EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	and	**Respondent**
Mr Tamas Varayev		C K Partnership Limited

Held at: Watford **On:** 2-3 November 2016

Before: Employment Judge Southam

Appearances:

Claimant: Mr Ben Norton, Student
Respondent: Mr George Christou, Director

JUDGMENT

1. BY CONSENT the respondent shall pay to the claimant the following sums:

   1.1 In respect of redundancy, the sum of £923.08; and

   1.2 In respect of pay in lieu of notice, the sum of £1600.

2. The claimant's dismissal was unfair.

3. The claimant is not entitled to a compensatory award for unfair dismissal. His rejection of the respondent's offer of reinstatement was unreasonable.

4. The respondent is ordered to pay to the claimant the sum of £510.00 in respect of tribunal fees paid by the claimant in respect of the issue of the proceedings and the hearing.

RESERVED REASONS

Claim and Response

1. The claimant submitted this claim to the tribunal on 18 July 2016. He did so having entered into early conciliation with ACAS by sending them the

requisite information on 20 May 2016. The ACAS certificate of early conciliation was issued by email on 20 June.

2. In the claim, the claimant said that he was employed as a trainee accountant by the respondent from 25 November 2013 until 22 February 2016. He brings complaints about unfair dismissal, a redundancy payment, notice pay and "other payments". In an attachment to the claim form, the claimant said that he was employed from November 2013 by Upper Street Accounts Ltd, a company which was taken over by the respondent at the end of 2014. The claimant was moved from an office in Angel, Islington to Southgate but, he says, he was promised a move to Farringdon in January 2016. He was then informed in January 2016 of the possibility of redundancies. The claimant said that he was at the time saying to his employers that it would be difficult to meet certain deadlines because of the volume of work he had to do, and he asked for support. His case is essentially that another colleague was identified as the person to be made redundant, but that changed and in due course on 18 February he was told that he was to be made redundant. His employment was terminated on 22 February 2016.

3. The claimant said that, on 1 March 2016, he was offered reinstatement. The claimant refused it, because of the way in which the respondent had handled the redundancy situation, because of their unfair treatment of him and the fact that there were no prospects of moving to Farringdon. He said that the respondent withheld his notice pay and redundancy payment.

4. In a response form submitted to the tribunal, accepted by the tribunal on 9 August, the respondent resisted the claim. They said that the claimant was transferred to Southgate because of a personality clash with a colleague. There was no promise to transfer the claimant to Farringdon, although it was discussed as a possibility. The respondent disputes that the claimant had insufficient time to complete certain work. They also dispute that the claimant's colleague was first identified as the person to be made redundant. Their case is that the claimant was selected for redundancy after a selection process involving three employees. They say that all staff working primarily on the Angel office portfolio were included in the pool for selection. They also say that the redundancy process was conducted in accordance with current employment legislation and fairly with no bias. They say that objective selection criteria were applied based on strengths and weaknesses of all staff members. The respondent agrees that they offered the claimant reinstatement on 1 March 2016, but the claimant declined the offer. They noted that the claimant said that he was glad that a position had become available. The respondent contends that they were entitled to withhold the claimant's redundancy payment because he unreasonably refused an offer of renewal of his contract of employment. They agreed that they were liable to pay him a payment in lieu of notice, equivalent to one month's pay.

Case Management

5. This claim was listed for a one-day hearing, as soon as it was issued, in accordance with current practice. Standard case management directions

were given. These included a requirement on both parties to supply a list of the documents in the case and for there to be an agreed bundle of documents for the purposes of the hearing. The hearing was to be on 13 October.

6. After the response was filed, the parties were invited to say whether or not they thought that one day was a sufficient allocation of time. The respondent said it would call two directors and the claimant said he would call two witnesses. The claimant thought that one day would be sufficient, but Employment Judge Heal decided that it should be listed for two days. The claimant secured the assistance of the Free Representation Unit to represent him. The respondent was not represented.

7. On 23 September the respondent made application to the tribunal to have the claim struck out on the basis that the claimant had failed to serve a list of documents. They said that they had not copied the claimant into that application because he had already confirmed that he had not complied with the case management order. In fact, the claimant's representative had apologised for the delay and promised to deliver a list of documents by 19 September. The respondent's application was not placed before a judge.

8. On 14 October the claimant, through his representative, made application for specific disclosure of certain documents and for the respondent to provide copies of documents included in a list.

9. Belatedly on 19 October, the respondent's application for a strike-out was referred to me, along with the application from the claimant. I directed that the claim was not struck out because of the claimant's delay in providing a list of documents, because a fair hearing was still possible. I further directed the parties to disclose copies of documents which appeared on any list of documents which have been exchanged. I made no order in relation to the long list of documents of which specific disclosure was sought. Nothing further arose before the hearing.

