EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101351/2022

Final Hearing Held at Dundee remotely on 22 – 24 August 2022

Employment Judge A Kemp

Miss Sundas Kamran	**Claimant** **Represented by:** **Mr W McParland, Solicitor**
Mr Haitham Tabra	**Respondent** **Represented by:** **Mr R Russell, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. **The claimant was unfairly dismissed by the respondent, and the claimant is awarded the sum of ONE THOUSAND THREE HUNDRED AND THIRTY NINE POUNDS THIRTY FIVE PENCE (£1,339.35) as a compensatory award, payable by the respondent.**

2. **The claims for breach of contract and a statutory redundancy payment are dismissed on withdrawal by the claimant, under Rule 52.**

REASONS

Introduction

1. This was a Final Hearing into claims that were originally for both age discrimination and dismissal for making a protected disclosure, both of which were later withdrawn, as well as for unfair dismissal, the balance of a statutory redundancy payment, and breach of contract in respect of notice pay. All claims were defended. The Claim Form was produced when the claimant was a party litigant, but thereafter she instructed Mr McParland. Mr Russell appeared for the respondent. I was grateful to both of them for the manner in which they conducted the hearing, including the agreement on two heads of claim and the extent of financial loss, and for the helpful submissions each made to me.

2. There had been an earlier Preliminary Hearing at which the nature of the claims made was discussed. Thereafter, on 10 May 2022, the claimant presented Further and Better Particulars of the claims, which referred to the alleged lack of a statement of particulars of employment. The respondent responded on the following date to the effect that no such claim was before the Tribunal. On 10 August 2022 the claimant sought to amend the claims to add that claim, under section 38 of the Employment Act 2002. The respondent opposed that, and after hearing submissions for reasons given orally I refused the application to amend.

3. The hearing was conducted remotely by Cloud Video Platform. The hearing proceeded effectively, and all participants were able to hear and see the others. I was satisfied that the hearing was conducted adequately and that it was appropriate to make a decision on the basis of it.

The issues

4. At the commencement of the hearing I set out a proposed list of issues, which the parties agreed with. They were latterly reduced as agreement was reached as to notice and the statutory redundancy payment, in respect of each of which an agreed sum was paid by the respondent on the first day of the hearing. Those two claims were then withdrawn by the

claimant on the second day of the hearing, and are dismissed under Rule 52 accordingly. The issues that remained were:

(i) What was the reason, or principal reason, for the respondent's dismissal of the claimants?

(ii) If that was a potentially fair reason, was it fair or unfair under section 98(4) of the Employment Rights Act 1996?

(iii) In the event that the claimants succeed, to what remedy should she be entitled, having regard amongst other matters to an argument raised in respect of ***Polkey,*** and mitigation of loss?

The evidence

5. There was both a Joint Bundle of Documents, and the claimant had also sent additional documents shortly before the hearing, which I considered to be in accordance with the overriding objective to receive albeit late. Not all of the documents in each Bundle were spoken to in evidence. Some of the pages were not easily legible, or not legible at all, and by agreement after submissions clean copies of them were provided. During evidence Mr Russell read out the relevant terms of those documents, again without objection. Each of the parties gave evidence.

The facts

6. I found the following facts, material to the issues, to have been established:

7. The claimant is Miss Sundas Kamran. She was employed by a predecessor business of the respondent, a Mr Afif Nazir, with effect from 4 March 2019. There was a transfer of the business to the respondent on 16 June 2019 as a result of which she became an employee of his. She worked on a part-time basis for the respondent as a Post Office clerk.

8. The respondent is Mr Haitham Tabra. He is a sole trader. He operates a Post Office business at 127 Perth Road, Dundee.

9. The respondent had four employees, all of whom worked part-time and had transferred to his employment when he acquired the business. In

addition to the claimant the employees were Gillian Moffat, Delphine and Ashlie (no surname was given for either of them). All were Post Office clerks. All the other employees had been employed prior to the claimant.

