**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4106401/2024**

**Held in Glasgow on 11 and 12 November 2024**

**Employment Judge E Mannion**

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| **Mr E Heggarty** | **Claimant** |
| **Record U.K. Limited** | **Respondent** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Tribunal is as follows:

The claimant was unfairly dismissed by the respondent. The respondent is ordered to make the following payments to the claimant:

£19,052.75 for loss of earnings. This is a gross figure and so subject to tax and national insurance.

£1,518.17 for pension loss and loss of statutory rights.

The claimant's claim or unlawful deduction of wages in respect of two days' holiday pay is unsuccessful and dismissed.

## REASONS

### Introduction

1. This a claim of unfair dismissal. The respondent contends that the claimant was dismissed for reason of redundancy or in the alternative, by some other substantial reason justifying dismissal namely a business reorganisation carried out in the interests of economy and efficiency. The claimant's case was that the reason provided by the respondent, namely redundancy was not genuine and the real reason for dismissal was alleged poor performance, which was not appropriately managed and a poor working relationship with Mr Joseph Greenlees.

2. The claimant also contended that the respondent should not have deducted two days' holiday from his final salary payment.

3. I heard from the following witnesses in this order;

    (i) Mr Joseph Greenlees Operations Director (witness for the respondent)

    (ii) Ms Jessica Richmond, Head of HR (witness for the respondent)

    (iii) Mr Tomás Robertson, director and shareholder of Currie Retreats Ltd (witness for the claimant)

    (iv) The claimant.

4. The parties agreed a joint bundle of documents in advance of this hearing.

### Relevant Law

5. **Section 94(1) of the Employment Rights Act 1996 (the ERA)** states that '*An employee as the right not to be unfairly dismissed by his employer.*'

6. **Section 98 of the ERA** provides that in determining whether a dismissal is fair or unfair in law, an employer must show that the reason amounts to one of the following: conduct; capability (including performance and ill health); redundancy; that holding the role contravenes the law; or some other substantial reason justifying dismissal.

7. **Section 98(4) of the ERA** outlines that where an employer has shown the reason for the dismissal is one of the above quoted reasons, the Tribunal must determine where the dismissal was procedurally fair or unfair having regard to whether the employer acted reasonably or unreasonably in treating it as a reason for dismissal, having regard to their size and administrative resources and also determining same in accordance with equity and the substantial merits of the case.

*8.* The burden of proof to show the reason for dismissal, and that it was a fair one, falls to the respondent. This is not a heavy burden of proof.

*9.* Where a claimant challenges the respondent's reason for dismissal, it is for the respondent in the first instance to show, on the balance of probabilities, that the reason for dismissal was one of the potentially fair reasons. It is then open to the claimant to adduce evidence casting doubt on whether the reason provided by the respondent was indeed the real reason for dismissal. In those circumstances, the respondent has to satisfy the Tribunal that it's proposed reason was in fact the genuine reason relied on at the time of dismissal (**Associated Society of Locomotive Engineers and Firemen v Brady 2006 IRLR 576, EAT**.)

*10.* The EAT finding in **Moon and others v Homeworthy Furniture (Northern) Ltd 1977 ICR 177 EAT** that it is not for tribunal to investigate the reasons behind redundancy situations. There is no jurisdiction for the tribunal to consider the reasonableness of a respondent decision to create a redundancy situation. The Court of Appeal in **Hollister v National Farmers' Union 1979 ICT 542 CA** found that a good commercial reason was enough to justify the decision to make redundancies and in **James W Cook and Co (Wivenhoe) Ltd v Tipper and others 1990 ICR 716 CA** accepted that tribunals can

require that the decision to make redundancies is based on proper information.

11. It is for the employer to consider the appropriate pool of employees who are at risk of redundancy. There are no fixed requirements on how a pool should be identified and an employer has a wide degree of flexibility. It is not for the Tribunal to substitute their view on whether the pool was correctly identified. Rather, it is for the tribunal to decide whether the pool is within a range of reasonable responses. (**Heady Banks City Print Limited v Fairbrother and others UKEAT/0691/04/TM**). Determining the appropriate pool is a matter for the employer, provided the employer genuinely applies its mind to the choice of a pool. A pool of one is permitted and does not in and of itself render a dismissal unfair.

12. The Tribunal requires to be satisfied that the respondent acted reasonably in applying their minds to the question of a pool and had genuine reasons for the pool.

