EMPLOYMENT TRIBUNALS

Claimant: **Mrs J Elliot**

Respondent: **Sam Turner & Sons Limited**

HELD AT: **Newcastle ET by CVP**

ON: **1 & 2 November 2023**

BEFORE: **Employment Judge McCluskey**

REPRESENTATION

Claimant: **Represented by Mr J Elliot, Husband**
Respondent: **Represented by Ms A Beech, Counsel**

RESERVED JUDGMENT & REASONS

The judgment of the Tribunal is that:

1. The complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed.
2. There is a 66.7% chance the claimant would have been fairly dismissed in any event.
3. The respondent shall pay to the claimant a compensatory award of **£560.28** **Note**: this is the actual sum payable to the claimant after deductions have been applied.
4. The Employment Protection (Recoupment of Benefits) Regulations 1996 do not apply to this award.

5. The claimant's complaint of unlawful deduction of wages and/or other payments, not being insisted upon, is dismissed.

REASONS

Introduction

1. The claimant is making a complaint of unfair dismissal. She had also ticked the box on her ET1 claim form stating she was owed other payments. This was not insisted upon by the claimant.

2. Parties had prepared and exchanged witness statements prior to the final hearing.

3. There was a joint bundle of documents extending to around 507 pages. An additional bundle had been prepared which contained documents relating to a protected conversation between the parties. After discussion with the parties the claimant's husband, who was representing her, clarified that he no longer sought to rely on information about a protected conversation. Parties were reminded that if they wished me to consider documentation in the joint bundle it must be referred to in evidence (witness statements or oral evidence).

4. The claimant gave evidence on her own behalf. Mr Charlie Tuner – director and Mr Ben Turner – director gave evidence on behalf of the respondent. The claimant submitted witness statements from Ms Rebecca Breckon, Laura Siggers – Lavelle and Richard Crane. These individuals did not attend to give evidence to the Tribunal. There was no opportunity for cross-examination of them. Accordingly, I determined that I was unable to give any weight to the contents of these statements. In any event, having read the statements I concluded that they did not deal with matters upon which material facts required to be found by me.

Issues

5. The list of issues to be determined by the Tribunal had been agreed by parties prior to the final hearing. On the morning of the final hearing the respondent sought to add an additional issue about the reason for dismissal. This was that in the alternative to redundancy, the reason for dismissal was some other substantial reason, namely business reorganisation. The claimant objected to the proposed addition to the list of issues. It was agreed by parties that no further evidence would be required from either party nor any additional documentation, if the list of issues was to be updated. The respondent submitted that it was for the Tribunal to determine the reason or principal reason for dismissal, whether or not some other substantial reason ("sosr") was referred to in the list of issues. Additionally, the claimant had not identified any prejudice by way of further evidence or documentation which she would require to submit, and which had not already been submitted. I clarified with the parties that further evidence in chief could be led on "sosr" if they wished to do so. The parties could also deal with the reason for dismissal in submissions. The list of issues was updated accordingly.

6. The issues for determination are set out in the Annex to this judgment.

Findings in fact

7. I have only made findings in fact necessary to determine the issues.

8. The claimant was employed by the respondent from 31 October 2005 until 7 February 2023 in the role of Café Manager at the respondent's Northallerton store. The respondent primarily sells farm and garden supplies, country clothing and garden machinery from its four stores. The respondent also has a café at its Piercebridge store.

9. The claimant reported directly to Mr Charlie Turner ("CT"), a director of the respondent. The claimant had a written contract of employment. Her duties included day to day management of staff and the rota, working with suppliers and other duties required by the respondent from time to time.

10. On 24 September 2022 the claimant began a period of sickness absence, having injured her ankle on holiday.

11. By late October 2022 CT was becoming concerned about the respondent's financial position. He was looking at ways to save costs. In late October 2022 the respondent asked the bank for an overdraft which it had never done before.

12. CT and Jill Pattison, General Manager ("JP") of the respondent became involved in the day-to-day management and operation of the Northallerton café whilst the claimant was absent.

13. The cooking and cleaning carried out by the claimant were carried out by Caroline Tonks, Assistant Café Manager (CTO), Shirley Stevens, Café Assistant ("SS") and the wider café staff during the claimant's absence

14. By late November 2022 CT realised that the café was operating well despite the absence of the claimant. The duties of the Café Manager were being carried out by CT, JP, CTO and SS.

15. CT kept in touch with the claimant by email during her absence about the changes made and how the café was operating. The claimant remained absent from 24 September 2022 until her dismissal on 7 February 2023.

16. On or around 17 December 2022 there was a work Christmas night out for the Northallerton café staff. The claimant attended although still absent from work. On 22 December 2022 there was an exchange of emails between JP and Claire Tiffney from the HR company used by the respondent ("CTI"). That correspondence showed a concern raised by JP about the claimant apparently causing upset at the Christmas night out and concerns by staff at the Northallerton café about the claimant's return to work in the new year.

