EMPLOYMENT TRIBUNALS

Claimant: Mr A Reason

Respondent: McCarthy Tétrault LLP

Heard at: London Central Employment Tribunal (by CVP) **On:** 14 and 15 May 2024

Before: Employment Judge Anthony

REPRESENTATION:

Claimant: Mr T Brown (Counsel)
Respondent: Mr T Goodwin (Counsel)

RESERVED JUDGMENT

1. The Tribunal's judgment is that the claimant's claim of unfair dismissal is well founded and succeeds.

REASONS

Introduction

1. The claimant claims unfair dismissal. There is no dispute the claimant was dismissed. The respondent states the claimant was dismissed for redundancy. The question is whether a redundancy situation existed and whether that caused the claimant's dismissal.

The Evidence

2. The Tribunal heard evidence from Robert J Brant (Managing Partner) and David Woollcombe (Partner) on behalf of the respondent.

3. The Tribunal heard evidence from the claimant.

4. The Tribunal was provided with:

   a) a final joint hearing bundle totalling 912 pages;

b) witness statement of the claimant totalling 27 pages;

c) witness statement of Robert J Brant totalling 23 pages;

d) witness statement of David Woollcombe totalling 12 pages;

e) claimant's skeleton argument totalling 10 pages;

f) respondent's skeleton argument totalling 8 pages;

The Issues

5. It was agreed by both advocates that the question of remedy would not be dealt with at this hearing. Therefore, the issues before the Tribunal were as follows:

   a) What was the reason for the claimant's dismissal? The respondent relies on the reason of redundancy.

   b) Was the claimant's dismissal fair in all the circumstances having regard to section 98(4) of the Employment Rights Act 1996 ("ERA 1996")?

Relevant Law

6. I have taken into consideration the relevant law drawn to my attention in both skeleton arguments.

7. Section 139(1) of the ERA 1996 states:

> "[…] 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."

8. The reason for dismissal is the "set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee" (*Abernethy v Mott Hay and Anderson* [1974] ICR 323, CA at [330]). It is an objective test both in terms of whether a redundancy situation existed and whether it caused the dismissal (*Baxter v Limb Group of Companies* [1994] IRLR 572, CA).

9. In general terms, employers acting reasonably will give as much warning as possible of impending redundancies to employees, consult employees about the decision, the process and alternatives to redundancy, and take reasonable

steps to find alternatives such as redeployment to a different job (*Williams v Compair Maxam Limited* [1982] IRLR 83.)

10. In *Safeway Stores plc v Burrell* 1997 ICR 523, EAT, the EAT set out a simple three-stage test. A Tribunal must decide:

    i) was the employee dismissed?
    ii) if so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?
    iii) if so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

11. In relation to (ii), this is a question of fact for the Tribunal. The only question to be asked when determining the stage (ii) test is whether there was a diminution in the employer's requirement for employees (rather than the individual claimant) to carry out work of a particular kind.

12. Reorganising work so that fewer employees can do it will still create a redundancy situation (*Sutton v Revlon Overseas Corporation Ltd* [1973] IRLR 173, NIRC) even if the overall amount of work has actually increased, or in circumstances where the employer engages independent contractors to undertake the work (*Bromby and Hoare Ltd v Evans and anor* [1972] ICR 113, NIRC). It is irrelevant at this stage to consider the terms of the claimant's contract.

13. The stage (iii) test is one of causation, namely whether the dismissal is wholly or mainly attributable to that state of affairs (*Murray v Foyle Meats Ltd* [2000] 1 AC 51). The terms of the contract are only relevant at stage (iii) when determining, as a matter of causation, whether the redundancy situation was the operative reason for the employee's dismissal.

14. The Tribunal's jurisdiction in redundancy cases only goes as far as considering whether the redundancy is genuine. The Tribunal must not go behind or investigate an employer's commercial and economic reasons for its decision to make redundancies (*James W Cook & Co (Wivenhoe) Ltd v Tipper* [1990] ICR 716, CA).

Factual Background

15. Since 1995, the claimant has held the role of Partner at four other law firms. The claimant first worked for the respondent on a self-employed basis in February 2013. The claimant commenced employment on 6 November 2018 as an Income Partner at the respondent's London office in domestic and international commercial litigation and international arbitration.

