Respondents said they had a job for the Claimant in their factory in Devon for six to eight weeks.

49. The mobility clause at paragraph 4.1 of the Claimants contract of employment [P36] stated: -

> 4.1 Your normal place of work is Great British Confectionary Company, Thrapston, or such other place as we may reasonable determine.'

50. I found that asking the Claimant to move to the Respondents factory in Devon approximately 250 miles away from where the Claimant lived was not a reasonable determination by the Respondent of the mobility clause. In any event by this point the Claimant had in effect been dismissed on the 24 January when he was advised that he was 'laid off' indefinitely.

51. On the 23 of February 2022 the Claimant then received an e-mail from James Boxell saying that his four-week layoff had come to an end, and he was required to return to work at 8:00 AM on Monday the 28 of February 2022. The Claimant gave evidence that there had never been a mention of a four-week layoff, and I found that the Claimant had simply been told the layoff was indefinite and that they could not say how long it would last.

52. In any event the Claimant gave evidence, and I found, that the Respondent didn't set out where the Claimant was to attend at work on Monday the 28 of February and it would be ludicrous for a Respondent to try and assert that they still had employment for the Claimant when there was no identifiable site that the Claimant could attend at within a reasonable travelling distance of where he lived.

53. The Claimant replied by e-mail to the Respondent on the 24 of February 2022 stating there was no job for him to return to as the factory in Thrapston had shut down permanently, that all machines had been moved to the Devon site, that his life and that of his family was in Northamptonshire and not in Devon and that his role at his place of work was redundant. The Claimant said for the avoidance of doubt he turned down any temporary work in Devon for six to eight weeks. He pointed out it was not suitable alternative employment.

54. On the 24 of February 2022 the Claimant received an e-mail from Ravi Sharma advising that they had acquired a new site in Kettering but did not say where this new site was. The Claimant gave evidence that he did not believe that this was true i.e., that they had suddenly secured a new site in Kettering. The Claimant asserted there was no new site in Kettering and that the company was operating from Devon. I found that there was no new site set up by the Respondents in Kettering for the Claimant to work from.

55. I found that the Claimant's account of the sequence of events pointing to a dismissal of him by the Respondents on the 24 January 2022 was borne out by the evidence, and that the Respondents assertion throughout that he was still employed by them was a sham in order to try and cover up what was in effect the unfair dismissal of the Claimant on the 24 of January 2022, and as set out below.

The Law

Unfair Dismissal

56. The first question that the Tribunal must consider is whether there has been a dismissal. Dismissals are defined in the Employment Rights Act (ERA) 1996:

> ""95. — Circumstances in which an employee is dismissed.
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if) –
> (a) the contract under which he is employed is terminated by the employer (whether with or without notice)
> …
> (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.
> …"

Redundancy

57. The definition for the circumstances in which an employee is dismissed for the purposes of Part XI (Redundancy Payments) can be found at s 136 ERA. Where a claim is brought under Part XI ERA 1996, based on an employee's right to a redundancy payment, or where the amount of a redundancy payment arises, it is stated that "an employee who has been dismissed by his employer shall, unless the contrary is proved, be presumed to have been so dismissed by reason of redundancy" (s 163(2) ERA 1996).

58. An employee will have a right not to be unfairly dismissed by their employer (s 94(1) Employment Rights Act (ERA) 1996). It is set out in s 98 ERA 1996, that: -

> "98. — General.
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position
> which the employee held.
> (2) A reason falls within this subsection if it—
> …

(c) is that the employee was redundant, …

…

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by
the employer)—
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case."

59. The statutory definition of 'redundancy' is found at s 139 Employment Rights Act ('ERA') 1996, and so far, as is relevant, states:

"(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—
(i) to carry on the business for the purposes of which the employee was employed by him, or
(ii) to carry on that business in the place where the employee was so employed…"

60. In the decision of **Murray and anor v Foyle Meats Ltd [1999] ICR 827 (HL),** Lord Irvine stated that two questions of fact needed to be addressed in cases of redundancy:

"[t]he first is whether one or other of various states of economic affairs exists … The second question is whether the dismissal is attributable, wholly or mainly, to that state of affairs" (Murray, 829G [AB/9/117]).