10. The business operates from two counters, a main counter and an open one. The main counter has what is termed a fortress, by which there is security protection in place. Various services are conducted from that counter, which contains the main safe, currency services, an automated teller machine (ATM), keys for the premises, and facilities for CCTV footage, amongst others. The open counter has other services conducted from it, including Royal Mail Parcelforce, Moneygram, Passports, Road Tax, International Driving Permits, the payment of energy bills, and payments or deposits of up to £500.

11. The claimant worked for the large majority of the time at the open counter. She generally worked from Mondays to Fridays only. The Post Office was open for about nine hours on those days, and for four hours on Saturdays. It was closed on Sundays. The respondent usually was the sole person working on Saturdays. Rotas were compiled two weeks in advance, and generally employees could swap shifts between them if that was agreed between them.

12. On 10 June 2021 the respondent received a letter from the Post Office which intimated a change to the ATM arrangements. It had been a Bank of Ireland ATM, and the proposal was to change that to a Post Office ATM, with a different fee structure. The effect of that change for the respondent was to be a reduction in his income from about £6,500 per annum to about £3,600 per annum. The respondent explained in general terms to his staff what was proposed, and that that might result in redundancy. They were also aware of the position from newsletters provided by the Post Office.

13. In June 2021 the respondent received a further letter from the Post Office [which was not before the Tribunal] intimating a change to remuneration in what was known as MDA2. That involved a reduction in income for high volume work such as for parcels, and an increase for specific work. The overall effect for the respondent was likely to be reducing his income.

Originally the intention had been to introduce the changes in December 2021 but the date was delayed to April 2022.

14. On 18 October 2021 the respondent received a letter from the National Federation of Sub-Postmasters, which referred to a Supreme Court decision in England that affected the manner in which business rates were charged there for ATMs. The letter referred to an appeal in Scotland to the Lands Tribunal with regard to that issue, but subject to that appeal the claimant understood that he would be required to pay business rates of about £4,000 per annum for the ATM.

15. On 21 October 2021 the respondent received a letter from the Post Office intimating that the new ATM would be installed on 29 November 2021 from when the new fee structure would become effective.

16. The respondent considered that in light of that letter he required to make a redundancy from his four members of staff because of the anticipated reduction in his income from the new ATM, and further reductions he foresaw both for business rates that would be payable unless the appeal succeeded and in relation to MDA2.

17. The respondent and his staff member Gillian Moffat in about late October 2021 commenced work to prepare a matrix of skills that each staff member might undertake, and listed them for each of the four members of staff, and started to place a tick against each staff member who had carried out the relevant skill. The scoring for the claimant had been completed by the end of October 2021, but that for two other employees was not completed until after 1 November 2021. The claimant scored the lowest of all four on that matrix, being 12. The next lowest scoring member of staff received a score of 16.

18. The claimant was not given any score for currency exchange, ATM balancing and top up, weekly balance period, monthly balance period, business banking over £500, working at the fortress counter or CCTV check, amongst the skills she did not receive a score for. She had at least to some extent carried out work for each of those skills during her employment.

19. The claimant did not receive a copy of the matrix from the respondent at any stage prior to the commencement of the present proceedings.

20. On 13 November 2021 the claimant and respondent exchanged a series of text messages. The claimant asked about the rota for the following week, and the respondent stated

> "It's your holiday next week no hours in the rota for you. The week after you can't do Monday and you will be going away as you said so I will do one week paid holiday and one week unpaid holiday"

21. The claimant replied

> "But I was supposed to be working Monday next week at least and someone could have covered Friday. Please have a think Haitham how unfair it sounds."

22. The respondent replied

> "Usually I don't allow any holidays after 15th of November and I have said that to everyone. But you still getting your holiday next week plus a further unpaid one so you call that unfair even if it was your request….!"