16. There is no dispute the claimant was employed on a full-time capacity on an initial salary of £305,000 per annum and with the opportunity to be awarded a discretionary bonus. The contract was terminable by either party on six months'

notice. The claimant's salary had increased to £320,000 per annum at the point of dismissal.

Findings of fact

17. The pages in brackets refer to the page numbers in the joint hearing bundle.

Whether a Redundancy Situation Existed?

18. The respondent states that a redundancy situation existed from December 2022. The respondent states that, as is common practice within the legal industry, the claimant was set a number of target hours per annum (in the claimant's case, 1,400 hours per annum) that he was required to work, record and bill to clients. The respondent states that the claimant was only able to meet this target in 2018 and that since then, there had been insufficient litigation work for the claimant to undertake to meet his target.

19. Mr Brant, the respondent's Managing Partner met with the claimant on 7 December 2022. There is no dispute that an informal discussion took place over drinks at the Coq d`Argent restaurant where Mr Brant proposed to adjust the claimant's remuneration structure, namely that the claimant's salary would reduce to £110,000 and his target hours to 460. I find there was no discussion at this meeting about the claimant being redundant.

20. The claimant's case is that revised terms and conditions which allowed the claimant to continue to work full-time for the respondent for a reduced salary, could not in law be "a redundancy situation", because the requirements of the business remained for the claimant, as a litigator, to work full-time. The claimant states that the respondent continued expressly to offer the claimant employment on such a basis until 31 March 2023 (page 260). The claimant states that the offer continued after the inception of the redundancy consultation (page 217). According to the claimant, this demonstrates that the respondent did not, at this time, have a reduced requirement for employees to carry out work of the kind carried out by claimant.

Reduced Requirement for Employees to Carry Out Litigation Work

21. Section 139(1)(b) of the ERA 1996 states that there is a redundancy situation where the requirements of the business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where they are employed, have ceased or diminished.

22. This gives rise to broadly three separate scenarios: a) where work of a particular kind has diminished, so that employees have become surplus to requirements; b) where work has not diminished, but fewer employees are needed to do it because the employees have been replaced by, for example, independent contractors or technology; or c) where work has not diminished, but fewer employees are needed to do it because of a reorganisation that results in a more efficient use of labour.

23. The respondent's position is that this case falls within the first of the three scenarios. The respondent's case is that there had been insufficient litigation work for the claimant to undertake to meet his performance expectations and that is reflected in the claimant's underbilling since 2018. The dispute between the parties is whether the claimant's underbilling demonstrated litigation work had indeed diminished so as to give rise to a redundancy situation.

Underbilling Indicating a Reduced Requirement for Employees?

24. Mr Brant states in oral evidence that he had not always been formal with the claimant in respect of discussions on underbilling. I find his oral evidence is consistent with his discussions with Mr Woollcombe on 10 May 2023 (page 434) during the redundancy appeal process. Mr Brant stated on that occasion that because of the claimant's status as an income partner, they "always just had a catch-up".

25. I find Mr Brant's informal approach to underbilling was not the respondent's accepted practice of dealing with underbilling by fee earners. I place weight on Mr Woollcombe's remarks in that interview, that it was typical for the respondent to record in the annual reviews "some kind of warning about hours not being sustainable". I find from the documentary evidence discussed below that the claimant was given no such warning.

26. I have been provided with one annual review, the 2022 Lawyer Feedback Form (page 909). I find there is no warning within this review about the claimant's underbilling either in the year 2022 or before. The only oblique reference to billing is the following extract from Mr Brant's feedback of the claimant's performance:

> "For obvious reasons, 2022 has and continues to pose economic difficulties generally for London and the rest of the United Kingdom with the result that "legal belts" are being tightened and the appetite for "drawn out" litigation/arbitration risk diminishes.
> Conversely, this is likely to lead to more thought being given to settlement options than would usually be the case. That said, the domestic and international litigation objectives (those numbered 2. and 3. in 2021) have been met and has the objective (numbered 4.) to continue assisting the firm's offices in Canada on English law disputes, and to attract disputes work from them/client base to London. By way of an addition, the facilitation of a significant instruction from an external law firm in London to Canada in respect of contentious (Canadian) law advice has been achieved. The development of more arbitration work in London (objective numbered 1) and elsewhere in the firm as a whole continues to be a "work in progress" in terms of formal instructions to act but there is an increasing volume of pre-commencement advisory work emanating from Canada with regard to potential/use of arbitration in London."