61. It is established law that the employee's place of work for redundancy purposes is determined by the factual circumstances which existed before the dismissal, not merely by the terms of the employee's contract. In particular in **High Table Ltd v Horst [1998] ICR 409 (CA)**, the Court of Appeal stated, in relation to the 'place of work', that if a Claimant's contract of employment contains a mobility clause the following issues had to be considered (High Table, 419 [AB/7/77]):

"If an employee has worked in only one location under his contract of employment for the purposes of the employer's business, it defies common sense to widen the extent of the place where he was so employed, merely because of the existence of a mobility clause. Of course, the refusal by the employee to obey a lawful requirement under the contract of employment for the employee to move may constitute a valid reason for dismissal, but the issues of dismissal, redundancy and reasonableness in the actions of an employer should be kept distinct. It would be unfortunate if the law were to

encourage the inclusion of mobility clauses in contracts of employment to defeat genuine redundancy claims. Parliament has recognised the importance of the employee's right to a redundancy payment. If the work of the employee for his employer has involved a change of location, as would be the case where the nature of the work required the employee to go from place to place, then the contract of employment may be helpful to determine the extent of the place where the employee was employed but it cannot be right to let the contract be the sole determinant, regardless of where the employee actually worked for the employer."

Fairness in Redundancy Dismissals

62. An employer will have acted reasonably by having regard to the 'band of reasonable responses', including by reference to s 98(4) ERA 1996. Specific guidance on reasonableness in relation to a redundancy situation is set out in the leading decision of **Polkey v A E Dayton Services [1988] AC 344 (HL)** an employer will not normally act fairly unless they:

    i) warn and consult any employees affected or their representatives.
    ii) adopts a fair basis on which to select for redundancy; and
    iii) takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within their own organisation.

63. In relation to the requirement to warn and consult, a consultation must be meaningful, and must give the employee "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" **(R v British Coal Corporation ex p Price (No 3) [1994] IRLR 72 (Div Ct), para [25];**

64. On the issue of the offer of alternative employment the Tribunal must make an objective assessment of the suitability of proposed alternative employment, the location of such proposed employment, and the possible requirement to commute long distances, and all will be relevant to the suitability of alternative employment (indeed, as stated by the Court of Outer Session in **Laing v Thistle Hotels plc [2003] SLT 37, para [42] [AB/10/132]**:

    "… commuting is not generally regarded as a joy". A fortiori, even where the alternative employment is considered to be suitable by the Tribunal, an employee may reasonably reject such an offer where there is a requirement to relocate may affect their family life (e.g., an employee's refusal to move from North London to Huntingdon, when his wife refused to do so, was a reasonable rejection of an offer of redeployment **(Rose v Shelley and Partners Ltd [1966] ITR 169 [AB/1]).**

Unlawful Deductions from Wages

65. In relation to the Claimant's holiday pay claim, such a claim can be brought as an unlawful deduction from wages claim (s 13 ERA 1996) where it is stated that:

    (1) An employer shall not make a deduction from wages of a worker employed by him

unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

…

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

66. The definition of "wages" includes holiday pay (s 27(1)(a) ERA 1996; **HMRC v Stringer [2009] UKHL 31)** and also **Pimlico Plumbers v Smith [2022] EWCA Civ 70, [2018] ICR 818.**

Collective Consultation

67. Section 188(1) TULR(C)A provides as follows:

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

68. A 'proposal' for the purposes of collective redundancies was considered in **UK Coal Mining Ltd v NUM [2008] ICR 163, with Elias J stating that (UK Coal Mining Ltd, para [86] [AB/13/193]):**

"The difference between proposed and contemplated will still impact on the point at which the duty to consult arises - it will not be when the closure is mooted as a possibility but only when it is fixed as a clear, albeit provisional, intention."

69. For the purposes of any proceedings under TULR(C)A where an employee is or is proposed to be dismissed, it shall be presumed that he is or is proposed to be dismissed as redundant unless the contrary is proven (section 195(2) TULR(C)A).

70. A redundancy dismissal is a dismissal for any reason "*not related to the individual employee concerned or for a number of reasons all of which are not so related*" (section 195(1) TULR(C)A).

71. "Employer" is defined in section 295(1) TULR(C)A as follows:

"*employer, in relation to an employee, means the person by whom the employee is (or, where the employment has ceased, was) employed.*"

72. The obligation for collective consultation is triggered by the proposal, not the number of individuals who are in fact dismissed.

73. The duty to consult does not arise merely because redundancy dismissals are contemplated, nor even because redundancy dismissals are probable, "proposed" means something much more certain and there must be a 'fixed, clear, albeit provisional intention' to make collective redundancies.

