Case number: 2603183/2020 (V)

EMPLOYMENT TRIBUNALS

BETWEEN:

Claimant		**Respondent**
	And	
Mr A Stanhope		Magnum Mezzanin Floors Ltd

AT A FINAL HEARING

Held: Remotely via CVP **On**: 8 January 2021

Before: Employment Judge R Clark (Sitting Alone)

REPRESENTATION
For the Claimant: In Person
For the Respondent: Ms Duane of Counsel

JUDGMENT

The claim of unfair dismissal **succeeds**. The respondent shall pay the claimant compensation assessed in the sum of **£641.25.**

REASONS

1. Introduction

1.1 By a claim presented on 24 August 2020, Mr Stanhope claims financial compensation for unfair dismissal. This arises from his dismissal on the stated ground of redundancy and taking effect on what was initially thought to be 31 July 2020. Before me the parties confirmed he remained on the payroll, albeit on furlough leave, until 30 September 2020 when his employment then terminated.

2. Preliminary issues

2.1 I had been concerned with the respondent's failure to comply with the case management orders on time or at all. That had prompted much correspondence with the claimant and led to at least 3 referrals to Judges over recent weeks. Despite that, it seems no further orders were made. As late as the close of business yesterday, it appeared it had still not served any evidence and I had anticipated the various orders that I may have been required to make today. At 17:20 yesterday, the claimant and tribunal received an electronic bundle and witness statements. Earlier this week the claimant had indicated that he was keen not to delay his hearing. At the start of proceedings, I explored whether he was truly in a position to deal with the evidence that he had had only hours to digest and whether he was content to rely on the cursory witness statement he had originally served, on time, despite the respondent's failure to prepare an indexed bundle. He confirmed he was happy to proceed. On that basis the hearing proceeded and I further gave the claimant an opportunity to deal with any additional matters arising from the late prepared bundle and evidence in his evidence in chief, which he declined.

3. Evidence

3.1 I have heard from Mr Stanhope, Mr Dixon the decision maker and Mr Chambers the appeal chair. I received a small bundle running to 109 pages. Both parties made closing submissions.

4. The Issues

4.1 The issues in the claim are: -

a) The reason for dismissal. The respondent relies on redundancy or, alternatively, some other substantial reason.

b) Whether it was reasonable for the employer to rely on that reason sufficient to dismiss all the circumstances.

5. Facts

5.1 It is not the Tribunal's purpose to resolve each and every last dispute of fact between the parties. My focus is to make such findings of fact as are necessary to answer the issues in the claim before me and to put them in their proper context. On that basis, and on the balance of probabilities, I make the following findings of fact.

5.2 The respondent is a company making and installing mezzanine flooring. It is one of two small associated companies in a small group called the Magnum Group, the other being Magnum Fabrications Limited.

5.3 The respondent employs only four employees not including the director, Chris Dixon. They were made up of a CAD technician, the claimant and two workshop staff. The sister company, Magnum Fabrications, employed another CAD technician and two workshop staff. Both companies shared a finance manager. Mr Chris Dixon is the director. His fellow

director, Murray Chambers, holds the title of Managing Director but, in reality, he is more of a non-executive director and it is Mr Dixon who fulfils what might ordinarily be thought to be the managing director role.

5.4 Mr Stanhope had been employed since 7 November 2016. Since January 2020 he had been promoted to the role of contracts manager which entailed finding and securing new work, surveying for quotes and project managing installations. Before then he had been employed as a project manager and had been encouraged to develop his skills in the use of CAD. That was because of both a general need for the CAD work but also because the CAD operator at the time had ill health. I find Mr Stanhope to be someone who could express his opinions robustly and was confident in steering how his role should be framed within this setting. He was reluctant to do the CAD work and I find he had little interest in developing that skill. I find the contracts manager role was then developed to fit around his particular skills. He was therefore the only person in that role. In late 2019 the respondent appointed a second CAD technician to fulfil the work and in response to the ill health of the first CAD technician.

5.5 In the Spring of 2020, the implications of Covid-19 hit the UK. The first national lockdown commenced on 23 March 2020. The respondent's initial response was to implement various protective measures in the workplace including social distancing and working from home and to assess how the business could continue to function. It did not initially seek to agree to furlough its staff. Three of the office staff had health issues and were told to work from home. The initial requirement on the claimant was for him to attend the office to deal with telephone enquiries, the telephone system being of an old type that could not divert calls. I find the claimant also wanted to work from home. His partner is an I.C.U. Nurse and I find he had some early appreciation of the importance of limiting transmission of the virus. However, his manner of engaging with his employer was as robust as ever and was such that he gave Mr Dixon the impression he was less concerned about what might be needed to secure the survival of the business. From the onset of Covid, it is important to see all exchanges in the context of an extremely stressful time for all. Whilst Mr Stanhope had no health issues himself, he was concerned about the spread and the apparent futility of him attending the office. For Mr Dixon's part, he of course was seeing the company's work evaporate day by day as contracts were cancelled, work on site stopped, and pipeline enquiries deferred.

5.6 I find that Mr Dixon was at best disappointed and at worst annoyed with the claimant's attitude in response to this, which he described as "unenthusiastic". In his later discussions with the external HR adviser appointed by the respondent, he described the circumstances of his decision to initially require him to still attend the workplace as having "strong words as Andy did not like that".