17. On 22 December 2022 the claimant emailed CT to say she hoped to return to work on 27 January 2023.

18. In early January 2023 CT discussed the claimant's return date with other directors of the respondent and with CTI. He spoke to CTI, in her capacity as the respondent's HR adviser about the arrangements on the ground in the café since the claimant had been absent and whether that constituted a redundancy situation. He also spoke to CTI about the Christmas night out and the concerns of staff about the claimant's return.

19. After speaking to CTI, CT concluded that the claimant's role as Café Manager at the Northallerton store was a risk of redundancy. Others had absorbed the claimant's duties whilst she had been absent, and the café had been operating well in her absence.

20. The respondent also operates a café from its Piercebridge store. The two cafés operate independently of each other. The Café Manager at Piercebridge is Rebecca Breckon (RB), the claimant's daughter. RB was on maternity leave in January 2023. She was not due back at work for some months. CT considered whether the Café Manager role at Piercebridge was also at risk of redundancy. He decided that it may well be so. He did not want to commence a redundancy consultation process with RB whilst she was on maternity leave.

21. CT invited the claimant to attend a meeting which took place on 17 January 2023. At that meeting CT told the claimant that the role of Café Manager at Northallerton was at risk of redundancy and that a redundancy consultation process would follow. The meeting on 17 January 2023 was not a consultation meeting. The email invite to attend the meeting on 17 January 2023 indicated that the purpose of the meeting was a "Business Update". The claimant was upset at the meeting. She felt she had been misled as to the nature of the meeting on 17 January 2023.She emailed CT later that day saying that she had lost trust in the organisation. She told CT a number of times throughout the consultation process that she had lost trust in the respondent. On one occasion her email used a derogatory term for CT.

22. On 19 January 2023 CT wrote to the claimant by letter headed "Notification of Potential Redundancy". The letter set out a timetable for redundancy consultation.

23. On 21 January 2023 a first redundancy consultation meeting took place with the claimant. This was conducted by CT. CTI also attended. The respondent was concerned about a breach of confidentiality which had taken place as the claimant's daughter had informed staff at Northallerton that the claimant was being made redundant. The respondent was also concerned about the claimant

being disruptive if she attended the Northallerton store given the content of correspondence she had sent to the respondent. The respondent notified the claimant that the consultation meeting would take place by video conference. The claimant indicated that in the absence of an in person meeting she wished the consultation to be by audio conference and not video. The respondent agreed to this.

24. The respondent did not give the claimant an opportunity to be accompanied at the meeting on 21 January 2023 by a colleague or trade union representative. She attended on her own. At the meeting CT discussed the proposed redundancy of the Café Manager post held by the claimant. It was explained that management of the café had been taken over by senior leadership during her absence, that her other day to day duties had been taken over by CTO, SS and the wider café team and that the café had been operating well without the Café Manager post. The claimant proposed a number of alternatives to redundancy. The respondent agreed to consider those proposals and to revert at the next meeting. The respondent also told the claimant about the steps it had taken to control costs such as negotiating better prices with suppliers. The claimant asked for statistical or empirical information about the amount of costs saved by negotiation with suppliers and other matters which were not about the absorption of her management and day to day duties. That information was not provided to the claimant.

25. On 24 January 2023 a second consultation meeting took place with the claimant. This was conducted by CT and CTI was also present. CT responded to each of the proposals made by the claimant at the meeting on 21 January 2023 as alternatives to her role being made redundant. CT explained that none of those alternatives could be implemented.

26. The claimant proposed undoing the temporary reorganisation to give her an opportunity to make cost savings. CT decided not to implement this proposal. CT decided JP had been doing a good job whilst the claimant had been absent. JP had incorporated the management of the Northallerton café into her role without changing any of her other duties.

27. The claimant proposed seeking voluntary redundancies or early retirement from staff in the Northallerton café and in the wider business. CT decided not to implement this proposal. CT decided that it would need several people to take voluntary redundancy to achieve the same cost savings as redundancy of the Café Manager role and would not address the proposal that the Café Manager role was redundant.

28. The claimant proposed restricting recruitment. CT told the claimant that recruitment was already restricted in the Northallerton café which was much

quieter at the current time of year and that recruitment across the wider business was restricted and only went ahead if absolutely necessary.

29. The claimant proposed making another member of the Northallerton café redundant, rather than the claimant. CT decided not to implement this proposal. CT told the claimant that more than one role in the Northallerton café would need to be made redundant if the respondent was to make the same cost saving as making the Café Manager role redundant. This may result in insufficient staff to operate the café.

30. The claimant proposed a job share scheme in the café or across the wider business. CT decided not to implement this proposal. CT decided job share was not a solution to the Café Manager role having been absorbed by others.

31. The claimant proposed that the Assistant Manager role at the Northallerton café be placed at risk of redundancy. CT decided not to implement this proposal as potential further reorganisation of the Northallerton café may be required in addition to the redundancy of the Café Manager role.

32. On 30 January 2023 a third consultation meeting took place with the claimant. This was conducted by CT and CTI was also present. The claimant was accompanied by CTO. It was decided that as the claimant had raised a grievance against CT, the redundancy consultation process would be paused until the grievance had been heard.

33. On 3 February 2023 Ben Turner ("BT"), a director of the respondent conducted a grievance hearing with the claimant. She chose not to bring a companion. BT decided that claimant should remain on full pay until 22 January 2023 and thereafter would receive statutory sick pay only. This overturned the decision of CT that the claimant move to statutory sick pay from 1 January 2023.