74. The ECJ in ***UQ v Marclean Technologies SLU (C-300/19) [2022] IRLR 548*** ruled that under the Directive, an employer proposing redundancies must look backwards and forwards for 90 days to determine whether there are sufficient redundancies to trigger the collective consultation obligations and so in relation to the question of 'staggered' dismissals, in Marclean the ECJ held that for the purposes of assessing whether the threshold for collective redundancy consultation is met, the reference period must be calculated taking into account any period of 30 or 90 consecutive days (as relevant) during which an individual dismissal took place and in which the greatest number of dismissals carried out by the employer occurred for one or more reasons not related to the individual workers concerned.

75. Where a declaration is made the Tribunal may also make a protective award pursuant to section 189 TULR(C)A. Where an award is to be made it is punitive rather than compensatory. This includes a consideration of the deliberateness of any default. The starting point is that the maximum award of 90 days' pay should be made unless there are circumstances making it just not to do so.

76. The consultation must commence, in situations where fewer than 100 employees are being dismissed, at least 30 days before the first dismissal takes effect (s 188(1A) TULRCA 1992), and on the basis set out in ss 188-188A TULRCA 1992.

77. Where the obligations under ss 188-188A TULRCA 1992 have been breached, both a declaration to that effect must be made by the Tribunal, and a just and equitable protective award of up to 90 days' gross salary for a 'protected period' may be made. This protective award is punitive, and not intended to compensate the employee for their financial loss **(GMB v Susie Radin Ltd [2004] EWCA Civ 180.**

Applying the Law to the Facts

Unfair Dismissal

Was the Claimant dismissed?

78. At paragraph 1 of the ET3 form in box 6 the Respondent stated that the Claimant was not dismissed but instead resigned at the end of January 2022. Having found that the telephone call on the 24 January 2022, wherein he was

advised he was being laid off indefinitely, was a sham layoff, I found that the actions of the Respondent communicated a dismissal of the Claimant by the Respondent.

79. It was clear from the evidence that the Respondents hoped that by placing the Claimant in this impossible and financially non-viable position of an indefinite layoff that he would agree to leave without being paid his notice, as had all the other 18 employees who I found had left the employment of the Respondent on the 14 January 2022. The telephone call on the 24 January, where they unreasonably asserted that he was being laid off indefinitely in accordance with his contract when it was clear there was no other work either then or in the future that they would be able to offer to him, would, to any objective observer, be concluded to be a dismissal of him. It was abundantly clear that they had no other work they could reasonably ask him to do in accordance with the terms of his contract.

80. In any event the layoff provision in the Claimants contract of employment related, on any proper construction of it, to a lay off for reduction in work and on a proper interpretation of the clause it cannot be said to apply to a situation where there is a complete site closure and clearly this was not a temporary reduction in work. Though the Respondents purported to lay off the Claimant in reality they were not laying him off and this was a straightforward mislabelling of a redundancy situation.

81. I therefore found that the Claimant was dismissed by reason of redundancy by the actions of the Respondent that day. In particular in the case of **Gisda Cyf v Barratt [2010] UKSC 41, [2010] 4 All E.R. 851, [2010] 10 WLUK 257**– it was stated that: -

> 'A dismissal may be by word or deed,…. And the test will be how they would be understood by the objective observer … and that an employer's termination of a contract of employment need not take the form of a direct, express communication.'

If the Claimant was dismissed, what was the reason or principal reason for dismissal?

82. As set out above the Claimants place of work in Thrapston had closed and the job he did for the Respondents at that place of work no longer existed. I therefore found that the reason for the Claimants dismissal was by reason of redundancy by reason of the closure of his place of work pursuant to S.139 of the ERA 1996 due to the fact that his employer had ceased to carry on business at the place where was employed.

Was the dismissal for a potentially fair reason?

83. I found that there was a potentially fair reason for the Claimants dismissal which was that of redundancy.

Did the Respondent act reasonably in all the circumstances?

84. The correct approach for the Tribunal to adopt in considering section 98(4) of the ERA (as set out in Iceland Frozen Foods v Jones [1982] IRLR 439) is as follows:

> "… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case.

85. The ACAS Code of Practice on Disciplinary and Grievance procedures sets out matters that may be taken into account by tribunals when assessing the reasonableness of a dismissal on the grounds of conduct, as follows:

> 'Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.
>
> Employers and employees should act consistently.
>
> Employers should carry out any necessary investigations, to establish the facts of the case.
>
> When investigating a disciplinary matter take care to deal with the employee an affair and reasonable manner. The nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against it. Be careful when dealing with evidence from a person who wishes to remain anonymous. In particular, take written statements that give details of the time, place, dates as appropriate, seek cooperative evidence check that the person's motives are genuine, and assess the credibility and weight to be attached to their evidence.
>
> Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.
>
> Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.
>
> If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct. And its possible consequences to enable the employee to prepare to answer the case of the disciplinary hearing. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements within the notification. At the meeting, the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should also be given a reasonable opportunity to ask questions, present

> evidence, and call relevant witnesses. They should also be given the opportunity to raise points about information provided by witnesses.
>
> Employers should allow an employee to appeal against any formal decision made."

