EMPLOYMENT TRIBUNALS

Claimant: Mr P Metcalfe

Respondent: Green Energy International Ltd

Heard at: Manchester **On:** 25 and 26 August 2020

Before: Employment Judge Phil Allen (sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Mrs M Peckham, Employment Consultant

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's continuous employment with the respondent started on 4 July 2016 and ended on 2 September 2019. Accordingly, the claimant had sufficient qualifying employment to claim: unfair dismissal under section 108 of the Employment Rights Act 1996; and a redundancy payment under section 155 of the same Act;

2. The claimant was dismissed by reason of redundancy;

3. The dismissal of the claimant was unfair;

4. Applying *Polkey*, the claimant would have been dismissed by reason of redundancy in any event had a fair procedure been followed by the respondent. It would have taken an additional period of one week for such a process to be followed. The compensatory award should be limited to one week's pay to reflect the fact that the claimant would have been fairly dismissed after one week in any event;

5. It is not just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to section 122(2) of the Employment Rights Act 1996;

6. The claimant did not cause or contribute to his dismissal and therefore his compensatory award should not be reduced pursuant to section 123(6) of the Employment Rights Act 1996;

7. The claimant was entitled to a redundancy payment as a result of his dismissal and such a payment has not been paid by the respondent;

8. The respondent did make an unlawful deduction from the claimant's wages in respect of pay due for the period 12-18 August 2019 of £115.96 net (tax and NI having already been deducted in respect of the amount in accordance with a payslip provided to the claimant);

9. The respondent also made unlawful deductions from the claimant's wages in respect of 1½ days pay, for days during which the claimant was on annual leave and/or a Bank Holiday and for which payment was accordingly due;

10. The respondent did not make any other unlawful deductions from the claimant's wages, in respect of notice or otherwise; and

11. The respondent did not breach the claimant's contract of employment in respect of notice or other payments.

REASONS

Introduction

1. The claimant was employed by the respondent from 1 October 2017 until 2 September 2019, having previously been engaged as, what was described as, a "self-employed person" from 4 July 2016. The reason provided for the claimant's dismissal was redundancy.

2. The claimant claimed that he had more than two years qualifying service as he was an employee during the period he was described as self-employed. He claimed his dismissal was unfair and he also claimed that there were unlawful deductions from his wages, and that he was dismissed in breach of contract with regard to notice.

3. The respondent contended that the dismissal was fair by reason of redundancy and that no sums were due. It also relied upon *Polkey* and contributory fault, the latter in particular with reference to misconduct which the respondent alleged it had identified shortly prior to the redundancy dismissal taking effect.

Claims and Issues

4. The case had previously been considered at a Preliminary Hearing (case management) on 7 April 2020. That had been the date when the case was due to be heard but, as a result of the COVID-19 pandemic, it had been converted to a

preliminary hearing conducted by telephone. The summary of the claimant's dismissal case in the case management order made, was recorded as: *"The claimant complains of unfair dismissal in relation to his redundancy. He says that there was a lack of consultation, that the selection process was incorrect as he was in a pool of one, and thirdly that the respondent failed to find him alternative work which he believed was available".* The Order also recorded the issues of *Polkey* and contributory fault.

5. In relation to unfair dismissal, the respondent provided a List of Issues at the start of the hearing. It was confirmed that the respondent was not relying upon "some other substantial reason" as a fair reason for dismissal, as was recorded in that list. That records the issues as being as follows:

(1) Does the claimant have sufficient qualifying service pursuant to section 108 of the Employment Rights Act 1996 to pursue his unfair dismissal claim?

(2) Was the claimant dismissed for a potentially fair reason, i.e. redundancy?

(3) If so, was the dismissal of the claimant wholly or mainly attributable to a redundancy situation, namely that the duties that the claimant had performed pursuant to his employment contract had diminished/ceased?

(4) Did the respondent adequately consult with the claimant in respect of the redundancy situation/business reorganisation and his dismissal, and comply with its legal obligations to do so?

(5) Did the respondent fairly select the claimant for redundancy?

(6) Did the respondent consider all viable alternatives to avoid the need for redundancy?

(7) Did the respondent act reasonably having regard to this reason and its size and administrative resources in treating this as a sufficient reason for dismissing the claimant?

6. It was agreed at the start of the hearing that the Employment Tribunal would reach decisions on the issues of *Polkey* and contributory fault as part of its liability decision. The respondent alleged that the claimant would have been dismissed by reason of conduct and argued that this should be taken into account in relation to both *Polkey* and contributory fault.

7. There was also a claim for a redundancy payment. The respondent identified the issues as follows:

(1) Does the claimant have sufficient service for payment of a statutory redundancy payment pursuant to section 135 of the Employment Rights Act 1996?

(2) If so, is the claimant disqualified by reason of section 140(1) of the Employment Rights Act 1996 to receive a statutory redundancy payment?

8. The claimant also had claims for unlawful deduction from wages and in relation to notice. The respondent identified these issues as being:

(1) Has the claimant been subject to an unlawful deduction from wages in regard to holiday pay and holiday payments?

(2) If so, what is the amount of the unlawful deduction?

(3) Is the claimant entitled to contractual/statutory notice pay?

(4) If so, how much?

9. In the course of the hearing, the claimant highlighted his Schedule of Loss (111-114). This recorded the claimant's unlawful deduction from wages claims as also including claims for:

(1) A shortfall of pay for the period 12-18 August 2019 of £115.96; and

(2) A shortfall in commission. The claimant alleged that on the effective date of termination he had a minimum of ten cases due to complete with an average payment of £10,000 to the respondent. His commission structure was 20% of this income and therefore he claimed lost commission of £20,000.

10. The other aspects of the schedule claimed by the claimant were payments which related to compensation for unfair dismissal.