5.7 In the week that followed the national lockdown it became clear that there was next to nothing for most of the staff to do. In a visit to the offices, Mr Chambers spoke with Mr Dixon in the presence of Mr Stanhope and said he thought the staff should be on furlough as it was clear from what he had seen of their clients and contracts that they were being told to get off

site and there was no reason why anyone needed to be in the office whilst there was nothing to do.

5.8 On 30 March 2020 the claimant was asked to agree to go on furlough leave together with all other office staff and two of the four workshop staff.

5.9 The furlough agreement was in writing. I have seen a copy of the agreement which, I am told, was signed by Mr Stanhope on or around 30 March. The terms of the agreement were to replicate the terms of the first version of the Coronavirus Job retention Scheme ("CJRS"). In essence, that meant being paid at 80% of normal pay. At that time, the expectation was that furlough leave would last for a month. I find that the claimant and all staff were explicitly told they were not allowed to undertake work whilst on furlough. That is itself a condition of the employer being eligible to access the reimbursement of 80% of its employment costs through HMRC.

5.10 Around the turn of April to May, the initial furlough leave was extended and a further letter sent out for staff to sign. There is some dispute about the correspondence in the bundle and whether this is what was actually sent out. I find preparing accurate formal correspondence is not a strength of this employer, be it Mr Dixon or Mr Chambers and much of the correspondence I have seen contains obvious errors. That said, there is no dispute that Mr Stanhope had a conversation about furlough leave being extended, that it was expected and that he agreed to it on the same terms as had previously been agreed.

5.11 During the course of the period that employees were on furlough, certain contact and activity took place either between employer and employees, or between employees and clients. It is the claimant's case that this amounts to staff being expected to work during furlough and he says that because he did not work, he was selected for redundancy.

5.12 The first contact occurs at some point during the first few days of furlough leave when the claimant was contacted by a client, John Gray. He apologised and explained he was on furlough leave. Mr Gray had apparently spoken with Chris Dixon prior to the call and he had not during that call told Mr Gray that the claimant was now on furlough leave. However, whilst that seems to be what happened, there is no basis for finding Mr Dixon positively directed him to contact Mr Stanhope. I find Mr Stanhope had not set up an out of office message on his email account. He continued to receive and see his colleagues emails during furlough (as was the convention within this business). He received further calls from other clients who had his direct contact details. I find he had to ask Mr Dixon to inform clients not to contact him as he said he would. In any event, I find that issue was remedied and dealt with.

5.13 The fact that all staff seemed to be able to see all of each other's email traffic other than Mr Chambers meant Mr Stanhope could see business emails on his phone during his furlough leave. I find that Mr Dixon, as a director, was the only member of the office staff not on furlough leave. He was trying to keep on top of what work needed to be done. That included one installation job which lasted only one day, a new quote and dealing with a previous quote that the client confirmed was now accepted. I find Mr Dixon was attempting to deal with these matters himself. On the face of it, he was the only person "working" on those

matters on behalf of the respondent. However, I find he did not always have the skills, technical competence or in some cases access to the relevant files or drawings. He therefore sought assistance from those furloughed employee's that did. Those interactions originate from both employer and employee at times and those originating from the employer require varying degrees of response.

5.14 In April I can see the claimant sent an email to Chris Dixon and another recipient attaching a purchase order that had apparently been sent to him by the customer. Mr Dixon replied "Nice one bud".

5.15 On 23 April, Mr Dixon asked two or more of the staff to send him the original quote for the "Allen Commercial interiors" work explicitly for the stated purpose "so that I can look at what we have stated we are doing/supplying".

5.16 In May, there are emails involving Nick Barsley, one of the CAD technicians in respect of the Allen the Commercial interiors quote. One is an email from Chris Dixon thanking him for something and stating that he wanted "two bits of glass for another job also. I'll get over two (sic) u ASAP"

5.17 Similarly, in June Mr Dixon sent another email. Neil Fairbanks, the other CAD technician was asked for "a little help over the weekend to sort drawings and revised quotes for Monday morning". He set out instructions for Neil and sought help to put the drawings he had attempted himself to "put them in frames labelled up and tidy up". Nick was asked to requote and save the costing sheet for Mr Dixon to check. Both were asked to ring him to discuss further. Neil responded by email over that weekend attaching 5 files.

5.18 The exact recipients in these exchanges are not always clear. The headings sometimes suggest the emails were sent to the claimant but the body suggests otherwise. I suspect this is a consequence of everyone being able to see all emails.

5.19 In late June, I have seen a number of emails which show the one new quote accepted during lockdown and the phased plan of work. These are clearly addressed to Chris Dixon and although the claimant had access and/or was copied into these emails, that is something out of the control of the employee or employer.