23. The claimant replied complaining about the extent to which the respondent allowed Ms Moffat to take decisions and that not being able to work affected her pay. She said that no one had mentioned the 15 November rule, and that Ms Moffat had said that it was

> "ok [to] take that week holiday it was no problem until is said can't do Friday. Honestly so much unfairness. Only because I couldn't do Friday next week."

24. The respondent did not reply to that last message.

25. On 16 November 2021 the respondent sent an email to the claimant stating

> "Please note that I'm giving you two weeks notice to end your employment with the Perth Road Post Office. I have requested my

> accountant to add your final week holiday payment and your redundancy payment to your November 2021 payslip and also to prepare your P45. I would like to thank you for the time you have worked at Perth Road Post Office and wish you all the very best."

26. The claimant made several attempts to contact the respondent by telephone on 16 and 17 November 2021 leaving voice and text messages with him, but he did not respond to her. On 17 November 2021 the respondent replied by text to indicate that she should email him.

27. On 24 November 2021 the claimant sent an email to the respondent stating that she was raising concerns over unfair dismissal, seeking to appeal, and asking to be re-instated.

28. On 28 November 2021 the respondent sent an email to the claimant referring to his previous email, stating that she had "been made redundant due to financial reasons" and attaching a final wages slip and P45. No appeal was heard.

29. The claimant's employment terminated on 30 November 2021.

30. The claimant was paid a gross wage of £167.58 per week, and £163.93 net. The respondent paid pension contributions of £1.43 per week. The claimant did not receive benefits after her dismissal. She sought employment by presenting her CV to local businesses, and registered online with Asda to which she applied for a number of roles, for which she was not successful. The first such application she made on 16 November 2021. She applied for a role with BT and was interviewed on 21 January 2022 for that, on which she was successful, and her new employment commenced with effect from 21 February 2022. Her earnings were at or greater than those with the respondent from that date onwards. Throughout her employment she also worked three weekends out of four for Nespresso in a sales role, which continued after termination.

Submission for respondent

31. The following is a very basic summary of the submission made. I was invited to prefer the evidence of the respondent to that of the claimant. The

reason for dismissal was redundancy, and the claimant had not made appropriate concessions about the downturn in turnover evidenced by documents. There was an argument that the dismissal was fair, but an acceptance of procedural deficiencies. The "main thrust" of the submission was that a different procedure would inevitably have led to the claimant being chosen for redundancy. There was no evidence of any ulterior motive to dismiss the claimant, there was inconsistency in the claimant's arguments, the documents as to increases in cost were genuine, the timing of events supported the respondent, who had been trying to balance the books. Authority was provided in the case of ***Vickers Ltd v Lloyd UKEAT 2005/0785*** for a 100% deduction, and an appeal would have been futile. It was also argued that there was a failure to mitigate loss in particular by not asking Nespresso for more hours, and from an absence of documentation provided in support. The argument was that if the dismissal was unfair, the reduction should be at or very close to 100%.

Submissions for claimant

32. The following is a very basic summary of the submission made. I was invited to prefer the evidence of the claimant to that of the respondent. His evidence stretched credibility to breaking point. There was an almost total lack of documentary evidence, including what were said to be notes of meetings in a diary. Ms Moffat had not been called, and an adverse inference should be drawn. The argument as to redundancy was a sham. The real reasons were because of the claimant's relationship with Ms Moffat, her complaints about unfair treatment, and the issues around taking holidays. Reference was made to ***Timex Corporation v Thomson 1981 IRLR 522,*** in which there was reference to redundancy as a pretext. Here the respondent had attempted to backfill a reason, which was why there was little or no evidence. There was no documentation for a fair redundancy process. The respondent's email of 16 November 2021 was important for what it does not say, as was the case with the messages on 13 November 2021. It was not just and equitable to embark on speculation as to what consultation would have been, there had been substantive errors. The claimant would have scored more highly than another

employee. The respondent's evidence was insufficient. There should be no deduction, and there had been proper mitigation.

