EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107714/2021

Held in Glasgow by Cloud Video Platform (CVP) on 15, 16 and 17 August 2022

Employment Judge: J McCluskey

Matthew Carson	**Claimant** **Represented by:** **Mr A Bryce - Solicitor**
Michael Ball t/a WC in Fields	**Respondent** **Represented by:** **Mr D Milne - Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:

1. the claimant's claim for unfair dismissal is not well founded and is dismissed.

2. the claimant's claim for a statutory redundancy payment, having been withdrawn by the claimant, is dismissed.

REASONS

Introduction

1. The claimant brought claims for a statutory redundancy payment and unfair dismissal. These claims were resisted by the respondent.

2. At the outset of the hearing the claimant advised that a statutory redundancy payment had been received and he no longer insisted upon this claim. His outstanding claim was for unfair dismissal. The dismissal was admitted. The respondent asserted that the reason for the dismissal was redundancy and

that this was a potentially fair reason for dismissal of the claimant. The claimant asserted that redundancy was not the reason for his dismissal. He asserted that the reason for his dismissal was because he had been critical of Sarah Simpson, the respondent's operations manager. He asserted that this was not a potentially fair reason for his dismissal and his dismissal was unfair.

3. There was a joint bundle of documents extending to 174 pages. Only pages in the bundle to which the Tribunal was directed during the course of evidence were considered by the Tribunal.

4. The claimant led evidence on his own account. The respondent led evidence from Michael Ball (MB) sole trader at the time of the claimant's dismissal and trading as WC in Fields (2) Sarah Simpson (SS), the respondent's operations manager; and (3) Alasdair White (AW), external HR consultant.

Issues

5. At the outset of the hearing the Tribunal asked the parties to clarify the issues to be decided.

6. The respondent identified the following issues to be determined by the Tribunal:

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

8. 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, having regard to 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 suitable alternative employment for the claimant and (d) dismissal was within the range of reasonable responses.

9. If the dismissal was unfair what are the claimant's losses and has he taken reasonable steps to mitigate his losses?

10. The claimant agreed with the issues identified. The claimant asserted that if the Tribunal found that the reason for dismissal was redundancy, in addition to considering whether the respondent took reasonable steps to find suitable alternative employment, the respondent ought to have considered the option not to dismiss the claimant but for him to remain on furlough.

11. The respondent's objected to the question of whether the claimant ought to have remained on furlough being included in the list of issues. This was not a matter which had been raised in the ET1 claim form or subsequently. The claimant acknowledged that this was not raised in the ET1 but asserted that it was incumbent on all employers to consider continuing furlough as part of the reasonableness of the dismissal.

12. The Tribunal considered the balance of injustice and hardship in allowing or refusing an amendment to the pleadings about remaining on furlough as an alternative to dismissal. If it was allowed it would then be included in the list of issues. The respondent identified that the witnesses already cited to appear could give evidence about the matter. The Tribunal identified that the respondent's witnesses could be given an opportunity, before commencement of evidence, to consider what additional evidence may be required by them. The Tribunal could see no real practical hardship for the respondent in allowing the amendment, given that their available witnesses could speak to the matter, and thus for the issue to be included. On the other hand, to exclude the issue may lead to injustice for the claimant.

13. The Tribunal was satisfied that the issue of continuing furlough as an alternative to dismissal was not an amendment to introduce a new claim. Rather it was an amendment which added particularisation of the existing claim of unfair dismissal. It appeared to the Tribunal that the matter may be relevant for the Tribunal to consider as part of the reasonableness of the dismissal. On that basis it was to be allowed.

Findings in fact

14. The respondent MB is a sole trader, trading as WC in Fields. The respondent's business provides portable toilets and showers for events such as festivals and weddings and provides portable welfare units for workplace and construction sites. It also services domestic and commercial septic tanks at customers' sites.

15. At the time of the claimant's dismissal MB employed the claimant, two drivers, SS and another employee in administration in the office.

16. The claimant was employed as a yard operative from 5 September 2014 until 30 October 2020. He was based in the respondent's yard. The claimant worked full time Monday to Friday each week. At the time of his dismissal the claimant was the only yard operative in the respondent's business.

17. Prior to the outbreak of covid-19 in March 2020, the claimant's duties primarily involved the cleaning and servicing of portable toilets and showers at the respondent's yard. The toilets and showers would be collected from the customers' sites by the respondent's service drivers and deposited at the respondent's yard. The claimant would clean and service the toilets and showers ready for the next events.

18. Prior to the outbreak of covid-19 the claimant had also, occasionally, gone on to customers' sites to clean and service the toilets and showers. This might happen if a festival was running over more than one day and cleaning and servicing on the customers' sites was required. The claimant did this infrequently. When he did so he would sometimes drive to the customers' sites.

19. The claimant lost his car driving licence for a period of time as a result of a driving ban. He got his car licence back in around late 2019. At that time, SS looked into whether the respondent could obtain insurance for the claimant to drive their trucks. The cost to do so was around £6,000. In addition, the insurers were not able to offer full insurance. The respondent did not obtain any insurance for the claimant. The claimant did not carry out any driving for the respondent whilst banned from driving and thereafter until his dismissal.

20. From the start of the pandemic lockdown in around 23 March 2020 and for at least the following year there was no events work, such as festivals and weddings, due to the pandemic.

21. From around 23 March 2020 there was some demand for portable toilets from factories which were still open. They required additional toilet facilities for social distancing purposes. Those toilets remained long term on the customers' sites. They were cleaned and serviced by the service drivers who drove to the customers' sites on their driving rounds.

22. In or around May 2020 construction businesses reopened. The respondent provided toilet facilities and larger welfare units to construction customers. The toilets and welfare units remained long term on the customers' sites. They were cleaned and serviced by the service drivers who drove to the customers' sites on their driving rounds.

23. From around 24 March 2020 the claimant was placed on furlough as there was no work for him to do as a yard operative. In around May 2020 the claimant was brought back to work on a flexible furlough basis. He worked one day per week at the yard. He was furloughed for the other four days. The respondent tried to find work for the claimant to do for one day per week. He was tasked with carrying out maintenance on equipment which had been sitting out in the yard. There was very little work in cleaning and servicing portable toilets and showers at the yard. This was because events work had stopped and toilets and showers which had been let out to customers were mainly based at customers' premises on a long term basis.