5.20 Overall, I do find these emails show contact with the furloughed employees in the context of their work. The principle of de minimis applies. It is clear Mr Dixon was the only person working and, on occasion, required things that were in the possession of his furloughed staff. In most cases, I am satisfied that the interactions were little more than the furloughed employee giving the non-furloughed worker (Mr Dixon) the tools for him to do the work. By analogy, I view it as being in the nature of someone giving the other worker a password or the keys to the filing cabinet. In the main, they do not demonstrate that the furloughed employees are working. Indeed, there is one email from the claimant in early June where he was obviously contacted by a potential client concerning a quote. He forwards that to Mr Dixon with the suggestion that this should be followed up quickly. There is no suggestion by forwarding this email it can be said that he was "working" albeit he is doing the right thing with the employer's interests in mind. Overall, I can find no basis for

concluding that the claimant was either asked or expected to do work during his period of furlough leave nor that he refused any such request.

5.21 However, it is equally clear that there are some emails which do appear to suggest the CAD technicians did do some work, particularly in revising drawings and preparing quotes. Such tasks are more than merely passing on information received during furlough. I cannot say this would fall within a de minimis threshold. It would appear to have been within the scope of their normal duties and would seem to amount to providing work for the benefit of the employer.

5.22 The Allen Interiors order was a substantial one valued at £187,000 including VAT although I do not know the profit margin. Mr Dixon described it as being four jobs. It's significance to the claimant's case is in the timing of when it was approved, that is on 5 June and the first phase of the work was to start in week commencing 17 July. I accept Mr Dixon's evidence that it amounted to four jobs although I don't see any significance in the distinction. The email itself suggests the four phases meant some work would be available to the respondent through to September time. I do not accept, however, that this one contract, as significant as it was, meant Mr Dixon's overall assessment of the market was wrong. This was a potential contract that had been nurtured for some time. It had been in the pipeline and I find was already factored in to his assessment of the trading prospects for the immediate future. I find the fact the order was confirmed did not assuage his fears that the longer term market had dried up and it did not have the effect of returning the forecast for the foreseeable future to the level of certainty that the company had previously felt was there.

5.23 The need to furlough was itself a serious reflection of a sudden reduction in the need for employees but balanced with a hope that things would recover. During the period of furlough leave, Mr Dixon began reflecting on the longer term needs and whether any changes should be made to the staffing structure to reduce overheads. I am satisfied that the picture he had gleaned from talking to clients was bleak. As he would put it, the clients were themselves also expecting "slim pickings" for the rest of the year. By the end of May, he had made an assessment that he needed to make savings in the staffing costs and the only post that might realistically be removed from the limited structure was the contract manager post. The key factor in that decision seemed to be the lack of specific technical skills which the other posts had.

5.24 The respondent contracts with an independent consultancy for advice and assistance on HR matters called Personnel Advice and Solutions. Mr Dixon contacted Chris Moses of that organisation for advice on what to do. He shared his initial thoughts as follows. Work had dropped significantly; finances were getting tighter; they were struggling to provide work to the remaining workshop staff not furloughed. He had reviewed the existing staffing and the contracts manager role was the obvious area to make savings and he was considering absorbing those duties into his own role. He had considered CAD but decided they needed both technicians, albeit he recognised one had short service. I find he had considered restructuring in a way that would keep the claimant in a CAD role but reflected on the claimant's previous reluctance to learn CAD. Interestingly, he shared with Mr Moses the fact

of their “strong words” at the start of the pandemic on their working relations, Mr Stanhope’s strong opinions and leading to what he described as a drop in work ethic and enthusiasm.

5.25 The adviser suggested an initial phone discussion and letter setting out the proposal. That advice was adopted. On 28 May, Mr Dixon spoke with Mr Stanhope on the telephone to tell him that his post was at risk of redundancy. There is a dispute as to whether Mr Stanhope was told a number of posts were at risk or not. I don’t accept that Mr Dixon said that as it would serve no purpose and was not in line with his review of business needs. It may be that he made reference to considering the need for all of the roles within the company, which he had in fact done, and that Mr Stanhope interpreted that as being that all were at risk of redundancy. However, I accept Mr Stanhope’s evidence that he and Nick Barsley spoke by telephone after this call and that Mr Barsley indicated he was aware that Mr Stanhope’s role was at risk of redundancy. The accompanying letter was emailed to the claimant the same day. The letter referred to the drop in revenues following the covid-19 outbreak, that Mr Dixon could not foresee business getting back to pre-pandemic levels for the foreseeable future and certainly not that year and he had been forced to review the personnel budget. He set out how as he was proposing to keep both CAD technicians and the finance manager, his only potential option was to make the contracts manager redundant, the duties of which he could incorporate into his role.

5.26 The letter proposed a consultation period in order for “this proposal to be given full consideration”. That period was said to be between then and 11 June, approximately two weeks. Mr Stanhope was told that consultation was at his discretion and if he wished to discuss any of the points during the consultation period he was invited to arrange a meeting with Mr Dixon but, in any event, there was a formal consultation meeting scheduled for 12 June. The letter made clear that following the consultation period, if the decision is to confirm the redundancy he would then be invited to a formal meeting to discuss the outcome at which he would be entitled to representation. I find that letter was written by Mr Moses.

5.27 Within a few days of this letter, Mr Stanhope set out his position and proposals in writing and sent them to Mr Dixon. He confirmed his attendance at the consultation meeting on 12 June. In that document, an issue arose about the language used by Mr Dixon in his letter which had described his role as unskilled. I find this was resolved. It was, perhaps, clumsy wording but I accept it was used to distinguish it from the technical skills required in the roles of finance and CAD and to bring his duties within scope of functions Mr Dixon could himself perform. Mr Stanhope’s proposals noted that the devastating drop in work could be picked up as the clients themselves would be keen to get their projects back on track. He then set out two specific proposals. They warrant setting out in full.

