EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Numbers 4100478/2021 and 4100479/2021 (V)

Case Heard on 6 and 7 September 2021 by CVP

Employment Judge Campbell

Ms Una Kelly	**First Claimant** **Represented by:** **Mr William Alexander**
Ms Michelle Kelly	**Second Claimant** **Represented by:** **Mr William Alexander**
Mount Vernon Tennis and Bowling Club	**Respondent** **Represented by:** **Mr Walter Kilgour,** **Board Chairman**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the tribunal is that:

1. The claimants were not unfairly dismissed and their claims of unfair dismissal are refused;

2. The claimants each suffered an unlawful deduction from their wages on 24 November 2020, the sum being due to Ms Una Kelly being £188.25 and the sum being due to Ms Michelle Kelly being £297.96;

3. The respondent did not unlawfully discriminate against Ms Una Kelly on the basis of her age, and her claim of discrimination is refused.

REASONS

Introduction

1. This claim arose out of the claimants' employment with the respondent. The claimants are mother (Una Kelly) and daughter (Michelle Kelly). They are referred to in this judgment as C1 and C2 respectively, i.e, the first and second claimants.

2. The claimants' dates of service were partially agreed with the respondent. They were each dismissed with effect from 31 October 2020. The respondent maintains that they were dismissed by reason of redundancy.

3. Evidence was heard from Mr Walter Kilgour, President and chair of the respondent's operating board and Mr Graeme Leiper, the respondent's Bar Convenor. The claimants each also gave evidence.

4. Although there was a degree of dispute over a small number of details of the evidence, the witnesses were all found generally to be credible and reliable.

5. The parties each provided their own bundle of documents. The respondent's documents are referred to below with the letter R and the claimants' with the letter A. The claimants also provided a schedule of loss.

6. Closing submissions were delivered orally and noted by the tribunal. The parties' representatives are thanked for their diligent assistance in presenting their cases.

Issues

The issues to be determined in the claim were as follows:

1. Did the respondent dismiss each claimant for a potentially fair reason, whether redundancy as the respondent maintained or another potentially fair reason under section 98(1) or (2) of the Employment Rights Act 1996 ('ERA')?;

2. If so, did the respondent act reasonably in effecting each claimant's dismissal within the requirements of section 98(4) ERA, taking into account its size and resources, equity and the substantial merits of each case?:

3. Did either of the claimants suffer an unlawful deduction from wages under section 13 ERA by being paid furlough pay rather than full pay for their notice periods?

4. Was Ms Una Kelly discriminated against contrary to section 13 of the Equality Act 2010 ('EA') by reason of her age?;

5. If so, was the respondent's treatment of her a proportionate means of achieving a legitimate aim?;

6. If any of the claims are successful, what remedy should be granted?

Findings in fact

1. The following findings in fact were made as they are relevant to the issues.

2. The respondent operates as a bowling and tennis club in the east of Glasgow. It has a management board which is appointed each year in or around March. Positions on the board include President, Secretary, Treasurer, Greens Convener and Social Convener. It has fewer than ten employees. The respondent operates a bar and function space within its premises.

3. The claimants both were employed by the respondent as members of its bar staff. They worked behind the bar and also when functions were being held. At the time of the events considered below there were four bar staff. The other two were Ms May Fairweather, who had around six years' service and Ms Liz Brown or Boyle (hereafter referred to as Ms Brown) who was recruited around November 2019.

4. Ms Una Kelly, C1, was an employee of the respondent from 10 March 2003. Ms Michelle Kelly, C2, was an employee from 1 April 2001. These are the dates recorded by the respondent. They are also the dates on which the respondent based their redundancy payments, which the claimants accepted. The claimants gave evidence to the effect that they worked for the respondent

before those dates, but on the evidence before the tribunal it is found that to the extent they did, they were acting as casual workers and not employees. They did not acquire continuous service during that time.

5. None of the bar staff had entirely fixed hours of work, although they would tend to work on given days and/or shifts. Those could vary depending on factors such as whether there were functions or whether it was during or outside of the playing season.

6. Bar staff hours were set weekly by the preparation of a rota by Mr Graeme Leiper, the Bar Convenor.

Events of early 2020

7. The respondent held its Annual General Meeting on 1 March 2020. An extract of the minutes of that meeting were produced [R2]. The treasurer reported details of a further annual deficit in the financial year just ended. The deficit was in the sense of a trading loss after depreciation, although the respondent had cash reserves. There had been a trading deficit in the previous financial year (2018-2019) also.