The Hearing

10. At the hearing, the parties appeared and were represented as indicated above. I heard evidence from Mr Ravi Koppa, one of the partners in the respondent company, and from the claimant. The evidence was completed on the first day. On the second day, I heard the parties' submissions and reached my decisions. My reasons were reserved.

11. There was an agreed bundle of documents, extending to 286 pages. In these reasons references to page numbers are to the numbered pages of the agreed bundle.

Issues

12. At the start of the hearing, I agreed with the parties what would be the issues I would have to determine. There was first a concession by the respondent, by which they agreed to pay the claimant sums in respect of notice pay and redundancy pay. This concession entailed an acceptance

that the respondent had been wrong to withhold the claimant's redundancy payment on the basis that they had made an offer of reinstatement, because that offer was not made before the end of the claimant's employment, as section 141 Employment Rights Act 1996 requires (see below). It was also conceded by the claimant that the respondent would show that the reason for the claimant's dismissal was that he was redundant.

13. The only liability issue I had to determine, expressed broadly, was the question of whether the respondent acted reasonably in treating redundancy as the reason for the claimant's dismissal. There were, however, detailed issues I was asked to consider and they were as follows:

13.1 Was there a proper consultation throughout the process?

13.2 Was the claimant's selection for redundancy pre-determined?

13.3 Or did the respondent identify a pool for selection within the range of reasonable pools?

13.4 If so, did they conduct the selection exercise using objective criteria?

13.5 Did they conduct the actual selection fairly (bearing in mind that the tribunal cannot substitute its view for the view taken by representatives of the respondent, acting reasonably)?

13.6 Was there a reasonable search for alternative employment?

13.7 If the dismissal was unfair, should the tribunal order the respondent to pay the claimant a compensatory award for unfair dismissal? That would entail the following further questions:

13.7.1 What was the claimant's loss?

13.7.2 Should the tribunal take account of the respondent's offer to reinstate the claimant with no loss of salary?

13.7.3 In this respect, the tribunal should consider, if necessary afresh, the following questions in assessing the reasonableness of the offer:

13.7.3.1 Whether or not there had been generally a poor consultation;

13.7.3.2 Whether or not someone else had been pre-selected for redundancy;

13.7.3.3 I should take into account that the claimant was the given less than two days to consider the offer;

13.7.3.4 I should take into account that the claimant was entitled to think that there was something suspicious or odd about the offer because, one week later, the respondent refused to make a payment in lieu of notice or a redundancy payment;

13.7.3.5 The claimant received a lack of support in January and February 2016; and

13.7.3.6 That the respondent reneged on a promise to relocate the claimant to Farringdon.

Findings of Fact

14. Having heard the evidence, I reached the following findings of fact:

14.1 The respondent is a firm of accountants. Although it is a limited company, as its name implies, it operates as if it were a partnership. Mr Koppa and Mr George Christou are partners in the business and are responsible for taking decisions about the future direction of the business including decisions about any redundancies.

14.2 In July 2014, the respondent firm acquired an accountancy practice called Upper Street Accounts Ltd, based in Islington. That practice was managed by Sarah Hodgson, and there were, according to the respondent, at the time of the acquisition of the practice in July 2014, four employees of that practice, including the claimant. The claimant thought that there were five employees in addition to Sarah Hodgson, but the difference between the parties in this respect is unimportant. It is agreed that two (or three) of the claimant's three (or four) former colleagues left the firm after the takeover. Those departures had the consequence that the claimant and a colleague, Sawako Takahashi and the manager, Sarah Hodgson, were the only survivors of the firm taken over by the respondent in July 2014.

14.3 Sarah Hodgson herself left the practice in January or February 2016 and was replaced as a manager of the office at Islington by Zoe Gorman, a long-term employee of the respondent.

14.4 The claimant himself had joined Upper Street Accounts Ltd on 25 November 2013. His responsibility included processing payroll and assisting more senior employees. The claimant was a trainee accountant. When, in 2016, redundancy decisions were made by the respondent the claimant was the holder of the Association of Accounting Technicians Level 2 Certificate in Accounting, awarded in November 2012 and the Level 3 Diploma in Accounting awarded on 8 October 2013. The claimant was studying for, but had not yet achieved that organisation's Level 4 Diploma in Accounting, in respect of which he had one optional paper outstanding. The claimant has a university Masters degree in accounting and audit from Ukraine, which is not recognised in the UK, five years

accounting experience in Ukraine and four years similar experience in the United Kingdom.