13. **Section 13 of the ERA** provides that an employer shall not make a deduction from their employee's wages unless the deduction is required by law or authorised by a relevant provision in the employee's contract. A relevant provision is a written term of the contract, given to the employee in advance of making the deduction in question.

14. The formula for calculating the basic award is set out in **Section 119 of the ERA** and provides that a claimant is entitled to one week's pay for each complete year of continuous service where the claimant was below the age of 41 but not younger than 22. A week's pay is capped at £700 under statute.

15. As per **Secretary of State for Employment v John Woodrow and Sons (Builders) Ltd 1983 ICR 582, EAT**, a week's pay is calculated based on gross pay.

16. The compensatory award is provided for in **Section 123 of the ERA** and is such amount "as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained" by the claimant in

consequence of the dismissal. The loss must be attributable to the actions taken by the respondent employer. As per **Norton Tool Ltd v Tewson 1972 ICR 501 NIRC**, the compensatory award should include items such as loss of earnings loss between the date of dismissal and the hearing; estimated loss after the hearing; expenses incurred as a consequence of dismissal; and loss of statutory protection rights.

17. Where it is established that the claimant would have been dismissed in any event had the dismissal process not contained procedural flaws, it is for the Tribunal to consider if there should be a deduction to the compensatory award to reflect this. This is often referred to as a Polkey deduction from the lead case of the same name. **Software 2000 Ltd v Andrews and others 2007 ICR 825 EAT** summarises the up to date position on what is required of the Tribunal in making that assessment. In short, the Tribunal must assess the loss flowing from the dismissal, which involves an assessment of how long the employee would have been employed but for the dismissal. In making this assessment, the Tribunal must have regard to all relevant evidence, including that from the claimant. A finding that an employee would have continued in employment indefinitely should only be made where the evidence to the contrary is so scant that it can be effectively ignored.

18. A claimant has an obligation to mitigate their loss. It is for the respondent to evidence that the claimant has acted unreasonably. **Fyfe v Scientific Furnishings Limited 1989 ICR 648 EAT** confirms that the onus of showing the claimant's failure to mitigate loss falls to the employer. Further in **Cooper Contracting Ltd v Lindsey 2016 ICR D3 EAT** it is for the employer to prove that the claimant acted unreasonably, not for the claimant to show what he did was reasonable.

**Findings in fact**

19. Having considered the evidence and the submissions made by the parties, the Tribunal makes the following findings in fact on the balance of probabilities.

20. The respondent organization is concerned with the supply and installation of automatic doors. They manufacture, supply, install and service these doors for their clients. Their clients include Tesco, Morrisons and Marks and Spencer, high street shops, the NHS as well as offices and builders. Their work is broken down into the following workstreams: the supply and install of their doors for their clients; the supply of their doors to third parties; and the service of both their doors and third party doors for clients.

21. The claimant was employed by the respondent as a Senior Quantity Surveyor. His employment began on 5 January 2021 and he remained in this role until his dismissal on 20 March 2024.

22. The claimant was the only Senior Quantity Surveyor in the respondent organization. Others within the organization had quantity surveyor qualifications, namely Mr Greenlees, but the claimant was the only person employed as a quantity surveyor.

23. The claimant's role was primarily concerned with managing risk for the respondent by reviewing contracts prior to completion to ensure that the exposure level for the respondent is appropriate. Once the contract was signed, he managed the commercial basis of that contract. He was also responsible for ensuring invoices were raised and paid. If a client was unhappy with the respondent's performance and wished to claim damages, the claimant was required to defend the respondent's position. The tasks and responsibilities relating to contract review were ones that best practice required a quantity surveyor to do. The claimant also undertook other administrative and commercial tasks associated with the contracts.

24. The claimant worked in the Supply and Installation department. His line manager was Robbie Burns, Head of Commercial. Mr Burns in turn reported to Mr Greenlees, Operations Director. Kyle Elrich worked alongside the claimant as a commercial assistant. As well as undertaking his role, Mr Elrich is currently undertaking studies to qualify as a quantity surveyor. The respondent is supporting him in these studies. The claimant acted as a coach and mentor to Mr Elrich. Mr Elrich and the claimant made up a small team of

two within the Supply and Installation department. They were not part of the larger planning, projects or sales teams within that department. Both Mr Elrich and the claimant covered the other's duties and responsibilities when the other person was absent on annual leave.

