# EMPLOYMENT TRIBUNALS

**Claimant:** Matthew Aston

**Respondent:** Hadley Steel Framing Limited

**Heard at:** Birmingham via CVP

**On:** 28th and 29th July 2022

**Before: Employment Judge Bennett**

**Representation:**

For the Claimant: Mr J Crozier (Counsel)
For the Respondent: Mr P Keith (Counsel)

## RESERVED JUDGMENT

1. The claim of unfair dismissal is well founded and succeeds. A Polkey deduction of 90% will be made to the compensatory award for the relevant period.

2. The claim of automatically unfair dismissal under s104 ERA 1996 is not well-founded and fails.

3. The claims for breach of contract and unlawful deduction from wages in respect of:
   a. BUPA invoice
   b. Holiday pay

   Are dismissed upon withdrawal.

4. Remedy for the successful complaints is to be assessed if not agreed:
   a. The parties should liaise to seek to agree remedy;
   b. If the parties agree remedy they should notify the tribunal forthwith;
   c. If the parties are not able to agree remedy they must attend the remedy hearing which has been listed for Friday 7 October via CVP.

## WRITTEN REASONS

### Background

1. Following the purchase by the Respondent of the Claimant's business (Hadley Steel Framing Limited ("HSF")) in 2018 the Claimant was employed by the Respondent as Regional Sales Director – UK and Ireland Structural products.

2. Following the onset of the Covid-19 pandemic the Respondent placed some of its employees onto furlough leave. There is dispute regarding whether or not the Claimant was placed on furlough although it is clear that there were discussions between the parties regarding furlough leave and also redundancy around this time. The Claimant was given notice of termination of his employment, asserted by the Respondent to be on grounds of redundancy, on 28 April 2020 and his employment terminated on 28 October 2020.

### Claims and Issues

3. By a claim form presented on 31 March 2021, following a period of early conciliation from 20 January 2021 to 3 March 2021, the Claimant brought claims of:

   (a) Automatically unfair dismissal pursuant to s104 Employment Rights Act 1996 (ERA) on the basis that being furloughed without his consent involved an unlawful deduction from his wages;

   (b) Ordinary unfair dismissal under s94 and s98 ERA;

   (c) Breach of contract and unlawful deduction from wages in respect of:

      (i) Accrued holiday pay; and

      (ii) the costs incurred by the Claimant for his BUPA healthcare.

4. At the outset of the hearing Counsel for the Claimant confirmed that the unpaid holiday allowance and BUPA costs had now been paid to the Claimant and that the claims in respect of these items were withdrawn.

5. The issues to be decided are therefore:

   (a) What was the reason or principal reason for the Claimant's dismissal?

   (b) Has the Claimant shown on a balance of probabilities that the principal reason for his dismissal was automatically unfair under s104 ERA? This involves consideration of the following two questions:

      (i) Did the Claimant make it reasonably clear to the Respondent what right, namely the right not to have an unlawful deduction from his wages, he claimed had been infringed?

(ii) Was this allegation (that his statutory right not to have an unlawful deduction from his wages had been infringed) the principal reason for the Claimant's dismissal?

(c) If not, has the Respondent shown on a balance of probabilities that the principal reason for the Claimant's dismissal was a potentially fair one under sections 98(1) and (2) ERA? The Respondent asserts that it was redundancy or, alternatively, some other substantial reason.

(d) If so, was the dismissal fair or unfair within section 98(4) ERA and, in particular, did the Respondent act at all times within the band of reasonable responses?

(e) If the dismissal was procedurally unfair what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed, in accordance with the principles in **Polkey v AE Dayton Services Ltd [1988] AC 344?**

**Evidence, documents and procedure**

6. At the outset of proceedings I confirmed with the representatives for each party that I had all relevant documents. These comprised:

(a) Witness statement for Matthew Aston (Claimant)

(b) Witness statement for Ben Towe (Respondent's Group Managing Director, witness for the Respondent)

(c) Witness statement for Stewart Towe (Respondent's Executive Group Chairman, witness for the Respondent)

(d) Bundle - final version (445 pages) (references in this judgment to pages in the bundle are denoted by numbers in square brackets)

(e) Index (5 pages)

(f) Claimant's chronology and cast list (2 pages)

7. After confirming that I had all relevant documents there followed a discussion of the claims and the issues. The representative for the Respondent asked for further particulars regarding the Claimant's claim of automatically unfair dismissal and the Claimant's representative clarified the basis of this claim.

