EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr. M Handley	**v**	Tatenhill Aviation Limited

Heard via Cloud Video Platform in the Midlands (East) Region

On: 12 March 2021

Before: Employment Judge Ayre (sitting alone)

Appearances
For the Claimant: In person
For the Respondent: Mr. R Chaudhry, Solicitor Advocate

JUDGMENT

1. The claimant was unfairly dismissed.

2. The claimant is not entitled to any compensation as a result of the unfair dismissal.

REASONS

3. By claim form dated 12 August 2020, following a period of early conciliation from the claimant brought claims of unfair dismissal and for a redundancy payment.

4. In summary, the claim arises out of the respondent's decision to dismiss the claimant following a substantial loss of revenue due to the Covid 19 pandemic.

5. A preliminary took place before Employment Judge Hutchinson on 16 December 2020. At that hearing the claimant asserted that his claims were for unfair dismissal, a redundancy payment and breach of contract in respect of notice pay. He acknowledged however that he had, by the time of that hearing, been paid his redundancy payment and notice pay. Those claims were therefore dismissed upon withdrawal.

The issues

6. The issues that fell to be determined at the final hearing were as follows:-

6.1. What was the reason or principal reason for the claimant's dismissal and was it a potentially fair reason? The respondent says that redundancy was the reason for dismissal. The claimant says that there was not a genuine redundancy situation, as he was 'replaced' with self-employed flight instructors, and that the real reason he was dismissed was to save costs.

6.2. Was the dismissal fair or unfair? The claimant alleges that the dismissal was unfair because:-

6.2.1. He agreed to furlough on the understanding that he would stay on furlough until he could fly again, but just 3 weeks on furlough the respondent began a redundancy process; and

6.2.2. When flight training started again on 6th July the claimant was kept on furlough and his work was covered by a self-employed instructor.

The proceedings.

7. I heard evidence from the claimant and his wife Claire Handley and, on behalf of the respondent, from Paul Shelton, director and company secretary.

8. There was a bundle of documents running to 176 pages. That bundle was agreed with the exception of one page (p 179) which the claimant objected to. The claimant also introduced a supplemental bundle running to 514 pages and containing technical flight logs for the months of January, February, March, July and August 2020.

9. I was provided with written submissions on the part of the respondent, for which I am grateful, and heard oral submissions from the claimant and the respondent's representative.

Findings of fact

10. The respondent operates a small private airfield and provides flying lessons, flying experiences, aircraft hire, aircraft maintenance and related activities. The claimant was employed by the respondent from 11 July 2004 to 10 August 2020 as a full time flying instructor. His role involved providing private flying lessons and flight experiences to customers of the respondent in small private aircraft.

11. He worked 40 hours a week and, until February 2020 his normal working days were Sunday to Thursday inclusive. In February 2020, at the claimant's request, his days of work changed so that he worked from Monday to Friday inclusive.

12. The respondent is a small business with 12 employees. It also uses self-employed flight instructors. Prior to the first Covid19 related lockdown in March 2020, the respondent employed two full time flying instructors, the claimant and Dave Wood, and also used four self-employed part time flying instructors who mainly worked at weekends. The respondent has two directors, Mr. Shelton and his father who was, at the relevant time, unwell.

13. The self-employed instructors operate on a different basis to the claimant and Mr. Wood. They are not paid salaries but instead submit invoices. They don't receive any pension benefits or sick pay and only work when required. The respondent has limited control over what they do. They often source their own clients who usually booked in directly with them. The clients would pay the respondent for their lessons / flights, and the self-employed instructors then submit an invoice to the respondent which the respondent pays.

14. On 14th February 2020 the claimant sent an email to the respondent's directors asking for a pay rise. The directors replied on 4th March and told the claimant that it was their intention to carry out a proper pay review with the claimant after the April budget. The claimant was asked to prepare proposals justifying an increase.

15. On 15 March 2020 the claimant and members of his family developed Covid19 symptoms. The claimant remained at home self-isolating for two weeks. During this period the country went into the first national lockdown, and the claimant was notified by the respondent that all flight training had ceased for the foreseeable future.

