EMPLOYMENT TRIBUNALS

Claimant: Mr Mark Hill

Respondent: Uralmoto (UK) Ltd

Heard at: London South Employment Tribunal, Croydon
On: 7, 8 and 9 November 2022 (with Tribunal deliberations also on 10 November 2022)

Before: Employment Judge Abbott, Mrs J Jerram and Mr S M Khan

Representation
Claimant: Mr A Hill (lay representative)
Respondent: Mr N Turner (director)

RESERVED JUDGMENT

1. The claim for unfair dismissal succeeds. The respondent is ordered to pay to the claimant compensation as follows:

    a. a basic award of £207.68;

    b. a compensatory award of £5,850.00 (gross);

    c. an award for loss of statutory rights of £270; and

    d. an award for lost employer pension contributions of £229.77.

2. The claim for disability discrimination is not well-founded and is dismissed.

3. The claim for a further payment in respect of redundancy is dismissed on the basis that the reason for dismissal was not redundancy, and any shortfall is addressed as part of the award for unfair dismissal.

4. The claim in relation to holiday pay succeeds. The respondent is ordered to pay to the claimant the sum of £285.71 (gross).

REASONS

Introduction

2. The Claimant, Mr Mark Hill (***Mr Hill***), was employed by the Respondent, Uralmoto (UK) Ltd (***Uralmoto***), as an MOT tester from January 2012. His employment ended with him being dismissed, purportedly on grounds of redundancy, effective 26 October 2020.

3. The Claimant brought claims for unfair dismissal, disability discrimination, for an alleged shortfall in his redundancy payment, and for alleged unpaid holiday pay. The Respondent denied the Claimant's claims.

4. The case came before the Tribunal for Final Hearing listed on 7-9 November 2022. The hearing was listed to take place in person, and all parties attended at the venue on the first day for opening discussions and the evidence of the Claimant. Unfortunately, Mr Turner was taken ill overnight following the first day and notified the Tribunal by email that he was unable to attend. Following enquiries made by the Tribunal clerk during the morning, it was established that Mr Turner would not be fit to participate on 8 November 2022 but felt he was able to do so by video the following day. The Tribunal sat that morning solely to explain the position to the Claimant and his representative, who were content to proceed on the basis that Mr Turner attend remotely for the remainder of the hearing. The substantive hearing resumed on 9 November 2022, with Mr Turner giving evidence via video, the Claimant was then briefly recalled to give evidence relevant to remedy, and the parties then gave their closing submissions. The Tribunal reserved judgment, taking time to deliberate on 10 November 2022.

5. Mr Hill provided a witness statement and a statement of impairments and gave oral evidence. He also relied upon statements from four other witnesses, namely Mr Rodd and Mr Newcombe (who had worked with Mr Hill at Uralmoto), Mr Chamberlain (a friend of Mr Hill) and Mrs Hill (Mr Hill's wife). However, as these witnesses did not attend for cross-examination, the Tribunal could afford their evidence little weight – the extent to which the evidence was considered relevant (if at all) is indicated in the factual findings below.

6. Uralmoto relied upon a witness statement from Mr Turner, who gave oral evidence by video. Uralmoto also relied upon two statements from Mr Quinn (who now operates the business in which Mr Hill was previously employed) and a statement from Mr Rowe (another potential acquirer of the business). However, as above, as these witnesses did not attend for cross-examination, the Tribunal could afford their evidence little weight – the extent to which the evidence was considered relevant (if at all) is indicated in the factual findings below. Two other late filed statements were not admitted into evidence on the basis they were not relevant to the issues before the Tribunal.

7. The Tribunal was provided with a variety of documents including various emails and Facebook Messenger exchanges, which were considered.

The issues: liability

8. The issues to be determined were recorded in an Order of EJ David Hughes dated 19 July 2022. Following discussion with the parties on the first day of the hearing, the issues were refined as follows:

Unfair dismissal

(1) What was the reason or principal reason for dismissal?