14.5 The Islington office acquired by the respondent in July 2014 operated from offices in respect of which the lease would expire in January 2016. The respondent had a general intention to relocate the office into other premises in that area, when the lease expired.

14.6 The claimant lives in Islington. He is married and has two daughters. It was very important for the claimant to be able to continue to work in Islington because of the local connection with his children's' schools. At the time of the redundancy I had to consider, in February 2016, his two daughters were aged seven and 17. The older daughter attends college. The younger daughter attends a school in Islington, minutes from where the claimant and his wife live, and the office where the claimant worked in Islington was 20 minutes from his home.

14.7 In August 2015, the claimant was transferred to work at Southgate, the offices of the respondent which they had always occupied before and since the acquisition of Upper Street Accounts Ltd. Mr Koppa alleges that the reason for the claimant to be transferred was that there was a clash of personalities between the claimant and Sawako Takahashi. That matter was not put to the claimant for him to confirm or deny. I therefore make no finding about that. It is agreed that the claimant was transferred to Southgate in August 2015. He was not happy about the move, and I find that, in order to keep the peace, the respondent's partners made a vague promise to the claimant that, as and when replacement premises were found in the Islington area after the expiry of the lease, the claimant could be transferred back to work there. That promise is to be found in a document at page 41, an email of 16 June 2015, in which the claimant was informed by Mr Koppa that his salary was to be adjusted upwards, that course fees would be paid for the first sitting, that the claimant would be allowed unpaid study leave and that he would be based at the Farrington office from January or February 2016, possibly earlier, along with Zoe Gorman.

14.8 After the claimant moved to work at Southgate, he continued to work for the same clients for whom he had worked previously at Islington. These were clients of the former practice Upper Street Accounts Ltd. At the Southgate office there were approximately eight other employees, who worked on two different floors of the premises at Southgate. Those working on the ground floor worked for clients of the former practice Upper Street Accounts Ltd. Those working on the first floor worked on the Southgate portfolio of clients. I accept that all of them did similar work. The only thing that distinguished them was the portfolio of clients whose work they did.

14.9 Having acquired the Islington practice in July 2014, the respondent experienced significant client losses from the Islington portfolio of clients during the course of the year to December 2015. This is the

evidence of Mr Koppa. I have no reason not to accept his evidence, and the claimant did not challenge it. It is perhaps not surprising that the respondent might sustain a loss of clients from a business they acquired, which resulted in a change of partner responsibility and departures of staff undertaking the work. For those reasons, I accept that the respondents sustained this loss of regular work from the Islington portfolio of clients. Mr Koppa put the figure at an annual loss of fee income of £120,000.

14.10 The respondent's decision was to reduce the number of staff by one. That decision was made in January 2016. The only evidence of the rationale about the selection process is in a minute of a meeting of partners held on 8 January 2016, pages 45-46. What is clear from the document is that the respondent's partners decided to have a pool for selection from which one person was to be made redundant, which would either be the group of staff working on the Southgate portfolio of clients or the group working on the Islington portfolio of clients. The decision was made to isolate the staff working on the Islington portfolio as the pool from which the selection would be paid. There is a rationale in this document. It said that the Southgate team have a good working relationship with Southgate clients and had worked with them for a number of years. It was said that, on this basis, it would not make sense to include any member of this team in the potential redundancy pool. By contrast, the team servicing the Islington clients had very high staff turnover and a significant loss of clients. Only Sarah Hodgson had a close working relationship with clients. The decision was therefore to choose one member of the staff working on the Islington portfolio of clients. That group was Zoe Gorman, the claimant and Sawako Takahashi.

14.11 Mr Koppa accepted that the claimant had good working relationships with his clients, but they were not as long-lasting as client relationships other staff had with the Southgate clients. The claimant had only been with the practice for just over two years.

14.12 I should record here that the distribution of work of the Southgate and Islington clients was not exclusively as between the three identified members of staff working on Islington client work and the others working on Southgate work. A member of staff called Alina did some work on the Islington portfolio of clients, but I find that she worked mainly for Southgate clients, even when she worked on the ground floor of the premises in Southgate. Dana Pope, who left in December 2015 had done some work for Islington clients. A lady called Joanna moved to the ground floor and undertook a specialised audit for an Islington client, but mostly her work was done for Southgate clients.

14.13 The respondent held a meeting with the three redundancy candidates, Zoe Gorman, the claimant and Sawako Takahashi on 13 January 2016. At this meeting, the partners invited applications for voluntary redundancy, but there were no volunteers. The

partners provided the staff attending the meeting with details of the method by which there would be a selection for redundancy. The document shown to the staff attending is at pages 49-55 in the bundle. The meeting lasted about five minutes.