16. On 7th April Mr. Shelton told the claimant that the respondent's flying school was closing due to the Covid19 pandemic. It was agreed that the claimant would be placed on furlough in accordance with the terms of the Coronavirus Job Retention Scheme. The claimant signed a letter agreeing to go on furlough. The letter contained the following terms:-

> "*Fortunately the Government are introducing a Job protection scheme for employees like yourself who would be otherwise lose their jobs due to commercial effects of Covid19. This is termed 'being furloughed'. You are a valued employee and we hope that the situation will be temporary. We should like to offer you the opportunity to remain in Tatenhill's employ whilst remaining at 80% of your salary which we hope to be able to pay as normal. This will be for a period of up to 3 weeks initially or until you can return to work as normal. Furlough to commence Monday 30th March…"*

17. Covid19 had a significant impact upon the respondent's business. Even prior to the pandemic the trading side of the business (which included the flying school) was struggling financially. For the financial year February 2019 to 2020 it made a trading loss of £32,895, but was supported by rental income which prevented the respondent from making an overall loss. With the loss of income from flight school and aircraft hire during lockdown the respondent suffered a cash flow crisis. Initially it did not receive any financial support by way of leisure rate relief or CIBLS, although this did subsequently change.

18. In April 2020 the respondent began considering redundancies. Mr. Shelton produced a document, headed "Flight training / instructor redundancy" and dated 16 April 2020. That document noted that all flight training had ceased due to the Covid19 restrictions, that the flight training part of the respondent's business had no income at all, and that it was envisaged that this would remain the case for the foreseeable future. It was anticipated that, even when flight training resumed, there would be a much reduced need for it, partly because flight training involves

close contact between instructor and student in a small confined environment in which the risk of transmission of Covid19 was very high.

19. Mr. Shelton commented in the paper that it may be necessary for both instructors to be made redundant, but then went on to compare the skills and experience of both the claimant and Mr. Wood in case a selection process was required. Mr. Wood had a number of additional skills which the claimant did not have:-

    19.1. Mr. Wood could teach and fly aerobatics (which were a significant source of income) and Tailwheel;
    19.2. Mr. Wood worked weekends when the demand for lessons was highest;
    19.3. Mr. Wood was a qualified flight examiner; and
    19.4. Mr. Wood had also worked as an aircraft engineer and so could work in the respondent's engineering facility which was still open at the time.

20. He also wrote that:

    "*When flight training becomes possible we anticipate a much reduced demand. The business is anxious to be able to recommence some flight training when this becomes possible and as such would like to maintain one flight instructor to enable this.*

    It may be necessary for both instructors to be made redundant, however if there is initially a selection to be made then Martin can only fulfil part of the flight instruction role in that he cannot instruct aerobatics which is a significant element of the business nor tailwheel instructions which is also part of the flight training. Martin doesn't work weekends when we have high demand. Dave is also a flight examiner. Essentially Dave Wood can fulfil the total instructor role, Martin cannot….

    Aerobatic flights are a significant source of income to the company and amount to the greatest proportion of flight voucher sales.

    In terms of temporary redeployment we have no role that Martin could undertake. Dave was an aircraft engineer in the past and our engineering facility is still operating so this may be a possible option?"

21. In his evidence to the Tribunal Mr. Shelton accepted that, by 16 April, he had formed a view that it was likely that the claimant would be selected for redundancy. When asked if there was anything that the claimant could have said to change his mind, Mr. Shelton replied 'yes' if the claimant had said he was happy to do other work for the respondent, such as marketing or engineering, but the claimant had made clear that he did not want to do any work other than flight training.

22. On 27 April 2020 there was a conversation between the claimant and Mr. Shelton. The claimant's evidence is that the conversation took place by telephone. Mr. Shelton said that the conversation took place face to face in a meeting in Mr. Shelton's office. On balance I prefer Mr. Shelton's evidence on this issue, as it is supported by an email sent to the claimant the following day in which Mr. Shelton referred to "*our consultation meeting*". Nothing turns however on whether the conversation took place by telephone or in person, given that the country was by

that time in national lockdown. Both parties agree that there was a discussion about potential redundancy on 27 April.