24. Prior to the pandemic, the role of the service drivers was to deliver and collect portable toilets and showers from events. They drove the respondent's trucks and used trailers to carry out this work. Th service drivers also serviced septic tanks at customers premises and used the trucks for this work. At the start of the pandemic there were two service drivers and MB also carried out this work.

25. From the start of the pandemic, the work of the service drivers changed. They delivered toilets, showers and welfare units to factories, using the trucks, and cleaned them on customers' sites during their rounds. They also continued to service septic tanks, using the trucks. Several months into the pandemic, construction sites opened up again. The service drivers began delivering portable toilets, showers and welfare units to construction sites, where they remained long term. The service drivers also carried out cleaning and servicing on their rounds.

26. On or around 3 October 2020 the claimant asked for an informal meeting with MB and SS to discuss the lack of work and his concerns about where he stood in relation to continued employment.

27. On 9 October 2020 MB received an email from the claimant. In the email the claimant made various allegations against SS. The email was sent to MB's personal email address so that SS would not see it. The email contained allegations about SS. He alleged that SS had a conversation with him about one of the service drivers being made redundant and the claimant taking on his role. He alleged he told SS about another job he had been offered and she said there was plenty of work if he stayed with the respondent. He alleged SS had told him two weeks ago that he should resign but that he was not being sacked or made redundant

28. MB replied by email on 11 October 2020 to acknowledge receipt and said he would come back to the claimant. MB did not do so.

29. MB sent the email of 9 October 2020 to SS. They discussed the email by phone. SS denied the allegations. SS was on annual leave after 9 October 2020. She returned to work on 19 October 2020.

30. On or around 19 October 2020 SS and MB discussed a potential redundancy situation of the claimant's role. They discussed that the events business across the UK was non-existent. They discussed that there was very little work in the yard for the claimant to undertake. They discussed that "wintering" of equipment left in the yard, which was usually done over the winter period,

had been completed by the claimant. They identified that the claimant was the only employee who carried out yard work, cleaning and servicing of toilets and showers. They identified that the duties associated with the claimant's yard operative role could be absorbed by the drivers. They decided that he was the only employee at risk of redundancy.

31. On or around 19 October 2020 SS contacted AW and asked him to assist with a redundancy consultation with the claimant. On or around 20 October 2020 the claimant was invited to a redundancy consultation meeting to take place on 23 October 2020.

32. At the redundancy consultation meeting on 23 October 2020 AW raised that there was a down turn of work in the yard. AW raised that that claimant did not hold a driving licence. AW raised that the respondent's view was that there were no alternative jobs available as the claimant could not carry out driving duties. No alternatives were proposed by the claimant. SS was aware that the claimant could not carry out driving duties due to the costs and difficulties with insurance. AW asked the claimant to consider any counter proposals and if so that these should be raised before the next meeting.

33. SS provided a letter to the claimant on 23 October 2020 summarising what had been discussed at the first consultation meeting.

34. The claimant attended a second and final redundancy consultation meeting with AW and SS on 30 October 2020. The respondent was unable to identify any alternatives to redundancy at the meeting.

35. On 30 October 2020 SS delivered a letter to the claimant at his home confirming his dismissal by reason of redundancy. The effective date of termination was 30 October 2020. The letter was written in the name of SS. The first draft of the letter was written by AW and it was completed by SS. The decision to dismiss was taken by SS, in her role as operations manager of the respondent.

36. The letter dated 30 October 2020 stated that the claimant would be paid in lieu of working his notice period and confirmed other payments to be made to him. The claimant's statutory redundancy payment was calculated based on 6 full years' service to 30 October 2020.

37. The claimant was offered a right of appeal against his dismissal but did not do so.

38. As at 30 October 2020, the government's furlough scheme (known as the Coronavirus Job Retention Scheme), was due to end the following day on 31 October 2020. In its place the government had intended that the Job Support Scheme Open (JSSO) would commence on 1 November 2020. On 31 October 2020 the government announced that the JSSO would not commence on 1 November 2020 and that the CJRS would be extended.

39. As at 30 October 2020, under the JSSO, the minimum hours required for employees to work was 20%. The claimant's work as a yard operative had diminished to the extent that less than 20% of his duties remained.

40. AW and SS did not consider, as part of the redundancy consultation process, whether the claimant could remain on the CJRS or move to the JSSO as an alternative to dismissal for redundancy.

41. A new employee (JG) was employed by the respondent on 14 December 2020. He was employed as a driver / service operative. The intention of MB was that JG would also be trained up to take over some duties which MB currently carried out.

Observations on the evidence

42. It is not the function of the Tribunal to record all of the evidence presented to it and the Tribunal has not attempted to do so. The Tribunal has focused on those parts of the evidence which it considered most relevant to the issues it had to decide.

43. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event in fact occurred.

44. There was a dispute in the evidence about the allegations which the claimant made about SS in his email to MB of 9 October 2020, which had been forwarded to SS on 11 October 2020. SS denied the allegations. She denied having had a conversation with the claimant several months previously about one of the service drivers being made redundant and the claimant taking on his role. She denied having had a conversation with the claimant seven weeks previously and telling the claimant not to hand in his notice with the respondent as there was plenty of work for him to do. She denied saying to the claimant two weeks previously it would be better if he resigned and told him he was not being sacked or made redundant.

45. The Tribunal found SS's evidence in relation to these allegations to be somewhat evasive. SS and the claimant referred to an informal meeting which had taken place between them both and MB, which had been called by the claimant, at the beginning of October 2020. The purpose of the informal meeting was so the claimant could understand where he stood regarding his job. That appeared to the Tribunal to be a natural concern given that he was only working one day per week.

46. It appeared likely to the Tribunal that there would have been various conversations between SS and the claimant about his role, the fact he was only working one day per week and the lack of events work. Additionally, the claimant had sought a meeting with MB and SS to understand where he stood with his job. It is unlikely that there would have been no conversations of this nature given that the claimant had documented them in an email and sent them to MB's personal email address. That said the Tribunal considered on balance that it was likely that the claimant had a different interpretation from SS in relation to what was said. The Tribunal did not require to make specific findings in relation to the veracity or otherwise of each of the allegations. The

Tribunal is required to consider whether the sending of the email by the claimant was the reason why he was dismissed. This is addressed below.