> ***The government has announced today that at the beginning of August till the 31st of October they plan to offer a 60% furlough payment to employees asking the companies included in the scheme to add an additional 20% to bring an employee’s wage in line with an 80% take home pay. I ask therefore that you consider me working a 4 day week during this period for the 80% wage to enable me to continue with my employment and assist in regaining some much needed contracts to assist in the economic repair of the company. If at the end of October the company still appear to struggle I appreciate that you will have no alternative but to proceed with a relevant redundancy package and terminate my employment.***

> ***Failing the above I would also ask you to consider keeping me as an employer till the 1st of August on the government 80% furlough scheme on the understanding I will be made redundant with a relevant package on this date as this will give me a chance to source alternative employment which I'm sure you will understand will be very difficult given these unprecedented times.***
>
> ***I would ask that you consider my first proposal and would like to take this opportunity to guarantee whilst ever I am in your employment you will receive 100% effort from me as usual regardless of the possible redundancy. All I ask is you give me the opportunity to help get the company back to providing the service we did prior to the covid 19 outbreak.***

5.28 On 2 June, Mr Stanhope contacted Mr Dixon seeking to take up the offer of an informal consultation meeting during the consultation period and before the formal one scheduled for 12 June. He did not receive a reply until 8 June when Mr Dixon replied that he did not have time for a meeting save for a brief slot on the afternoon of 10 June. As it was so close to the proposed date of 12 June, he suggested that they meet then to discuss the issues, but he did still offer the claimant the slot on the Wednesday. In his reply he confirmed he had received the claimant's representations and had read them and taken them fully on board.

5.29 The two did not meet before the formal consultation meeting took place on Friday 12 June. There are the briefest of notes of that meeting taken by Mr Dixon. The way it is set out and apparently annotated leads me to conclude it was partly prepared in advance and added to during the meeting. It set out three points of discussion for the meeting. The first explored how the claimant proposed to obtain new contracts. The second and third explored Mr Stanhope's response to the Covid-19 pandemic and records that "his contact has been limited until proposed redundancy has arisen". I find that must be a reference to the period of time that the claimant had been on furlough leave. It dealt with the background financial circumstances of the company and summarised the claimant's potential severance entitlements.

5.30 The parties were in agreement that the way points 2 and 3 were introduced by Mr Dixon in the meeting was with the words: -

> ***"This has no bearing on the redundancy decision but I have to tell you how disappointed I am that…."***

5.31 There is nothing in what was put before Mr Dixon at that meeting which altered his initial view that the claimant's role of contracts manager could be removed and the claimant made redundant. Some emails were exchanged later on that same day about the format of payments which led to Mr Dixon sharing the advice from the HR adviser. The advice assumed a termination date of the end of July and confirmed the claimant was entitled to receive 100% of his pay during any notice period, even if he remained on furlough. Mr Stanhope was told that Mr Dixon would be in touch on Monday 15 June to arrange a remote formal meeting once he had made the final decision. In fact, he emailed Mr Stanhope on the Saturday to propose that the formal meeting take place on the coming Monday afternoon. The claimant agreed. A formal letter was then sent giving details of the purpose and reminding Mr Stanhope of his right to be accompanied. Mr Stanhope confirmed his attendance restating his position that it was unfair not to make use of the furlough scheme to the full before making him redundant and he was still hopeful that it would not come to that.

5.32 The formal meeting took place as arranged and the decision to make the post redundant was conveyed. The outcome letter referred to consideration of Mr Stanhope's suggestions in terms of his skills. It does not make any reference to his proposals of delaying the decision to review things at a later date or making use of the furlough scheme. The formal letter actually appears to bring forward the date of termination to the end of June although I find this to be one of a number of errors in the various formal correspondence produced by the respondent and I am satisfied that the parties had discussed the final pay date being the July pay day, although that is itself was on 19 July and even then still left open some uncertainty as to the actual date of termination. On balance, I find both had the end of July in mind as the date of termination.

5.33 Again, I find the letter was drafted by Mr Moses with minimal input from Mr Dixon and I find upon receipt of the draft, Mr Dixon accepted and signed it without any meaningful check of its contents.

5.34 The letter gave the claimant a right of appeal. Mr Stanhope exercised that right and set out his appeal in an email to Mr Dixon dated 17 June. His ground of appeal was focused on the comments made during the consultation meeting. He said: -

> ***During our meeting you made reference relating to matters surrounding your personal feelings to myself and furlough leave. Although you instructed me not to do anything work related during furlough leave, you highlighted your disapproval that I had not been in contact with you. This despite me ringing you and forwarding emails from clients who you had failed to notify that mezzanine staff had been furloughed. I am fully aware that other employees that are on furlough, have been working. As I have been abiding by the government furlough rules, I feel this has contributed why I have been selected for redundancy.***
>
> ***I still believe that there is enough work coming through to keep my job available, as you yourself stated you were struggling with time to follow leads up I had given you.***

5.35 The appeal hearing took place on 24 June and was chaired by Murray Chambers. He has some personal connection to Mr Stanhope's family which I find meant he viewed his role as appeal chair with some added sensitivity.