23. There were handwritten notes of the conversation in the bundle. They record that Mr. Shelton told the claimant that as flight training had ceased; there was no income and therefore no work for flying instructions, and a risk that a flight instructor may be made redundant. They also record that the claimant was told that a consultation process would take place and the claimant was invited to put forward any suggestions of ways to avoid a redundancy situation.

24. Mr. Shelton had a similar conversation with Mr. Wood, and warned him that he was also at risk of redundancy. Mr. Wood suggested to the respondent that he could work in the respondent's engineering department as well as teaching flying lessons, and as a result was taken out of the pool for redundancy selection.

25. Following the meeting on 27 April, the respondent wrote to the claimant on 28th April confirming what had been discussed and warning him that there was a potential redundancy situation and that the respondent would be starting a period of formal consultation with a view to avoiding compulsory redundancies. The respondent asked the claimant whether he had any suggestions of avoiding redundancies, and that he give some thought to the possibility of alternative employment. The letter also made clear that if compulsory redundancies were required, it was likely that only one flight instructor would be required in the future and set out the provisional criteria that would be used to select for redundancy, namely:-

    25.1. Qualifications;
    25.2. Length of service; and
    25.3. Abilities to carry out the instructional role as a sole instructor.

26. Redundancy consultation meetings took place with the claimant on 4th and 18th May 2020. On 4th May Mr. Shelton and a Mr. Calverley, met with the claimant. During the meeting the claimant was asked for his comments following the meeting that had taken place on 27 April. The claimant told the respondent that he understood that if flight training was not possible then he must be redundant, and that he had no suggestions of alternative work that he could do for the respondent because he is a flying instructor. There was then a discussion, initiated by the claimant, about his notice and redundancy pay entitlement.

27. After the meeting on 4th May, the claimant sent an email to Mr. Shelton asking why the company had chosen to make him redundant rather than keep him on furlough, and why only one person was being made redundant. Mr. Shelton spoke to Mr. Calverley and asked him to reply on his behalf. Mr. Calverley told the claimant that the respondent was concerned that the job retention scheme would come to an end in the near future which would leave the company struggling to pay wages.

28. In his evidence to the Tribunal, when asked why he had not kept the claimant on furlough, Mr. Shelton said that it was due to the uncertainty of the scheme and how long it would be in place. The respondent had to make a decision and decided to use the furlough scheme to pay towards the cost of redundancy. As a director of the company Mr. Shelton was under an obligation to try and keep the business solvent.

29. On 13 May the respondent wrote to the claimant again about the potential redundancy. In this letter the respondent told the claimant that it had used a scoring system for skills and qualifications. The respondent explained that as aerobatic flights generated significant income, it was important for the instructor to be able to carry out aerobatic flights. Mr. Wood was able to do these flights whereas the claimant was not. The claimant's scores against the selection criteria were set out in the letter. The respondent told the claimant that Mr. Wood had previously been an engineer in the air force and had suggested that he could work in engineering. The respondent had agreed to this and therefore Mr. Wood was no longer at risk of redundancy.

30. A final consultation meeting was held with the respondent on 18th May. Mr. Calverley and Mr. Shelton were present at that meeting, along with the claimant and Lee Parker, Chief Engineer, who attended at the claimant's request.

31. Mr. Calverley opened the meeting by asking the claimant if he had thought of anything else that could be done to avoid redundancy, and the claimant replied that there was nothing else that he could do. The claimant asked why the respondent was considering redundancy now, whilst the furlough scheme was paying his wages. Mr. Calverley explained that if flight training did not restart for some time the company would have to pay the full cost of notice pay, whereas at the time the furlough grant would reduce that cost to the respondent.

32. The claimant made it clear during the meeting that he did not want to be made redundant as he 'loved his work' and wanted to continue doing it. Mr. Shelton told the claimant that if the situation changed during the claimant's notice period then the claimant would be offered his job and the redundancy retracted.

33. At the end of the meeting on 18th May the claimant was told that his employment would be terminating due to redundancy. The claimant was given 12 weeks' notice of termination of his employment and offered the right of appeal.