47. There was a dispute in the evidence about what was discussed about driving duties as alternative employment. The claimant said that he put forward a proposal that he could carry out driving duties as an alternative to dismissal. AW and SS said that was not the case. None of those who attended the meeting said that insurance costs were discussed. It was SS position that the claimant knew he was not insured to drive any of the respondent's trucks due to the insurance cost and therefore he could not carry out driving duties.

48. The Tribunal determined that it was likely that the claimant did not put forward a proposal about carrying out the service driver role during the consultation process. If he had done so the issue of the insurance costs and the inability to obtain full insurance cover would likely have been raised by SS and discussed further by AW. The Tribunal accepted that it was likely that the claimant would have known about the insurance position in relation to the trucks. He had got his car driving licence back in late 2019 but had not been doing any driving duties for the respondent.

49. There was a dispute in the evidence about when the claimant received the letter of 30 October 2020 from SS (page 129) headed confirmation of redundancy dismissal. AW said he prepared the letter after the consultation meeting and gave it to SS to complete details about wages and holidays. SS says after completing the details she hand delivered it to the claimant's home that day, posting it through his letter box. The claimant says he did not receive the letter until 11 November 2020.

50. There was also a dispute in the evidence about the date of dismissal. The letter dated 30 October 2020 headed confirmation of redundancy dismissal says "You are entitled to 6 weeks' notice that will expire on Friday 11 December 2020 which will be your final day of employment". In a later paragraph the letter sets out the date when payment in lieu of notice and other payments will be received and states that they "will be paid into your bank

account on 5/11/20 (next pay date) and termination date is 30/10/20". The respondent's position is that employment terminated on 30 October 2020. The claimant's position was that employment had terminated on 11 December 2020 although he acknowledged that he had received the sums referred to in the letter including payment in lieu of notice on 5 November 2020, as stated in the letter.

51. The Tribunal noted that the letter of 30 October 2020 stated that the statutory redundancy payment had been calculated based on 6 full years' service to 30 October 2020. The Tribunal noted that the schedule of loss prepared by the claimant (page 168) showed the claimant's date of dismissal as 30 October 2020. The Tribunal determined that the effective date of termination of the claimant's employment was 30 October 2020 and by making a payment in lieu of notice that had been the respondent's intention notwithstanding the letter of 30 October 2020 also referred to 11 November 2020, in error, as the date when employment ended.

52. The Tribunal was also satisfied, on balance, that the claimant had received the letter of 30 October 2020 on that date when it was hand delivered by SS to his home. Having reached a decision on 30 October 2020 that the claimant was to be dismissed by reason of redundancy, the Tribunal thought it likely that the letter would have been delivered that day, rather than waiting until 11 November 2020 as asserted by the claimant. This was also supported by the fact that the letter of 30 October 2020 gave the claimant until 13 November 2020 to appeal against the decision of SS. If it had only been delivered on 11 November 2020 the claimant would have had insufficient time to appeal.

53. The claimant asserted that JG had been brought into the business in December 2020 and was doing his job. The contract of employment for JG (page 133) showed his job title as Driver / Service operative. The duties referred to JG's contract of employment were driving duties. The respondent's evidence was that JG's role was to be an evolving one, taking over some duties of MB as he neared retirement. The Tribunal was satisfied on balance that JG was not doing the claimant's job.

Relevant law

54. Section 94 Employment Rights Act 1996 (ERA) provides for a right not to be unfairly dismissed, which is determined having regard to the terms of section 98 ERA. Case law has established that save in unusual circumstances consultation with the employee is required before there can be a fair dismissal for redundancy, including in **Polkey v AE Dayton Services [1988] ICR 142**.

55. Section 139(1) ERA states (in relevant part) that for the purpose of that 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.

56. Section 123(1) ERA states that if a tribunal decides that an employee has been unfairly dismissed, it will award such compensation as is just and equitable in all the circumstances, having regard to the loss sustained by the employee in consequence of the employer's actions.

57. The Tribunal directed itself to the decision in **Wrexham Golf Co Ltd v Ingham** EAT 0190/12. There the EAT noted that the word ‘pool’ is not found in S.98(4) ERA and ‘there is no rule that there must be a pool: an employer, if he has good reason for doing so, may consider a single employee for redundancy’. Accordingly, the question that the tribunal ought to have considered said the EAT was whether, given the nature of the job of the claimant, it was reasonable for the respondent not to consider developing a wider pool of employees.

58. The Tribunal also directed itself to the summary of the law set out in the **Wrexham** case per David Richardson J a) “It is not the function of the

Employment Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted" (per Browne-Wilkinson J in **Williams v Compair Maxam Limited [1982] IRLR 83 [18];** b) "[9]...the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn" (per Judge Reid QC in **Hendy Banks City Print Limited v Fairbrother and Others (UKEAT/0691/04/TM)**; c) "There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem" (per Mummery J in T**aymech v Ryan [1994] EAT/663/94);** d) The Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has "genuinely applied" his mind to the issue of who should be in the pool for consideration for redundancy; and that e) [Even] if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it."

Submissions

59. Both representatives made oral submissions and provided written submissions to the Tribunal. The Tribunal carefully considered the oral and written submissions of both parties. Their written submissions are summarised below

Respondent's submissions

60. The respondent submitted that there were two primary issues: (i) was the claimant dismissed unfairly in terms of s.98(4) ERA and (ii) if so, what loss has been suffered, the claimant having accepted that he has received a statutory redundancy payment or basic award, which has been calculated correctly. The respondent submitted that a genuine redundancy situation

existed. The principal reason for the claimant's dismissal was that there had been a diminution of work carried out by the claimant. In dismissing the claimant, the respondent acted within the band of reasonable responses. The respondent submitted that no loss has been suffered by the claimant. If a fair procedure had not been followed (which is denied) he would have been dismissed in any event. Alternatively, the claimant has failed to show he has mitigated his loss.

61. The respondent submitted that the claimant's case rests on three matters: (i) whether a genuine redundancy situation existed; (ii) whether the principal reason for dismissal was redundancy (iii) whether the respondent acted reasonably in dismissing the claimant and, more particularly, putting him in a pool of one and considering further use of the Coronavirus Job Retention Scheme ("CJRS").

62. The respondent referred to section 139(1) ERA which deals with redundancies and section 98(4) which deals with the fairness or otherwise of a dismissal. A tribunal must consider whether the decision to dismiss an employee was within the range of conduct that a reasonable employer could have adopted: **Iceland Frozen Foods Ltd v Jones [1983] I.C.R. 17** per Browne Wilkinson J at 24H and 25C-D. There is a range of binding authority in relation to the issues in the current case. The following propositions can be derived from those authorities:

63. The respondent submitted i. An employer must: (a) warn and consult; (b) adopt a fair basis on which to select for redundancy; and (c) consider suitable alternative employment: **Polkey v A E Dayton Services Ltd 19 [1988] I.C.R. 142**.

