**THE EMPLOYMENT TRIBUNAL**

**SITTING AT:** **LONDON SOUTH by CVP**

**BEFORE:** **EMPLOYMENT JUDGE TRUSCOTT QC**

**BETWEEN:**

**Mr J Ahmad** **Claimant**

AND

**Merco Medical Staffing Limited** **Respondent**

**ON:** **14 July 2021**

**Appearances:**

**For the Claimant:** **In person**
**For the Respondent:** **Mr M White of Counsel**

## JUDGMENT

1. The claimant's claim of unfair dismissal brought under Part X of the Employment Rights Act 1996 is not well founded and is dismissed.

2. The claims for a redundancy payment, notice pay and holiday pay are not well founded and are dismissed.

## REASONS

PRELIMINARY

1. The respondent was represented by Mr M White, barrister who led the evidence of Mr Champion, the Chief Financial Officer. The claimant represented himself and gave evidence on his own behalf.

2. There was a bundle of documents to which reference will be made where necessary. The numbering in the judgment refers to the pages in the electronic bundle. The respondent sought to lodge an additional bundle of documents which it had intimated the day before the hearing. The claimant objected and the Tribunal did not permit the second bundle to be lodged. The Tribunal did permit two documents in that bundle to be admitted:

(i) Pages 73-76 Board Minutes of 18 February 2020
(ii) Page 84 last two pages, payment made to the claimant on 12 July 2021

FINDINGS OF FACT

1. The respondent is a recruitment agency in the healthcare sector. It places senior clinicians, including consultants and GPs, with hospitals and other employers in the sector. The respondent has operated for some 17 years and employs 27 people. Mr Champion is its Chief Financial Officer and a chartered accountant.

2. The claimant is a chartered accountant. He joined the respondent on 29 January 2018 on a temporary contract. This was converted to a permanent contract on 1 May 2018.

3. The claimant's role was the most senior in the accounts team. Within six months of the claimant's role being made permanent, the claimant's next two most senior colleagues, Ms Kanellou and Rishabh Sood (Credit Controller), had both asked to report directly to Mr Champion, the CFO, instead of the claimant, as had been the case until then. This change took effect in October 2018.

4. Because of these structural changes in the team meant, the claimant's role became a standalone, independent role within the accounts team. He did not manage anyone.

5. In September 2019, it emerged that a client of the respondent had been over-charged by some £63,400, potentially causing significant reputational damage. During the investigation, it was identified that the claimant was completely unaware of the problem, despite sitting alongside his colleagues who had been discussing this issue amongst themselves.

6. The claimant was invited to join the senior management team in October 2019.

7. On 15 January 2020, Ms Kanellou, who had worked for the respondent for some four years, tendered her resignation [100]. The respondent saw Ms Kanellou as an asset to the team with significant knowledge of its business. To retain her, it offered her a substantial pay rise. She accepted this offer. Ms Kanellou's pay rise was not discussed with the claimant at the time. He was not her manager and was not involved generally in decisions about pay and promotion, which were as a matter handled by the respondent's Board.

8. As Financial Controller, the claimant processed the respondent's payroll. On 24 January 2020, the claimant emailed Mr Champion to seek approval for that month's payroll. In the email, he noted that Ms Kanellou and Mr Sood had received pay-rises

(Mr Sood's salary had been increased slightly). He objected in particular to Ms Kanellou's pay-rise, saying:

> *"… This pay rise seems unusual since all of them got pay rise [sic] in October 2019, just four months ago. In the case of Dionysia, she has got significant pay rise of £12,500 which represents around 40% increase, and this is in addition to pay rise of £2,500 in October 2019, therefore she was given total pay rise of £15,000 (50%) in short period of just four months"* [116].

9. Mr Champion approved the payroll, saying that they could discuss any matters the next day [116]. The claimant did not follow up on the matter and Mr Champion did not discuss it with him.

10. The respondent had posted a profit in the year to 30 September 2016, but its financial position had subsequently deteriorated. In the years to 30 September 2018 and 2019, it posted losses of £76,631 and £62,993 [SB 2 – 52].

11. In late 2019, the respondent conducted a review of the performance and efficiency of the accounts team as a whole, in the context of a significant incident of overcharging by the team which had risked damage to the respondent. This was not a specific review of the claimant's performance or his role.