Procedure and Evidence

11. The claimant appeared in person at the hearing. The respondent was represented by Mrs Peckham, an Employment Consultant.

12. The parties had exchanged witness statements prior to the hearing. On the morning of the first day of hearing the Tribunal read the statements prepared by the witnesses. The respondent's witnesses were: Mr Arthur Bell, CEO; Mr William Threlfall, Associate Director; and Mrs Lisa O'Farrell, MD. Mrs O'Farrell did not attend the hearing and therefore her evidence was given limited weight (the reason being due to re-arranged holidays). The claimant had also prepared a witness statement of his own evidence. Each of the statements was read and each witness who attended was cross examined and asked questions by the Tribunal.

13. The Tribunal was also provided with a bundle of documents which ran to 142 pages. The content of the first 114 pages was agreed, the additional documents thereafter were not necessarily agreed by the claimant as he had not seen them prior to the hearing. The Tribunal read only the documents to which it was referred either in a witness statement, in the respondent's skeleton argument, or in the course of questioning during the hearing.

14. Following the evidence, the parties each made oral submissions. The respondent had prepared a skeleton argument which it had provided at the start of the hearing. At the end of submissions, the Employment Tribunal reserved judgment and accordingly provides the judgment and reasons outlined below.

Facts

15. The claimant was employed by the respondent as head of commercial rooftops. His role was to sell solar panels to offices, factories and academic organisations. The respondent had two parts to the business: the Ground Mount business with which the claimant was not involved, which was the core part of the business; and the commercial part, in which the claimant was primarily responsible for sales. In submissions the respondent described the commercial part of the business as ancillary to the Ground Mount business, which was also the position as explained by Mr Bell in his evidence.

The initial engagement

16. Initially the claimant was engaged on what was described by the parties as a self-employed basis, from 4 July 2016 until 30 September 2017. The claimant paid tax and national insurance himself during this period and invoiced the respondent for the work undertaken. The claimant's evidence was that he: worked set hours, being 8.30am or 9.00am to 5.00pm Monday to Friday; had business cards with the title "National Sales Manager"; and managed the sales team, conducting appraisals, recruitment and disciplinary hearings. The claimant was paid a regular wage each week on a Friday, initially being £500 per week and later being £600 per week.

17. The claimant's evidence was that he did not work for anyone else. Mr Bell in his answers to questions referred to the claimant also being engaged by a third party early in his time with the respondent. The claimant denied that was the case. On this issue, the Tribunal accepts the claimant's evidence as being correct, on the basis that there was a lack of specific information in the evidence of Mr Bell about what the claimant was doing and it was not referred to in Mr Bell's witness statement, as the Tribunal believes it would have been if such significant evidence had been correct. The Tribunal accepts the claimant's evidence about the regularity of his hours of work.

Employment from October 2017

18. The claimant moved to being acknowledged as being employed with the respondent from 1 October 2017. There was no evidence available to the Tribunal of any material change in the claimant's role or duties at this time. The claimant ceased to pay his own tax and national insurance and ceased to provide invoices. The claimant's evidence was that this happened because Mr Bell told him it would happen, or at least asked him to change. Mr Bell's evidence on this was unclear and certainly did not contradict the claimant. The claimant signed a contract of employment on 26 September 2017 (39-44), which stated that continuity of employment commenced on 1 October 2017.

19. In June 2019 the respondent was in financial difficulties. The length of time required for Ground Mount work to come to fruition was a challenge for the business. Mr Bell's evidence was that there was an issue with: funding and the withdrawal of a partner organisation; and a significant invoice from National Grid in relation to one site. The respondent accordingly looked at ways of saving money and reducing costs. There is no dispute that this included placing some employees on short time working. There is no dispute that the respondent was in such difficulties.

20. The respondent's financial issues impacted upon the commercial sales side of the business, as the respondent was unable to pay at least one supplier's bill. Mr Bell accepted that this was, to a certain extent, true. The claimant argued that these issues effectively stopped the commercial sales altogether – the respondent contended that there were little or no commercial sales in 2019 in any event. The claimant's evidence was that he had a sales pipeline in excess of £100K of business and that he covered his own wages with the sales he made – the respondent did not agree. The Tribunal does not need to resolve these evidential disputes, as the commercial merits of the reasons why the respondent considered reducing or removing its commercial sales resource is not a matter which the Tribunal should, or needs to, determine.

Redundancy and process followed

21. Mr Bell proposed that the claimant's role was to be placed at risk of redundancy. The sales team which the claimant had managed, no longer existed. If the proposal was adopted, the respondent would cease to have someone responsible for commercial sales. Mr Bell's evidence was that this would save the respondent in the region of £41,000 at a time when the respondent's business had financial challenges. There was no dispute that, ultimately, the claimant was not replaced.

22. On 8 July 2019 Mr Bell met with the claimant and informed him that his role was at risk of redundancy. He said that this meeting lasted approximately half an hour. The outcome was confirmed in a letter of 9 July (50). That referred to a one week consultation period. It stated a further meeting would take place on 11 July: "*to discuss this situation and the potential impact it may have on your future with* [the respondent]*. At the meeting I will explain in more detail the reasons why the company has to make these proposals and in particular why your job as Rooftop Manager is at risk of redundancy. We will also be discussing whether there is any other suitable work we can offer in order to protect your employment*". In fact no such discussion or explanation ever occurred. There was no further meeting at which the reasons were explained, the impact on the claimant discussed, or alternative employment explored with the claimant (albeit there was discussion of a non-employment option, which could have applied after the claimant was dismissed).

