



EMPLOYMENT TRIBUNALS

Claimant: Mr. M. Strydom

Respondent: Bridge Facilities Engineers Limited

Heard at: Watford (by CVP)

On: 13, 14, 15 & 16 March 2023

Before: Employment Judge J Galbraith-Marten (sitting alone)

Appearances

For the Claimant: Mrs. T. Strydom, Claimant's wife

For the Respondent: Mr. Nath, Counsel

RESERVED JUDGMENT

1. The claimant was unfairly dismissed by the respondent.
2. A remedy hearing with a time estimate of 1 day will be fixed to take place to determine the claimant's entitlement.
3. The claimant's unlawful deduction from wages claim is dismissed upon withdrawal.

REASONS

Introduction

1. The claimant claims his dismissal was unfair within s.98 of the Employment Rights Act 1996. The claimant also claimed he was subject to an unlawful deduction from wages but he withdraws that claim.
2. The respondent contests the unfair dismissal claim. It says the claimant was fairly dismissed by reason of redundancy or some other substantial reason (SOSR).
3. The claimant's wife represented the claimant, and he gave sworn evidence. Mr. Nath of Counsel appeared on behalf of the respondent company. The respondent called live evidence from Mr. Simon Halsey, Managing Director, Ms. Veronica Knights, Company Secretary, Ms. Tasneem Virani, Director of Claris Coaching and the independent appeal officer, Mr. Stevie Berry, Apprentice Engineer, Ms. Hayley Howard, Administration Manager and Ms. Emily Dolman, Labour Manager. A signed statement was provided by Mr. Ben Kirkbright, Commercial Gas Engineer, but he was not called to give evidence. Both sides adopted their witness statements as their evidence and each side was cross examined by the other.
4. As well as hearing live evidence, the Tribunal also considered numerous documents contained in the joint paginated bundle comprising 393 pages. The parties provided written submissions.

Issues

5. The parties agreed a list of issues, and the Tribunal refined those as follows:
 - 5.1. What was the reason or principal reason for the dismissal? The respondent says the reason was redundancy or some other substantial reason.
 - 5.2. If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will decide in particular whether:
 - 5.2.1. The respondent adequately warned and consulted the claimant
 - 5.2.2. The respondent adopted a reasonable selection decision, including its approach to a selection pool
 - 5.2.3. The respondent took reasonable steps to find the claimant suitable alternative available employment
 - 5.2.4. Whether the dismissal was within the range of reasonable responses

- 5.3. If the reason for dismissal was not redundancy, the respondent says the reason nonetheless was a substantial reason capable of justifying dismissal namely the claimant's unwillingness/inability to return to work from their office base and that home working could not be accommodated full time by the respondent.
- 5.4. Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?
- 5.5. Is there a chance the claimant would have been fairly dismissed anyway if a fair procedure had been followed or for some other reason? If so, should the claimant's compensation be reduced and if so by how much?
- 5.6. if the claimant was unfairly dismissed, did he contribute to his dismissal by blameworthy conduct? The respondent relies on the claimant's capability resulting in large contractual losses and his alleged unwillingness/inability to work from the respondent's office after 5 January 2021. If so, would it be just and equitable to reduce the compensatory award and by what proportion?

Findings of Fact

6. The findings of fact made by the Tribunal are based on the live evidence provided and the documentary evidence the Tribunal was referred to during the hearing. Any relevant conflicts of evidence have been resolved on the balance of probabilities.

Background

7. The claimant commenced employment with the respondent on 11 December 2017 and he was employed as a contract manager. His employment was terminated on 18 February 2021 on the grounds of redundancy.
8. The respondent is a small business providing planned preventative maintenance, emergency breakdown services and the installation of air conditioning and refrigeration equipment, ventilation, heating and electrical services in commercial offices, industrial units, schools and university facilities and residential care homes.
9. The respondent's employees include administrative staff, engineers, and a management team. The administration team are based at the respondent's office in Watford as are the management team and the engineers visit the office but primarily work off site. The claimant was based at the office.
10. The respondent company is owned by Mr. Simon Halsey the Managing Director, and it is a family run business. His partner Ms. Veronica Knights is the Company Secretary, and her daughter Ms. Hayley Howard is the company's administration manager.
11. Mr. Halsey emphasised to the Tribunal the office is the hub of the business as it is predominantly paper based, and the business contracts and paperwork including invoices etc are all held at the office. Ms. Howard & Ms. Dolman explained how the

company operates from the office and the interaction between the administrative team, the engineers, and the management team. Ms. Howard confirmed the office has two white boards; one for engineers and the jobs they are allocated to or are pending, and the other white board is a to do list of reminders. The white boards are available for all staff in the office to view. That information is also separately entered onto an excel spreadsheet at the end of each week.

12. Ms. Dolman stated the engineers are required to call the office landline after each completed job to debrief the office and confirm they are moving to their next job so the white board can be updated. She further explained if there was problem with a particular job the engineer would speak to the relevant contract manager.
13. The respondent's business has contracts with clients for planned preventative maintenance work, it also provides additional remedial work for those clients, and it carries out ad hoc repairs. As the respondent's contract manager, the claimant managed the relationship between the respondent and various clients and he was their main point of contact. He provided quotes for remedial work, scheduled required contracted maintenance of equipment, prepared risk and method statements, reviewed client reports, arranged delivery of materials and dealt with contract tenders. The scope of the claimant's role was set out in the respondent's offer of employment included at page 38 of the bundle. The claimant's two main clients were Engie and Go Native.
14. The claimant stated that visiting client sites was part of his role, but he was predominantly based in the office. He estimated site visits comprised about 10% of his working time. Most work undertaken on site was done by the respondent's engineers. Mr. Halsey stressed that site visits were extremely important to the respondent's business as a contract manager could not manage a contract properly without understanding the client's site environment. Although he is the Managing Director, Mr. Halsey also had contract manager responsibility for certain clients.
15. Mr. Halsey as the Managing Director generated new clients for the business and was of the view the claimant was required to do the same. The claimant stated that his role did not include pitching for new business, and he was an engineer by background and not a salesman. Furthermore, he had not pitched and obtained any new business for the respondent during his employment. The Tribunal accepts the claimant's evidence that his role was not to pitch for new clients as that was not included in the scope of his role as set out in his offer of appointment.
16. Also included in the claimant's offer of employment was an agreement that he could work from home every Tuesday. This was included in the bundle at page 39. The claimant's son has a chromosome disorder meaning he has severe learning difficulties and complex medical needs. He also has a history of seizures associated with cold and flu symptoms that once resulted in his being placed in a coma. Both the claimant and his wife are their son's carers and working from home one day a week allowed him to be close at hand in the event of an emergency.