The law

33. It is for the respondent to prove the reason for a dismissal under section 98(1) and (2) of the Employment Rights Act 1996 ("the Act"). In ***Abernethy v Mott Hay and Anderson [1974] ICR 323***, the following guidance was given by Lord Justice Cairns:

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

34. These words were approved by the House of Lords in ***W Devis & Sons Ltd v Atkins [1977] AC 931***. In ***Beatt v Croydon Health Services NHS Trust [2017] IRLR 748,*** Lord Justice Underhill observed that Lord Justice Cairns' precise wording was directed to the particular issue before that court, and it may not be perfectly apt in every case. However, he stated that the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which caused him or her to take that decision.

35. To be fair potentially, the reason must fall within one of those set out in section 98(2) of the Employment Rights Act 1996. Redundancy is a potentially fair reason. The definition of redundancy is found in section 139 of the 1996 Act, and include where the dismissal is wholly or mainly attributable to the fact that the requirements of the business to carry out work of a particular kind or to do so in the place where the employee was employed have ceased or diminished, or are expected to cease or diminish.

36. If the reason is potentially fair, whether it is or is not fair is determined by section 98(4) of the Employment Rights Act 1996, which provides as follows:

> "… the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer:

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

37. Whether or not a dismissal is fair, where the reason is potentially fair, depends on all the circumstances. Guidance was given by the House of Lords in the case of ***Polkey v AE Dayton Services [1987] IRLR 503*** as follows:

> "… 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"

38. It is a question of fact and degree as to what level of consultation is required in any case – ***Mugford v Midland Bank [1997] IRLR 208***. The overall picture in the period up to the date of termination is viewed. What consultation means was explored in ***Rowall v Hubbard Group Services Ltd [1998] IRLR 195***, in which guidance from an earlier case in the context of collective consultation was followed:

> "'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.'
>
> Another way of putting the point more shortly is that fair consultation involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely."

39. There is a limit to the extent to which the Tribunal can consider the reasons behind the decision to make redundancies. That was discussed in ***James W Cook & Co (Wivenhoe) Ltd v Tipper [1990] IRLR 386***. The Court indicated that it thought that the question whether a dismissal could be unfair because the decision to implement redundancies was itself unfair was a 'troublesome point', but concluded that whilst it could be argued in principle that the courts ought to have that power to decide whether the employer was justified in implementing redundancies, as a matter of law it was not open to the court to investigate the commercial and economic reasons prompting the closure. That was a decision of the Court of Appeal. Two earlier EAT decisions require to be considered in light of it. In ***Ladbroke Courage Holidays Ltd v Asten [1981] IRLR 59*** the EAT held that if an employer seeks to justify a dismissal by alleging that it needed to reduce the wage bill, it should produce some evidence to show that there is a need for economy. In ***Orr v Vaughan [1981] IRLR 63*** the EAT held that whilst the choice of method of reorganisation is largely for the employer to determine, the employer must act on reasonable information reasonably acquired. These cases support the proposition that at least some evidence of there being a redundancy must be produced, such that it has a proper basis in fact, but the limits to it were demonstrated by the EAT in ***Berkeley Catering Ltd v Jackson UKEAT/0074/20*** in which the claimant argued that a redundancy was being used cynically that is to be dealt with by concentration on whether the redundancy was the real reason for dismissal and/or whether the dismissal was unfair, and not by stretching the basic concept of 'redundancy' itself, which is an objective concept.

40. In the event of a finding of unfair dismissal, the tribunal requires to consider firstly whether to make an order for re-instatement under section 113 of the Employment Rights Act 1996.