86. I found there was no individual consultation with the Claimant whatsoever about his potential redundancy and therefore found that his dismissal was unfair. The utter lack of any consultation with the Claimant about his redundancy amounted to a procedure that was outside the reasonable band of procedures of any other reasonable employer. The range of reasonable responses test applies as much to the procedure which is adopted by the employer as it does to the substantive decision to dismiss (Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23).

85. I found that any attempt at consultation with the Claimant only took place after his actual dismissal on the 24 January 2022 by which time it was too late.

Exercise of the Mobility Clause

86. In relation to the offer to him of alternative work at the Devon Factory I did not find that this was a reasonable exercise of that clause and in any event the offer of employment at the Devon factory was only an offer of temporary employment.

87. In the case of Kellogg Brown & Root (UK) Ltd v Fitton; Kellogg Brown & Root (UK) Ltd v Ewer UKEAT/0205/16 the following was stated by HHJ Eady QC, as she then was, in relation to that case and she cited the previous authorities of Curling and Ors v Securicor Ltd [1992] IRLR 549 EAT and Home Office v Evans [2008] ICR 302CA as follows :-

> 'That said, in both cases the ET had gone on to consider the question of fairness in the alternative. In so doing, it had applied the three-stage test identified by the Respondent, asking (1) whether the instruction was lawful (whether the mobility clause relied on was contractual), (2) whether the Respondent had acted reasonably in giving that instruction, and (3) whether the Claimants had acted reasonably in refusing to comply with that instruction. It had concluded that the mobility clause was too wide and uncertain, had been unreasonably invoked by the Respondent and that the Claimants (both faced with an additional 20-30 hours' commute each week, and given that Mr Fitton had brought a property near to his former workplace and did not have a car, and that Mr Ewer had worked near to his home town for the Respondent/its predecessor for 25 years, would soon be 64 and due to retire a year later) had reasonably refused to comply with the instruction. As the ET had applied the tests identified by the Respondent in its alternative, "conduct" findings, had reached permissible conclusions on the material before it, and had provided adequate Reasons, there was no basis for overturning the decision on fairness, and the appeal in this regard was dismissed.

88. In accordance with the case of *Kellogg Brown* I find invoking a mobility clause even on a temporary basis which involved relocating to a workplace 250 miles

away was not reasonable. The Claimant lived in Kettering with his family, and this could not be a reasonable invocation of this clause and particularly where the mobility clause stated it could only be operated reasonably.

90. I found the Claimant was able to reasonably reject such an offer as it would have affected his family life to move from Kettering to Devon. In any event I found that the formal offer of work at the Devon site occurred after his dismissal on the 24 January 2022 and so this point falls away in any event.

Offer of Alternative Employment

91. I found the alleged offer of alternative employment at an alleged new site in Kettering, the address of which was never identified, to be a sham. The instruction to the Claimant to attend work at this site, that was not identified by the Respondent at any point, was plainly not a genuine instruction when no address was supplied to the Claimant, and I found no such site existed.

92. In any this offer was made after his dismissal on the 24 January 2022 and so this point falls away in any event.

93. I therefore find that by reason of failing to consult about the potential redundancy of the Claimant and instead asserting a sham layoff culminating in a dismissal by reason of the Respondents conduct on the 24 January 2022 that the Claimant was both procedurally and substantively unfairly dismissed.

Basic Award

94. I therefore award the basic award of **£7616.00** for the unfair dismissal of the Claimant.

Compensatory Award

95. The Claimant limited his claim for a compensatory award to 12 weeks' pay in his schedule of loss for actual unfair dismissal which is the net figure of £553.85 net per week, and he is awarded the sum of **£6,646.20.**

96. I also award the loss of pension contributions in the gross sum of **£480.72** which is subject to any necessary deductions for national insurance and tax.

Redundancy Payment

97. I found that the Claimant was dismissed by reason of redundancy and as such was entitled to be paid a redundancy payment pursuant to s.135 of the ERA. However, as I have made an award of a basic award for the purposes of the unfair dismissal claim then I make no award for a redundancy payment.