23. At the 8 July meeting, the claimant suggested an alternative option of being engaged on a self-employed basis – this was something raised by the claimant. That is, that he would still be dismissed as redundant, but that there would be some form of engagement thereafter which was not employment. There were discussions relating to this which addressed a spreadsheet and the way the claimant would be paid (some basic rate but with a more significant commission element). For the

purposes of the Tribunal's decision, what is relevant is that such an engagement was not a way of averting redundancy (albeit it was something which would reduce the impact of termination on the claimant).

24. On 11 July the claimant met with Mr Bell. It was common ground in the evidence given by the claimant and Mr Bell that there was no discussion of redundancy at all in this meeting and no mention of redundancy. The meeting discussed the potential alternative arrangement.

25. On 31 July 2019 the claimant spoke to Mr Bell for 2 minutes – his evidence was that he was called into a meeting with Mr Bell and Mrs O'Farrell and did not sit down. This conversation was not about redundancy – it was about the potential engagement. Mr Bell in evidence suggested there were other conversations, which the claimant denied. There is no evidence of any other discussion and, in particular, of discussion which could have amounted to consultation about the proposed redundancy.

26. During the morning of 1 August Mr Bell and the claimant spoke in a meeting room about the potential self-employed arrangements. Mr Bell's evidence was that he spent the day preparing a letter with his employment advisers. Having identified that the claimant was intending to leave at 4pm, at 3.55 Mr Bell asked the claimant to hang on for a minute and at 4.05 (without any further discussion) Mr Bell handed the claimant a letter (53) which informed the claimant that he was to be dismissed by reason of redundancy, effective 2 September. The letter stated that the respondent was going to hold a final meeting at 4pm on 1 August to discuss the potential redundancy and outlined the right to be accompanied to the meeting – but that meeting did not take place (the time for it having already passed when the letter was handed to the claimant).

27. The Tribunal finds that the last meeting which discussed potential redundancy and the reasons for it prior to the claimant's dismissal, was in fact the meeting of 8 July at which the claimant was first informed he was at risk. All the other meetings were about an alternative non-employment arrangement. No further discussion took place about the proposed redundancy and there was no genuine consultation. There was also no final meeting at which a decision was made – the claimant was simply handed a letter.

28. The claimant's evidence was that on Monday 12 August Mr Bell arranged for a meeting with regard to some cases. Mr Bell asked why they had been removed from the respondent's CRM system. The claimant told Mr Bell that it was due to GDPR requests from clients who wanted to be removed. The claimant's evidence was that he had also deleted emails for the same reason. The claimant thought that all of the issues in the meeting had been resolved. In answers to questions, Mr Bell accepted that the meeting took place and that the claimant provided this explanation in it, albeit that Mr Bell did not himself believe that explanation.

29. The claimant's last day in the office was Thursday 15 August 2019. The claimant was on agreed annual leave on 16 August 2019 (it being confirmed that that day was agreed annual leave in an email from Mrs O'Farrell – 75). The claimant was sent a letter on that day referring to alleged misconduct relating to: the introduction of products without prior consultation; deletion of emails; deletion of

data; and alleged theft of intellectual data (68). That letter invited the claimant to an investigatory meeting on Monday 19 August. The claimant was not paid on 16 August as he should have been by the respondent, for the work that he had done that week.

30. The claimant responded in an email at 5:02pm on 16 August (61A) in which he said he would not be attending the meeting until he was paid. He also said, *"Apart from that we already discussed these points on Monday".*

31. The claimant was paid on 19 August (100) for four of the five days of the previous week. Mr Bell emailed the claimant on 19 August confirming that the money had been paid (70A) but said that he would not be paying for the previous Friday (16 August) as the absence was *"unauthorised".* That statement was incorrect as it is clear from the emails from Mrs O'Farrell that she had authorised the absence.

32. On 19 August the claimant raised a grievance (69-70). That was acknowledged by the respondent (71). That acknowledgement, dated 22 August, was from Mr Bell and arranged a grievance hearing on 27 August and a redundancy appeal hearing on the same date. The claimant responded on 23 August objecting to Mr Bell being the person to hear the grievance as he was the person about whom the claimant was complaining in the grievance he had raised. The claimant also confirmed that he had booked holiday on 9 and 16 August as well as a half day for 23 August and had confirmed these dates with Mrs O'Farrell. Mr Bell responded on the evening of Friday 23 August (74). In that email Mr Bell erroneously said that the claimant was no longer working for the respondent; in fact he remained employed and in his notice period. The claimant had however ceased to actively attend at the respondent's premises to undertake work.

33. On 27 August Mrs O'Farrell confirmed to Mr Bell and Mr Threlfall the position with respect to the claimant's annual leave (75). That email confirmed that the claimant had used the holiday to which he was entitled (if his employment ended on 2 September) to book as holiday 9 and 16 August and a half day on 23 August. The email suggested that the claimant owed the respondent for annual leave based upon the fact that the claimant had left on 15 August. It was accepted by the respondent's representative that that was also an error, the claimant still being in employment until 2 September.

34. On 2 September the claimant wrote to Mr Bell (75A). Mr Bell responded to the claimant offering alternative dates for a grievance or redundancy meeting (76). A document was included in the bundle from Mrs O'Farrell dated 4 September (76A). The claimant's evidence was that he never received this letter. The Tribunal accepts that evidence. The Tribunal was also provided with a subsequent email from the claimant of 13 September and a letter from Mr Bell of 18 October.

Holidays

35. There was some evidence and discussion in the hearing about holidays. The claimant's written contract of employment records the claimant as being entitled to 22 days each calendar year; with holiday calculated at the rate of $1/12^{th}$ of the annual entitlement for each complete month of service. The claimant was also entitled to

take and be paid for Bank/Public Holidays. The contract included the provision that excess holiday could be deducted from final pay (40-41).