The respondent says the reason was redundancy, which is a potentially fair reason for dismissal under s.98(2) of the Employment Rights Act 1996. The claimant says the reason was to facilitate the sale of the respondent's business to Mr Quinn as his employment would then not transfer with the business under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (***TUPE***).

(2) If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will usually decide, in particular, whether:

(a) The respondent adequately warned and consulted the claimant;

(b) The respondent adopted a reasonable selection decision, including its approach to a selection pool;

(c) The respondent took reasonable steps to find the claimant suitable alternative employment;

(d) Dismissal was within the range of reasonable responses.

(3) If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct. This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.

Disability discrimination

(4) Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

(a) Did he have a physical or mental impairment?

(b) Did it have a substantial adverse effect on his ability to carry out day-to-day activities?

(c) If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

(d) Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

(e) Were the effects of the impairment long-term? The Tribunal will decide:

(i) did they last at least 12 months, or were they likely to last at least 12 months?

(ii) if not, were they likely to recur?

(5) Did the respondent decide not to assign the claimant to motorcycle MOT testing because of doubts as to his physical ability to perform the role?

(6) Was that less favourable treatment? The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's. The claimant has not named anyone in particular who he says was treated better than he was.

(7) If so, was it because of disability?

Holiday pay

(8) Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?

Redundancy payment

(9) Was the claimant's redundancy payment correctly calculated?

Relevant law

Unfair dismissal

9. Section 94(1) of the Employment Rights Act 1996 (***ERA***) provides that an employee has the right not to be unfairly dismissed by their employer. It is not in dispute that Mr Hill was a qualifying employee and was dismissed by Uralmoto.

10. Section 98 ERA deals with the fairness of dismissals. There are two stages within this section.

    a. First, the employer must show that it had a potentially fair reason for the dismissal, *i.e.* one of the reasons listed in section 98(2) or "*some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held*" (section 98(1)(b)). Redundancy is a potentially fair reason (section 98(2)(c)).

b. Second, if the employer shows that it had a potentially fair reason for the dismissal, the Tribunal must consider whether the employer acted fairly or unfairly in dismissing for that reason. Section 98(4) provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) shall depend 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. The burden of proof at this stage is neutral. It is not for the Tribunal to substitute its own view of what it would have done in the position of the employer, but to determine whether what occurred fell within the range of reasonable responses of a reasonable employer, both in relation to the substantive decision and the procedure followed (*J Sainsbury plc v Hitt* [2003] IRLR 23; *Whitbread plc v Hall* [2001] ICR 699).

11. However, there are certain reasons for dismissal which are deemed to be automatically unfair, in which case the second stage outlined above does not need to be considered. One such reason is contained in Regulation 7(1) of TUPE, which provides that "*[w]here either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee is to be treated … as unfairly dismissed if the sole or principal reason for the dismissal is the transfer*".

Direct disability discrimination

12. Section 13 of the Equality Act 2010 (***EqA***) prohibits direct discrimination. Section 13(1) EqA states: "*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*"

13. Disability is a protected characteristic under section 6 EqA. Section 6(1) EqA defines what is a disability for the purposes of the EqA:

> "*A person (P) has a disability if—*
>
> *(a) P has a physical or mental impairment, and*
>
> *(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*"

14. Supplementary provisions are found in Schedule 1 to the Act. Paragraph 2 of Schedule 1 provides, insofar as relevant, that:

> "*(1) The effect of an impairment is long-term if – (a) it has lasted for at least 12 months, (b) it is likely to last for at least 12 months, or (c) it is likely to last for the rest of the life of the person affected.*"

15. Paragraph 5 of Schedule 1 provides, insofar as relevant, that:

"*(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if - (a) measures are being taken to treat or correct it, and (b) but for that, it would be likely to have that effect.*
(2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid…"

16. It is the practice of the Employment Tribunal, consistent with paragraph 12 of Schedule 1, to also take account of ministerial guidance, specifically the "*Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions related to the definition of disability*" (May 2011) (**the Guidance**), and we have had regard to the Guidance in making our decision. We have also had regard to the guidance on the meaning of "disability" included in Appendix 1 to the "*Equality and Human Rights Commission: Code of Practice on Employment*" (2011).

