EMPLOYMENT TRIBUNALS

Claimant: Diana White

Respondent: Deekay Technical Recruitment Limited

HELD AT: Manchester **ON:** 12 October 2017

BEFORE: Employment Judge Holmes

REPRESENTATION:

Claimant: Mr M Mensah, Counsel
Respondent: Mr D Knutton, Director

JUDGMENT

It is the judgment of the Tribunal that:-

1. The claimant was unfairly dismissed.

2. The claimant is entitled to compensation. The parties are invited to consider agreeing remedy, and, in default are to notify the tribunal in writing by **17 November 2017** as to whether any remedy hearing is required. If so, the parties shall set out what the issues relating to remedy are, whether they wish to proceed in person or by way of written representations, and shall provide an estimated length of hearing and dates to avoid.

3. The claimant's complaint of unlawful deductions from wages is dismissed upon withdrawal by her.

4. The claimant's complaint of breach of contract and failure to pay notice pay will be further considered, if necessary , at any remedy hearing.

REASONS

1. The Tribunal today has been considering the claims of Ms Diana White arising out of the termination of her employment with the respondent company on 20 January 2017. The claimant has been represented by Mr Mensah of Counsel today and the respondent by Mr Knutton, its Director and effectively owner of the business.

The claimant has given evidence herself and Mr Knutton has as well but neither of them have called any live witnesses. There has been a bundle of documents and although there were some additional documents at first it appeared the respondent may have but it turns out eventually that the bundle prepared by the claimant's solicitors is the one that has been used and all those documents have been considered by the Tribunal.

2. The claimant claims unfair dismissal and has also sought notice pay claiming that she has been underpaid notice pay and originally claimed unlawful deduction from wages in the sum of £100 relating to what was described as a bonus. That has however been withdrawn and will be dismissed. A list of issues has been helpfully prepared by Mr Mensah for the claimant, and although Mr Knutton is not legally represented or qualified, he has seen that as well and has made no observations upon it . It does indeed seem to me to be an accurate representation of the issues to be determined by the Tribunal with a couple of refinements I will come to in due course.

3. In terms of the claims, the claimant alleges that her dismissal was unfair but the respondent contends that she was dismissed for the potentially fair reason of redundancy , and, indeed that her dismissal was fair in all the circumstances. In the alternative, although not advanced as such by the respondent who as I say is not legally represented, the respondent would contend that if the Tribunal were to find that the claimant was unfairly dismissed by reason of redundancy, but particularly by reason of any procedural defects that any compensation should be reduced on what is known as the ***Polkey*** principle, and the Tribunal has considered that in the alternative as well on behalf of the respondent. So in terms of the issues, leaving aside the notice pay which I will come to at the very end in terms of the calculation in respect of that, the Tribunal has had to determine, firstly what the reason for dismissal was and if so, whether it was a potentially fair reason, and if so, whether it was actually fair in all the circumstances. In doing so the Tribunal starts with its findings of fact which are as follows.

3.1 The claimant was employed by the respondent as a Receptionist/Systems Administrator from 24 June 2013 until her dismissal on 20 January 2017 and a copy of her contract of employment is in the bundle and at page 7 are the relevant notice provisions which provide at clause 1.1.1 that she would be entitled to a week's notice if her employment was for two years or less and thereafter for an additional week's notice for each completed year of employment up to a maximum of four weeks mirroring the statutory entitlement where of course in excess of four weeks would go a week every year to a maximum of 12 but that is by the by because the claimant was only employed for some 3 1/2 years and was on that basis entitled to three weeks notice.

3.2 The respondent is a small company, a recruitment agency specialising in temporary staff although apparently it also recruits some permanent staff but the emphasis Mr Knutton told me was on temporary staff and it is a small employer having some twelve to fifteen staff at the highest and at the time of which I am concerned around about some twelve employees at the end of December 2016. Mr Knutton is the 100% owner and sole director of the company which was set up in 1988. The claimant worked in the business in

the administration side also dealing with compliance as her job evolved after she initially started and she worked alongside and indeed under for she was her superior as it were one Lorna Watts, and Lorna Watts has some less service than the claimant had, around about some two years or so at the time of the claimant's dismissal but the two of them comprised the administration of the respondent's business, the other staff being two ladies involved in the accounting function which the claimant had little to do with and certainly never worked in and the others including Mr Knutton and other members of the company were involved in the actual recruitment side of the business being Recruitment Consultants or Assistants to Recruitment Consultants.