17. After the claimant was appointed, the respondent provided him with a company handbook and that was included in the bundle at pages 42 - 67. The handbook contains the respondent's redundancy provisions:

"The company is committed to provide regular employment to our staff. However, the flow of work cannot always be anticipated or guaranteed and in certain circumstances redundancy cannot be avoided.

The company will always offer consultation in the event of any threatened redundancies and will endeavour to consult with the appropriate individual employees as soon as practicable and as fully as possible. The company will seek to reduce the effect of any redundancy situation by:

Reappraising its recruitment policy

Reducing or eliminating overtime

Investigating the possibility of redeployment and natural wastage

Seeking applicants for early retirement

Introducing short time working or temporary lay off

Where the above measures fail to prevent a redundancy situation the company will use the following selection criteria to determine which employees will be made redundant: skills or experience standard of work performance or aptitude for work attendance or disciplinary record."

18. In January 2020 the claimant was given a £10,000.00 salary increase. Another contract manager had recently left the respondent and the claimant took over his workload and Mr. Halsey agreed to increase the claimant's salary as the value of his client database had increased. The claimant also asserted that Mr. Halsey agreed to increase his notice period from one month to three months during the same discussion. Mr. Halsey refuted that.

19. Mr. Halsey stated that he has never provided any employee with a 3-month notice period. The claimant maintained the agreement had been reached during cross examination. There is no confirmation of this amendment of the claimant's notice period in writing, but Mr. Halsey did accept he agreed to increase the claimant's salary and he did not confirm that in writing either. Therefore, the Tribunal prefers the claimant's evidence on this issue. The claimant's position is that from January 2020 onward his relationship with Ms. Knights became strained due to his pay rise and increased notice period.

Covid-19 Pandemic

20. On 21 March 2020, and as the claimant's son was deemed extremely clinically vulnerable, he was advised by the NHS to shield at home for a period of 12 weeks and avoid all face-to-face contact except for with his carers or health care workers. The claimant and his wife were therefore required to strictly adhere to the social distancing guidance that was issued at that time and minimise their interactions outside their home. That letter from the NHS was included in the bundle at pages 71- 74 and the claimant provided that to Ms. Knights by email and that was included in the bundle at page 68.

21. On 23 March 2020 the government announced the first national lockdown and Mr. Halsey agreed the claimant could work from home, but the respondent adopted a different stance with its other employees. On 24 March 2020 the engineers were stood down by Ms. Knights, but the administration staff were given a choice whether they attended the office or not and this is reflected in the email Ms. Knights sent to all staff on that date and included in the bundle at pages 69 & 70. The email was not sent to the claimant as he was already working from home. When the claimant pointed out that he had not received the email to Ms. Knights she replied, *"Whoops! Nearly forgot you Tinus! – Out of sight out of mind!"*. The claimant stated this comment was indicative of Ms. Knights approach to home working. He stated in his witness statement that Ms. Knights referred to his working from home day as his day off and he says that is the negative view the respondent has of home working.
22. The claimant was placed on furlough by the respondent and did not return to work until 31 August 2020.
23. During the claimant's absence and on 12 May 2020, the respondent received notice of termination from its client Hans Road. The termination letter was included in the bundle at page 376. Connie Lester the Head of Operations confirmed they planned to streamline their service facilities providers and she also referenced poor communication with the Respondent. Mr. Halsey was the contract manager for Hans Road.
24. On 14 May 2020 the respondent was informed it had been unsuccessful in the retender for the Go Native contract and this was due to price, the tender submitted to Go Native was too low. Chris Moore their Head of Estates and Facilities commented the claimant had been a superb contract manager, nonetheless. That letter was included in the bundle at page 382.
25. On 2 June 2020 the respondent received notice of termination from Engie at page 340 of the bundle. No reason was provided for the termination of that contract, and they declined to provide payment for outstanding purchase orders. The claimant was the contract manager for the Engie contract.
26. There is a dispute between the parties as to who was responsible for the loss of those contracts. In relation to Hans Road, the respondent stated it lost that contract due to a boiler quotation prepared by the claimant but that was not reflected in the termination letter nor any other document. On that basis, the Tribunal finds the claimant was not responsible for the loss of the Hans Road contract.
27. In relation to Go Native, the claimant was the contract manager, and the respondent states it was the claimant's tender quote that resulted in the loss of that contract and that does correlate with the information in the termination letter. On that basis, the Tribunal does find the claimant was responsible for the loss of that contract as he prepared the tender quote. However, Go Native was complimentary about his services in all other regards.

