EMPLOYMENT TRIBUNALS

Claimant: Aaron Ireland

Respondent: Wing Lee Creative Ltd

Heard at: Watford **On:** 5th and 6th May 2022

Before: Employment Judge Dick

Representation:
Claimant: Mr Tim Sheppard (counsel)
Respondent: Mr Nigel Boulton (an employee of the Respondent)

RESERVED JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent.

2. The Respondent was in breach of contract by dismissing the Claimant without notice.

3. The Respondent was in breach of contract by failing to pay the Claimant three months' accrued holiday pay upon dismissal.

4. The appropriate remedies for the above will be determined at a hearing at 10 a.m. at Watford Employment Tribunal on 7th June 2022, reserved to Employment Judge Dick.

5. The part of the compensatory award for unfair dismissal accounting for the period after 15th April 2020 will be the subject of a 60 % deduction under the principles in *Polkey* v *A E Dayton Services Limited* 1988 ICR 142.

REASONS

Key to references: [x] = document from agreed bundle, {x} = paragraph number in witness statement (of the witness I am referring to unless otherwise recorded). All dates are 2020 unless otherwise stated.

INTRODUCTION

1. The Claimant was employed as a graphic designer by the Respondent, a marketing agency. On 31st March 2020 the Claimant was informed by an emailed letter that he was being dismissed, effective the following day. The reason given for the dismissal was redundancy. The Claimant claims the decision to dismiss, taken without consultation or notice, was unfair. He also claims for notice pay (wrongful dismissal) and holiday pay said to have been accrued in 2020. I am also asked to consider claims that the Respondent failed to give the Claimant adequate particulars of employment and that the redundancy payment made to the Claimant was £ 92 short.

2. This dismissal took place in the context of the worldwide COVID-19 pandemic, which had substantially affected the Respondent's business. A week before the Claimant's dismissal, on 23rd March, the country had entered what is now known as the first lockdown. It was not in dispute that the Claimant had not attended work after the 23rd, though whether he was justified in so doing was in dispute.

CLAIMS AND ISSUES

3. Following discussions with the parties before the evidence began, I identified the following substantive issues:
    a. Unfair dismissal:
        i. Was the reason for dismissal redundancy? (I had initially alerted the parties that I might also consider whether it was for some other substantial reason, though in the event, the way the evidence came out meant that I did not need to consider this.)
        ii. Was the dismissal fair or unfair? (Both in terms of the process and substantively.)
        iii. If unfair, should there be a reduction to damages for future loss to reflect fact that employment would have ended fairly in any event (following *Polkey* v *A E Dayton Services Limited* 1988 ICR 142).
    b. Notice pay
        i. Was the Claimant entitled to payment in lieu of notice? The Respondent's case was that he was not, since he had refused to come into work after 24th March.
    c. Holiday pay:
        i. The Claimant did not take any holidays between 1st January 2020 and the date of his dismissal. Was he, as the Claimant said, entitled to full payment for the days accrued during that period or was the Respondent, as the Respondent claimed, entitled not to pay him that amount on account of what the Respondent said were unauthorised absences between 24th March and 1st April (6 working days).

4. During the course of proceedings, after hearing submissions from the parties, I decided that any other aspects of remedy (i.e. relating to any award ultimately made by the Tribunal) would be dealt with at a later remedy hearing, should one be required. This would include:
    a. The claim for an "uplift" under s 38 Employment Act 2002 ("EA") for failure to give employment particulars under s 1/s 4 Employment Rights Act 1996 ("ERA"), that claim being contingent upon whether the Claimant succeeds on any of the above claims.
    b. The claim for an uplift for failing to follow the ACAS code.
    c. Contributory fault (if pleaded).
    d. The claim that the Claimant's redundancy payment was short. This was essentially an alternative to the unfair dismissal claim, since if I found in the Claimant's favour on the former, any shortfall in the redundancy payment would be reflected in damages awarded.

PROCEDURE, EVIDENCE etc.

5. The case was heard over two days on the Cloud Video Platform, all the participants (bar me) attending remotely. I am pleased to record that there were no significant technological problems and that all those appearing over CVP were able to participate fully.