17. In *Goodwin v Patent Office* [1999] ICR 302, the then President of the Employment Appeal Tribunal, Mr Justice Morison, provided guidance on the proper approach for the Tribunal to adopt, holding that the following four questions should be answered, in order:

    a. Does the claimant have an impairment which is either mental or physical? ('the impairment condition')

    b. Does the impairment affect the claimant's ability to carry out normal day to day activities, and does it have an adverse effect? ('the adverse effect condition')

    c. Is the adverse effect upon the claimant's ability substantial? ('the substantial condition')

    d. Is the adverse effect upon the claimant's ability long-term? ('the long-term condition')

    However, Morison J. warned of the risk of disaggregating the four questions, noting that it is important to look at the overall picture.

18. The relevant point(s) in time for the assessment of whether the claimant is disabled is the time of the alleged discriminatory act(s): *Cruickshank v Vaw Motorcast Ltd* [2002] ICR 729.

19. The primary focus in a direct discrimination case is on identifying why the claimant was treated as he was, before coming back to whether it was less favourable treatment because of the protected characteristic (see *e.g. Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11). It is well established law that a respondent's motive is irrelevant and, indeed, the possibility of unconscious discrimination is recognised (see *e.g. Nagarajan v London Regional Transport* [1999] IRLR 572, HL). Moreover, the protected characteristic need not be the sole or even principal reason for the treatment as long as it is a significant influence or an effective cause of the treatment.

20. The bare facts of (i) a difference in status and (ii) a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal could conclude that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination (*Madrassy v Nomura International plc* [2007] EWCA Civ 32). Something more is needed.

21. The provisions relating to the burden of proof are found in Section 136(2) and (3) EqA:

> "*(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*"

22. It is thus for the Claimant to prove facts from which the Tribunal could conclude, in the absence of any evidence from the Respondent, that the Respondent committed an act of discrimination. Only if that burden is discharged is it then for the Respondent to prove that the reason for the treatment was not because of a protected characteristic (see, *e.g.*, *Royal Mail Group Ltd v Efobi* [2021] UKSC 33).

23. Notwithstanding the above, in *Efobi*, Lord Leggatt repeated Lord Hope's reminder in *Hewage v Grampian Health Board* [2012] UKSC 37 that it is important not to make too much of the role of the burden of proof provisions: "*They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.*"

Holiday pay

24. Employees are entitled to be paid in lieu of accrued but untaken holiday on termination of employment pursuant to the Working Time Regulations 1998 (***WTR***). An employee's leave year begins on the anniversary of their start date (regulation 13A(4) WTR). The WTR also provide that an employer may require a worker to take leave on particular days, provided that notice is given twice as many days in advance of the earliest day specified in the notice (regulation 15 WTR).

Redundancy pay

25. Redundancy pay is calculated on the basis of a statutory formula. In this case, there is no dispute that Mr Hill would be entitled to the equivalent of 12 weeks' pay. The dispute concerns what a weeks' pay is: this is to be calculated based on the average the employee earned per week over the 12 week period running up to the notice of redundancy (Chapter II of Part XIV of the ERA).

<u>Findings of fact</u>

26. The relevant facts are, we found, as follows. Where it was necessary for us to resolve any conflict of evidence, we indicate how we have done so at the

relevant point. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in these reasons. We have not referred to every document read by the Tribunal in the findings below, but that does not mean such documents were not considered if referred to in the evidence and/or in the course of the hearing.

27. Uralmoto operated an MOT testing centre. The director of Uralmoto, Mr Neil Turner, primarily performed the role of MOT tester for motorcycles.