28. Finally, and in relation to Engie, the respondent strongly asserted the contract was terminated as Engie discovered that several of its planned preventative maintenance work had not been completed and that was entirely the responsibility of the claimant.
29. Mr. Halsey challenged Engie's assessment of what work was outstanding under their contract and how much remained owing to the respondent and how much required to be reccredited to Engie for uncompleted work. He wrote to Engie on 12 June 2020 and his letter was included in the bundle at pages 342 & 343. The claimant summarised the planned preventative work that was outstanding for Engie at page 344 of the bundle and only three out of the sixteen incomplete pieces of work pre-dated the claimant's furlough period. The rest expired during his furlough period. In respect of those three items prior to his furlough period, the claimant's evidence was that remedial work needed to be completed before the planned maintenance work could be done.
30. The claimant put to Mr. Halsey in cross examination the respondent chose to stop carrying out planned preventative maintenance for Engie in March 2020 as the respondent knew it had lost the contract as it did not take part in the retendering exercise. Therefore, Engie refused to pay the outstanding monies not because the contract had been mismanaged by the claimant but due to the contract not being serviced as it should have been. Mr. Halsey denied that suggestion and the Tribunal does not accept the respondent would have deliberately put itself in a breach of contract position with Engie when that would have resulted in financial loss to the business.
31. The parties were agreed that the engineers complete the planned preventative maintenance work, but the contract manager is responsible for ensuring the engineers are sent to complete the work and must review their reports to ensure compliance. However, the claimant was on furlough from March 2020 as were the respondent's engineers and they could not have completed the work that became due after March 2020. In respect of the other three pieces of planned preventative maintenance that were incomplete prior to March 2020, this was as result of other remedial work outstanding and not a deliberate non-compliance issue. The Tribunal finds the Engie contract was terminated earlier than intended due to the incomplete work identified. However, almost all the incomplete work became due when the claimant was on furlough, and he provided an explanation as to why the three pieces of planned preventative work prior to his furlough could not be completed and although the claimant was the contract manager, the Tribunal does not find the claimant responsible for the loss of that contract.

Return to Work

32. On 20 August 2020 Ms. Knights emailed the claimant. She advised that Mr. Halsey was unwell and burnt out as he was concerned about the future of the business having lost some contracts and he was unable to gain new ones due to his ill health. In the circumstances, Ms. Knights conceded she had asked Mr. Halsey to consider reducing the claimant's salary to lower the company's financial outgoings and to allay some of Mr. Halsey's concerns regarding the numbers as she described it. Her email to the claimant was included in the bundle at pages 75 & 76.

33. The claimant wanted to return to work to assist Mr. Halsey, but he was confused as to why he needed to take a pay cut when the respondent had employed an additional member of staff, Paul Flanagan, whilst he had been on furlough. He called Ms. Knights to discuss her email. He also called Mr. Halsey and they agreed the claimant would accept a reduction in pay of £750 per month as a temporary measure to assist the respondent but this was not confirmed in writing.
34. Ms. Knights stated that when the claimant returned to work the contracts he had managed had been lost and there was limited work available, but the respondent did not want to raise the issue of redundancy with him at that time as it would have caused shock waves with the other employees. The Tribunal does not accept that evidence, if there was no work to do, Ms. Knights would not have sought the claimant's return. The Tribunal finds as a fact there was contract management work to do and as Mr. Halsey was unwell, the claimant was required to step in and do that.

September 2020 – January 2021

35. The claimant returned to work at the respondent's office on 31 August 2020 and he was provided with a covid-19 risk assessment by Ms. Howard. Her email attaching the risk assessment was included in the bundle at page 77. She asked the claimant to confirm by email that he had read, understood, and agreed to work in accordance with the risk assessment.
36. Although he had returned to work, the claimant remained concerned regarding the risk that working in the office presented to his son from September 2020 onwards and as such he built a screen around his desk to minimise contact and urged his colleagues to use a post tray, but he stated his colleagues did not take the risk of transmission of covid 19 as seriously as he did. Although hand sanitiser was available, social distancing was not always adhered to in the office nor was regular cleaning undertaken. The claimant did what he could to reduce his risk of infection so that he did not put his son at risk given his underlying medical conditions.
37. The claimant stated he was as busy upon his return as he had been pre furlough. He was assigned the Freemantle Trust contract previously looked after by Mr. Halsey and that comprised three care homes. He was also allocated various schools including Dormers Wells Infants and Juniors, Oaklands Primary School and six others. In cross examination the claimant stated he was so busy upon his return he was required to do more site visits and assist the engineers as there was too much work for them. For example, the claimant attended the Purcell School of Music as the heating was not working in the school sports hall.
38. Dormers Wells Nursery Infant and Junior school served the respondent with notice of termination on 23 December 2020 and the contract expired on 31 March 2021. That letter was included in the bundle at page 257 and the school highly encouraged the respondent to retender for the contract. The contract was terminated as the school wanted to ensure compliance with the Academies Financial Handbook and not due to the actions of the respondent or claimant.

