EMPLOYMENT TRIBUNALS

Claimant: Mr Bryan Joseph

Respondent: Heathrow Express Operating Company Limited

HEARD AT: Bury St Edmunds

ON: 19, 20 & 21 June and 5 July 2023

BEFORE: Employment Judge Michell, Ms Susan Laurence-Doig and Ms Janina Schiebler

REPRESENTATION: Claimant: In person
Respondent: Mr Declan O'Dempsey (counsel)

RESERVED JUDGMENT

1. By consent:
    a. The claimant's breach of contract claim in relation to alleged lost staff privileges in the form of a 75% discount on all railway travel and free travel on the Heathrow Express ("the travel claim") is stayed for a period of **two months** from the date this judgment is sent to the parties.
    b. The parties are **within 14 days** of the expiry of the said two month period each to write to the tribunal (jointly, if practicable) setting out their proposed directions in relation to the travel claim.

2. Each and all of the claimant's other claims (including unfair dismissal, age discrimination, equal pay, redundancy pay, notice pay, holiday pay, and any other claim for monies or other relief) are dismissed.

REASONS

BACKGROUND

1. The claimant is now aged 67. He was employed by the respondent from 21 February 2011 until his dismissal, purportedly for redundancy and in the context of a business reorganisation during lockdown, on 30 June 20220.

2. Following compliance with the Early Conciliation procedure, on 9 September 2020 he presented a claim alleging unfair dismissal, sex and age discrimination. He also made a variety of money claims. The respondent disputed liability for all claims, and made clear in the grounds of resistance that the precise bases of the claims were not yet understood.

3. At a case management hearing before EJ Anstis on 11 June 2021, there was some limited clarification of the claims. In particular, it was ascertained that the age discrimination claim related to the dismissal. (The case management summary explains that a deposit order was made in relation to the age discrimination claim, but we paid no attention to that fact when assessing its merits.) The sex discrimination claim amounted to an assertion that the claimant was not paid the same as a female comparator, Carole Crookes, doing 'like work'. It was envisaged that the equal pay claim would be dealt with separately, with directions being made at a further preliminary hearing. However, this appears never to have been actioned.

4. EJ Anstis explained that "the claims for notice pay and other payments all… seem to arise on [the claimant's] dismissal". The precise bases for the various money claims was not fully explored at that time, and no list of issues was articulated before or at the preliminary hearing or prepared by the parties in good time before the final hearing.

5. Directions were made for preparation for a final hearing. These included the usual directions relating to witness statements.

HEARING

Evidence

6. The hearing was a remote hearing on the papers, which was not objected to by the parties. The form of remote hearing was by CVP. A face to face hearing was not held because it was not practicable and all issues could be determined at a remote hearing.

7. The hearing had been listed for 4 days. That time period was reduced to 3 days, due to lack of judicial resource, the parties having indicated that 3 days ought to suffice. The parties helpfully agreed with our suggestion that liability should be determined first, with remedy thereafter being addressed as appropriate.

8. We heard oral evidence from the claimant. The two witness statements he had produced provided almost no detail of the claims he was making, and no reference to pages in the bundle, despite the directions given for witness statement preparation in the 11 June 2021 order. So, with the tribunal's permission, the claimant adopted the content of the particulars of claim in the ET1 as additional evidence. He also referred in his evidence to various parts of a 'full statement of claim' document (of 40 pages, plus appendixes) which he had produced at some point in 2021. He was in any event questioned in detail on his various claims, and gave full responses to those questions.

9. The claimant also produced a document which had the name of Carole Crookes on it, and which appears to have been emailed by her to the claimant on 17 June 2020. That document purported to be a witness statement. It is unsigned, and has no statement of truth on it. We gave it the very limited weight that such a document can attract. For the respondent, we heard from Mr Mike Morgan-Batney (Head of Customer Experience) and Fiona Hobbs (Head of Employee Relations and Engagement). We were referred to an agreed 294 page bundle of documents, to which the respondent added one page (146A) as the hearing progressed. The claimant produced some additional documents during his closing submissions, but he did not in fact refer to them.

Issues

10. The first day of the hearing was spent trying to ascertain what the issues in the case were. We used as a starting point a draft list of issues that Mr O'Dempsey had prepared at the tribunal's request shortly before the hearing.

11. The process of ascertaining the issues took all of day 1 (excluding some reading in time for the tribunal), and the start of day 2. By the end of the day 1, it appeared that the draft list of issues was close to agreement. Mr O'Dempsey[1] and the claimant planned to discuss between themselves any loose ends. At the start of the day 2, we were given a revised list of issues which set out almost everything the parties agreed

[1] Mr O'Dempsey identified at the start of the hearing that he and the Employment Judge were at the same chambers. The claimant indicated that he did not consider any issue arose as a result of that fact. We agreed.

were the only points to determine, save for a claim for £15,000[2] which related to payment in relation to holiday since February 2012 The claimant's case is that he was contractually entitled to take 26.4 days leave p.a., but was only able to take 14 days p.a. after year 1. It was the respondent's position that such a claim was not pleaded[3], was based upon an incorrect interpretation of the claimant's contract and rights to holiday, and that in any event could only go back for a two-year period, pursuant to s.23(4A) &(4B) of the Employment Rights Act 1996 ("ERA"). (This last point was sensibly conceded by the claimant in his closing submissions.)

