EMPLOYMENT TRIBUNALS

Claimant: Mr M Williams

Respondent: Swansway Garages Limited

HELD AT: Manchester (by CVP) **ON:** 25 & 26 January 2022

BEFORE: Employment Judge Peck (sitting alone)

REPRESENTATION:
Claimant: In person
Respondent: Ms B Zeitler (Counsel)

JUDGMENT

1. The respondent's application that the claimant's claim be struck out in accordance with rule 37(1)(b) or 37(1)(e) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2010 is not granted. The claimant's claim shall not be struck out.

2. The claimant's claim for unfair dismissal under section 104 Employment Rights Act 1996 is well-founded and succeeds. The claimant was unfairly dismissed by the respondent.

3. The claimant shall be awarded compensation and the matter shall be listed for a remedy hearing for this purpose.

REASONS

Claims and Issues

1. This was a final hearing conducted as a remote hearing by CVP on 25th and 26th January 2022. The parties did not object to the case being heard remotely.

2. By a claim form presented on 27th July 2020 the claimant, who was employed by the respondent from 4th February 2019 until 27th July 2020, complains of unfair dismissal and alleges that "*I was dismissed for asking about the amount of furlough paid to me in April*". The claimant claims compensation only.

3. By a response submitted on 27th August 2020, the respondent denies the claimant's claims. It states that the claimant has been paid all monies due and owing to him and submits that the claimant's claim should be struck out on the basis that the claimant was employed for less than 2 years and does not meet the service requirement for bringing an unfair dismissal claim (at section 108 Employment Rights Act 1996 (**ERA**)).

4. After correspondence with the tribunal, the claimant presented an amended claim on 13th September 2020 and at a preliminary hearing for case management purposes before Employment Judge Ainscough on 4th May 2021, the claimant was ordered to provide further particulars of his amendment application by reference to section 43B ERA (protected disclosure claim) and section 104 ERA (assertion of a statutory right).

5. By email dated 9th May 2021, the claimant informed the tribunal that his claim is being pursued under section 104 ERA and he provided an accompanying statement, in response to which the respondent submitted further and better particulars of its response on 23rd June 2021.

6. At a further preliminary hearing for case management purposes before Employment Judge Hodgson on 28th July 2021, the claimant confirmed that the sole basis for his claim of unfair dismissal is that the reason or principal reason for his dismissal is that he asserted a statutory right, namely that there had been an unauthorised deduction from his wages. It was conceded on behalf of the respondent that the essence of such a claim had been set out in the claim originally presented by the claimant and that accordingly this was simply a case of labelling rather than amendment.

7. The issues to be determined were agreed and these are as follows:

    a. Did the claimant allege that the respondent had infringed a right of his which is a relevant statutory right?

    The claimant alleges that he asserted a breach of the statutory right not to suffer unauthorised deductions from his wages in two discussions with Mr Phil Metcalfe on or about 18th June 2020 together with his follow up email correspondence with the respondent's payroll department.

b. Was such allegation made in good faith?

c. What was the reason or principal reason for dismissal?

The claimant says that the reason (or principal reason) for his dismissal was that he made such an allegation. The respondent says that the reason (or principal reason) for the claimant's dismissal was redundancy.

d. In the event of a finding of unfair dismissal by reason of assertion of a statutory right is there a chance that the claimant would have been fairly dismissed anyway by reason of either redundancy or conduct?

The conduct to be relied upon by the respondent is the claimant's manner of raising the issue of pay and/or the manner and purpose of raising it with his colleagues.

e. If so, should the claimant's compensation be reduced and if so, by how much?

f. If the claimant was unfairly dismissed, did he cause or contribute to such dismissal by blameworthy conduct?

g. If so, by what proportion would it be just and equitable to reduce the claimant's basic and/or compensatory award?

8. At the outset of this hearing, I clarified with Ms Zeitler that the respondent's position is that the reason for the claimant's dismissal was redundancy, referring to paragraph 8 of the respondent's further particulars, which state: "*The Claimant was therefore dismissed as part of the general redundancy process. Further, it was felt by the Respondent that the Claimant's tone and manner in which he had conducted himself when questioning the interpretation of the furlough scheme, was inappropriate and the Respondent had lost trust and confidence in the Claimant*". She confirmed this to be correct, explaining that the claimant's conduct was a factor in his selection for redundancy.

9. I also clarified with the claimant that there were no outstanding amounts that he considered to be owing to him by the respondent, and he confirmed this to be correct.