64. The respondent submitted ii. The law on pools of one was usefully summarised in a decision of the EAT in **Wrexham Golf Club v Ingham UKEAT/0190/12/RN** per David Richardson J at [23]. a) "It is not the function of the Employment Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within

the range of conduct which a reasonable employer could have adopted" (per Browne-Wilkinson J in **Williams v Compair Maxam Limited [1982] IRLR 83** [18]; b) "[9]...the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn" (per Judge Reid QC in **Hendy Banks City Print Limited v Fairbrother and Others (UKEAT/0691/04/TM**); c) "There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem" (per Mummery J in **Taymech v Ryan [1994] EAT/663/94)**; d) The Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has "genuinely applied" his mind to the issue of who should be in the pool for consideration for redundancy; and that e) [Even] if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it."

65. The respondent submitted iii. The fact that the employer is a small company does not remove the obligation to consult although it may affect the nature or formality of the consultation process which it must undertake in order to have acted reasonably: **De Grasse v Stockwell Tools Ltd [1992] IRLR 269** per Tucker J at 270 [12].

66. The respondent submitted iv. The fairness will be judged not simply at the day on which notice is given but also with regard to events up to the date on which it takes effect **Stacey v Babcock Power Ltd 1986 ICR 221** per Waite J at 225 H.

67. An employee's period of continuous employment will end on the effective date of termination (EDT). The EDT is defined as: i. The date on which the employee's notice expires (where the employee has been terminated with notice); or ii. The date on which termination takes effect (where the employee has been dismissed without notice): section 97 ERA.

68. The respondent submitted that it is the tribunal's assessment of the evidence which matters. But the respondent would make these observations in relation to the witnesses. MB was a credible and reliable witness. MB did his best to assist where he could. He admitted when he could not remember a conversation and was convincing on matters he could remember. AW is also a credible and reliable witness. He had no axe to grind. He was clear in the evidence he gave. He made a genuine effort to establish whether there was a genuine redundancy situation and concluded that there was. In relation to the matter as to the discussion of the driving licence at the initial consultation meeting, the minutia of this point is largely irrelevant. The relevant point is this: alternatives for redundancy were considered. SS's evidence ought to be preferred over the claimant's. In relation to the allegations of 9 October 2020, this is simply a matter of one person's word against the other. SS denies the substance of these allegations. She remained consistent in her evidence that the principal reason for dismissal was a downturn in work. The claimant was, at times, a difficult and evasive witness. He suggested that AW, an independent external witness, was wrong in what was written in the various extraneous material issued following the meetings of 23 and 30 October 2020. At no point before these proceedings were these matters raised. His evidence in this regard was completely contradictory to the evidence of SS, AW and the extraneous material. A genuine redundancy situation existed.

69. The claimant contends no genuine redundancy situation existed at the point of dismissal (ET1 [16]: JB16). He argues that the employment of JG shortly after the claimant's dismissal is evidence of this (ET1 [18]: JB16). Such a contention is wrong in both law and fact.

70. The respondent made submissions on the effective date of termination for the claimant. Put simply, the claimant's termination date is the date on which his notice expires. The claimant was paid in lieu of his notice period. The letter of dismissal stated that the dismissal date was 30 October 2020. His notice therefore expired on 30 October 2020 when the notice was given. We heard evidence from both AW and SS the letter was delivered after the meeting on

30 October 2020. The respondent had a contractual right make a PILON. In any case, he was paid this on the next payroll on 5 November 2020. To assert that he was unaware he was dismissed on 30 October 2020 having received a PILON which had been discussed is simply not credible.

71. There was a diminution of events work within the respondent. The claimant was principally responsible for preparation and cleaning of the toilets for hire in events work. This took up the vast majority of his role as a Yard Operative and it was his core function. The full description can be found at JB 100. In essence, we heard evidence that the claimant's role was restricted to work in the yard. He occasionally would work on site as opposed to the yard however this was a rarity. MB gave evidence that the impact of COVID on the respondent was considerable as at 30 October 2020. The impact can be summarised into five brief points: i. The events services stopped in their entirety for around two years until they picked up again around May 2022; ii. The business lost around 95% of its events revenue in the period of April 2020 to April 2021; iii. The respondent incurred a number of cancellations evidenced by the correspondence at JB 145 – 167; and iv. All of the respondent's staff, with the exception of MB, were made redundant. The impact of COVID on the events part of the business resulted in a diminution, if not a complete cessation, of events work. The respondent was generous to the claimant. It paid his wages at 100% when it did not have to. We heard evidence the claimant was brought back one day a week as a favour where he carried out miscellaneous tasks around the yard. This was to make him feel part of the team and have interactions with his colleagues. The role carried out one day per week by the claimant could have been carried out by the service drivers as part of their duties. This consisted of early "wintering" work which would normally have been carried out over the winter. The result was that there was nothing to do for the claimant as a Yard Operative. MB was clear that he expected that to remain the case "at the very earliest, within the next six months" from the date of dismissal. In summary, there was a diminution of work for the claimant's role from the point he was furloughed

until the point of dismissal. That was expected to continue for a substantial period of time.

72. The allegation that JG was employed to replace the claimant is wholly misconceived. The intentions of the respondent in recruiting JG and his duties are critical in finding there was a genuine redundancy situation. I begin with the intentions of the respondent. We heard evidence from MB that he had been looking for somebody to train up to take over his own responsibilities as a manager. MB had been running the business day to day for thirty years and wanted to step back. The respondent is a small business set up by MB as a sole trader. He wanted somebody he could trust to take over the day to day running of the business. This is an entirely different role to the one the claimant carried out. There are six particularly significant differences in the JG role: i. It involved client facing duties; ii. It involved helping customers plan their event; iii. It related to significant amounts of work outside the yard; iv. Negotiating with customers; v. Liaising with customers; and vi. It involved driving with a trailer which the claimant had not done for a significant period of time due to a driving ban. On a proper analysis, this is a completely different role from that which the claimant carried out. Further, looking at the reasons for this hire, it was very clear that JG was brought in to replace MB. This was something which had been on his agenda for a number of years. On that basis, there is a genuine redundancy situation.