36. The claimant's evidence was that leave entitlement had been increased to 25 days and to corroborate that he: identified two other employees' entries in the annual leave tables provided to the Tribunal which recorded that amount; and he pointed to the calculation of Mrs O'Farrell when she confirmed to the claimant that he had 2½ days' holiday to use up to 2 September (page 75). Whilst there is no written record of such an increase, it is clear from Mrs O'Farrell's email that she believed that had the claimant worked to 2 September his leave entitlement included 9 and 16 August and a half day on 23 August. The Tribunal finds the claimant's evidence on this point to be credible.

37. Accordingly, the Tribunal finds that the claimant was entitled to be paid for the annual leave he took on 16 August and he was also entitled to be paid for the half day annual leave booked on 23 August and (applying the terms of his contract) the Bank Holiday which occurred on 26 August 2019.

Pay

38. The Tribunal was shown a payslip for the week of 12-18 August 2019 (page 99). That recorded the claimant as being entitled to net pay of £579.77 and records PAYE and NI contributions being deducted from the gross amount. In fact (which was not in dispute) the claimant was paid £463.81 on 19 August for that week's work (100).

39. Mr Bell's account to the Tribunal was that he had deducted one fifth of a week's pay because the claimant had taken 2 August off work. The claimant had been unable to attend work on 2 August because of the potential breach of a dam local to his home. This was referred to in Mrs O'Farrell's email of 27 August, but as the Tribunal has not heard from Mrs O'Farrell there is no evidence from the respondent to substantiate what was agreed. The claimant's evidence was that he had agreed with Mrs O'Farrell that he would work from home, there was no reference to the day being unpaid, and that in fact he undertook a significant amount of work whilst at home on that day – this evidence was not contradicted (at least by anyone from whom the Tribunal heard). The Tribunal finds that the claimant was entitled to pay for 2 August based on the evidence of the claimant. In any event, Mr Bell's evidence to the Tribunal was entirely inconsistent with what was recorded in Mr Bell's own email of 19 August (70A) in which he said that the deduction related to the claimant not working on 16 August, which was agreed holiday. As a result, the Tribunal finds that the respondent had no reason to make any deduction from the claimant's wages for that week and the claimant was entitled to the full week's pay.

40. In any event, as the claimant highlighted in his submissions, had a deduction been made for one day not worked, the calculation should have been to reduce the gross amount due, and the tax and NI deducted should have been adjusted. This was not done, the respondent simply withheld a fifth of the claimant's take home pay for the relevant week.

The investigation

41. Towards the end of the claimant's employment, the respondent did undertake an investigation into the sales pipeline for specific clients and the deletion of emails. Mr Threlfall gave evidence about these matters and also compiled a report (77-78). The Tribunal was also shown another report (62-64) which was written in very one-sided terms and appears to have been prepared by Mr Bell. The Tribunal was provided with a printout listing the emails which had been deleted (65-67). This was presented as evidence that the claimant had deleted a large number of client records. In fact, the majority of the deletions are recorded as having been made by the claimant's wife who was (or at least had been) also engaged by the respondent as a salesperson.

42. The claimant accepted that he had deleted some emails and some client information, his explanation being that the form used to contact clients included an option for them to have their information deleted, and under GDPR the respondent was obliged to delete such information if the client so chose. The respondent's position appeared to be that no one was allowed to delete information, although the Tribunal does not find that can have been the case as it would have meant that the respondent did not comply with its GDPR obligations if a contact requested that their details be removed.

43. The Tribunal was provided with no credible evidence which substantiated three of the allegations put, namely: the introduction of products without prior consultation (although Mr Bell referred to this when answering questions in general terms); the deletion of colleagues' emails; and/or the alleged theft of intellectual data.

44. Prior to dismissal, there were no formal investigation meeting or disciplinary hearing undertaken with the claimant. From the unchallenged evidence of Mr Threlfall, there clearly was some issue to be explored about 1` a particular client and the lack of records around pipeline work and contact. However in the light of the differences between the parties in what the available evidence showed and whether there had been a full and appropriate investigation, the process was still at too early a stage for either: the Tribunal to make any findings about whether misconduct had occurred and/or whether it would have resulted in dismissal; or for the Respondent to genuinely demonstrate that the claimant would have been likely to have been dismissed.

45. Mr Bell's evidence was that he would have dismissed the claimant and that had a fair process been followed he would have been able to do so by the end of August. However, the Tribunal finds that this reflects the fact that Mr Bell appears to have made up his mind without a fair process having been followed (as is reflected in the terms of the report he prepared), rather than what would have in all likelihood have happened had a fair process been followed (which was not pre-determined). As at 2 September 2019 the claimant had not in fact been dismissed for misconduct, his employment ended as a result of the notice given to him following the redundancy process.

46. These issues were not the reason for or the cause of the claimant's dismissal. The claimant was dismissed due to the proposed removal of his role, not the issues identified by the respondent after the (limited) redundancy consultation process.

The Law

Employment Status

47. The starting point are the definitions of employee and contract of employment in section 230 of the Employment Rights Act 1996. They say:

> *"In this Act 'employee' means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment."*
>
> *"In this Act 'contract of employment' means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing."*

48. Section 212 of the Employment Rights Act 1996 says that any week in which an employee's relations with his employer are governed by a contract of employment, count towards computing the employee's period of employment.

49. The key starting point in determining whether someone is an employee is the Judgment of McKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 1 All ER 433, where he said as follows:

> *"A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service ….*"

50. The right approach is to weigh up all the factors. None are necessarily determinative. The key relevant factors include:

- How the parties themselves describe the relationship, which is potentially a significant factor, but is not determinative;
- The amount of remuneration and how was it paid – regular wage tends to point towards a contract of employment;
- Was the worker tied to one employer or free to deliver work for others;
- What were the arrangements for income tax and NI;
- What were the arrangements re risk;
- Is the individual required to work set hours;
- What is agreed re sick pay and holiday pay;

- Is it a contract which the individual must fulfil personally – the ability to send a substitute indicates strongly that it is not an employment relationship (and an unfettered right to do so is inconsistent with it); and

- Is the individual integrated into the organisation and how is he presented to the outside world?