10. I informed the parties that evidence on liability and remedy would be dealt with at this hearing. In reaching Judgment and having found in the claimant's favour, however, I have identified that some additional information needs to be before me to determine the amount of compensation to be awarded to the claimant. Separate correspondence is being issued to the parties in this regard.

Procedure, Documents and Evidence

11. The claimant represented himself and the respondent was represented by Ms B Zeitler (counsel).

12. In terms of oral evidence, I heard from the claimant for himself. For the respondent, I heard from Mr B Quirk (Franchise Director). I was also provided with a witness statement for Mr S Smith (Head of HR). Mr Smith was not in attendance to give oral evidence at this hearing. No explanation for this was put forward by the respondent. I have attached very limited weight to Mr Smith's witness statement given his absence and the fact that he was not cross-examined on his evidence.

13. I was provided with an agreed bundle of documents, which ran to 119 pages and to which the claimant's email to the tribunal dated 14th October 2021 was added as page 120 and the claimant's P60 for the tax year ending 5th April 2021 as page 121.

14. Having heard all of the evidence, I heard oral closing submissions from both parties, in advance of which Ms Zeitler provided to me (and to the claimant) a copy of the EAT decision in Mr F Spaceman v ISS Mediclean Limited t/a ISS Facility Service Healthcare UKEAT/0142/18.

Strike Out Application

15. The claimant gave evidence on the first morning of this hearing. There was a short break during the morning and then a break for lunch, each time in advance of which I warned the claimant that he must not discuss his evidence whilst he remained on oath.

16. Prior to the lunchtime break I did inform the claimant, however, that he might want to consider what questions he would ask of the respondent's witness, Mr Quirk. I did this given that the claimant was a litigant in person and that it looked likely that his evidence would finish shortly after lunch, his evidence on liability having been completed.

17. On reconvening the hearing after the lunch break, Ms Zeitler brought to my attention a concern about the claimant's conduct, explaining that the claimant had not left the CVP hearing room and had been heard discussing the case with who she believed was his wife, as well as making comments about Ms Zeitler, not realising he was being overheard. I was also informed that recordings of this had been made by the respondent. Ms Zeitler explained that she was therefore pursuing a strike out application, given the claimant's conduct.

18. After a short break, I reconvened the hearing and explained that I considered it to be in the interests of the overriding objective to complete the claimant's evidence, following which I would invite the respondent to confirm if it was still pursuing the strike out application, on which I would hear representations from both sides. I made it clear to both parties that this did not mean I had yet formed a view on any such application.

19. On commencing the hearing the following day, Ms Zeitler confirmed that a strike out application was being pursued under rules 37(1)(b) and 37(1)(e) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations

2013 (the **Tribunal Rules**). I heard her submissions in this regard and then heard from the claimant.

20. According to Ms Zeitler, the claimant had been heard discussing email correspondence, which was evidence on which he had been questioned during cross examination. Reference was also made by the claimant to the redundancy issue before the claimant went on to discuss what matters and questions he might put to Mr Quirk.

21. Ms Zeitler explained that the discussion lasted 30-40 minutes and had been recorded by her. She had used her phone to record the conversation and left it recording whilst she went out for lunch. She had initially been alerted to the fact that the claimant might be discussing the case by the respondent.

22. The claimant explained that he had believed that he had logged out of the CVP hearing and had then engaged in a private conversation with his wife. According to the claimant, during that conversation he had discussed what had happened so far and also what was next, including what he might ask of Mr Quirk.

23. Ms Zeitler made clear that the application was being pursued under rule 37(1)(b) and 37(1)(e) and referred me to the cases of E and O Laboratories v Miller UKEATS/0007/19/SS and Chidzoy v British Broadcasting Corporation [2018] UKEAT 0097/17. She submitted that the claimant's discussion with his wife would have an effect on the truthfulness of his evidence, that his evidence had been badly affected and that the trust had gone.

24. The claimant disagreed. He explained that he believed that he had already gone through everything in his evidence clearly and honestly. He also asked that it be noted that he was concerned about a private conversation being recorded, that took place in his home, when it was clear that he did not realise that he was still in the CVP hearing room.

Strike out application: relevant law

25. Under Schedule 1 of Tribunal Rules, rule 37 provides (in so far as is relevant):

> **(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds-**
>
> **(a)…**
>
> **(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;**
>
> **(c) for non-compliance with any of these Rules or with an order of the Tribunal;**
>
> **(d) …**

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) …

Strike out application: decision and reasons

26. I informed the parties and emphasised to the claimant, in particular, that this was not a matter to be treated lightly. I believed that he had understood my instruction and I had expected him to have complied with it. I also did not feel that the fact that he did not realise he was being overheard excused his actions.