12. On 18 February 2020, the Respondent held its monthly Board meeting. The Board, including Mr Champion, reviewed the company's management accounts [Bundle 2 pages 73-76]. The business had lost a further £14,947 in the four months to 31 January 2020. The Board concluded that these ongoing losses could not be sustained, especially in view of concerns about the firm's trading position in view of the emergence of Covid-19. The Board therefore decided that the respondent should look at measures to cut costs. The Board considered whether any roles could be made redundant as one means of cutting costs and shoring up the business's financial position. It decided that the role of Financial Controller was an unnecessary one because the role was a standalone role within the accounts team, the role required a different skillset to the only other similarly paid role in the team, that of Finance Manager, the workload of the role of Financial Controller could be absorbed into that of the CFO and the wider accounts team, the other employees in the accounts team in February / March 2020 save for Mr Champion, all earned much less than the claimant, the nearest being Ms Kanellou. In view of the foregoing, the claimant's position was identified as being at risk of redundancy.

13. He was told of this at a meeting on 6 March 2020, after which he was given a letter and invited to a consultation meeting the following week [117].

14. On 10 March 2020, the first consultation meeting took place [121-122]. The claimant had been invited by letter to bring a companion but chose not to do so. At the meeting, the claimant made various points in objection to his redundancy, that he should have been consulted earlier, that he was selected because he raised the issue of Ms Kanellou's pay, that because she wanted to leave, she should have been selected, other employees should have been considered for redundancy and he had been discriminated against because English was his second language and he said that he would give the respondent proposals to avoid his redundancy. The respondent considered these points.

15. The claimant repeated his offer to propose ways to avoid redundancy in correspondence on 11 March 2020, saying that he would aim to do so by the next day [133]. However, he did not put forward any proposals.

16. On 13 March 2020, Mr Champion held a second consultation meeting with the claimant. He felt that the claimant's objections were not such as to make redundancy inappropriate. In particular, as to the suggestion that the claimant should have been consulted earlier, Friday 6 March had been the first possible time at which the claimant could have been told of the risk, i.e. the first time at which the respondent had considered his position to be at risk [143], as to the suggestion that the claimant was being made redundant because he had queried Ms Kanellou's pay-rise: this was not related in any way to the decision to put the claimant at risk of redundancy [143], as to the suggestion that the respondent should consider other staff for redundancy, including Ms Kanellou: it was the claimant's specific role, that of Financial Controller, which was being considered for redundancy [143]. At the conclusion of this second meeting, the respondent confirmed that the claimant would be made redundant. The respondent placed the claimant on garden leave for his one-month notice period, i.e., until 12 April 2020, but said he would be expected to attend one or two handover meetings in this time [152].

17. This position was confirmed to the claimant by letter on 17 March 2020 which confirmed the claimant's right to appeal which was also restated in correspondence on 19 March [154]. The Claimant did not appeal [163].

18. In the course of the process, Mr Champion offered to contact recruitment agencies on the claimant's behalf in an effort to find him a new job [152 – 153], [156], [189]. The claimant did not take up or even acknowledge the offer.

19. On 18 March 2020, Mr Champion emailed the claimant to propose a handover meeting at 10:30am on 23 March 2020, at the respondent's offices [156]. Mr Champion said also that he would like to discuss with the claimant the possibility of the respondent contacting certain other recruitment agencies in support of finding the claimant his next role. Later that day, the claimant replied, refusing to attend a handover meeting [157]. He repeated this refusal by text message, to which Mr Champion replied reminding the claimant of his obligations [158].

20. On 19 March 2020, Mr Champion emailed the claimant back. Among other things, he reiterated that the claimant had to attend a handover meeting. He said that this could take place off-site if the claimant would prefer this, and invited him to suggest a venue [161].

21. On 20 March 2020, the claimant replied to Mr Champion saying that he would not attend a handover because *"due to the current coronavirus crisis it will not be safe for me to come to the office due to vulnerable relatives and self-isolation"* [162]. He offered a written handover. Later that day, Mr Champion emailed the claimant back, asking him immediately to clarify why his specific situation in respect of coronavirus prevented him from coming in to work, for example, whether someone with whom the claimant lived had symptoms [163]. He proposed a handover call for 09:30 on Tuesday 24 March 2020.

22. On 23 March 2020, the claimant emailed Mr Champion referring the business to two manuals which had existed when he joined, stating that his *"main tasks"* were all up to date and listing his eleven *"main tasks"*, each on a single line. Mr Champion emailed the claimant back the same day, writing:

> *"Thank you for your email below. This is not the handover Merco requested. You have provided a task list. Your email gives no information about these tasks nor any indication of where the information relevant to the tasks has been collated/saved; nor is it adequate to suggest that the availability to Dionysia and Rish of the two manuals, dating back to January 2018, constitutes an acceptable handover, especially when you consider the number of changes that have been made to the accounts department over the last 2 years.*
> *We find your attitude to your continued employment by Merco and to the obligations you owe to the business as both a senior accounting professional and the most senior member of the accounts team, totally unacceptable. …"* [165].