27. The Feedback form is undated and Mr Brant could not recall precisely when this was completed, although it was accepted by both parties that such reviews were generally undertaken towards the end of the calendar year with revisions carried out into the new year. It is therefore possible that the remarks were

entered on Feedback Form either shortly before the meeting of 7 December 2022 or after.

28. I find the recognition that 2022 continued to pose economic challenges for London and prospective clients having less of an appetite for "drawn out" litigation/arbitration does not *per se* indicate a diminution in the respondent's requirement for employees to carry out litigation work at the London office. I find it may indicate the changing nature and scope of the litigation generally and the general economic outlook but nothing more could be inferred from this general statement.

29. Apart from the general comment above, I find the 2022 Feedback form was framed in overall positive terms about future work. I find there is nothing to suggest from the 2022 Feedback form that Mr Brant or the respondent had anticipated a downturn in litigation work either within the respondent's firm or in London generally. In fact, Mr Brant's comments on the Feedback form appeared to suggest to the contrary, namely the development of more arbitration work in London as a "work in progress". I find the reference to an "increasing volume of pre-commencement advisory work emanating from Canada with regard to potential/use of arbitration in London" was a further indication of Mr Brant's contemporaneous view at the time of other potential streams of arbitration work for the claimant. Mr Brant's contemporaneous remarks on the Feedback form causes me some concern as to whether the respondent truly had in mind a genuine redundancy situation or diminution in their requirement for employees to carry out litigation work at the London office.

30. Furthermore, I find there is nothing to suggest from the Feedback form or other documents pre 17 March 2023 that the claimant's underbilling since 2018 was directly linked to the insufficient litigation/arbitration work in London. I conclude from the 2022 Feedback form that there is nothing to indicate that the requirements of the respondent's business for employees to carry out litigation work had diminished, or were expected to cease or diminish (*Safeway Stores plc v Burrell* 1997 ICR 523, EAT).

Group Targets and the 'Fourth Bucket'

31. The claimant states that the reason for his underbilling was because there was a focus on group targets and that account had not been taken by the respondent of the 'fourth bucket', namely instances when the claimant had supervised other fee earners on another partner's files.

32. I have considered whether the information set out in paragraph 21 of Mr Woollcombe's statement, which was not produced in the final appeal decision letter, would indicate it was not taken into consideration by the respondent at the appeal stage. I accept Mr Woollcombe's oral evidence that all of the claimant's billable or recorded hours would have been captured in the data presented to him before he made his decision. The fact that these were not broken down into different categories (the different buckets) within the appeal decision letter is I find irrelevant. Furthermore, the fact Mr Woollcombe had asked for the data to be broken down in a different way during the appeal

process does not indicate that not all of the claimant's billable hours had been taken into account at an earlier stage in the process. Although the claimant asserts that the data did not capture all of his recorded or billable hours, the claimant has produced no documentary evidence to demonstrate the respondent's records are incorrect. I conclude that the data in respect of the claimant's total billable hours are correct and those billable hours had been considered at all stages of the process.

No Salary Increase

33. In cross examination by Mr Brown, it was put to Mr Brant that a period of underbilling which is not accompanied by a warning would mean that someone might develop a sense of comfort even though they had not met their performance expectations. Mr Brant refuted the suggestion that there was any comfort to be had. Mr Brant in his oral evidence states that the claimant had not received even a "cost of living" salary increase for some years and that this was principally due to the claimant not meeting his billing targets. Mr Brant states that in the legal business that he is in, if one does not get a cost of living adjustment, that in and of itself is a "stark warning".

34. It is unclear to me what that "stark warning" might relate to. Mr Brant accepts in oral evidence that he did not say to the claimant that he would need to accept a variation to his contract of employment or be made redundant.