28. Mr Hill was employed under a contract of employment stated to be effective from 30 January 2012. There were two different versions of the contract in the materials before the Tribunal, but there were no meaningful differences between the two. Mr Hill's initial salary was stated to be £21,000 per annum, and he was engaged as an "MOT Tester for Class IV vehicles". Class IV vehicles primarily are motor cars, but also covered some trikes of above a certain weight. His paid holiday entitlement was stated to be 24 days per year, and the notice period was 1 month, from either side. Mr Hill was the only employee of Uralmoto for the majority of his employment, working alongside Mr Turner.

29. Mr Hill received a salary increase in 2015, meaning his salary was increased to £25,000 per annum at that stage.

30. In addition, as a consequence of statute, Mr Hill's holiday allowance by the time of the relevant events in this case had increased to 28 days.

31. Between 14 and 18 September 2017, Mr Turner was abroad for his son's wedding. By this time, Mr Hill had become qualified to conduct motorcycle MOT tests and had conducted a handful of such tests in the latter part of 2016 and early 2017. Uralmoto's logs show that, whilst Mr Turner was away, Mr Hill conducted 6 motorcycle MOTs on 14 September 2017, 1 on 15 September 2017 and 2 on 18 September 2017. Considering the numbers of MOTs conducted, particularly on the 14 September 2017, we find that on the balance of probabilities Mr Hill was asked by Mr Turner to fulfil those MOTs in Mr Turner's absence.

32. In the course of 2019, Mr Turner had to have cancer surgery. During his recovery from around June 2019, he organised for the motorcycle MOT operation to be covered. One temporary employee engaged to cover that business was Mr Paul Rodd, who had (according to the logs) previously covered that work in the period 2016-2019 at times when, we infer, Mr Turner was away. From 8 June 2019, Mr Rodd was generally covering Thursdays, Fridays and Saturdays. Another temporary employee engaged was Mr Howard Newcombe, who covered Mondays, Tuesday and Wednesdays from 22 July 2019 because he unable to start his engagement earlier than that date.

33. During Mr Turner's absence, the logs show that Mr Hill conducted several motorcycle MOT tests, particular prior to Mr Newcombe starting his engagement. We find that Mr Turner did not specifically tell Mr Hill not to conduct motorcycle MOTs during his absence. It may have been his expectation that Mr Hill turn away customers looking for a motorcycle MOT, but we don't consider that was communicated to Mr Hill. In any event, Mr Hill

was qualified to conduct such tests and provided he was not fully engaged conducting car MOTs, it would be reasonable for Mr Hill to perform the motorcycle MOTs should a customer present themselves.

34. Also during 2019, Mr Turner had begun to consider selling the car MOT part of the business. He had discussions with Mr Jonathan Rowe which were not fruitful. Uralmoto had been making pre-tax losses in 2017 and 2019 (a profit in 2018 due to the sale of an asset). Mr Turner's efforts to sell the business continued into 2020. Throughout this time, Mr Turner was seeking to ensure that Mr Hill's employment was protected as part of any transfer of the business. Mr Turner also had discussions with Mr Hill himself about Mr Hill acquiring the business, but Mr Hill not financially in a position to do that. Mr Hill also had discussions with Mr Newcombe about potentially partnering to acquire the business, but such proposal was never put to Mr Turner.

35. Following the start of the COVID-19 pandemic, Mr Hill was put on furlough from April 2020. He continued to be paid 100% of his salary, notwithstanding that government support was less than that.

36. In mid 2020, discussions began between Mr Turner and Mr Paul Quinn regarding the latter potentially acquiring the car MOT business. It is apparent that Mr Quinn was open to the possibility of Mr Hill continuing to be employed in the business. There was a delay in Mr Quinn and Mr Hill meeting to discuss issues around Mr Hill's employment. We find it unnecessary to decide whether there is any blame to be attributed to any party for this delay.