January 2021

39. Mr. Halsey's evidence was that by January 2021 there was simply no work left for a contract manager and Ms. Knights confirmed the same. However, the Claimant stated the respondent had acquired a new contract with Interserve by that date and that was getting increasingly busy as was the Free Mantle Trust contract.
40. In January 2021 a new variant of Covid-19 emerged, and the number of deaths increased as set out in the BBC news extracts included in the bundle at pages 80-86. The claimant became increasingly anxious for his son, and he discussed his concerns with Ms. Knights & Mr. Halsey on 4 January 2021 by text message following the government's announcement of the third national lockdown. The claimant stated that his anxiety for his son was "sky high" and he had noted the government's guidance had again reverted to "work from home" unless you reasonably cannot. Ms. Knights responded by stating the lockdown was nothing like the first in March 2020 and she would talk to the claimant the following day. The text messages were included in the bundle at pages 87-89.
41. The next day the claimant and Ms. Knights and Mr. Halsey had a conversation regarding the government's guidance at the respondent's office. The claimant raised his concerns for his son and asked to work from home "*until it calms down a bit*". The claimant asserted Mr. Halsey said, "*I am not putting Veronica through that again*" and walked out of the office slamming the door. The claimant called Mr. Halsey to discuss it again later that day and he said, "*I can't let you work from home for an indefinite period*" and again the claimant replied "*it would only be until things calm down*". The claimant stated Mr. Halsey said, "*you must do whatever you feel is necessary to protect your son and I will do what is necessary for the business*" and "*just do what you need to do and I will do what I need to do.*" Mr. Halsey accepted in cross examination that he made that statement.
42. Later that day, the claimant sent a text to Mr. Halsey at 7.40pm and he stated, "*Further to our conversation today, I will be following the government's advice and will need to work from home to shield Luke. If we don't follow the government's advice and something was to happen to Luke, that is something I would have to live with for the rest of my life.*" The claimant's text was included in the bundle at page 90.
43. Mr. Halsey responded on 6 January 2021 at 7.14pm and he said, "*I sat today and took a lot more notice of the effect on the office of working from home. It confirmed what I already know. I appreciate what you are trying to do but it doesn't work – maybe it worked 1 day a week, but it will not work for an indefinite period. I have to consider the impact of your decision on your colleagues and my company and advise that I am unable to sustain your position as CM working from home. Therefore, I urge you to consider alternative options to include the support we are able to offer you in the workplace or request to be released for a period of time to see how the situation evolves. I reiterate that I fully sympathise with your situation but I have to be seen to be fair to all.*" Mr. Halsey's reply was included in the bundle at page 91.

44. The claimant queried what Mr. Halsey meant by being released, did he mean furlough or should he hand in his notice. The government advice at that time urged employers and employees to discuss their working arrangements and employers were advised to take every possible step to facilitate their employees working from home. The claimant sent this guidance to Mr. Halsey by text message on 6 January at 9.13pm and this was included in the bundle at page 95.
45. Mr. Halsey responded to the claimant's messages by email on 7 January 2021 at 4.57pm. His email was included in the bundle at pages 100-101. Mr. Halsey stated he respected the claimant's decision to remain at home to shield his son and the issue as he saw it was how that impacted on the office, and he didn't believe that the claimant could effectively carry out the role of contract manager from home. He stated the claimant not being present in the office meant he was not up to date with what was happening with the engineers, and it meant duplication of work for the administrative staff as they had to have a telephone call with the claimant to explain what was happening at the office to him.
46. Mr. Halsey also raised the issue of having to consider an alternative role for the claimant to enable him to work from home full time. Furthermore, he was unwilling to offer the claimant a further period of furlough given the impact on other employees who may also have a need for it as schools were closed at that time and other employees had childcare issues but importantly, there was work for the claimant to do and that differed from the position in March 2020 when there was less work available.
47. Mr. Stevie Berry gave evidence regarding his experience of the claimant working from home and the impact it had on him as an apprentice engineer. His evidence was that when the claimant was working from home, he missed one in every five calls, that he heard the claimant's children in the background and the claimant did not always have all the information he needed. In relation to the last point, Mr. Berry confirmed that was no different to when the claimant was working on site away from the office.
48. The claimant replied by email on 8 January 2021 and asked Mr. Halsey whether he wanted to have a conversation. His email was included in the bundle at pages 98-100. He suggested making the office white board accessible electronically on a shared platform so that it could be accessed remotely. This would remove any duplication for the administrative staff and provide him with access to all the relevant real time information that sat within the office to enable him to work effectively from home or any other location. The claimant offered to set that up for the respondent. It would also avoid the need for the information to be transcribed from the white board onto a spreadsheet later that did involve duplication of effort.
49. Regarding the other problems identified by Mr. Halsey such as engineers experiencing problems on site and the claimant being unaware if not in the office, the claimant responded this could also be dealt with remotely. All the engineers used vehicles with trackers so he could access their live locations and any problems could be resolved via mobile calls rather than his office landline. The claimant stated these were precisely the reasonable steps the government envisaged in its guidance for employers to facilitate employees working from home.

The claimant stated he hoped to receive the vaccine in February 2021, and he would only be required to work from home until the government changed its guidance on lockdown. He also offered to use his accrued but untaken annual leave in the meantime. The claimant had his vaccination on 29 February 2021.

Redundancy

50. Mr. Halsey did not agree the claimant's request to have a conversation and he emailed the claimant again on 12 January 2021. Mr. Halsey stated the office team were already under pressure and he was not prepared to increase their workload by implementing the steps suggested by the claimant. Mr. Halsey referenced his own health difficulties and those of Ms. Knights and that the claimant's position was impacting on both, and he would rather close the business than risk their health. To that end, Mr. Halsey confirmed he had spoken to his financial advisors and the claimant's colleagues, and he planned to work towards closure by downsizing and restructuring the business. He did not intend to replace the three engineers who left during the first lockdown, nor would he pursue new contracts for the business. As such, he could not justify a full-time salary to an employee who he was unable to offer full time work to at home and therefore he proposed a redundancy package to the claimant. His email was included at pages 102 & 103 of the bundle.
51. This was the first-time redundancy had been raised with the claimant and it was not in a consultative manner. Rather than informing the claimant he was at risk of redundancy, Mr. Halsey informed him he was to be made redundant without warning or discussion. The Tribunal finds he had already made his decision.
52. Ms. Dolman confirmed that Mr. Halsey spoke to her and her colleagues regarding the claimant working from home with effect from 5 January 2021. She said the meeting was to figure out what to do with the claimant's work, and it was reallocated amongst the remaining staff who were present in the office.
53. The claimant responded the following day and submitted a grievance to Mr. Halsey. He complained of not being able to meet with Mr. Halsey to discuss the issues, he also provided an annotated copy of the company's covid risk assessment and why he did not believe the respondent's office was a safe environment for him to work in.
54. The respondent's covid risk assessment was developed following a spot check by Rundles Limited on behalf of the Health & Safety Executive. The claimant annotated the document, and it was included in the bundle at pages 106 - 117. One of the risks identified was the risk of serious illness or death from covid-19 and one of the control measures they identified to reduce that, and where it was appropriate and practical, consideration was to be given to home working. A further risk identified was the increased risk of infection in the office environment and again, the control measure identified to reduce that was consideration of home working and whether the employee's duties could effectively and efficiently be carried out from home.