34. On 22nd May the respondent wrote to the claimant confirming that his employment would terminate by reason of redundancy on 10th August 2020. The claimant was reminded of his right to appeal against the decision to make him redundant, and was told that he would not be required to attend work during the notice period, but would remain on furlough.

35. The claimant appealed and, in a letter dated 25 May 2020 addressed to Mr. Shelton, he set out his grounds of appeal which were, in summary, that:-

    35.1. There was not a genuine redundancy situation;
    35.2. The respondent had assured him, at the time he was furloughed, that he would return to work as normal;
    35.3. Mr. Shelton had not told him on 27 April that this was the start of a redundancy consultation process;
    35.4. The letter dated 13 May had not indicated whether the claimant was the individual selected for redundancy or contain Mr. Wood's scores against the selection criteria; and
    35.5. There were deficiencies in the redundancy process, and the process was not transparent

36. On 28th May Mr. Shelton wrote to the claimant to acknowledge his appeal. He also acknowledged that ideally the claimant's appeal would be heard by another director, but that this was not possible due to health reasons. The claimant was told that his appeal could either be heard by Mr. Calverley or by Mr. Shelton, both of whom had been involved in the redundancy consultation process. The claimant replied, in writing, to Mr. Shelton's letter stating that "*…I can see no reason why the decision on my appeal could not be based on my written submission. I have no preference as to whether the decision is made by yourself or John Calverley…*"

37. The claimant confirmed, in a further letter to Mr. Shelton dated 2 June, that he was content for the appeal to be decided on written submissions.

38. Mr. Shelton told me in his evidence that the decision to make the claimant redundant was his decision and that he had also made the decision at the appeal stage.

39. On 12th June the claimant was informed that this appeal had been rejected. The appeal decision was made by Mr. Shelton, who also made the decision to dismiss the claimant. Unsurprisingly, Mr. Shelton concluded that there was a genuine redundancy situation, and that there were no deficiencies in the redundancy process.

40. After receiving the outcome of the appeal, the claimant wrote to Mr. Shelton alleging that the respondent had breached the furlough agreement that was designed to avoid redundancy, as furlough was intended to last "*for a period of up to 3 weeks initially or until you can return to work as normal".*

41. On 26th June the respondent announced on social media that flight training would be resuming on 6th July. On 29th June the claimant became aware that Dave Wood was fully booked for the following week, and that his (the claimant's) name had been deleted from the respondent's booking sheet and replaced with John Fisher, one of the self-employed instructors, who, it appeared, had been given a number of bookings.

42. The claimant sent an email to Paul Shelton asking for clarification of the position, as he believed that there was considerable demand for flight training, and that his name had been replaced on the booking sheet by a self-employed instructor, John Fisher.

43. Mr. Shelton replied the following day, and wrote that John Fisher had always been on the booking sheet and had not replaced the claimant. Mr. Shelton explained that there had been an initial 'flush' of bookings, but that self-hire was operating at about 10% of pre-Covid levels and that: "*We feel it unlikely that Tatenhill will have a requirement for more than one full time instructor for the foreseeable future*".

44. On 6th July flight training resumed in the UK and Dave Wood began giving flying lessons again. The self-employed instructors also resumed teaching. The claimant remained on furlough until the termination of his employment on 10 August.

45. Since resuming flight training, the respondent has been operating at approximately 60% of the pre-Covid levels of operation. It subsequently had to close down the flying school again due to further lockdowns.

46. Recreational flying is seasonal and weather dependent. July and August are normally the busiest months of the year, and January and February are the quietest.

47. In January 2019 the total number of hours flown by all aircraft solely for the respondent's flying school was 169:55. In comparison, the number of hours flown in January 2020 was 101:35, a reduction of approximately 40%. In July and August 2019 the total hours flown by the respondent's flying school were 262.45 and 220 respectiv4ely. In July and August 2020 the numbers were 172 and 184.15 hours, a reduction of 34% year on year in July and 16% in August. The claimant was on holiday for 17 days during this period. The respondent was able to meet the reduced level of demand with one flying instructor, Dave Wood. Mr. Wood was not kept fully occupied by flying during July and August.