41. The tribunal requires also to consider a basic and compensatory award if no order of re-instatement or re-engagement is made, which may be made under sections 119 and 122 of the Employment Rights Act 1996, the latter reflecting the losses sustained by the claimant as a result of the dismissal. The basic award is extinguished if a statutory redundancy payment has

been made. The amount of the compensatory award is determined under section 123 and is "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". It may be appropriate to make a deduction under the principle derived from the case of ***Polkey,*** if it is held that the dismissal was procedurally unfair but that a fair dismissal would or might have taken place had the procedure followed been fair. That was considered in ***Silifant v Powell 1983 IRLR 91***, and in ***Software 2000 Ltd v Andrews 2007 IRLR 568,*** although the latter case was decided on the statutory dismissal procedures that were later repealed. The assessment is to be made on evidence, and in ***King v Eaton (No. 2) [1998] IRLR 686*** the Inner House warned against embarking on a "sea of speculation".

42. There is a duty to mitigate, being to take reasonable steps to keep losses to a reasonable minimum. The onus of proof in that regard falls on the employer - ***Fyfe v Scientific Furnishings Ltd [1989] IRLR 331*** reaffirmed in ***Ministry of Defence v Hunt [1996] IRLR 139*****,** (which was upheld on other grounds at the Court of Appeal, reported as ***Ministry of Defence v Wheeler [1998] IRLR 23***). How to assess mitigation issues was addressed in ***Cooper Contracting Ltd v Lindsey UKEAT/0184/15.*** As was there stated, not too exacting a standard must be applied to the claimant.

Discussion

43. I address each of the issues in the case as follows:

What was the reason, or principal reason, for the respondent's dismissal of the claimant?

44. I was satisfied that the respondent had proved that the reason for dismissal was redundancy. The respondent was anticipating a material reduction in income, and sought to reduce cost to compensate for that, with reducing staff costs what he considered to be the only option. That was a decision for him. He produced some documentation which

supported his position on that, including two letters from the Post Office and one from the Federation. He might have produced more, particularly in relation to MDA2 (which was not a part of the pled case) but I did not consider that the failure to do so meant that he had not discharged the onus on him.

45. I did not consider that the selection matrix was a complete fabrication, nor that the redundancy was a sham, as the claimant argued. It appeared to me unlikely that the respondent would both have entirely made that document up, and spoken to it in evidence to the extent that he did, if that had been in effect an attempt to mislead the Tribunal, given the nature of the case and its moderate financial value. There was no suggestion in the evidence that another person had been employed in place of the claimant and it appeared to me that the number of employees had therefore reduced from four to three. That is consistent with redundancy being the reason for dismissal, or if not the sole reason the principal reason. If there was a degree of annoyance at how the claimant handled matters including her relationship with Ms Moffat that fed into the issue of fairness and was not, I concluded, part of the principal reason as the claimant had argued.

46. Whilst I had concerns over his evidence as set out below it was clear to me that the respondent's knowledge of standard employment practices was less full than it required to be, this being the first Tribunal case he had been involved in, and he had not sought legal or HR advice on matters at the time of the dismissal as he was seeking to save expense. He might have called Ms Moffat as a witness to support his position both on the reason and fairness and he did not, again as I refer to below, but on balance I accepted this part of his evidence. I do however understand why the claimant argued for sham if all she received was the email of 16 November 2021, and the later email which did not address her intimation of an appeal other than to refer to financial reasons for the dismissal.

If that was a potentially fair reason, was it fair or unfair under section 98(4) of the Employment Rights Act 1996?

47. I considered that the dismissal was not fair. Mr Russell tried to argue that the dismissal could have been fair even given the procedural deficiencies he candidly and professionally accepted, but he did so without much enthusiasm, and he accepted that his primary argument was that under the ***Polkey*** principle. In any event, I was satisfied that this was not a fair dismissal. Neither party had the onus of proof in that regard.

48. Firstly, I required to determine whether the claimant's or respondent's evidence should be preferred on whether meetings took place on 1 and 3 November 2021. That was not simple where only they gave evidence. Each side in submission made criticisms of the other, and some of those criticisms were I considered justified in each case. I did not consider that either party was seeking to mislead the Tribunal, but that each was seeking to give honest evidence. The issue was essentially one of reliability.