3.3 In terms of the business and its progress in support of the contention that there was a redundancy situation Mr Knutton has put forward his own verbal evidence in relation to the business and how it was proceeding in 2016 and has also produced a document from the companies accountants at page 45 of the bundle which sets out a summary of the companies trading results for the past four years going back from 2017 and those figures show turnover reducing from 2014 when it was £12,180,140.00 to 2015 when it was £10,353,868.00 an increase in 2016 to £10,449,421.00 and then a decrease in 2017 to £9,898,323.00. The gross profit is set out in respect of each of those years and beneath that appears a column for the gross profit expressed as a percentage which for 2014 was 13%, 2015 was 11.95%, 2016 10.1% and 2017 9.95%. The note at the bottom of this document says "as you will note the company is experiencing a deteriorating trading situation due to increased competition and pressure from customers on its profit margin, this situation is expected to continue for the foreseeable future. That is the information from the companies Accountants and is the only financial document produced and relied upon by the respondent.

3.4 In addition to that evidence Mr Knutton has explained how the profit margins have been squeezed over the last three or four years and how in 2016 the market got worse because of a combination of government initiatives and a move towards permanent employment status for staff, his business being of course involved in the temporary staff market and the involvement of intermediaries who then took a percentage themselves and thereby reduced the percentage profit available to the respondent. He deals with this in the second paragraph in the introduction to his witness statement and has elaborated upon it somewhat today in his evidence. In terms of any further documents however none have been produced.

3.5 The position in 2016 Mr Knutton contends was that he was considering redundancies during that year and indeed mentioned this to a colleague or possibly two in terms of the Senior colleagues his operations Manager or Recruitment Manager or Directors he has termed them. Other than that however no other discussions are referred to and certainly not documented but Mr Knutton's evidence is that he was concerned about the financial position of the business for some time and during 2016 was considering the possibility of making redundancies but he did not have any further detailed discussion with anybody else and certainly not with the claimant or any other more junior members of staff. Thus it was that in December 2016 the claimant was unaware of any such potential redundancies being in the offing

as no discussions had been had with her and as far as she was concerned the work that she was doing with Lorna Watts was proceeding as normal and that if anything Lorna Watts and Mr Knutton accepted this had been asking for more staff during the course of the year, a request which was declined so from the claimant's point of view she had no inkling at that time that any redundancies were likely, let alone her own and that Mr Knutton did not suggest realistically that she would be aware although he does suggest she might have been aware of the general squeeze downturn in the business.

3.6 In terms of the events giving rise to the dismissal they occurred on 23 December of last year, when Mr Knutton held a meeting with the claimant, this was as is clear and everyone agrees not by prior arrangement, there was no invitation to this meeting, no document in advance setting out what it would be about, it was simply impromptu and called by Mr Dutton and in that meeting again it is common ground that the claimant was told that she would be made redundant and in terms of that meeting Mr Knutton in evidence said that he had 95% decided before the meeting that he was going to do that and indeed that is what he told the claimant in this meeting. There are no notes or minutes of that meeting and both sides have given a recollection of it, some of which coincides, the other details of which do not but in essence we both agree that the claimant was told in that meeting that she would be made redundant and the degree to which other alternatives were discussed at that point is unclear, the claimant claiming that Mr Knutton did not explore any alternatives with her other than ones that she herself raised such as part time employment whereas Mr Knutton's account is somewhat different, but the upshot of it was that the claimant would be made redundant and again it is a bit of a moot point as to whether she was actually dismissed then or subsequently because on 3 January the claimant then got a letter in which her dismissal was confirmed and that is at page 14 of the bundle in which Mr Knutton says "further to our meeting on 23 December 2016 where were discussed making your position redundant and I now confirm the following. Your position as Receptionist/Systems Administrator is unfortunately redundant and your end date with the company is as per your contract will be Friday 20 January 2017. The reason your position is redundant is due to a downturn in workload and company profits" and he went on to wish the claimant well and thank her for her years with the company and that is what that letter says and the claimant received it.