34. On 7 February a fourth consultation meeting took place with the claimant. This was conducted by CT and CTI was in attendance. JP attended the meeting, at the claimant's request, as her companion. CT told the claimant that as no alternatives to redundancy had been found, the role of Café Manager in Northallerton was being made redundant.

35. CT wrote to the claimant by letter dated 8 February 2023. The letter confirmed the decision to dismiss the claimant by reason of redundancy with effect from 7 February 2023. The letter summarised the consultation process, the alternatives to redundancy proposed by the claimant and the reasons why the respondent had not implemented any of the alternatives.

36. The claimant received a payment in lieu of her notice period and a statutory redundancy payment of £14,275 calculated in accordance with her completed years of service, her age and her weekly pay.

37. On 8 February 2023 the claimant took a screenshot of a job vacancy with the respondent which was being advertised on the Indeed website. The vacancy was for one full-time or two part –time sales assistants in the clothing department of the respondent's Northallerton store. The full-time salary was £23,000 - £24,000 per annum. The advert showed that it had been posted 5 days ago.

38. On 9 February 2023 the claimant appealed against the decision to terminate her employment by reason of redundancy. She did not refer to the advert for the sales assistant role in her grounds of appeal.

39. On 28 February 2023 an appeal meeting took place with the claimant. This was conducted by BT. The claimant was accompanied at the meeting by a work colleague. At the meeting the claimant's grounds of appeal were confirmed. These were that the outcome was prejudged and not meaningful as a result of the actions of CT and CTI and that she had been bullied and coerced during the consultation. The claimant's letter of appeal also asserted that the redundancy was not genuine.

40. During the appeal hearing the claimant referred to the job advert for the clothing sales assistant post. BT asked the claimant if she had stated to CT during the consultation process that she would be willing to move department. The claimant said she did not as it was up to the respondent to offer alternatives, not her.

41. The claimant was aware of the sales assistant vacancy prior to the final consultation meeting on 7 February 2023 but chose not to raise this with CT.

42. BT wrote to the claimant by letter dated 6 March 2023. The claimant's appeal against her dismissal by reason of redundancy was not upheld. The reasons given by BT were that there was a genuine commercial reason for placing the role of Café Manager at Northallerton at risk of redundancy; the claimant was the only person holding that role; there were a number of consultation meetings where the claimant's proposals as alternatives to redundancy were considered, the consultation process was paused whilst the claimant's grievance was addressed, the claimant was given an opportunity to be accompanied by a companion at the latter stages of the process and there was no evidence of bullying or coercion by CT or CTI.

43. The appeal outcome letter did not refer to the job advert for the clothing sales assistant post.

44. The claimant commenced a new job (Job 1) on 10 March 2023 and worked in Job 1 until 21 August 2023. She was paid twelve weeks pay in lieu of notice by the respondent on termination of her employment. Her notice period would have expired on 2 May 2023. The period from 3 May until 21 August 2023 is 14 weeks.

45. The claimant's net pay at Job 1 (£20,000 gross pa) as calculated on the salarycalculator.co.uk website is £338.89 per week.

46. The claimant's employer pension contribution at Job 1 is £10.78 per week.

47. The claimant's net earnings and employer pension contributions at Job 1 are £349.67 per week.

48. The claimant commenced a different job on 22 August 2023 (Job 2). The claimant's net pay at Job 2 (£28,000 gross pa) as calculated on the salarycalculator.co.uk website is £443.50 per week.

49. The claimant's employer pension contribution at Job 2 is £16.16 per week.

50. The claimant's net earnings and employer pension contributions at Job 2 are £459.66 per week.

51. The claimant's net pay in the sales assistant role with the respondent (£24,000 gross pa) as calculated on the salarycalculator.co.uk website would have been £391.20 per week.

52. The claimant's employer pension contribution in the respondent sales assistant role has been estimated as the same amount as her Café Manager role, in the absence of specific figures. This would have been £52.26 per week.

53. The claimant's net earnings and employer pension contributions in the respondent's sale assistant role would have been £443.45 per week.

Relevant law

54. 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

55. 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.

56. 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.
57. 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**.
58. 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*."
59. 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.

60. The word 'pool' is not found in S.98(4) ERA. There is no rule that there must be a pool. An employer, if he has good reason for doing so, may consider a single employee for redundancy. The question for the Tribunal is whether, given the nature of the job of the claimant, it was reasonable for the respondent not to consider developing a wider pool of employees **Wrexham Golf Co Ltd v Ingham EAT 0190/12**.

61. The Tribunal also directed itself to the summary of the law set out in the **Wrexham Golf Co Ltd** case per David Richardson J a) "It is not the function of the 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" (per Browne-Wilkinson J in **Williams v Compair Maxam Limited [1982] IRLR 83 [18]**; b) "[9]...the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn" (per Judge Reid QC in H**endy Banks City Print Limited v Fairbrother and Others (UKEAT/0691/04/TM**); c) "There is no legal requirement that a pool should be

limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem" (per Mummery J in **Taymech v Ryan [1994] EAT/663/94**); d) The Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has "genuinely applied" his mind to the issue of who should be in the pool for consideration for redundancy; and that e) ... if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it." Also, **Capita Hartshead Ltd v Byard 2012 ICR 1256, EAT**: If the employer has 'genuinely applied his mind to the problem' of selecting the pool an employer's decision will be difficult, but not impossible, to challenge.