12. The claimant confirmed that the claim for 'overtime holiday pay', for which £179.74 is sought in the ET1, was now for £92.80 because of a payment the respondent made to him in January 2021, post-ET1 ("the overtime claim"). During the respondent's evidence on day 2, he confirmed that the overtime claim was in relation to a 'holiday pay top up' or 'annual leave premium' which the respondent paid in January each year as a lump sum in relation to overtime done. The claimant's case is that he was not paid such a sum in relation to his work during furlough in, he clarified, (just) May and June 2020 when he represented union members in negotiations in some remote Teams meetings whilst on furlough. The respondent's case on the point was that, by agreement with the union, and because all employees were on furlough at that time (and were being paid 80% of their wage anyway), no payment was due in respect of attendance for such purpose- which in the circumstances of furlough would not (the respondent said) really be 'overtime' anyway.

13. As regards the age discrimination claim, the claimant clarified that his claim was of direct discrimination, but that he was not asserting he was chosen for dismissal because of age. Rather, he asserted that, because of his age, he found it far more difficult as a then-64 year old to find other work than someone who was younger (i.e. aged 55) would have done. He also said that someone who was younger and who therefore had caring responsibilities for children would probably have accepted the revised job offer which he had received but refused, out of necessity.

14. As for the equal pay claim, the respondent accepted that Carole Crookes did the same job as the claimant, and that she was paid more. It relied on administrative errors as accounting for the disparity, as a genuine material factor ("GMF") defence. The claimant accepted that such a claim could only go back 6 years.

[2] This figure, and most of the other figures for which a claim was made as set out in the list of issues below, were modified by the claimant in his written closing submissions.
[3] The ET1 refers to a £15,079 claim for "Lost Holidays 02/2011 to 06/2020 =- 115 Days". So, albeit the claim is not clearly articulated, we consider it is discernible from the pleadings.

15. Whilst in further discussion about the list of issues on the morning of day 2, the claimant said he wanted to advance as an unlawful deductions claim the contention that he was due 'overtime holiday pay' for the period of June to December 2017, in the sum of £825.62. He accepted that such a claim was not included in his ET1. He applied to amend the claim. The application was opposed. Having heard from the parties, we rejected it. First, it seemed to us that such allegations were brought too late as an unlawful deductions claim, in the light of s23(4A) & (4B) ERA. Second, and in any event (bearing in mind guidance given in **Selkent** and subsequent cases), the application was made far too late. It was not in the original claim. It was not mentioned in the witness statements. Nor was it mentioned in the 'full statement of claim' document which the claimant produced at some point in 2021, and which at no point had itself been the subject of an amendment application. (The claimant took us to paragraph 5.3 of that document, and asserted that the matter was raised there. It does not appear to us to be- certainly not in terms that could be clearly understood. He suggested that it was raised in the excel spreadsheet which is referenced in that paragraph. We were not given a copy of that spreadsheet, which is not in the agreed bundle provided to the claimant last year.) The first time the matter was expressly raised by the claimant as something for addition to the claim was on day two of the hearing. It was prejudicial to the respondent to have such matters raised at such a very late stage, some 5.5 to 6 years after the event. The balance of prejudice weighed against introduction of the claim.

16. At the start of day 3, when the claimant was asked to confirm that the list of issues was now agreed and definitive, he pointed to the reference in his ET1 to alleged lost staff privileges in the form of travel -which he explained was a 75% discount on all railway travel, and free travel on the Heathrow Express ("the travel claim"). That reference in the ET1 is under the header 'compensation', rather than being articulated as a separate breach of contract claim.

17. After some discussion, which took some time, the claimant confirmed that he also wanted to pursue the travel claim, as a breach of contract claim. He asserted that the respondent's handbook entitled him to the above staff privileges in the event of redundancy.

18. Mr O'Dempsey then confirmed that the claimant was a party in a multiple claim (Case 2307667/2020), and told me that the travel claim was raised and had been rejected in that claim. He told me that the claimants' appeal had passed the sift, and was pending in the Employment Appeal Tribunal. He could not ascertain if, as the claimant told us, the multiple claim covered precisely the same point as in the ET1.

19. The parties agreed that the appropriate course would be to stay the travel claim, for a two-month period. The parties would thereafter need to inform the employment tribunal in writing as to their proposed next steps.

20. Subject to the above, the issues for us to determine were agreed as set out in the parties' finalised list of issues, which was as follows:

Unfair dismissal
1. The claimant was dismissed by reason of redundancy. Was the claimant dismissed because he was in a post which was redundant?
2. Alternatively was the claimant dismissed due to a business reorganisation constituting a substantial reason of the kind such as to justify the dismissal of an employee holding the position which the claimant held?
3. Did the respondent act reasonably in treating the reason found for the dismissal as sufficient in all the circumstances of the case and having regard to equity in the substantial merits of the case?