3.7 The company had in fact closed down for Christmas on 23 December , and so the 3rd January was in fact the next time that everybody was in and the claimant received that letter on that occasion. Her reaction was on the following day, 4 January to send an email to the respondent in fact two emails on that date, the 4 January on page 15 of the bundle where she says that she referred to her selection for redundancy and she asked for a copy of the criteria used together with a copy of her assessment and all other information on which her selection for redundancy was based and she said that she was entitled to this information and looked forward to receiving it within seven days. She also raised a grievance in relation to unlawful deduction from wages and made reference to a trade union official representing her because she was in fact a member of a trade union and this was the first mention that she had made of this and this was a matter which Mr Knutton was unaware of

up until that point. There then ensued some email correspondence about the claimant's union membership and the arrangements would then be made in relation to her grievance and the redundancy issue and on 6 January 2017 Mr Knutton sent an email to the claimant putting her on garden leave as he says he was entitled to do by the contract and indeed that is what then occurred, her employment then ending in due course on 20 January.

3.8 The union then took up communication on her behalf and on 6 January Lawrence Chappellgill wrote an email to the respondent at page 19 to 20 of the bundle in which she raised issues in relation to the redundancy raising questions in relation to the lack of consultation and also the grievance in relation to the unpaid wages matter. Mr Knutton entered into communication with the union about that and indeed in relation to the redundancy by email of 9 January 2017 page 22 of the bundle, he replied to Mr Chappellgill's letter and set out an account of the meeting on 23 December, he then went on in the final paragraph under the heading Re: Objective criteria for redundancy to say this "all members of staff responsible for carrying out similar role to Diana were considered for redundancy, there are only two members of staff including Diana who operate within the Receptionist/Systems Administration Department and there is only a slight overlap between the two in their duties. The following criteria were used when considering both employees for redundancy: disciplinary record, aptitude for work, performance skills and experience, attendance and time keeping". Thereafter he communicated with the claimant in relation to a meeting in relation to the grievance and by email of 9 January the union representative on behalf of the claimant raised an appeal against the dismissal for redundancy and invited Mr Knutton to arrange an appeal hearing.

3.9 In the communications from the claimant and her union it was made clear to Mr Knutton that they were challenging the reason for the dismissal contending that the reason for the dismissal was not redundancy but was another reason. That reason arose this way on or about 23 December, it was the practice of the respondent to pay what the term bonus is to staff and the claimant had in the past received one of these around the Christmas period which would be paid in cash, on this occasion however in 2016 the claimant did not receive such a payment but most other people, both men and women in fact did. This became widely known and a number of colleagues apparently commented upon it and at the very least one person may be more communicated with Mr Knutton about it, either on or shortly before 23 December 2016. It is suggested that there were emails sent to him, Mr Knutton doesn't agree that was the case but he accepts at least one person did refer to his failure to pay the claimant this "bonus" and possibly suggesting that he was being tight or something along those lines. The evidence that rather more happened is contained in a chain of text messages passing between the claimant and Lorna Watts because around about that time in fact shortly after the claimant's meeting on 23 December they entered into a text exchange which is at pages 36 to 37 of the bundle and in the course of that exchange were L refers to Lorna Watts, Lorna Watts said to the claimant that she had spoken to Lyndsey, that being the Director or Manager involved who said all the emails to Darren slating and calling him for not giving you a bonus actually signed your death warrant, Daz wasn't going to do anything but he had to justify not

giving you a bonus". The claimant replied to that that she didn't know why people had emailed Darren and that she didn't want them to do that but that is what has led the claimant to believe that more than one person or more than email was sent to Darren about the non-payment of bonus and Lorna Watts was telling the claimant rightly or wrongly one doesn't know that this is something that Mr Knutton was reacting to and what may have led to him taking the action he did on 23 December in dismissing the claimant, but that it what was referred to when the claimant and her union representative were saying in correspondence that they did not believe that the real reason for the dismissal was redundancy but was to do with this non payment of bonus and the reaction of other staff to it.