48. The claimant was paid a statutory redundancy payment and notice pay. At the time he was dismissed there was no alternative work available with the respondent that the claimant was willing and able to carry out. The claimant has not been replaced. John Fisher did change his working hours, working shorter days during the week so as to free up aircraft for the weekend.

49. In September 2020 the respondent resumed flight experiences. September has been the only 'normal' trading month

50. During his evidence to the Tribunal the claimant accepted that if he had been in the position of having to make someone redundant it would have been him rather than Dave Wood, as Mr. Wood had been with the respondent for longer than the claimant, and was able to do aerobatics, which the claimant could not. The claimant also acknowledged that he was not trained to fly aerobatics or tail dragging planes.

The Law

51. The relevant law on unfair dismissal is set out in section 98 of the Employment Rights Act 1996 ("**the ERA**"):-

> "*(1) in determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
> *(a) The reason (or, if more than one, the principal reason) for the dismissal; and*
> *(b) That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) A reason falls within this subsection if it –*
> *…(c) is that the employee was redundant…*

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) 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 employer, and

(b) shall be determined in accordance with equity and the substantial merits of the case…"

52. Section 139 of the ERA contains the definition of 'redundancy' and provides as follows:-

"*(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –*

(a) The fact that his employer has ceased or intends to cease –

(i) To carry on the business for the purposes of which the employee was employed by him, or

(ii) To carry out that business in the place where the employee was so employed, or

(b) The fact that the requirements of that business –

(i) For employees to carry out work of a particular kind, or

(ii) For employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish. "

53. In *Williams and ors v Compair Maxam Ltd [1982] ICR 156,* the EAT set out a number of steps that a reasonable employer might be expected to follow when dismissing employees by reason of redundancy, namely:-

53.1. Were the selection criteria used by the employer objectively chosen and fairly applied;

53.2. Were employees warned and consulted about the redundancy;

53.3. If there is a union, was the union consulted; and

53.4. Was there any alternative work available?

54. The EAT stressed, however, that when the Tribunal decided whether the dismissals were fair or not, it was not for the Tribunal to impose its standards and decide whether the employer should have acted differently. Rather, the Tribunal should ask the question 'did the dismissal lay within the range of conduct which a reasonable employer could have adopted'?

55. The case of *Polkey v AE Dayton Services Ltd [1988] ICR 142* established the importance of procedural fairness in determining whether the dismissal was fair or unfair under section 98(4) of the ERA. In that case the House of Lords decided that a failure to follow a fair procedure was likely to render a dismissal unfair unless, in exceptional cases the employer could reasonably have concluded that doing so would have been futile. Lord Bridge concluded, in his judgment, that "*the*

employer will not normally act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by deployment within his own organisation. "

56. Procedural fairness will, therefore, make a redundancy dismissal unfair, but the question of whether the employee would have been dismissed even if a fair procedure has been followed will be relevant to the question of compensation payable to the claimant.

57. In *Langston v Cranfield University [1998] IRLR 172* the Employment Appeal Tribunal held that it was implicit, unless the parties had agreed otherwise, that an unfair redundancy dismissal claim incorporates unfair selection, lack of consultation and failure to seek alternative employment on the part of the employer, even if those specific issues are not raised before the employment tribunal. The Tribunal must, therefore, consider each of those issues when reaching its decision on the fairness of a redundancy dismissal.

58. A fair appeal process is not a prerequisite of a fair redundancy dismissal. In *Taskforce (#Finishing & Handling) Ltd v Love EATS 001/05* the EAT held that there is no rule that "*a dismissal for redundancy will automatically be regarded as unfair on account of the absence of an appeal procedure or, indeed, the type of appeal procedure provided in the event that there is one".*

59. Where selection criteria are used to determine who should be made redundant, as is the case here, the application of the criteria must be reasonable.

Submissions

Respondent's submissions

60. Mr. Chaudhry submitted that the respondent is a very small business which had faced unprecedented challenges arising from the pandemic. The respondent had, he argued, acting reasonably in placing the claimant on furlough and subsequently making him redundant. The fact that the claimant was furloughed did not prevent the respondent from making him redundant.