37. On 15 August 2020, Mr Hill was present at the premises of Uralmoto, with his friend Paul Chamberlain and another person, to clear his possessions out of the premises. This follows several requests from Mr Turner for Mr Hill to clear his possessions in order to enable the redecoration of the unit which was a condition of the lease. Mr Turner was also on site. At around 1.30pm, Mr Quinn arrived. Mr Quinn and Mr Turner both state that there a meeting scheduled for this time with them and Mr Hill. Mr Hill denies this. We find that Mr Hill was not aware there was to be a meeting at that time.

38. A short conversation took place between Mr Quinn and Mr Hill. We find there was no detailed discussion of Mr Hill's contractual terms on this occasion, but they agreed to speak by telephone later.

39. On 16 August 2020, there was a telephone conversation between Mr Hill and Mr Quinn. During that conversation, Mr Hill identified a number of points that he considered to form part of his terms of employment. These were:

    a. That Mr Hill's personal vehicles would get free MOTs;

    b. That Mr Hill should be able to keep his motorcycle on the premises;

    c. That Mr Hill should receive part of his wage in cash each Friday (so-called "fish and chip money");

    d. That Mr Hill should be able to use the premises for meetings of his motorcycle group on occasion.

40. Regarding point a., we find that Mr Hill had been receiving free MOTs on his personal vehicles through his employment and that this would be customary for MOT testers. We find this was a term of Mr Hill's employment contract.

41. Regarding point b., we find that Mr Hill had kept his motorcycle on the premises, but that this was not a contractual right Mr Hill had. This is supported by the fact that Mr Turner was, through mid 2020, asking Mr Hill to remove the motorcycle to facilitate decorating.

42. Regarding point c., we find that Mr Turner was giving Mr Hill some money in hand each week as a contribution to his diesel costs and fish and chips. However this was money coming out of Mr Turner's pocket as a personal gesture and did not form part of Mr Hill's contractual salary entitlement.

43. Regarding point d., we find this was not a contractual right, even if meetings had occasionally been allowed to take place on the premises.

44. Mr Quinn gave evidence that Mr Hill had also asked for a £2.50 mark-up on each car MOT test conducted, which he would take for himself. Mr Hill denied he raised this with Mr Quinn. We find that Mr Hill did not raise it. We do not need to make a finding as to whether this was in fact happening, as it would not be a contractual right in any event.

45. Following that call, Mr Quinn spoke with Mr Turner regarding what Mr Hill had told him about his alleged contractual entitlements. Mr Turner told Mr Quinn that all Mr Hill was entitled to was what was stated in his original written contract of employment (as varied by the salary increase letter).

46. On 17 August 2020, Mr Quinn and Mr Hill again spoke. Mr Quinn expressed to Mr Hill that, as far as he was concerned, the only applicable terms were those contained in his written contract. Mr Quinn asked Mr Hill whether he was still content to be employed on that basis, and Mr Hill responded that he couldn't afford to keep the job without those extra benefits and would want to take advice on the status of those benefits. We find it likely that Mr Quinn was frustrated by the situation and may have expressed that on the call.

47. As some point shortly after his discussion with Mr Hill, Mr Quinn notified Mr Turner that he was not prepared to move forward with a deal to acquire the business with Mr Hill remaining employed with the benefits Mr Hill had identified. Over the following days Mr Turner and Mr Hill exchanged several Facebook messages in which Mr Turner was seeking to understand what Mr Hill had said to Mr Quinn and, once the demands had been clarified to Mr Turner by Mr Quinn, seeking to have Mr Hill reconsider his demands. The messages show that a potential meeting of Mr Turner, Mr Hill and Mr Quinn on 19 August 2020 did not take place. By the end of that week, the exchange of messages largely comes to an end.