14.14 The respondent then confirmed to each of the three of them the matters that had been discussed, in a letter dated 13 January 2016, page 48. This letter stated that the business had sustained the loss of a significant number of clients from the Islington portfolio and that there may be further client losses in the near future. The decision was to consider making redundancies. All of the employees working on the Islington portfolio were at risk of redundancy. Selection would be made on the basis of objective and quantifiable selection criteria, which were attached.

14.15 After this meeting, the claimant went for a coffee with Zoe Gorman at her invitation. During a discussion, Zoe Gorman suggested that Sawako Takahashi would be the person to be made redundant. She thought the view about her was that she was difficult to work with, unhelpful and rude. She suggested the claimant need not be worried about being made redundant.

14.16 A further letter was sent to each of the three potential redundancy candidates, Zoe Gorman, the claimant and Sawako Takahashi on 30 January: see page 58. This letter stated that the respondent was being forced to consider making redundancies by the reorganisation programme because of client losses. It was envisaged that one employee would have to be made redundant. There was to be consultation over next few days.

14.17 On 2 February, claimant found that his workload was greater than he could cope with. At that time, he was unable to meet some deadlines set for 5 February. He sought help from Zoe Gorman and they discussed the matter. The claimant was provided with advice about how to prioritise his work. The claimant thought that the work could not be done in the time agreed. The partners and Zoe Gorman took a different view.

14.18 The parties agree that the respondent invited the claimant, on 4 February, to attend a consultation meeting the following day. I was not provided with a copy of the letter. The meeting took place on 5 February. The respondent has produced minutes: page 62.

14.19 The evidence of the witnesses I heard as to what was discussed at this meeting differ. The claimant states that he was told that Sawako Takahashi would be made redundant and that he would be staying with the firm. He was grateful. He said the partners told him that they were very dissatisfied with Sawako Takahashi. They knew she was looking for another job. The claimant says that, during the same meeting, he asked for overtime to enable him to complete the outstanding work and it was refused. He also says that he was informed that he would not be relocating to Farringdon. Insofar as

those matters were put to Mr Koppa, he denied the first of those matters only. He states that he did not tell the claimant that Sawako Takahashi would be made redundant. He agrees that the claimant requested overtime, that they refused to give it and that they told the claimant that he was not ready to go to Farringdon. They needed two people who could work independently. In the short-term, the claimant would remain at Southgate, but they had not decided whom to make redundant. The disagreement between the witnesses is as to whether or not the claimant was told that Sawako Takahashi was to be made redundant. I find that he was not told that. I believe that the claimant has made the assumption, based on what Zoe Gorman told him, that that was a settled view of the partners before this meeting.

14.20 A minute of that meeting, at page 62, which was not sent to the claimant for his approval, shows that it was an individual meeting and, according to the minutes, those present discussed ways of avoiding redundancy or mitigating its consequences and the claimant was asked for his proposals. There is reference to the claimant requesting that he be allowed to work overtime and receive payment for it, the refusal of that request and the proposed transfer to the Farringdon office.

14.21 On 8 February, the respondent wrote to the three candidates for redundancy to invite them to consider making an application for voluntary redundancy. They were told that the respondent reserved the right not to accept any application. If an application was made, it could be withdrawn at any time prior to 12 February. No-one applied for voluntary redundancy.

14.22 On 15 May, the partners, Mr Koppa and Mr Christou met to discuss their choice as to who should be made redundant. They purported to complete the selection criteria matrix form. The guidance, which had been shown to the employees, at pages 49-55, indicated that the partners should undertake the selection for redundancy separately, arriving at their own independent scores, using the agreed criteria and scoring matrix. Once they had done that, they were to meet to discuss and agree final selections. An independent moderator from HR was to be present at the meeting, to oversee the process, provide professional and technical advice and ensure the process is fair and transparent. It is said that it is recommended that partners involved in the redundancy selection are to have direct knowledge of the employee and the work they perform or access to verified records of the employees' performance.

14.23 Mr Koppa accepted that he and his partner did not undertake independent scoring of the three at-risk employees. There was no independent moderator present. He insisted that he did have direct knowledge of the claimant's work. Once the claimant moved to Southgate, as he put it, he had "intimate" knowledge of the claimant's work, and, prior to that, feedback from Sarah Hodgson prior to the redundancy process. Mr Koppa claimed that they used

available evidence to assess performance, but I was not provided with copies of any of that evidence. There was no evidence used to assess knowledge, skills or experience. Their assessments in those respects were based on personal knowledge of the candidates.