3.10 The appeal was heard by Mr Knutton, he had been the person who took the decision, of course, to dismiss the claimant but he was the only person he says given the structure of the company this is obviously right to whom any appeal could be made as he was the sole director and consequently he heard the appeal on 13 January 2017 and notes of that appeal are at page 27 of the bundle. The claimant was represented by Ross Quinn from her union and the appeal dealt with a couple of issues, there was the grievance in relation to the claimant's payments but also the question of redundancy and her dismissal for that was discussed as indeed was the suggestion that any emails had been received by Mr Knutton, he denying that in the course of that meeting. In that meeting however the text message that I have just referred to was read out to him but Mr Knutton said he didn't know anything about that. There was further questioning in the appeal on behalf of the claimant about the employment as indeed the respondent accepts of an apprentice around about this time, Mr Knutton explaining that this was because a client had asked for this person to be taken on and in his evidence today he has explained that there was indeed an apprentice taken on but that person only stayed for some two weeks or so.

3.11 Also raised in the appeal however was a job advertisement which the claimant and her union rep had become aware of, which is at page 42 of the bundle and which is for a Recruitment Assistant, that is an advertisement with the respondent's logo on the top, it says Recruitment Assistant Manchester and the date of 22 December 2016 and indeed a time 14:25 is upon that document and the advertisement reads: *"We are looking to recruit a Recruitment Assistant to assist with administrative and clerical duties reporting directly to the Recruitment Director within the civil/structural engineering section"*

3.12 It then goes on to list the tasks and responsibilities and the candidate requirements. This was put to Mr Knutton in the course of the appeal meeting on 13 January and he said at that stage that this was an old job advertisement that had not been taken down and he disputed that it was as it were current at the time of the claimant's redundancy. He contended that alternative work and hours had been considered and discussed with the claimant and that really was the end of the appeal, Mr Knutton agreeing to send copies of the minutes which were in due course duly sent. In terms of the outcome of the appeal that was sent to the claimant on the 30 January 2017, page 29 of the bundle where in that letter Mr Knutton says "further to your appeal hearing on

16 January 2017 I confirm your appeal is unsuccessful on the grounds discussed at the hearing and laid out in previous correspondence". He then went on to set out the claimant's entitlement to redundancy pay setting out her three year entitlement at 1.5 weeks pay and enclosing a cheque payable in the appropriate amount. That was the first time in which the actual figures for redundancy had been given to the claimant, they were not enclosed in the letter of 3 January but that sum was duly paid and there is no claim in relation to it.

3.13 Consequently the union having received the outcome of the appeal by letter of 6 February 2017 wrote to the respondent effectively complaining of the dismissal and threatening proceedings in the Employment Tribunal, indeed in great detail in terms of rules they were going to rely upon etc but it is clear from that letter that the claimant would be bringing an Employment Tribunal claim alleging that her dismissal was unfair and indeed in the second paragraph there was a statement that the union was of the view that redundancy was not in fact the genuine reason for the claimant's dismissal and reference was made again to the text exchange that I have referred to. It goes on to argue in the alternative that even if there was a genuine redundancy situation there was nonetheless inadequate consultation and other grounds upon which it would be found that the dismissal was unfair, so it was clear from an early stage that the union would be taking the matter further with the claimant as indeed of course has occurred. Mr Knutton replied to that letter by a letter of 9 February 2017 and he dealt with it under various headings, the first was in relation to the alleged text messages in relation to emails about the non payment of the bonus to the claimant and he said in this letter "my decision to make Diana redundant was made before our meeting on 23 December 2016 and text messages you refer to which as of yet I have not seen did not change my decision in any way" and indeed that chimes with his evidence to the Tribunal that he went into the meeting on 23 December 95% decided upon her dismissal.

3.14 He then went on to address under the heading "inadequate consultation" by saying that the meeting on 23 December was a consultation meeting and referring to what he had said in previous correspondence, he then dealt with alternatives to redundancy which he said were discussed on 23 December and re-iterated that the advertisement that had been referred to was an old advertisement which had never been taken off line which he then said he had arranged to have taken down. He then went on to deal with payments due which he disputed saying that the claimant had been paid he thought and dealing with the minutes of the appeal.

3.15 That in essence is the process whereby the claimant was dismissed in relation to the advance of December and January of this year, following her dismissal she has remained out of work, she has produced a series of fit notes for January through to July of 2017 in which she was stated to be "unfit for work" either by reason of low mood or a combination of low mood and a foot injury which she had sustained in fact in April 2016 and in respect of which she was undergoing treatment which ultimately will now result in her having an operation, but it was a combination of both those matters which appears on some of the fit notes she has produced. She has been in receipt

of benefits during this period and the documents in relation to that are in the bundle, and in terms of the depression and anxiety the low mood referred to in the fit notes there is medical evidence in the bundle from the claimant's GP Dr Whittaker at page 63i which refers to her consulting him on the 30 December 2016 complaining of low mood because she had been made redundant and referring to the treatment he then gave her and to the fact that she was then put back on anti depressants she having a previous history of depressive illness but having ceased to take anti depressants for some period up until this incident in December 2016, and indeed she sets out the medical position in that letter of 9 October at that page in the bundle. The claimant did she accepts and documents show during the early period following her dismissal apply for other jobs notwithstanding that she was not fit enough to do them according to the fit notes that were being provided by her GP, she didn't get any of them however but she did initially make some applications and thereafter she did not, not least of all that she was concerned that the foot issue that she had which would require an operation would meant that she would not be able to start work without them having the risk of having to stop while she went off for that operation and the combination of that plus of course being signed off by her GP in relation to low mood is what has prevented her so far from returning to seeking work.

4. Those then in essence are the relevant facts as found by the Tribunal and I now turn to the findings in relation to the claims. The list of issues provided is a very helpful starting point for that, because the first of those is did the respondent have a diminished requirement for employees to carry out work of a particular kind in accordance with Section 139 of the Employment Rights Act 1996 which of course is the section which defines redundancy. It is important however before going on to that to set it in context which of course is in the context of this claim of an unfair dismissal claim redundancy being, of course, one of the potentially fair reasons for a dismissal, for which the burden of establishing is upon the respondents initially, so in terms of a potentially fair reason it is for the respondent to show that. If it is then shown the burden of whether the dismissal was fair or otherwise is a neutral one but the initial burden is upon the respondent. In terms of that and the reason in this case it is fairly and squarely said to be redundancy, and it is not sufficient for the respondent to show that it believed that there was a redundancy situation, unlike for example cases of conduct where it is sufficient for an employer to show that they believed that there had been misconduct and that was the reason operated on their minds in the case of the redundancy, and indeed certain other types of reason that are potentially fair under Section 98, the subjective belief is not sufficient the employer must in fact show that those grounds exist in fact, that is the view of both the authors of the IDS volume on unfair dismissal and of the learned editors of Harvey, and the authority of ***Elliott -v- University Computing Company Great Britain 1977 ICR*** is cited as being authority for that proposition, so it is not sufficient simply to show the respondent believed there was a redundancy situation, the respondent has to show that there was, and that therefore the circumstances set out in Section 139 of the Employment Rights Act existed. Of course those are alternatives, because the others include, for example, closure of a place of work and this is very much the final category under Section 139, a diminution in the requirement for employees to carry out work of a particular kind and that is the residual category of potential redundancy.

5. The Tribunal looks to see what evidence the respondent has adduced in support of its contention that there was a redundancy situation, and the difficulty with the respondent is that the evidence that has been adduced is somewhat scant, the evidence comes from Mr Knutton and to some extent the document at page 45 of the bundle. In terms of documents that is the only document that the respondent has put forward in support of its contentions that there was a redundancy situation. Mr Knutton's evidence is , and this is supported one accepts to some extent by the accountants letter, of a squeeze upon profits, a reducing of the profitability of the business over the last year or two, but in terms of whether that has given rise to a diminution in the requirement for employees to carry out work of a particular kind I find he has failed to establish that. A reduction in profitability does not necessarily equate with a diminishing in the need for employees to carry out work of a particular kind. It may do but it does not necessary do so. The company is making profits, they may be reducing profits, but they are still profits. If a loss was being shown and increasing losses over the years, then the situation might be a little different but this is evidence at the moment of no more than a reducing profit margin. In terms of turnover, the turnover went down from 2014 to 2015 but it went back up again in 2016 In any event Mr Knutton tells me that turnover is not really a guide in relation to the level of activity in the business, because it is very dependent on the level of pay of the persons placed by the agency, and so one cannot gauge activity and what one might call the level of business of the business simply by turnover. What he effectively does is invite the Tribunal to conclude that from the reduction in profitability the Tribunal can infer that there was this need to make redundancies but he has simply failed to make that connection, and in terms of tools at his disposal he apparently has weekly figures in terms of the financial performance of the business but he has not adduced any of those. With regard to any other evidence in support of his contention that redundancies were necessary, he has singularly failed to adduce any. If anything the indications may be the other way, as is pointed out in submissions on behalf of the claimant, she was unaware of any reduction in the need for her work, and Lorna Watts was doing the opposite, she was actually seeking an increase in staffing levels for her and the claimant. So that rather goes the other way. Additionally, of course, one has the dismissal of the claimant at the same time as an apprentice is taken on, appreciating that the apprentice may have been taken on for particular reason, and may have been short lived, that is somewhat at odds with the need to make staff reductions. In terms of other persons coming and going, that was very unclear as well and it turns out that in terms of dismissals there were not two people dismissed for redundancy around about this time, one Recruitment Consultant apparently left because they wanted more money and it was not until the following year that a new one was potentially dismissed. In terms of staff levels the position is very unclear, and additionally one has the job advertisement at page 42 of the bundle where on the face of it the respondent was advertising for a Recruitment Assistant on 22 December 2016. The respondent has said this is an old advertisement, but it is difficult to avoid the conclusion that when it is dated 22 December 2016 that is the date of it and although it may have been placed by somebody else in the organisation it rather suggested if somebody else was doing that, they too were unaware of the need to make cut backs and reductions and were proceeding on the basis that things were going ahead.

6. In terms of any corroboration of what Mr Knutton says, he has relied upon a statement from Mr Lawrie Lindsey at page 44 of the bundle, but all that says in relation to redundancies is in two lines, where he says Mr Knutton spoke to him in or

around October or November regarding making redundancies within the office but he was not privy to who or when. That is as much he says, and is a long way short of corroborating Mr Knutton's evidence that there was this downturn in business which necessitated contemplating reductions in staffing levels, particularly in the administration side.

7. There is another indicator it seems to me in the bundle which has not been alluded to this far, but which is there to be seen and that is in the text exchanges between Lorna Watts and the claimant following her dismissal or certainly following her meeting on 23 December. In that text exchange after discussions about the emails about the claimant's bonus, on page 37 of the bundle at 11.23 on what I think is the 27 December after making an observation about Rachel going, which I have already referred to and the apprentice coming in and making some observations about the New Year, Lorna Watts says this:

"I cannot do everything so looks like we will both be looking for a new job",

If anything that is an indication from Lorna Watts at that time that taking the claimant's job off her in those circumstances was something she did not consider was appropriate, because it would actually seem to increase her likely work load. So all the indications at the moment do not support Mr Knutton's contention that there was a redundancy situation , and as I say the burden is upon the respondent to establish that It seems to me that the very best that can be said is that he has established that there may have been a redundancy situation, but the Tribunal decides matters on the burden of proof, and the balance of probabilities and it has to be established that it is more likely than not that there was a redundancy situation.

8. Finally, (and this was not mentioned in the oral judgment) , in relation to the point made by the respondent that the claimant has not been replaced, the Tribunal attaches little weight to this fact. The respondent was on notice almost as soon as the claimant was dismissed that it would be contended that her dismissal was unfair, and indeed that redundancy was not the real reason for her dismissal. It is hardly surprising in those circumstances that the claimant has not been replaced, as the respondent would clearly be aware that this fact would be likely to be of some significance in any subsequent Tribunal proceedings. Consequently the Tribunal attaches no weight to this fact.

9. The most the respondent has done it seems to me is to establish that there may have been, but there are indicators on both sides and he has failed to satisfy the Tribunal that there was in fact a redundancy situation. and that Section 139 of the Employment Rights Act was satisfied . Consequently he has failed to establish that there was a potentially fair reason for the claimant's dismissal.