62. In **Thomas and Betts Manufacturing Co v Harding 1980 IRLR 255, CA** the Court of Appeal ruled that an employer should do what it can so far as is reasonable to seek alternative work. Moreover, the EAT confirmed **Fisher v Hoopoe Finance Ltd EAT 0043/05** that an employer's responsibility extends to also providing information about the financial prospects of any vacant alternative positions.

63. In **Polkey v AE Dayton** it was determined that if a claimant is entitled to compensation for unfair dismissal, their compensation can be reduced or limited to reflect the chance that the claimant would have been dismissed in any event and that any procedural errors accordingly made no difference to the outcome.

64. Therefore, procedural unfairness will make a redundancy dismissal unfair, but the question of whether the employee would have been dismissed even if a fair procedure has been followed will be relevant to the question of compensation payable to the claimant.

65. There is relevant guidance on how to approach this issue in **Software 2000 Ltd v Andrews and ors 2007 ICR 825,** where the EAT confirmed the Tribunal should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

66. There is relevant guidance on how to carry out the calculation in **Red Bank Manufacturing v Meadows [1992] IRLR 209** where the EAT confirmed that it is necessary for a Tribunal when calculating the amount to be awarded for compensation to ask itself this two-stage question; if the proper procedure had

been followed and if consultation had take place, would it have resulted in an offer of employment? If so, the Tribunal must go onto consider first what that employment would have been and, second what wage would have been paid in respect of it.

67. The first and overriding principle is that an award of compensatory damages should be such as to put the injured party in the same position so far as money can do so as the wrongful injury had not been suffered. That entails a comparison between the real events which actually followed the wrongful act or omissions and the hypothetical events which would have followed it had it not occurred. If those hypothetical events are the offer and acceptance of a different job then it is the earnings in that job which must be compared with actual earnings following the unfair dismissal. Pre-dismissal earnings that would not have continued are not relevant **Weston v Metzeler (UK) Ltd EAT/303/91**

Submissions

68. Both parties made oral submissions. I carefully considered the submissions of both parties during my deliberations and have 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.

Discussion and decision

Principal reason for claimant's dismissal

69. The respondent says the principal reason for the claimant's dismissal was redundancy, failing which some other substantial reason due to a business reorganisation. The claimant says the principal reason for her dismissal was because she was perceived by management to have caused upset at the Christmas night out and because of concerns raised by staff about the claimant's return to work.

70. The claimant's evidence in support of this position was that as part of the disclosure exercise by parties for this claim the respondent had disclosed correspondence between JP and CTI on 22 December 2022. That correspondence showed a concern raised by JP about the claimant apparently causing upset at the Christmas night out and concerns by staff at the Northallerton café about the claimant's return to work in late January 2023.

71. Whilst I found that there were concerns raised by JP to CTI about the claimant apparently causing upset at the Christmas night out and the concerns of staff about her return, I do not find that this was the reason or the principal reason

for the claimant's dismissal. The respondent had carried out a temporary reorganisation of the Northallerton café when the claimant went off sick in September 2022. By late November 2022 CT realised that the café was operating well despite the absence of the claimant. Cost savings had been made. The management and operational duties of the Café Manager were being carried out by JP and to a lesser extent CT. The cooking and cleaning carried out by the claimant was being done by CTO, SS and the wider café staff. By late November 2022 CT had identified that the café could operate well without the Café Manager role. By late November 2022 CT had identified that the Café Manager role was at risk of redundancy. It was understandable that, rather than commence a redundancy consultation exercise whilst the claimant was off sick, he would wait until she had indicated her intention to return to work in January 2023.

72. The claimant also submitted that because CT had discussed the Christmas night out and the concerns of staff about the claimant's return with CTI, it followed that the principal reason for the claimant's dismissal was not redundancy but conduct or capability. I did not find that this was the case. CTI was providing external HR support to the respondent. It was understandable that CT would speak to CTI about these matters. I find that it did not follow that because there was such a discussion, the principal reason for dismissal was not redundancy. CT also spoke to CTI about the arrangements on the ground in the café since the claimant had been absent and whether that constituted a redundancy situation. He took advice and then proceeded with a redundancy consultation process.

73. For these reasons I concluded that the reason or principal reason for the claimant's dismissal was not because of concerns about the claimant apparently causing upset at the Christmas night out and concerns by staff at the Northallerton café about the claimant's return to work.

74. The respondent's primary position was that the dismissal of the claimant was by reason of redundancy. Section 139(1) ERA includes provision that an employee who is dismissed shall be taken to be 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 in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish. The management and operational duties of the Café Manager were being carried out by JP and to a lesser extent CT. The cooking and cleaning carried out by the claimant was being done by CTO, SS and the wider café staff. On that basis CT had concluded that the requirements of its business for a Café Manager at Northallerton had ceased. I am satisfied that this falls within the definition in section 139(1) ERA. I find that the principal reason for the claimant's dismissal was redundancy.