25. The respondent has a senior executive team which is called the Key Leadership Team (KLT). This is made up of eight persons: the Managing Director; Finance Director; Head of IT; Sales Director; Supply Chain Director; Head of Finance; Head of HR; and Operations Director. Mr Greenlees sits on the KLT as Operations Director and Ms Jessica Richmond sits on it as Head of HR.

26. The respondent operates a hybrid working policy allowing employees to work two days a week from home and requiring them to spend three days a week in the office. When in the office, they are required to clock in and out. It is a requirement of the hybrid working policy that working from home should not be used for pet or childcare.

27. In September 2024, the claimant and Mr Elrich submitted an expenses claim for a trip they took to London and Leeds to meet with respondent Project Managers. The total amount of expenses for the two came to £2,000. This was in excess of what employees were expected to claim for hotel and subsistence on such work trips.

28. Mr Greenlees sought to speak to the claimant about the expenses claim. The claimant was working from home and was unavailable for a call for some time in the afternoon as he was picking up his child from their grandparents. Mr Greenlees was frustrated at the amount of money claimed in expenses and the fact that the claimant could not be contacted. It was approximately 4pm before Mr Greenlees was able to speak to the claimant.

29. The claimant was informed after this call that he would no longer benefit from the hybrid working policy which allowed him to work from home two days a week and was required to attend at the office five days per week. Mr Elrich was also informed of this. The following week both employees resumed

working full time from the respondent offices in Blantyre. The claimant viewed this as a punishment for submitting a high expenses claim.

30. Between September 2023 and December 2023, Mr Greenlees was required to speak to the claimant about a number of issues which included: non-compliance with the dress code; time keeping; and failing to clock in and out. Mr Greenlees also asked the claimant to complete a diary setting out his daily tasks and the amount of time spent on these. The claimant saw this as increased scrutiny and believed that it resulted from the expenses claim he submitted in September.

31. Towards the end of 2023, the KLT were asked whether any cost saving measures could be taken in the coming year. The order book, that is the number and value of orders over the course of 2023, had decreased from £6.5 million in January 2023 to just above £5 million in the last months of 2023. The projected orders for 2024 were lower again. While revenue was strong, the number of orders decreased. The business required work to come in at the same rate at which they were delivering and this was not the case.

32. The KLT were also to asked to consider the levels of recruitment within the organisation. They took the decision to consider whether to backfill posts if employees left the business. Unless it was necessary, posts would not be backfilled and the headcount would be reduced.

33. When viewing the daily and weekly tasks sheets completed by the claimant, Mr Greenlees considered that the claimant's tasks could be undertaken by others within the respondent. He therefore proposed that the claimant's role could be made redundant. He made the proposal to KLT, to place the claimant's role at risk of redundancy and proceed with a redundancy process. This was approved at KLT level. Mr Greenlees spoke to Mr Burns about the proposal to ensure that Mr Burns agreed with it, which he did.

34. The claimant's role was the only role considered at risk of redundancy and at the time of the hearing is the only redundancy to take place in 2024.

35. In February 2024, the claimant asked to work from home to assist with childcare. A meeting was arranged with Mr Burns and Ms Richmond which took place in one of the Board rooms in the respondent premises on 28 February 2024. Ms Richmond sent meeting invitations to Mr Burns and the claimant. Mr Greenlees was also in attendance at that meeting although he was not on the invite list. Mr Burns informed the claimant that he could not return to working from home because of his performance.

36. The discussion about the work from home application lasted approximately 10 minutes. Once this was finished Mr Greenlees informed the claimant that his role was at risk of redundancy due the company looking to cut costs. The claimant was informed of the process that would be followed, that the respondent would consult with him about the potential redundancy. He was made aware of vacancies in the business he could consider and information was provided in respect of same. The claimant was shocked by the unexpected news of his potential redundancy.

37. Ms Richmond emailed the claimant on 29 February 2024 attaching a letter confirming that his role was at risk of redundancy and the job description for three vacancies within the business: Service Planning role; Service Commercial Coordinator; and Installation Coordinator. This email also confirmed that the claimant was entitled to a one month trial period in any of these roles.

38. A further consultation meeting took place on 5 March. This was organised by letter dated 29 February where the claimant was informed of his right to be accompanied. The attendees at this meeting were: the claimant (who declined to be represented) Mr Burns, Mr Greenlees and Ms Richmond. They began by discussing the three alternative roles but the claimant indicated that these roles were not in line with his current role. The roles fell outwith the department the claimant worked in. Two of these roles were planning roles and the claimant had no experience of this. Although the Service Commercial Coordinator role had some commercial aspects to it, it did not have the same commercial outlook of a quantity surveyor.