8. In terms of timetabling it was agreed that the Respondent's witnesses would go first and would be finished by early on the second day, leaving time for the Claimant's oral evidence and then submissions from the representatives. It was agreed that the hearing would consider liability only, except insofar as Polkey may be relevant, and that a date for a potential remedy hearing would be agreed which could be vacated if not needed.

9. All witnesses provided written witness statements and relied upon those statements, which were taken as read, and all witnesses were subject to cross examination. At the

end of the evidence Mr Crozier and Mr Keith made their submissions, Mr Keith providing written submissions supplemented with brief oral submissions.

## Findings of fact

10. Following the sale of the Claimant's business to the Respondent, the Claimant was entitled under his service agreement to the benefit of a bonus scheme. The scheme was formed of two strands and the Claimant was entitled to earn bonus calculated by reference to 1) an increase in the operating profits of Hadley Steel Framing limited; and 2) a reduction in the losses of Hadley Structural products division (Oldbury).

11. The Claimant's continuity of employment started on 14 December 2004.

10 February 2020 email

12. In an email dated 10 February 2020 [65], Jonathan Jaggar (JJ), Group Sales Director and a member of the Board of the Respondent, emailed the Respondent's HR director copying in other board members and asking him to "*do what is necessary to plan out what would be required to compromise Matt Aston out of the business*".

13. It is the Respondent's case, as put forward in submissions, that an employer is entitled to have settlement agreement discussions with its employee. I find that the Respondent did not crystallise any decision regarding the Claimant's potential exit at this time and I also find that the principal reason for the Respondent wishing to explore such a plan was a desire to reduce costs in the businesses that the Claimant was engaged in, in the light of poor financial performance.

14. In making these findings I have considered that recruitment within the Claimant's sales team was continuing at the time, with new starters joining in the second half of 2019 and the first half of 2020. I have also had regard to the email from JJ to the Claimant on 12 February 2020 [66/67] which is positive in tone and states "*I think next year could be a good year"*.

15. I also note that the losses associated with Oldbury between September 2018 and September 2019 significantly reduced, as indicated by the figures on page [212] and although the figures for HSF over the same period had gone down significantly there were signs of an improvement, as agreed by Ben Towe in his oral evidence, by February 2020.

16. Against this, however, I have taken into account that Ben Towe in his witness statement at [3], paragraph 12, states that the reason for investigating an exit for the Claimant in February 2020 was the poor performance of HSF. This is similarly borne out by the email from the Respondent's Group Finance Director to board members on 5 February 2020 [365] which paints a bleak picture of HSF's financial position.

17. The figures in the P&L account at page [213] demonstrate that the HSF results for both January and February 2020 show significant losses (£141,259 and £125,530 respectively). Ben Towe in his oral evidence accepted that "*we possibly were quite busy"* during February 2020 but he emphasised that the broader picture was not good and I find that this is correct.

18. In relation to the reduced losses in the Oldbury division of the business I note that losses were expected in Oldbury. Indeed, the Claimant explains at para 3 of his witness statement that after his business was purchased "one of my primary wider objectives was to turn around the performance of Hadley Building Products Division". So although an improvement to the financial position here would obviously have been good news for the Respondent, it was also presumably within expected projections. Figures in respect of HSF, however, dropped significantly and unexpectedly after the purchase and although I recognise that the financial table at [212] shows that there was an improvement in the HSF figures from the low in the year-to-September 2019, the position during 2020 was still significantly below the year-to-September 2018 figure.

19. The Claimant gave a compelling description in his oral evidence as to why there had been a change in the fortunes of HSF following its purchase. He pointed to actions taken by the Respondent which he says led to a loss of productivity and clients, and which he says he would have handled differently. I accept the Claimant's evidence in this regard but this does not impact the central point that the financial position of HSF by February 2020 was poor, meaning that the Respondent was investigating steps it could take to address it.