55. The claimant was also aggrieved that Mr. Halsey would not consider any of the options he had proposed to enable him to work effectively and efficiently from home nor did he seem to appreciate the impact of the situation on his mental health.
56. Mr. Halsey replied to the claimant's grievance on the 14 January 2021. He again replied by email and that was included in the bundle at pages 118-120. Mr. Halsey began his reply by pointing out he couldn't meet with the claimant given the circumstances i.e., because he was working from home but there are remote means of meeting that could have been utilised such as teams, zoom or FaceTime. The Tribunal finds Mr. Halsey did not want to discuss these issues directly with the claimant as his mind was made up and closed to any of the claimant's suggestions.
57. Mr. Halsey dismissed the claimant's comments on the risk assessment as the claimant was not a designated home worker (save for one day a week) and therefore, he didn't believe those control measures were applicable to him. Again, he reiterated he was unable to facilitate the claimant working full time at home for an indefinite period. He also stated that none of his employees had contracted the virus despite the claimant's comments on the veracity of the respondent's compliance with the risk assessment. Furthermore, every suggestion made by the claimant had been considered by Mr. Halsey and the claimant's colleagues and none were workable. Mr. Halsey's concerns regarding the claimant working from home full time were drawn from his experience of the claimant's one day working from home per week and his own attempts to do so while unwell which he believed placed the office staff under considerable pressure.
58. The claimant replied by email on the 15 January 2021 pointing out that Mr. Halsey had not raised any concerns with him regarding his one day working from home during the previous three years. The claimant's email was included in the bundle at pages 121-123.
59. Ms. Knights confirmed in evidence that another of the respondent's employees took three weeks of paid leave to deal with a childcare emergency in January 2021 which the respondent accommodated. The respondent also accommodated some of the administrative team's children working in the empty office space above their main office during this period, yet it could not accommodate the claimant.
60. On 18 January 2021 Mr. Halsey sent the claimant a word document purporting to bring finality to the stream of emails. On the same date Mr. Halsey also sent the claimant formal notice of redundancy. Both documents were included in the bundle at pages 124 - 129.
61. In the formal notice of redundancy Mr. Halsey states, "*it is of no benefit for the company to agree to your request to work from home for the foreseeable future. We are also unable to find alternative work to offer you.*" The claimant was provided with 3 weeks' notice of redundancy in line with his service, informed his employment would terminate on 18 February 2021 and he would receive a statutory redundancy payment of £1,614.00. The claimant was also offered the right of appeal.

Appeal

62. The claimant submitted an appeal on the 22 January 2021, and this was included in the bundle at pages 133 – 137. The main ground of appeal being the respondent had made no attempt to accommodate the claimant's request to work from home as advised by the government and instead the respondent chose to make the claimant redundant. The claimant also complained his notice period was incorrect, that no fair process had been carried out, and he recounted the chronology of events that preceded his dismissal on the grounds of redundancy.
63. Mr. Halsey responded to the claimant's appeal by letter dated 25 January 2021. Mr. Halsey did not meet with the claimant to discuss his appeal. He repeated that redundancy was the only option so far as the company was concerned and he would not countenance any of the other options suggested by the claimant. Mr. Halsey provided additional clarity on why the claimant's request to work from home was not acceptable to the company. He stated it would be detrimental to the company's finances and the claimant's colleagues' workloads. The claimant would also be unable to meet the respondent's clients' demands for site visits when requested and that would impact on the quality of the services provided. Mr. Halsey also considered that there was insufficient work available for the claimant to undertake from home. This is the quandary at the heart of this case. Both parties accept that contract manager work remained but for the respondent that work had to be undertaken in the office. For all those reasons the claimant's redundancy remained. Mr. Halsey stated he had to make better use of the talents in the business to improve efficiency and reduce costs. A copy of Mr. Halsey's letter was included in the bundle at pages 139-141.
64. Notwithstanding Mr. Halsey's letter of 25 January 2021, the claimant received a further letter from Ms. Knights on the 12 February 2021. Ms. Knights confirmed that Mr. Halsey was now undertaking the claimant's tasks and as he had returned his work laptop and approached ACAS for assistance, she had inferred the claimant had resigned. She accepts the respondent had not followed a process in respect of the claimant's dismissal; *"ordinarily, we would have taken you through a formal redundancy at this stage given that you were our only contract manager, and there is now no need for your services."*
65. As that was the case, Ms. Knights offered the claimant an appeal meeting and to treat the appeal hearing *"fairly"*, Ms. Tasneem Virani an independent HR Consultant had been instructed to hear the appeal via zoom.
66. Ms. Virani confirmed in evidence that she had not dealt with an appeal hearing before and she didn't question why the respondent wanted her to carry out this exercise when Mr. Halsey had already dismissed the appeal on the 25 January 2021, nor did she refer to that fact in her outcome report.
67. Ms. Knights' letter appeared in the bundle at pages 144-145, and she was candid during her evidence that was a result of legal advice the respondent had obtained. This was an extremely confusing development for the claimant who understood he had been made redundant and his appeal had already been refused by Mr. Halsey.

Ms. Knights confirmed that she never made anyone redundant in her 22 years' service with the respondent and she was not familiar with the process.