8. Part of the reason for the deficit was that bar takings were declining. They had been falling for around 4 years. Part of that was thought to relate to increases in prices and stricter limits on driving after drinking alcohol. The reduction in custom was most evident during weekdays.

9. At this time the respondent operated the bar seven days a week throughout the year, which was rare for such clubs as the norm is for the bar to be closed on certain days. Mr Leiper reported to the meeting that on 70 days of the previous year the takings did not cover the wages of the bar staff.

10. It was decided that the operation of the bar would be reviewed and may have to be revised to keep it financially viable.

Effects of Covid-19 and furlough

11. As a result of the Covid-19 pandemic the respondent had to close around 23 March 2020. All of the bar staff were placed on furlough under the UK Government's Coronavirus Job Retention Scheme (CJRS).

12. With the assistance of external accountants, the respondent calculated and paid furlough pay to the bar staff. Related to the fact that Ms Brown had only commenced working on November 2019, the calculation of her furlough pay resulted in her being entitled to significantly less than the other three more long-serving employees.

13. The board decided to top up Ms Brown's furlough pay to bring it closer to the pay of the other three. She received a weekly 'top up' payment of £34.53. Details of bar staff weekly pay from 8 May 2020 onwards were produced by the respondent. In the weeks when no work was being done, Ms Boyle's furlough pay, including the top up, was £83.64 which was less than the other three. C1 received £91.46 and C2 received £137.15.

14. In the weeks commencing 17 and 24 July 2020, C1 received the same furlough figure as above but Ms Brown received £94.98 in both weeks. This was a combination of furlough pay and pay for hours worked, i.e. flexible furlough which had been introduced as an option under the CJRS from 1 July. Those two weeks were the only occasions when Ms Brown was paid more than C1 up until 31 October 2020 when C1 left the respondent's employment.

15. The bar remained closed and its staff continued on furlough until around June 2020 when it was able to partially reopen. The Board had a virtual meeting on 10 June 2020 which was minuted [R3]. Mr Leiper reported on the current state of play and delivered a plan for returning to normal operations through four phases, which he had circulated in advance. Phase one involved the bar still being closed, which was the position at that time. Phase two involved partial opening outdoors on Saturdays and Sundays. Phases three and four envisaged further reopening. These are discussed in further detail at paragraph 19 below.

16. Mr Leiper said that even setting to one side the effects of the virus, there was a need to address staffing arrangements. The previous year's figures only

justified having paid staff at weekends when functions were being held. There was discussion of using volunteers to help cover the bar during weeknights. A draft letter had been prepared to go to the bar staff explaining the situation and raising both the option to return to work in some capacity, but also possible voluntary redundancy. It was therefore agreed to begin a period of consultation with each member of bar staff.

Redundancy consultation

17. Each member of bar staff was sent a letter dated 16 June 2020 and signed off by Mr Anderson [R4, R5]. The letter was headed 'Notice of Consultation Period'. It explained that some difficult decisions had to be made at the club, and that the letter should be taken as the start of a consultation period in relation to the future of their role, and the number of hours available to them going forward. The letter stressed that no formal decisions had been taken, but that there was a possibility that at the end of the consultation period the individual could have fewer hours to work or have their position made redundant.

18. The letter went on to say that the board would consider any application for voluntary redundancy and any other proposals the recipient wished to make.

19. The four phases of the plan for reopening were set out in terms of dates and anticipated levels of activity. Those were as follows:

    a. **Phase 1** – March to June 2020 – bar closed

    b. **Phase 2** - June to August 2020 – bar open for outside drink consumption, 4 hours per day maximum, weather dependent

    c. **Phase 3** – September to December 2020 – normal trading without functions, socially distanced, winter opening hours

    d. **Phase 4** – January 2021 onwards – normal trading with functions

20. The above were described as assumptions which were subject to change in line with Government guidance.

21. In order to fit in with the above plan, two staffing structure options were put forward.

22. **Option 1** involved retaining all four staff, working initially for two hours at weekends during phase 2, increasing to between 3 and 7.5 hours at weekends during phases 3 and 4.

23. **Option 2** involved reducing the number of bar staff to two and sharing the same proposed number of working hours through phases 2 to 4 as for option 1 between them. They would work 4 hours each initially, increasing to between 8.5 and 10 hours.

24. Responses to the proposals were requested by 27 June 2020. If any of the recipients of the letters had questions they were asked to telephone or email Mr Leiper.