39. The claimant asked what would happen to his role if he was made redundant and he was informed that his tasks would be spread between others with Mr Greenlees taking on his contract reviews and his remaining tasks absorbed by Mr Elrich, Mr Burns, Natasha Hide and Jarek Costa. The claimant was asked to think about any gaps in the business or positions that the respondent was overlooking.

40. A further consultation meeting took place on 19 March. The attendees at this meeting were: the claimant (who declined to be represented) Mr Burns, Mr Greenlees and Ms Richmond. The meeting was very short and little was said. The claimant confirmed he had not identified any alternative suggestions nor did he want to consider the vacant roles.

41. A final consultation meeting took place on 20 March at which the respondent confirmed that the claimant's role was redundant and that he was dismissed. This was confirmed in writing by letter dated 21 March. This letter set out the claimant's right of appeal. The claimant did not exercise this right. He felt that the respondent was trying to get rid of him and so there was no point in appealing the decision to dismiss. He was also under the incorrect presumption that Ms Richmond would deal with the appeal as she was the Head of HR and so would not be impartial given her role in the process to date.

42. The decision to make the claimant redundant was one that was discussed as between Mr Greenlees, Mr Burns and Ms Richmond. Mr Greenlees was ultimately the decision maker and decided that the claimant was dismissed by reason of redundancy.

43. The claimant was paid a statutory redundancy payment. He was also paid in lieu of working one months' notice. A deduction of two days' pay was made as the claimant had taken more annual leave than he had accrued. The respondent did so relying on clause 12.4 of his contract of employment which states "if your employment is terminated during the course of the holiday year, you will be entitled to accrue holiday pay at the basic rate for holiday entitlement accrued but not taken and record UK will be entitled to recover

and deduct from your salary holiday pay in respect of holidays taken but not accrued."

44. The claimant's tasks and responsibilities have been absorbed by others in the respondent as set out in paragraph 39 above. The respondent does not employ a Senior Quantity Surveyor at present and the claimant's role has been removed from the company structure.

45. The claimant has been a director and shareholder in Coorie Retreats Limited since September 2022 and has taken a more active role in the business since his dismissal. The business concerns the build and running of a glamping site in Scotland with plans to expand further once established. Neither the claimant nor the other director Mr Robertson are in a position to draw a salary or any income from this business at this time. The only employees of the business are cleaners.

46. The claimant made some attempts to find alternative work as a quantity surveyor but was unsuccessful.

47. In September 2024, the claimant established a further business in the short term holiday rental market. This does not yet provide him with an income.

**Observations on the evidence and submissions**

48. All the witnesses gave their evidence in a clear way and I considered they were all giving an honest account of events as they remembered them.

49. Some areas where evidence was heard were not directly relevant to the legal issues being decided.

50. Both parties made full and detailed submissions. Copies of these submissions were made available to the Tribunal at the conclusion of the hearing. These submissions were considered in detail in coming to the decision outlined below, even if not directly referenced in the decision.

**Decision**

*What was the reason for the claimant's dismissal?*

51. This case involved competing reasons for dismissal, with the letter of dismissal stating the decision was made on the ground of redundancy. The ET3 provided a supplementary decision, that there was some other substantial reason justifying dismissal under Section 98(1) of the ERA. The claimant's position was that the real reason was the alleged underperformance of the claimant and/or the poor relationship which developed as between the claimant and Mr Greenlees from September 2024 onwards.

52. Both redundancy and some other substantial reason justifying dismissal are potentially fair reasons under Section 98 and capable of justifying dismissal. Poor performance also falls within Section 98, albeit the claimant asserted that there was a failure to manage his performance adequately prior to dismissal.

*53.* Where redundancy is set out as the reason for dismissal, a redundancy situation must exist.

*54.* Mr Greenlees gave evidence about the financial position of the respondent, whereby their order book was decreasing over the year 2023, and confirmed that while revenue was strong orders were reducing. Evidence was heard about a challenging construction market and impact from inflation which resulted in competitors going into liquidation/administration or having to make collective redundancies. The claimant challenged this on the basis that the department was meeting its financial targets. Mr Greenlees' evidence was that the target information shows the respondent did well to navigate a difficult year but that in looking to the future, that is 2024, orders were diminishing and this would impact on revenue. This has since been borne out. The KLT was asked to consider what cost saving measures could be introduced to assist with the decreasing orderbook.