73. The respondent made submissions with whether the respondent ought to have offered the claimant this role. If the tribunal is to find that the respondent acted unreasonably in this regard, it must ask itself the following question: would no reasonable employer have acted in the way the respondent did? I submit the answer to that question is no. The role is entirely different and was a particularly sensitive hire for MB. It would have resulted in a considerable escalation of responsibility and duties for the claimant. Finally, in looking at the fairness at the date of termination at 30 October 2020, the respondent has continued to act in a fair manner. This was a position in the mind of the

respondent from April 2020, well before the claimant's redundancy procedure commenced.

74. The respondent submitted the tribunal must consider whether there has been a diminution or cessation of work in terms of section 139 ERA. There was patent diminution of events work for the respondent. Put simply, the respondent no longer required the services of the claimant. The assertions that JG replaced the claimant are, on a proper analysis, wrong. It was reasonable for the respondent not to offer the claimant that role. The principal reason for dismissal was redundancy The claimant sought to argue the principal reason for his redundancy was that he did not hold a Class 2 HGV Licence (JB 16 [16]). Further, he sought to rely on an agenda of SS to make him leave the business. That is wrong and I will deal with it briefly. There was a genuine redundancy situation and I do not intend to labour that point any further. AW was an external advisor who was contracted to carry out the redundancy consultations. He had no axe to grind. There is no basis whatsoever to suggest that he dismissed the claimant because he did not hold a Class 2 HGV Licence. The matter was discussed because, quite rightly, AW was considering alternative employment. I invite the tribunal to prefer the evidence of the respondent in relation to the allegations against SS: see the 9 October 2020 email at JB 126. These allegations are simply unfounded. If the tribunal is not with me on that, it was not the principal reason for the claimant's dismissal. There was a genuine redundancy situation, which was the principal reason. The respondent acted reasonably in dismissing the claimant.

75. The respondent submitted that a fair process was followed when taking into account the size and administrative resources of the claimant.

76. The respondent submitted that the respondent acted reasonably in adopting a pool of one.

77. The respondent submitted that the respondent acted reasonably in not considering to continue to furlough the claimant. In applying the test of

reasonableness as set out in **Polkey**, it is submitted the respondent met that test. The respondent did warn and consult with the claimant. The claimant was invited to a meeting on 23 October 2020 to consult on his potential redundancy. He was told he was at risk of redundancy at this meeting. Alternative positions were discussed at that meeting and redundancy was discussed as an option. The claimant was then given a period of seven days to consider his potential redundancy. A final meeting took place on 30 October 2020. The claimant's position remained the same and he was made redundant. The respondent is a small business consisting of six employees. Its needs were being met by the existing employees carrying out their respective roles. Finally, the respondent did consider alternative employment. There were no vacancies at the time the claimant was dismissed. I have already discussed JG's role in that context. AW did consider the role of service driver for the claimant however he did not hold the required licence to carry out those duties. A pool of one was a reasonable approach.

78. The respondent did adopt a fair basis on which to select for redundancy. It identified that the events part of its business had diminished considerably due to covid. While service drivers were still able to carry out driving duties in relation to other parts of the business, the claimant's duties were restricted to dealing with events-based duties. It considered all the areas of the business which had been affected by the downturn in the events. Due to the impact of covid, the respondent did not foresee the events business picking up. No other members of staff within the respondent's business carried out the same work as the respondent. While there was an element of cross-over of duties between the claimant and service drivers, the service drivers core duty was driving. The respondent genuinely applied its mind to considering the pool of employees to make redundant. Therefore, it would be difficult for the Tribunal to interfere with that decision. Indeed, I do not see any basis on which it could. There was only one Yard Operative.

79. It was reasonable for the respondent not to consider the CJRS. The respondent submitted that to find that it ought to have considered furlough is

a classic example of a straw man fallacy. It is a fallacy for the following reasons:

a. The CRJS, as at the date the decision was made to dismiss (30 October 2020), was due to terminate on 31 October the next day. The respondent did not require to consider the continued application of CJRS.

b. It was due to be replaced by the Job Support Scheme (Open) for employers, such as the respondent, who remained open. This had the principal requirement that the employee was required to carry out at least 20% of their role. The claimant's role had diminished completely for the reasons mentioned. The claimant would not have been eligible for this scheme.

c. While some employers may have waited a further day to the end of the scheme, it was not outside the band of reasonable responses for the respondent to dismiss a day earlier than the scheme ending. In any case, AW told the claimant that furlough was not an option during the consultation process.

80. On compensation the respondent submitted there were four short propositions which the Tribunal is bound to follow when assessing matters of compensation. They are as follows:

a. If a Tribunal decides that an employee has been unfairly dismissed, it will award such compensation as is just and equitable in all the circumstances, having regard to the loss sustained by the employee in consequence of the employer's actions: section 123(1) ERA.

b. Having assessed an employee's loss, a Tribunal may make a reduction in the compensatory award to reflect the possibility that there would have been a fair dismissal in any event: **Polkey v AE Dayton Services Ltd [1987] IRLR 503**.

c. A Tribunal is not under a general duty to investigate whether a fair dismissal would have occurred had proper procedures been followed. But it must do so where there is concrete evidence to that effect: **Software 2000 Ltd v Andrews and others UKEAT/0533/06** per Pill LJ at [52] to [53]. The claimant's compensation ought to be reduced in applying a Polkey reduction. He would have been dismissed in any event had a fair procedure been followed. Alternatively, the claimant has failed to mitigate his losses. In any case, the schedule of loss submitted by the claimant contains errors.

81. The respondent submitted that if a fair process had been followed (which is denied), the claimant would have been dismissed in any event. The Tribunal must consider whether a fair dismissal would have happened in any event. There is concrete evidence that the CJRS was due to end on 31 October 2020, a day after the claimant was dismissed. The claimant was not eligible for the JSSO as there was simply not enough work to keep him employed at the rate of 20% required by the scheme. It simply does not follow that the respondent required to consider CJRS and continue to furlough the claimant. That is a classic example of a straw man fallacy. Accordingly, his compensation ought to be reduced to zero. Alternatively, the claimant's schedule of loss is not a true representation of his losses.