20. Finally, in relation to the reason for the request in JJ's email of 10 February 2020, I note that the email finishes by saying "*Unfortunately I do not see an option but to limp along for a bit longer"* which I consider is consistent with a view that the Claimant's departure is required because the company is struggling financially.

21. As to whether the suggestion of an exit for the Claimant in or around February 2020 was crystallised into a plan, I note that there are no further references to such in the documentation before me. This accord with Ben Towe's oral evidence that "*there wasn't a plan"* and "*it was an option we were considering*" and *"of course you would expect the Board to meet and explore what options are available".*

Furlough

22. After the first national UK lockdown due to Covid 19 was announced on 23 March 2020 the Respondent carried out a review of its employees and announced on 30 March 2020 that with effect from 1 April 2020 employees would be divided into those that would remain in the workplace, those that would work from home and those that would be furloughed.

23. The Claimant was included in the group of employees selected to be furloughed.

24. I find that the Respondent divided employees into groups according to its understanding of business need. I have had regard to the email and chart at [70 – 74] by which the Respondent sought to understand how various customers of its structural team were likely to proceed in light of the latest Covid developments. This email is dated late on 24 March 2020 and I accept the Respondent's position, as set out by Ben Towe, that the situation was changing rapidly and required constant reassessment by the Respondent. This is also reflected in the board minutes at [153] which evidence reassessment of the need for various employees to be furloughed.

25. I find that the Claimant was not the only senior employee to be selected for furlough and that the rationale behind the decisions communicated by the Respondent on 30

and 31 March 2020 [81 - 94] was to reduce costs in the business as much as possible whilst maintaining ongoing projects, in light of a very uncertain period ahead. As well as placing employees on furlough the salaries of those working from home were reduced to 75% of their full amount and other senior employees who continued working took voluntary pay reductions.

26. The Claimant was informed by JJ in a phone call on 31 March 2020 that his role had been selected for furlough. I do not place significant weight on the record of the details of this phone call at [165] as, first, this was prepared by JJ over a month later on 7 May 2020, after the Claimant had been given notice of termination and had indicated that he wished to appeal. Second, JJ was not present at the tribunal to give evidence and nor was a statement provided on his behalf, in circumstances where this might have been helpful and expected. Finally, I note in passing the WhatsApp message sent from JJ to the Claimant at [98] which suggests that JJ does not necessarily recognise or respect the need for a professional business environment. Looked at in the round, I conclude that I must treat the record at [165] with some caution.

27. The Claimant explained in his oral evidence, and I accept, that after the call on 31 March 2020 he understood that he had been selected for furlough leave but he was unclear about whether he was actually on furlough or not. In his words to the tribunal, "*I came out of the conversation entirely confused*". The Claimant's oral evidence was that both he and JJ finished the call by saying that they would look into various points and "*get back*" to the other. I find that although the Claimant understood from this phone call that he had been selected for furlough, he was not asked and nor did he specifically consent to being placed on furlough.

28. I find that the Respondent assumed that the Claimant had accepted that he would be furloughed and that he would agree in writing to furlough leave. The Respondent accordingly took preparatory steps such as setting the Claimant's Out of Office email response on 1 April 2020 [95] and notifying his team that he was furloughed.

29. I find that these steps impacted the amount of work that the Claimant was exposed to over the next few weeks and reduced the business communications that he received.

30. The Claimant understood that his consent was required in order for him to be furloughed. He had not consented. The steps taken by the Respondent were nonetheless consistent with the Claimant being furloughed and led the Claimant to believe that the Respondent considered him to be on furlough, at least until he received the email from Ben Towe on 2 April [97] which reiterated that he was requested to accept the terms by 5pm on Monday 6 April. As the Claimant did not provide his unqualified consent and no deductions of pay were made from him, on this basis I find that he was not in fact formally on furlough leave at any point, albeit that on 1 April he considered that the Respondent believed him to be.

31. I find that the Claimant was unclear whether he was supposed to be working and therefore reduced the work he did as a result of the Respondent's instructions to him.

32. In his email dated 6 April 2020 [100] the Claimant made it clear to the Respondent that he did not consent to being placed on furlough and that this would involve him taking a significant salary cut that he did not at that time agree to.