5.36 There are no notes of that meeting. Mr Chambers took what he described as bullet point notes but destroyed them. I found Mr Chambers was genuine in his concern for Mr Stanhope's situation but, frankly, his evidence of what he knew about what had happened during the consultation process, what happened at the initial dismissal decision, what preparation he did for the meeting, how he reached his decision and how the final outcome letter was drafted was less than impressive. There is a dispute of fact as to whether he said to Mr Stanhope at some point during the meeting words to the effect of "I agree this sounds personal but I don't know how Chris Dixon and you could work together in the future". On balance I have to prefer Mr Stanhope's recollection.

5.37 The outcome of the appeal was that the original decision was upheld save that the effective date of termination (whatever that might have actually been) was put back to 30 September 2020 during which Mr Stanhope necessarily remained on the payroll and remained subject to the furlough scheme, notwithstanding Mr Moses previous advice about the effect of notice payments which, in broad terms, appears correct.

5.38 The outcome letter deals with the grounds of appeal. In the second paragraph it does so in these terms: -

> ***In your Appeal of the 17th June you stated that although I had instructed you not to do any work during Furlough Leave, I had been unhappy that you had not been in contact with me while you were on the Leave. You believe that the fact that you had not worked while on Leave was the reason why you had been selected for redundancy. Furthermore, you believe that there is sufficient work to keep your job. These points were repeated by you in the Appeal Hearing.***

5.39 It is clear that the apparent author of the letter, Mr Chambers, has not "instructed" the claimant to do anything nor was it him that had been "unhappy" about not being in contact during furlough leave. The use of the first person pronoun is clearly wrong. Because of that, Mr Stanhope quite understandably pressed the case that it was Mr Dixon who must have prepared the appeal letter and that this gives away his unfair involvement in it. The drafting is clearly shoddy but I have come to the conclusion that, on balance, this poor drafting reflects the reality that Mr Moses was the author of the letter and that he drew the contents from what he knew from both Mr Dixon and Mr Chambers. This paragraph is itself structured in almost identical terms to the letter of appeal as if it had simply been cut and pasted. It may be that Mr Moses wrongly believed the letter of appeal had been addressed to Mr Chambers and the allegations contained within it were addressed at him. Equally, he may have had contact with Mr Dixon to understand his response to the appeal grounds, something Mr Chambers surprisingly denied he had done.

5.40 At some point after Mr Stanhope was dismissed, Mr Dixon prepared a communication to be sent to the respondent's clients to inform them of the changes. There would seem to me to be nothing improper in that. However, on its face, it is dated 15 June, the date of the initial dismissal decision and before any appeal. Mr Dixon could not really explain the reason for the date but described it as a typo in the sense that his recollection was that it was not sent before the appeal was determined, on 24 June, and he thought the letter to clients was likely prepared on 25 June. He thought the date of 15 June was the incorrect typing of a "1" when a "2" was intended. That theory is not impossible. In any event, I have no evidence before me that it was in fact sent before the appeal was concluded. Even if it was prepared on 15 June there is nothing particularly unusual in that although it may be unwise to communicate matters publicly before the time to appeal a dismissal had expired. Overall, the absence of evidence that it was in fact sent before the appeal seems to me to render this of little relevance to the case and does not necessarily advance the case that the decision was predetermined.

5.41 The remaining staff who had been on furlough leave returned to work in or around August 2020. Whilst the Allen order had by then come in, I am satisfied that the orders had not in fact returned to such a position that the underlying need to review and reduce staffing costs could be said to have been reversed.

6. Unfair dismissal

6.1 The first question posed by s.98 of the Employment Rights Act 1996 is the reason for dismissal. In viewing the totality of the surrounding circumstances of this case, I am satisfied that there was a state of affairs where an employer such as this could legitimately have

decided that its need for employees to perform a particular kind of work, contracts management, had diminished. Reminding myself that whether to restructure the workforce is a management decision and not an employment law decision within the tribunal's jurisdiction, it seems to me that the circumstances found to exist do fall within s.139 of the Employment Rights Act 1996 and satisfy the definition of redundancy. The Tribunal's focus is whether that is the genuine reason for dismissal.

6.2 The competing challenge is that this decision was predetermined or contrived to get rid of the claimant as he had refused to work during furlough leave. In redundancy cases, there is often some sense of a predetermined decision as, unless an entire workplace is closed, there is usually a preliminary stage of reviewing the roles and needs of the employer identifying those at risk. That much does not assist the claimant with a claim of unfairness. His challenges potentially impact on whether the redundancy was the true reason for dismissal or whether it was the true principal reason.