48. On 21 August 2020 Mr Turner emailed Mr Hill notifying him that Mr Quinn would "*not now agree to [Mr Hill's] continued employment with him*", and that Mr Turner was considering making Mr Hill redundant. The email states that Mr Turner was in the position of having "*a business that doesn't cover its overheads*". However, in the absence of live evidence from Mr Quinn as to what discussions he had with Mr Turner, and taking account of the timing of

this email in light of the Facebook messages, we find that Mr Turner's principal (but not only) motivation was to remove the single obstacle to the sale of the business to Mr Quinn, that being Mr Hill's continuing employment. We reject Mr Turner's evidence in this respect. This finding is consistent with Mr Turner's clear intention to wind-down into retirement given his age and health conditions.

49. On 22 August 2020, Mr Turner emailed Mr Hill notifying him that he was opening a consultation period regarding the proposed redundancy. On 24 August 2020 Mr Turner notified Mr Hill by email that he intended to put Mr Hill on a period of 8 weeks garden leave, which would include Mr Hill's contractual notice period and also his outstanding holiday allowance.

50. There were exchanges of emails and Facebook messages during this period. In one such message, sent on 27 August 2020, Mr Turner referred to a request made by Mr Hill for him to take on the motorcycle MOT testing responsibility. Mr Turner said "*it was you who wanted to add it to your repertoire [sic] but I had no use for it and, given your ailments of weak knees and, more recently, inflamed shoulders, I have serious doubts as to whether you could actually perform a proper workload on bikes...*" There was medical evidence before the Tribunal that confirms Mr Hill had osteoarthritis in his knee dating back to at least December 2016 and problems with his shoulders going back to 2005. Mr Hill gave evidence that he was dependent on painkillers taken every day in order to properly function. We find that, but for the painkillers, Mr Hill's day-to-day activities would have been substantially impaired.

51. In his evidence Mr Turner explained that the role of motorcycle MOT tester was fulfilled by Mr Turner himself, so there would be no commercial sense in giving Mr Hill that responsibility, as this would effectively make Mr Turner redundant. We accept that evidence. Moreover, Mr Turner was not able to furlough himself as a director of Uralmoto. We therefore find that Mr Turner's motivation in not giving Mr Hill responsibility for motorcycle MOT testing was a commercial one, and not as a result of Mr Hill's physical conditions.

52. Notice of redundancy was issued on 31 August 2020.

53. Mr Hill's employment terminated on 26 October 2020, and he was paid a redundancy payment of £5,769.24. This was calculated based on Mr Hill's salary being £25,000 per year, though the various P60s in the materials indicate different figures each year, some below this and some above. The evidence before the Tribunal was that Mr Hill was being paid a set figure (£404.36) net per week on a Friday, which grosses-up to approximately £500 gross per week. This is also consistent with the payslips, which show £2,000 gross per month but with periodic corrections to account for there being some months with 5 Fridays in them.

54. There was competing evidence as to whether Mr Hill had taken any annual leave during the holiday year up to his dismissal – on the balance of probabilities, and absent any formal record of him having taken leave, we find he had not done so.

55. Also on 26 October 2020, Mr Quinn began advertising on Facebook that he was now operating a car MOT testing centre from the address of Uralmoto. We accept Mr Turner's evidence that, around this time, Uralmoto granted Mr Quinn a subcontract to operate the car MOT testing centre in exchange for a cash payment, with Uralmoto continuing to be the authorised examiner for the purpose of DVSA. We find this timing to be consistent with our finding that Mr Hill's termination was to facilitate the transfer of the business, and that Mr Turner and Mr Quinn had continued to discuss this transfer whilst Mr Hill was on garden leave.

56. After his dismissal, Mr Hill took various steps to secure new employment, including printing 500 cards with his details on, and visiting numerous local garages to try to seek a new role. He also worked on week-long trials as various garages, though none of these resulted in a new job. Eventually he secured a new full-time role on 30 March 2021.

Discussion of the issues

57. We will consider the issues in the order outlined above.

Issue 1: reason or principal reason for dismissal

58. As set out in paragraph 48 above, we have found that in deciding to consider making Mr Hill redundant and then doing so, Mr Turner was motivated by clearing away Mr Hill's employment as an obstacle to the transfer of the business to Mr Quinn. We find this was the principal reason for the dismissal.