68. The claimant was by this point struggling with his mental health and had been prescribed antidepressants, which he confirmed in evidence he had been taking on and off since the birth of his son. Ms. Virani contacted the claimant to arrange the appeal meeting, and she was persistent in requesting a date and time to meet with him and she informed him if he was not willing to engage with the process she would proceed in his absence. This only served to exacerbate his ill health. The claimant's wife wrote to Ms. Virani to explain the situation by email on the 16 February 2021 and this exchange was included in the bundle at pages 149 - 150.
69. The claimant provided a fit note regarding his health to Ms. Knights and Ms. Virani agreed to delay her meeting with him until 1 March 2021, but she was not prepared to delay any further. She told the claimant and his wife that she apologised for the additional stress this must be causing them, but she wanted to make an impartial decision to draw the matter to a close. Ms. Virani's email of 17 February 2021 was included in the bundle at page 153.
70. The meeting took place on 1 March 2021 by zoom and it consisted of Ms. Virani interviewing the claimant. It could not be described as an appeal hearing as the respondent was not present.
71. The claimant recorded the meeting with Ms. Virani on 1 March 2021 without her knowledge or consent. In evidence he stated his memory was poor at that time and he needed the recording to recall what had happened. The Tribunal accepts that may have been true in part. The claimant was very mistrustful of the respondent and the process it was following, and he was unwell but there was no reason not to have informed Ms. Virani of the recording. The transcript of the recording was included in the bundle at pages 232-251.
72. Ms. Virani described the claimant as hostile at the beginning of the meeting. The transcript records that he didn't understand the purpose of her involvement as Mr. Halsey already responded to his letter of appeal. He also stated he didn't believe there was a genuine redundancy situation as both Mr. Halsey and the claimant were working flat out. Ms. Virani confirmed she had spoken with Ms Knights and Mr. Halsey who had informed her that the respondent's business had reduced by 50%. However, Ms. Virani agreed in evidence she accepted that without considering any corroborating financial evidence to determine whether that was an accurate description of the business.
73. The claimant explained to Ms. Virani that he was most upset that Mr. Halsey dismissed all his suggestions to keep working albeit from home. Also, he felt the emails regarding the situation were aggressive and no process was followed. The claimant also informed Ms. Virani his request to work from home was only until he was able to obtain the covid-19 vaccine and had Mr. Halsey spoken to him directly about this he would have understood that. They also discussed the claimant's position that the work available had not diminished and that must have put an enormous amount of stress on Mr. Halsey to do both his job and the claimant's. The claimant became upset during the meeting and his confusion as to why he

was being required to participate in the interview when he had already been made redundant and received his redundancy payment was abundantly clear.

74. Ms. Virani stated in evidence that in her opinion the respondent had no knowledge of the concepts of consultation, fair selection, or suitable alternative employment. In her words the respondent did “*everything very casually*”. Ms. Knights provided Ms. Virani’s report to the claimant on 9 April 2021 with a covering letter from Mr. Halsey although drafted by the respondent’s legal advisors summarising the outcome. This was included in the bundle at pages 171 - 184.
75. Ms. Virani found there was a genuine redundancy situation, but the process had not been followed. The respondent maintained that even if a process had been followed the outcome would still have been the same as Mr. Halsey had taken over the claimant’s duties. Also, no consideration was necessary in respect of a pool or selection criteria as the claimant was the only contract manager employed by the company. Furthermore, no suitable alternative employment was available for the claimant. Also, and for the first time, it was suggested that had the claimant remained employed by the respondent a capability process would have been implemented. In the circumstances, the claimant’s appeal was dismissed.
76. The respondent filed its accounts for the year ending 31 March 2021 which showed a profit of £51,606.00. A copy of the respondent’s profit and loss account was included in the bundle at page 339. Mr. Halsey accepted in cross examination that he purchased two vehicles for the business in the sum of £20,000.00 in September 2020 and January 2021 notwithstanding the financial concerns and his intention to downsize the business. The respondent’s business remains trading, but Mr. Halsey stated it will return a loss for the year ending 31 March 2022.
77. Ms. Knights confirmed in evidence that Paul McCarthy joined the company as Director of Operations in June 2022. She accepted his role encompasses the role of contract manager, he works in the office and has taken over the administrative side of Mr. Halsey’s role. No other employees have been made redundant by the respondent since the claimant’s dismissal.

Submissions

78. The claimant submits he was made redundant because of his request to work from home in January 2021 and that is not a fair reason for dismissal. Furthermore, there was no genuine redundancy situation. The respondent’s business has not closed and in fact the respondent has recruited new staff, bought new equipment and there was not at the time the claimant was dismissed or since been a diminution or cessation in the work of the particular kind carried out by the claimant.
79. Also, the claimant submits the respondent had no other substantial reason to justify his dismissal. Requesting to work from home for a period of 6 weeks was not a substantial reason to justify his dismissal nor would the claimant have been dismissed for misconduct. The allegations regarding the claimant’s capability and the loss of the Go Native, Hans Road and Engie contracts are fabrication on the part of the respondent. The claimant was not subject to any formal capability or disciplinary process during his employment.