51. In interpreting the agreement between the parties including any documents which record the relationship, the question the Tribunal must ask is what was the true agreement between the parties? The terms of any written agreement can assist in determining this but sometimes in employment the terms they do not reflect the reality. In the decision of the Supreme Court in *Autoclenz Ltd v Belcher* [2011] IRLR 820, *Lord Clarke said:*

> "*So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description."*

52. An employee cannot waive statutory continuity of employment and section 203 of the Employment Rights Act 1996 provides that any provision is void in so far as it purports to exclude or limit the operation of any proceedings in that Act.

Redundancy

53. This is a claim for unfair dismissal and in all such claims the starting point is section 98 of the Employment Rights Act 1996.

> *"In determining for the purposes of this Part whether the dismissal or 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."*
>
> *"A reason falls within this subsection if it…is that the employee was redundant."*
>
> *"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) – 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 shall be determined in accordance with equity and the substantial merits of the case."*

54. Section 139 of the Employment Rights Act 1996 defines redundancy:

> *"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 – … the fact that the requirements of that business – for employees to carry out work of a particular kind, or 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."*

55. It is generally not open to an employee to claim that his dismissal is unfair because the employer acted unreasonably in choosing to make workers redundant. The Tribunal is not to sit in judgment on that particular business decision. The respondent relied upon *Moon v Homeworthy Furniture (Northern) Ltd* [1976] IRLR 298 as authority for the fact that the Tribunal has no jurisdiction to investigate the reasons for creating redundancies.

56. In *Williams v Compair Maxam Ltd* [1982] IRLR 83, the EAT set out the standards which should guide the Tribunal in determining whether a dismissal for redundancy is fair under section 98(4). Browne-Wilkinson J, expressed the position as follows (including only the factors relevant to this case):

> *"… there is a generally accepted view in industrial relations that… reasonable employers will seek to act in accordance with the following principles:*
>
> *(1) The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.*
>
> *(2) ….*
>
> *(3) … the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.*
>
> *(4) The employer will seek to ensure that the selection is made fairly in accordance with these criteria ….*
>
> *(5) The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.*
>
> *… The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim."*

57. The respondent relied upon *Rolls-Royce Motors Ltd v Dewhurst* [1985] IRLR 184 as authority for the proposition that breach of the *Compair Maxam* guidelines is not grounds, in itself, for a finding of unfair dismissal.

58. The House of Lords in *Polkey v AE Dayton Services Ltd* [1987] IRLR 503 summarised the relevant procedures required in a redundancy dismissal in the following terms:

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

59. In *Langston v Cranfield University* [1988] IRLR 172, the EAT held that so fundamental are the requirements of selection, consultation and seeking alternative employment in a redundancy case, they will be treated as being in issue in every redundancy unfair dismissal case.

60. On pools for selection*, in Capita Hartshead Ltd v Byard* [2012] IRLR 814*,* having reviewed the case law, Silber J at para 31 gave this summary of the position:

> *"Pulling the threads together, the applicable principles where the issue in an unfair dismissal claim is whether an employer has selected a correct pool of candidates who are candidates for redundancy are that:*
>
> *(a) "It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted" (per Browne-Wilkinson J in Williams v Compair Maxam Limited);*
>
> *(b) "…the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn" (per Judge Reid QC in Hendy Banks City Print Limited v Fairbrother and Others (UKEAT/0691/04/TM);*
>
> *(c) "There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem" (per Mummery J in Taymech v Ryan EAT/663/94);*
>
> *(d) The Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has "genuinely applied" his mind to the issue of who should be in the pool for consideration for redundancy; and that*
>
> *(e) Even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it."*

61. On consultation, the EAT in *Mugford v Midland Bank* [1997] IRLR 208, summarised the state of the law as follows (including only that which is relevant to this case):

> *"(1) Where no consultation about redundancy has taken place with either the trade union or the employee the dismissal will normally be unfair, unless the [employment] tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.*
>
> *(2) ….*
>
> *(3) It will be a question of fact and degree for the [employment] tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy."*

62. Glidewell LJ said in the case of *R v British Coal Corpn and Secretary of State for Trade and Industry, ex p Price* [1994] IRLR 72:

> *"It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in R v Gwent County Council ex parte Bryant, reported, as far as I know, only at [1988] Crown Office Digest p 19, when he said:*
>
> *'Fair consultation means:*
>
> *(a) consultation when the proposals are still at a formative stage;*
>
> *(b) adequate information on which to respond;*
>
> *(c) adequate time in which to respond;*
>
> *(d) conscientious consideration by an authority of the response to consultation."*

63. The Respondent emphasised that the limited size of the respondent was relevant when considering consultation and submitted that consultation can be more informal when there is a smaller employer. The respondent relied upon *De Grasse v Stockwell Tools Ltd* [1992] IRLR 269 in support of that proposition. It is of course correct that section 98(4)(a) of the Employment Rights Act 1996 makes clear that the size and administrative resources of the employer's undertaking are factors which should be taken into account when considering whether the dismissal is fair or unfair in all the circumstances of the case. What Mr Justice Tucker says in *De Grasse*, when summarising the decision of the EAT in that case, is this:

> "*In our judgment while the size of the undertaking may affect the nature or formality of the consultation process, it cannot excuse the lack of any consultation at all. However informal the consultation may be, it should ordinarily take place.*"

Polkey

64. Following the decision House of Lords decision in *Polkey* the chances of whether or not the claimant would have been retained in employment must be taken into account when calculating the compensatory award. This can be applied by the Tribunal taking the approach of reducing by a percentage the compensation, to reflect the chance that the claimant would still have lost his employment if the employer had followed a full and fair procedure. Alternatively, if the Tribunal decides that the dismissal would have occurred in any event it would have been delayed if a fair procedure had been followed, the compensatory award ought to reflect the additional period for which the employee would have been employed had the dismissal been fair.