59. That being so, this was an automatically unfair reason for dismissal and accordingly the claim for unfair dismissal succeeds.

60. Issue (2) does not arise for decision given the above. However, the Tribunal considered that the particular circumstances in this case, with Mr Hill being the only employee of Uralmoto, mean that had redundancy been the principal reason for dismissal, the process undertaken was, overall, a fair one. Even if there had been a more lengthy consultation, we cannot imagine that any different conclusion would have been reached.

61. We will deal with issue (3) as part of remedy below.

Issue 4: did the claimant have a disability for the purposes of EqA

62. As set out in paragraph 50 above, we find that Mr Hill had a physical impairment (namely osteoarthritis in his knees and shoulder problems) that would have had a substantial impact on his day-to-day activities but for the medication he was taking. This was a long-term impairment, having persisted for more than 12 months prior to the alleged discriminatory act.

63. Accordingly, we conclude that Mr Hill was disabled for the purposes of the EqA.

Issue 5: was the decision not to assign Mr Hill to motorcycle MOT testing due to concerns over his physical abilities?

64. As set out in paragraph 50 above, we find that the motivating factor behind Mr Turner's decision was a commercial one, namely that Mr Turner himself was performing motorcycle MOT tests and there was no good commercial reason for him to reassign that to Mr Hill. The Tribunal notes that Mr Turner's Facebook message to Mr Hill refers to Mr Hill's physical conditions; however, we find that these were not the reason why Mr Turner took the decision he did, given the clear commercial realities in the circumstances. What was said was more a throw-away remark made at a time that was clearly stressful for all involved.

65. That being so, issues 6 and 7 do not arise. The claim for disability discrimination fails.

Issue 8: holiday pay

66. The first question to answer here is how much holiday entitlement Mr Hill had remaining at the time of his dismissal. Applying pro rata to his annual allowance, Mr Hill would have had a full allowance of 21 days up to his date of termination. We have found at paragraph 54 above that he had not taken any of his allowance in that leave year. He therefore had 21 days of annual leave still to take.

67. As set out at paragraph 49 above, Mr Turner notified Mr Hill on 24 August 2020 that he intended to include Mr Hill's outstanding annual leave entitlement as part of his garden leave prior to termination. We find this was not fully adequate notice of a direction on the part of Uralmoto that Mr Hill would take his annual leave entitlement running up to his date of termination. This is because:

    a. Mr Hill's date of termination was to be 26 October 2020. Counting back from that date on days Mr Hill would have worked (i.e. not including Sundays and the alternate Saturdays on which Mr Hill would not have worked a half-day), the first leave day would be 29 September 2020.

    b. Effective notice would need to have been given 42 days before that date, which is 18 August 2020.

    c. Accordingly, the notice that was in fact given was effective only for 18 days of annual leave allowance, the first day of which would be 1 October 2020 requiring notice to be given by 26 August 2020.

68. That being so, Mr Hill had 3 days of holiday outstanding on termination, and is entitled to be paid for these. We will calculate the sum outstanding in the remedy section below.

Issue 9: redundancy pay

69. This issue does not arise since Mr Hill was not dismissed on the basis of redundancy. However, the correct calculation is an issue to be determined as part of remedy below.

Remedy

Unfair dismissal: the law

70. Section 118 of the ERA provides that where a tribunal makes an award of compensation for unfair dismissal, the award shall consist of a basic award and a compensatory award. The amount of the basic award is calculated in accordance with section 119 ERA, which is the same basis as for the calculation of a redundancy payment. However, the amount of the basic award shall be reduced by the amount of any redundancy payment made by the employer to the employee on the ground that the dismissal was by reason of redundancy.