*55.* It is not for the Tribunal to assess whether the decision to make redundancies was a wise one or to investigate the commercial and economic reasons

behind the decision. The Tribunal can only look at whether the decision to make redundancies was based on proper information and whether there was a commercial basis for the decision. Having considered the evidence, particularly the evidence of Mr Greenlees outlined above and submissions, I am satisfied that the respondent has satisfied the initial burden of proof and established that a genuine redundancy situation existed.

*56.* Based on the Brady guidance, it is for the claimant to adduce evidence that the proposed reason, namely redundancy, not the real reason for dismissal.

*57.* The claimant's position was that redundancy was not the genuine reason for dismissal. He gave evidence that from September 2023, his performance was scrutinised by Mr Greenlees. The catalyst, in the claimant's eyes, was the submission of an expenses claim by the claimant and Mr Elrich. Mr Greenlees confirmed that the claimant submitted an expenses claim which Mr Greenlees believed to be excessive. He did not accept that he was angry about this, instead stating that he was really disappointed in the claimant.

*58.* Mr Greenlees accepted that he spoke to the claimant about his dress in the office as he did not believe this was appropriate. He accepted that he spoke to the claimant about time keeping and clocking in and out. His evidence was that flexibility was given to the claimant on his start and finish times to assist with his commute and once this change was made, the claimant's time keeping was no longer a concern. He also accepted that he spoke to the claimant about a presentation. His view that this was not to the standard expected. While not given specific dates, all of these events occurred between September and end of December 2023. It was not in dispute that the claimant was asked to complete a diary setting out his daily tasks. Evidence was not led on the reason or expectation behind this request, nor was evidence led on whether this request was individual to the claimant or the wider workforce.

*59.* Mr Greenlees also accepted that he did not place the claimant on a performance improvement plan (PIP). His reasoning was because none of these issues were sufficiently serious to require a PIP. They were minor issues and concerns that were easily dealt with through informal discussions.

His evidence was that performance is not a binary concept of either perfect employees or those on a PIP. Ms Richmond confirmed that the claimant was not placed on a PIP and also confirmed in evidence that she was not aware of any performance concerns the respondent may have had.

*60.* It was put to Mr Greenlees that at meeting in November 2023, he informed the claimant that he could not look him in the eye. Mr Greenlees denied this. I did not hear any further evidence on this point.

*61.* The claimant's argument was that Mr Greenlees was dissatisfied with his performance but rather than managing his performance, he used the redundancy process to dismiss him.

*62.* I accept the premise that between September and December 2023, Mr Greenlees had concerns with the claimant's performance and that he spoke to him about these. However, the claimant's position is that these concerns were such that they should have been subject to formal performance management and a PIP so that he would be aware of how to improve and would receive constructive feedback and support. I accept the position as set out by Mr Greenlees in evidence that a PIP was not needed to deal with these issues. In the same way that minor issues of misconduct can be dealt with without recourse to the formal disciplinary process, minor issues with performance can be addressed on an informal basis. I do not find that any of the issues raised in evidence would warrant formal performance management under a PIP or similar.

*63.* The claimant's case requires the Tribunal to go further and find that rather than deal with these performance issues appropriately, the respondent, via Mr Greenlees, wanted to remove the claimant from the business and used the redundancy process to do so. There does not appear to be a firm causal link between the performance concerns being raised and addressed and the start of the redundancy process on the 28 February 2024 which culminated in the decision to dismiss on 20 March 2024. I can understand why a claimant who had no history of performance concerns may see a link between informal performance management and a later decision to place him at risk of

redundancy. However, the only link appears to be the timing and even then, the link is weak. As per the evidence, the performance issues were resolved in December 2023 and not ongoing when the redundancy process began.

*64.* Mr Greenlees was clear in his evidence that he took responsibility for the decision to dismiss and that he proposed the potential redundancy in the first instance. His evidence was that the claimant's performance played no part in the decision making process. I accept that evidence. If it were the case that Mr Greenlees wanted the claimant gone because Mr Greenlees was unhappy with the claimant's performance but did not wish to manage it, which is the claimant's position, then placing himself at the centre of the decision making would surely only draw further attention to Mr Greenlees and his motivations. Further as set out above, the performance issues were relatively minor. The claimant described being scrutinised by Mr Greenlees from September onwards, but based on the evidence heard I find it was not unreasonable for an employer to raise the issues that they did in the manner in which they did.