Redundancy consultation

33. The Claimant was informed on 2 April [97] that if he did not accept the furlough terms by 6 April then the Respondent would 'consider alternative actions intended to conserve cash during this unprecedented crisis'.

34. The Respondent's business case for furlough was the same as its business case for redundancy at the time. The two options were viewed by the Respondent as alternatives, albeit the Respondent's preferred option was for the Claimant to accept furlough.

35. On 8 April the Claimant had a call with Ben Towe in which redundancy as an alternative to furlough was discussed. This was followed up with a letter of the same date sent at 15.42 [103] in which it was stated that if the Claimant did not accept being placed on furlough by 5pm on 9 April then "we will have no option other than to formalise the redundancy of the position of Regional Sales Director – Structural'.

36. The Claimant did not acknowledge or respond to the 8 April letter until 14 April [104] when he requested more time to consider with his legal advisors. The Respondent ignored this request and wrote to the Claimant on 14 April 2020 [106] to initiate a redundancy consultation process.

37. The Claimant responded to the Respondent on the same date [107] confirming that he was willing in principle to be placed on furlough on standard furlough pay, subject to reassurance about two elements regarding his bonus. I find that the Claimant viewed the furlough discussions as running alongside redundancy consultation at this point as he stated *"…if you determine to continue with the redundancy process without continuing with our ongoing discussions you will clearly not be acting in good faith…".*

38. The information/reassurance requested by the Claimant in respect of his bonus was not, in his view, difficult or unreasonable for the Respondent to provide. I agree with the Claimant. The Claimant understood that his concession regarding furlough – that he would be furloughed if he could obtain the necessary bonus reassurances - meant that the redundancy consultation would be abandoned.

39. The Respondent failed to properly consider the email sent by the Claimant at [107] and took the view that the Claimant was refusing furlough – or was accepting it subject to onerous conditions. The Respondent did not recognise that the Claimant had agreed to take furlough pay on the normal terms. The Respondent made clear that the redundancy consultation process was continuing.

40. The Respondent continued to misunderstand the nature of the information requested by the Claimant. In cross-examination before the tribunal it was apparent that Ben Towe misunderstood the Claimant's request and thought he was asking to fix the amount of the bonus part-way through the year whereas what the Claimant had actually requested was an indication of what the bonus would be worth if it was to be calculated at that time.

41. The Claimant made significant efforts to engage with the redundancy consultation process by providing lists of clients and projects [112].

42. The Respondent attempted to further the possibility of furlough by providing P&L figures but only partial information was provided. There was no indication in the emails between Ben Towe and the Group Finance Director that the information was in any way difficult to retrieve and I find that it was not.

43. A second set of P&L figures was sent to the Claimant on 24 April [133]. In its email of 26 April [138] the Respondent once again offered the Claimant the opportunity to go on furlough and stated "If you agree to go on furlough leave…I would provide you with, as previously promised, financial information to enable you to monitor the financial performance / bonus position".

44. The evening before the redundancy consultation was due to finish the Claimant emailed Ben Towe addressing a number of points [140]. He repeated that he agreed to be furloughed "if you share with me all the relevant information surrounding the Company performance to enable me to assess the bonus position at this stage and to discuss the same with me." The Claimant also made clear that he was expecting a meeting between himself and Ben Towe the following day before the redundancy decision was taken.

45. On 28 April 2020, the Claimant sent a further email to Ben Towe requesting further detail in respect of the financial information that he had been provided on 24 April. The Respondent did not respond to this email.

46. The Respondent gave notice to the Claimant on 28 April 2020 of the termination of his employment.

47. The communications between the Claimant and Ben Towe of the Respondent at this time took place against the backdrop of an ever-changing Covid situation. The board minutes at [122] indicate the scale of the workload and major decisions being undertaken by the board at the same time as it was carrying out the Claimant's redundancy consultation process.

48. The Claimant continued to receive his full salary throughout April 2020 and I find that he carried out minimal work during this period. The Claimant showed little awareness of any need for the Respondent to progress matters swiftly.

49. The Claimant was not given a business case or plan as part of the redundancy consultation. There was no discussion of his own particular cost/value to the business or how the work which he carried out was intended to be reorganised in the future. The Respondent did not consider pooling the Claimant with other sales employees or offering him into a more junior role. Ben Towe accepted that he did not look at ACAS or similar guidance in the lead up to the Claimant's dismisal.