71. Section 123 ERA provides that the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

72. The correct approach to the calculation of a compensatory award was set out by the Court of Appeal in *Digital Equipment Co Ltd v Clements (No.2)* [1997] ICR 237, CA as modified to include, at the appropriate point, adjustments that fall to be made under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 in respect of breaches of the Acas Code of Practice on Disciplinary and Grievance Procedures. In summary the approach requires the Tribunal, first, to ascertain the employee's total loss in consequence of the dismissal, insofar as that loss is attributable to the employer's actions. Deductions and adjustments (if applicable) should then be made in the following order:

    a. deduction of any payment already made by the employer as compensation for the dismissal – to include payment in lieu of notice but not any enhanced redundancy payment;

    b. deduction of sums earned by way of mitigation, or to reflect the employee's failure to take reasonable steps in mitigation;

    c. 'just and equitable' reductions, including reductions in accordance with the principle in *Polkey v AE Dayton Services Ltd* [1988] ICR 142, HL to reflect the chance that, notwithstanding procedural unfairness, a dismissal would have happened in any event;

    d. increase or reduction of up to 25 per cent where the employer or employee failed to comply with a material provision of the Acas Code of Practice;

    e. adjustment of up to four weeks' pay in respect of the employer's failure to provide full and accurate written particulars;

    f. percentage reduction for the employee's contributory fault;

g. deduction of any enhanced redundancy payment to the extent that it exceeds the basic award;

h. grossing up the figure to allow for the incidence of tax; and

i. finally, application of the statutory cap.

73. In this case, only some of these deductions arise on the facts – specifically we need address only the question of mitigation and contributory fault.

Unfair dismissal: application

74. Mr Hill is entitled to a basic award. This is calculated on the same basis as a redundancy payment. It is agreed that the correct award should be 12 weeks' pay. The question is what was a weeks' pay.

75. As set out at paragraph 53 above, we find that Mr Hill was paid £500 gross per week. Accordingly, his basic award is £6,000. He has already been paid £5,769.24 by way of redundancy payment, and therefore his remaining basic award is the sum of £230.76.

76. For his compensatory award, Mr Hill seeks 13 weeks' pay at a rate of £507.27. This is based on 23 weeks between Mr Hill's dismissal and him getting a new full-time job, less 10 weeks in which Mr Hill worked on a trial basis at various other garages. We consider 13 weeks to be an appropriate level of compensation, having heard and accepted Mr Hill's evidence as to the steps he took to try to obtain a new job in difficult circumstances (namely the ongoing COVID-19 pandemic and the automatic extension of MOT certificates on certain vehicles).

77. We will therefore award 13 weeks' pay by way of compensation: that is £6,500 (gross) based on our findings as to Mr Hill's weekly pay.

78. An award is also claimed in respect of loss of statutory rights. £500 is claimed. The Tribunal considers this to be a little excessive, and considers an appropriate award to be £300.

79. An award is also claimed in respect of lost employer pension contributions. On the basis of the payslips provided, Mr Hill received an employer pension contribution of £44.40 per 4 week period, equating to £11.10 per week. He was without a full time role for 23 weeks. We therefore award the sum of £255.30.

80. Finally, we need to consider any deduction to be made for Mr Hill's contribution to his dismissal by way of his conduct (for the basic award) or contributory fault (the compensatory award). We find that Mr Hill was culpable to a limited degree for behaviour that led to his dismissal, specifically raising with Mr Quinn certain demands around conditions that he claimed were contractual but could not reasonably be considered to be so. That said, we find that was only a relatively small factor, and assess that an appropriate deduction is 10% on both parts of the award.

81. The result is therefore an award of:

a. a basic award of £207.68;

b. a compensatory award of £5,850.00 (gross);

c. an award for loss of statutory rights of £270; and

d. an award for lost employer pension contributions of £229.77.

Holiday pay

82. We have found that Mr Hill had 3 days of holiday outstanding on his termination. He worked an average of 5.25 days per week and his weekly gross salary was £500. Mr Hill is therefore entitled to be paid the sum of £285.71 (gross) in respect of outstanding holiday.

Employment Judge Abbott

Date: 10 November 2022