Age discrimination
4. The claimant relies upon his age at dismissal: 64
5. The claimant relies on a hypothetical comparator aged 55.
6. Was the claimant in all material respects and the same circumstances as the comparator?
7. Did the claimant receive less favourable treatment than that would have been given to the comparator? The claimant relies on the fact that, being made redundant, he was rendered less employable.
8 Was that treatment given to the claimant because of age?

Redundancy payment
9 Did the respondent pay to the claimant an amount equal to or greater than the statutory redundancy payment? Is the claimant entitled to a statutory redundancy payment in those circumstances? The claimant was paid £12,255.00.
Statutory redundancy payment would have been: £4,081.99 (weekly pay of 302.37 gross)

Notice pay
10 What was the claimant's notice pay entitlement? The respondent says that the claimant's notice entitlement is set out in the contract (p91 bundle) and was to 9 weeks' pay (based on £302.37 per week).
11 Was the claimant paid his full contractual entitlement to notice? Was the claimant paid his full entitlement? The respondent says that the claimant was paid his full

contractual entitlement to notice in his final payslip (p211 bundle) namely £2721.38 (i.e. 9 complete years of service x gross weekly pay of £302.37 = £2721.38)
12 If not how much pay is owing to the claimant? The claimant says £4,905.72 (£1048.23 X 4.68 years). The claimant says that his notice pay should have been worked out using the formula whereby he received 4 weeks' pay per completed year of service.

Holiday pay
13 Was the claimant owed any outstanding holiday pay? If so how much?
(a) The Claimant claims: £92.80 for the period of May 2020 to June 2020. C claims that he should have got overtime premium/holiday pay top up for May and June 2020.
(b) R does not accept that this is an issue: Claimant says that he was entitled to 24[4] days holiday under his contract but was only permitted to take 14 days holiday after year 1.
The claimant claims £15,000 for this head of claim. [claimant to clarify the figures being claimed]
(c) The Respondent argues that the claimant can only claim 2 years' back pay due to the effect of the section 23(4A) and (4B) of the ERA 1996. By reference to the amounts claimed on p216 the maximum compensation for this head would be £710.60

Equal pay
14 The respondent accepts that the claimant was doing the same work as his named comparator, Mrs Crooks.
15. The respondent accepts that the comparator was paid more than the claimant and that the comparator is a woman.
16, Can the respondent show that the difference between the pay of the claimant and his comparator is because of a material factor reliance on which does not involve treating the claimant less favourably than the respondent treats the comparator because of his sex?
(a) Was the explanation (administrative error) genuine and not a sham or pretence explanation?
(b) Was the less favourable treatment due to administrative error in the sense that it was the cause of the disparity? Was it a significant and relevant factor?
(c) Was the reason something other than the difference of sex?
(d) Is it a significant and relevant difference between comparator woman's case and the claimant's?

[4] This is incorrect. The contract refers to a 26.4 day figure.

17 The respondent will argue that the claimant cannot claim for more than 6 years back pay in terms of equal pay (section 132(4), Equality Act 2010).

18. The claimant claims equal pay in the following sums (p216)
2014 256.22
2015 266.41
2016 267.84
2017 295.91
2018 269.13
2019 240.40
2020 201.07

Total £1796.98
Contract claim (stayed on directions)
[19. Was the contract claim (below) determined against the claimant in the multiple claims under case number 2307667/2020 and if so is the matter "res judicata" or is the claimant prevented from bringing the claim before this tribunal because to do so is an abuse of process, on the basis that the issue was (or could have been) raised in that case?
19.1 The contract claim: If not, was the claimant contractually entitled on termination of his employment to Lifetime Rail Staff Travel Privileges including free Travel on Heathrow Express and 75% reduction on rail fares nationally?]

Submissions

21. Evidence concluded on day 3, but there was insufficient time to hear submissions. It was in any event appropriate for the claimant to have some time to prepare his submissions, having had sight of Mr O'Dempsey's written arguments (which were supplied in advance.) We heard submissions on 5 July 2023, and received written arguments from both parties, which were concise and focused, and to which they both spoke.

FACTUAL FINDINGS

Background

22. The respondent runs the express train service from London to Heathrow Airport terminals. The claimant commenced work for the respondent on 21 February 2011. He worked 17.5 hours per week on a half time basis -effectively, job sharing with a colleague- and on a pattern which varied the days of the week on which he worked.

It was expressly provided for in his contract of employment dated 15 December 2010 that he could be asked to work shifts if required.

23. The contract provides, at Clause 6, that his annual leave allowance would be "26.4 days (calculated using average working weekly hours)". He was told by rostering that he was entitled to 14 days' holiday p.a., and since at least 2012 he took 14 days only p.a., without issue or complaint. In particular, at no point did he suggest that he was entitled to 26.4 days of holiday p.a., or that any other half time worker was entitled to/had taken that number of holiday days in a year.

24. The claimant's comparator, Carole Crookes, commenced employment on 12 April 2010. Like the claimant, she performed a CC role, on a half time basis. Her contract was in all material respects identical to the claimant's. So, her Clause 6 was the same.