25. None of the four bar staff responded to the letters of 16 June by 27 June.

26. A further board meeting took place on 8 July 2020. This was minuted [R7]. In advance of it Mr Leiper provided a written report on the steps taken so far [R6]. Mr Leiper said in his report that no responses had been received to the letters sent to the bar staff and so it should be assumed none of them had any other suggestions or wished to be made redundant. Accordingly the proposal was to move forward with interviews and assessment of each individual. The proposed structure and method of conducting the interviews was detailed in a set of numbered points. A panel of three board members would explain to each individual that the proposal was to reduce the number of bar staff from four to two. A skills assessment would be undertaken, involving the individual being scored on various aspects of the role. This would be used as the basis of selection. There would be a separate panel of three people to hear any appeals against selection. Those should be independent of the board and three individuals were suggested. Two of them had HR experience and the other was the former Bar Convener.

27. At the board meeting of 8 July 2020 Mr Leiper's proposal was approved. The selection panel were confirmed to be Mr Leiper, Mr John Anderson, the club

Secretary and Mr John Frew, the Treasurer. Mr Leiper's proposals for the appeal panel were also approved.

Meetings with affected employees and further procedures

28. Mr Anderson wrote a letter to each affected employee dated 1 July 2020 which invited them to a meeting with the panel on 10 July [R8, R9]. That was described as an opportunity to discuss the new structure and the options for the future. It was confirmed that an assessment of their skills would be carried out in four specified areas of the role and they were given the option to bring a companion.

29. On 10 July 2020 the redundancy panel met with each of the four members of bar staff individually. The panel reiterated the background and reasons for holding the meeting. Each employee was asked for their thoughts on the proposals put forward in the letters of 16 June 2020. They were provided with a proposed set of written terms and conditions of employment for the role going forward [A1]. They were able to take a copy away for consideration. They were asked if they wished to undertake the skills assessment. Only Ms Brown wished to do so, and she completed the assessment. Each of the other three said they did not want to at that point and, after an adjournment in their meetings, asked for more time to consider their position, which was agreed.

30. After obtaining advice from a trade union representative, the two claimants took issue with the proposed statement of terms as it did not guarantee them a minimum number of hours. The working hours were specified as follows:

> *'To work the hours as directed by the Bar Convener, which include functions mainly on pre-booked Friday and Saturday nights.'*

31. The claimants therefore viewed the document as a zero-hours contract and as such a departure from their previous contracts. In their evidence, both claimants said that they had at one time possessed, but subsequently mislaid, a written statement of their terms and conditions dated at the time they began working for the respondent, and that each specified a guaranteed minimum number of hours. C1 said she was guaranteed 16 hours in this way and C2

claimed she was entitled to 21 hours. Mr Leiper's evidence was that every member of staff was provided with a new statement of terms and conditions in 2006, although he conceded that this predated his involvement on the board and he could find no record of a copy of the 2006 terms being issued to either claimant. The 2006 template was similar to the proposed statement he provided to the bar staff on 10 June 2020 in that it did not guarantee a minimum number of hours.

32. There is little evidence on which to resolve the issue of whether the claimants were initially guaranteed certain hours. By their own admission they were recalling documents some years old which they had not looked at recently and could not find. However, based on their evidence and the apparent regularity of their working patterns, it is found that they had been entitled to receive the minimum number of weekly hours of work that they claimed. It is also found that Mr Leiper did not know that to be the case, and that he was acting genuinely on the understanding that neither claimant (nor their two colleagues if relevant) was entitled to a minimum number of hours. It follows that he did not know, when proposing the terms he provided on 10 July 2020, that this would represent a change to their terms in relation to hours of work.

33. Neither claimant came back to Mr Leiper after leaving their meeting on 10 July 2020 to discuss the proposed contract.

34. Mr Anderson wrote to each claimant on 13 July 2020 [R10, R11]. He acknowledged that they did not wish to go through the assessment the Friday before, and rescheduled this to 20 July 2020. The date was then moved to 27 July 2020.

35. In the course of each of their meetings on 27 July 2020, the claimants and Ms Fairweather said they wished to apply for voluntary redundancy. In each case, they were told that this would be put to the board for consideration. Mr Anderson wrote to each on 30 July 2020 to confirm this [R12, R13]. Each was asked to confirm their request in writing which they did. C2 did so by letter [R14] and C1 did so by email, which was not produced, but which was accepted to have been sent in similar terms.

36. As a result of that, neither of the claimants nor Ms Fairweather completed the skills assessment as had been envisaged by the respondent up until the meetings on 27 July 2020 took place.