27. However, having considered the relevant Tribunal Rules and in the context of the overriding objective, the strike out application was refused.

28. I did not conclude that the claimant's conduct was scandalous or vexatious. And whilst I acknowledged that the claimant had been warned not to discuss his evidence but had done so, I did not believe that this amounted to unreasonable conduct of the proceedings on this occasion, such as to warrant strike out.

29. I noted that the respondent's approach itself (and its decision to record the claimant's conversation as opposed to alerting him to the fact that he had remained in the hearing room and reminding him of my warning) was potentially unreasonable.

30. I also felt entirely satisfied that a fair hearing was still possible.

31. In reaching this view, I took into account the nature of what was discussed between the claimant and his wife, being an analysis of evidence already given as opposed to matters on which he was yet to be questioned; the stage reached in the claimant's evidence, with his evidence on matters of liability being complete; that the discussion was with his wife and not with another witness; that the claimant was an unrepresented litigant in-person; that I had informed the claimant to consider preparing questions for Mr Quirk; that I had not lost trust in the claimant or his evidence; and that I could not see how any prejudice had been caused to the respondent and if anything, hearing what the claimant was intending to ask Mr Quirk may well have created an advantage to the respondent.

32. I also considered the authority of Chidzoy v British Broadcasting Corporation [2018] UKEAT 0097/17 and distinguished the facts before me from that case, being a case in which the Tribunal had lost trust in the claimant and in which the claimant: had discussed cross examination questions with a journalist (in comparison with the claimant who was at home speaking with his wife); was legally represented; had been warned 6 times about not discussing her evidence; and had clearly discussed her evidence and an important aspect of it.

33. Having dealt with the strike out application, I continued with and concluded the hearing.

Findings of Fact

34. In making my findings of fact, I have taken account of the witness statements, the oral evidence and the documents that I have been provided with. Where there was a conflict of evidence, I have made a finding on the balance of probabilities.

The respondent

35. The respondent is a motor retailer, with 20 sites across the UK and employing 2,500 people.

The claimant

36. The claimant commenced employment with the respondent on 4th February 2019. He was employed as a Sales Executive, under a contract of employment signed by the claimant on 23rd January 2019 and by the respondent on 24th January 2019. The claimant worked at the respondent's Rochdale branch.

37. On commencement of employment, the claimant received a basic annual salary of £12,000 gross, increasing to £15,000. He also received commission, a pension scheme entitlement, life insurance and a company car. After 3 months' service, the claimant's notice entitlement was one month.

Furlough leave

38. On 24th March 2020, the claimant signed a furlough agreement with the respondent, indicating his agreement to be furloughed and to receive a reduction in pay as a result.

39. The claimant was therefore furloughed, and the respondent made claims for furlough pay under the Coronavirus Job Retention Scheme (**CJRS**). He was one of numerous employees of the respondent placed on furlough (Mr Quirk's evidence being that in the region of 1,000 employees were furloughed in a 24-hour period).

40. The claimant was asked to return to work on 1st June 2020, which he did.

41. The claimant was paid on or around the 20th of each month and it is not in dispute that employees were provided with their payslips approximately one-week in advance, payment having by then been processed by payroll. The claimant's pay comprised his monthly salary for that month and a payment for commission earned in the previous month.

42. During his furlough leave, the claimant was paid the following: -

a. on 20th April 2020, the claimant received his monthly basic pay of £1,000 (being 80% of his monthly basic pay of £1,250) and £2,025.97, being commission earned by the claimant in March 2020; and

b. on 20th May 2020, the claimant received a total payment of £2,194.68, which the claimant understood to amount to 80% of his monthly basic pay *and* his average commission pay.

43. On 20th June 2020, the claimant having returned to work, he received his monthly basic pay of £1,250 (being 100% of his monthly basic pay now he was back at work), but received no commission pay.

44. On receipt of his June 2020 payslip, which I find will have been on or around 13th June 2020, the claimant noticed that he was only to be paid his monthly basic pay and was to receive no commission in June 2020. The claimant says that he was shocked and disappointed by this, with it leaving him with a not insignificant shortfall in pay.

The claimant's asserted allegation

Conversation with Mr P Metcalfe

45. The claimant therefore discussed this with his manager, Mr P Metcalfe. He says that this was on or around 18th June 2020, although considering the dates of the emails exchanged with payroll and Mr Smith (see below), I find that it may have been prior to this and at some time between 13th June 2020 and 16th June 2020. In any event, the claimant says that he discussed the issue with Mr Metcalfe twice. The claimant says that he was informed by Mr Metcalfe that he (Mr Metcalfe) had checked with his manager and that the payment that the claimant was to be made was correct.