25. It was Ms Hobbs' evidence that an incorrect template was probably used in the claimant's (and Carol Crooke's) case, which is why the 26.4 day figure appears. She told us that it could not be right that a half time worker had that much holiday- which would presumably mean that a full time worker would be entitled to get twice as much (when that was not and had never been, the case).

26. At all material times, the claimant's job description was customer concierge ("CC"), which role was based on the trains and focused primarily on customer service, including help with inquiries, onward journeys etc.

27. By early 2020, the respondent had about 78 employees working as CCs, 69 of whom worked full time (35 hours p.w.). Some CCs (like the claimant) worked half time (17.5 hours p.w.), and some part time. The respondent also had about 45 employees working in the role of Mobile Sales Assistant ("MSA"), 43 of whom worked full time. That role focused primarily on sales (and thus was commission based), and was centred on the airport arrivals routes.

Pay increases

28. In 2014, a new pay deal was agreed which covered increases to pay on 1 January 2016. A pay freeze was then supposed to be put into effect. However, due to an administrative error, three of the claimant's colleagues including Carole Crookes were not made subject to that salary freeze, and mistakenly received a pay increase instead. So, by 1 January 2016, she was receiving £162 p.a. more than the claimant (who had been properly 'frozen'). On 1 January 2019, another pay award was agreed.

Due to another administrative error, some of the CC staff members received a salary increase of £200 more than the agreed figure, and the claimant and one other CC employee received an increase of £400 -again, in error. (This meant that when the claimant's redundancy payment was calculated in 2020, it was reckoned by reference to an incorrectly inflated figure.)

29. In 2018, the fact that errors had led to a salary discrepancy was noted by the respondent. But unfortunately, due (we accepted) to the logistical challenges of the pay department being based in Scotland, and a resulting 'disconnect' in the respondent's administrative function, the error was not rectified as it ought to have been.

30. The claimant did not suggest to the witnesses or in his own evidence that anything other than 'mistake' or ineptitude was causative of the initial or continued disparity.

Redundancy situation

31. By about early 2020, the respondent was under significant commercial threat. This was because the Elizabeth line was in development, and was expected considerably to reduce the number of customers using the Heathrow Express line. Other competing rail services added to that commercial pressure.

32. The sudden onset of COVID and lockdown made matters suddenly and considerably worse. At the beginning of that 2020, around 480,000 passengers used the Heathrow express every month. By May 2020, that number had plummeted to around 2,000 per month. In 2020, the respondent made a loss of around £14 million. It became essential to cut costs rapidly, and adjust the business model, in order to try and ensure the survival of the business.

33. Hence, in May 2020, the business therefore began consultation in respect of the restructure of the Customer Experience team with a view to avoiding compulsory redundancies. It considered it was necessary to consolidate the CC and MSA roles so that they be merged to create a new role – Sales and Service Ambassador ("SSA"). This role, as Mr Morgan-Batney explained, was in essence an "upskilling" of the CC and MSA roles and gave the respondent flexibility in terms of staff apportionment.

34. By this time, all material employees were on the furlough scheme, and as a result were receiving £2,500 per month or 80% of their earnings. MSAs were losing out because of this cap, given the fact that a significant amount of their income was commission based. So, the respondent decided to pay staff 80% of their salaries,

even if that resulted in the monthly payment of more than the government's £2,500 figure.

Consultation

35. Mr Morgan-Batney was tasked with leading the restructure and consultation, because the impacted employees were all based in his team.[5]

36. At the time he began consultation, there were in total 123 MSA and CC roles. and 78 As there were only 117 new SSA roles in total available, he expected that 6 employees would have to be made redundant.

37. Most members of affected staff, including the claimant, were members of the recognised union, the RMT. On 13 May 2020, Mr Morgan-Batney wrote to Mr Eddie Dempsey (lead negotiator of the RMT), explaining the situation and -amongst other things- sending him a copy of the HM1, and a job description for the SSA role. Mr Morgan-Batney also formally opened a 45 day consultation period on the proposed removal of the MSA and CC roles, which he proposed would end on 30 June 2020.

38. Due to the pandemic, all consultation meetings were held virtually, via Microsoft Teams. (Due to the pandemic, and because they were on furlough, most employees may well have had more time to read the consultation materials which were provided by the respondent.)

39. Mr Morgan-Batney delivered a virtual presentation on 14 May 2020, informing both staff and the RMT of the proposals. During that presentation, he explained the proposal that the MSA and CC roles would be made redundant and replaced with the SSA role; that the 112 full time contracts which were at that time in existence would be reduced to 60, and that the part time contracts would increase to 57. He considered, and we accept, that the increase in part time contracts and merger of the two roles would give the respondent much-needed flexibility which the separate roles and previous predominantly full time contracts and 'job share-type' half-time contracts did not provide. Thus, the overall team size would reduce, with colleagues being invited to consider voluntary redundancy.