49. I have concluded that the claimant's evidence should be preferred on this point. I did so for the following reasons

(i) She gave her evidence in what was mostly a straightforward and candid manner. She accepted that she had forgotten about a message sent by the respondent on 17 November 2021, but that was understandable where that email was not in fact a part of the Bundle of Documents. Whilst the respondent criticised her for that issue, I did not consider that to be indicative of someone not reliable. She did maintain her position of there being a sham, and was somewhat intransigent in limited respects, but as I indicated above her view of a sham was understandable where the respondent failed to give her a copy of the matrix, failed to give a formal written warning of the risk of redundancy, failed to write to her to call her to a consultation meeting, did not maintain any notes of the meeting, and did not write to her setting out the reasons for his decision, amongst other points that could be made. Overall I considered that her evidence was reasonably reliable in general and subject to those comments.

(ii) There were occasions in the evidence of the respondent when he sought to give answers not easy to reconcile with previous pleading, at least to an extent. For example, his Response Form had not mentioned MDA2 at all, and no document in relation to that had been provided in the Bundle.

(iii) The respondent alleged that Ms Moffat had been present at the meetings, but he did not call her as a witness although that had originally been the intention. That someone who might have provided support for his position was not called when that witness might have been is I consider a factor, albeit far from determinative, against the respondent

(iv) His evidence was that the first meeting took place on 1 November 2021 but that he did not at that stage discuss the matrix, only the risk of redundancy, but he accepted that by that date the matrix and scores for the claimant had been completed. It does therefore seem unusual at the least for that not to have been raised with her then if such a meeting had taken place as he claimed. His evidence was not consistent with the pled case that he had discussed "the outcome of the matrix scoring".

(v) The meeting he said had taken place on 3 November 2021 was simply to intimate redundancy on his evidence, the decision having been taken beforehand. That is a short timescale between two such meetings.

(vi) His evidence was that both meetings were during the working day, interspersed with meetings with customers in the shop. That is an unusual way of handling an important meeting such as one for a prospective redundancy. His evidence was that the meetings had ended by about lunchtime, although he was rather vague over the detail. The claimant said that she had started work on 1 and 3 November 2021 at 11.30 and 1.30 respectively. That had not been put to the respondent in cross examination, but it did appear to me that it was less likely that such meetings took place given the two sets of evidence on timings.

(vii) He said that he had notes of each meeting in his diary, but those notes were not produced in evidence. That was despite an email from the claimant's solicitors seeking them.

(viii) The email sent to the claimant on 16 November 2021 started "Please note that I'm giving you two weeks notice to end your employment…..". That wording is I consider not consistent with the respondent having, as he claimed, on 3 November 2021 given her orally notice of redundancy. One would then have expected the formal confirmation email to start with something such as "Further to our meeting on 3 November 2021" or "As I said at our meeting on 3 November 2021".

(ix) It is also not consistent with his position that it took 13 days to send the confirmation by email if that is what had taken place on 3 November 2021, as the email sent was a short one which would have taken a short period of time to create.

(x) The email did not refer at all to the two meetings or to a selection matrix, indeed to redundancy as the reason, at all.

(xi) In the text messages exchanged on 13 November 2021 the respondent did not refer at any stage to the alleged two meetings or that the claimant had been informed verbally that she was to be made redundant, and the tenor of the messages is not consistent with that having taken place, but rather is consistent with the parties' expectations of employment continuing, in my judgment.

(xii) The respondent's evidence that the claimant had asked for two weeks' holidays for the latter two weeks of November 2021 is contradicted both by her own evidence and the text exchanges on 13 November 2021, which refer to the possibility of the claimant swapping one Friday with a colleague, and her seeking to work, stating that not doing so affected her pay. The messages were to the effect that the claimant wanted to work, not to take all the period as a holiday.