Holiday Pay

98. The claim for holiday pay was not specifically denied in the Response of the Respondent to this claim.

99. I therefore found that in failing to pay this sum to the Claimant, which was set out in the schedule of loss as amounting 2 days holiday pay in the amount of £138.46 per day, that the Claimants claim under to s.13 of the Employment Rights Act 1996 is well-founded and succeeds and I award the total sum of **£276.92** which is subject to any necessary deductions for national insurance and tax.

TULCRA and failure to consult

100. When asking myself if, on the 12 January 2022 the Respondent proposed to dismiss 20 or more employees within a period of 90 days I found that they did. I found that the Respondent deliberately stated only 18 employees were being made redundant in order to evade their responsibilities under s.188 of TULCRA to appoint employee representatives and to collectively consult.

101. I found they failed in their duty to appoint employee representatives, and to collectively undertake consultation in good time and in any event within 30 days before the first dismissal took effect on the 14 January 2022.

102. As set out above taking the initial 18 employees who were told they were to be made redundant, then adding to this the evidence about the indefinite layoff of the Claimant, Philip Knighton and Patrick Swift in the following 90 day period, and during which I found they were all dismissed by the conduct of the Respondent, then adding those two batches of affected employees together and in accordance with the case of **Marclean** of looking forward and back the total number of employees proposed to be dismissed was 21 within 90 days, and I find that the Respondent committed a calculated breach of its duty to collectively consult under s.188 of TULCRA.

103. This case was similar to that of the first instance case of **Jones and ors v Sunlight Service Group Ltd ET Case No.1200582/09: SSG Ltd** and there the Respondent suffered a downturn in business in 2009 and announced that it was closing a plant at Wellingborough with a loss of 89 jobs. This triggered a 30-day consultation period. However, the employment tribunal found that the company had deliberately reduced the number of employees being made redundant, and thereby brought down the consultation costs, by making ten staff redundant immediately after the decision to close the plant was taken. This was held to be a calculated breach of its S.188 duty. I found that as in that case the Respondent acted as it did in a calculated manner to breach its duty under S.188 of TULCRA.

104. Having found that there was no consultation at all collectively with the initial employees of 18, and then with the remaining three employees including the Claimant, and in particular that there was no consultation about avoiding

dismissals, reducing the numbers of employees to be dismissed, and mitigating the consequences of the dismissals (Section 188(2) I found there was a breach of S.188(2) by the Respondent. There was no disclosure of the information required by section 188(4). No special circumstances defence has been run by the Respondent.

105. The case law in the area is clear that compensation is designed to be punitive, and the starting point should be 90 days' pay with a discount to be applied having regard to the seriousness of the failure of the employer to comply with his duty, if there are material mitigating factors. There has been a complete failure of collective consultation. There are no mitigating factors and I award the maximum 90 days. I am satisfied that such a protected period is of such length that I consider just and equitable in all the circumstances having regard to the seriousness of the Respondents default.

Amount of the Protective Award

106. When I gave oral Judgment on the 5 May 2023, I had regard to the period of time for which the Claimant claimed a protective award of 13 weeks gross pay in the sum of £9,000.00 in accordance with the case of **Susie Radin Ltd v GMB [2004] EWCA Civ 180.** I took this to mean that the Claimant was actually claiming 7 days x 13 weeks = 91 days i.e., rounded down to 90 days x £692.31 which equated to £9,000.03 rounded down to £9,000.00 as set out in the Claimants schedule of loss.

107. I determined that the period for which the Claimant should receive compensation should be 73 days. I based this on the protective period running from the 14 January 2022, this being around the date that the factory closure was announced, for a period of 90 days, but allowed for the fact that the Claimant as I understood it had been paid in full up to the 31 January 2022, when he said by email that he had either been dismissed on the 24 January 2022 or resigned as of the 31 January 2022. I calculated that there was therefore a period from the 14 January 2022 to the 31 January 2022 of 17 days and deducting from the maximum period of 90 days 17 days meant the protective award period for the award of gross pay for the Claimant should be 73 days. Using the claimed gross pay of £3000.00 per month I therefore deducted 17 days gross pay and awarded the sum of £7200.00 to represent 73 days gross pay.

Notice Pay and Breach of Contract

104. Whilst the ET1 Form set out a claim for Notice Pay of 12 weeks, and while I find that he was summarily dismissed without notice, and in breach of contract, on the 24 January 2022, as no sum for this was contained in the Claimant's schedule of loss I therefore make no award for this claim.

_____
Employment Judge Brown

Date: …10 August 2023……..

Sent to the parties on: .30 August 2023.

.....
For the Tribunal Office