*65.* I find that the performance issues were sufficiently minor and were resolved well before the decision to dismiss. It is my finding that the claimant has not adduced sufficient evidence to satisfy that his dismissal was for performance rather than redundancy.

*66.* As there was no evidence led about the poor relationship between the claimant and Mr Greenlees outside of the performance issues, I find that the claimant has not adduced sufficient evidence to satisfy that his dismissal was for a poor relationship with Mr Greenlees rather than redundancy.

*67.* Mr Greenelees and Ms Richmond set out in evidence the basis for the decision on 20 March to dismiss the claimant. They concluded that as the claimant was placed in a pool of one, as he did not wish to consider the alternative roles suggested to him and as he was unable to identify any alternatives or ways to mitigate the redundancy, his role was redundant and he was dismissed for that reason. This evidence is accepted and the Tribunal is satisfied that the claimant was dismissed for the potentially fair reason of redundancy.

*68.* As redundancy is found to be the reason for redundancy, there is no need to make a determination on the secondary reason of some other substantial reason justifying dismissal as put forward by the respondent.

**Reasonableness**

*69.* The Tribunal therefore turns to the reasonableness of the respondent's actions under Section 98(4). I am required to consider the following three limbs (i) warn and consult; (ii) adopt a fair process of selection; and (iii) consider suitable alternative employment. It was not in dispute that the respondent consulted with the claimant nor was it in dispute that they proposed three alternative roles which the claimant did not take up. The claimant's only case here regards selection, and specifically the pool of one.

*Pooling*

70. The claimant was placed in a pool of one. The claimant's position was that the respondent failed to consider Mr Elrich or Mr Burns when deciding on the pool.

71. Mr Greenlees accepted and acknowledged that he was the person to suggest the proposed redundancy to the KLT. His evidence was that against a backdrop where the respondent was seeking to make cost savings, a review of the tasks the claimant was undertaking as set out in his daily/weekly diary sheets, "planted the thought" in his mind that these tasks could be covered in the main by others within the department. These people included himself, Mr Elrich, Mr Burns, Mrs Natasha Hide and Mr Jarek Costa. This was already happening on an ad hoc basis when the claimant was on annual leave. His evidence was that as there was only one Senior Quantity Surveyor, the pool was therefore a pool of one.

72. While in cross examination Mr Greenlees' confirmed his view that neither Mr Elrich nor Mr Burns' roles were comparable to be included in the pool along with the claimant, this was the extent of the evidence on their potential involvement or not. He spoke about how he gave the redundancy proposal a lot of thought before bringing it to the KLT, that it was not something that he

took lightly and set out the detail of how he came to the proposal which placed the claimant at risk of redundancy. And yet the considerations of the appropriate pool, as set out in evidence and submissions, did not build up a picture of factoring in anyone else such as Mr Elrich or Mr Burns and rejecting them from the potential pool for genuine or specific reasons. Consideration of the pool started and ended with the claimant.

73. The respondent's case centered on the fact that the claimant was the sole Senior Quantity Surveyor in the business, his role was unique and this is why he was placed in a pool of one. The evidence, however, was that the quantity surveyor elements of the role were not in and of themselves the largest area of work undertaken by the claimant. They was just some of many tasks undertaken. The diary sheets at pages 79 and 80 of the bundle set out a list of 18 tasks undertaken by the claimant on a daily basis. The evidence heard was that only two of those tasks, 'review commercial customer contracts' and 'commercial contract review with PMs', were those which best practice would require a quantity surveyor to undertake. The role was unique in terms of its title but not in terms of the work undertaken. If the redundancy arose from the loss of a specific area of work, such as the loss of a client who was the claimant's primary source of work then the argument that the claimant as the sole Senior Quantity Surveyor being the sole employee at risk of redundancy might carry greater weight. However, the evidence heard and accepted was that the company was looking to cut costs more generally and the claimant's role, and the claimant's role alone, was identified as that which could be shared amongst other employees.

74. I am reminded that it is not for the Tribunal to substitute their view for that of the employer. My role is to review the appropriateness of the pool that was chosen and assess this against the band of reasonable responses.