6. At the beginning of the hearing, in order to establish the issues which I have set out above, I confirmed that the following facts, evident to me from the ET1 (claim form), ET3 (response) and witness statements, were not in dispute:
    a. The claim and response were in time and the parties were correctly identified.
    b. The Claimant had been employed for more than two years.
    c. The Claimant had been dismissed, i.e. the Respondent had terminated his employment.
    d. Reinstatement was not sought.

7. Before the evidence was heard I explained the procedure to the parties and told them that I would read the witness statements but they should not assume that I had read any of the documents in the joint bundle unless I was specifically referred to them in the course of evidence or submissions. I also explained the law that I would be applying (as set out below) and explained that, as the burden would be on the Respondent to establish the reason for redundancy, I would hear the Respondent's case first, although when the time came for submissions I would invite Mr Sheppard for the Claimant to go first, before allowing Mr Boulton sufficient time to consider his response.

8. By operation s 18(7) of the Employment Tribunals Act 1996, a party's communications with ACAS during the statutory conciliation process (which is required before Employment Tribunal proceedings are instituted) are not admissible in these proceedings except with that party's consent. I therefore

explained to the parties that I would not take account of any references to conciliation which were contained in the bundle and statements.

9. After taking time to read the statements, I heard evidence from Mr Boulton and then from Mr Ireland. For the reasons set out below, Mr Boulton gave oral evidence-in-chief and was then cross-examined. In Mr Ireland's case, the usual procedure was adopted, i.e. his written statement stood as his evidence-in-chief and he was then cross-examined.

10. The only witness for the Respondent was originally to have been David Jackson, a director of the company. In advance of the hearing an application for postponement, on the basis that Mr Jackson would be abroad on business at the time of this hearing, had been made and refused by a different judge. At the start of this hearing the parties agreed that it would be appropriate for me to proceed on the basis of Mr Jackson's written evidence (consisting of a short witness statement and various documents in an agreed bundle), while Mr Boulton, the Respondent's Accounts Director, who described himself as a second to Mr Jackson, and who had also been involved in the decision to dismiss the Claimant, would be able to give oral evidence, though he had not himself provided a statement.

11. Just before Mr Boulton's evidence began I drew counsel Mr Shepperd's attention to one of the documents in the bundle [22] headed "Relevant Information/Documents to Support Above case" which Mr Boulton confirmed had been prepared by Mr Jackson; it was signed off in type by Mr Jackson but did not carry his handwritten signature. It did not contain a declaration of truth (though nor did any of the witness statements in this case; Tribunal rules do not require that). The document is significant in the context of this case since Mr Jackson's witness statement deals with why the Respondent had to reduce "headcount" but contains little if any detail on the decision specifically to dismiss the Claimant. In contrast, the document does deal with that issue, in some detail, albeit that much, though not all, of it is a repetition of what is written in the ET3 (response to the Claim Form). I invited counsel to cross-examine Mr Boulton on anything materially in dispute in the document (since most of the contents were within Mr Boulton's knowledge). Having reflected upon the matter over the lunch adjournment, by which time Mr Boulton was in the middle of his evidence, Mr Shepperd submitted that, to paraphrase somewhat, adopting this course of action would not be right, as he and his client had prepared the case on the basis that they would have to challenge disputed evidence in witness statements, but would not be expected to take the same approach to statements made in documents that were not witness statements. This of course would not usually be an issue since in this sort of case the author of the document would usually be giving live evidence and so could be invited to adopt the statement as part of his evidence, but of course Mr Jackson was not here. Given that there was no dispute that the Claimant had had advance sight of the document and there was no dispute that it was prepared by Mr Jackson, it seemed to me somewhat artificial for me to treat it in a materially different way to a witness statement simply because it happens not to contain the heading "witness statement". However, as Mr Sheppard rightly points out, whether it is or is not a witness statement, in the circumstances of this case it

is right to say that its author has not adopted its contents, on oath, as his evidence-in-chief. I decided that I would consider the document as I would any other piece of evidence (indeed there was no application to exclude it) in light of any of the rest of the evidence and I would give it what weight I saw fit. I did consider it fair in all the circumstances to allow counsel for the Claimant time to consider the matter overnight before completing his cross-examination of Mr Boulton and also to allow the Claimant the time to prepare a supplementary statement addressing any points in the document which he had not addressed in his original statement. Such a statement was prepared and, there being no objection on behalf of the Respondent, I considered that it was in accordance with the overriding objective to admit it into evidence.