61. Mr. Chaudhry also argued that the respondent had engaged in lawful and meaningful consultation with the claimant, had not prejudged the redundancy and applied a fair selection process. It was not possible, he argued for the respondent to find someone other than Mr. Shelton to deal with the appeal

62. He pointed out that the claimant had not suggested any proposals for alternative employment, and had accepted in evidence that the respondent was correct to select him for redundancy rather than Dave Wood.

63. There is, in Mr. Chaudhry's submission, no legal requirement for the respondent to continue with the furlough scheme when it considered that it would not in the future need 2 flying instructors.

64. Any upturn in work in the summer of 2020 was, Mr. Chaudhry argues, temporary, and by the time of the second lockdown work there was a reduction in the need for flying lessons. The claimant's full time hours were not being given to part time self- employed flying instructors, who had always been used by the respondent. The work given to the self-employed instructors was work that the claimant could not do, namely aerobatics and tailwheel, and lessons at weekends.

65. He referred me to the case of *Williams and others v Compare Maxam Ltd [1982] IRLR 83* as authority for the proposition that tribunals should not impose their own standards and decide whether, had they been the employer, they would have acted differently. Rather, the Tribunal must ask whether the employer's decision fell within the band of reasonable responses.

Claimant's submissions

66. The claimant argued in his submissions that there was no genuine redundancy situation, and that the respondent had used the situation as an opportunity to move to a self-employed instructor model at the expense of the taxpayer.

67. He also submitted that it had cost the respondent more to make him redundant than to keep him on furlough.

Conclusions

68. I accept that in this case there was a genuine redundancy situation, as the respondent's requirements for employees to carry out flying instructor duties had reduced. The respondent had previously employed two full time flying instructors, and, with effect from 10 August 2020, only employed one. This was as a result of a reduction in the volume of work for flying instructors due to the Covid19 pandemic. The respondent no longer needed two full time employed instructors and needed to reduce its overheads as a result of a loss of income.

69. It is clear, on the evidence before me, that the need to make cost savings and keep the company solvent were an important factor in the decision to make the claimant redundant. The need to save costs is often behind the decision to make redundancies and does not mean that the reason for dismissal cannot be redundancy. The question I have to ask myself is whether there was a redundancy situation within the definition set out in section 139 of the ERA. I am satisfied, in this case, that the reason for dismissal was that the requirements of the respondent for employees to carry out work of a particular kind, namely flight instruction and flight experiences, had reduced and were expected to reduce in the future. This falls within the definition of redundancy set out at section 139(1)(b)(i) of the ERA.

70. The claimant argues that he was, in effect, replaced by self-employed flying instructors. I do not accept, on the facts, that that is the case. Even if it were, however, that would not prevent there being a redundancy situation. In *Bromby and Hoare Ltd v Evans and anor [1972] ICR 113*, the National Industrial Relations Court held that the dismissal of two decorators because their work could be done more efficiently by independent contractors was a dismissal for redundancy. In

Noble v House of Fraser (Stores) Ltd EAT 686/84 Lord McDonald said that "*If an employer chooses to engage outside contractors instead of employees to do work of a particular kind he no longer requires employees to do it. That in our view clearly falls within the definition of redundancy"*.

71. I am satisfied, therefore, that the respondent has proved that the reason or principal reason for the claimant's dismissal was redundancy, which is a potentially fair reason for dismissal.

72. I also accept that the respondent took steps to follow a fair procedure in relation to the redundancies. It put both the claimant and the other employed flight instructor, Mr. Wood, at risk of redundancy and began redundancy consultation with them. The respondent in my view acted reasonably in limiting the pool for redundancy selection to the claimant and Mr. Wood, as they were the only two employed flight instructors.

73. Three meetings were held with the claimant before notice of redundancy was served. The claimant was asked whether he could suggest any alternatives to redundancy and given ample opportunity to consider the position and put forward his views. He was clear throughout the consultation process that he was only interested in flying instruction work, and he did not suggest any alternatives to redundancy or any other work that he could perform for the respondent. The claimant was also offered the right to appeal against the decision to make him redundant.