65. In *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274*,* the EAT noted that a *Polkey* reduction has the following features:

> *"First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer* would *have done so? The chances may be at the extreme (certainty that it would have been dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between the two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer would have done) … The Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand.*"

Contributory fault

66. Section 122(2) of the Employment Rights Act 1996 provides that the basic award shall be reduced where the conduct of the employee before dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to do so. As a result, there can be a reduction in the basic award in a case where the conduct in no way causes the dismissal, but the conduct of the employee must pre-date notice being given. The reduction provided for in Section 122(2) does not however apply under Section 122(3) if the reason for dismissal was redundancy (the exceptions to that provision, do not apply to this case).

67. Section 123(6) of the Employment Rights Act 1996 provides that if the Tribunal finds that the claimant has, by any action, to any extent caused or contributed to his dismissal, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

This test differs from the test which applies to the basic award. The deduction for contributory fault can be made only in respect of conduct that caused or contributed to the employer's decision to dismiss. It follows that the employee's conduct must be known to the employer prior to the dismissal. Conduct of the employee *during* employment which the employer finds out about after the dismissal may not be taken into account under s 123(6) – the only conduct which can be taken into account is conduct that contributed to the dismissal.

68. The Tribunal must identify the conduct which give rise to the possible contributory fault. There are three factors required to be satisfied for the Tribunal to find contributory conduct under section 123(6): the conduct must be culpable or blameworthy; it must have cause or contributed to the dismissal; and it must be just and equitable to reduce the award by the proportion specified. (*Nelson v BBC (No 2)* [1979] IRLR 346).

Redundancy payment

69. The right to a redundancy payment is governed by sections 135-146 of the Employment Rights Act 1996. The employer is required to pay a redundancy payment if the employee is dismissed by the employer by reason of redundancy. Redundancy is defined by section 136, as described above.

70. Section 140(1) provides that an employee is not entitled to a redundancy payment where the employer terminates the contract by reason of the employee's conduct and the employer would have been entitled to terminate without notice. Where notice is given (for the exclusion to apply), the employer must have either given shorter notice than would otherwise have been required, or have accompanied notice given with a statement in writing that the employer would, by reason of the employee's conduct, be entitled to terminate the contract without notice.

Unlawful deductions from wages and breach of contract

71. For both the unlawful deduction from wages claim and the breach of contract claim the Tribunal needs to establish whether the claimant was contractually entitled to a particular sum and/or a period of notice and, if so, whether that was paid to the claimant, and/or whether there is a fair and valid reason for non-payment as agreed and/or as the employer is entitled to deduct as provided for in sections 13-16 of the Employment Rights Act 1996.

Discussion and analysis

The claimant's status between 4 July 2016 and 30 September 2017

72. In considering the claimant's status for the period from 4 July 2016 to 30 September 2017, the important factors are as follows:

(1) The claimant agreed in consideration for payment to provide his own work and skill in performance of a service for the respondent;

(2) the claimant agreed to be subject to the respondent's control – the claimant emphasised that he reported to Mr Bell (which was not in dispute);

(3) The claimant was paid a regular wage weekly on a Friday, £500 or later £600 per week;

(4) There is no evidence that the claimant could have worked for others, the Tribunal prefers the claimant's evidence to that of Mr Bell in this respect;

(5) The claimant agreed to and did make payments for national insurance and tax himself on the basis that he was a self-employed person. The claimant invoiced for the work (27-28);

(6) There was no risk to the claimant in terms of receiving pay for the work;

(7) The claimant worked set hours – Monday to Friday 8.30am or 9.30am to 5.00pm at the respondent's offices. The claimant was not free to choose his hours of work;

(8) The claimant had to provide his service personally, there was no suggestion that he could provide a substitute;

(9) The claimant was fully integrated into the respondent's organisation – he managed the sales team, had company business cards with the title National Sales Manager, and conducted employee appraisals, recruitment and disciplinary hearings;

(10) There was a written agreement in which the claimant described his employment as having commenced only on 1 October 2017 (39); and

(11) Immediately following the end of the engagement, the claimant was employed by the respondent, and there was no material change of circumstances between the two engagements.

73. The key factors suggesting that the claimant was not an employee are:

(1) The payment of tax and national insurance;

(2) The claimant invoicing the respondent;

(3) The opinion of the parties as it was expressed in the contract of 1 October 2017.

74. All of the other factors point to the claimant being employed, including in particular: control; regular hours of work and pay; risk; and integration into the organisation.

75. In terms of the views of the parties, it is clear that at the time the parties considered themselves and presented themselves as working on the basis that the claimant was self-employed. However, the views of the parties are indicative but not determinative. The terms used in the contract (39) are of limited value in the light of

the provisions of section 203 of the Employment Rights Act 1996, although it does demonstrate what the parties thought to be the case. However, the weight given to the views of the parties at the time is offset by the subsequent view of the parties, being that a subsequent engagement was one in which the claimant was employed when there was no tangible differences (aside from the approach to tax) between the two engagements.

76. Taking into account all of these factors, the Tribunal finds that the genuine legal position during this period was that the claimant was employed by the respondent. The numerous factors indicating employment including the regular hours of work, regular pay and subsequent engagement of the claimant as an employee in circumstances without tangible difference, are all key factors in the Tribunal's conclusion that the claimant was employed throughout this period.