12. After hearing the evidence I heard submissions from the parties and reserved judgment on liability. Whilst making clear that I had not yet come to decision, I thought it best to set a date for a remedy hearing in case one should be required, in order to avoid unnecessary delay.

FACT FINDINGS

13. I find the following facts on the balance of probabilities. I have indicated where there were material disputes as to the facts between the parties; where I have not done so, the material facts were not in dispute.

14. The Claimant was employed by the Respondent on 16th September 2013 [27.3] as a "graphic designer." At some point before 2020 he had become a Senior Graphic Designer. By 2020 the Respondent's business broadly fell into two categories. The first, which the Claimant was not involved in, was the sale of promotional gifts. The second was creative marketing, involving the graphic design of such things as logos and adverts for clients. By early 2020 the bulk of this business was in two contracts with pharmaceutical companies based in India.

15. At the start of 2020, the following people worked from the company: David Jackson, his son Ross Jackson, Mr Boulton, Anil Toora, the Claimant and Scott McAdam. There was some dispute between the parties as to whether Mr Jackson Senior and Mr Jackson Junior were directors or employees or both; I have not found it necessary to determine that point as on any view both men were working for the company and being paid to do so and neither worked in the "creative" department, which was then made up of Mr Toora, the Claimant and Mr McAdam. Mr McAdam was a new employee, taken on in November 2019. Mr Jackson Sr was in overall charge of the company. (Where I refer above or below only to "Mr Jackson", I mean Mr Jackson Sr.) Mr Boulton was the Accounts Director, being responsible for the day-to-day running of both aspects of the business; he did not produce graphic design work himself but gave input to the creative team, who would receive instructions from him or from Mr Jackson Sr.

16. Throughout the Claimant's employment, the Respondent had always been content with the standard of his work. Form the point of view of both Claimant and Respondent, until 2020 the employment relationship was a good one.

17. In December 2019 through to early 2020 the world was hit by the COVID-19 pandemic. Like many other businesses, the Respondent was profoundly affected by it. In fact, the Respondent's business was affected earlier than many others since the promotional products side of the business mainly imported from China, where the pandemic first hit. The Respondent's sales figures for 2020-2021 [22] represented a sharp decline compared to previous years.

18. On 17th March [5] the newest member of the creative team, Mr McAdam, was dismissed for redundancy by the Respondent in order to cut costs. On the same day the Claimant was informed that his working week would be cut from 5 to 4 days a week, effective from 23rd March [1]. the Claimant was given no prior notice of this. The Claimant raised no formal objection at that point, when the matter was discussed at two meetings that day. In any case, this development was quickly overtaken by the events I set out below.

19. The Claimant continued to attend work until 23rd March. On the evening of Monday 23rd March, the Prime Minister announced what is now known as the first lockdown (although the measures did not legally come into force until 26th March). People were now legally obliged to stay at home unless they had a reasonable excuse. One such reasonable excuse was travel for the purposes of work, but only where it was not reasonably possible to work from home. The Respondent's business was not one of those legally required to shut down.

20. Between 24th March and 30th March the Claimant did not attend the office. There were a number of oral and written communications about that between the Claimant and Mr Jackson Sr. On 24th March the Claimant's evidence, which I accept, was that he telephoned Mr Jackson to say that he believed that it was possible for him to work from home. He would attend the office once to collect a computer and any necessary files. Mr Jackson told him that the nature of his work required him to be present and after becoming angry told the Claimant to stay at home if that was how he felt.