46. I did not hear from Mr Metcalfe and there is no documentary record of this discussion, but I accept the claimant's evidence and find that this conversation took place as the claimant describes and that Mr Metcalfe did inform him that the payment was correct. This is consistent with the position that the respondent took in later correspondence and also explains why the claimant was prompted to email the respondent's payroll department (see below).

Correspondence with payroll

47. The claimant looked further into this, and I accept that the extent of his investigation was to look at the ACAS guidance.

48. A series of emails was then exchanged between the claimant and the respondent. Initially, the claimant's communications were with payroll (on 16th June 2020), with him stating "*I need to know why furlough commission had not been claimed for the 2 months I was not working and why I have only received basic salary which is below minimum wage guidelines*".

49. When the claimant enquired what amount had been claimed by the respondent under the CJRS, Mr Smith became involved and further emails were exchanged between Mr Smith and the claimant on 16th June 2020.

50. It was through this exchange that the claimant identified what he believed to be a shortfall in payment to him of £1,500. He understood from the respondent that it had claimed £2,500 under the CJRS for April 2020, but that he had only been paid £1,000. The claimant believed that this should have been paid to him, to reflect the loss of commission pay whilst furloughed and that either his April 2020 pay, or his June 2020 pay was short by £1,500.

51. The respondent maintained during this email exchange that it had correctly paid the claimant (including the amount processed for payment on 20th June 2020) and I find that this was its genuinely held belief at the relevant time. I accept the respondent's evidence, that there was no intention on its part to withhold monies due to the claimant. Its emails to the claimant support this finding – the respondent was seeking to properly understand the basis upon which the claimant considered its approach to be incorrect – as does the fact that on realising the mistake, the respondent paid the shortfall to the claimant.

52. I also acknowledge and accept that the CJRS and accompanying guidance was subject to change and that the respondent, as was the case for numerous employers at the relevant time, was grappling with a new concept during an unprecedented global pandemic.

53. However, I find that through his discussions with Mr Metcalfe and the email exchanges with payroll and Mr Smith, the claimant made it clear to the respondent that he considered that he had been incorrectly paid, either in April 2020 when he received only £1,000 by way of basic pay (despite the respondent claiming £2,500 under the CJRS), or in his June pay which had been processed by the respondent for payment on 20th June 2020. The claimant was clear, stating that "…*you have only paid part of my March commission in April so the remaining £1500 is owing this month as commission in arrears*", "*there should be £1500 of March commission outstanding to be paid in June*", "*you can't pay March commission in April whilst someone is on furlough, the March commission should have been paid at the end of March and just the £2,500 in April*…" and "*I know I have been paid incorrectly*!".

54. In its further particulars dated 23rd June 2021, the respondent asserts that, at this time, the claimant became rude and unhelpful to his line manager and other members of staff. It also asserts that the claimant threatened Mr Metcalfe with "shopping" the respondent to HMRC.

55. During cross examination, it was put to the claimant that he had been threatening to the respondent, with him being referred to emails in which he said to Mr Smith: "*You need to get this looked at ASAP if HMRC investigate they will take back any furlough monies claimed*", "*I know I have been paid incorrectly*!" and "*I shouldn't have to explain to you what is wrong just look at the furlough guidelines where it is quite clear the company have breached, I will give you until next Tuesday the 23rd for you to sort this before I have to take it furthe*r".

56. The claimant disputed this. He accepted that he had, in effect, given Mr Smith an ultimatum but explained that this was because he wanted the matter to be resolved. He did not consider this to be a threat. His evidence was that his emails may have been brief and to the point, but he was frustrated by the situation and felt that the respondent should be able to resolve it. He denied that he was rude and unhelpful.

57. It is my finding, taking in account the evidence before me, that the claimant did not threaten to "shop" the respondent to HMRC. The claimant denied this, and Mr Metcalfe have no evidence.

58. Nor do I find that there was threatening conduct on the part of the claimant, having considered the content of the emails to which I was referred.

59. It was also put to the claimant that he was asked by Mr Scott to clarify why he felt that there were monies owing to him and invited to call Mr Scott to discuss this but failed to do so and that this was unhelpful and unreasonable on his part.

60. In response, the claimant accepted that he did not reply to the respondent to provide the further information that it had requested from him. He was prepared to accept that he did not directly address Mr Smith's request. His explanation for this was that he had referred to the ACAS guidance, had already explained why he thought that there had been a shortfall and expected that the payroll department of a large organisation would be capable of ensuring employees received the correct amount of pay.