Voluntary redundancy

37. The board next met on 12 August 2020. The minutes contained a report on how the meetings on 27 July 2020 had gone [R15]. The board agreed that all three requests for voluntary redundancy should be granted. Although it had wished to retain two members of bar staff overall, it did not consider it fair to grant some requests but not others.

38. All three applicants for voluntary redundancy were told following the board meeting that their requests had been granted. Each was served notice of termination according to their legal entitlement. For each claimant that was 12 weeks, taking them to 31 October 2020 as their final day of service.

39. During their notice periods both claimants worked some shifts at the bar. On one occasion, C2 attended the bar for a shift to find a temporary worker already there. This was explained by Mr Lieper to have been an error, caused by him believing that the claimant was unavailable that day and arranging cover for her. On that occasion he allowed the claimant to go home but still be paid in full for her shift.

40. An email was sent to the respondent by the claimants on behalf of themselves and Ms Fairweather on 1 October 2020. It intimated that as a result of showing potential symptoms of Covid-19, they were self-isolating and would not be available to work for 14 days. Mr Anderson wrote back to confirm that they would be put on garden leave from the end of their self-isolation period until their employment terminated. Therefore neither claimant retuned to work at all in October.

41. On 27 October 2020 Mr Anderson wrote to each claimant to confirm that their employment would end at the end of that month, and to confirm some other related details [R16, R17]. Each was to receive payment in lieu of any accrued holidays and a statutory redundancy payment, the component

details of which were specified. The date of C1's continuous employment was stated as 18 May 2003 and C2's start date was 1 April 2001.

42. Each claimant was asked to sign and return acceptance of the redundancy calculation and both did so. There had been exchanges between the parties before this date over aspects of the respondent's initial calculations, but the claimants confirmed that the figures in these letters were correct.

43. The redundancy payments were sent to the claimants by cheques on 24 and 30 November 2020.

Notice pay discrepancy

44. At some later point it became clear to the respondent that it had paid the claimants furlough pay at 80% of their average weekly pay for weeks when they were not required to work, rather than full pay throughout their notice periods. It conceded that they were due full pay for each week.

45. A document had been prepared by the respondent [R22] calculating the shortfall due to C1 as £188.25 and the amount owed to C2 as £297.96. The claimants accepted those figures were correct.

The claims of unfair dismissal under section 94 ERA

Reason for dismissal

46. It is necessary to consider whether the claimants were unfairly dismissed under section 94 and, in particular, section 98 ERA.

47. First it is necessary to establish the reason for dismissal and consider whether this is a permitted reason within section 98(1) and (2) ERA. The onus is on the dismissing employer to do so.

48. The respondent contends that each claimant was dismissed by reason of redundancy within section 98(2)(c), which would therefore be a fair reason. This was challenged by the claimants.

49. The statutory definition of redundancy is contained in section 139 ERA, which reads as follows:

> ***139 Redundancy.***
>
> *(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—*
>
> *(a) the fact that his employer has ceased or intends to cease—*
>
> *(i) to carry on the business for the purposes of which the employee was employed by him, or*
>
> *(ii) to carry on that business in the place where the employee was so employed, or*
>
> *(b) the fact that the requirements of that business—*
>
> *(i) for employees to carry out work of a particular kind, or*
>
> *(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.*

50. There was a volume of evidence in support of redundancy being the reason for the claimants' dismissal, both documentary and oral. It was clear that the respondent was facing a downturn in its level of bar custom even before the Covid-19 pandemic, which accelerated the effect. The respondent concluded that it would need to scale down the amount of hours when the bar was open, save costs and potentially reduce the number of roles required. There was clearly a reduction in work for employees to do as of late March 2020 when the club closed, and the plan for reopening later in that year involved reduced hours and with it the requirement for paid staff. The respondent was entitled to conclude that it needed fewer hours to be worked and, potentially, fewer employees. There was no evidence of any significance to suggest a different reason.

51. Mr Alexander pointed to a passage in the minutes of the board meeting on 8 July 2020 in which Mr Frew, the Treasurer, had reported the respondent's bank balance and said that *'profit to date is actually up on the same period last year.*' He took that to indicate that the respondent was in a healthy position financially and could not justify making redundancies. However, that was a snapshot against a trend over a number of years involving declining bar trade. The overall picture was adequate as a basis for the respondent's decision to follow the process which it did.