75. In my view of the evidence and submissions, the respondent did not act within the band of reasonable responses as it did not actively consider a pool beyond the claimant and so did not genuinely apply its mind to the appropriate pool. There were genuine reasons for the claimant to be in the pool. However, the

evidence heard was that the pool of one flowed automatically from the decision that the claimant's tasks could be absorbed elsewhere, without consideration of others, particularly Mr Elrich the commercial assistant in the team of two with the claimant. If it was the case that other permutations of a pool were considered but disregarded either while Mr Greenlees was formulating the proposal himself, when obtaining approval from the KLT, or when discussing with Mr Burns, that was not the case presented.

76. I want to be clear that it is not my finding that in failing to adequately consider the pool, the respondent or more specifically Mr Greenlees and/or Ms Richmond were acting with malice or ill intent towards the claimant. I do not accept that they were looking for any route to remove the claimant from the business. Nor do I find that their relationship interfered with their decision making on the pooling or that they acted in any way unprofessionally when undertaking the redundancy process. They simply made an error, but unfortunately one that goes to the fairness of the redundancy process in a legal sense.

77. Consequently I find that failures in respect of the pool renders the dismissal unfair.

**Remedy**

*Mitigation of loss*

78. I accepted the claimant's evidence that he took on an increased role in his business Corrie Retreats Ltd but that the business is not in the position to pay the directors at this time and only the cleaning staff receive a salary. This was also the evidence of Mr Robertson which is also accepted.

79. The claimant also gave evidence that he sought quantity surveyor roles but was unsuccessful. I note that full documentary evidence of these applications was not provided and the documentary evidence was undated. Questions were not asked of the claimant as to when these applications were made and the time period within which he was looking for work as a quantity surveyor. Despite the lack of specificity on the dates, I accept that the claimant

attempted to look for roles as a quantity surveyor but was unsuccessful. He then began to focus on the business already established with Mr Robertson.

80. The respondent made the curious case that the market was such that the claimant should have been able to find a quantity surveyor role within a month of dismissal but also that the economic climate within the construction sector was such that they were one of the lucky few businesses in their sector which was not required to make compulsory redundancies or consider administration/liquidation. The economic climate and the impact on their sector was the background to the claimant's dismissal for redundancy.

81. The respondent also made the case that the claimant would have been in a better position to obtain a quantity surveyor role had he looked wider than hybrid positions, providing documentary evidence of the number of roles available on LinkedIn dating from a four to five week period prior to the hearing. The respondent referred to a LinkedIn post from the claimant (pg 135 of the bundle) where he stated that he was "hanging up his quantity surveyor hard hat" to focus on his business, Coorie Retreats and argued that by announcing this in a public fashion, this would impact on his ability to obtain new employment as a quantity surveyor.

82. I find that the respondent has not evidenced that the claimant acted unreasonably in mitigating his loss. The claimant looked for work in his field and when it was not available to turned to the business he had established the previous year with Mr Robertson. It was not unreasonable for the claimant to do so. The business is a nascent business. I accepted that due to its financial position and the manner in which investment was received, it is not possible for the claimant as a director to receive a salary or dividend. It is an accepted position in caselaw on mitigation that a claimant may return to education or change their career path following a dismissal without a finding that they have acted unreasonably by doing so. The fact that the business was not in a position to pay the claimant a salary does not render his decision to work in the business unreasonable.

*Polkey Deduction*

83. Given the finding in **Software 2000 Ltd v Andrews and others** , I am required to consider whether a Polkey deduction should be made from an award of compensation.

84. The respondent submitted that a Polkey deduction is appropriate, stating that the respondent would have dismissed the claimant in any event even if a fair procedure was applied. The claimant did not make any submissions on this legal point, which is to be expected from a litigant in person.

85. The respondent's submission flows again from the position that the pool of one was appropriate. The submission stated that "Even if any alleged procedural deficiency was remedied, it would not have changed the Respondent's decision or the substantive outcome" and noted that the claimant's role has been deleted from the structure. The respondent has not hired another Senior Quantity Surveyor since the claimant's dismissal.

86. The Tribunal is required to go beyond a review of what did happen and instead is required to consider if, absent the procedural flaws, the claimant would have been dismissed in any event. If so, a deduction from compensation may be appropriate.

87. Having considered the evidence, I find that there had the respondent actively considered the pooling question, there is the potential that a wider pool would have been reached, at a minimum a pool of two covering the claimant and Mr Elrich. This pool is the most obvious given the two employees were in a standalone team of two. The roles of Senior Quantity Surveyor and Commercial Assistant were not identical but had an overlap in the work undertaken. Both the claimant and Mr Elrich covered each other's work in the other's absence. Mr Elrich took on the majority of the claimant's duties and responsibilities following the claimant's dismissal under the supervision of other employees.

88. In a pool of two, an employer would apply selection criteria to those in the pool to identify the redundant employee. I am aware that the claimant was a qualified quantity surveyor, while Mr Elrich was studying to obtain this

qualification. The evidence heard (pg 73 of Bundle) from the respondent was that the tasks which the claimant was qualified to undertake as a Quantity Surveyor are now undertaken by Mr Greenlees with assistance from Mr Elrich. The majority of his other tasks went to Mr Elrich. Given that the claimant acted as a mentor and coach to Mr Elrich, it can be taken that the claimant had a greater level of experience in the role. I did not hear any evidence of disciplinary action against the claimant during the course of his employment. In respect of performance, the respondent's position, which I have accepted, is that the respondent was required to address minor issues but nothing was serious enough to merit formal performance management. Mr Elrich's disciplinary and performance history is unknown. These points tend to be the factors upon which selection criteria are drafted.

89. In considering whether the claimant would have remained employed by the respondent but for the dismissal, I am also required to consider any relevant evidence from the claimant. It is clear from the evidence that the claimant felt the respondent did not act appropriately in the informal manner in which they addressed minor issues of performance. Further, he viewed the decision to revoke the hybrid working benefit as punishment and was unhappy with the decision in February 2024 that he be required to continue to work from the office. Whether he would have viewed the redundancy process as a route to remove him from his role had he been in a pool of two is unclear. However, his unwillingness to consider the alternative roles suggests that he may not have been open to a change in duties and responsibilities which would have resulted from the deletion of Mr Elrich's role. While these points suggest that he may have looked elsewhere for alternative roles, I also heard that the redundancy decision came at a time where the claimant had bought a new house and committed to a higher mortgage. His wife was also expecting another child and while this was the motivation for a more flexible working pattern, combined with the increased mortgage, these issues are likely to have impacted on any decision by the claimant to leave the role without securing alternative employment on similar terms and salary.

90. Having considered all of the evidence, submissions and caselaw, I do not find that the claimant would have continued indefinitely in employment with the respondent but for the dismissal. However, it is not my view that the respondent would have made the claimant redundant in any event if the process ran without flaws. There is not a 100% chance that the claimant would have been made redundant in a procedurally secure process. Taking into account what I have set out above on the appropriate pooling and selection criteria, alongside the claimant's own personal circumstances and distrust of the respondent at the commencement of the redundancy process, I find that there is only a 75% chance that he would have remained in employment with the respondent. Accordingly, the compensatory award should be reduced by 25%.

*Basic Award*

91. The claimant has already received a statutory redundancy payment and so a basic award is not due and owing.

*Compensatory award*

92. I find that it is just and equitable for an award reflecting six months' loss of earnings. The claimant's ongoing loss of earnings is as a result of his dismissal. He has attempted to mitigate his loss by taking a greater role in business, Corrie Retreats after his dismissal but at the time of the hearing is not drawing a salary.

93. The claimant's monthly gross salary was £4,233.94. Six months' loss of earnings is £4,233.94 x 6 = £25,403.66. This is a gross amount and tax and national insurance is required to be deducted from this. Applying the Polkey deduction of 25% to this amount, the award for loss of earnings is £19,052.75. This is a gross amount and so subject to tax and national insurance.

94. The claimant is also entitled to a payment in respect of pension loss of those six months. The employer pension contributions were 6% of gross monthly salary. This amounts to £254.04 per month and comes to £1,524.22 pension

loss over the six months. Applying the Polkey deduction of 25%, the pension loss which is payable is £1,143.17.

95. The claimant is also entitled to compensation for loss of statutory rights. This is awarded at £500. Applying the Polkey deduction of 25%, this loss comes to £375.

96. The claimant was paid in lieu of working his notice period and so no notice pay is due and owing.

97. There is no provision for the Tribunal to make an award for financial distress.

*Holiday pay*

98. The respondent deducted two days' pay from the claimant's final salary payment and the claimant is seeking repayment of this amount. The claimant's contract of employment at pg 45 of the Bundle states that the respondent "will be entitled to recover and deduct from your salary pay in respect of holidays taken but no accrued" on termination. The deduction was therefore authorised by a relevant provision in his contract.

**Employment Judge E Mannion**

**23rd January 2025**
**Date of Judgment**

**Date sent to parties** **03 February 2025**