61. Whilst it might have been helpful had the claimant done so, I do not find that it was unhelpful that he did not. And having considered the emails and the evidence of the claimant, I do not make a finding that the claimant was rude to his manger and other members of staff.

62. The respondent also asserts in its further particulars that the claimant was disruptive within the workplace and was telling fellow sales staff that the respondent was operating the furlough scheme illegally and incorrectly.

63. No documentary or witness evidence in support of this assertion was presented by the respondent. When this was put to the claimant in cross examination, the claimant's position was that he accepted that he discussed furlough pay with sales colleagues, but his explanation was that he did this when he was approached by colleagues who were concerned to ensure that they had received the correct pay.

64. In this regard, I accept the evidence of the claimant and I do not find that the claimant was disruptive in the workplace. The claimant's explanation about discussing pay with staff is a reasonable one, when he was rightly concerned about a shortfall in pay of £1,500.

<u>Conversation with Mr B Quirk</u>

65. The claimant says that after raising concern about a potential shortfall in pay, Mr B Quirk (Franchise Director) met with him and told him: "*not to take this any further or you could be the next for redundancy*". The claimant says he therefore decided not to raise the issue again and forgot about it.

66. It is not in dispute that Mr Quirk had a conversation with the claimant, although his evidence is that, whilst he cannot recall the exact conversation, "*it was more likely to be along the lines of an advisory comment such as; if I was you I'd keep your head down and not put your head above the parapet*".

67. On balance, I accept the claimant's account of this conversation and find that he was warned that pursuing the furlough pay issue might have a detrimental impact on his employment. The wording recalled by Mr Quirk supports this, as does the fact that the claimant did not pursue the furlough pay issue again, until the point at which his employment terminated.

Respondent redundancies

68. It is not in dispute that, when the respondent reopened in June 2020, it found itself in financial difficulties and Mr Quirk gave evidence to the tribunal about the significant impact the pandemic had on the respondent's business.

69. In this context, I accept that the respondent needed to make redundancies in order to save costs, notwithstanding the availability of the furlough scheme. Across its dealership sites approximately 80 employees were made redundant. As per its further particulars, this included numerous salesmen being made redundant, given the reduction in sales of new and used cars.

70. The claimant did not challenge this and accepted that there were redundancies across the respondent's business.

71. However, his evidence was that at his branch there were no redundancies and that there had, in fact, been 2 new members of staff recruited in mid-June. He did not believe that there was any reason to make redundancies at his branch and no reason for his role to be at risk of redundancy. His evidence, which I also accept, was that his branch was short-staffed for a period of time prior to his dismissal.

72. Mr Quirk confirmed in his evidence that the respondent had taken on two additional salespeople, which he believed was in July 2020. His explanation for this was that the respondent was expanding into the used cars market, although this contradicts the respondent's further particulars, which state that "*sales of new and used cars had plummeted as a result of the pandemic*".

73. The respondent's case is that in making redundancies, it looked to make employees who had less than 2 years' service redundant over those with 2 years' service or more. I accept and make the finding that employees with less than 2 years' service were more likely to be considered for redundancy than those with longer service.

74. However, the evidence before me shows that this was not an absolute criteria. It was accepted by the respondent that there were employees, working at the same branch as the claimant, who had less than 2 years' service and who were not made redundant (including the newly recruited employees). In other words, therefore, the respondent did not make all employees with less than 2 years' service redundant. The fact that an employee had less than 2 years' service did not automatically result in termination of employment.

75. I therefore find that the respondent must have considered additional and/or other factors when selecting employees for redundancy. The evidence as to what these factors were is, at best, limited. The respondent did not, for example, provide to this tribunal any documentation about the redundancy process, there was no evidence that selection matrices were prepared and applied, there was no data or information in terms of the employees who were made redundant, their length of service and/or job roles.

76. On this basis and on the balance of probabilities, I therefore find that the respondent did not have a clear and defined method for selecting which employees with less than 2 years' service would be made redundant.

<u>20th July 2020 - termination of the claimant's employment</u>

77. In this context, I consider the claimant's dismissal.

78. In mid-July, the claimant received his payslip in advance of being paid on 20th July 2020 and noted that he was to receive a salary correction of £1,500. I accept his evidence, that he was not informed that this correction was to be made in advance. In any event, the respondent's position is that this salary correction was made, given that it since accepted that there had been a shortfall in the payments made to the claimant during his period of furlough.