75. Having found that the principal reason for the claimant's dismissal was redundancy I must determine whether, in treating redundancy as the reason for dismissal, the respondent acted reasonably.

76. The test I had to consider was whether the decision to dismiss the claimant was within the range of conduct that a reasonable employer could have adopted (i.e. the "band of reasonable responses test"), having regard to section 98(4) ERA and the principles of fairness established by case law.

77. I am mindful that the legal test is an objective one: the question is not whether I would have acted differently if I were the respondent; I must ask myself whether the procedure adopted was within the range of responses open to an employer acting reasonably in the circumstances of the case.

78. I reminded myself of the leading cases on reasonableness in redundancy situations which confirmed that I must consider all the ways in which a redundancy may be unfair which broadly amount to (a) inadequate warning/consultation, (b) unfair selection, and (c) insufficient effort to find alternatives.

79. The claimant argued that the procedure undertaken by the respondent was unfair with respect to all three of the above factors. I will consider each of them.

Selection

80. The claimant argued in submissions that the selection pool was too narrow. She asserted that the selection pool ought to have included the Café Manager posts at Northallerton and Piercebridge. She asserted that the Assistant Manager posts at both locations should also have been included in the pool. She asserted that the post of the person who was providing maternity cover for the Café Manager post at Piercebridge should have been included in the pool. She asserted that the pool should have comprised these 5 posts and that she should have been consulted about this. Accordingly, she asserts that CT did not genuinely apply his mind to the pool and if he had the pool would have been expanded.

81. The evidence demonstrated that CT had applied his mind to the Café Manager role at Piercebridge. He had identified that the cafes ran independently of each other. He had identified that the roles were not the same. He had identified that the Café Manager role at Piercebridge was also likely at risk of redundancy. He discussed this with his directors. He decided that as the Café Manager at Piercebridge was currently on maternity leave and not due back for some months, he did not wish to proceed with a redundancy consultation exercise for that post at the same time. I accepted CT's evidence on this point.

It was put to him in cross examination that as the Café Manager at Piercebridge was not made redundant within about a month of her return from maternity leave, before she then resigned, this indicated that CT had not identified that the Piercebridge post was at risk of redundancy. This does not accord with the evidence of the exchange between CT and one of his directors where the potential of the Piercebridge post being at risk of redundancy, in addition to that at Northallerton, was discussed.

82. In submissions the claimant argued that the Assistant Managers carried out the role of Café Manager on shifts when the Café Managers were not present. Thus, they should also have been included in the pool for selection with the claimant. In relation to the Northallerton café this was not the findings of CT when putting in place a temporary structure when the claimant was absent from September 2022. The temporary structure involved JP and CT taking over the management aspects of the claimant's role. If the role of the Assistant Manager at Northallerton had been interchangeable with that of the claimant's role, on balance it could have been expected that the Assistant Manager would have taken over the management responsibilities of the claimant. That did not happen. The evidence led did not support a finding that the Assistant Managers roles were interchangeable such that they ought to have been included in a pool with the claimant for selection for redundancy.

83. The evidence also demonstrated that CT had applied his mind to how the Northallerton café ran and how the Piercebridge café ran. He had discussed this with other directors and concluded that they operated independently of each other.

84. The question of how the pool should be defined is primarily a matter for the employer to determine. It is difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem" **Taymech v Ryan [1994] EAT/663/94**). Whilst the claimant did not agree with the respondent's decision about pooling, I am satisfied that the respondent did genuinely apply its mind to the question of pooling. I am satisfied that the respondent's method of selection fell within the band of reasonable responses.

Consultation

85. The claimant asserts that the consultation exercise was not carried out fairly because she was not provided with statistical or example based information to demonstrate that her role was redundant; she was prevented from having face to face consultation meetings or having a companion present at the first two consultation meetings; the decision making was carried out only by her line manager; her suggestions for ways to avoid redundancy of her post were rejected and she was not made aware of a vacancy on the shop floor in the clothing department of the Northallerton store.

86. At the first redundancy consultation meeting it was explained to the claimant that during her sickness absence management duties of pricing and costs and rota had been taken on by JP with input from CT and that other day-to-day duties had been covered by CTO and SS and other café staff. It was explained to her that the café was operating well without a Café Manager, her duties having been absorbed by others. It was explained to her that there was a financial saving of her salary which the respondent had identified could be made. There was other discussion with the claimant about the actual steps taken by management to negotiate with suppliers and to try to increase footfall at the Northallerton Café. In some ways this was a distraction from the core of the redundancy consultation, which was about the claimant's duties having been absorbed by others during her absence. I am satisfied that in relation to that matter the respondent consulted with the claimant about how her duties had been absorbed by other existing members of staff and therefore why the respondent proposed that the Café Manager role no longer existed. Reasonable consultation requires that the employee at risk is given enough information to understand why their role had been selected for redundancy. I am satisfied that the claimant was given enough information. The statistical information sought by the claimant at the first consultation meeting, which was referred to by the claimant as "empirical evidence" was about the precise amount of costs saved by negotiation with suppliers and other matters which were not about the absorption of her management and day to day duties. It was not necessary to provide the claimant with this information.