14.24 I was provided with copies of the scores for each of the three candidates. Zoe Gorman scored 24, Sawako Takahashi 18, and the claimant 4. Although it may not have made any difference, the claimant was given a weighted score of -9 for attendance, which significantly affected his final score, although, if his score for attendance had been zero, his overall score would still have been less than that of Sawako Takahashi. Mr Koppa was quite unable to explain how that score had been arrived at. In an analysis of those results in minutes of a partners meeting held on 15 February, those scores are recorded. In particular, the score for the claimant is shown as 13 but also as 4, after taking into account the attendance score. Mr Koppa confirmed that all the scores were arrived at by the partners working collaboratively and not independently.

14.25 The result was that the claimant was selected to be made redundant and he was so informed of that decision at a meeting on 18 February. Minutes of that meeting, at page 68, suggest that the claimant was told that his selection was provisional and there would be a further meeting on 22 February. In the meantime, however, the claimant would be placed on gardening leave. All of that was explained to the claimant in a letter sent to him the same day, page 69.

14.26 At a further meeting on 22 February, the claimant was informed that he was to be made redundant, and he was provided with a letter confirming the decision. Those documents appear at pages 70-72. The claimant's employment was to end immediately, that day. However, he would be paid a sum of money in lieu of notice.

14.27 Thereafter, having avoided redundancy, Sawako Takahashi handed in her notice. The claimant was informed of this development in an email sent by Mr Christou to him on 1 March. He wrote to the claimant to say that they no longer needed to make him redundant and his job position was now available again. They wanted him to come back to work with immediate effect and, for goodwill, they would pay him his salary with effect from the date of dismissal, 22 February. The claimant replied to this email asking who had resigned. He said he was glad that the position was available, but he would need to consider some things before giving an answer. Mr Christou replied immediately to say that it was Ms Takahashi who handed in her notice. All of those emails were on 1 March. The following day at 1004, the claimant sent a short email to Mr Christou, saying, "sorry for the delay. I will come back to you as soon as I can.".

14.28 Later that day, Mr Christou pressed the claimant on his decision and, at 1459 on 2 March, the claimant gave his decision. It was to decline the offer of reinstatement. He said that the reason for his decision was that, throughout the past several weeks, their position concerning the claimant's post kept changing. He said that he had a family to take care of and that he could not afford any job insecurity. He had therefore started considering other more suitable job opportunities. Mr Christou replied to wish him all the best for his future career.

14.29 On 8 March, Mr Christou wrote again to the claimant to say that he would sort out the claimant's final pay, but there would now be no redundancy package or termination payment in view of the claimant's decision not to accept the offer of reinstatement.

14.30 The claimant went to the Islington Law Centre to complain about what had happened and they wrote to the respondent on 21 April. The matter was not resolved. The claimant approached ACAS for early conciliation purposes on 20 May 2016, and, as indicated above, he commenced these proceedings on 18 July.

Relevant Law

15. In considering my conclusions. I considered and applied the following provisions of law or case law.

15.1 Section 98(1) Employment Rights Act 1996 provides that it is for the employer to show the reason for the dismissal and that it is one of the potentially fair reasons set out in Sections 98(1)(b) or 98(2) of that Act. A reason that the employee is redundant is one of those reasons and is provided for at Section 98(2)(c).

15.2 When the requirement in section 98(1) has been fulfilled, the determination of the question whether the dismissal is fair or unfair depends on whether in the circumstances including the size and administrative resources of the employer's undertaking the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and is to be determined in accordance with equity and the substantial merits of the case: section 98(4) Employment Rights Act.

15.3 In Williams v Compair Maxam [1982] IRLR 83 the Employment Appeal Tribunal held that it was generally accepted that, where employees are represented by a union recognised by the employer, reasonable employers will seek to act in accordance with the following principles. The employer will seek to give as much warning as possible of impending redundancies. The employer will seek to agree with the union the criteria to be applied in selecting employees to be made redundant. The criteria will be those which do not depend on the opinion of the person making the selection but which can be objectively checked. The selection will be made fairly

in accordance with those criteria. Lastly, the employer will seek to see whether he can offer the employee alternative employment. However, in Rolls–Royce v Dewhurst [1985] IRLR 184, it was held that a breach of those guidelines is not a ground in itself for a finding of unfair dismissal. In Simpson & Son v Reid and Findlater [1983] IRLR 401, it was said that those guidelines are not principles of law but standards of behaviour where substantial redundancies arise where there is a recognised union. They were not intended to be considered in every case, being ticked off as if on a shopping list, giving rise, where one has not been complied with, to automatic unfairness.