79. On 20th July 2020, whilst the claimant was on annual leave, he was invited to attend work by way of a text message from Mr Metcalfe. He did so and upon arrival, met with Mr Metcalfe, who informed the claimant that his employment was being terminated. The claimant says that he was informed that he was being given notice "*due to the tone of my emails regarding the furlough money*" and that "*the directors of Swansway could not work with me in the future*".

80. I accept the claimant's evidence in this regard and find that this is what was said to him by Mr Metcalfe on 20th July 2020. In making this finding, I note that the claimant's witness evidence was uncontested, that I did not hear from Mr Metcalfe and that there is no evidence (documentary or oral) to make me call into question the accuracy of the claimant's recollection of this meeting.

81. In its further particulars, having stated that the claimant was dismissed "*as part of the general redundancy process*", the respondent goes on to say that "*further, it was felt by the respondent that the claimant's tone and manner in which he had conducted himself when questioning the interpretation of the furlough scheme, was inappropriate and the respondent had lost trust and confidence in the claimant*". This further supports this finding and is consistent with how the claimant describes the termination meeting.

82. The claimant's evidence is that there was no mention of his role being redundant at the meeting with Mr Metcalfe and I accept this to be correct. There is no evidence to the contrary. I also find that there was no mention to him that he was being made redundant due to his length of service.

83. I acknowledge that it is possible that what was communicated to the claimant at the meeting about the reason for his employment terminating may not have accurately reflected the actual reason and that Mr Metcalfe was not necessarily the decision-maker. The evidence of Mr Quirk, as given to this Tribunal, was that he was involved in making the decision to dismiss the claimant and that this was a redundancy dismissal, although his witness statement only went so far as to say he was involved in an internal discussion about the claimant being someone the respondent could (not would) let go when the respondent embarked on the redundancy exercise.

84. However, on balance, I find that what was communicated to the claimant was an accurate reflection of the reason for the claimant's employment terminating.

85. I note that it is primarily the witness statement of Mr Smith that addresses this issue (the reason for dismissal), although I place limited weight on his evidence in any event. Mr Smith first states that "*At this time [being when the claimant was raising concerns about his furlough pay], we were very aware that the claimant had less than two years' service and when I discussed the claimant with the directors of the company they felt that they did not want a character such as the claimant in the business. They felt that he had been unduly rude, and he should simply have raised any dispute in relation to the furlough scheme as a formal grievance. In addition, they felt that he had no right to defame the company with other employees and they felt that his threat about reporting us to HMRC was unlawful*." Unlike the respondent's further particulars which suggest that redundancy was the first factor at play, with the claimant's conduct then being a further consideration, Mr Smith's statement suggests that both factors were of equal weight, going on to say: "*In addition, and just as importantly, at the time of the claimant's return the respondents did embark upon a redundancy exercise…thus, we were instructed to look at redundancies across the group and individuals like the claimant who had only been with us less than two years' service were to be reviewed first in any event as part of the cost cutting exercise*". Mr Smith goes on to say: "*the claimant was dismissed because of his conduct and behaviour*".

86. The respondent says that it confirmed the claimant's dismissal to him in writing, by letter dated 30th July 2020. The claimant says that he did not receive this letter. I accept that he did not and given the contents of the letter, there would be no reason for him to say that he had not received it if he had.

87. I note that the termination letter is silent as to the reason for the claimant's dismissal. No reference is made to the tone of his emails. Nor is any reference made to redundancy or conduct.

88. On the balance of probabilities considering the evidence before me, I therefore make a finding of fact that the claimant was not dismissed because his role was

redundant but that the claimant's employment was terminated due to his conduct.

Law

Section 104 ERA

89. The claimant pursues a claim for unfair dismissal under section 104 ERA which, so far as relevant, provides as follows:

> **(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee-**
>
> **(a)…**
>
> **(b) alleged that the employer had infringed a right of his which is a relevant statutory right.**
>
> **(2) It is immaterial for the purposes of subsection (1)-**
>
> **(a) whether or not the employee has the right, or**
>
> **(b) whether or not the right has been infringed;**
>
> **but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.**
>
> **(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.**
>
> **(4) The following are relevant statutory rights for the purposes of this section:**
>
> **(a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal;**
>
> **(b) …**
> **(c) …**
> **(d) …**
> **(e) …**
>
> **(5) …**

90. Protection of wages rights (under section 13, 15 18 and 21 ERA) are relevant statutory rights covered by section 104(4)(a).

91. Any shortfall in payment of wages on any occasion is to be treated as a deduction, including late payment or non-payment (Elizabeth Clare Care Management Ltd v Francis UKEAT/0147/05, following Delaney v Staples [1991] ICR 331).