87. The claimant asserts that she was prevented from having face to face consultation meetings with the respondent and that this rendered the consultation inadequate. The evidence of the respondent which I accepted was that there had been a breach of confidentiality about the process by the claimant's daughter. The respondent also had concerns that the claimant would be disruptive on site. I am satisfied that a proposal by the respondent in these circumstances to conduct consultation by video conference was within the band of reasonable responses. The respondent subsequently agreed, at the claimant's request, that this was converted to a telephone hearing.

88. The claimant asserts that she was prevented from having a work colleague or trade union representative with her at the first and second consultation meetings and that this rendered the consultation inadequate. Whilst the ACAS guidance on managing redundancies states that the employer should consider allowing employees to be accompanied at one-to-one meetings, there is no statutory requirement to do so. The evidence was that at the third and fourth consultation meetings and at the redundancy appeal meeting the claimant was given the opportunity to be accompanied by a work colleague or trade union representative. It is clear from the evidence that at the earlier stages of the

process when the claimant did not have a companion, she was able to engage in the consultation process. She provided information and asked questions at both of those meetings. I am satisfied that the respondent's arrangements for allowing the claimant to bring a companion were within the band of reasonable responses.

89. The claimant asserts that as the decision to dismiss was made only by CT, the respondent's decision is outside of the band of reasonable responses. I do not agree. This was not a situation where employees where being scored on competencies in a pool, where objective checking of the scoring may be reasonable. This was a situation where the respondent had concluded, based on what had been happening on the ground from September 2022, that the claimant's role had disappeared. The evidence is that this was a matter which had been discussed by CT with other directors and senior management. Further, the grievance raised by the claimant against CT during the consultation process had been heard by another director. The redundancy consultation process had been paused whilst this took place. The grievance was not upheld in relation to the redundancy consultation process. I am satisfied that the respondent's arrangements whereby CT was the sole decision maker was within the band of reasonable responses.

90. The claimant was given the right to appeal against her the decision to dismiss her. Her appeal was heard by a different director who had not been involved in the decision to dismiss. The claimant was critical of the fact that CT and BT are cousins. The respondent is a family-owned business. There was no evidence that the claimant had requested that someone else conduct her appeal nor did she suggest in evidence who else might have done this. I am satisfied that the respondent's arrangements for the dismissal appeal hearing fell within the band of reasonable responses.

91. The claimant asserts that as her suggestions for ways to avoid redundancy of her post were rejected the consultation was inadequate. I do not agree. The evidence was that the CT had discussed each of her suggestions with her and followed this up in writing with an explanation as to why each of her suggestions were not viable. The claimant was not happy that none of her seven suggestions were accepted by CT. That does not mean that consultation was inadequate. I am satisfied that the consultation about the alternatives to redundancy which she proposed to CT was reasonable and the decision making of CT fell within the band of reasonable responses.

92. The claimant was given a right of appeal against the decision to dismiss her. The appeal hearing took place on 28 February 2023. The claimant's written grounds of appeal were discussed with her, and a decision made that none of these grounds of appeal were upheld.

Alternatives to redundancy – clothing assistant vacancy

93. The claimant asserts that there was a viable alternative to her redundancy which the respondent failed to consider, namely the vacancy for a full-time clothing sales assistant at the Northallerton store.

94. The claimant provided a screenshot of an Indeed job advert for a clothing sales assistant at the Northallerton store. She took the screenshot on 9 February 2023. In cross examination by the claimant's representative CT agreed that the claimant had not been advised of that vacancy during the redundancy consultation process. He said that he did not know when the vacancy had been posted. The claimant's representative replied that it had been posted on 3 February 2023. The screenshot taken by the claimant on 9 February 2023 shows that it was posted 5 days earlier. CT's evidence was that if the claimant had been interested in that position, she would have been considered for it. It was not clear to me that CT had been aware of the vacancy prior to dismissal of the claimant. Nevertheless, as a director of the business who was engaged in a redundancy consultation process with a member of staff, it would have been reasonable for him to have appraised himself of any current vacancies within the respondent's business. Thereafter it would have been reasonable for him to have discussed any vacancies for which she would have been considered with her. He had referred to considering alternative employment during the consultation process. He had not done so in relation to this role. CT said in cross examination that the sale assistant role was one for which the claimant would have been considered.

95. The claimant raised the sales assistant vacancy with BT at her appeal. She told him that it had been live during the consultation process with CT. She told him it was still live. BT's evidence was that he asked CTI about the vacancy when it was raised by the claimant with him. He could not remember what CTI had said. He did not refer to the vacancy in his appeal outcome letter. There was no evidence that BT had considered the vacancy as an alternative to the claimant's dismissal being upheld.

96. For these reasons I concluded that the respondent's actions did fall outside the band of reasonable responses with respect to considering the sales assistant role as an alternative to making the claimant redundant.

Polkey

97. Having found the redundancy to have been procedurally unfair I considered the chances that the claimant would have been dismissed in any event had the respondent followed a fair procedure.