21. On 25th March the Claimant's evidence, which I accept, was that Mr Jackson asked him to attend the office for an essential conference call. The Claimant asked if he could participate from home and was told he should attend in person. The Claimant said that he was prepared to do that but believed he would be obliged to leave the office and work from home after the end of the call. He was again told by Mr Jackson that if he wasn't prepared to come to the office he should stay at home.

22. There was no dispute from the Respondent that the conversations on the 24th and 25th took place, nor was there any material dispute about their substance and result (if not their tone). Mr Boulton had not been a party to the conversations but had been told about some of them by Mr Jackson.

23. On 26th March the Claimant received a letter from Mr Jackson, dated 24th March [2]. The letter concedes that the Claimant's travel to work would not be an "absolute necessity" and makes clear that the Respondent had in mind Mr Jackson Sr and Jr and Mr Toora working as a "skeleton staff". It did not deal with the issue whether the Claimant was to work from home. It is however clear from the evidence of both parties that Mr Jackson Sr's position was that the Claimant's role could not be performed from home and that he wanted the Claimant to come into the office (despite what the letter said about the skeleton staff).

24. The Claimant replied on the 27th March [3] reiterating his wish/offer to work from home and inviting Mr Jackson to reconsider his position since it was unclear how long the present situation might persist.

25. On 30th March, the Claimant received a letter dated 27th March [4] saying that his (and everybody else's) working week was to be reduced to two days per week. The Claimant had not been consulted in advance about this. That day the Claimant telephoned Mr Jackson. His account of the conversation, which I accept, was that he was again told he could not work from home. He asked that the Respondent consider placing him on "furlough" (the Government by now having announced a package of financial support for employers who chose to do so). Mr Jackson refused to do so as, he said, there was still work for the Claimant to do and the Claimant was unwilling to work. Mr Jackson was not prepared to listen to the Claimant's complaints about the cut to his working week and Mr Jackson told the Claimant that all future communication should be in writing. The Respondent did not dispute that this conversation took place, but said that it was the Claimant who had insisted that all future correspondence should be in writing. I accept the Claimant's evidence on that point, since in a letter of 1st April, i.e. only two days later, (see below) the Claimant records that he is respecting Mr Jackson's request to put all future communications in writing.

26. A substantial issue of dispute between the parties was whether it would have been possible for the Claimant to have worked from home. It was not disputed that the Respondent had put in effect a number of measures to make the workplace as "COVID-secure" as possible (e.g. social distancing). The Respondent's position was that the Claimant's role was office-based and could not be performed from home. The creative process required face-to-face interaction and, even had "Zoom" or Teams" meetings been commonplace in early 2020, they would have been no substitute for working in person. Further, the Respondent's IT infrastructure was not set up to allow working from home and there were potential risks to clients' data from people working from home. Whilst in his evidence Mr Boulton identified a number of potential difficulties with the Claimant working remotely, he was not able to give any particular reason why the Claimant could not, for example, have been set up with a workstation at home. He also agreed that when Mr Toora travelled to India before the pandemic he had been able to take a portable drive and laptop with him that enabled him to do his work from there. Mr Boulton did not disagree

with the Claimant's suggestion that by March 2020 some meetings with clients were already taking place remotely. I keep in mind that although now, in 2022, it is evident that many roles can be performed from home, in March 2020 very many employees and employers had never heard of Zoom or Teams – put simply, what quickly became normal to many of us by 2021 was not normal in March 2020. I nevertheless accept the Claimant's evidence that it would have been possible for him to perform much if not all of his role at home, at least for the short period with which I am presently concerned (i.e. 23rd March to 1st April), and that Mr Jackson gave little or no consideration to that possibility; I also accept the Claimant's evidence (this point not really being in dispute) that he repeatedly offered to work from home but those offers were not accepted by Mr Jackson.

27. The cut to the working week from four to two days was, Mr Boulton told me, never in fact implemented as it was superseded by the redundancy. In what was undoubtedly a fast-moving situation, it has not been disputed that the measures which the Respondent believed necessary on 17th and 27th March (reduced hours etc.) were no longer sufficient by 31st March to stave off the company's financial difficulties. In other words, the need for the workforce to be cut, and cut quickly, has not been disputed. It was in this context that, on 31st March the Claimant received an email containing the letter [5] which informed him that he would be made redundant from 1st April. The letter made clear that the decision had been made as a result of the company's financial position but did not explain why the Claimant specifically had been selected for redundancy.