23. Mr Champion went on to say that a failure by the claimant to attend the telephone handover the next day would amount to a failure to follow a lawful management instruction and would result in the claimant not being paid for his period of garden leave, in view of that failure. There followed further emails in which the claimant refused to participate in a handover [167] and Mr Champion reiterated that the claimant needed to attend the call on 24 March [168]. The claimant was given dial-in details and sent an agenda [169-171].

24. The claimant did not attend [172]. The respondent refused to pay him for his garden leave [173]. Mr Champion offered to reconsider the respondent's decision to withhold payment from the claimant if he could offer some explanation for his behaviour [173].

25. The claimant's failure to conduct a handover caused significant problems for the respondent. Certain files and work that the claimant had done could not be located, and had to be done again as a result. This notwithstanding, the respondent was concerned that it had not heard from the claimant for several days after his refusal to conduct a handover, and made enquiries as to his wellbeing [175]. Mr Champion also reiterated his offer to help the Claimant find new work [189].

26. The respondent has not recruited anyone else to fulfil the claimant's former role. The residual elements of the role continue to be performed by the CFO and by Ms Kanellou, as envisaged when the claimant was made redundant.

27. The respondent made four further redundancies in August 2020 as a result of the coronavirus pandemic. These redundancies were not in the accounts team.

28. The respondent did not at first pay the claimant a redundancy payment. This was because it was under the impression that his initial, fixed-term contract did not count towards his continuous service, and as a result considered that he lacked the qualifying service for a redundancy payment [161]. On 2 October 2020, the respondent paid him a redundancy payment. On the same date, the respondent also adjusted his pay such that he was paid £1,335.81 in respect of his notice pay up to 24 March 2020,

the date on which he had failed to attend the telephone handover. The claimant accepts that these payments were made. He says that the payment in respect of the first part of his notice period should in fact have been £1,478.50, reflecting the fact that he included the 24 March 2020 in his calculation. He also seeks the balance of his notice pay from 25 March to 12 April 2020.

29. As at the start of his notice period on 13 March 2020, the claimant had accrued 5.1 days' leave that year of which he had taken 5 [189]. The respondent rounded up the claimant's 0.1 days of accrued leave to 0.5 days and paid the claimant in respect of that [81] [189].

30. The claimant claims that he is entitled to holiday pay in respect of the period after 13 March 2020 to 12 April [34]. The respondent required the claimant to take this holiday in his period of garden leave but now accepts that, in the circumstances, it was not entitled to do so. It accepted that the claimant is entitled to 1.5 days' outstanding holiday pay and paid this sum on 12 July 2021 [Second bundle 84].

SUBMISSIONS

31. Due to shortage of time, the Tribunal heard only brief oral submissions from both parties with a skeleton argument for the respondent.

LAW

32. Section 98 of the Employment Rights Act 1996 provides that it is for the employer to show the reason for a dismissal (section 98(1)) and that redundancy is a potentially fair reason (section 98(2)(c))

33. Section 139(1) of ERA 1996 defines the circumstances in which an employee will be presumed to be dismissed for redundancy as follows.

> 'For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to —
> (*a*) …
> (*b*) the fact that the requirements of that business —
> (i) …
> (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.'

34. A statutory redundancy situation may occur where there has been a reorganisation resulting in a reallocation of duties causing the requirement for the number of employees to diminish even though the volume of work is undiminished. In **Carry All Motors Limited v. Pennington** [1980] IRLR 455, it was decided to reorganise an overstaffed depot. The posts of transport manager and clerk were amalgamated and the clerk was dismissed. The clerk's dismissal was held to be attributable wholly or mainly to the employers' diminishing need for employees to carry out work of a particular kind since the work carried out by two men could be carried out by one. There is further discussion in **Kingwell v. Elizabeth Bradley Designs** (EAT 0661/02) at para 3.