6.3 The idea of an ulterior reason to dismiss is often encountered in unfair dismissal claims. Often it arises where an employer is keen to terminate an employee's employment and goes looking for a reason to do so. If it so happens that a reason is found which it then relies on, that leads to a consideration of whether that is the true reason and, even if it is, whether the malice infected the investigation or process or otherwise the general test of fairness. (see for example *ASLEF v Brady [2006] IRLR 576*). Determining the true reason for dismissal is a matter of fact finding for the tribunal. This may be particularly nuanced in cases where the employer relies on redundancy as this is a legal reason which is entirely within its gift to decide to deploy or not. It is perfectly possible, therefore, for an employer to fabricate a redundancy situation which in every other respect satisfies section 139 of the 1996 Act and would appear to give it a potentially fair reason to dismiss. If the true factual reason is to dismiss someone for their perceived conduct under a label of redundancy, a tribunal may find that redundancy was not the true reason for dismissal, even if the surrounding circumstances would appear to meet the legal definition but it seems to me that would require clear evidence to dispel what is otherwise a management decision. The reemployment of an employee to perform that particular work soon afterwards would be a clear example of such evidence and is not present here. I have already concluded that the circumstances that created a redundancy situation were genuine. The fact of the need to furlough a number of staff and the obvious circumstances of the commercial effect of Covid-19 support that. To the extent that it is possible to reconstruct the world in a way that removed the souring of the relationship between Mr Dixon and Mr Stanhope, I am satisfied that in such an alternative world Mr Dixon would still have been forced to review his staffing budget and, on doing so, Mr Stanhope's role of Contracts Manager would still have been the post that stood out as the only real possibility where savings could be made.

6.4 I have therefore concluded that the redundancy was genuine, and was not artificially created and used as a ruse to bring about the termination of Mr Stanhope. However, that does not necessarily mean that Mr Dixon's negative view of the claimant was not also a reason sitting alongside the genuine redundancy reason. If that is so, that would then require me to engage in an analysis as to which was the principal reason for dismissal. I have come

to the conclusion that the souring of their relationship was not an operative reason. That is not to say Mr Dixon's views were wholly irrelevant to the fairness of the dismissal and that is something I turn to shortly. However, I am not satisfied it can be said to be a reason for dismissal, largely for the same reasons already set out. If I am wrong to reach that conclusion, and a proper approach is that it was a reason, I would nevertheless conclude that the redundancy was the principal reason for dismissal. Consequently, there is a potentially fair reason for dismissal and consideration then turns to the fairness of relying on it as sufficient to dismiss the claimant in these circumstances.

6.5 The fairness of a redundancy dismissal is considered against the same test of fairness as any dismissal, as set out in s.98(4) of the 1996 Act. In redundancy cases, the case law has provided guidance as to the types of factors that may influence and inform that statutory test. They include the reasonableness of notice, of consultation, of measures to explore ways to avoid the redundancy including the search for alternative employment. There remain the same procedural expectations of any dismissal albeit the ACAS code of practice No 1 is not engaged in redundancy dismissals. Whilst the focus in a case is often on what the employer did or did not do from the employee's perspective, the question of reasonableness needs to look at all the circumstances and take into account the size and administrative resources of the employer. This is a small employer and though niaive, it did at least seek to engage external professional advice in the steps and decisions it took.

6.6 I am satisfied that there was reasonable notice of the situation. There always could be an argument for more but the notice that was given gave Mr Stanhope reasonable opportunity to consider his situation, the situation of the employer and the short term opportunities for avoiding redundancy. He was able to engage in the process and prepare proposals during the consultation period. In the final analysis, the actual date of dismissal was extended by some months after the initial notification that he was at risk.

6.7 As to the consultation itself, there are aspects of this which raise concerns. The first is what is meant by a consultation "period". The employer defined the consultation period as the period between the notice and the formal meeting. It seems to me that little if anything happened in that period. Mr Stanhope was informed why his role was in the frame for possible redundancy dismissal and he was invited to make any comments. That happened but the original invitation for an initial meeting within that period did not happen despite Mr Stanhope's request. I have considered whether the consultation can be said to fall within the range of reasonable responses of a reasonable employer in those circumstances. The circumstances of that hypothetical reasonable employer against which I consider the respondent's actions must be similar to the respondent. In other words, a small employer facing a real threat to its business with a director largely keeping all the plates spinning on his own. On these points alone, I have come to a conclusion that the consultation process was within the range of reasonable responses. First, the consultation did provide the necessary information to the claimant. It set out the basis to enable him to understand the issues faced by the employer and to provide a response. In other words, to engage with the issues affecting the selection of his role. Secondly, there was a formal consultation meeting planned for 12 June and as such, the offer of an additional informal meeting was always an additional

step and subject to the situation. Thirdly, the offer of an additional initial meeting was not refused, it was merely limited to the one slot that Mr Dixon had available. That informal meeting was made available to the claimant should he wish to or, alternatively, the discussion would happen in any event as part of the planned consultation meeting on 12 June. The reason for the difficulty was clearly the difficult situation Mr Dixon himself was in in being the only member of office staff able to undertake any work and trying to deal with the unprecedented situation. Yes there could have been other courses including making time, considering the response on papers, dealing with matters sooner during the consultation period or extending the consultation period. The real question is not what else could have reasonably happened, but whether what did in fact happen was itself within the range of reasonable responses. I am satisfied what was done, on those aspects of consultation, was within the range of reasonable responses.

6.8 Where I have greater concern is in the way the employer engaged with the substance of the consultation, as opposed to the process or mechanics of consultation. In this regard, the third typical factor in fairness is also engaged, that is in considering alternatives to the redundancy dismissal and alternative employment and I propose to deal with these two matters together.