82. The respondent submitted the claimant has provided no evidence of jobs he has applied to. He has only made bald assertions as to where he has applied. He confirmed that the Job Centre and various other businesses would have held details of his applications. He confirmed that he had been advised to keep any proof of his loss. He did not do so. The Tribunal should not rely on the assumption that if the Job Centre were satisfied, it is satisfied without any vouching whatsoever. Finally, the claimant has made an allegation that he has been blacklisted from small local employers in his schedule of loss. These are very serious allegations made by the claimant without any evidential basis. They are hopelessly particularised. Again, there is only a bald assertion made by the claimant to this effect and its nature runs contrary to fair notice.

In any case, the respondent denies telling any third party about the claim made by the respondent.

Claimant's submissions

83. The claimant submitted that where there was difference in the evidence between the claimant and the respondent, the Tribunal was invited to find that the claimant was credible and reliable in giving his evidence and to prefer his evidence to that given by the respondent and the respondent's witnesses.

84. The claimant submitted that the evidence from MB, AW and SS was a mix of confusion, uncertainty and contradiction. MB was not sure about very much beyond the fact that there was a redundancy situation and that the claimant was the only yard operative and therefore he had to be the one to go to suit the needs of the business. MB accepted that the claimant had expressed concerns about comments previously made by SS and asked for his personal email address to send those to, he got that email, sent it to SS and then did nothing else about it.

85. The claimant submitted that AW was sure about even less. AW had been told that as the only yard operative the claimant was the only employee in the at-risk pool. AW did not think to question that or to ask for information and felt he had everything he needed despite not knowing how many other employees there were or what their job descriptions were. AW concluded by telling us that he was not in fact the decision maker and that he was conducting a process to invite the claimant to come up with alternatives to redundancy and in the absence of any suggestions it was then for MB and/or SS to dismiss, allegedly by reason of redundancy.

86. The claimant submitted that the evidence of SS was that she saw the email of 9 October 2020, did not have the headspace or the desire to indulge it as it was not true and she was going on holiday. SS returned to work on the 19 October 2020 and by the 23 October 2020 the claimant was having his first consultation meeting with AW, as a pool of one. The claimant submitted that it could be concluded that the reason for the meetings on 23 and 30 October

2020, and the subsequent dismissal, was a reaction from her to the email of the 9 October 2020, although SS denies this.

87. The claimant submitted that the respondent's business was cyclical and seasonal and that event work, even without covid, would have dried up by the end of September. The respondent's business was in to the quiet period and the service drivers were not fully employed. MB's evidence was that there were two service drivers, SS's evidence is that there were three service drivers. There had been a downturn in business since covid at the start of 2020 and the claimant had been furloughed from 24 March 2020 until his dismissal, albeit flexibly for the latter part of that period. The evidence of SS was that the flexible furlough was for the claimant's mental health benefit and that redundancy was for the same reason. The claimant submitted that points to SS being the decision maker and driving force. What then had changed between March and October 2020 for the business? The simple answer is that nothing had got worse. Any event work would have dried up by October anyway and MB's evidence was that septic tank work and work on construction sites had picked up, hence the purchase of twelve welfare units for in excess of £50,000.

88. Was there therefore a diminution of work of a particular kind at October 2020? The claimant submits no. Section 139 ERA sets out the definition of a redundancy situation. The respondent's business did not close down nor did it close a workplace. Accordingly, the only applicable part of that definition is 139(1)(b) "that the requirements of that business for employees to carry out work of a particular kind or in the place where the employee was employed had ceased or diminished or was expected to do so." The claimant submitted that what the Tribunal heard from the respondent and his witnesses did not speak to such a redundancy situation existing. There was no cessation and no diminution of work. The welfare units were coming on stream and septic tank work had picked from even normal levels. A dozen extra welfare units had been bought and JG was taken on, according to the respondent's ET3, to service those welfare units. With JG, the ET3 says one thing, his contract

says another and MB and SS say something else again. That contradiction, submitted the claimant, is eloquent of the fact that there was an enthusiasm to avoid any hint of the truth that JG was brought in to replace the claimant. JG did not simply turn up on 14 December 2020, the next working day after the claimant's notice period ended. He must have been planned for, interviewed and brought in to the business weeks before.

89. Against all of that background the claimant invited the Tribunal to find that the reason for dismissal was not redundancy, which is a potentially fair reason in terms of section 98 ERA. The true reason was that the claimant had cast aspersions on SS and therefore within one working day of his email being sent to MB he was marked for dismissal in a pool of one. Redundancy arises where the statutory definition is engaged, so that the Tribunal is looking to evidence of cessation or diminution of work of a particular kind. It is not a matter of assessing the financial position of the employer. That said MB suggested that there was an element of this that was about cost saving. He could not explain why the decision to dismiss and pay for redundancy would have taken the business more than sixty weeks to recoup, as opposed to the claimant simply remaining on furlough.

90. Alternatively, if this has been a genuine redundancy situation, and that dismissal has been by reason of redundancy, the Tribunal was invited to look to issues of general reasonableness in terms of section 98(4) ERA. That requires determination in accordance with equity and the substantial merits of the case and regard to be had to the size and administrative resources of the employer. Here the claimant contends that:

    a. he was unfairly selected in a pool of one;

    b. that it was unreasonable to dismiss where an alternative was available; and

    c. that the consultation process was defective to the point of being a sham. An employer does of course have to follow a fair procedure as set out in **Polkey**. This is not a situation where there is perhaps a minor

irregularity in procedure which could be excused as making no difference. This was a pool of one where the employer accepts they did nothing other than invite the claimant to come up with alternatives of his own.

91. Pool selection is a matter for the respondent but they require to demonstrate that they acted reasonably in that decision making. They also require to demonstrate that they genuinely applied their mind to the issue of pool selection. Accordingly, the Tribunal is not precluded from finding that the choice of pool by the employer is so flawed that the claimant, selected as a pool of one, has been unfairly dismissed. Albeit in very different facts there is support for that in the decision of the EAT in **Capita Hartshead Ltd v Byard 2012 ICR 1256**. Evidence from MB and SS seemed to be that as the only yard operative, and with yard work having diminished, only the claimant should be in the pool. There was however an acceptance that the claimant could and had driven for the respondent, effectively doing service driver work. MB did not know what the insurance position was for the claimant. SS thought the cost of insurance was prohibitive at £6,000 per annum and AW didn't think about it all as he didn't think the claimant had a driving licence.