92. Section 104(1)(b) requires an allegation by the employee that there *has been* an infringement of a statutory right. An allegation that there *may be* a breach in the future is not sufficient (as confirmed by the EAT in Spaceman).

93. The requirement to make reasonably clear to the employer what the right claimed to have been infringed was (section 104(3)) requires an employee to at least refer to the constituent elements of that right, even if he or she need not point to the specific legal entitlement.

94. The question of whether an employee has acted in good faith in asserting that his or her statutory right has been infringed is one of fact for the tribunal to determine in each case.

95. Under section 104 ERA, where an employee does not have the requisite service to bring an ordinary unfair dismissal claim, the burden of proof is on the employee to establish the reason for dismissal, on the balance of probabilities (Smith v Hayle Town Council 1978 ICR 966, CA). Tribunals should weigh the evidence according to "*the proof which it [is] in the power of one side to have produced and in the power of the other side to have contradicted*" (Lord Denning MR). Tribunals should deal with an employee's alleged reason first but should not dismiss the claim without hearing evidence of the employer's stated reason, because if the latter reason was unproved it could bolster an employee's otherwise weak allegation (H Goodwin Ltd v Fitzmaurice and ors IRLR 393, EAT).

96. A "reason for dismissal" has been described as "a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee" (Abernety v Mott, Hay and Anderson 1974 ICR 323, CA).

97. It is the person deputed to carry out the employer's functions whose knowledge or state of mind counts as the employer's knowledge or state of mind (Orr v Milton Keynes Council 2011 ICR 704, CA).

98. Establishing the reason for dismissal will often require inferences to be drawn from the facts as found (JP Fitzpatrick (Cable TV) Ltd v Whicker EAT 1165/97).

99. The manner of complaint may be what caused the dismissal, but there are limits on the protection offered by section 104 ERA. Section 104 is "intended to shield an employee from unreasonable behaviour by the employer as a consequence of the employee acting reasonably in accordance with his or her statutory rights", not to "enable an employee to act as they see fit without fear of any possible consequences to continued employment" (as per the comments of Mrs Justice Cox in Khan v Trident Safeguards Ltd EAT 0621/04).

Decision and Reasons

100. It is not in dispute that the claimant was dismissed by the respondent.

101. I therefore move on to determine the issues by applying the law, in light of my findings of fact.

Did the claimant allege that the respondent had infringed a right of his which is a relevant statutory right?

102. **Yes. I am satisfied that he did.**

103. In respect of the first issue to be determined, I am satisfied that by way of two conversations with Mr Metcalfe following receipt by the claimant of his June 2020 payslip and by way of emails to the respondent's payroll department and Mr Smith on 16th and 17th June 2020, the claimant had alleged that the respondent had infringed a right of his which is a relevant statutory right, being the right not to suffer an unauthorised deduction of wages.

104. I am not persuaded by Ms Zeitler's submission that a dispute under the furlough scheme is not covered by section 104 ERA. Her submission was that the non-payment (or underpayment) of furlough pay cannot amount to an unauthorised deduction from wages on the basis that furlough pay is not within the ERA definition of wages. She referred to furlough payment sums as being government money and submitted that the origin of money is relevant when determining whether something amounts to wages. I disagree. There is no statutory definition of "furlough pay" but in my view, this is the term used to describe the pay to which an employee is entitled during a period of furlough. That, by its very nature, has to be within the definition of wages. Further, the fact that the payment is funded under the CJRS is of no relevance when determining if it amounts to wages. CJRS is simply the means by which an employer could fund payment of wages during an unprecedented global pandemic.

105. I also considered Ms Zeitler's submission on the Spaceman point, namely that an allegation that there *may* be a breach in the future is not sufficient and that the employee must be alleging that there *had* been a breach. I am satisfied that, at the time the claimant made the allegation (on or around 16th June 2020), whilst he had yet to receive his June pay, he was clear that he considered that a breach *had* occurred. That the claimant had not yet received his June 2020 pay and therefore arguably not felt the impact of the alleged breach, does not mean that the section 104(1)(b) criteria were not met.

106. I am further satisfied that the claimant's allegation that he had received less pay than that to which he believed he was (and subsequently proved to be) entitled made it reasonably clear to the respondent what right was claimed to have been infringed. In essence, he told the respondent that it had not paid him enough and that monies were owing. I am satisfied that this amounted to the assertion of an infringement.

Was such allegation made in good faith?