52. Reference was also made by the claimants to the respondent asking other individuals outside of the four bar employees to cover shifts in the bar. It was suggested that this contradicted the respondent's case for reducing hours and staff numbers. There appeared to be very few occasions when this happened, and the instances raised were more in the nature of short-term cover for the permanent staff who were on leave, self-isolating or otherwise unable to cover the shift in question.

53. Therefore it is found that the reason for each of the claimants' dismissals was redundancy, a potentially fair reason.

Whether the dismissals were implemented reasonably

54. Next the requirements of section 98(4) must be considered, namely whether, given its size and resources, the respondent acted reasonably in implementing the claimants' dismissal for the reason it held. This assessment should be made *'in accordance with equity and the substantial merits of the case'*. The onus is neutral in establishing whether this is the case.

55. It is found that the respondent satisfied this statutory requirement in these claims. That conclusion is supported in general by the following:

    a. The respondent is a small employer and had limited resources in terms of personnel and finances to apply to the process. Nevertheless the process was reasonably thought out, discussed and documented by the board and the individuals who had specific roles;

b. The affected employees were clearly informed at the beginning of the process what was happening, why, the proposed options, the future steps and the extent to which they could be involved;

c. Voluntary redundancy was offered;

d. For the more detailed reasons given below, the scoring approach was reasonable;

e. There were individual consultation meetings;

f. There was the opportunity to ask questions;

g. There was the opportunity to have input into the options suggested, or propose other options;

h. Those affected would be offered the right of appeal to an independent panel.

Scoring and selection

56. Although the respondent did not have to carry out a selection exercise ultimately, the potential for that was part of the context in which each claimant's employment came to an end.

57. Selection criteria and the basis for scoring should be clear and unambiguous. They should be objective as far as reasonably possible, with reference to supporting evidence rather than subjective opinion. The four key criteria chosen by the respondent were adequate to meet those requirements. They appear relevant given the needs of the respondent's business at the time and going forward.

58. The law is clear that, provided the selection criteria adopted are objective and contain no obvious bias, and that they have been applied in a reasonable fashion, an employment tribunal should not excessively scrutinise them – ***British Aerospace plc v Green 1995 ICR 1006 CA.***

Individual consultation and exchanges between the claimant and the respondent

59. When assessing the fairness of an employer's redundancy process it can also be relevant to consider the way the employee participated in it. It is particularly relevant to do so in these claims as each of the claimants requested and was granted voluntary redundancy.

60. In doing so they cut short the process which would have been followed. The respondent was entitled to take at face value their requests and grant them. There was no coercion and no evidence at the time that the claimants intended to challenge that process at a later date.

61. Both claimants stated that they decided to request voluntary redundancy after being shown the proposed statement of terms for the role on 10 July 2020. Both took issue with the fact that there appeared to be no minimum guaranteed hours. Whilst it is correct that this is what the wording entailed, Mr Leiper did not appreciate that this was a departure from their existing terms, much less that they were so strongly opposed to it. In his evidence Mr Leiper did not foresee a situation where the bar staff who were retained would not be given work. One of the premises of the proposed new system was that there would be enough work for those who remained. Thus, whilst the claimants could be understood for considering the new terms to amount to a 'zero-hours' contract, the respondent was not anticipating any significant change in working patterns although minimum hours could no longer be guaranteed. The introduction of the new statement of terms and conditions was not unreasonable in the context of this process.

62. Importantly, the claimants did not enter into any dialogue about the statement. Had they done so it is possible that agreement could have been reached on a change of wording or other assurance as to work levels. The respondent clearly indicated that comments on its proposals, or even alternative proposals, would be listened to.

63. The consequence of these events is that the respondent was reasonable in accepting the claimants' requests for voluntary redundancy and terminating their employment on that basis.

64. It was suggested by Mr Alexander in his submissions that the claimants could be viewed as having been constructively unfairly dismissed, with the material breach of their contract being the proposal of the 'zero-hours' contract on 10 July 2020, effectively an anticipatory breach, and their resignation being by way of the requests for voluntary redundancy.

65. However, there is authority to the effect that the granting of a voluntary redundancy request is a positive act of dismissal by an employer rather than a constructive one – ***Optare Group Limited v Transport and General Workers Union UKEAT/0143/07.***

66. In any event, such a claim would have failed on the evidence, particularly as the proposal of the contractual document on 10 July 2020 for discussion was not an anticipatory material breach of contract.

Claim of disability discrimination by Una Kelly

67. At the outset of the hearing Mr Alexander stated that it was C1's intention to claim direct discrimination based on age. Mr Kilgour for the respondent said that he had not known such a claim was being made.