92. The claimant submitted that that there was a significant element of interchangeability between the claimant's role and that of a service driver and that accordingly the service driver Ross Cameron should have joined the claimant in the pool. I would suggest that the selection of a pool of one was not reasonable and was concocted to ensure that the claimant left the employment of the respondent. Alternatively, it was submitted the Tribunal has to look at the process undertaken by AW and to assess whether that was reasonable in section 98(4) ERA terms.

93. As previously referred to, AW was brought in to deal with the consultation. He held himself out as having experience and expertise in the running of such consultations. What he did however was to take the most basic information from SS, accept it as fact and fail to question anything so as to arrive at conclusions of his own. He did not look to assess the fairness of the pool of

one. He did not know how many other employees there were or what their job descriptions were. He was content simply to accept what he was told by SS that there was no other work available. He did not know about the incoming welfare units. He believed that the claimant had no driving licence and denied that any discussion took place about class 2 HGV licences, despite SS telling us that was talked about. The insurance issue was not raised in the meeting according to his notes. His position was simply that this was a consultation where the claimant was being asked to come up with an alternative to dismissal and none of MB, AW or SS looked for alternatives from their side of the equation. In my submission the consultation was accordingly a sham. AW denied commenting to the claimant that he would be better off with redundancy than on furlough. He denied knowledge of the claimant's precise furlough position or the prevailing rules under the CJRS. In short there was nothing that the claimant could have done to escape an inevitable dismissal. That decision having been taken it seems by SS and certainly not by AW.

94. The claimant submitted there was an alternative, not in terms of alternative work but of simply being left on furlough, where the claimant had been at the time of the consultation beginning. The whole purpose of the CJRS was to protect the position of businesses and to allow them to retain the skills and experience of staff for whom there was otherwise no work. We heard that the claimant was a valued and experienced member of staff. He had skills and knowledge that benefitted the business. That could have been retained simply by leaving him on furlough. There is a first instance decision of the Reading Employment Tribunal in **Mhindurwa v Lovingangels Care Limited 3311636/2020** where the Tribunal found that failure to consider the use of furlough as alternative to redundancy dismissal amounted to unfairness. AW did not consider that option at all. SS felt that the scheme position was unclear and perhaps coming to an end in October 2020. There was another scheme proposed to start on 1 December 2020 but that fell away when CJRS was extended on 31 October 2020, the day after dismissal. There was no discussion about what the cost to the business of leaving the claimant on either the abandoned Job Support Scheme Open (JSSO) or the extended

CJRS may have been. The claimant submitted that it simply was not considered at all, primarily because SS wanted the claimant gone. I confess It was unclear what MB's position on consideration of furlough was, if anything. Even if that alternative was not considered at the time there was no review of the dismissal decision when the furlough position became clear on 31 October 2020 or where a further upturn in business came along with the purchase of the new welfare units. If the claimant was right in any of that the Tribunal was invited to find that the dismissal, even if for a genuine redundancy reason, was unfair.

95. The claimant received his statutory entitlement in terms of redundancy and pay in lieu of notice payments along with accrued annual leave. He sought other work but did not find it in the twelve months after dismissal. Covid remained as did CJRS until September 2021 so there was a governmental acknowledgment that work was not easy to come by. The claimant satisfied the Department of Work and Pensions DWP that he was actively seeking work and continued to be paid Universal Credit as a result. The respondent argues that there was a failure to mitigate. The onus is on them to demonstrate such a failure and to show when work should have been found so that the Tribunal can then restrict any compensatory award in terms of section 123 ERA to that date.

96. It is acknowledged that the claimant did not appeal the dismissal. That should not inform any reduction in the compensatory award as it impossible to see how any appeal would have achieved anything here given the positions stated by SS and MB. The provision in section 207A TULRCA permits a deduction of up to 25% for the failure to appeal. There is nothing in this case to demonstrate that a coming together of the parties to discuss matters would have helped in any way or altered the decision to dismiss. In any event the Tribunal heard from the claimant about the reason for the lack of an appeal.

Discussions and decision

97. By section 98 ERA, where an employee has been dismissed for redundancy, the determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer, depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.

98. By section 139 (1) (b), an employee is dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish. This requires consideration of the work that the employee actually did.

99. To determine whether someone had been dismissed by reason of redundancy three questions need to be asked was the employee dismissed? if so; had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish? if so; was the dismissal of the employee caused wholly or mainly by the ceasing or diminishing?

100. At the third stage the tribunal is only concerned with causation – so if the redundancy situation arises but does not cause the dismissal, the employee is not dismissed by reason of redundancy.

Reason or principal reason for dismissal

101. The claimant alleges that the real reason that he was dismissed was because the claimant cast aspersions on SS in his email to MB on 9 October 2020. The Tribunal does not consider that this was the case for the following reasons.

102. The Tribunal accepted the respondent's explanation that there had been a diminution in the work of a yard operative which is the work that the claimant actually did. The Tribunal accepted the respondent's explanation that there was limited yard work to offer to the claimant at the relevant time. Due to a significant downturn in events work there had been a significant downturn of work in the yard preparing toilets for hire and cleaning and repairing the toilet units. The "wintering" work, being the maintenance and repair of toilet units and equipment, which was normally carried out by the claimant over the winter months, had already been carried out by the claimant on his working days during flexible furlough. The Tribunal was satisfied that the respondent had limited work to offer to the claimant in the yard.

103. The claimant says that the timing of his sending of the email of 9 October 2020 and his first meeting with AW and SS on 23 October 2020 (around 4 days after SS returned from annual leave) points to the real reason for his subsequent dismissal being the aspersions cast on SS. The Tribunal is satisfied that this is not the case. The Tribunal considers it unfortunate that MB did not take any steps to address the contents of the claimant's email with him. The email had been sent to his personal email address, at the request of the claimant. The claimant was raising issues which were sensitive about a senior member of staff. MB replied to the claimant on 11 October 2020 to say he would get back to the claimant. He did not do so.

104. The Tribunal can understand why, because he received no substantive response to his email, the claimant may have been suspicious that by casting aspersions on SS, this was the real reason for his dismissal rather than redundancy. And additionally given the timing of him emailing MB on 9 October 2020 and being told on 20 October 2020 that he was being invited to a redundancy consultation meeting. Nevertheless, the Tribunal is satisfied that this was not the case. As at 23 October 2020, when consultation began, a genuine redundancy situation existed. This genuine redundancy situation had existed for a number of months, due to the significant downturn in events work due to covid. During the period when the claimant returned on flexible

furlough until his dismissal, he was working only one day per week. His normal contractual hours were 5 days per week. In the Tribunal's view this pointed to a significant downturn in work in the yard, being the work which the claimant carried out.