80. In addition to there being no fair reason for dismissal, the respondent did not act reasonably in dismissing the claimant. There was no consultation, there was no consideration of a redundancy pool, there was no fair selection criteria, consideration of suitable alternative employment or furlough and the claimant's appeal was dealt with by Mr. Halsey who also decided the claimant should be dismissed on the grounds of redundancy. The claimant submits the decision to dismiss him was a fait accompli and the instruction of Ms. Virani was a sham to try and remedy the non-existent process followed by the respondent. The second appeal conducted by Ms. Virani was no such thing as she accepted at face value the respondent's position without question.
81. The claimant disputes that he would have been dismissed if a fair procedure had been followed as the respondent's position that it was downsizing the business with a view to closure has not transpired. The respondent has also hired new staff to undertake contract management since his dismissal.
82. The claimant denies he contributed to his dismissal as he was not responsible for the contractual losses suffered by the respondent and he was not unwilling or unable to return to working in person indefinitely, he asked to do so for a period of 6 weeks until he could be vaccinated.
83. The respondent submits the respondent has established a fair reason and the main or principal reason for dismissal was redundancy and there was a genuine redundancy situation due to the respondent restructuring its business and requiring fewer staff due to downsizing.
84. The respondent submits it acted reasonably as treating redundancy as a sufficient reason for dismissal in all the circumstances. The respondent provided adequate consultation via email, the respondent applied its mind to the redundancy pool and a pool of one can be within the band of reasonable responses and the claimant was provided with an independent appeal officer who remedied any defect in the respondent's process.
85. It also submits the claimant did contribute to his dismissal as his actions resulted in the loss of the respondent's contracts of significant value. The most notable being the Engie contract with compliance issues dating back to 2019. Further, the claimant caused or contributed to his dismissal by virtue of his capability and insistence on working from home. If the Tribunal does find that the claimant was unfairly dismissed any award should be reduced by 100%. Furthermore, the claimant would have been made redundant at some point in any event due to the downsizing of the business.

The Law

86. The unfair dismissal provisions are contained in **Part X of the Employment Rights Act 1996**.

s. 94 The right.

(1) An employee has the right not to be unfairly dismissed by his employer.

s.95 Circumstances in which an employee is dismissed

- (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) and section 96, only if)—
- (a) the contract under which he is employed is terminated by the employer (whether with or without notice)

s.98 General

- (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—
- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
 - (b) relates to the conduct of the employee,
 - (c) is that the employee was redundant, or
 - (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment
- (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
 - (b) shall be determined in accordance with equity and the substantial merits of the case.

s. 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.

Redundancy

87. The Employment Appeal Tribunal in **Safeway stores plc v Burrell [1997] IRLR 200**, and endorsed by the House of Lords in **Murray and anor v Foyle Meats Ltd [2000] 1 AC 51**, held there is a three-stage test for Tribunals in deciding whether an employee has been dismissed for redundancy. First, was the employee dismissed? Secondly, if so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished or were expected to do so? If yes, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?
88. How a redundancy situation arises may be relevant to the fairness of a dismissal but not whether a genuine redundancy situation exists. In **Berkley Catering Ltd v Jackson UKEAT/0074/20/LA(V)** the employer arranged its business so that its director took over the claimant's duties in addition to his own duties. This established a redundancy situation. The Employment Appeal Tribunal held; *".. A redundancy situation under s.139(1)(b) either exists or it does not. It is open to an employer to organise its affairs so that its requirement for employees to carry out work particular work diminishes. If that occurs, the motive of the employer is irrelevant to the question of whether the redundancy situation exists."*
89. In **McCrea v Cullen and Davison Ltd 1988 IRLR 30, NICA** the Northern Ireland Court of Appeal held that if fewer employees are needed to do work of a particular kind, there is a redundancy situation. Thus, a redundancy situation will arise where an employer reorganises and redistributes the work so that it can be done by fewer employees.
90. There is also no need for an employer to show an economic justification for the decision to make redundancies as stated by the Employment Appeal Tribunal in **Polyfor Ltd v Old EAT 0482/02**.
91. Where the employer establishes the reason for dismissal and that is a potentially fair reason, the Tribunal must consider whether the dismissal was fair or unfair in accordance with s.98(4) Employment Rights Act 1996 depending on whether, in the circumstances (including the size and administration resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and in accordance with equity and substantial merits of the case.
92. In determining fairness of a redundancy dismissal, the Employment Appeal Tribunal in **Williams v Compare Maxam Ltd [1982] IRLR 83** outlined the matters which a reasonable employer might be expected to consider; fair selection of pool, fair selection criteria, fair application of criteria, seeking alternative employment and consultation on all these matters. However, it is not for the Tribunal to decide its standards, and fall into the substitution mindset, it is for the Tribunal to ask whether the dismissal was within the range of conduct open to a reasonable employer.
93. Furthermore, the House of Lords decision in **Polkey v AE Dayton Services Ltd 1988 ICR 142, HL** established procedural fairness as an integral part of the

reasonableness test in s.98(4) Employment Rights Act 1996. Lord Bridge stated, *“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.”*

94. The size and administrative resources of a company are relevant to the determination of reasonableness in s.98(4) Employment Rights Act 1996 but cannot excuse a total absence of consultation as held by the Employment Appeal Tribunal in **De Grasse v Stockwell Tools Ltd 1992 IRLR 269, EAT**.

95. More recently, the Employment Appeal Tribunal held in **Mogane v Bradford Teaching Hospitals NHS Foundation Trust and anor 2022 EAT 139** that for consultation to be genuine and meaningful, a fair procedure requires that it take place at a stage when the employee can still potentially influence the outcome.

Some Other Substantial Reason

96. Some other substantial reason must be of a kind to justify the dismissal of the employee holding the job in question. The reason needs to be substantial and genuine. In **Harper v National Coal Board 1980 IRLR 260, EAT**, the Employment Appeal Tribunal held that an employer cannot claim a reason is substantial if it is whimsical or a reason no ordinary person would entertain. In **Cobley v Forward Technology Industries plc 2003 ICR 1050, CA** the Court of Appeal stated that identifying the substantial reason for dismissal does not require consideration of fairness which comes at a later stage.

97. If the employer can establish the reason for dismissal was substantial it is then for the Tribunal to consider whether it acted reasonably within s.98(4) Employment Rights Act 1996 in treating it as a reason to dismiss and did that fall within a range of reasonable responses open to a reasonable employer.

Conclusions

98. There is no dispute the claimant was dismissed by the respondent but what was the main or principal reason for the claimant's dismissal? The respondent states it was redundancy or some other substantial reason. The Tribunal finds the reason for the claimant's dismissal was his request to work from home in accordance with the government's guidance on 5 January 2021. That request precipitated the claimant's dismissal. This was evident in the adverse reaction of Mr. Halsey in the office that morning, his contention that he was not prepared to put Ms. Knights through it again and his point-blank refusal to discuss the request with the claimant in person.