(xiii) The claimant sought new employment with Asda on 16 November 2021. That is the day of the email informing her of dismissal. I consider it likely that had she been informed of dismissal on 3 November 2021 she would have been likely to have sought

employment from that date, such that her doing so on the day of the email is consistent with her knowing of her dismissal only on 16 November 2021.

50. Taking account of all the evidence, I have preferred the claimant's version that there was no discussion with her as to her prospective redundancy on 1 or 3 November 2021. As such there was I consider no consultation with the claimant before the decision to dismiss. Whilst I take account of the fact that the respondent is a very small business, with very limited resources, and feared reducing income, it is a basic requirement of fairness to give reasonable notice of the risk of redundancy, and if using selection criteria to give the person concerned notice of the criteria and proposed scores, and an opportunity to comment on them, before taking a decision. It does not ask much of even the smallest employer to do so. The respondent failed in that, and I consider that the dismissal was unfair.

51. If I had accepted the respondent's evidence as to such discussions on 1 and 3 November 2021 however I would have held the dismissal to be unfair, even on such a hypothesis. That is so as the claimant was not given a reasonable opportunity to comment on the criteria and scoring. The respondent accepted that he had not sent the form to her or given her a copy otherwise, that he had spoken to her on 3 November 2021 (on his evidence) after taking the decision to dismiss such that he was not consulting with her as that word is understood, but intimating the decision taken and explaining it, indeed seeking to justify it. That leaves only what he says was a meeting on 1 November 2021 when at the best for him the issue of redundancy was discussed in general terms, not the skills matrix scoring she received, and as noted above his evidence on that was not consistent with the pleaded case in any event. As indicated above a basic level of consultation is required in most cases, and this is a case where that basic level did not take place. It is not an invariable rule, but here there was a period of about a month before the changes for the ATM were to take place, during which (or a part of which) adequate consultation could easily have taken place. Even a very small employer should in such circumstances give the employee affected a copy of the matrix, an opportunity to consider it, and then to discuss it at a meeting. No

reasonable employer would have acted as the respondent did, taking full account of the fact that such a reasonable employer can be a very small business with very limited resources, like the respondent. That is apart from issues such as a formal warning of redundancy by letter or email, and taking some form of adequate note of the meeting, then setting out the decision on that by letter or email or otherwise.

52. Whilst there was no appeal permitted, this was a very small employer, and an appeal was not in that situation practicable. Appeal in a redundancy was a requirement of the former statutory procedures, but following their repeal there is I consider no requirement in law to hold such an appeal. I discount that issue, but in my judgment the unfairness arises from a complete failure of adequate consultation. The respondent's solicitor, whilst not conceding the point, accepted that a finding of fairness would be a surprise, and he was right to make that comment.

53. In conclusion I consider that the dismissal was unfair under section 98(4) of the 1996 Act.

Remedy

54. The claimant did not seek re-instatement or re-engagement. There is no basic award as a redundancy payment has now been made. The issues are therefore the extent of loss, mitigation, and any ***Polkey*** deduction**,** for the compensatory award.

55. On the extent of loss the period is from 30 November 2021 the date of dismissal (notice having been given on 16 November 2021, and the date being consistent with the P45) to 21 February 2022 and the figure for that is agreed at £2,328.70. There is a claim for loss of statutory rights in the Schedule of Loss, either £350 or £500. The claim I consider is reasonably assessed at £350 in this regard, having regard to the circumstances including the claimant's length of service.

56. The claimant spoke to her attempts to find alternative employment, and produced various documents. She had an interview on 21 January 2022, and secured a new role after making a number of other attempts during

November and December 2021. I am satisfied that the claimant did mitigate her loss. As the case law establishes, not too high a standard must be applied in this regard. It is notable that the claimant obtained new employment to extinguish her loss by 21 January 2022 although she did not start for a month after the offer was made. She was making reasonable attempts to find alternative work, and succeeded reasonably promptly. She has been working at one other job during her employment, and her other work continued. She might have asked them for more hours at that role as was suggested in submission, but her evidence was that by the time of her dismissal employers had secured their additional cover for the Christmas period, and I accepted that. I did not consider that her not producing the job offer and contract, her CV or a list of businesses she gave it to, meant that she had not mitigated her loss. What she produced was I considered sufficient.