98. I have found that failure to provide the claimant with details of the clothing assistant vacancy and to discuss this with her prior to her dismissal and at the appeal hearing is outside the band of reasonable responses. Having reviewed the evidence I find, on balance, that the provision of information about the vacancy would have resulted in a 33.3% chance of the claimant not being dismissed by reason of redundancy.

99. The claimant's oral evidence was that she would have taken the sales assistant role on a full-time basis. This was despite the role being an assistant and not a manager role. She said that she had previously worked on a shop floor. On balance, I did not accept that this was necessarily the case.

100. The claimant was asked by me when she first became aware of the sales assistant role. I found her answer to be contradictory. She replied "During the process of the redundancy". She then said "The day I took the screenshot was the day I saw it". She took the screenshot on 8 February 2023 as shown at p 423 of the bundle. If the claimant first became aware of the advert on 8 February 2023 and this was a job which she would have taken I find it surprising that she did not refer to the vacancy in her grounds of appeal which she sent to the respondent the following day, on 9 February 2023. The vacancy would have been an opportunity to remain employed by the respondent as an alternative to redundancy. During the redundancy consultation process the claimant had proposed numerous alternatives to redundancy. It is surprising that she did not propose this alternative when she became aware of it.

101. In the redundancy appeal hearing the claimant told BT about the vacancy. In the notes of the appeal hearing prepared by the respondent, to which the claimant referred in her evidence, it is recorded that BT asked whether she had made CT aware that she would work in a different department. The claimant said she did not as it was up to the respondent to offer alternatives, not her. That part of the notes was not disputed by the claimant. I find on balance that this statement was made by the claimant in response to a question by BT about the sales assistant role, the claimant having referred to the vacancy. There was no evidence led about other named departments discussed in the appeal hearing. It could only have meant the clothing department. The claimant's response that she did not make CT aware that she would work in a different department, as it was not up to her to do so, points in my view to the claimant having knowledge of the sales assistant vacancy prior to her dismissal.

102. This also accords with the claimant's first answer to my question about when she became aware of the vacancy, when she said, "during the redundancy process".

103. On balance I have found that the claimant was aware of the vacancy prior to the final consultation meeting on 7 February 2023 but chose not to raise this with CT. She was also aware of the vacancy at the time of her appeal on 9 February 2023 but chose not to raise this in her written letter of appeal. These findings are relevant in relation to my assessment of the chances that the claimant would have been dismissed in any event had the respondent consulted with the claimant about the vacancy. Put another way, had the vacancy been offered to the claimant, on the basis of CT's evidence that she would have been considered for the role, what are the chances that she would have accepted it.

104. Considering the evidence and my findings above, as well as all of the circumstances of the case, I find that it is 33.3% likely that had the claimant been provided with the details of the sales assistant vacancy she would have accepted it and would have remained employed by the respondent. I have assessed the likelihood as 33.3% as on balance I think there is a 66.7% chance that the claimant would have turned down the offer of the vacancy. This is because I have found that she was aware of the vacancy both before her dismissal and at the time of submitting her grounds of appeal. She chose not to refer to the vacancy on either occasion. This is in contrast to her proactive approach in suggesting numerous other alternatives during the consultation process with CT. I have also considered the relationship between the claimant and the respondent, principally CT, during the consultation process. She told CT that she had lost trust in the respondent. She raised a grievance against CT. The relationship between the claimant and the respondent had significantly deteriorated. I found each of these considerations to be compelling.

105. On the other hand, the claimant was a long serving employee. She had previously had a good working relationship with CT prior to the redundancy exercise. She had worked as a sales assistant previously with a different employer, albeit many years ago. There was a chance that the claimant and CT could have entered into a discussion, such that she accepted the sales assistant role. I assessed that chance at 33.3%.

Remedy

106. The claimant sought compensation by way of remedy. She did not wish reinstatement or reengagement.

107. Section 118 ERA provides that a basic award is calculated in accordance with sections 119-122 ERA. In this case, the claimant's basic award of £14,275 (£571 x 25) is completely extinguished by the payment of £14,275 made by the respondent on the ground that the dismissal was by reason of

redundancy. This reduction which, in effect, completely extinguishes the basic award is required by section 122 (4)(b) ERA.

108. The claimant submitted that as she now works 40 hours per week whereas she worked 32 hours with the respondent compensation should be calculated based on what she would have earned with the respondent had she worked 40 hours per week

109. The respondent submitted that the calculation must be based on actual loss. I agree with the respondent. Section 123 ERA provides that the compensatory award should be the amount that the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal. Accordingly, the loss sustained by the claimant should properly be based on her actual loss and not based on any extrapolated hour model.

Past loss

110. I have found that a proper procedure might have led to an offer of the sales assistant role. The gross salary for the sales assistant role, as advertised, was £23,000 - £24,000 gross. I require to base my assessment of the claimant's losses on the wages that she would have earned in the sales assistant role.

111. Where I have found that a proper procedure might have led to an offer of alternative employment, I require to identify the job that would have been offered and base my assessment of the claimant's losses on the wages that would have been earned in that alternative job: **Red Bank Manufacturing Co Ltd v Meadows 1992 ICR 204, EAT**.