74. I am satisfied therefore that the respondent warned the claimant of the potential redundancy on 27 April 2020 and took reasonable steps to consider whether there was any alternative employment available within the respondent's business. Neither the respondent nor the claimant could suggest any alternative work that the claimant could reasonably be expected to or wanted to do.

75. There are, however, two flaws in the procedure followed by the respondent in my view. Firstly, it is in my view clear that the decision to select the claimant for redundancy was made prior to the start of the consultation process. The paper prepared by Mr. Shelton and dated 16 April, before the claimant had even been warned of the potential redundancy situation, let alone consulted about it, makes clear that the respondent had already scored the claimant and Mr. Wood and awarded Mr. Wood a higher score. Mr. Shelton had already decided who was going to be made redundant if only one instructor was to be selected, and that was the claimant.

76. The scoring of the claimant against the selection criteria took place before there had been any discussion with the claimant about the potential redundancy or the selection criteria to be used. It is evidence that the redundancy selection decision had been made before consultation had even started. Not only that, but it appears that Mr. Wood was taken out of the redundancy selection pool before the consultation with the claimant had concluded.

77. In a redundancy dismissal, not only must the selection criteria used be fair, but the application of those criteria must be reasonable. In Eurocasters Ltd v Greene *EAT 475/88* the inappropriate application of otherwise fair selection criteria rendered the dismissal unfair. It was, in my view, unreasonable of the respondent in this case

not only to decide the selection criteria, but also to score the claimant and Mr. Wood against those criteria before any consultation had taken place

78. The second flaw was in the manner in which the redundancy appeal was carried out, with Mr. Shelton deciding the appeal against a decision to dismiss that he had also made. This flaw would not, in itself, have led to a finding of unfair dismissal, but when taken together with the manner in which the selection criteria were applied, render the process followed by the respondent in dismissing the claimant unfair.

79. I have taken into account the size and administrative resources of the employer. The respondent is a small business with very few employees. It was facing a substantial loss of income and therefore needed to reduce overheads. Notwithstanding this, the respondent could, in my view, have achieved the same outcome without unfairly applying selection criteria before starting the consultation process, and by arranging for someone else to hear the appeal, particularly since the appeal was dealt with on the papers.

80. For the above reasons, I therefore find that the dismissal of the claimant was procedurally unfair.

81. The claimant suggested that the fact that he had been placed on furlough and the terms of the furlough agreement prevented the respondent from dismissing him by reason of redundancy. I disagree. Whilst another employer may have taken a different approach and chosen to leave the claimant on furlough for longer, it cannot be said that it was unfair of the respondent not to do so. It is for an employer, not the Employment Tribunal, to decide how to structure its business and whether to make redundancies. I accept the respondent's evidence that it needed to cut costs irrespective of the furlough scheme, and that it wanted to use the furlough scheme to pay some of the costs of making the redundancy. The nation was in unprecedented uncertainty at the relevant time, and it is not for me to step into the shoes of the employer and substitute my view for that taken by the employer at the time. The decision to dismiss the claimant nothwithstanding the existence of the furlough scheme does not, in my view, render the dismissal unfair.

82. I do not believe that the claimant's redundancy was part of a move towards using self-employed instructors on the part of the respondent, or that the claimant was replaced by a self-employed instructor or instructors. There was no evidence before me of anyone being recruited to replace the claimant and I accept Mr Shelton's evidence that he was not replaced. The respondent continued to use existing self-employed contractors and that does not render the claimant's dismissal unfair.

83. I also find however that following a different procedure would not have resulted in a different outcome. The claimant himself told me in evidence that he would have chosen to retain Mr. Wood had he been choosing who to make redundant.

84. In light of this admission, and of the evidence of the respondent, there was in my view a 100% chance that the claimant would have been dismissed had a fair procedure been followed in selecting him for redundancy. Accordingly any compensatory award should be reduced by 100% in line with the principles set out in *Polkey.*

85. The claimant has already received a statutory redundancy payment from the respondent and is therefore not entitled to any basic award.

86. The claimant was therefore unfairly dismissed but is not entitled to any compensation as a result.

2nd June 2021

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Employment Judge Ayre