57. The next issue, and the one that is the most difficult, is that of whether or not to make a ***Polkey*** reduction. The onus of proving that falls on the respondent, on the balance of probabilities. The claimant challenged the scoring on the matrix, arguing that she had done more than was claimed. Her arguments for that were I considered reasonable in some respects, in that she gave detail as to what she in fact did, and rejected the contentions for the respondent that she had not. Her score was 4 below that of the nearest comparator. She argued that had the scoring been fair she would have scored higher than one of the others in the pool, and the same as another. But not all of her evidence in this regard, particularly her views as to what others had or had not done, had been put to the respondent in cross examination. The evidence as to her views of the fair scores of others came out in cross examination and follow up questions from me, but I did not have the benefit of the respondent's evidence on such views. The claimant's evidence was to the effect, on her own view, that the scores of the other two employees at risk was close to her own. The respondent did not accept that, and I had concerns over his evidence for the reasons set out above, but I did consider that the claimant's perception of matters had been affected by the dismissal and its manner, and she was somewhat intransigent on some matters, maintaining her position despite

the terms of documentation (such as the second Post Office letter which stated in terms an estimate of reduced income, which she did not accept, which in my judgment affected the extent to which her evidence on this aspect can be regarded as fully reliable.

58. It is possible that she might have not been the lowest scorer had there been fair consultation with her, and that she would have argued both for additional criteria (such as her carrying out Google work that others did not), and more scores for those that existed. In a fair procedure however she would not have seen the scoring for other employees, and would only have commented therefore on her own scores. It seems to me likely that the scores of the other employees would have remained as they were under such a fair process.

59. It also appears to me to be within the range of acts of a reasonable employer to choose a skills-based matrix. Whilst the claimant could have argued that skills were omitted, the respondent was likely I consider to have retained the matrix he chose, and to have been acting as a reasonable employer could in doing so.

60. The issue then focusses on what fair scores for the claimant would have been had there been fair consultation with her. That is not an easy exercise, as it involves assessing something that did not happen. There is I consider a clear risk that the claimant would have been chosen for redundancy. Her working on the main counter was I consider more limited than that of her colleagues.. Even on her own assessment, the scores for her, Delphine and Ashlie was close. It is notoriously difficult to construct a world of full consultation that did not exist, and I am mindful of the risk of embarking on the sea of speculation that is referred to in ***King***, but I consider that there is sufficient evidence before me that I consider reliable to conclude that it is appropriate to reduce the extent of losses to take account of the risk of redundancy that did exist.

61. That is so as there is I consider evidence that I can accept that the skill assessment of the other employees was genuine, and reasonably reliable (as stated it was not challenged in the evidence of the respondent) and that although there were challenges to the detail for the claimant that she

presented in evidence, what I require to assess is how the respondent would have determined that had he done so fairly and genuinely. There is a risk from firstly the fact that the claimant had the least service, and was the least experienced, and secondly that whilst she had arguments that she had carried out more of the criteria the respondent did not accept them in cross examination, and his doing so may have been the same if he was assessing the arguments genuinely in a fair consultation process.

62. The risk of redundancy I consider is reasonably assessed at 50%. For the avoidance of doubt, that is not simply splitting the difference between the positions of the parties in submission, but my assessment from the evidence I heard of the risk to the claimant of being fairly selected for redundancy had a fair process been undertaken. Necessarily it is a broad assessment in circumstances where precision is impossible.

63. That means that the award is £2,328.70 plus £350 x 50%, which is £1,339.35. There were no benefits and no recoupment provisions apply accordingly.

Employment Judge: A Kemp

Date of Judgment: 26th August 2022

Date sent to parties: 26th August 2022