28. The Claimant wrote back the following day [6] asking the Respondent to reconsider the redundancy, citing the Government's Coronavirus Job Retention Scheme (the aforementioned support for workers on furlough) as a possible alternative. It was in this letter that the Claimant also said that he was respecting Mr Jackson's request to put all future communication in writing. Mr Jackson wrote back the same day [7] making clear that there was to be no reconsideration of the decision, which had been made due to the financial situation of the business and the "reduced creative requirements". It was therefore not in dispute that the Claimant was not consulted before the decision was made to dismiss him and that the decision was not subject to any appeals process.

29. Though the need for redundancy in the creative team has not been disputed, given the sudden loss of work, what *is* in issue in this case, as well as the alleged lack of proper process, is the selection of the Claimant in particular for redundancy, rather than Mr Toora. (There has been no suggestion that any of the others still working for the Respondent would have been suitable candidates given their different roles.) The decision to select the Claimant for redundancy was taken by Mr Jackson Sr, with some input from Mr Boulton. In his evidence Mr Boulton told me that the Respondent was in essence operating a "last in, first out" ("LIFO") policy – Mr McAdam, the shortest-serving employee had been dismissed first and when a further redundancy was needed, the Claimant was selected as Mr Toora had been employed for longer. There is no written record of this policy being applied and there is no mention of it in any of

the correspondence between the Claimant and the Respondent. The Claimant was never told why he (as opposed to anyone else) had been selected for redundancy. While I accept Mr Boulton's evidence to the extent that the Claimant's length of service may well have been a consideration, I also accept the Claimant's contention that given (amongst other reasons) the lack of any contemporaneous record of this fact it is likely that other more subjective factors also entered into the decision. I also note that, since it was the Respondent's case that a "LIFO" policy was being operated, it cannot also have been the case that the reason Mr Toora was not considered for redundancy was that his role was different to the Claimant's – if Mr Toora was not being considered for redundancy, that would have left only the Claimant in the pool and there would have been no need to apply a "LIFO" policy.

30. As will be clear, it was necessary for me to hear evidence relevant to the issue whether Mr Toora might have been a suitable candidate for redundancy instead of the Claimant. It was the Respondent's position that the Claimant and Mr Toora had different roles. Mr Boulton's evidence was that formally the Claimant reported to Mr Toora, who was the head of design/creative; though they were doing some of the same work in terms of doing graphic design for clients, Mr Boulton considered that Mr Toora's role also consisted of having day-to-day discussions with clients, whereas although the Claimant would occasionally have direct discussions with clients this was more often by email. The Claimant's evidence was that while Mr Toora may well have had a different job title (and I accept Mr Boulton's evidence on that point), their roles were in reality similar. While Mr Toora travelled more for business purposes than the Claimant (and therefore would see clients in person more, at least before the pandemic) I accept the Claimant's evidence that this was simply a pattern the two had fallen into, the Claimant preferring to stay in the office and Mr Toora being happy to travel, rather than a formal division of their roles. I also find that, though there may have been some differences in particular tasks they performed day-to-day, by March 2020 Mr Toora and the Claimant were doing substantially similar work.

31. I accept the Claimant's evidence, which I need not set out in detail here, that there were good arguments for why he should have been retained instead of Mr Toora, which he could have presented to the Respondent if given the chance, relating to the Claimant's skills, experience and qualifications and the quality of his work. Equally, it was clear to me from Mr Boulton's evidence that Mr Toora was (like the Claimant) a good employee and would have had his own good arguments for being retained.

32. The Claimant's contract of employment provided for one month's notice of termination from his employer. He had been employed for six years. Following his dismissal, the Claimant was not made any payment in lieu of his notice period. Nor was he as matter of fact in my view given the chance to work out his notice period – the Respondent's letter of 31st March made clear that the redundancy was effective the following day. The Respondent did not purport to be dismissing the Claimant for his refusal to attend the office and there is no

suggestion that any disciplinary proceedings were commenced against the Claimant.