10. Having failed to establish a potentially fair reason for the claimant's dismissal, it follows that her dismissal was unfair and in those circumstances the Tribunal does not need to go any further. It does not need to consider for example would a fair procedure have made any difference, because a fair reason has not been established, it does not get in to ***Polkey*** territory, and it does not get into any other issues of fairness because the respondent effectively falls at the first hurdle of potentially fair reason. For completeness however, and in case the Tribunal were wrong on that initial finding , and the respondent has established that the reason was

redundancy in the alternative the Tribunal would find that the dismissal was unfair, that would not be a surprise perhaps to the respondent, on the basis of the concession that is made that, procedurally in terms of consultation, this was not adequate by any stretch of the imagination and Mr Knutton doubtless appreciates that. Even if it was a redundancy dismissal, the lack of consultation or warning in relation to it would render it unfair. This is not a case where something suddenly happened, and there had to be an emergency meeting as a result of some cataclysmic event, as occasionally occurs, this was something where redundancy on Mr Knutton's own evidence, was in his mind for several weeks if not months. There was thus no reason whatsoever why he could not have consulted with the claimant sooner than he did, as to the proposals at a time when they were still in the formative stage, as indeed, of course, is indicated by the ***King v Eaton Limited Ltd [1996] IRLR 199*** case, to give her adequate information upon which to respond to set out proposed selection criteria if they were to be used and to enable her to formulate a meaningful response to information provided in that consultation process. He clearly did not do that, and frankly doubtless appreciates there were no real reason why he did not. Whether his decision was brought forward by the events of 23 December perhaps does not greatly matter, whatever the reason was that he acted somewhat precipitously, then is by the by as to whether or not the emails about the bonus and all that sort of thing prompted him into action. The fact is that the action he took on that occasion fell woefully short of any meaningful consultation, and would itself have rendered the dismissal unfair.

11. The fact that he did it of course rather than delegating it to anyone else in the company, such as one of his colleagues Lyndsey, Lawrie or anyone else did of course have the double effect that that then meant that he shut down any avenue to appeal to himself, because he had taken the original decision so in doing that he had effectively deprived himself , and indeed the claimant of a meaningful appeal because he was the person that carried out the exercise in the first place, so the dismissal would have been unfair for those reasons, even if it were redundancy dismissal.

12. In terms of the selection criteria, I too entertain grave suspicions as to whether or not they were in fact formulated at the time the respondent says they were. It is frankly surprising that no reference was made to them until they were disclosed in the course of the tribunal case. That may have been upon advice, but when the union were making it clear from a very early stage and the claimant was actually asking for the information and the details of her selection, not even to refer to the fact that that selection had taken place a week before the meeting held on 23 December does cause great doubt in the Tribunal's mind as to whether that document did indeed pre-date the meeting of 23 December. The claimant, of course, raises criteria as soon as she starts complaining about the dismissal, but be that as it may, another fact of course is that no reference was made to those criteria in the letter of 3 January, nor the Tribunal finds significantly was there any mention in that letter of the claimant's entitlements upon redundancy. Those only came in the letter of 20 January, it is usual when someone takes advice as to redundancy from anybody in addition to the advice they get as to how to do it they also make enquiries and find out what it is going to cost and include that in the dismissal letter. The Tribunal finds it significant that the dismissal letter itself does not refer to the redundancy calculation, it only comes out in the letter of 20 January.

13. So, for all those reasons in the alternative the Tribunal would have found that even if this was a redundancy dismissal, it would have been unfair, as to whether or not in those circumstances any reduction would have been made for ***Polkey*** as it is termed by lawyers, on the basis that had a fair procedure been followed it would have made no difference or would have simply delayed the inevitable dismissal by up to a month the Tribunal would not so have found, the reason it would not so have found and the reason it would not so have found is this. That as is clear from the ***Software 2000 Ltd v Andrews [2007]IRLR 568*** case and alluded to by Mr Mensah there are various possibilities in the ***Polkey*** reduction case, the Tribunal can decide it would have made no difference had a fair procedure been followed and therefore no reduction is made, that 100% reduction would be made in the first scenario but that the other alternative would be that she would have retained her job and that therefore there should be no reduction at all, or something in between. That exercise involves the Tribunal in a degree of speculation which, of course, the higher courts have said it should not preclude it from doing but it has had sensible material before it from which it can make an assessment of the chances the claimant would have had in those circumstances. That requires some more information before it than the Tribunal presently has and the problem with a flawed exercise such as this is that the flaws prevent the Tribunal effectively taking a sensible decision, if a Tribunal cannot say what would have happened it should not make a Polkey reduction, at the very most it seems to the Tribunal there might have been an argument for saying the claimant had a 50/50 chance when compared say to Lorna Watts but that brings supposes of the selection criteria would have been fair ones and appropriate ones, that the scores would have remained the same when reviewed and also that the possibility that Lorna Watts who one presumes was a more expensive employee would not in fact have been the better person to dismiss so for all those reasons even if the Tribunal had found that the dismissal was for redundancy it would have found it unfair and it would not have made any reduction for ***Polkey***.