107. **Yes, I am satisfied that the claimant made the allegation in good faith.**

108. Taking into account my findings of fact, I conclude that the allegation was made in good faith. The claimant genuinely believed, on his interpretation of the guidance at the relevant time, that he had been underpaid by the respondent and that he had suffered a shortfall in pay, which prompted him to raise the query when he did.

109. The claimant did not, as the respondent submitted "*stir things up*" and I have made no findings of fact to this effect, based on the evidence before me.

What was the reason or principal reason for dismissal?

110. **I conclude that the reason or principal reason for dismissal was the claimant's assertion that a relevant statutory right of his had been infringed.**

111. Taking into account my findings of fact and the evidence before me, I conclude that the real reason for dismissal was his complaint about a shortfall in pay. I am satisfied that the claimant has discharged the burden of proof for showing that this was the reason, on the balance of probabilities and that there is a sufficient causative link between the claimant's assertion of the statutory right and the dismissal. Prior to his dismissal, the claimant had been warned not to pursue the furlough pay issue. On being dismissed, the claimant was informed that it was because of the tone of his emails and the fact that the directors could not work with him anymore. It is not in dispute that the tone and manner of the claimant's emails and the way in which he allegedly conducted himself were in the mind of the respondent at the time.

112. And the claimant's reason carries weight in the context of an explanation put forward by the respondent which is inadequately substantiated by evidence. Whilst the respondent asserts that the reason or principal reason for the claimant's dismissal was redundancy, the facts as I have found them do not support such a conclusion. This is not what he was informed of in the dismissal meeting. There is no evidence of a redundancy consultation and / or selection process having been adopted by the respondent in relation to the claimant. Employees with less than 2 years' service were not automatically made redundant. Other employees at the claimant's branch remained in employment. Recruitment had taken place at the claimant's branch. The termination letter, although not received by the claimant, made no reference to redundancy.

113. In reaching this conclusion, I have also considered the respondent's assertion that, if the claimant's complaints about a shortfall in pay (and the manner in which these were brought) was the reason or principal reason for his dismissal, the respondent would have taken steps to dismiss the claimant at the time and not waited until July 2020. However, I have accepted that the branch at which the claimant worked was short-staffed, which would explain why action was not taken at that time. It is also evident, from the fact that the respondent did not make good the shortfall in payment until July 2020, that the furlough pay issue remained a live issue during that time.

In the event of a finding of unfair dismissal by reason of assertion of a statutory right is there a chance that the claimant would have been fairly dismissed anyway by reason of either redundancy or conduct? If so, should the claimant's compensation be reduced and if so, by how much?

114. On the matter of a potential reduction to any compensation awarded in terms of Polkey v AE Dayton Services Limited [1987] ICR 142, I take note of the following: "*The question is not whether the Tribunal can predict with confidence all that would have occurred; rather it is whether it can make an assessment*

with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice".

115. In this context, I have considered whether I am able to assess with confidence what might have happened had the claimant not been dismissed for asserting a statutory right. I accept that he may have found himself at risk of redundancy and selected for redundancy in any event. However, having found that a lack of service was not, in itself, a determinative criteria in selecting employees for redundancy and in the absence of any evidence before me about what the redundancy selection process otherwise entailed, I cannot assess with confidence the likelihood of this.

116. On this basis, **the claimant's compensation shall not be reduced by way of a Polkey reduction.**

<u>If the claimant was unfairly dismissed, did he cause or contribute to such dismissal by blameworthy conduct? If so, by what proportion would it be just and equitable to reduce the claimant's basic and/or compensatory award?</u>

117. It is clear from section 123(6) ERA that there is a duty on tribunals to consider the issue of contributory fault in any case where it is possible that there was blameworthy conduct on the part of the employee.

118. I have done so, and it is my conclusion that the claimant did not cause or contribute to his dismissal by blameworthy conduct and that **there shall therefore be no reduction to his basic and/or compensatory award.**

119. As per my findings, the claimant brought to the attention of his employer genuinely held concerns about a shortfall in pay and the manner in which he did so was appropriate in the circumstances.

<u>What period of loss should the claimant be awarded compensation?</u>

120. Finally, it is my conclusion that the claimant should be awarded losses for the period up to the final hearing on 26 January 2022.

121. Since his termination, he has secured alternative employment and I accept his assertion that he has applied for, but been unable to secure, a role commensurate with the role for which he was employed by the respondent.

122. Further, no evidence has been put forward for me to conclude that there were other reasonable steps that the claimant could take to mitigate his loss.

Employment Judge Peck
17 March 2022

JUDGMENT SENT TO THE PARTIES ON
22 March 2022

FOR THE TRIBUNAL OFFICE

Notes

1. Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.