112. I accepted the figures submitted by the respondent about the claimant's net weekly earnings (basic pay and employer pension contributions) had she been employed by the respondent in the sales assistant role and in Job 1 and Job 2.

113. The claimant's net earnings and employer pension contributions in the respondent's sale assistant role would have been £443.45 per week. The period from 3 May 2023 to the start of the final hearing is 24 weeks. Her earnings in the period would have been £10,642.80 (24 x £443.45)

114. The claimant's net earnings and employer pension contributions at Job 1 are £349.67 per week. The period from 3 May 2023 – 20 August 2023 is 14 weeks which totals £4,895.38.

115. The claimant's net earnings and employer pension contributions at Job 2 are £459.66 per week. The period from 21 August 2023 – 1 November 2023 is 10 weeks which totals £4,596.60.

116. The claimant's total earnings in the period 3 May 2023 to 1 November 2023 are £9,461.98 (£4,895.38 + £4,596.60)

117. The claimant's past losses before any Polkey deduction are £1,180.82 (£10,642.80 - £9,461.98). I have already assessed that there is a 66.7% chance that the claimant would have turned down the offer of the vacancy. The claimant's past losses of £1,180.82 require to be reduced accordingly. Taking account of the Polkey reduction of 66.7%, the claimant's past losses are assessed at £393.61.

Future loss

118. The claimant moved to Job 2 on 21 August 2023. Her salary since that date is £28,000. The claimant now earns more than if she been employed in the sales assistant role on a salary of £24,000. I am required to assess losses that flow from the dismissal based on the salary that the claimant could have earned in the sales assistant role had she taken up that employment. Her salary is now greater than the sales assistant role, Accordingly, the assessment of any future loss is nil.

Other matters

119. The claimant submitted that the compensation award should include a sum for loss of bonus. From the evidence led I did not find that the claimant was entitled to a contractual bonus. Accordingly, I do not find that the claimant is entitled to compensation to include a sum for bonus.

120. The claimant submitted that the compensatory award should be uplifted for failure to follow "ACAS guidelines" about bringing a companion with her to the first and second consultation meetings. The respondent submitted that there was no statutory entitlement to bring a companion. I agree with the respondent that there was no statutory entitlement to bring a companion to the first and second consultation meetings. The ACAS Code of Practice on Disciplinary and Grievance Procedures, for which an uplift can be made, does not apply to redundancies. Accordingly, I do not find that the claimant is entitled to an ACAS uplift on the compensatory award as sought or at all.

Loss of statutory rights

121. Loss of statutory rights forms part of the compensatory award. The amount of the award is a matter for the Tribunal and should be just and equitable. I

concluded that the appropriate award for loss of statutory rights is £500. It is just and equitable that the claimant should receive an award under this head because she must start afresh building up enough service to qualify for statutory rights, such as the right not to be unfairly dismissed or to be eligible for a statutory redundancy payment. I have taken into account the claimant's length of service and age as potentially relevant background factors in order to assess the level of award that may be appropriate under this head. As the loss of statutory rights forms part of the compensatory award it is appropriate to make the same Polkey deduction from this award. Taking account of the Polkey reduction of 66.7%, the claimant's loss of statutory rights is assessed at £166.67.

Conclusion

122. In conclusion the claimant is awarded compensation of £560.28 (£393.61 +£166.67). The claimant said that she did not receive state benefits as a result of her dismissal. Accordingly, the Recoupment Regulations do not apply.

Employment Judge McCluskey

Date: 24 November 2023

Notes

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription
Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

Annex

List of Issues

1 Was the reason or principal reason for the claimant's dismissal redundancy (as defined by section 139(1) of the Employment Rights Act 1996 ("ERA") or in the alternative some other substantial reason namely business reorganisation, and therefore permissible under section 98(2) ERA?

2 If so, did the respondent act reasonably in treating this as a sufficient reason for dismissing the claimant, applying section 98(4) ERA and in particular applying the guidelines from **Polkey v AE Dayton Services Ltd [1987**] as follows:

a) Before 8 February 2023, did the respondent warn and consult the claimant individually, specifically allowing the claimant to: i. challenge the basis for her selection for redundancy and comment on the selection criteria and pool; ii. suggest ways to avoid redundancy; iii. address any other matters and concerns she may have; and iv. consider alternative positions that may exist.
b) Before 8 February 2023, did the respondent apply a fair selection criteria to an appropriate pool of candidates for redundancy? and
c) did the respondent consider suitable alternative employment for the claimant as an alternative to redundancy?

3 Based on the answers to these questions, the Tribunal must establish whether the respondent's conduct and decision to dismiss fall within the band of reasonable responses available to an employer in the circumstances.

4 If the claimant succeeds in any of her claims, is she entitled to any remedy from the respondent?

5 If the Tribunal finds the claimant was dismissed unfairly, should any compensation awarded to the claimant be reduced to reflect: (i) contributory conduct on the part of the claimant; (ii) any failure by the claimant to mitigate her losses; and (iii) the fact that the claimant's employment would have been terminated in any event (in reliance on **Polkey v AE Dayton Services Ltd [1987]**)?