105. Further, although the claimant took issue with what he alleged that SS had said to him, the claimant's email of 9 October 2020 refers to a potential redundancy situation which SS had raised with the claimant a few months before the email of 9 October 2020 was sent. There had also been an informal conversation between the claimant, SS and MB on around 3 October 2020 when the claimant had discussed the lack of work and his concerns about where he stood in relation to continued employment. There had been concerns on both sides for some time about the lack of work. There were no signs that the situation with the pandemic was changing and the respondent was coming into the winter when the usual wintering activities had already been completed. It was clear that potential redundancy was in the minds of MB and SS as they monitored their business and monitored the yard work. Taking account of these matters the Tribunal is satisfied that the claimant was dismissed because of redundancy and not because of the contents of his email of 9 October 2020.

Diminished requirement

106. The Tribunal was satisfied as above that the work which the employee actually did, the cleaning and servicing of toilets and showers in the respondent's yard had diminished. This was as a result of events in the UK ceasing due to the covid pandemic. The dismissal was driven by a significant reduction of events work; the deletion of the claimant's role was in response to the significant reduction of events work, changes in the nature of the respondent's business resulting in units remaining on customers' sites long term and not return regularly to the respondent's yard for cleaning and servicing; the duties associated with the claimant's yard operative role could be absorbed by the drivers. These factors in combination meant that there was a diminution in the requirements of the business for employees to carry

out work of the kind that the claimant performed, namely preparation of toilets and other units for hire and cleaning and repairing such toilets and other units on return to the yard. Accordingly, the Tribunal is satisfied that the dismissal of the claimant is wholly or mainly attributable to the fact that the requirements of the respondent for employees to carry out work of a particular kind had diminished.

Pool of one

107. The Tribunal was satisfied that the claimant was not unfairly selected to be placed in a pool of one. The Tribunal was satisfied that the respondent genuinely applied their mind to the question of the pool for selection. MB and SS discussed a potential redundancy situation of the claimant's role. They discussed that the events business across the UK was non-existent. They discussed that there was very little work in the yard for the claimant to undertake. They discussed that "wintering" of equipment left in the yard, which was usually done over the winter period had been completed by the claimant. They identified that the claimant was the only employee who carried out yard work, cleaning and servicing of toilets and showers. On that basis they decided that he was the only employee at risk of redundancy. Applying the reasonable response test the Tribunal was satisfied that it was reasonable of the respondent to decide that the selection pool should be drawn from those who worked in the yard only, that being the claimant only.

108. The claimant's representative asserted in submissions that the claimant could and had driven for the respondent, effectively doing service driver work. Thus, the service drivers ought to have been in the pool for selection with the claimant. The Tribunal did not accept that assertion. The evidence of SS, which the Tribunal accepted, was that there were high insurance costs and difficulties with insurance cover for the claimant given his previous driving ban. In addition, the respondent had genuinely applied their mind to the work which the claimant was doing in the yard which had diminished. He was not carrying out driving duties nor was he able to do so due to a lack of insurance. Whilst the drivers could have carried out yard work, he could not have carried out

driving work. The Tribunal did not accept that it was unreasonable for the pool to have included the service drivers in addition to the claimant.

Suitable alternative employment

109. The Tribunal was satisfied that there was no alternative employment which the claimant could have carried out. The work of the respondent during the pandemic had changed significantly. The respondent's toilets, showers and welfare units were being used principally by businesses such as factories and construction for social distancing reasons. The units were staying on the customers premises long term rather than returning to the respondent's yard for cleaning and servicing. As a result, the respondent required drivers who could transport the units to the customers sites and also return to clean and service them on the customers' site. This required use of the respondent's trucks which the claimant was not insured to drive. The insurance costs and difficulties in obtaining insurance were due to the claimant's previous driving ban. The only other employees of the respondent in addition to two drivers, were MB, SS and another employee who worked in administration. The claimant asserted that he should have been offered a driving role with the respondent as suitable alternative employment. The Tribunal did not agree with this assertion due to the costs and difficulties with insurance. .

110. The Tribunal was satisfied that it was not unreasonable to dismiss the claimant rather than continue with the flexible furlough arrangement which had been in place with the claimant working one day per week. The claimant did not ask to remain on furlough. The respondent's position in evidence was that it had not considered continuing the flexible furlough arrangement prior to dismissal. The respondent's position in evidence was also that there was insufficient work for the claimant to do, to continue the flexible furlough arrangement of one day per week under the CJRS or the new JSSO arrangement, which was then abandoned by the government on 31 October 2020. As at the dismissal on 30 October 2020 there would also have been a cost to the respondent if the claimant had been moved on to the JSSO.

111. The Tribunal noted that as at 30 October 2020 the pandemic was continuing, there was no events work, wintering work of equipment was already completed and there would be a financial cost to retaining the claimant. Having regards to these matters the Tribunal concluded that a reasonable employer in the position of the respondent was not required to have given consideration to whether the claimant should be moved onto the JSSO, as was relevant on 30 October 2020, to avoid being dismissed on the grounds of redundancy.

Consultation

112. The Tribunal was satisfied that the consultation process was not defective as asserted by the claimant's representative. The respondent warned and consulted with the claimant. The claimant was invited to a meeting on 23 October 2020 to consult on his potential redundancy. He was told he was at risk of redundancy at this meeting. The respondent stated in that meeting that it could not identify any alternative positions which the claimant could carry out. The claimant was given a period of seven days to consider his potential redundancy. A final meeting took place on 30 October 2020. The respondent was unable to identify any alternative employment which the claimant could carry out and the claimant was dismissed on 30 October 2020. The respondent was a small business consisting of six employees including MB. Its needs were being met by the existing employees carrying out their respective roles.

113. In all the circumstances, the Tribunal was satisfied on the evidence before it that the dismissal was genuinely due to a downturn in work and that dismissal was within the range of reasonable conduct an employer could have adopted in the circumstances, which includes the size and administrative resources of the respondent set out above.

114. Accordingly, the Tribunal concluded that the claimant's claim for unfair dismissal was not well founded.

Employment Judge: Jacqueline McCluskey
Date of Judgment: 20 September 2022
Entered in register: 21 September 2022
and copied to parties