35. I have carefully considered whether the claimant would or should have inferred that an absence of "cost of living" salary increase would strongly indicate he was redundant or that the requirements of the respondent's business for employees to carry out litigation work had diminished. I have given consideration to the claimant's original contract of employment dated 30 October 2018 (page 66 to 84). The claimant's contract of employment states that his salary will be reviewed annually at the same time as his annual progress review. I find this is consistent with Mr Brant's evidence. The contract goes on to state that it is not anticipated that his annual basic salary will increase materially from year to year absent

> "a significant change in your practice or financial performance. The Firm may take into account factors which we consider appropriate including your performance generally as measured against your business plan objectives, your personal financial contribution to the profitability of the Firm and the profitability of the Firm generally. There is no right to any salary increase and any increase is discretionary."

36. In section 6 of the contract of employment, the claimant's performance expectations were set out as follows:

> "We expect you to contribute a minimum of 1400 billable hours (using the Firm's standard hourly rates for files opened in London or in Canada repsectively) (*sic*) or the financial equivalent thereof and 500 non-billable hours per year, subject to annual review and pro-rated for any partial year of employment. Work outside of regular office hours or in excess of the billable and non-billable hours

> expectations set out in this offer will not attract further basic salary or other remuneration."

37. I find the contract of employment does not provide for an expectation that there would be any salary increase unless there was a significant change in the claimant's practice or financial performance. "Significant change in practice" or "financial performance" is not defined in the contract but it is clear from the contract of employment that work in excess of regular office hours or in excess of the billable and non-billable hours expectations were not matters attracting further basic salary or other remuneration. I find that something more than that was required.

38. I find Mr Brant's oral evidence of the "culture" of salary increases year on year is not supported by section 6 of the claimant's contract of employment which appears to suggest there is no expectation of any increase in salary unless there was a significant change in the claimant's practice or financial performance. I have not been provided with other documentary evidence to suggest that year on year salary increases represented the norm at the respondent's firm.

39. I conclude from the contract of employment that it would not have been obvious to the claimant that not receiving a cost of living salary increase would be a "stark warning" that he was at risk of redundancy.

40. I find there can be many reasons for a fee earner's underbilling and that a diminishing need for employees to carry out such work is just one of those reasons. The burden lies on the respondent to show that, in this particular situation of fee earner underbilling, that redundancy was the reason or principal reason for the dismissal.

Smaller Role or Same Work Done under Different Terms?

41. The respondent in a letter dated 31 March 2023 (page 260) states that the solution to the reduction in work and maintaining the claimant's employment was to offer the claimant "a smaller role" as an alternative to redundancy given the claimant's

> "current role is not sustainable and the situation is not tenable given that your hours and revenue generation have been well below expectations for more than three years now."

42. The claimant's case is that an arrangement whereby he would continue to work full-time, for a reduced salary could not in law be a redundancy situation, because the requirements of the business remained for the claimant, as a litigator, to work full-time.

43. In *Murray v Foyle Meats Ltd*, it was held that

> "The contractual provisions which the employer may make with the employees are not necessarily a requirement of the business: they are rather a means

whereby the requirements of the business in respect of the workforce may be met."

44. In other words, the requirement for employees to do the work do not change simply because the work is carried out under different terms and conditions. I find from the caselaw that changes in terms and conditions are relevant to the fairness of a dismissal but they do not create a redundancy situation (see *Johnson v Nottinghamshire Combined Police Authority* 1974 ICR 170, CA; *Loy v Abbey National Financial and 2.49 Investment Services plc* 2006 SLT 761, Ct Sess (Outer House) and *Mitie Olscot Ltd v Henderson and ors* EAT 0016/04).

45. I have considered whether the requirement for employees to do litigation work within the respondent's firm had either ceased or diminished. I find that between 7 December 2022 and until 31 March 2023 (page 260), the respondent continued expressly to offer the claimant full-time employment at a reduced fixed salary and with reduced fixed targets. Mr Brant states in oral evidence that there was constant pressure on the respondent's business to "pay our way and be well run" and agreed that the claimant's salary was a particular cost pressure to be addressed because the claimant was "not close to pulling his weight".

46. Given the claimant's successive years of underbilling and failure to meet his performance expectations, I find the respondent would have had valid concerns regarding the economic impact of the claimant's salary on the respondent's business. However, the Tribunal's jurisdiction in this claim only goes as far as considering whether the redundancy is genuine i.e. whether the requirement for employees to do litigation work within the respondent's firm had either ceased or diminished.