Remedy.

14. That therefore means that the claimant, either way, but certainly the respondent having failed to establish a potentially fair reason is entitled to compensation and in terms of that compensation that set out in a Schedule of Loss. The claimant has been out of work since her dismissal, in terms of mitigation she has been unable to mitigate I find, in fact she sought to do so and indeed Mr Knutton cross examined her upon her attempts to do so, but ultimately her medical condition precluded her from getting any other employment. I am satisfied that it still does, I am also satisfied on the medical evidence that she has adduced that that medical condition arises predominantly as a result of her dismissal, to the extent that the interaction with Lorna Watts following her dismissal has added to that, that still arises out of her dismissal it seems to me and consequently whether her psychological difficulties are caused by her dismissal and/or her difficulties with Lorna Watts frankly doesn't seem to me to matter, they both arise out of her unfair dismissal, and so her medical inability to work which I find predominantly is because of a mental condition and not because of her foot condition, she having as it were soldiered on with that since her accident in April 2016 and there being no evidence that she could not have carried on at least up until the date of her operation, in employment then I find that she has not failed to mitigate her loss, and indeed is entitled to recover compensation for an appropriate period after her dismissal.

15. That begs a question of what that appropriate period should be and in the Schedule of Loss it is contended to be to date and then for future losses going forward for a year from today, subject of course to the cap that would be applied of 52 weeks gross pay. In the absence of any further representations on behalf of the claimant and having seen what she sets out in her Schedule of Loss assessing the appropriate period for which to award loss of earnings it seems to me that taking everything into account and given that this was relatively short lived employment, some three and a half years only and doing the best I can and allowing for the fact that the respondent's business, if nothing else, is not getting any better and allowing for the possibility that, even if she had got through last year, the position going forward may not be any better, and may well be deteriorating as Mr Knutton says. It seems to me that she is entitled to be compensated for her losses up to date, which is some 38 weeks, but in terms of how much further than that I should go I do not t think I can go a further year from today, but I do propose to go to a year from the date of the dismissal which would be a further 14 weeks.

16 On that basis the award I provisionally assess that would be made is for 38 weeks @ £242.74 which is £9,224.12, a further 14 weeks I calculate at £3,398.36, in total £12,623.48.

17. As however Mr Knutton had not apparently received a Schedule of Loss, the Tribunal will not proceed to make a final award, but will propose to make these awards together with the sums claimed for pension contributions of £6,81 per week and loss of statutory rights in the sum of two weeks pay. The respondent will be afforded 14 days from the date of this judgment in which to make any further representations in relation to the calculations of loss of earnings claimed by the claimant, and any other representations he wishes to make, and to seek a further hearing at which remedy will be determined.

18. Further, the claimant will, in this period, clarify the basis of her notice pay claim, the Employment Judge considering from the last pay slip available in the bundle that she appears to be have been for three weeks up until 20 January 2017, and consequently there seems to be no basis for this claim. The claimant, however, will doubtless advise the Tribunal within the same time scale as to whether this claim is pursued, and if so how it is calculated.

19. Further, the parties may wish to consider in the meantime whether they can reach an agreement as to remedy. It is likely that the compensatory award , in respect the loss of earnings up to the date of the hearing, would be subject to recoupment, given that the claimant received benefits, and the likely period in respect of which recoupment will apply will be from the date of her dismissal until the date of this hearing.

20. The parties are invited to consider whether a Remedy Hearing is necessary , and whether any further representations need be made in relation to remedy, or whether they can reach an agreement. If they cannot, however, they are to make any further representations in the timescale set out in the body of the judgment above, and to seek a remedy hearing if this is required..

Employment Judge Holmes

Dated : 20 October 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON
26 October 2017

FOR THE TRIBUNAL OFFICE

[JE]