77. As a result, the claimant's continuity of employment with the respondent commenced on 4 July 2016. As it ceased on 2 September 2019, the Claimant had the qualifying period of employment required to: claim unfair dismissal and have the right to a redundancy payment.

Fairness of Dismissal

78. As confirmed above, there was no dispute that the respondent was in financial difficulties and this led Mr Bell to consider ways of saving money. One proposal which resulted was the claimant's unique role being placed at risk or redundancy. Following the process followed, this resulted in the claimant's employment being terminated by reason of redundancy. Whilst the claimant does not agree with the respondent's decision to make him redundant and he criticises the factors that led to that decision, the Tribunal finds that the reason for dismissal was redundancy and it was wholly attributable to the respondent's reduction in the need for someone to undertake the role of selling the commercial side of the business. That role was not replaced. The reason for dismissal was redundancy.

79. In terms of selection, the claimant contended that Mr Threlfall should have been pooled with him and that the pool used (of just his own role) was not appropriate. Mr Bell's evidence was that the claimant's role was one that he felt could be removed, the staff who he managed had left, and he was a salesperson for an ancillary part of the business. Mr Threlfall was in a role which also dealt with Ground Mount, that is the other part of the business. Accordingly, the Tribunal finds that: the claimant's unique role being identified as at risk of redundancy was a decision that Mr Bell was able to take within the range of reasonable responses; that Mr Bell clearly applied his mind to the correct pool (being a pool of one); and that was a decision he was entitled to make.

80. In terms of consultation, it is a question of fact and degree for the Tribunal to consider whether the consultation undertaken with the claimant was so inadequate as to render the dismissal unfair. The overall picture must be viewed. As identified in the *British Coal* case cited above, consultation should involve: adequate information on which to respond; adequate time in which to respond; and conscientious consideration of the response. This should occur when proposals are at a formative stage.

81. The Tribunal does take into account the fact that the respondent is a relatively small business with a limited experience of such matters, as a relevant circumstance. It also agrees that the nature of the respondent may mean that relatively informal consultation may be fair. However, the size of the respondent does not remove the need for genuine consultation, it is just a factor to be taken into account in considering the fairness of the dismissal.

82. As identified in the Tribunal's findings of fact above, the only meeting at which any consultation with the claimant whatsoever took place, was the very first meeting at which he was told he was at risk of redundancy on 8 July. In none of the subsequent meetings was there any genuine consultation with the claimant about the proposal to make him redundant, why that proposal had been made, and/or what the employment alternatives might be. All of the subsequent conversations were about a possible independent contractor engagement and not about redundancy at all. Indeed, the further meeting which the letter of 9 July quoted above said would occur, never took place and there was no discussion at all of the matters outlined in that letter (quoted above).

83. On 1 August the claimant was dismissed when he was handed a letter, there was no consultation or consideration in that meeting at all. The meeting with the right to be accompanied to which the claimant was invited in the dismissing letter (53) never occurred.

84. As a result, the Tribunal finds that the dismissal was unfair because of the lack of consultation undertaken by the respondent. The fundamentals of consultation and seeking alternative employment did not take place in the case. Aside from the first meeting at which the claimant was informed he was at risk, there was no discussion or consultation with the claimant about the reasons for the proposal, any ways of avoiding redundancy (including alternative employment), or giving the claimant an opportunity to have a say.

Polkey and contributory fault

85. In considering the application of *Polkey*, the Employment Tribunal does consider whether the claimant would still have been fairly dismissed by reason of redundancy if a fair procedure had been followed. In the light of the respondent's financial position, the need to save costs, the lack of sales made in the commercial sector (whatever the reason) and the absence of any genuine alternatives for the claimant as an employee, the Tribunal finds that a fair procedure would have made no difference whatsoever: the claimant would still have been made redundant. The claimant did not at any point in the Tribunal hearing raise any issue which would genuinely have led to his redundancy not occurring (and no evidence of any alternative employment was identified).

86. Whilst the dismissal was unfair, the Tribunal concludes that, had a fair procedure been followed by the respondent, the claimant would have been dismissed by reason of redundancy. The financial position of the respondent and the ancillary nature of the Commercial work to the respondent (or at least Mr Bell's view of it as the ancillary work), mean that it is certain that the claimant would have been dismissed by reason of redundancy if a fair process had been followed.

87. In applying *Polkey* to this case, the Tribunal has therefore needed to decide what further period would have been required for a fair procedure to be followed. The Tribunal finds that a fair procedure could have been undertaken within a further week and accordingly finds that the losses resulting from the claimant's unfair dismissal are limited to one week's pay as a result of *Polkey*. The Tribunal finds that the correct approach is to award only this defined period of loss, and not to undertake a percentage assessment.

88. The respondent also relied upon the alleged misconduct as a factor which should be taken into account by the Tribunal when applying *Polkey*. Mr Bell's contention in his evidence was that a misconduct dismissal could have been concluded by the end of August. However the Tribunal does not find that to be the case, because: a full and fair procedure would have taken a longer period of time; and, in any event, the disciplinary process had not in fact been concluded or resulted in dismissal by 2 September (when the notice period expired). The respondent's representative submitted that a fair dismissal for misconduct could have occurred within two weeks. On the assumption that is correct, the Tribunal's finding in respect of the impact of *Polkey* and the time required for a fair redundancy dismissal (one week) means that this possibility should have no further impact on what the claimant is awarded.

89. In any event, and as highlighted above, as the respondent's investigation had not progressed very far and in the light of the limited evidence available to the Tribunal, any reduction to the compensatory award to reflect the chance of fair dismissal by misconduct, would have been a relatively small percentage. In the light of the approach taken in respect of redundancy and the period of likely employment, it is not just and equitable to reduce the compensatory award (further) to reflect this possibility.

90. In terms of contributory fault and the compensatory award, as explained above, the award can only be reduced by conduct which caused or contributed to the dismissal. The claimant was dismissed by reason of redundancy and therefore any misconduct (even if found) did not cause or contribute to the dismissal (as it actually occurred). As the reason was redundancy, no reduction can apply in any event.

91. For the basic award, the conduct issues could legally result in a reduction being made for contributory fault. However on the basis of the evidence which the Tribunal has heard, the Tribunal does not consider it to be just and equitable to reduce the basic award as a result of the misconduct alleged and/or the evidence heard about whether any such misconduct in fact occurred.

Redundancy payment

92. As the Tribunal has found that the claimant had the qualifying service required to be entitled to a redundancy payment, and he was dismissed by reason of redundancy, the Tribunal finds that the claimant was entitled to a redundancy payment (which the respondent has failed to pay).

93. Section 140(1) of the Employment Rights Act 1996 does not remove the claimant's entitlement to a redundancy payment because: the claimant was not in

fact dismissed by reason of conduct; and the respondent dismissed him on full notice without accompanying it with the relevant statement.

Unlawful deductions from wages and breach of contract

94. With regard to unlawful deduction from wages and for the reasons outlined in the facts section above, the Tribunal finds that the respondent did make unlawful deductions from the claimant's wages of the following:

a. £115.96 from the claimant's wages in respect of the week of 12-18 August 2019. As confirmed above, the claimant worked that week and was on agreed holiday on the Friday – he is entitled to the full five days' pay. The payslip produced by the respondent accurately reflected the claimant's entitlement to pay. The approach of paying the claimant 4/5ths of the sum to which he was entitled net, was simply an unlawful deduction from wages; and

b. 1½ days' pay in respect of annual leave taken for which the claimant was entitled to be paid whilst in employment. That is pay for the half day of leave on 23 August approved by Ms O'Farrell, and (applying the terms of his contract) the Bank Holiday on 26 August 2019. There is no valid reason for the respondent falling to pay or deducting these payments. The suggestion in the respondent's documentation that the claimant's employment had somehow ceased prior to 2 September was not correct (as was accepted by the respondent's representative). The Tribunal also finds the respondent was not entitled to make any deduction in respect of 2 August when the claimant in fact worked (albeit remotely) and Mrs O'Farrell had agreed that he would not be attending work (without referring to pay).

95. In relation to the claimant's notice period, the claimant chose not to work or attend work after 16 August. As the claimant did not work, he is not entitled to pay. The claimant was given the notice of termination to which he was contractually entitled, and was paid for the days in that period for which he worked. He is not entitled to any further payment in respect of notice. The respondent did not breach the claimant's contract of employment in relation to notice.

96. The claimant also claimed for commission, claimed as an unlawful deduction from wages and a breach of contract. It is for the claimant to prove that he was entitled to an amount and/or that there had been an unlawful deduction made. The Tribunal was not provided with any evidence which proved any such entitlement. Accordingly the claimant has not proved any breach of contract or deduction made and the claimant's claims relating to commission accordingly fail.

Other claims

97. The Tribunal understands that there has been a separate claim in another jurisdiction made by the respondent against the claimant. It was highlighted to the parties that the Tribunal would not determine any issues in relation to such a claim. The Tribunal's Judgment contains no finding whatsoever about any sums claimed and/or due from the claimant to the respondent.

Conclusions

98. The claimant was unfairly dismissed.

99. The respondent has failed to pay the claimant a statutory redundancy payment. In the alternative, a basic award will be due to the claimant.

100. Any compensatory award will, by reason of *Polkey,* be limited to one week's pay, as a result of the period which it would have taken the respondent to dismiss the claimant by reason of redundancy had a fair procedure been followed.

101. The claimant is entitled to an award for unlawful deduction from wages for the net amount of £115.96. The claimant is also entitled to an award for unlawful deduction from wages for 1½ days pay.

102. The claimant's other claims do not succeed.

Remedy

103. In the light of the Employment Tribunal's findings, the parties are to liaise and see if they can agree the remedy that should be due to the claimant. The following orders are also made:

(1) No later than 21 days after the date that this Judgment is sent to the parties, the respondent is to write to the claimant explaining what sums they accept are due to the claimant and how the figures have been calculated.

(2) Within 14 days thereafter the claimant is to write to the respondent either agreeing to the amounts stated by the respondent or explaining why he disagrees (if that is the case).

(3) The parties are to liaise and write to the Employment Tribunal by no later than 45 days after the date that this Judgment is sent to the parties confirming what (if any) remedy issues remain in dispute and/or if remedy has been agreed what sums have been agreed should be awarded.

(4) If remedy remains in dispute the Tribunal will arrange a remedy hearing. Unless the parties suggest otherwise, this will be listed for half a day and may be conducted remotely by CVP technology.

(5) No later than 14 days prior to the hearing the claimant is to send to the respondent any further documents upon which he wishes to rely at the remedy hearing, which are not already included in the bundle previously prepared. In the event that the respondent wishes to rely upon any additional documents, they must send copies to the claimant by the same date.

(6) Seven days prior to the remedy hearing the respondent is to prepare a bundle for the remedy hearing (paginated and indexed) containing any

additional documents not referred to in the original Tribunal bundle, and shall provide a copy to the claimant.

(7) No later than three working days before the date upon which the remedy hearing is listed, a witness statement containing the evidence of all and any witnesses (including the claimant) which either party intend to call to give evidence in relation to remedy, shall be provided to the other party.

Employment Judge Phil Allen

Date: 9 September 2020

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

11 September 2020

FOR THE TRIBUNAL OFFICE