47. I find it is clear from correspondence between the claimant and Mr Brant that there was extensive discussions between December 2022 and March 2023, whereby the respondent had sought the claimant's consent to a variation to the terms and conditions of the contract of employment. I find the focus was on agreeing a variation to the terms. I find there was no mention of the claimant being redundant or a reduced requirement for employees to do litigation work within the respondent's firm until the letter of 17 March 2023 (page 217).

48. If a reduced requirement for employees to do litigation work was indeed a material matter, it is curious that the respondent did not think it was relevant to highlight this earlier than 17 March 2023. The absence of any reference to a reduced requirement for employees to carry out litigation work at an earlier stage in the process strongly indicates that the requirement for employees to undertake litigation work did not change at the respondent's firm during this period or before.

49. Having reviewed all of the documentary and oral evidence, I find the facts more likely than not indicate that the respondent's principal focus between December 2022 and March 2023 was on securing the claimant's agreement for work to be carried out under different terms and conditions. I find that in itself can have no bearing on the stage (ii) test identified in *Safeway Stores plc v Burrell*, namely whether there was a diminution in the employer's requirement for employees

(rather than the individual claimant) to carry out work of a particular kind. I find the focus on negotiating terms can only be relevant to the stage (iii) question.

Withdrawal of the 'Alternative Employment Arrangement'

50. On 12 April 2023, the respondent, through Mr Brant withdrew the offer of the 'alternative employment arrangement'. It would appear Mr Brant reached this decision on or by 10 April 2023 (see email of 10 April at page 271 - 276).

51. I have carefully considered the reasons advanced by Mr Brant for the change in position. Mr Brant states in his witness statement at paragraph 40:

> "I realised we couldn't even leave the offer of the Alternative Employment Arrangement on the table anymore. Allan's hours at that point weren't even on track to meet the minimum requirements for the Alternative Employment Arrangement (i.e. one third of his target hours) – they were tracking at about half of that, and I had carefully considered his future projected hours as part of the redundancy process. In addition, it had become clearer to me based on Allan's 10-year track record with us that he would not be able to build the practice because building client or colleague relationships was not his strength."

52. Mr Brant gives two reasons for the withdrawal of the 'alternative employment arrangement'. Firstly, that the claimant's billing for that calendar year was not on track to meet the targets of the 'alternative employment arrangement' and secondly, that the claimant was not competent at building client or colleague relationships.

53. On the first point, it is unclear what other data was made available to Mr Brant between 31 March 2023 and 10 April 2023. The bundle does not include any annualised figures for the billing from January to March 2023 that was made available to Mr Brant before the decision was taken to withdraw the offer. I accept that annualised figures were subsequently considered at the appeal stage by Mr Woollcombe (page 655) but there is nothing to suggest this was considered by Mr Brant between 31 March 2023 and 10 April 2023 when the offer of 'alternative employment arrangement' was withdrawn. In the absence of documentary evidence on this point, I conclude there is nothing to suggest pertinent information regarding a change in the health of the London litigation practice in early April 2023 was brought to Mr Brant's attention, or that there was some change in its appreciation by Mr Brant in early April 2023.

54. On the second point, I do not accept Mr Brant's view of the claimant's (in)ability at building client or colleague relationships was a new factor which he had only begun to appreciate between 31 March 2023 and 10 April 2023. I find that the claimant's (in)ability to build relationships was not new information which had suddenly come to Mr Brant's attention by 10 April 2023 for the following reasons.

55. Firstly, in Mr Brant's oral evidence, he focused on an incident involving a partner in Canada, Patrick Shea. I find this incident was in any event, at the forefront of Mr Brant's mind when he negotiated the 'alternative employment arrangement'

with the claimant over informal drinks on 7 December 2022 (page 97). I find it is clear from the email that Mr Brant himself considered the issue to be fully resolved. I do not accept this incident amounted to new information.

56. Secondly, my findings of fact is further reinforced by Mr Brant's remarks on the 2022 Feedback form completed between December 2022 or early 2023. In the section 'Feedback received from clients over the past year', Mr Brant stated:

> "Considerable relief and delight from MTI Energy in terms of the "forceful" defence and successful outcome; recognition by OSA in terms of the very hard work to achieve a significant and positive recovery and substantial thanks and appreciation from individuals in Canada for the quick and pragmatic advice including one particular matter which led a 3 million Canadian dollar settlement and a very delighted (major) Canadian client."