35. In **Safeway Stores plc v. Burrell** [1997] ICR 523 EAT, the Employment Appeal Tribunal decided that it was not necessary to analyse the kind of work the employee was employed to do and whether there was a diminution in the employer's requirements for that kind of work. In **Murray and anor v. Foyle Meats Ltd** [1999] IRLR 652 HL, the Lord Chancellor agreed with the reasoning in **Safeway** and said that the language of the section asks two questions of fact. The first is whether one or other of various states of economic affairs exists, in this case whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second question is whether the claimant's dismissal was attributable, wholly or mainly, to that state of affairs. It is a question of causation and is for the Tribunal to determine.

36. Whether or not dismissal for that reason is fair or unfair depends on the answer to the issue identified in section 98(4):

> "…….where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
> (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. As has been repeatedly recognised, employers are afforded a measure of flexibility when it comes to determination of the pool; provided they genuinely apply their mind to the matter and act reasonably in determining it, their decision will not normally be open to question (see, for example: **Taymech Limited v. Ryan** [1994] UKEAT/663/94 per Mummery J*).* It is well established that an employer may in an appropriate case place an employee considered for redundancy in a 'pool of one', comprising only them: see for example **Halpin v. Sandpiper Books** (UKEAT/0171/11). The composition of a pool is primarily a matter for the employer **Wrexham Golf Co v Ingham** (UKEAT/0190/12),at para 22 (citing earlier case-law). An employer does not have to advert to the question of pooling in order for a redundancy to be fair, **Ingham**, above paras 21- 25. As the EAT held at para 25 of its judgment in that case:

> "… There will be cases where it is reasonable to focus upon a single employee without developing a pool or even considering the development of a pool. …"

38. Whilst in general terms, in circumstances of redundancy, a reasonable employer will be expected to consult before deciding who to dismiss, there is no rule of law that lack of proper consultation necessarily renders the dismissal unfair (**Hollister v. National Famers' Union** [1979] ICR 542.) The implications of a lack of prior consultation regarding the question of whether or not the dismissal was fair or unfair will depend on the whole relevant facts and circumstances of the case. A redundancy consultation need not last for any particular length of time in order to be fair: see e.g. **Hilton v. BAT Building Products** (EAT/787/87), in which a consultation period of 1.5 days was held to have been fair in the circumstances. The ACAS Code of Practice on Discipline and Grievance does not apply to redundancy dismissals.

39. Where an Employment Tribunal find a dismissal to have been procedurally unfair, including where the procedural deficiency consists of a lack of consultation, it must consider whether or not a **Polkey** (**Polkey v. AE Dayton Services Ltd** [1988] AC 344) reduction ought to be made. In **Polkey**, Lord Mackay of Clashfern, at p.161, referred with approval to part of what was said by Neill LJ in the judgment of the Court of Appeal:

> "…it seems to me to be proper and indeed necessary for the tribunal to investigate the effect of the failure to consult the employee or to warn him or to hold discussions or as the case may be. In some cases, the facts may show beyond peradventure that no discussions or other steps could have made any difference whatever because the state of the company was so grave. In other cases the matter will be more evenly balanced. But, for my part, I can see no objection in principle to the tribunal seeking to evaluate the effect in practice of any failure by the employer to observe the provisions of a code of practice or of the guidelines prescribed in cases such as *Williams v Compair Maxam Limited…."*

40. Procedure is part of the overall fairness to be considered by the Tribunal and not a separate act of fairness – see Langstaff J in **Sharkey v. Lloyds Bank plc** UKEAT/0005//15 (4 August 2015, unreported):

> …procedure does not sit in a vacuum to be assessed separately. It is an integral part of the question whether there has been a reasonable investigation that substance and procedure run together.

41. Procedural defects in the initial disciplinary hearing may be remedied on appeal provided that in all the circumstances the later stages of a procedure are sufficient to cure any earlier unfairness: **Taylor v. OCS Group Ltd** [2006] IRLR 613.

42. In many cases, there will not be a single reasonable response to the circumstances that have led to the dismissal; there will be a band of reasonable responses within which one employer would reasonably take one view whereas another, equally reasonable, employer would take a different view. To put it another way, in many cases, there will be room for legitimate differences of opinion amongst reasonable employers as to what is a fair way to respond. Thus, as explained in a redundancy case, **Williams v. Compair Maxam Ltd** 1982 ICR 156:

> " …it is not the function of the industrial 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." (p.161)

43. The Employment Appeal Tribunal in **Iceland Frozen Foods Ltd v. Jones** [1982] IRLR 439 summarised the way in which tribunals should approach the statutory question, saying at paragraph 24:

> "(1) The starting point should always be the words of section 57(3)[1] themselves;
>
> (2) In applying the section, an industrial [employment] tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the employment tribunal) consider the dismissal to be fair;

[1] Said provisions of the Employment Protection (Consolidation) Act 1978 having been superseded by section 98(4) of the Employment Rights Act 1996.

(3) In judging the reasonableness of the employer's conduct, an employment tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(5) The function of the industrial [employment] tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair: if the dismissal falls outside the band, it is unfair."

44. It is well established that the right to be paid a salary carries with it a *"reciprocal and fundamental obligation to work, or to be willing to work"* for the employer, **Luke v. Stoke-on-Trent City Council** [2007] ICR 1678, *per* Underhill LJ (giving judgment of the Court) at para 17. In **Luke**, the claimant had refused a reasonable and contractually permissible management instruction to work at a given location save on her own unilateral terms. The respondent did not dismiss her, but refused to pay her salary given that she was refusing to work. The claimant brought a claim for unlawful deduction of wages, which was founded on a contractual entitlement to those wages. The Court of Appeal found this to be *"a straightforward case of 'no work, no pay'"*. The same analysis applies to a claim that an employer has breached the contract by failing to pay notice pay.

45. By virtue of regulation 2 of the Working Time Regulations 1998, a 'relevant agreement' includes, among other things, *"any other agreement in writing which is legally enforceable as between the worker and his employer"*. This includes a contract of employment.

46. Regulation 14 of the Working Time Regulations 1998 provides as follows in respect of compensation for leave outstanding on dismissal:

*"(1) This regulation applies where—*

*(a) a worker's employment is terminated during the course of his leave year, and*

*(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13(1) differs from the proportion of the leave year which has expired.*

*(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).*

*(3) The payment due under paragraph (2) shall be—*

*(a) such sum as may be provided for for the purposes of this regulation in a relevant agreement, or*

*(b) where there are no provisions of a relevant agreement which apply, [a set formula shall apply]"*.

47. The relevant part of the claimant's contract of employment for the purposes of regulation 14(3)(a) of the Regulations is clause 9.8 [38] which provides that:

> "If you leave the Company's employment with accrued but untaken holiday entitlement, you will, in addition to any other sums to which you may be entitled on the termination of your employment, be paid a sum representing basic salary for the number of days holiday entitlement due to you as at the termination date."

DISCUSSION AND DECISION

48. The respondent was in financial difficulty and decided that it needed to cut costs. The reorganisation of the team meant that there was less need for the claimant's role than there had been when he was hired, because he no longer had staff reporting to him. The respondent considered that other staff could absorb the claimant's job. In consequence, the respondent's need for employees to carry out work of a particular kind, namely that done by a Financial Controller, had diminished. This is supported by the fact that the respondent:

(a) did not replace the claimant and had to make further redundancies on account of the coronavirus pandemic;

(b) bore no ill will to the claimant and, whilst it felt that he could be performing better, was not formally managing his performance.

49. In his evidence to the Tribunal, the claimant argued that he was dismissed because he raised the issue of his colleague's pay and that he should not have been the person selected for redundancy. He also touched on the other points he raised during the consultation. The Tribunal did not accept his evidence where it conflicted with that of Mr Champion. The suggestion that the claimant had been discriminated against is not pursued in this claim, either in the claimant's ET1 or in his witness statement [6-7]. The claimant was dismissed because his role was redundant.

50. The Tribunal considered that fairness of the dismissal. The claimant's role stood out as being one that the business could survive without. The claimant was fairly selected as the employee who would be made redundant because:

(a) his role was smaller than had originally been envisaged and that it could be absorbed by others in the team;

(b) the claimant was by some margin the highest paid member of the accounts team;

(c) in view of his salary, qualifications and experience, and the lack of any open roles in the (small) team, there was no alternative role for the claimant.

51. Having identified the claimant as being at risk for redundancy, the respondent put in place a procedure prior to dismissal. It:

(a) met with the claimant on two occasions, explained the situation to him, and invited comment. It listened to and responded to his concerns, despite the fact that for the most part he had not put those concerns in constructive terms;
(b) when the claimant said that he would provide proposals to avoid redundancy, it specifically and repeatedly invited him to put those forward. In the event, no proposals were forthcoming;
(c) offered the claimant a chance to appeal to an independent manager, which he declined to do.

52. The respondent selected the claimant fairly for redundancy, given the unique nature of his role in its business and the difficult and uncertain financial outlook for the respondent at the time. It followed a fair process in dismissing him.

53. The 'band of reasonable responses' test gives employers substantial latitude in deciding whether to dismiss, once a potentially fair reason is made out. Any reasonable employer could have taken the respondent's view that, in the circumstances, the claimant should be dismissed

54. From 14 March 2020 onwards, the claimant was on garden leave. His sole work obligation in the period starting on 14 March and ending with his dismissal on 12 April was to attend a hand-over meeting to ensure a smooth transition for the respondent's business. At 09:30 on 24 March 2020, the claimant failed to attend a handover call. This call had been scheduled several days beforehand. It followed a number of attempts by the respondent to schedule a handover, in the face of a sustained lack of co-operation by the claimant. The claimant was warned in advance that a failure to attend would lead to him not being paid. The claimant failed without reasonable excuse to fulfil the single task given to him in his garden leave. He said he was too stressed. The respondent behaved reasonably in that it was flexible as to the manner of the handover by offering to do it over the telephone instead of in person. The claimant wants to be paid for a period in respect of which he refused, with no excuse, to do the very small amount of work required of him. Like **Stoke-on-Trent**, this is a simple case of 'no work, no pay'. The claimant is not entitled to wages from 24 March 2020 onwards. The claimant was put on garden leave and was paid notice pay until he refused repeatedly to comply with reasonable management instructions to attend a handover meeting. From that point on, the respondent lawfully withheld pay on the basis that the claimant was refusing to fulfil his contractual obligation to do the (very little) work required of him on garden leave.

55. The claimant was claiming a redundancy payment. Initially, he did not receive it because the respondent misunderstood his length of service because he had at first worked under a temporary contract. He was paid a redundancy payment of £1,614 on 2 October 2020.

56. The claimant claims a balance of notice pay. The respondent paid him the claimant for ten days of his notice period, from 14 to 23 March 2020 inclusive, yielding a total payment of £1335.81. This equates to a payment of £190.83 for each weekday in respect of which the claimant was paid, the correct day rate. The claimant's annual salary was £50,000, 2020 was a leap year with 366 days in total, of which the claimant was entitled to be paid for 262 days (including all holidays, but not weekends). £50,000 / 262 = £190.83. The claimant says that he should have received £1,478.50 in respect

of this period. This is not correct for two reasons. First, the claimant has included 24 March 2020 in his payment. But the claimant failed to perform any work duties on that day, despite having been asked to attend a call at 09:30. The day was therefore excluded correctly from the calculation. Secondly, the claimant has calculated his day rate by sub-dividing March by the number of actual days (i.e., not the number of weekdays) in that month. This is not correct for two reasons:

(a) calculating payments by reference to month would lead to a different day rate being payable depending on the month, given that the number of days in a month varies. That would be inconsistent with a salary framed in terms of an entitlement to an annual sum (£50,000): the claimant's day rate should be consistent across the year;

(b) including weekends in the basis for calculating payment was not correct. The claimant was not contracted to work weekends. He was contracted to work weekdays, and was contractually and statutorily entitled to be paid for the same (including weekdays that were taken as contractual or public holidays).

57. The correct calculation of the claimant's day rate, for the purposes of working out his notice pay, is by reference to a day rate calculated from his annual salary and the number of weekdays in the year, and to pay him for ten days' notice at that rate. That yields a figure of £1335.81, which the respondent paid to the claimant on 2 October 2020.

58. The claimant was not at first paid holiday pay because the respondent believed that it was entitled to order him to take his remaining holiday in his garden leave period. The respondent now accepts that it is liable to pay the claimant holiday pay in respect of holiday accrued from 14 March to 12 April 2020. It disputes the figure of £502.92 in the claimant's Schedule of Loss [34]. The claimant seeks a higher payment on the basis that his holiday pay should be calculated not by reference to his contractual day rate, but as a fixed salary percentage. The claimant accrued leave over his garden leave period at a rate of 1.67 days per month, rounded up to the nearest half day, in terms of clause 9.7 of the claimant's contract [56]. His untaken leave as at his date of dismissal was 1.77 days, rounded up to 2 days paid at his basic rate of pay of £190.83 per day, totalling £381.66. Of this, he was paid £95.79 for half a day, leaving £285.87 outstanding [81]. The respondent paid the claimant £285.87 in respect of this on 12 July 2021 [Second bundle 89].

## Conclusion

The Tribunal concluded that the claimant's unfair dismissal claim and his monetary claims are not well-founded and are dismissed by the Tribunal.

_____

**Employment Judge Truscott QC**

**Date 27 July 2021**