99. It also manifested in Mr. Halsey adopting an entrenched but mistaken belief that the claimant had requested to work from home indefinitely. This culminated in the claimant's letter of redundancy dated 18 January 2021 in which Mr. Halsey states clearly the claimant's request to work from home indefinitely is of no benefit to the business. For those reasons, and albeit the claimant's dismissal was labelled as a redundancy, the Tribunal finds that was a sham to cover up the real reason for the

claimant's dismissal. The respondent simply would not tolerate the claimant working from home on a full-time basis even if only for a short period.

100. In the alternative, and if the Tribunal is wrong about the reason for the claimant's dismissal, the respondent has not shown the reason was redundancy or some other substantial reason.

101. In relation to the definition of redundancy and establishing the requirement 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. The respondent has not shown that was the case.

102. The claimant was clear that he was just as busy in January 2021 as he was pre furlough including with site work. The respondent had lost three clients during his period of furlough and had a fourth contract loss pending but it had also gained a contract with Interserve and the claimant was working on the Free Mantle Trust contract consisting of multiple care homes and other schools.

103. Ms. Dolman stated the respondent reallocated the claimant's work away after 5 January 2021, but this was only as consequence of the claimant requesting to work from home and not before. Therefore, it can be distinguished from **Berkley**. Although Mr. Halsey maintained there would still have been a redundancy situation if the claimant had remained working in the office after 5 January 2021, the Tribunal is not satisfied that is true. The issue was the claimant wanted to work from home and not in the office and it was for that reason the respondent restructured its work and removed the claimant's contract management duties creating in its mind a redundancy situation.

104. Removing the claimant's work and redistributing it to Mr. Halsey and others as he requested to work from home did not amount to a genuine redundancy situation because the requirements for employees to carry out work of a particular kind had not ceased or diminished. Even if the requirement for employees had ceased or diminished that was not the reason for the claimant's dismissal.

105. Nor has the respondent shown the claimant's request to work from home following 5 January 2021 and until he was vaccinated, or the government changed its guidance on working from home was a substantial reason justifying the claimant's dismissal. Such a reason must be substantial and genuine and in accordance with **Harper**, it cannot be a substantial reason if no ordinary person would entertain it.

106. In the claimant's circumstances with an extremely clinically vulnerable child for whom he cares and the risk transmission presented and, given all forms of industry were required to adapt their working practices following the onset of the pandemic to enable work to be carried out from home, no ordinary person would consider the claimant's request to be a substantial reason to dismiss. Furthermore, other than vague assertions that it would have resulted in additional work for the administrative office-based staff, the respondent was unable to provide any specific reason why the claimant could not carry out his duties from home as he had been doing once a week for more than 3 years in any event.

107. Therefore, the respondent has not established a fair reason for dismissal. For completeness, even if it had, the Tribunal would have concluded the respondent did not act in a procedurally fair manner. The procedure they adopted was not within the range of reasonable conduct open to a reasonable employer for a multitude of reasons and even taking into consideration the size and resources available to the respondent it cannot excuse the total absence of any fair procedure whatsoever.
108. The claimant was given no warning of his dismissal; it was presented as a fait accompli and after the respondent had made its decision. There was not even one meeting to discuss the situation before the claimant was issued with formal notice of redundancy on 18 January 2021. The respondent did not follow its own company handbook in terms of how it should approach the redundancy situation. The respondent did not turn its mind to any pool of selection or any fair selection criteria. Nor would it entertain any of the claimant's suggestions in order that his dismissal might be avoided. There was simply no discussion or engagement, just rejection via email.
109. The respondent's actions were at complete odds with the government's guidance at that time that all reasonable steps should be taken to accommodate home working and furlough was to be utilised as a mechanism to avoid redundancies. The respondent had a closed mind from 5 January 2021 when the claimant submitted his request to work from home. The Tribunal rejects the respondent's contention any procedural defects were rectified on appeal. The appeal was at first dismissed entirely by Mr. Halsey and then as an afterthought and following legal advice, the respondent instructed Ms Virani who had no experience of these matters and simply took the respondent at its word without question. The appeal did not serve to rectify the procedural errors that came before, it only served to compound them.
110. Therefore, and notwithstanding the respondent has not established a fair reason for dismissal, the procedure adopted by the claimant was beyond the range of reasonable conduct open to a reasonable employer on all counts in any event.
111. Was there a reasonable chance the claimant would have been fairly dismissed after the completion of a reasonable consultation process or for some other reason? The Tribunal is not satisfied the claimant would have been fairly dismissed if a reasonable consultation process had been followed as there was no fair reason for dismissal in the first instance. Furthermore, and although the respondent submits the claimant would have been made redundant in any event because of the business downsizing, the respondent provided no evidence that was in fact the position. Although the business returned a loss for the year ending 31 March 2022, it remains trading and new staff have been recruited and their duties include an element of contract management. Therefore, the Tribunal does not find the claimant would have been fairly dismissed for some other reason.
112. Did the claimant contribute to his dismissal by blameworthy conduct? The respondent relies on the claimant's capability resulting in large contractual losses and his alleged unwillingness/inability to work from the respondent's office after 5

January 2021. The Tribunal found the claimant was responsible for the loss of the Go Native contract. However, the claimant was not subject to any disciplinary process because of that contractual loss. Although the respondent made much of its contractual losses in these proceedings, they were never raised with the claimant during his employment. That being the position, it did not contribute to the claimant's dismissal.

Employment Judge J Galbraith-
Marten

Date: 13 April 2023

Judgment and Reasons sent to the
parties on: 16.4.2023, GDJ