68. C1 completed her claim form by omitting to tick the box in section 8.1 to confirm *'I was discriminated against on the grounds of: / age'*. She had ticked the box in section 9.1 to state that if her claim was successful, she was claiming a recommendation in a discrimination claim.

69. The nature of the claim, said explicitly by Mr Alexander to be a claim of direct discrimination, was that in topping up the furlough pay of Ms Brown, C1 was treated less favourably on the basis of age. C1 was 79 at the start of the pandemic whereas Ms Brown was a younger person. The respondent was alleged to have treated Ms Brown more favourably as it wanted to retain a younger employee more than it did an older one.

70. On hearing Mr Alexander in relation to the detail of the supposed discrimination claim, Mr Kilgour said that he was opposed to it, but would be in a position on the respondent's behalf to answer it if it formed part of the claim. He therefore dealt with C1's allegations in his cross-examination of her, his examination in chief of Mr Leiper and his closing submissions.

71. Judgment was reserved until all the evidence was heard on the questions of whether:

    a. An age discrimination complaint was raised within the original claim (i.e. the ET1 form as originally submitted);

    b. Mr Alexander's submissions should be taken as an application to amend the claim to include such a complaint now; and

    c. Whether in either case the complaint should succeed.

72. I concluded that no discrimination complaint had been made as part of the original claim. The claimant had clearly omitted to tick the box to indicate that she was making such a claim. The indication of a desire to seek a recommendation (whilst available as a remedy only in discrimination cases) does not make up for that. There was no wording in the particulars of claim which could be realistically said to have given the respondent fair notice of the complaint now being described.

73. However, I considered that it was in the interests of justice to have the complaint determined, and thus treat Mr Alexander's submissions as an application to amend the claim to that effect. I considered the overriding objective, and its constituent aspects, in terms of rule 2 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 in this context. In particular, it best did justice to both parties to have the claim determined, as C1 was clearly willing and able to pursue it and Mr Kilgour equally was in a position to defend it. There required to be little or no disruption to the hearing in terms of additional time, witness evidence or documents. It was a proportionate and cost-effective approach.

74. Having therefore decided to determine the discrimination complaint on its merits, it is found that the respondent did not discriminate against the claimant on the basis of her age.

75. There are a number of issues with the complaint. C1 was not herself placed at a disadvantage in the sense of being treated less favourably than she would have been had the action complained about not take place. She was paid the same furlough pay all the way through her furlough period. Additionally, there were two other members of bar staff, including C2, her daughter, who were treated the same way she was, by not having any changes made to their furlough pay.

76. It is recognised that age discrimination against the claimant could still have existed despite the above factors tending to point away from it. However, the act complained of, namely the enhancing of Ms Brown's furlough pay, was not an act of direct discrimination because it did not occur by reason of the claimant's age, or for a reason connected to age at all. On the evidence it is clear that Ms Brown's pay was topped up simply because the operation of the CJRS resulted in her reference weekly pay figure falling materially short of her colleagues, to the point that the respondent viewed it as an inadequate weekly wage. Their decision to enhance it was motivated by a desire to treat its staff equally. There was no evidence to support C1's contention that the respondent did this because it was keener to retain a younger employee than an older one.

77. Had the respondent's practice been an example of direct age discrimination, I would have found it to be a proportionate means of achieving a legitimate aim under section 13(2) EQA. The legitimate aim was to provide all staff with a similar amount of weekly pay notwithstanding the unequal effect of following the strict rules of the CJRS. The means of achieving that were proportionate as all that was required was a relatively modest top up of the disadvantaged employee's weekly pay. As such, the discrimination would have been lawful.

Conclusions

78. For the reasons above, it is found that the claimants were dismissed by reason of redundancy and that the respondent conducted itself reasonably in all of the circumstances, given its size and administrative resources, in dismissing the claimants for that reason. They were not unfairly dismissed and those claims are refused.

79. As a result it is not necessary to review further the matter of the claimant's post-termination losses or calculate compensation.

80. As admitted by the respondent, it unintentionally miscalculated the claimants' weekly pay during their notice periods. It has offered to make that good and the claimants agree with the calculations made. Accordingly those sums are awarded to the claimant in recognition of the unlawful deduction from their wages.

81. C1 was not the subject of unlawful age discrimination, and that claim is also dismissed.

Employment Judge: Brian Campbell
Date of Judgment: 17 September 2021
Entered in register: 22 September 2021
and copied to parties