15.4 Section 141 Employment Rights Act 1996 is concerned with where an offer is made, whether in writing or not, to an employee, before the end of his employment, to renew his contract of employment, or to re-engage him under a new contract of employment, where the renewal or re-engagement is to take immediately or not later than four weeks after the end of the employment. In those circumstances, the employee is not entitled to a redundancy payment if he unreasonably refuses the offer. There are conditions attached to that provision. The conditions provide that the provisions of the renewed or new contract should not differ from the corresponding provisions of the previous contract or otherwise the offer represents an offer of suitable employment in relation to the employee.

15.5 Awards for unfair dismissal are dealt with in chapter II Employment Rights Act 1996. Although a successful claimant who is dismissed, unfairly, for redundancy is entitled to a basic award for unfair dismissal, the amount of the basic award is reduced by the amount of any redundancy payment awarded by the tribunal. Such a claimant would still, however, be entitled to a compensatory award, as provided by section 123 of that act. Section 123(1) provides that the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal, insofar as that loss is attributable to action taken by the employer.

15.6 Sub-section (4) of that section provides that, in ascertaining the loss referred to in subsection (1), the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales.

15.7 In Cooper Contracting v Lindsey (unreported UKEAT/0184/15), the Employment Appeal Tribunal considered the common law duty of an employee to mitigate his loss. In his judgment Langstaff J said as follows:

Therefore:

(1) The burden of proof is on the wrongdoer; a Claimant does not have to prove that he has mitigated loss.

(2) It is not some broad assessment on which the burden of proof is neutral. I was referred in written submission but not orally to the case of **Tandem Bars Ltd v Pilloni** UKEAT/0050/12, Judgment in which was given on 21 May 2012. It follows from the principle - which itself follows from the cases I have already cited - that the decision in **Pilloni** itself, which was to the effect that the Employment Tribunal should have investigated the question of mitigation, is to my mind doubtful. If evidence as to mitigation is not put before the Employment Tribunal by the wrongdoer, it has no obligation to find it. That is the way in which the burden of proof generally works: providing the information is the task of the employer.

(3) What has to be proved is that the Claimant acted unreasonably; he does not have to show that what he did was reasonable (see **Waterlow**, **Wilding** and **Mutton**).

(4) There is a difference between acting reasonably and not acting unreasonably (see **Wilding**).

(5) What is reasonable or unreasonable is a matter of fact.

(6) It is to be determined, taking into account the views and wishes of the Claimant as one of the circumstances, though it is the Tribunal's assessment of reasonableness and not the Claimant's that counts.

(7) The Tribunal is not to apply too demanding a standard to the victim; after all, he is the victim of a wrong. He is not to be put on trial as if the losses were his fault when the central cause is the act of the wrongdoer (see **Waterlow**, **Fyfe** and Potter LJ's observations in **Wilding**).

(8) The test may be summarised by saying that it is for the wrongdoer to show that the Claimant acted unreasonably in failing to mitigate.

(9) In a case in which it may be perfectly reasonable for a Claimant to have taken on a better paid job that fact does not necessarily satisfy the test. It will be important evidence that may assist the Tribunal to conclude that the employee has acted unreasonably, but it is not in itself sufficient.

Conclusions

16. I reached the following conclusions, having applied to the facts I have found, the relevant legal provisions, in relation to the issues that I had to decide.

17. I will address each of the issues in paragraph 13 above.

18. The first matter is to consider the extent to which the respondent undertook consultation. I am satisfied that there was proper consultation

with the claimant. He attended a joint consultation meeting at the start of the process on 13 January and there was a series of individual consultation meetings with the claimant thereafter. I think that the consultation was meaningful in the sense that the claimant clearly understood that the respondent had decided to make one person redundant, that he understood the reasons for it and that he understood that he was at risk of redundancy. In my judgment, this is a sufficient consultation. However, I think that the respondent did no more than to pay lip service to the possibility of alternatives to redundancy. There was no evidence of any actual consideration of such alternatives. This is despite the correspondence from the respondent making clear that they understood that it was their responsibility to consider the possibility of alternatives to redundancy, for instance, in the letters or minutes at pages 58, 60, 62 and 68. I return to this criticism below.

19. The next issue is about whether the claimant's selection for redundancy was predetermined. I heard disputed evidence about whether or not the selection of Sawako Takahashi was predetermined, but in any event, it did not happen. I do not accept that the partners told the claimant that she had been pre-selected for redundancy. This is inconsistent with other evidence, for instance the offer of voluntary redundancy, which occurred later than the meeting, 5 February, at which, supposedly, the claimant was informed that Sawako Takahashi had been preselected and the actual scoring, which suggests that it is highly unlikely that Sawako Takahashi would have been selected. I am of the view that Zoe Gorman expressed a personal view, and not the view of the partners. There was no evidence of the claimant having been preselected for redundancy, which is the matter I was asked to consider.