57. I find there is simply nothing to suggest from the 2022 Feedback form or otherwise that the respondent had any concerns regarding the claimant's (in)ability to build client or colleague relationships. I reject the oral evidence of Mr Brant that he came to the realisation in early April 2023, that the claimant's (in)ability to work with others was a cause for concern. I find the withdrawal of the 'alternative employment arrangement' was not materially or causally linked to the claimant's (in)ability to build client or colleague relationships.

58. Having rejected the two reasons put forward by the respondent for why the offer of the 'alternative employment arrangement' was withdrawn, I find the withdrawal of the offer appears to be for another reason which the respondent has not articulated in the evidence before me. I find the withdrawal of the offer took away the only alternative offer which would have kept the claimant in employment.

Extension of the Claimant's Contract

59. There is no dispute the claimant's employment was subsequently extended by consent from 12 July 2023 to 30 August 2023 so that the claimant could deal with the litigation in Uganda which required an eight day trip to Uganda in order for the claimant to attend at an initial court hearing held on 18 July 2023. I find there is nothing to indicate from the documentary evidence before the Tribunal that the claimant had not behaved appropriately at work either in terms of client or colleague relationships.

60. I have considered whether the reason the claimant's employment was not extended was because the requirements of the respondent's business for employees to carry out litigation work had diminished, or were expected to cease or diminish.

61. On 20 August 2023, the claimant's solicitors sought a further extension of the claimant's employment in light of better projected work (page 541). It was argued that the claimant's financial performance had continued to improve. Reference was made to the main appeal hearing in the Uganda litigation now fixed for 23 October 2023 and the pipeline of work including in the TD Bank

case. The claimant's solicitors stated that ignoring the substantial further time to be incurred in September and October 2023 in advance of the hearing listed in October 2023, the claimant's annualised hours projection has increased to 573 hours, which was in excess of the respondent's expectation of 460 chargeable hours which underpinned the offer pre 1 April 2023. The claimant's solicitor reiterated that even at this very late stage, the claimant "remains willing to accept a reinstated offer of continuing employment on the terms previously proposed by you and without any additional contractual safeguards in the event of early termination."

62. Mr Brant responded on behalf of the respondent on 22 August 2023 (page 540). The claimant was accused of being manipulative of the situation. Mr Brant stated in the email of 22 August 2023 that the claimant's "improving" financial performance can be attributed "entirely to the Ugandan litigation which has been subject to significant periods of delay over many years but required some work during your client's notice period." Mr Brant stated that the respondent agreed with the claimant that he would service the Ugandan litigation and at the same time, this was a temporary way of avoiding the claimant's redundancy for as long as possible. Mr Brant stated that "[a]s a gesture of goodwill, the Firm has agreed to pay your client the same amount he would have received as pay in lieu of notice even though he has now worked most of his notice period."

63. Mr Brant acknowledged the increased workload created by the Ugandan litigation but considered it a "temporary" increase. Mr Brant stated that the respondent did not view the claimant's practice as commercially viable either on a full time or reduced hours basis based on the pattern of a significantly reduced average workload over many years. Reference was made to the fact negotiations had been ongoing for several months and that the claimant had been paid in full for eight months since the offer of taking up a reduced role was made. The respondent stated that the claimant's belated offer to accept the reduced role was "misconceived" and that the smaller role was no longer considered commercially viable.

64. I deal with the points raised in Mr Brant's email of 22 August 2023, namely what had changed when the respondent withdrew the offer of the 'alternative employment arrangement'. In relation to the claimant's underbilling, I find this was not something new that the respondent had suddenly became aware of. I find this was a fact the respondent had been fully appraised of throughout the period of negotiations. I have already found above that Mr Brant was not in possession of any additional information regarding the claimant's annualised billing between 31 March 2023 and 10 April 2023 which caused him to withdraw the offer.

65. As for the fact the claimant had been paid for eight months, I find that this was not a relevant consideration given the claimant would have been entitled to six months' notice in the event of dismissal.