33. The Claimant's holiday year commenced on 1st January 2020 and there was no dispute that from then until his dismissal he did not take any holiday. Nor was there any dispute that the Claimant was not paid for the holiday accrued from that date. His contract provided for 23 days' holiday, for which he would be paid in lieu upon termination of employment, pro rata for each complete month of service, at a rate of 1/260 of his annual salary [27.11, 27.12].

LAW

Unfair Dismissal

34. S 94 ERA confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under s 111. The employee must show that he was dismissed by the employer (see s 95 ERA), but in this case the Respondent admits that it dismissed the Claimant.

35. S 98 ERA deals with the fairness of dismissals in two stages. First, the employer must show that it had a potentially fair reason for the dismissal within s 98 (1) and (2). Second, if the employer shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason. So far as the first stage of fairness is concerned, S 98 ERA provides, so far as is relevant:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it— …
>
> (c) is that the employee was redundant,…

36. So in this case it is for the Respondent to prove that the principal reason for the Claimant's dismissal was redundancy (i.e. a reason falling within ss (2).

37. Redundancy is defined by s 139 ERA, which provides, again so far as is relevant:

(1) … an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

…

(b) the fact that the requirements of that business—
for employees to carry out work of a particular kind…
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.

38. In *James W Cook and Co (Wivenhoe) Ltd* v *Tipper and ors* 1990 ICR 716, the Court of Appeal stressed that Employment Tribunals are not at liberty to investigate the commercial and economic reasons behind a decision to close (i.e. to create a redundancy situation). In short, as the authors of the IDS Employment Law Handbooks ("IDS") put it (Vol 9, 8.4) a Tribunal is entitled only to ask whether the decision to make redundancies was genuine, not whether it was wise.

39. The second stage of fairness is governed by s 98 (4) ERA:

(4) … the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

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

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

40. In deciding fairness, I therefore must have regard to the reason shown by the Respondent and to the resources etc. of the Respondent. In general, my assessment of fairness must be governed by the band of reasonable responses test set out by the EAT in *Iceland Frozen Foods Ltd* v *Jones* 1983 ICR 17. In applying s 98(4), it is not for me to substitute my judgment for that of the employer and to say what I would have done. Rather, I must determine whether in the particular circumstances of this case the decision to dismiss the Claimant fell within the band of reasonable responses open to a reasonable employer.

41. In the specific case of redundancy, in *Williams and ors* v *Compair Maxam Ltd* 1982 ICR 156, the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. These are summarised at Vol 9 8.81 of the IDS Employment Law Handbooks:

- whether the selection criteria were objectively chosen and fairly applied
- whether employees were warned and consulted about the redundancy
- whether, if there was a union, the union's view was sought, [not an issue in this case] and
- whether any alternative work was available.

42. In the same case the EAT made two other points which I also take into account. First, the guidelines are not principles of law but standards of behaviour that can inform the reasonableness test under S.98(4). A departure from these guidelines on the part of the employer does not lead to the automatic conclusion that a dismissal is unfair. Secondly, the guidelines represent fair industrial relations practice in 1982 and are not immutable. The overriding test is whether the employer's actions at each step of the redundancy process fell within the range of reasonable responses.

43. In *Polkey* v *AE Dayton Services Ltd* 1988 ICR 142, HL, Lord Bridge, in relation to redundancy dismissals held that "the employer will not normally act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by deployment within his own organisation". Failure to follow correct procedures was likely to make an ensuing dismissal unfair unless, in exceptional cases, the employer could reasonably have concluded that doing so would have been 'utterly useless' or 'futile'.