50. The Respondent carried out an assessment of the work that the Claimant was involved in in the few weeks prior to the redundancy decision. I find that the Respondent turned its mind to the likely reaction of the Respondent's customers to the Covid pandemic. It also gave consideration to whether the Claimant's work could be redistributed amongst remaining employees. I accept Ben Towe's oral evidence that the Respondent was "*evaluating whether or not there is a redundancy situation. But in that period customers were opening and closing, stopping and starting. It was extremely difficult to do. We thought as carefully as possible."*

51. The possibility of furlough was viewed by both the Claimant and the Respondent as a process running alongside the redundancy consultation process and not part of the redundancy consultation itself.

The Appeal

52. Stewart Towe, Executive Group Chairman, conducted the Claimant's appeal hearing.

53. Stewart Towe was not involved in the redundancy dismissal before hearing the appeal however he was aware of the discussions about the possibility of removing the Claimant from the business in February 2020.

54. Stewart Towe was unaware of any policy within the Respondent's group dealing with the conduct of appeal hearings and I find that there is no such policy. He was unfamiliar with the different forms that an appeal hearing may take, such as a review of the previous decision or a full rehearing of the evidence.

55. I find that at the time of hearing the appeal Stewart Towe had a copy of the email correspondence between Ben Towe and the Claimant but he did not have any formal business case for the Claimant's redundancy or details of the process that had been followed. I find that he did not have a copy of the Claimant's appeal letter before him when hearing the appeal.

56. The appeal letter at point 7 sets out details of email traffic that the Claimant received between 1 – 28 April 2020 and uses this to justify the Respondent's position that there was insufficient work to sustain the Claimant's role. The Claimant did not see this information or have the opportunity to respond to it before the appeal decision was made.

Redundancy/Polkey

57. At the time that the Claimant was earmarked for furlough leave the Respondent considered that the business could manage without the role of Regional Sales Director by arranging for the Claimant's direct reports to report directly into JJ, the Claimant's line manager and Group Sales Director.

58. At the time of the tribunal hearing, more than 2 years after the Claimant was given notice of redundancy, the role of Regional Sales Director has not been replaced.

59. A total of 122 employees, which equated to 25% of the Respondent's total UK workforce, were dismissed by the Respondent by reason of redundancy in 2020.

60. The Respondent's plan in respect of redundancies was set out in June in a forecast prepared for a Barclays presentation [174]. This envisages voluntary redundancies taking place in June, July, August and September and then compulsory redundancies in October 2020. The actual dates of the resulting redundancies appear in the table at [215]. It was Ben Towe's evidence, which I accept, that the reality did not exactly follow the procedure envisaged in the Barclays plan. There were some compulsory redundancies before October, including the Group Finance Director who was made compulsorily redundant in August.

## The Law

Automatically unfair dismissal under s104

61. Section 104 ERA states as follows:

*s104 Assertion of statutory right.*

*(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—*

*(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or*

*(b) alleged that the employer had infringed a right of his which is a relevant statutory right.*

*(2) It is immaterial for the purposes of subsection (1)—*

*(a) whether or not the employee has the right, or*

*(b) whether or not the right has been infringed;*

*but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.*

*(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.*

Unfair dismissal

62. Section 94 ERA states that an employee has the right not to be unfairly dismissed by their employer. Redundancy is one of the potentially fair reasons for dismissal listed in s.98 ERA and is defined in s139 ERA.

*139 Redundancy*

*(1) 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) 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.*

*…*

*(6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.*

63. If a potentially fair reason for dismissal has been shown, under s98(4) ERA the determination of the question whether the dismissal is fair or unfair having regard to this reason:

*98 (4)…*

*…(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.*

64. The Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (Iceland Frozen Foods Limited v Jones [1982] IRLR 439).

65. The factors suggested by the EAT in **Williams and ors v Compare Maxam Ltd [1982] ICR 156, EAT** that a reasonable employer might be expected to follow in making redundancy dismissals are to be considered, being mindful that it is not for the employment tribunal to impose its standards and decide whether the employer should have behaved differently. Instead I must ask whether the dismissal "lay within the range of conduct which a reasonable employer could have adopted", the factors that a reasonable employer might be expected to consider being:

(a) Whether the selection criteria were objectively chosen and fairly applied;

(b) Whether employees were warned and consulted about the redundancy;

(c) Whether, if there was a union, the union's view was sought; and

(d) Whether any suitable alternative work was available.

66. This guidance was reflected in the HL decision of **Polkey v AE Dayton Services Ltd** [1988] ICR 142 ("Polkey") in which the HL confirmed that the appropriate test of fairness under section 98(4) in a redundancy situation is that an employer will be expected to (i) sufficiently warn and consult affected employees (unless the Tribunal finds that the employer acted reasonably in taking the view that, in the exceptional circumstances of the case, consultation or warning would be 'utterly useless'); (ii) adopt a fair (objective) basis on which to select for redundancy; and (iii) take such steps as

may be reasonable to avoid or minimise redundancy by redeployment within its own organisation.

Polkey

67. It was agreed with the parties at the start of the hearing that if I concluded that the Claimant had been unfairly dismissed, I should consider whether any adjustment should be made to the compensation on the grounds that if a fair process had been followed by the Respondent in dealing with the Claimant's case, the Claimant might have been fairly dismissed, in accordance with the principles in Polkey.

68. There are three possible outcomes. First, I may find that the Claimant would have been retained if proper procedures had been adopted, in which case no reduction ought to be made. Second, I may conclude that the dismissal would have occurred in any event, with a possible delay to allow for a fair procedure. This may result in a limited compensatory award to take account of any additional period for which the employee would have been employed had the proper procedure been adopted. Third, I may make a percentage assessment of the likelihood that the employee would have been retained.

69. Counsel for the Claimant reminded the tribunal that in accordance with the case of King v Eaton Ltd (no 2) [1998] IRLR 686 the tribunal may decide not to make a Polkey deduction at all in circumstances where the Respondent's failing was such that one could not sensibly reconstruct the world as it might have been and the exercise is simply too speculative.

70. In undertaking this exercise I must assess the actions of the employer before me, on the assumption that the employer would this time have acted fairly though it did not do so beforehand (**Hill v Governing Body of Great Tey Primary School** [2013] IRLR 274).

## Conclusions

71. In applying my findings to the issues identified at the outset I need to first identify the reason for the dismissal.

Automatically unfair dismissal

72. I consider that the Claimant's email of 6 April [99-100] does amount to an assertion of an infringement of his statutory rights as required by s104 ERA. The Claimant in that email makes clear that he believes the Respondent has attempted to place him on furlough leave with a commensurate reduction in salary, that he has not agreed to this and, specifically, that he has not agreed to an associated salary reduction.

73. Section 104, however, requires an employer to dismiss because of the allegation or assertion and does not cover the case where an employee is dismissed for merely exercising his statutory rights.

74. I do not consider that the Respondent dismissed the Claimant because of his assertion that placing him on furlough was an infringement of his rights. I am satisfied that if the Claimant had not accepted furlough without making any assertion of an infringement of his rights – if the Respondent had not taken any preparatory steps and the Claimant

had simply indicated at the outset that he did not consent to being placed on furlough – then the Respondent would still have made the Claimant redundant. I consider in these circumstances that the Claimant has not proved that the principal reason for his dismissal was his allegation that his statutory rights had been infringed. The dismissal was therefore not automatically unfair.

Potentially fair reason

75. The Respondent has asserted that the reason for the Claimant's dismissal was redundancy or in the alternative some other substantial reason, but the Claimant does not accept that this is the real reason for dismissal. He considers that the Respondent formed a plan to remove him from the business months before the redundancy consultation started and that his questioning of the conditions regarding furlough leave gave the Respondent an excuse to dismiss him as previously planned.

76. Although I accept the evidence put forward by the Claimant that at the time of the Claimant's dismissal there were still potential sales to be gained by the Respondent as well as numerous significant projects in the pipeline to be pursued and managed, I am satisfied that Covid 19 had led to many of the Respondent's customers stopping or reducing their activities. Other customers were expected to stop or reduce their activities. The amount of work to be done in relation to existing projects and customers, and the number of employees required to carry out this work, was therefore reduced and the definition in s139 ERA is satisfied. The requirements of the business for employees to carry out work of the kind engaged in by the Claimant had diminished and was expected to diminish further in following weeks.

Fairness of dismissal

77. As I am satisfied that the decision to dismiss the Claimant was on the grounds of redundancy, which is a potentially fair reason for dismissal, the question then becomes one of overall fairness and whether it was reasonable in all the circumstances for the Respondent to treat that as a sufficient reason for dismissing the employee.

78. Part of this question overlaps with the issue of whether there was a potentially fair reason for the dismissal. Significant emphasis was placed by the Respondent both during the redundancy consultation process and during the tribunal hearing on whether and how much work the Claimant carried out in April 2020. The Claimant's position is that the level of work he carried out at this time was not a fair measure of ongoing and future work due to the steps that were taken towards furloughing him and his uncertainty regarding whether he was supposed to be working or not. It was agreed by the parties that the Claimant's role was primarily 'forward facing' and so, regardless of the position in April, the Claimant's position is that his role would be needed going forwards. Was the Respondent's decision in relation to these factors within the range of reasonable responses?

79. I am satisfied that the primary objective of the Respondent in April 2020 was a short-term one. It aimed to cut costs so far as possible whilst still maintaining the reduced level of ongoing work. I consider that the steps the Respondent had taken in February 2020 towards investigating the possibility of exiting the Claimant from the company meant that it was in a better position to quickly assess the business case for removing the Claimant's role, both in the short term and the longer term.

80. I bear in mind that there is considerable leeway for an employer when deciding how to structure its business, even if this may appear to be against its own commercial interests. I consider that it was open to the Respondent and within the range of reasonable responses for it to decide to remove the Claimant's role from the organisation.

*Procedural fairness*

81. In assessing whether the decision to dismiss the Claimant was procedurally fair I have kept at the front of my mind the demands placed on the Respondent as a result of the Covid situation at the time. Not only was there pressure to act swiftly due to potentially devastating financial consequences, but the situation was in constant flux with new government advice being issued on a sometimes daily basis. The procedural standards that may be expected of an employer at such a time are therefore lower than those that may normally be expected.

82. Notwithstanding the lower expectations referred to above, I am satisfied that the redundancy consultation that was carried out by the Respondent fell far short of the minimum required standards in the circumstances.

83. Although I accept the Respondent's position, as stated by Ben Towe in his oral evidence, that the Claimant had access to generic financial information showing the state of the Respondent's finances, I consider that before making the Claimant redundant he should have been provided with a business case which included information specific to his own role and showed the impact of his own ongoing salary costs against the projected finances of the Respondent in the short-term in order that he could properly appreciate the basis of the Respondent's decision.

84. Ben Towe accepted in his oral evidence that he did not discuss with the Claimant any financial models of downturns at particular percentages: *"I am not sure why I would when you can see that the team is working through huge problems*". He also agreed that he never told the Claimant about the plan to remodel his business unit "*No I didn't, I don't see why I would"* and nor was any document produced to show what either the Structural or HSF teams would look like if the Claimant was to be made redundant *"No, and I don't believe it should have been produced to be shared with the Claimant."* I conclude from Ben Towe's oral evidence that the Respondent does not understand what a fair redundancy consultation should include and instead views it as an opportunity for the employee to raise matters with the employer rather than it being a two way process. I consider that this falls outside the range of reasonable responses.

85. During the redundancy consultation period the Respondent took the view that if furlough was not agreed then redundancy was a foregone conclusion. This meant that it did not engage in genuine consultation with the Claimant and failed to structure its decision or offer the Claimant the opportunity to challenge its decision according to traditionally understood 'fair' procedural elements such as business case and selection pools. There is no evidence that selection criteria was considered or applied either formally or informally, and I bear in mind also that the Respondent did not follow a redundancy policy/procedure when carrying out its process.

86. Failure to structure the redundancy process in the normal way does not of itself make it unfair, especially in light of the Covid background. In the circumstances however,

and given the size of the Respondent's organisation and the fact that it has an HR function, I do not consider that this is reasonable and I am satisfied that this contributed to a wholesale failure to carry out transparent and genuine consultation with the Claimant.