66. As for the fact there had been an increase in work or that the claimant's projected billing was likely to increase, I find that this was not a material consideration because it is open to the respondent to reorganise work to suit

its organisational needs. The key issue is whether there was a diminution in the employer's requirement for employees (rather than the individual claimant) to carry out work of a particular kind. Given the extension of the claimant's contract was solely in respect of one case, I find that the extension of the claimant's contract can at best be described as a neutral point.

What was the reason for the claimant's dismissal?

67. I now turn to the first question identified in the list of issues namely what was the reason for the claimant's dismissal. The burden of proof is on the respondent to show what the reason or principal reason was for dismissal (section 98(2) ERA 1996).

68. I do not accept a redundancy situation existed or that the respondent had a reduced requirement for employees to carry out litigation work because this was not a reason articulated or brought to the claimant's attention in December 2022 when the respondent first sought to vary the claimant's terms and conditions of employment. I find that during a three month period prior to 17 March 2023 when the respondent sought to renegotiate the claimant's terms and conditions of employment, the respondent did not cite redundancy or a reduced requirement for employees to carry out litigation work as a reason underpinning the negotiations with the claimant.

69. I have placed significant weight on the 2022 Feedback Form. I find the respondent's remarks on the Feedback Form were positive in terms of future projection of litigation and arbitration work at the respondent's firm. I find this was a contemporaneous note prepared without influence of the exigencies of litigation and represents a true reflection of the respondent's projection of future litigation work within the firm.

70. I find redundancy was first articulated on 17 March 2023 when it became clear to the respondent that the claimant and the respondent could not come to an agreement on the variation of the terms of the contract of employment. I find this in and of itself is irrelevant to whether the respondent had a reduced requirement for employees to carry out litigation work. I find there is nothing to suggest the respondent had any other information available to them either on or before 17 March 2023 which presented a different picture of the health of the London litigation practice, in contrast to the view held when the Feedback Form was completed between the end of 2022 and early 2023. In fact, it would be wholly surprising if the respondent, an established international legal practice, did not know the state of health of its litigation practice between the end of 2022 and early 2023, and only suddenly became aware in or around March 2023. I do not accept this is the case.

71. Furthermore, I find the respondent continued to expressly offer the 'alternative employment arrangement' until 31 March 2023. If the respondent did suddenly become aware on 17 March 2023 that the requirements of the respondent's business for employees to carry out litigation work had diminished, or were expected to cease or diminish, the respondent has failed to explain why the offer of 'alternative employment arrangement' continued to remain available

until it was withdrawn on 10 April 2023. I find the respondent has failed to provide a cogent explanation for what had changed.

72. If the respondent did suddenly become aware between 31 March 2023 and 10 April 2023 that the requirements of the respondent's business for employees to carry out litigation work had diminished, or were expected to cease or diminish, the respondent has provided no such data for the Tribunal to consider. The only information the respondent has relied on is the claimant's successive years of underbilling. I have already found that these were matters which the respondent were fully appraised of when the respondent sought to negotiate terms with the claimant in December 2022.

73. I have already found there can be many reasons for a fee earner's underbilling and that a diminishing need for employees to carry out such work is just one of those reasons. The burden lies on the respondent to show that redundancy was the reason or principal reason for the underbilling which led to the claimant's dismissal.

74. I have already found there is nothing to suggest within the Feedback Form that the claimant's underbilling since 2018 was directly linked to the insufficient litigation/arbitration work in London, still less that the requirements of the respondent's business for employees to carry out litigation work had diminished, or were expected to cease or diminish.

75. I have already found that the lack of salary increase, in and of itself cannot be taken as an indication that the claimant was redundant. I find there is simply no causative link between those two matters. I find it is clear from the contract of employment that any salary increase is directly linked to performance and meeting billable targets. I find that is the true reason why the claimant did not receive a salary increase, not because the requirements of the respondent's business for employees to carry out litigation work had diminished.

76. I conclude the respondent has failed to prove that the reason for the claimant's dismissal was redundancy because the requirements of the respondent's business for employees to carry out litigation work had diminished. As a consequence, I find the respondent has offered no potentially fair reason for the claimant's dismissal. The claim of unfair dismissal is accordingly well founded and succeeds. There will have to be a separate hearing on the issue of remedy. The Tribunal will issue further case management directions shortly.

Employment Judge Anthony
5 June 2024

Judgment sent to the parties on: 18 July 2024

……
For the Tribunal: