Case Number: 6003943/2024

EMPLOYMENT TRIBUNALS

Claimant: **Mrs G Foster**

Respondent: **First Thought (Equine) Ltd**

Heard at: **London South, by video On: 21st -22nd March 2025**

Before: **Employment Judge MJ Reed**

Representation
Claimant: Mr R Bashford, Lay Representative
Respondent: Mr Glencross, Solicitor

RESERVED JUDGMENT

1. The complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed.

2. There is a 100% chance that the claimant would have been fairly dismissed in any event. Therefore a *Polkey* deduction of 100% is applied to the compensatory award.

3. The respondent shall pay the claimant a basic award of £73.83. Note that this is the actual sum payable to the claimant.

REASONS

Introduction

1. This is a claim about unfair dismissal in the context of an alleged potential redundancy situation. The claimant, Mrs Foster, worked as an Industrial Sewing Machinist for the respondent, First Thought (Equine) Ltd, which manufactures various equine products. Both parties agree that she was dismissed. First Thought argued that this was on the basis of redundancy, arising from a severe reduction in their business sales. Mrs Foster disputes this and argued that, in any event, the dismissal was unfair.

Procedure, documents and evidence heard

2. The Tribunal heard evidence from Mrs Foster on her own behalf and from Mrs Joanne Bashford and Ms Sara Walker. From the respondent the Tribunal heard evidence from Mr Kempsell and Ms White, the directors of the company; and from Mr Johnson, an employee. I also read statements from a number of witnesses on behalf of the claimant who did not attend the hearing. I considered those statements, but gave them less weight than I might otherwise have done side they did not give sworn evidence and First Thought did not have the opportunity to question them.

3. I was provided with a bundle of documents running to 103 pages and a further pack of additional documents running to 14 pages. References to page numbers in this decision are to the bundle of documents, unless otherwise indicated.

4. The sole claim before the Tribunal was of unfair dismissal. At the beginning of the hearing, I discussed the issues in dispute with the parties. There was no issue in relation to Mrs Foster's qualification to bring a claim for unfair dismissal (First Thought accepted that she was an employee, with sufficient qualifying service and that none of the statutory exceptions to the right to claim unfair dismissal applied). Both parties agreed she had been dismissed by First Thought.

5. The key questions were therefore a) whether Mrs Foster had been dismissed for a potentially fair reason (First Thought relied upon redundancy as the reason for dismissal, but this was disputed by Mrs Foster) and b) if the dismissal was for a potentially fair reason, whether it was fair.

6. Both parties made submissions to the Tribunal. Their arguments are addressed as they arise in these reasons, rather than being set out separately.

Findings of fact

7. The Tribunal considered the oral evidence and the documentary evidence to which I was referred. All findings of fact are made on the civil standard of proof. That means that they were reached on the basis that they are more likely to be true than not.

8. The written findings are not intended to address every point of evidence or resolve every factual dispute between the parties. I have made the findings of fact necessary to resolve the legal disputes before me. Where I have not made findings or made findings in less detail that reflects the extent to which those areas were relevant to the issues and the conclusions reached.

Background

9. Mrs Foster began working for the respondent as an agency worker on 4th January 2021. She became an employee of the respondent on 4th May 2021. From 1st November 2022 she worked on a four-day working week of 40 hours per week.

10. In the course of her employment, Mrs Foster had worked on a number of First Thought's products. She agreed, however, that from Autumn of 2022 the vast majority of her work was making girths. This was because of the high demand for that product at the time.

11. By July 2023 there were three members of staff working on producing girths: Mrs Foster, Sharon Walker and Sarah Tyler. For convenience, I have referred to these three workers collectively as 'the girth department'. This should not, however, be taken to mean they formed an organisational structure of any real formality. They were simply the three machinists who were engaged in making girths.

12. Like Mrs Foster, Sharon Tyler was an employee of First Thought, although she worked part-time. Sarah Walker was engaged through an agency and not directly employed by First Thought.

13. In Summer 2023 there was a high demand for girths and the department was busy. Mrs Foster described them as working 'flat out'.

14. Although there are many common skills, making First Thought's products each require different techniques and experience. The fact that someone is a skilled saddle maker does not mean they are equally skilled at making girths, and vis versa. Mastering a new product would require some time. An important element of this is that a skilled maker will be able to produce products more quickly and more cost efficiently. Many of First Thought's products are expensive and work is held to a high standard. This impacts on how quickly a less experienced maker can product products, since mistakes in leather stitching cannot generally be corrected. This means that a machinist working on a product they have less experience of will generally work more solely, to avoid making a mistake that might make the product unsalable.

15. Although there was some dispute about her precise skills and experience, essentially both parties agreed that Mrs Foster was an experienced and skilled Industrial Sewing Machinist, with some past experience in working on other products made by First Thought. There was therefore no reason why she could not be assigned to make other products or any reason to expect she would have difficulty doing so. She would have required some time to get up to speed on a different product, but the same would have been true of anyone in a similar position. The fact that she was working exclusively on girths from Autumn 2022 simply reflected the high demand for that product and the fact that the demand for other products was being met by the work of other employees.

16. It was suggested to Mrs Foster that she had expressed a lack of interest in other areas of work. She said that she did not recall this. At one point, she said, there had been some discussion between her and Rebecca Wood, who made saddle panels, of Mrs Foster making those. This had not happened because Ms Wood was an efficient worker who was able to keep up with the level of demand without assistance.

17. Mrs Foster agreed that she did not go out of her way to ask to work in another area. She said that, in practice, there was simply no opportunity for her to do so. I accept Mrs Foster's evidence on this point. She had not gone out of her way to seek other work, but this simply reflected the fact that she was content

with her existing role and there was enough work there to keep her busy. She had done nothing to imply that she would be unwilling to work elsewhere if that situation changed.

Situation Autumn / Winter 2023

18. The respondent's position is that in the Autum / Winter of 2023 there was a substantial decline in their sales generally. Orders, both directly from customers and from stockists of their products, had reduced precipitately. Both Mr Kempsell and Ms Smith said that there had a particular reduction in the sales of girths.

19. Both parties also agreed that many of the orders being placed on the electronic order system from this point were orders for 'stock'. These were orders generated by First Thought itself rather than an outside buyer. Products manufactured under these orders would then be held, in the hope that they could be used to fulfil a future order.

20. Very limited documentary evidence has been produced as the level of orders or First Thought's financial position at this time. I have not been provided with the respondent's accounts, sales records or any internal documentation in relation to these matters.

21. Given, however, both parties agree that there was a very substantial reduction in orders, I accept that this was the case.

22. The reduction would have been apparent to First Thought's employees at the time, because of the way that its electronic order system worked. Orders coming would be placed on a computer system that would then display the orders to the workers. When there was a significant change in the number of orders this would be apparent to everyone.

23. Mr Kempsell and Ms Smith held an informal meeting with staff in November 2023. They set out that the business was experiencing difficulties and that they were launching incentive schemes that they hoped would produce more sales. They said that, if this did not work, reduced hours or redundancies were a possibility.

24. Despite attempts to bolster sales, they did not increase and the business situation remained difficult. This was particularly worrying, because First Thought would normally expect an increase in sales, particularly of smaller / cheaper items, in the run up to Christmas. This did not occur.

25. Mrs Foster accepted that, by January, the level of girth orders were such that one person would have been sufficient to fulfil them. The three employees previously working on girths were making themselves available to do other work. The 'stock orders' that had been put through meant that there were a large number of girths already produced and waiting to be sold.

26. Both Directors have said that as early as November 2023 Ms White had wanted to consider redundancies. Mr Kempsell opposed this because he did not want to dismiss staff shortly before Christmas.

15th February 2023 meeting

27. Mr Kempsell and Ms Smith gave evidence that there was a meeting on the 15th February in which they warned employees about the risk of redundancy. The respondent's evidence is that there was a 'all hands' meeting in the Cutting Room (being the only room large enough for this purpose) and that all employees at work on that day attended. Miss White says that she then emailed employees who were not at work on that day.

28. In summary, they say that they explained that sales for saddles and girths had dropped to the lowest point the organisation had experienced and the market was extremely poor. They went on to explain that the company was running on its reserves, but this could not continue long-term. They explained that various sales promotions had been tried since November, but the situation had not changed. Therefore, they suggested, they were likely to need to either make redundancies or reduce working hours.

29. First Thought also said that following that meeting employees were provided with a memo, which covered much the same information, page 45-46.

30. Claimant denies that a meeting occurred. She accepts that she was given the memo, but says that it was left on her worktable.

31. I find that there was a meeting on the 15th February, in which the difficult business situation was set out by Mr Kempsell and Ms Smith. The staff were warned about there were likely to be redundancies. They were told that if they were interested in moving on voluntarily or reducing their hours they should let Mr Kempsell and Ms Smith know, since it might prevent another person's redundancy. I accept Mr Kempsell's evidence that two members of staff did subsequently volunteer to reduce their hours and this was agreed by First Thought.

32. I rely in particular on Mr Johnson's evidence in relation to this meeting. He described a brief meeting, lasting no more than 5-10 minutes. He said that they were told that there were likely to be redundancies, because of the lack of work. He said there was no discussion of the procedure that would be used during the redundancy process.

33. I also accept that Mrs Foster was being honest when she says that she did not attend such a meeting and was not aware that it occurred. She is supported by Mrs Bashford and Ms Walker, who I also accept were honest witnesses. All said that no meeting occurred. There is no obvious reason that they would wish to lie in support of Mrs Foster's claim. It also seems to me that, if Mrs Foster was willing to lie about what had happened in order to bolster her case, there would be no reason for her to accept that she received the memo, which covered much the same information that First Thought says was discussed in the meeting.

34. The most likely explanation, it seems to me, is that the meeting was held, but it was organised in a more informal and ad hoc manner than Mr Kempsell and Ms Smith have suggested to me. One element of that was that were not careful to ensure that all members of staff had been told about the meeting or were in attendance. I find that what occurred was in the nature of an informal gathering,

rather than a formal meeting. Given this, combined with the shortness of meeting, it seems to me plausible that it could have occurred without Mr Kempsell and Ms Smith appreciating that not all staff were present. They may also have been so aware at the time, particularly since they had produced a memo dealing with the same information and it was in their mind that not everyone was at work that day in any event. Similarly, it is plausible that some member of staff, including Mrs Foster, would be unaware that the meeting was taking place.

Initial selection of those at risk and scoring of employees

35. There has been considerable dispute about how individuals were selected as being as risk of redundancy.

36. Both parties agree that, around the middle of February, Mr Kempsell and Ms White carried out a redundancy scoring exercise. This was based on a scoring system that they have been provided with by a previous HR adviser, Peninsula, although they were not involved in this redundancy process.

37. All of First Thought's staff were scored in relation to the following categories: length of service, disciplinary status, sickness absence, timekeeping, skills (actual), skills (possible), cost efficiency, versatility, responsibility, self-motivation, quality of work, and uniqueness.

38. Length of service was graded 0-4 points, depending on the time an employee had been with First Thought. Disciplinary was scored between 4 and 0 points; an employee with no disciplinary sanctions scored 4, while someone on an extended final written warning scored 0. Sickness was scored between 4 points (no days absent) and 0 (more than 10 days absent), based on days absent in the last year. Time keeping was scored between 4 and 0 points. Skills actual and skills possible were both scored between 0 and 5 points. Skills actual was intended to reflect the skills that the employee was using in their work, while skills possible was intended to reflect the skills they would be able to acquire. Cost efficiency was scored between 1 and 3 points, depending on how efficiently the employee worked in terms of using materials without wastage. Responsibility was scored between 1 and 3 points; employees scored 1 point if they were reluctant to accept responsibility and 3 points is they actively sought responsibility. Self-motivation was scored between 1 and 3 points, with 1 point being scored if an employee was not always cooperative or receptive to instructions and required regular supervision and 3 points scored if they were normally very co-operative, committed and regularly demonstrated initiative. Quality of work was graded between 1 and 3 points. Uniqueness was graded between 3 and 1 points, referring to whether other employees carried out the same work of that employee.

39. In total 21 employees were scored on that matrix. The scoring was carried out by Mr Kempsell and Ms White. There was no discussion with anyone else of the scoring matrix used or the scores that employees received. The scores received by employees varied between 41 and 22.

40. Mrs Foster scored a 24, placing her joint 17th place with two other employees. Her scores were as follows:

a. Length of service: 2
b. Disciplinary: 3
c. Sickness: 3
d. Time keeping: 2
e. Skills actual:1
f. Skills possible: 3
g. Cost efficiency: 2
h. Versatility: 1
i. Responsibility: 1
j. Self-motivation:1
k. Quality of work: 3
l. Uniqueness: 2

41. Mr Kempsell was questioned about the way that they had scored Mrs Foster. Mr Kempsell accepted that he had not carried out any formal appraisal process or consulted records. He agreed that the scoring was a subjective exercise, based on his 'feel' for his employees.

42. In particular, Mr Kempsell was asked about his scoring of Mrs Foster in the categories: skills actual, skills possible, versatility and motivation. He said that Mrs Foster had scored low on skills actual, because Mrs Foster had not developed skills in making First Thought's products apart from the girths and therefore it was appropriate to score her relatively low on this. He said she scored highly on skills possible, because he was confident that she would be able to pick up other skills quickly.

43. In respect of versatility, Mr Kempsell said that he had scored Mrs Foster low because when he had in the past spoken to her about potentially working in other areas she had indicated that she was happy working on girths. He contrasted this attitude to an employee who was keen to take on other work.

44. In respect of motivation, Mr Kempsell said that he scored Mrs Foster low because, although she was motivated, efficient and 'everything else' about making girths, he was also aware that she had a Bed and Breakfast in France with her husband and had sought time off to support that business. He said that Mrs Foster had sometimes given then impression that she didn't need the job. Based on this he said that he viewed her as 'not that motivated'.

45. The impact that the scoring matrix had on the decision to dismiss Mrs Foster was the subject of significant dispute and it has not always been easy to understand First Thought's position on this important issue.

46. In his witness statement Mr Kempsell wrote that, in mid-February he and Ms Smith had reached the conclusion that it was the girth department 'that was no longer needed as we had no work'. He went on, however, to say that they decided to use the redundancy selection table that had been used in previous redundancies, to determine how they would proceed if they had to increase the number of redundancies. He said that this was 'why we then realised that there was a second tier of positions there were at risk'.

47. Mr Kempsell went onto say that Ms White wanted to carry out the scoring exercise, to see if anyone scored 'massively below' those working in the girths department. He said that, if that was the case, they might need to reconsider.

48. I have concluded that Mr Kempsell and Ms White had two motivations for carrying out the scoring exercise. First, there was an element of what might be termed a cargo cult procedure, which was carried out in a ritualistic, rather than strictly rational manner.

49. From previous experience with redundancy exercises, Mr Kempsell and Ms White were aware that a fair selection process was an important part of carrying out a redundancy process properly. This is, of course, correct where an employer must select a number of people from a pool of employees larger than the total number of redundancies to be made. It was no doubt in that context that Mr Kempsell and Ms White were advised about the importance of such a selection process. It is not, however, a meaningful exercise where all of the employees doing a particular type of work are to be made redundant. In that situation there is nobody to select, because there is no requirement on the employer to make a choice between employees.

50. Similarly, there is no need to place all employees of an organisation into a redundancy scoring process, when only some of those employees are actually at risk of redundancy. The suggestion, expressed in Mr Kempsell's evidence that such a process might determine whether further redundancies were necessary is, on examination, nonsensical. Determining the general quality of First Thought's workforce by carrying out a scoring exercise would not shed light on whether the businesses requirement for employees carrying our particular kinds of work had increased, decreased or stayed the same.

51. Nonetheless, having absorbed the principle that a redundancy scoring exercise was an essential part of a fair process, Mr Kempsell and Ms White felt obliged to carry one out.

52. The second motivation was somewhat different. I accept that Mr Kempsell and Ms White viewed the scoring exercise as a sort of cross-check that they were not losing a particularly valuable employee. They had in mind the possibility that, if someone who would otherwise have been made redundant scored exceptionally highly in the scoring exercise, that might indicate that they were a particularly valuable employee. In such a circumstance, they would have consider, in the employment law vernacular, bumping. That is they would have considered making another employee, doing different work, redundant, in order to move the especially valuable employee into their role.

53. I do not think that either Mr Kempsell or Ms White considered this a likely outcome of the process. It is likely that their thinking on this matter arose, at least in part, from a conscious or subconscious conviction that, if the scoring exercise was required it must have some purpose. And, given that there was no need to select from a pool of employees, the possibility of bumping was the only plausible justification for the exercise. Any attempt to consider bumping would have created significant additional complication in the redundancy process. I have concluded that it would only have been pursued if someone in the pool for redundancy achieved an exceptionally high score. Even in that scenario, it would have been a possibility that they considered, rather than something they were bound to do.

54. On balance I have accepted Mr Kempsell and Ms White's evidence that their main line of thinking was that there was insufficient work to maintain the three people working as the de facto girth department. At this point almost all the

orders for girths had, for some time, been stock orders generated by First Thought. A large amount of stock had built up, from which future orders could be satisfied. Their assessment of the situation was that, for some time, they would not need any workers making girths, because the limited number of orders could be satisfied from stock. If this was not the case (for example if a girth of an unusual type or size was required) this work could be absorbed by workers who ordinarily worked on other products on an ad hoc basis.

55. At this time Mr Kempsell's and Ms White also considered moving all employees to short working, i.e. reducing the working hours of staff across the board rather than making redundancies. I accept their evidence that this approach was rejected because they thought that it would have resulted in many staff leaving for other jobs.

Meeting 22nd February 2024

56. On the 22nd February 2024 Mr Kempsell and Ms White held a meeting with Mrs Foster. Mrs Foster was not invited to the meeting in advance, but called in on that day.

57. Mrs Foster's evidence is that she was told she would be made redundant at that meeting. She says that Mr Kempsell said to her 'There are a lot of talented people working here, but unfortunately you are not one of them'. She says that he told her that First Thought had to save £200,000 on the wage bill and that meant that she would be made redundant. She says that there was no discussion of alternatives to redundancy, such as an alternative position or reduced hours. She also says that there was no discussion of how she had been selected for redundancy.

58. Ms White's evidence was that Mrs Foster was 'very negative' and 'did not want to sit down and have a discussion'. She said that, when the meeting began, Mrs Foster did not sit down, but stood in the doorway.

59. Ms White says that, at the beginning of the meeting, she said something like 'We're still intending to make the department [meaning the girth department] redundant.' She went on to say that there were currently no sales, and that no company could continue without sales. She said that there, at present, the plan remained to make Mrs Foster redundant. She said that Mrs Foster replied that there nothing to talk about, because there was no work. At that point, Ms White said, Mrs Foster didn't want to continue the meeting further. That meant that they did not discuss further why Mrs Foster was being made redundant or the redundancy scoring exercise. Ms White said that, had the meeting continued longer, she would have explained further and shown Ms Foster the redundancy scoring tables.

60. Ms White said that, at the end of the meeting, she did say that, if the situation changed Mrs Foster might be able to come back.

61. Ms White made a short note of the meeting, Additional documents, page 10.

62. Mr Kempsell denied saying anything like 'There are a lot of talented people working here, but unfortunately you are not one of them'. He said that he would not say anything like that to a member of staff, especially at such a moment

when they were in a position of redundancy.

63. I accept Mr Kempsell's evidence on this point. Although Mrs Foster has suggested that Mr Kempsell can be brusque and rude on occasion, this would be behaviour of a quite different quality. It seems to me unlikely that he would behave in such a rude and unreasonable manner in a meeting of this nature. Mr Kemsell had nothing to gain by such behaviour and it could only serve to make a difficult situation more difficult and unpleasant.

64. I suspect that what has happened is that in the course, of an emotional meeting, something that Mr Kempsell said something that was misheard or misinterpreted. He might have said something like 'We're lucky to have such talented people working here' intending to include Mrs Foster within that group, before going on to say 'Unfortunately it looks like you won't be one of them anymore', intending to refer to the fact that Mrs Foster was likely to be made redundant. A misunderstanding of this nature seemed to me much more likely than Mr Kempsell being so gratuitously rude without apparent reason.

65. I do find that Mrs Foster was told that First Thought intended to dismiss her at this meeting. It was not a consultation meeting in the sense that there was a discussion of the possibility or Mrs Foster was invited to suggest alternatives. Both Mr Kempsell and Ms White had formed a clear view at this point that those working in the girths department would be made redundant. They honestly expressed that view to Mrs Foster. I have concluded, however, that Mrs Foster was not dismissed at that meeting. What was communicated was a clear expression of an intention to dismiss her at a later point, rather an immediate dismissal. In other words, she was told that she would be dismissed in the future, rather than she was being dismissed on that day.

Decision to dismiss

66. Mr Kempsell and Ms White met to make a final decision about the redundancies on 28th February 2024.

67. That decision was to dismiss the three workers who were assigned to making girths and to dismiss Wendy Gray, who worked on side panels.

Dismissal

68. Ms White met with Mrs Foster and the other employees being made redundant on the 28th February 2024. Each employee was met individually and told that that the decision had been taken to dismiss them. There was no further discussion at this point.

69. During that meeting, Ms White handed Mrs Foster a letter of dismissal, p41-42. The letter set out that the dismissal was on the basis of a redundancy, arising from poor sales, particularly in respect girths. Mrs Foster was dismissed on notice and her last day of employment was said to be 29th March 2024.

70. Mrs Fosters last day in the workplace was 27th March, because she took 28th March as annual leave and the 29th March was a bank holiday.

71. The other two employees working primarily on girths, were also made redundant and their employment concluded on 28th March 2024.

Dismissal of Wendy Gray

72. At about the same time as Mrs Foster, Wendy Gray was also dismissed, on the grounds of redundancy. Ms Gray worked on saddle panels alongside one other member of staff.

73. This case is not about Miss Gray's dismissal, save as it is relevant to Mrs Foster's case. For these purposes, it is sufficient to record that the evidence of Mr Kempsell and Ms White was that the number of orders for saddles had reduced to the point where two employees making saddle panels were not required to keep pace with the orders. The other member of staff making panels also made saddle flaps. She was also the only person who was engaged in making Western Saddles at that time. It was therefore Miss Gray who was selected for redundancy.

74. Like Mrs Foster Miss Gray was dismissed towards the end of February 2024. She was, however, given a longer period of notice. Mr Kempsell said that when he and Ms White met with Ms Gray she was clearly upset by the dismissal. She had been able to secure a new job elsewhere, but was not expecting to begin that role until the middle of April. Ms White therefore suggested that she could stay for a couple of weeks more, so that there was not be a gap where she was not earning money. Ms Gray agreed.

Events following Mrs Foster's dismissal

75. On 9th April 2024, First Thought began a process to recruit an Industrial Sewing Machinist. Miss White emailed Unitemps, an employment agency, enquiring about a candidate that they had previously proposed in November 2023, Additional Documents page 11. At about the same time, a job advert was placed with Unitemps, page 83-89.

76. Mr Kempsell's evidence was that this recruitment arose because there had been an increase in the number of orders for saddles in late March. By early April he said it had become apparent that another person would be needed to carry out the work that Ms Gray had been doing. He said that the final decision had probably been made on 8th April 2024. Ms White said that she spoke to Ms Gray and offered to withdraw her redundancy. But she did not accept that offer and left as planned for her new job.

77. This meant that First Thought needed to recruit a new person to carry out the work previously done by Ms Gray. This was done on the basis that they would be engaged through Unitemps on an agency basis.

78. I have given careful thought to the timing of these events, since that seemed to me to be important to the question of whether this post might have been relevant to the issue of seeking alternative employment for Mrs Foster. I have considered in particular the fact that First Thought was seeking a new worker in a very similar role, very shortly after the end of Mrs Foster's employment. Mr Kempsell's evidence in relation to the timeline, however, was not challenged in

cross-examination. Nor is it inherently implausible that there might be an increase in orders in late March. I also accept that there would be some delay following an increase in such orders before a decision would be made that this meant the business could support an additional worker. Mr Kempsell and Ms Smith would inevitably wish to see that an uptick in orders was sustained. They would then need some time to consider and to make a decision. A period of a couple of weeks does not appear excessive for that process to take place. It was not suggested to either Mr Kempsell or Ms Smith that the process was deliberately delayed to avoid offering the role to Mrs Foster.

The law: unfair dismissal

79. The general approach to determining whether a dismissal is fair is set out in s98 Employment Rights Act 1996. s98(1) requires the employer to establish the reason for the dismissal and that it is one of the potentially fair reasons set out in s98(2). In this case the reason relied upon is redundancy. The reason for dismissal is the factor or factors operating on the mind of the person who made the decision to dismiss.

80. Redundancy is defined by s139 ERA. In summary an employee is dismissed by reason of redundancy if the dismissal is because a) the employer ceases to carry out the business for the purposes of which the employee was employed (either at all or in the place where the employee was employed) or b) the requirements of the business for employees to carry out work of a particular kind (either at all or in the place where the employee was employed) ceases or diminishes or is expect to do so.

81. If an employer succeeds in showing that the reason for the dismissal is potentially fair, the Tribunal must consider whether the dismissal was fair. S98(4) requires that, in doing so, it consider whether in all the circumstances (including the size and administrative resources of the employer) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal. The fairness of the dismissal must also be determined in accordance with the equity and substantial merits of the case. Neither the employer nor the employee bears the burden of proof on the question of fairness, which is to be approached neutrally.

82. A fundamental element of considering fairness properly, in the context of a claim for unfair dismissal, is that a tribunal must not substitute its own view for that of the employer. Instead, the Tribunal's role is to consider the employer's actions and decide whether they were within the range of possible options open to a reasonable employer in the circumstances. This is often known as the 'range of reasonable responses'. See in particular *BHS Ltd v Burchell* [1980] ICR 303 and *Iceland Frozen Food v Jones* [1983] ICR 17.

83. This means that the tribunal must not 'stand in the shoes' of the employer and decide whether it would have reached the same decision. That would, inherently, involve the Tribunal replacing the employer's decision with their own. The Tribunal must focus on assessing the employer's decision, by reference to the range of reasonable responses. At the same time, that range is not infinitely wide and a finding that dismissal fell outside the range should not inevitably suggest that a Tribunal has substituted its own view for that of the employer, see *Newbound v Thames Water Utilities Ltd* [2015] IRLR 734.

84. In the context of a redundancy dismissal the fairness of the decision to dismissal should be approached by reference to the guidance given by the Employment Appeal Tribunal in *Williams v Compair Maxam Ltd* [1982] IRLR 83. A fair redundancy requires:

    a. A fair process of warning / consultation with affected employees and any recognised Trade Union.
    b. A fair process of selecting employees to be made redundant.
    c. A fair process of seeking to find any employee at risk of redundancy alternative employment.

85. To determine whether the process of selection is fair it is necessary to consider both the identification of the pool (i.e. how the group of employees who are at risk of dismissal is determined) and how employees are selected from that pool.

86. This approach was confirmed by the House of Lords in *Polkey v AE Dayton Services Ltd* [1987] ICR 142, in which Lord Bridge indicated:

    > *… in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representatives, adopts a fair decision which to select for redundancy and takes such steps as may be reasonable to minimise a redundancy by redeployment within his own organisation'.*

87. The guidance in *Williams* and *Polkey*, however, is not a series of statutory tests to be applied mechanistically, but questions to assist a Tribunal in applying the test in s98(4) ERA.

88. This is a particularly important point where the nature of an employer as an organisation means that it is of a different type to the large, unionised organisation from which much of the approach encapsulated in *Williams* and *Polkey* is drawn. A small, informal employer must still act fairly. But what that means may be different in that context, compared with a much larger and more formally run organisation.

89. Consultation with employees that may be affected by potential redundancies is an important element of a fair redundancy dismissal. Fair consultation requires: consultation before proposals have been finalised; sufficient and accurate information to which the employee can respond; adequate time to respond and genuine consideration of the employees response, see in particular *R v British Coal Corpn and SoS for Trade and Industry, ex p Price* [1994] IRLR 72.

90. As noted above the employer must take reasonable steps to find an employee alternative employment. This duty, however, ends once the employment comes to an end. An employer does not have to re-engage an employee who has already been dismissed on grounds of redundancy, see *Octavius Atkinson & Sons Ltd v Morris* [1989] IRLR 158. The law of unfair dismissal applies only to the fairness of the employers actions in dismissing an employee; there is no continuing duty to act fairly after the dismissal has taken effect.

91. Where a dismissal is found to be unfair, it is open to a Tribunal to reduce any compensatory award to reflect the possibility that the employee may still have been dismissed had the employer acted fairly. This is described as a Polkey

reduction, following the case of *Polkey v AE Dayton Serviced Ltd* [1988] ICR 142.

92. As in relation to unfair dismissal, the Tribunal must not substitute its own view for that of the employer, the key questions are a) Whether the employee could have been fairly dismissed? and b) Would the actual employer have done so? See *Hill v Governing Body Great Tey Primary School* [2013] IRLR 274.

93. The assessment of a Polkey reduction is an inherently uncertain exercise since it inevitably involves an element of speculation. Although there are cases in which the evidence related to any potential reduction is so riddled with uncertainty that no sensible assessment can be made, this is unusual. Tribunals should only proceed on the basis that employment would have continued indefinitely where the evidence that it would not have done so can properly be ignored, see *Software 2000 v Andrews* [2007] IRLR 568.

Conclusions

What was the reason for dismissal? Was it a potentially fair reason?

94. I have concluded that the reason for dismissal was redundancy, which is a potentially fair reason.

95. Both parties agreed that there was a significant reduction in sales, particularly in relation to girths in the time leading up to Mrs Foster's dismissal. I accept that First Thought was in a difficult operational and financial position. There were insufficient orders, particularly of girths, to occupy its existing employees. It was therefore natural that it would seek to reduce that staff that it employed, rather than continue to absorb the cost of employing them when there were inadequate orders to keep them in productive work.

96. No other plausible reason has been put forward to explain why Mr Kemsell and Ms Smith would dismiss a number of employees, including Mrs Foster.

Was the dismissal fair?

97. I have concluded that the dismissal of Mrs Foster was not fair, in particular because First Thought failed to follow a fair procedure.

98. There was a failure to take adequate measures to consult. Although I have accepted that First Thought's employees were aware of the reduction in sales from an early stage, that is not the same as having been fairly consulted in relation to the decision to make redundancies.

99. I have concluded that Mrs Foster was not included in the meeting that took place on 15th February 2024 and that meeting did not therefore contribute to any process of consultation with her.

100. The meeting on the 22nd February 2024 did not involve meaningful consultation. At that point Mr Kempsell and Ms Smith had all but reached their decision. The decision to make Mrs Foster redundant was no longer at a formative stage.

101. Further, they did not provide Mrs Foster with sufficient information on which she could have fully responded to the proposal. In particular, although Mr Kempsell and Ms Smith had carried out the scoring exercise in contemplation of the possibility that they might engage in bumping of an employee outside of the relevant pool, this was not revealed to Mrs Foster. She did not have the opportunity to discuss this part of the redundancy exercise or to challenge the results of the scoring exercise. She was not even aware that it had occurred.

102. Beyond the lack of consultation, I am satisfied that the approach to scoring Mrs Foster was unfair. In particular, I accepted that the criticisms of the scoring of her in the categories of versatility, responsibility and motivation were justified.

103. In respect of versatility, it was wrong proceed from the fact that that an employee had indicated that they are happy with the work they are carrying out, to the conclusion that they are less versatile in the context of potential redeployment. The one thing has nothing to do with the other, especially in the situation of a potential redundancy situation where any employee is likely to appreciate that continuing with the work they have done in the past may not be an option. The approach this score was not one that a reasonable employer could have taken.

104. Similarly, in respect of motivation, I have concluded that it was outside the range of reasonable responses to conclude that Mrs Foster lacked motivation because she was involved in a family business and, with the agreement of First Thought had taken leave to support it. Again, this had nothing to do with the question of whether she was motivated within the workplace. In particular this is so because Mrs Foster was not employed in a leadership or managerial role, she was engaged as a skilled labourer. It might, in certain senior positions, be reasonable to take into consideration some sense of how committed an employee was to the future of the business. It was not a criterion by which a reasonable employer would have judged an employee in Mrs Foster's role.

105. I did not, however, accept that the criticism of the scoring in respect of Mrs Fosters skills was justified. I accept Mr Kempsell's evidence that the score in relation to skills actual focused purely on Mrs Fosters experience with First Thought's products. Although she had worked on other products in the past, for some time she had exclusively made girths. If she was moved to other work, she would have required a period of training and development. It was therefore reasonable to assess her skills, in that sense, as relatively narrow. It was not intended to refer more generally to her abilities as a Industrial Sewing Machinist, which were considered under the skills, potential category where Mrs Foster scored much higher.

106. I have accepted, however, that the scoring system in fact played very little part in the decision to dismiss Mrs Foster. I therefore need to consider to what extent, if any, elements of unfairness in respect to it affect the overall fairness of the dismissal.

107. In principle, it seems to me that if part of a selection process genuinely has no bearing on the final decision to dismiss, it will only be relevant in so far as it might have mislead an employee about the process and the way that the decision is made. There is no suggestion that Mrs Foster was mislead in this way, because she was not aware of the scoring exercise at the time.

108. I do not accept, however, that the selection scoring exercise played no part in the decision to dismiss. Rather, I accept Mr Kempsell and Ms White's evidence that it acted as a double check on their decision. If Mrs Foster (or another individual in the girths department) had scored particularly highly in the assessment, I accept that Mr Kempsell and Ms Smith would have considered whether they should have 'bumped' another employee. That is, they would have considered making another employee, with a lower score redundant, in order that the high scoring employee could be moved into their role, thereby retaining a particularly valuable member of staff.

109. Employers are not required to consider bumping when conducting a redundancy exercise and, generally, declining to 'bump' another employee in order to avoid making someone redundant will not render that redundancy unfair. But, having decided to operate an approach that included the possibility of bumping, First Thought were required conduct that process fairly. I have concluded that they did not, both because of the failure to consult Mrs Foster about it and the flaws in the way she was scored.

110. In relation to the pool for potential dismissal and the selection from it, I have concluded that First Thought acted fairly. I have accepted Mr Kempsell and Ms Smith's evidence that they had identified a particular reduction in the available work in making girths and concluded, in essense, that the work of the girth department could, at least in the short term, be absorbed by other members of staff on an ad hoc basis. They therefore decided that the department as a group should be made redundant. This meant that there was no need to select from that group, because all were to be made redundant. Another employer might reasonably have made other choices on this issue, but that is not the question before me. I must determine whether, in the circumstances, this was an option open to a reasonable employer. I am satisfied that it was.

111. In relation to considering alternative roles, I have concluded that, at the point that the decision to dismiss Mrs Foster was made, there was no alternative work that she could have been offered and this was clear to both Mr Kempsell and Ms Smith. Sales across their produces had reduced; they had made one other redundancy and were considering whether it would be necessary to carry out a second round of redundancies.

112. In those circumstances, First Thought had taken reasonable steps to seek alternative work for Mrs Foster. The reality was that there was no such work available.

113. I accept that First Thought did begin to recruit a new member of staff on 9th April 2024. If Mrs Foster had remained in employment at that point, fairness would have required considering whether that post might constitute suitable alternative employment for her. I am satisfied, however, that Mr Kempsell and Ms White did not consider creating this post until April 2024, when Mrs Foster was no longer employed by them. At that point, there was no longer any obligation on First Equine to take reasonable steps to seek alternative work for Mrs Foster, because she was no longer an employee.

Polkey

114. Having concluded that the dismissal of the claimant was unfair, I go on to consider whether there should be a Polkey reduction.

115. I am satisfied that, even if First Thought had carried out a fair consultation process and corrected the flaws in the way that it scored Mrs Foster, she would nonetheless have been dismissed.

116. I have reached this conclusion because:

a. There was a genuine redundancy situation.

b. I am satisfied that First Thought's decision to make the girth department as a whole redundant was a reasonable one and greater consultation would not have made any different to that decision.

c. Although Mr Kempsell and Ms Smith had in mind the possibility of bumping another member of staff, based on the scoring exercise, I have concluded that that possibility was a remote one. It would only have been considered as a serious possibility if one of the individuals potentially at risk of redundancy had achieved an exceptional score. Even if Mrs Foster had scored much higher in the areas where I have concluded her criticisms of the process were justified, it would not have placed her in a position where she was outperforming other members of staff to an exceptional degree

d. Even if Mrs Foster had achieved such a score, I have concluded that it is unlikely that Mr Kempsell and Ms Smith would have pursued the option of bumping another member of staff. It would have significantly complicated the redundancy process. It would have required identifying a pool of employees are risk of being bumped and then consulting with them. This would have prolonged the redundancy process, at a time where the business was already under financial strain and there had been significant delay from the time when redundancies had first been contemplated. It is clear from the speed with which matters developed in February 2024 that they felt that there was some urgency in addressing the situation.

e. Taking all these factors together, I was satisfied that the possibility of a different and fairer procedure producing a different outcome was extremely remote one and that compensation should be assessed on that basis that it would not have occurred.

117. I have considered whether a fair process would have taken more time and therefore resulted in Mrs Foster being dismissed at a later point. This is relevant for two reasons. First, if a fair process would have taken longer, Mrs Foster should be compensated for the time she would have remained employed while that process was completed. Second, in the circumstances of this case, if Mrs Foster would have remained employed for longer, she might have still been employed at the point that Mr Kempsell and Ms Smith decided to create a new post. The duty to take reasonable steps to seek alternative employment would then have been engaged.

118. I have concluded, however, that a fair process would not have taken more time. The unfairness in the dismissal did not arise from the fact that First

Thought moved too quickly, but rather from the fact that they did, during that time take the steps that fairness required. A fair process would not therefore have delayed the dismissal.

Basic award

119. The basic award is calculated according to the arithmetic formula set out section 119 of the Employment Rights Act 1996. It is based on an employee's age, length of service and weekly pay, calculated in accordance with the provisions of the ERA.

120. Throughout her employment Mrs Foster has been above the age of 40, her age multiplier is therefore 1.5. She had two years of continuous employment. Although Mrs Foster had worked for First Thought from 5th January 2021, prior to May 2021 she was engaged by an agency, rather than as an employee of First Thought. That period therefore does not count towards her period of continuous employment.

121. Mrs Foster's ET1 and schedule of loss identified her gross weekly pay as £508.61. This was accepted by First Thought in their response and was not challenged in the hearing.

122. The section 119 calculation is therefore 1.5 x 2 x £508.61 = £1,525.83

123. Mrs Foster received a redundancy payment of £1,452. This must be deducted from the section 119 calculation, see section 122(4).

124. The final basic award is therefore £73.83.

Approved by:
Employment Judge Reed
Date: 18 August 2025

Notes

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a

copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. 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:

www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/