20. The next question is whether the selection pool adopted by the respondent was within the range of reasonable selection pools. I am satisfied that it was. On the evidence presented to me, I was unable to reach a concluded view about the respective workloads of individuals working at Southgate. The choice the respondent made was to identify those members of staff responsible for working on the Islington portfolio of clients as the pool from which to make the selection of one person to be made redundant. Bearing in mind that the evidence presented to me was that the loss of clients was from that portfolio of clients and not from the Southgate portfolio, this was not an unreasonable decision for the respondent to make. These three staff worked predominantly for the Islington clients and the amount of work done by other staff for those clients was not very great. For those reasons, I do not consider that the selection of the Islington team as the pool from which the selection was to be made is outside the range of reasonable selection pools.

21. The next issue requires me to consider whether the actual selection process was undertaken fairly and I take the next two issues together. The first is concerned with the use of objective criteria. The second, as to whether the actual selection was conducted fairly. Here it is clear that the respondent did not act in accordance with its own policy. The selection criteria were objective. But the partners did not undertake the scoring independently, as they were required to do. There was no independent

moderator. I accept that the partners will have had knowledge of the work that all three candidates did. In a small firm, it is inevitable that the assessment of candidates for redundancy will be based on personal knowledge. However, I was told that the assessment of performance was based on performance records. No evidence was presented to me to support that assertion, and the records were not shown to me. It would not have been for me to undertake an evaluation of the records, but, Mr Koppa's evidence was that the assessment of performance was based on records, and I would have to be satisfied that the process had been undertaken transparently. In the absence of the production of such records, I cannot be satisfied that that happened in practice. Lastly, there was clearly an error in the attendance score in relation to the claimant.

22. These matters are sufficient in my judgment to render the dismissal unfair. Not following the employer's own procedure entails a risk that a candidate was marked unfairly. In addition to that matter, there was no search for alternative employment for the claimant, let alone a reasonable search. I accept that in a small firm, the possibility of alternative employment in a redundancy position might be remote, but there was no suggestion of any discussion of part-time employment as an alternative to redundancy. This aspect of the matter is an echo of the failure of the respondent to do more than to pay lip service to the need to try to identify alternatives to redundancy, which I mentioned above. This is a further aspect of unfairness in relation to this dismissal.

23. Having regard to those findings, I concluded that the dismissal was unfair.

24. Bearing in mind that the respondent had agreed at the start of the hearing to pay the claimant his redundancy payment, the only matter I had to determine was whether or not the claimant was entitled to receive a compensatory award for unfair dismissal.

25. I therefore had to consider the questions at paragraph 13.7 of the list of issues above. There were essentially two questions. The first was an assessment of the claimant's loss. The second was to determine whether the claimant should receive a compensatory award at all, when he had refused an offer of reinstatement with no loss of pay. The issues at the sub-paragraphs of paragraph 13.7.3 are the matters I was asked to consider in assessing whether or not the claimant acted reasonably in refusing the offer. I considered those first.

26. The first of those matters was not established, in my judgment. I was not satisfied that there had been a poor consultation. In turn, therefore, that was not a reason justifying the claimant in refusing the offer of reinstatement. The same applies to the second factor. No one had been pre-selected for redundancy. As to the third matter, it was the claimant himself who promised to get back to employers quickly with his decision on the offer of reinstatement. It was therefore not an unreasonable action on the part of the respondent to insist that the claimant make his decision by the end of 2 March. The claimant had himself agreed to act quickly.

27. As to the fourth matter, this is not an arguable point. At the time at which the claimant had to consider the respondent's offer of reinstatement, he did not know that they would thereafter, wrongly, decide to withhold the redundancy payment and payment in lieu of notice. This after-acquired knowledge cannot be used in support of the claimant's earlier decision not to accept the offer of reinstatement.

28. The only matter which the claimant relied upon in terms of lack of support was in relation to February 2016. On the evidence presented to me, the claimant was provided with some support when he found that he was having difficulty meeting deadlines. I cannot say that the support offered was sufficient. The claimant will have had his own view about that. That might amount to a reason for not wanting to remain with the respondent in the long term. But, in my judgment, it does not justify the claimant's refusal of the offer of reinstatement and his claim for a substantial compensatory award in these proceedings.

29. Lastly, I am to consider that the respondent reneged on its promise to relocate the claimant to Farringdon. It seems to me that this is the sort of decision that the partners in a firm of accountants are entitled to review from time to time. The promise to transfer the claimant to Farringdon was not contractually binding. I understand that it was important to the claimant to be working in the Islington area. Again, this is a reason why the claimant might not wish to remain with the respondent in the long term, but it does not justify the claimant's refusal of the offer of reinstatement and his claim to a substantial compensatory award in these proceedings.