*Furlough as an alternative to redundancy*

87. It is an essential element of a fair procedure that the employer considers steps to avoid the need for redundancy. The only alternative option under consideration in the current case was the possibility of furlough leave. This was a realistic option and I am satisfied that if the Respondent had engaged more genuinely with the Claimant that he would indeed have been furloughed.

88. There was considerable misunderstanding and miscommunication between the parties regarding the possibility of furlough and I consider that they were speaking at cross-purposes in most of the communications from 14 April. The Respondent incorrectly believed that the Claimant wanted to agree more favourable rates of furlough pay and also failed to give due attention to the Claimant's requests for information, carrying out no proper exploration with the Claimant regarding the reassurances he was seeking.

89. The Claimant's requests were not unreasonable and yet there was still a fundamental lack of understanding demonstrated by Ben Towe in cross-examination about what the Claimant had been asking for. This persuades me that the Respondent had not taken the time to appropriately engage with Claimant about this as part of redundancy consultation or otherwise. I accept the many competing demands on the time of the Respondent and its officers at time the redundancy consultation was going on, but I nonetheless consider that it is an essential part of a fair procedure to carefully and genuinely consider alternatives being put forward by employee especially where, as here, the alternatives are reasonable and not onerous.

*Appeal hearing*

90. I consider that there were also significant procedural errors in the conduct of the appeal hearing by the Respondent and I am therefore not satisfied that the appeal hearing was sufficient to remedy the errors identified above so as to result in a fair dismissal. Stewart Towe did not have the relevant information before he interviewed the Claimant and I have found that he is not aware of many of the essential hallmarks of a fair appeal hearing. The Claimant also did not have the opportunity to comment on information that was taken into account by Stewart Towe.

91. Looking at matters in the round I conclude that the Respondent's decision to dismiss the Claimant was not within the range of reasonable responses open to it and was therefore unfair.

<u>Polkey</u>

92. Having had regard to the procedural failings in this appeal I consider that had a fair process been followed the Claimant would have been placed on furlough in April 2020 instead of being made redundant.

93. When considering whether there would have been a chance that the Claimant would have been fairly dismissed in any event I have taken into account the evidence before

me regarding the subsequent redundancy dismissals made by the Respondent in 2020.

94. I have had regard to the financial position as it was and the large round of redundancies which took place in the Respondent's business over the following months, which resulted in 25% of the Respondent's employees being made redundant in 2020. I bear in mind that the Claimant's role had previously been identified by the Respondent as dispensable and so it is probable that it would have been identified by the Respondent as potentially redundant fairly early on in the Covid redundancy exercise, especially given the Claimant's relatively high income. I note that the Claimant's role of Regional Sales Director has not been replaced more than two years later. There is no evidence before me to suggest that the Claimant would have agreed to take a more junior or less well-remunerated sales role and I consider that it is unlikely given his significant level of experience and length of time in the senior realms of HSF.

95. I accept there is a chance that, having properly consulted with the Claimant and considered in more detail the projects that he said were imminent or ongoing, the Respondent would have retained the role of Regional Sales Director (UK and Ireland Structural products), but I consider that this chance is small. I consider that the Respondent would have assessed the cost of the Claimant's role compared to the financial performance of the company over the 2 year period since the takeover of HSF and would have been unlikely to conclude that future sales were significant or reliable enough to sufficiently offset the costs.

96. I have also had regard to the lunch meeting between the Claimant and Stewart Towe which took place after the Claimant was given notice of redundancy. Stewart Towe accepted in cross-examination that he had asked the Claimant to consider a consultancy role and agreed that it was because "*there was work for someone with the Claimant's experience and seniority to be doing within the Hadley Group, yes"* . I recognise there is a possibility that the Claimant may have been offered, and may have accepted, an alternative role if a fair redundancy process was followed, although I note that no consultancy work did apparently result from this conversation in practice (perhaps understandably in the circumstances of a tribunal claim).

97. Taking the above factors into account I find that there is an approximately 90% probability that the Claimant could and would have been dismissed fairly for redundancy on 31 January 2021 (with notice being given on 31 July 2020) following a fair and reasonable procedure.

Employment Judge **Bennett**
3 August 2022