44. In the event that the dismissal was unfair, I would go on to 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*.

45. The authors of the IDS Employment Law Handbooks note (at 17.100):

> In *Williams* v *Amey Services Ltd* EAT 0287/14 the EAT helpfully summarised the various methods by which it is open to a tribunal to make a *Polkey* reduction. Her Honour Judge Eady observed that: 'In making such an assessment the [employment tribunal] is plainly given a very broad discretion. In some cases it might be just and equitable to restrict compensatory loss to a period of time, which the [tribunal] concludes would have been the period a fair process would have taken. In other cases, the [tribunal] might consider it appropriate to reduce compensation on a percentage basis, to reflect the chance that the outcome would have been the same had a fair process been followed. In yet other cases, the [tribunal] might consider it just and equitable to apply both approaches, finding that an award should be made for at least a particular period during which the fair process would have been followed and thereafter allowing for a percentage change that the outcome would have been the same. There is no one correct method of carrying out the task; it will always be case-and-fact-specific. Equally, however, it is not a "range of reasonable responses of the reasonable employer" test that is to be applied: the assessment is specific to the particular employer and the particular facts.'

Breach of Contract

46. I treat the claims for accrued holiday pay and notice pay as being brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, Art 3, as claims for breach of contract outstanding on the termination of the Claimant's employment. The burden is on the Claimant to prove the breaches on the balance of probabilities.

47. So far as notice is concerned, an employee is entitled to notice of termination unless they have fundamentally breached the contract e.g. the contract is terminated because the employee is guilty of gross misconduct. S 86 ERA sets out the minimum notice period to which an employee is entitled. The provision has effect even where the contract provides a shorter period. As the Claimant had been employed for six years, the applicable statutory notice period was six years.

CONCLUSIONS

Unfair Dismissal

48. The Respondent has in my judgment proved that the reason for dismissal was redundancy. Indeed, there has been no dispute that the dismissal was wholly or mainly attributable to the fact that the requirements to carry out work of the kind that the Claimant was doing had diminished.

49. I therefore go on to consider whether in my judgment the Respondent acted fairly or unfairly in dismissing the Claimant for that reason. I keep in mind that this was a small company, with limited resources, acting in a truly unprecedented situation, which was changing very quickly and which was having a very significant effect upon the company's finances. So quickly were things changing, for example, that by 31st March it was clear that the cost-saving measures which the Respondent had announced only two weeks earlier were not going to be sufficient. There was therefore clearly a need for the Respondent to act quickly in considering significant cost savings by way of redundancy, savings which it has not realistically been disputed were necessary. Given the size of the company there was clearly also no alternative work available for whoever was made reduandant.

50. It is not in dispute that there was absolutely no consultation with the Claimant; nor indeed was there any warning at all for him. He had no real opportunity to challenge the decision before or after it was made. Once the further cuts to the working week were ruled out, no other alternatives to redundancy were considered. The Claimant was not made aware of the basis for the decision to select him for redundancy and, for the reasons I have set out above, if some objectively identifiable criteria, i.e. "LIFO", was applied (and the evidence on that point is scant) then it was not in my judgment the only consideration that was applied. While it might at least be arguable that an employer might

reasonably have put the Claimant in a pool of one, on account of Mr Toora's seniority, it was not the Respondent's case that this was their approach – there would of course be no need to apply "LIFO" to a pool of one. This is not in my judgment one of the "exceptional" (per *Polkey*) cases where proper procedure could reasonably be abandoned. Though in my judgment a reasonable employer would have been entitled, as the Respondent did here, to decide not to seek to rely on government support in the form of the job retention scheme, and to conclude that cutting all their employee's working days from four to two was not a viable option, that does not mean that a consultation would have been pointless. It would, for example, have given the Claimant the opportunity to make representations about why it should have been Mr Toora, rather than him, since, as I have found the two had similar even if not identical roles. Such a consultation need not in my judgment needed to have been a lengthy process, given the need for a speedy decision, but that did not negate the need for consultation entirely.

51. Taking all of the points in the previous paragraph cumulatively, in my judgment, even taking account into account the difficult situation in which the Respondent found itself, the Respondent's decision to dismiss the Claimant for redundancy fell outside the band of reasonable responses open to an employer. I therefore find that the Claimant was unfairly dismissed.