30. Those were the issues that I was asked to consider in assessing whether or not it was reasonable for the claimant to reject the offer of reinstatement with full pay back to the date of dismissal. For the reasons I have given above, I am satisfied that it was unreasonable for the claimant to reject the offer. The claimant had the opportunity to continue working for the respondent with no loss of pay. In those circumstances, it seems to me that he had the opportunity fully to mitigate his loss by going back to work for the respondent. He rejected that opportunity. I therefore consider that he is not entitled to any compensatory award. Applying the words of section 123 Employment Rights Act 1996, any loss the claimant sustained is not loss which was sustained in consequence of the dismissal, nor was it attributable to action taken by the employer. It was attributable to the claimant's failure to accept a reasonable offer of reinstatement. It is not just and equitable, in those circumstances, for me to make any compensatory award for unfair dismissal. For those reasons, I did not assess the claimant's loss.

Tribunal Fees

31. All of those decisions were communicated to the parties when I completed my deliberations on 3 November. That left still to be determined the question of whether or not the claimant should be reimbursed the tribunal fees he paid in connection with these proceedings. The respondent conceded that they had not paid the claimant his redundancy payment or his payment in lieu of notice before the proceedings were commenced or

even before the hearing. They accept that they should have paid the claimant those sums and they accept that they are therefore liable for a Type A fee in respect of these proceedings. The claimant has of course paid the much larger Type B fee and, since the matter could not be agreed, I directed the parties to make submissions and agree a bundle of documents to be presented to me so that I could make my decision about tribunal fees, on paper after the hearing.

32. The parties have presented, as I directed them, a small bundle of correspondence relating to the question of tribunal fees and they have made written submissions about that subject.

33. Under the Employment Tribunals Rules of Procedure 2013, Rule 75-76, a costs order includes an order in respect of a tribunal fee paid by a claimant. Under rule 76, the tribunal may make a costs order of that kind where a party has paid a tribunal fee in respect of a claim, and that claim is decided in whole, or in part, in favour of that party.

34. The correspondence I was shown was in September and October 2016. The correspondence was therefore after the proceedings were commenced, and before the hearing before me. In September, the respondent made a without prejudice offer to pay the redundancy pay and notice pay and the tribunal fee, said to be £310, paid by the claimant so far. Mr Christou, who was conducting that correspondence on behalf of the respondent was adamant that they would not accept any compensatory award as they strongly denied unfair dismissal. Mr Koppa repeated that offer through ACAS on 26 September. There was further correspondence at the end of October. By then, it appeared that the respondent had changed its position in relation to the redundancy payment because Mr Norton found it necessary to explain to them that the respondent was not entitled to withhold the redundancy payment because the offer of reinstatement was not made before the end of the claimant's employment.

35. In his written submission, Mr Koppa recites those offers and states that the claimant is not entitled to the type B claim fee of £250 or the type B hearing fee of £950, as the matter should not have been brought to the employment tribunal. The claimant would only have been entitled to a type A claim fee of £160, but not the type A hearing fee. Mr Koppa asserted that considerable time and cost had been incurred by the respondent in defending the claim, but there was no evidence of any legal representatives having been retained to assist them.

36. For the claimant, Mr Norton submitted that the claimant should be awarded the type B fees of £1200 because he won on all three issues, and in particular because the tribunal found that he had been unfairly dismissed. He makes the point that the respondent denied liability in respect of the statutory redundancy payment. He further argues that the respondent did not make a discrete offer to settle the claim for statutory redundancy pay and notice pay separate from the unfair dismissal claim. The only offer they made was to settle all issues, including unfair dismissal. It was not unreasonable for the claimant to reject this offer, because accepting it would have forced him to drop his claim for unfair dismissal.

37. My view is that, whether or not the claimant thought that he had a strong claim in respect of unfair dismissal, he ought to have appreciated after the response was filed, that bringing such a claim was highly unlikely to yield any compensatory award because of his rejection of an offer of reinstatement with full pay. I think that the claimant was entitled to commence the proceedings on the basis of a type A claim and he should be reimbursed the issue fee of £250. Once the offer was made in September, the claimant could have achieved all that he achieved before me, without the need for a hearing. However, at some stage, the respondent appeared to withdraw its offer to pay the statutory redundancy payment. In those circumstances, it is appropriate that the claimant is reimbursed the amount of a type A hearing fee, £260. For the reasons given above, pursuing the unfair dismissal complaint was futile and it is not in my view appropriate to reimburse the claimant the larger type B hearing fee.

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Employment Judge Southam

Date: 6 January 2017

JUDGMENT SENT TO THE PARTIES ON:

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FOR THE TRIBUNAL OFFICE