6.9 I start with a recognition that there were no other posts that Mr Stanhope could have performed. Clearly there were no vacancies and no obligation on the employer to create a post, but this factor could potentially extend to whether he should be given another existing role, and the occupant of that role be the one who is dismissed. In this case, that was not an option either and there is no dispute that Mr Stanhope could not have performed any of the other posts within the business. In fact, the only area of real overlap in skills and duties was to the extent that Mr Dixon was himself able to absorb as much of the reduced need for the contracts management role as could reasonably have been foreseen to exist for the near future. Whilst I can reach these conclusions as primary facts, my main focus is the extent to which the employer genuinely and meaningfully engaged with these issues. I am satisfied Mr Dixon's approach to these issues was within the range of reasonable responses. Indeed, it was largely his initial review which had forced him to consider these possibilities and there is nothing in the consultation that did, or could reasonably, have changed that. That much of the test of fairness does not lead me to conclude any unfairness.

6.10 However, the convergence of the need to reasonably engage in the issues raised in the consultation process and the obligation to consider alternative means of avoiding the dismissal then raises the question whether dismissal is reasonable ***at that time***. That is particularly so where there was an option for dismissal to take effect after a period of extended notice based on exploiting the furlough scheme. During such notice, the world might change and the factors which led to the initial decision could be affected such that the hypothetical reasonable employer would have kept those factors under review during any notice period. It is in that regard that I have concluded Mr Dixon's recent negative view of the claimant unfairly clouded his decision making in a way that the reasonable employer would have put to one side. I am not satisfied that any real consideration was given to the changing circumstances and the availability of continuing furlough. The termination letter deals with the

skills issues. It does not engage with the options of delay or permitting some attempt to restore the incoming orders before dismissal eventually takes effect. The view that Mr Dixon had formed of Mr Stanhope's "enthusiasm" for the role undoubtedly took the edge of what I accept would otherwise have been a difficult decision to reach. That in itself does not go to the fairness but I have concluded that once the decision was made, there was then no desire to keep the decision under review nor any continuing engagement with the possibility of alternatives to dismissal. I remind myself at this stage, dismissal was to take effect approximately 6 weeks later at the end of July. In my judgment, it is not within the range of reasonable responses of even a small employer such as this, to fail to keep under review the decision as was reached in this case. It is clear that the surrounding circumstances were changing. Things were looking less bleak than they looked at first. Plans were emerging for the other staff. Though they remained on Furlough at the date of the decision, they were to return to their roles from August although in respect of that date, I keep in mind that the CJRS was subject to a number of changes that may have been relevant to how any particular employer acted. In August, the employers became responsible for National Insurance contributions and, from September, to make up 10% of the 80% furlough leave wages due. However, I am not satisfied that in this case the decision to return the staff then on furlough leave was as a means to avoid these contributions. That would not make sense if there was still no work for these staff to do or means of paying them in full. On balance, it seems to me that whilst the small but growing contribution to the cost of furlough might help tip the balance and make an employer decide to return staff to work, there would have to be a sense that the employer could make it work to return staff to the workplace as opposed to force it into wholesale redundancies, as some employers did. I am satisfied that work was there to be done by the other staff in the short term, particularly in the form of the Allen Interiors Contract. Had there not been the negative view formed of Mr Stanhope's commitment to the business, I am satisfied the actions of the hypothetical reasonable employer would have included a genuine review of the need for the redundancy dismissal at that time. That review did not happen in this case. I have to conclude that the decision not to do so was influenced by Mr Dixon's perception of the claimant's attitude to his work. All that falls outside the range of reasonable responses and is sufficient to render the dismissal unfair.

6.11 That unfairness was partially addressed in Mr Chambers' conclusions on the appeal. I found his approach to the appeal to be sympathetic and well-intended albeit lacking in any real grasp of the issues. It accidentally dealt with part of this issue insofar as his decision was to extend the termination date by two months to the end of September 2020. This was more in the nature of a mechanism to make an additional payment to the claimant at next to no cost to the employer as all this period was paid under the furlough scheme. As a matter of law Mr Stanhope was entitled to be paid his normal pay during any notice period, a matter of fact the employer had been advised by its HR consultants. Mr Chamber's actions were well intended but did not deal with the substance of the proposals put to Mr Dixon which he did not have. His proposals were, in essence, to use an extended period of furlough to keep the situation under review and only then to confirm the redundancy dismissal. In other words, the issue of whether the world might change sufficiently between June and the decisions taking effect.

6.12 I have referred to the developments in the workplace that did in fact take place during this period and in particular the return to work of the other staff previously on furlough leave. Whilst Mr Chamber's appeal has dealt with part of the unfairness, to the extent of keeping the claimant employed for an extended period, it did not lead to any reflection on Mr Stanhope's employment, albeit there remained a further two months of his extended notice to run. It did not remedy the unfairness as the substance of the decision was closed once made in June.

7. Remedy

7.1 The claimant is entitled to a basic award in principal but where a redundancy payment has been paid, as in this case, the latter serves to off-set the former under the provisions of s.122(4) of the 1996 Act. He was paid £1,687.50. Whilst he seeks a basic award of only £1,611 in his schedule of loss, I proceed on the basis that the employer's higher calculation would be more likely to be accurate. This has the consequence of simply cancelling out the basic award claim and I do not carry forward the difference of £76.50 to any compensatory award.