40. As the claimant rightly told us, the 45 day period was the minimum required for *collective* consultation purposes, given the potential number of redundancies -even though the number of actual redundancies was, as it transpired (and as was anticipated), far smaller. However, given the dire financial circumstances in which the

[5] This was the first of several restructuring exercises across the business. Several others, and more redundancies/salary cuts, followed.

respondent found itself, and the urgent need to make changes in the workforce in order to maintain viability, we do not consider that a 45 day consultation period was of itself inappropriate for the respondent to adopt.

41. Mr Dempsey was unhappy with the message being delivered on 14 May 2020. He exited the meeting. However, following an email from Mr Morgan-Batney on 18 May 2020, another meeting was arranged the next day and on 22 May, so that consultation could continue. We accepted Mr Morgan-Batney's evidence that following the 14 May meeting, a constructive relationship was built and maintained with the RMT. The RMT may not have agreed with everything proposed; but several changes to the proposals were made following further interaction and discussion with the union.

42. On the same day, the claimant wrote an email to a variety of individuals in the RMT, expressing his frustration at the RMT's alleged inaction regarding respondent's plan "to covertly[6] abolish outright" the CC and MSA roles and replace them with the SSA role, "with forcibly induced hardships of lower pay and increased number of working hours, and a total rewriting of our pre-furlough job descriptions". (In response, Mr Dempsey wrote to the claimant to say that he would be grateful if the claimant would "communicate with your elected representative before emailing the entire union with phrases like 'to do absolutely nothing while we sit in negotiations with HEX'".)

43. On 15 May 2020, Mr Morgan-Batney put up a virtual noticeboard which was accessible to the RMT and all relevant employees including the claimant. It had FAQs and answers regarding the proposed changes to work structures. The noticeboard also gave links to full details of the job descriptions.

44. The claimant told us he never looked at the linked job descriptions, because (he said) he said he ought to have received "correspondence of that nature" through the union. When questioned during his evidence, he accepted that he may have looked at the FAQs, and that he went to the notice board "at least once", but he asserted that things were being done "in the wrong forum" (i.e. that everything ought to have been done via the union).

45. As we see it, if -which we doubt- the claimant did not use the link to look at the new job description, that was a matter of choice. But in the circumstances, any such choice would have been ill-advised.

[6] Given e.g. the 14.5.20 presentation to staff, and the information put up on 15.5.20 as Q&As on the virtual noticeboard, we had difficulty understand how the respondent was being "covert".

46. Consultation meetings continued throughout May and early June 2020. Mr Morgan-Batney told us, and we accept, that as a result of the consultation which thereafter took place, changes were made to the original proposals. For example, the selection process to determine who would be offered an SSA role was revised, and the amount which would be payable as part of voluntary severance increased considerably. Alterations were also made to proposed SSA shift patterns/timings.

47. On 29 May 2020, the claimant and the variety of other employees were sent an email asking them to express a preference for future work (i.e. full time, part time or voluntary redundancy). That email, we accept, attached the proposed job description for the SSA role, as well as a 'preference letter' and 'preferencing from'. The claimant conceded that he received the email, and the preference letter and form. But he denied receiving any job description. (In fact, he denied ever receiving the SSA job description- despite there being no contemporaneous paperwork in which the claimant raised that as an issue.)

48. We do not accept the claimant's evidence on this point. In circumstances where it was plainly in his interests to know details on the job description, we also consider it likely he would have also opened the attachment containing (as we find) the job description[7]. He could also have accessed the job description via the virtual notice board, even if (which we doubt) he chose not to do so.

49. On about 25 May 2020, the claimant became a union representative for the purposes of consultation when a colleague stepped down. In that capacity, he represented union members during his time on furlough via Teams in negotiations on about 5 occasions in May and June 2020[8]. We accepted Mr Morgan-Batney's unchallenged evidence to the effect that no payment was due in respect of his attendance -this also having been discussed and agreed with the union. (For the claimant to be doing paid work during furlough may have been problematic, too.)

50. On 10 June 2020, the claimant returned his preferencing form- on which (amongst other things) he wrote that he was unable to confirm any preference at that time. He also suggested that the restructure "at such a critical time" was "totally logical and therefore unnecessary". He notified the respondent of his "intention to retain continuous employment… on resuming work after the end of the furlough period, and

[7] In his evidence to us, the claimant suggested that the document might in fact not have been attached. If this was correct, we do not understand why neither the claimant nor any of the other recipients of the email asked for the attachment to be sent again.

[8] We were not told by the claimant whether the topic of the content of the job description came up in any of those meetings. If it did, and if the claimant had not (as he alleges) seen a job description, that may have been an issue. But it was not raised as one by him at the time.

under the Government's coronavirus job retention scheme". (Many other employees wrote similar script on their form.)

51. Following the implementation of a selection process, on 18 June 2020 Mr Morgan-Batney emailed the claimant offering him a part time SSA role. That role would (like others in his position) have required the claimant to work a somewhat different shift pattern, for 20 hours per week on average, and at an annual salary reduced by about £1,026[9]. In so far as the work pattern might have caused the claimant 'work/life balance' issues as he later asserted at termination, this was something he could have discussed with Mr Morgan-Batney. However, as set out below, he chose not to do so.