52. I should make clear that although I have made findings about whether the Claimant could have worked from home, those findings are most directly relevant to the contractual claims with which I deal below. They are not directly relevant to the issue whether the Claimant was unfairly dismissed, as none of the parties have made the case that the Claimant was dismissed for insisting on working from home; nor was it put to Mr Boulton that that was the reason for picking the Claimant for redundancy.

53. Turning now to *Polkey*, both Mr Jackson in writing and Mr Boulton in oral evidence, while conceding that the Respondent may not have "dotted i's and crossed t's" when it came to the procedure, asserted that whatever fair process that might have been followed would still inevitably have resulted in the Claimant's redundancy. In my judgment there are two issues to be considered here.

54. First, given that the Claimant was dismissed without notice, if a fair procedure had been followed, his employment would clearly have been extended for at least the period of the fair consultation. In his closing submissions for the Claimant Mr Sheppard argued that a fair process here would have lasted six weeks. In the circumstances of this case, given the size of the employer and the urgency of the situation, that goes too far. In my judgment a fair process involving meetings with the Claimant and consideration of any proposals he might have made, and even any appeal if one were realistic in such a small firm, could have been completed in two weeks.

55. Second, in light of my findings above I do not accept that, had a fair process been conducted, it would inevitably have been the Claimant who was chosen for redundancy. Equally, it is clear to me that there was a good chance that it

would have been the Claimant. Some alternative measures to redundancy had already been tried and were insufficient. The cut in the workforce would only realistically have come from the creative team, now consisting of two employees. The Respondent might, acting reasonably, have concluded that due to Mr Toora's seniority in title, it would not have been appropriate to place him in a pool with the Claimant, leaving only the Claimant. Given however that the bulk of their roles were similar, I do not think that outcome particularly likely. The more likely outcome of a fair process would have been the Claimant being placed in a pool of two with Mr Toora and assessed against various objective criteria. While Mr Sheppard submitted that there was at least a 50 % chance of the Claimant retaining his employment in that situation, in my judgment the chances of that were somewhat lower, particularly given that Mr Toora held the more senior job title and had been in post longer, whereas the Respondent was clearly content, on the evidence of Mr Boulton, with the quality of both men's work. In my judgment the overall chance of the Claimant remaining in employment after a fair redundancy process was 40% and that figure will be reflected in the damages awarded at the forthcoming remedy hearing.

Breach of Contract: Notice Pay

56. When it was put to Mr Boulton on the Claimant's behalf that the Claimant was never given the opportunity to work out his notice, Mr Boulton's position was that the Claimant was refusing to come into the office so that was not possible. Two points weigh against that. First, Mr Jackson Sr's (albeit grudging) acceptance in his letter of 24th March that the Claimant would not be coming into the office. Second, and most significant, the letter of 31st March, which made clear that the Claimant's redundancy was effective from the following day. The Respondent was not, and did not purport to be, dismissing the Claimant for gross misconduct for failing to attend work. It is therefore clear in my judgment that the Claimant was entitled to, but did not receive, six weeks' notice.

Breach of Contract: Accrued Holiday Pay

57. The Claimant clearly had a contractual entitlement to be paid for the holiday he had accrued up to 23rd March. On the basis of my factual findings above, he was also entitled to holiday accrued between the 24th March and 31st March, as he was making himself available for work (albeit it from home) which the Respondent could reasonably have given him. He was therefore entitled under his contract to be paid on dismissal for holiday accrued for three full months.

58. For the avoidance of doubt, I find that the Claimant was right to take the view that attending the office, when he could, as I have found, have worked from home, would have been a contravention of the "lockdown" regulations. There is therefore no question in my judgment of the Respondent having the right to dock the Claimant's final month's pay to reflect a week of "unauthorised absences". While the Respondent's position was that whether an employee could work from home was a decision for the employer not the employee, this

overlooks in my judgment that fact that the Claimant would have been committing a criminal offence if he left his house unless one of the exemptions applied; whether one of those exemptions applied would ultimately have been a matter for the police (and, if that decision were challenged, a Court) and not the Respondent.

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Employment Judge **Dick**

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Date: 6th June 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

6 June 2022

FOR THE TRIBUNAL OFFICE