7.2 Any consideration of compensatory award starts with s.123 of the 1996 Act. Subsection 1 provides

> ***(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.***

7.3 This engages the principles derived from *Polkey v AE Dayton Services [1987] UKHL 8*. In short, my task is to award the compensation which is just and equitable to award having regard to the unfairness that founds the unfair dismissal. In cases such as this, that necessarily requires me to reach a conclusion on what would have happened had the matters giving rise to the unfairness not occurred. It may also engage consideration as to whether the employment would have ended fairly in any event irrespective of the dismissal in question, for example where a business closes or whether there is evidence of an employee being likely to leave for other reasons. In short, the task is, as far as possible, to put the claimant in the financial position they otherwise would have been but for the unfair dismissal.

7.4 In this case, but for the decision to reduce its staffing costs and make a redundancy it seems there is nothing before me to conclude anything other than that this employment was likely to continue for the foreseeable future. However, that decision and the underlying situation that caused it raises a stark reality in this case. That is that the prospect of avoiding dismissal had the employer engaged more positively with the claimant's proposals or kept its decision under review are so low as to be in the realms where the fairness could be said to have all-but made no difference to the outcome. I keep in mind that the employer clearly was entitled to review its staffing needs and to come to a decision that it could do without the contract manager post. Secondly, I have not found evidence that the world had changed sufficiently between June and September to say with confidence that had this employer addressed its mind again to the contract's manager role it would have reversed the decision. I do accept that the Allen Interiors contract was substantial and provided a short-term flow of

work and was likely to be the key factor which kept this employer going over the second half of 2020. I also accept that as time went on, the respondent's clients no doubt began to review the implications of Covid-19 on their businesses and the original pessimism improved. However, those were changes which would lead to an ability to return the furloughed staff to work in the first instance. The key factor in this case is that the contracts manager role was a role that could be absorbed into Mr Dixon's role. Mr Stanhope's submissions that he should have had chance to generate the work largely misses the point of what a redundancy following restructuring entails. A redundancy in law focuses not on the need for work to be done, but on the need for employees to perform that particular work. The work was of course still there, albeit much reduced. For present purposes, my reconstruction of the likely events needs to focus less on the need for the contracts management work to be done as business began to slowly improve, but on the extent to which the employer's decision on its need for another employee to do it was likely to change sufficiently in any review. In fact, I am satisfied that the employer's need for employees to perform that work did not materially change at any point between the decision in June and when the employment ended at the end of September. Had the employer's consultation fairly kept the decision under review as the business prospects improved over the period, and in particular had it been undertaken with a fair view of the claimant's "enthusiasm" for the respondent's business, I cannot even then realistically say there was anything more than a passing chance that the outcome would have been any different. The extent that Mr Dixon's negative view of the claimant played on the unfairness means I am not prepared to say this is a case where there is a 100% reduction. However, the facts lead me to take just one step back from that likely outcome. I therefore assess the prospects of a different outcome at only 10%.

7.5 I then turn to the necessary supplementary findings of fact in respect of compensation. Mr Stanhope has set up his own business as a means of mitigating his loss. I am satisfied that he has not been shown to have acted unreasonably in his attempts to mitigate. He has produced a schedule of loss claiming £9,348.75 plus future losses. Much of that schedule of loss needs further consideration.

7.6 First, it includes a capital outlay of £8000 in respect of the purchase of a van needed to set up his new business and which he purchased in July 2020. I am told that he has borrowed that sum from his family. He cannot claim the capital cost of an asset he retains as part of his new business venture. I have no evidence of interest charges on the informal loan. That sum must come out of the schedule. Secondly, the income from the new business is providing a shortfall in income of £150 net per week compared to his employed earnings. I am not satisfied that the schedule is accurate in the way it expresses time without any income, and time at that reduced income. I find he has lost 10 weeks at full net loss of £338.75 per week and the balance at £150. For the 14.5 weeks between the EDT and today's hearing that equates to £4,062.50 (£338.75 x 10 + £150 x 4.5). The claimant is entitled to a notional award in respect of loss of his statutory rights which I assess broadly in the sum of £400. As to future loss, I accept there is a continuing loss presently in the region of £150. I have concluded that in the ordinary course of events that difference will gradually narrow and be extinguished over time. That may well have been expected to have happened by now in normal circumstances but I must factor in the further effects that the national and

regional Covid restrictions are likely to have on that timescale. I would expect the difference to be extinguished in 6 months. On a straight line analysis, I therefore award the full loss but at the mid-point. That is the equivalent of 3 months, or 13 weeks, at £150 per week making £1950. The total compensatory loss is therefore £6,412.50. However, the effect of the adjustment to be made under section 123 above is that the respondent will be ordered to pay 10% of that sum, namely £641.25.

EMPLOYMENT JUDGE R Clark

DATE 1 March 2021

JUDGMENT SENT TO THE PARTIES ON

4 March 2021

……...……

AND ENTERED IN THE REGISTER

……...……
FOR SECRETARY OF THE TRIBUNALS