52. On 19 June 2020, Mr Morgan-Batney wrote to all relevant employees explaining that the furlough scheme had been extended until the end of July for those who were remaining with the respondent. For those who had opted for voluntary redundancy at the preference stage, or who had received an offer of employment, but wished to take voluntary redundancy instead, termination of employment would be on 30 June 2020.

53. The claimant declined the part time SSA offer, which under cover of an email dated 20 June 2020 he said had been made to him "in the most unethical of manners. Unethical because I believe there is a legally binding requirement for such initiatives involving changes to one's employment contract [to]… originate from none other than the Human Resources department, dispatched on legal company stationary, to one's fixed abode and by mail that must be either registered, recorded, tracked, and in all events to be signed-for." This demonstrated a somewhat rigid approach to matters which. Amongst other things, he said he "reserved the right to revert back to my previous position". He also said: I have no choice but to turn down the offered alternative employment primarily due to the impact on my Work-Life balance - a clear breach of the Equality Act 2010". (At no point, whether at the time or during the hearing before us, did the claimant assert he ought to have been offered a full time role.)

54. On 21 June 2020 Mr Morgan-Batney wrote to Mr Dempsey. He explained: "… Whilst our proposal made the MSA and CC roles redundant we made the SSA role available and amongst other things the proposed model allows us to offer a temporary part-time role to some colleagues at a time when passenger demand is so low, allowing them to transition into a permanent full-time role as soon as demand returns to a place where we can viably do this…".

[9] So, the claimant would have to be work slightly longer hours, for less pay. This was obviously not welcome news. However, the salary reductions were across the board. Mr Morgan-Batney also took a salary cut.

55. On 24 June 2020, Mr Morgan-Batney emailed the claimant explaining that he had put aside time to have a 121 meeting to talk through the claimant's personal circumstances in order to help him reach a decision. The claimant took issue with the fact that Mr Morgan-Batney did not think it was appropriate for the claimant to be accompanied by a union representative, given that the meeting was not a formal one. But in any event, the claimant in an email dated 26 June 2020 made clear that he did not see the point in a meeting with Mr Morgan-Batney at that time. (In fact, on 24 June the claimant spoke with the respondent's Chief Commercial Officer on the telephone to discuss his concerns. Hence he had the opportunity to discuss the proposals both within the consultation process, and also at a high level within the respondent.)

56. On 26 June 2020, the claimant emailed Mr Morgan-Batney, asserting that he was unable to accept the part time SSA role "without a full understanding of the Job Role in itself", and that he was "left with no other choice but to opt for voluntary severance". He set out a series of issues, such as an assertion that a four-week trial to test out the SSA role was "not being on offer".

57. Mr Morgan-Batney responded to the claimant under cover of an email dated 29 June 2020. He answered each of the questions and issues raised by the claimant in some detail. For instance, he explained that, as per "our first Q&A", a four week trial was always available; that on 21 May he had met with the RMT to discuss the proposed changes, and that on the 29 May he had shared with colleagues the SSA job description. He also pointed out that he had offered the opportunity for the claimant to meet with him "on a 121 basis so that we could discuss your personal circumstances", but that the claimant had declined that offer. He said that the claimant still had "the opportunity to seek further clarity before making a final decision", and he urged him to do so.

58. On the same day, the claimant responded to Mr Morgan-Batney by email. He confirmed his decision to choose voluntary severance. He thanked Mr Morgan-Batney "for giving me yet another opportunity to change my mind. Sometimes even I wish that I could have been less rigid with my thinking. But my principles don't allow me to waver either".

Termination

59. The claimant was one of 44 employees who chose voluntary severance. No compulsory redundancies were made.

60. Upon termination, the claimant was paid his voluntary severance package (£12,255) and notice pay. The breakdown of figures which he was sent was not particularly clear. However, the claimant accepted in his evidence -once further detail had been provided by the respondent- that he in fact received the appropriate monies if (but only if) his equal pay claim failed. (Otherwise, his case was that he ought to have been paid more, based on his comparator's salary.)

61. He was also paid his Annual Leave premium -which relates to holiday accrued through overtime. That payment was made in January 2021, in accordance with the respondent's usual practise. It did not include payment in relation to union activities in May and June 2020, for the reasons set out above. It was based on the claimant's salary, rather than his comparator's. (Hence if his equal pay claim succeeds, he was underpaid.)

62. The claimant told us, and we had no reason to doubt, that his age made it harder for him to find alternative work once his position at the respondent had been terminated.

THE LAW

Unfair dismissal

63. The following principles are material:

a. When considering whether or not a dismissal was fair for s.98(4) purposes, a tribunal must not substitute its own judgment as to what would have been a fair outcome. Rather, it must consider what was within the band of responses reasonably open to the employer.
b. Proper warning of impeding redundancies; a transparent and (if not agreed) appropriate criteria for selection, fair application of that criteria, and -where possible- checks to see if alternative employment could be offered, are generally part of a fair process for S.98(4) ERA purposes. See **Williams v. Compair Maxam Ltd**[10]. (There the EAT also explained that "not all these factors are present in every case", albeit departure from such principles would require some good reason. Further, it held that the guidance it had given did not constitute "principles of law", but rather "standards of behaviour".)
c. The overall picture must be looked at up to the date of termination, to ascertain whether the employee has or has not acted reasonably in dismissing the employee on the grounds of redundancy. See **Mugford v. Midland Bank**.[11]

[10] [1982] IRLR 83, EAT
[11] [1997] IRLR 208, EAT.

d. The tribunal can investigate the operation of a redundancy process, and issues such as selection or notice given. However, it has no jurisdiction to consider the reasons for creating redundancies. **Moon v. Homeworthy Furniture (Northern) Ltd**[12].

e. As regards the interplay for 'fairness' purposes between consultation via a union and individual consultation, Harvey says this: "Where unions are recognised, consultation will generally be with the trade unions, although this does not normally eliminate the obligation to consult in addition with individual employees... Consultation with individuals will generally arise once they have been at least provisionally selected, and will be for the purpose of explaining their own personal situations, or to give them an opportunity to comment on their assessments".

Equal pay- GMF defence

64. In **Glasgow CC v. Marshall**[13], Lord Nicholls set out the exercise of establishing a material factor defence in what has become the seminal passage on that test:

> *"The scheme of the Act is that a rebuttable presumption of sex discrimination arises once the gender-based comparison shows that a woman, doing like work… is being paid or treated less favourably than the man. The variation between her contract and the man's contract is presumed to be due to the difference in sex. The burden passes to the employer to show that the explanation for the variation is not tainted with sex. In order to discharge this burden the employer must satisfy*[14] *the tribunal on several matters. First, that the proffered explanation, or reason, is genuine, and not a sham or pretence. Second, that the less favourable treatment is due to this reason. The factor relied upon must be the cause of the disparity. In this regard, and in this sense, the factor must be a material factor, that is, a significant and relevant factor. Third, that the reason is not the difference of sex. This phrase is apt to embrace any form of sex discrimination, whether direct or indirect. Fourth, that the factor relied upon is or, in a case within section 1(2)c, may be, a material difference, that is, a significant and relevant difference, between the woman's case and the man's case.*
>
> *When section 1 is thus analysed, it is apparent that the employer who satisfied the third of these requirements is under no obligation to prove a good reason for the pay disparity. In order to fulfil the third requirement he must prove the*

[12] [1976] IRLR 298, EAT.
[13] [2000] 1 WLR 333.
[14] The burden of proof is to the civil standard, i.e. balance of probabilities. See **National Vulcan Engineering Group v. Wade** [1979] QB 132.

> *absence of sex discrimination, direct or indirect. If there is any evidence of sex discrimination, such as evidence that the difference in pay has a disparately adverse impact on women, the employer will be called upon to satisfy the tribunal that the difference in pay is objectively justifiable. But if the employer proves the absence of sex discrimination he is not obliged to justify the pay disparity…"*

65. As was put by Elias J in **Villalba v. Merrill Lynch & Co**[15], sex must be "the cause of the difference in treatment, either directly or indirectly". The notion of 'fair wages', if not tied to sex discrimination, is (as he put it) "*not to the point*". Unless a causal link with sex is established, there is no need for objective justification of the reason for the disparity. This is because:

> "… *If objective justification needs to be established in every case where a woman can raise a presumption of equal pay because she is employed on work of equal value with their chosen comparator, then the effect is to convert a law which is designed to eliminate discrimination on grounds of sex into fair wages legislation*".

66. Effluxion of time does not in itself transform a non-sex-based reason into a sex-based reason. **Skills Development Scotland Ltd v. Buchanan** UKEAT 0042/10. That case is also authority for the proposition that, as per a claim under s.13 of the Equality Act 2010, the onus is first of all on a claimant to make out a prima facie case. Only if that is done does it fall to the respondent to show that any differential in pay had nothing to do with sex.

Tribunal's powers of construction

67. The tribunal has power to construe a contract. Although it probably does not have the power to order rectification as such, it has jurisdiction (per Underhill LJ) to determine the case that an agreement is rectifiable for mistake- for example, as part of a defence to an unlawful deduction from wages claim. **Tyne and Wear Passenger Transport Executive t/a Nexus v. National Union of Rail, Maritime and Transport Workers** [2022] EWCA Civ 1408.

APPLICATION TO THE FACTS

Unfair dismissal

[15] [2007] ICR 469.

68. We consider that the reason or principal reason for the claimant's dismissal was redundancy. The claimant realistically conceded as much in closing submissions. Alternatively, the reason or principal reason was the need to make significant changes to the workforce structure -i.e. 'some other substantial reason'. As such, the dismissal was potentially fair.

69. We also consider that the dismissal was 'fair' for the purposes of s.98(4) of ERA. The respondent had to change its business model as a matter of urgency in order to survive. It had as a matter of urgency to save money and adjust the work patterns and functions of its employees. The changes it made to work patterns and jobs were in our view well within the range of reasonable responses open to the respondent- particularly bearing in mind the fact that it is not for us or the employee to challenge the reasons for making redundancies. The respondent also made available both to staff and the RMT relevant material and information for consideration and discussion.

70. We do understand that the changes the respondent made would or may have impacted on the work/life balance of some if not all staff members; also, that the fact of an overall pay cut would have been unwelcome. But given the catastrophic impact of lockdown, and as part of the urgent need to make savings and ensure workforce flexibility, it was open to the respondent -as part of the responses reasonably available to it- to implement the changes it put in place.

71. In the pressing circumstances of this case, we consider the consultation period was sufficient. And we consider that the consultation which took place during the 45 days was adequate and meaningful. As already noted, the claimant turned down the opportunity for further individual consultation within that time.

72. The claimant is right to say that there is no 'maximum' consultation period imposed by ERA or any other provision. But the mere fact that 45 days was the minimum period for *collective* consultation does not mean, on the facts of the case, that the 45 day period was inadequate as the collective consultation period, or -more to the point in this case- that it was inadequate for *individual* consultation purposes.

73. No real challenge can be made to the selection criteria used. Nor would such a challenge have assisted in circumstances where the claimant was offered a part time role, chose voluntary severance, and did not suggest that he wanted a full time role instead.

Age discrimination

74. As explained above, the claimant does not assert that he was chosen for dismissal/redundancy, whether consciously or otherwise, on grounds of age. He made no such suggestion in his questioning of Mr Morgan-Batney.

75. As we see it, any s.13 Equality Act 2010 claim against the respondent which is founded on the assertion that the claimant's age made it harder to find alternative work elsewhere cannot possibly succeed. Such a claim focuses on the consequences of the dismissal, rather than the motivation of the individual or individuals who made the decision to dismiss. Difficulties in finding work after the event by reason of age *might* have been relevant to remedy. But it does not amount to even a prima facie of age discrimination as against the respondent. In any event, we find that nothing material which the respondent did, or did not do, was on grounds of age.

Equal pay

76. We consider that the respondent has fully explained the differential in salary between the claimant and his comparator. The reasons were administrative errors on the respondent's part (some of which led the claimant to be paid slightly more than he ought to have been paid). Those errors may well be said to be unsatisfactory. We accept that they ought to have been remedied at an earlier stage. But, as we found, they and any delay in remedying the situation had nothing to do with sex. The errors were a significant and relevant factor, accounting for the whole of the disparity. The GMF defence is made out.

Holiday pay claim

77. We find that the claimant's reliance on his contract to claim more than 14 days' holiday per annum is misplaced.

78. We consider that the relevant words mistakenly did not reflect the parties' mutual understanding as to holiday entitlement- i.e. 14 days' entitlement[16], not 26.4 days. (Ms Hobbs' evidence concerning probable use of an incorrect template is consistent with that analysis.) As such, we find that the clause is rectifiable for mistake as a defence to the holiday pay claim.

[16] In her supplemental statement, Ms Hobbs said that the "correct amount of annual leave that [the claimant] was in fact entitled to … was 264 hours full time equivalent ("fte") and 132 hours pro rata (for working 0.5 fte)", which she said yielded 14 days. If that is right, the mistake is in saying "26.4 hours" rather than "264 hours".

79. Average hours worked per week is on the face of Clause 6 relevant to calculation of holiday entitlement. In the alternative, as a matter of construction we consider that entitlement to 26.4 days had to be reckoned pro rata to the claimant's half time 17.5 hours p.w. work (rather than full time of 35 hours p.w.)- i.e. 13.2 days (which would need to be rounded up to 14 days so as to take account of Regs 13 & 13A of the Working Time Directive 1998).

80. We are fortified in the above analyses by the following:

    a. The claimant at no point until presentation of the claim around took issue with the fact that the respondent treated him as being (or told him he was) entitled to 14 days holiday p.a.
    b. If the claimant's analysis was correct, it would follow that those employees working 35 hours p.w (i.e. most staff) would presumably be entitled to 52.8 days holiday per year. Such an extravagant result is surely not realistic. As Ms Hobbs confirmed in her evidence, "no colleague receives or received this amount of leave".
    c. Despite what is said in her 'witness statement' about taking 26 days' holiday p.a., Carole Crookes was paid for accrued but untaken holiday at the time of the termination of her employment reckoned on a 14 days p.a. rather than 26.4 days p.a. basis, and she did not dissent from that. This does not sit easily with her paper contention that she was in fact entitled to 26.4 days p.a.

81. Even if our finding at paras 77-80 above is wrong, as set out above the holiday pay claim must (as the parties agree) be limited to a two year lifespan.

Overtime claim

82. For the reasons set out at para 49 above, we do not consider the claimant was entitled to the additional payments he seeks for the union work he did in May and June 2020.

Notice and redundancy pay

83. As regards notice and redundancy pay, this claim must fail given our rejection of the equal pay claim and the words in parentheses at paras 60 & 61 above.

84. **To conclude**: It follows that, save as set out above in relation to the travel claim, the entire claim must be dismissed.

Employment Judge Michell, Bury St Edmunds
12 July 2023

JUDGMENT SENT TO THE PARTIES ON

17 July 2023

GDJ

FOR THE SECRETARY TO THE TRIBUNAL