EMPLOYMENT TRIBUNALS

Claimant: Mr A Hawkes

Respondent: Ausin Group (UK) Ltd

Heard at: London Central **On:** 6 and 7 April 2017

Before: Employment Judge H Grewal

Representation

Claimant: Ms A Carse, Counsel

Respondent: Mr J Bacon, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1 The Tribunal has jurisdiction to consider the complaint of unfair dismissal.

2 The complaint of unfair dismissal is not well-founded.

REASONS

1 In a claim form presented on 6 December 2016 the Claimant complained of unfair dismissal under sections 98(4) and 103A of the Employment Rights Act 1996 ("ERA 1996"). On 5 April 2017 the Claimant withdrew the complaint of unfair dismissal under section 103A ERA 1996.

The Issues

2 It was agreed at the outset of the hearing that the issues that I had to determine were as follows.

2.1 Whether the Tribunal had jurisdiction to consider the Claimant's claim of unfair dismissal;

2.2 If it did, whether there was a potentially fair reason for the dismissal;

2.3 If there was, whether the dismissal was fair;

2.4 If the dismissal was unfair, whether any compensation should be reduced on Polkey or contributory conduct grounds.

The Law

3 Section 94(1) of the Employment Rights Act 1996 ("ERA 1996") provides that an employee has the right not to be unfairly dismissed by his employer. Section 108 ERA 1996 provides,

> "*(1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.*
> *…*
>
> *(5) Subsection (1) does not apply if the reason (or, if more than one, the principal reason) for the dismissal is, or is connected with, the employee's membership of a reserve force (as defined in section 374 of the Armed Forces Act 2006)"*

It was not in dispute that the Claimant was a member of a reserve force as defined by section 374 of the Armed Forces Act 2006.

4 Section 98 ERA 1996 provides,

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

5 Section 139(1) ERA 1996 provides,

"*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 –*
…
(b) the fact that the requirements of the 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 A reason for dismissal is a set of facts known to the employer or beliefs held by him which cause him to dismiss the employee – **Abernethy v Mott, Hay and Anderson [1974] IRLR 213.**

7 In **Martin v Devonshires Solicitors [2011] ICR 352** Underhill P in the EAT stated,

"*The question in any claim of victimisation is what was the "reason" that the respondent did the act complained of: if it was, wholly or in substantial part, that the claimant had done a protected act, he is liable for victimisation; and if not, not. In our view there will in principle be cases where an employer has dismissed an employee (or subjected him to some other detriment) in response to the doing of a protected act (say, a complaint of discrimination) but where he can, as a matter of common sense and common justice, say that the reason for the dismissal is not the complaint as such but some feature of it which can properly be treated as separable. The most straightforward example is where the reason relied on is the manner of the complaint."*

The Evidence

8 The Claimant and Captain Burlton (Training Officer, Royal Marines Reserve, London) gave evidence in support of the Claimant. Alexandra Stuart-Robertson (Director) gave evidence on behalf of the Respondent. Having considered all the oral and documentary evidence I made the following findings of fact.

Findings of Fact

9 The Respondent is the UK subsidiary of the Australian-based Ausin Group which is a property and investment services business. The Respondent was set up in August 2015 and focused on introducing clients from China to invest in London and the UK generally. It had four employees – a Business Development Manager and three sales staff.

10 The main role of the Business Development Manager was to build, maintain and foster relationships with stakeholders and developers to ensure that developers had projects that suited the Respondent's China market so that the sales team, both in the UK and China, had stock which they could sell. It was essentially to be the bridge between the developer, who had the stock, and the sales team doing the selling.

11 In late July and August Joseph Zaja, the CEO of Ausin Group, and Alexandra Staurt-Robertson interviewed the Claimant (in person and on Skype) for the Business Development Manager role. They considered the Claimant to be a good candidate for the role because he had previous experience of working with developers to sell property to China and he was fluent in Mandarin. During the interviews the Claimant told them that he was a Royal Marine volunteer reservist which meant that he had to undertake 28 days' training per year and that he would require an additional one week's unpaid holiday to fulfil his training requirements. He also alerted them to the fact that there was always a risk of being called out for active service.

12 As a Royal Marine reservist the Claimant was obliged to complete 28 days' training each year. This had to include one period of 12 days' continuous training. The remaining days could be completed on individual days or weekends by undertaking certain specified exercises or tests.

13 The Claimant was appointed to the role and commenced employment on 7 September 2015. In respect of holidays, clause 9.1 of his contract provided,

> "*The Employee shall be entitled to 28 days' paid holiday each year including the usual public holidays in your country of residence. In addition the Employee will be entitled to take 1 week's holiday unpaid each year provided that the Employee remains a Royal Marine reserve. The Company's holiday year runs between 1 January and 31 December."*

Clause 9.2 provided,

> "*Holiday shall be taken at such time or times as shall be approved in advance by Alexandra Stuart-Robertson or other senior staff member as shall be notified to the Employee from time to time."*

14 The Claimant's annual salary was £70,000 and he was entitled to commission. He was the most senior and highly paid employee in the London office.

15 The Claimant utilised all his annual leave entitlement in 2015 and did not carry forward any holidays into 2016.

16 In his role the Claimant was required to travel to China for about ten days once every two months. In addition, he sometimes had to work and to entertain clients in the evenings and over weekends. The Claimant was entitled to time off in lieu if he had to work on bank holidays or over weekends.

17 By the beginning of June 2016 the Claimant had taken 12 days' annual leave which broke down as follows –

1 January (bank holiday)

22 – 26 February (5 days)
14 -16 March (3 days)
3 – 4 May (2 days)
30 May (bank holiday)

That left him 16 days of annual leave, three of which (August bank holidays and two days for Christmas) had to be taken on the dates that they fell. Ms Stuart-Roberston had agreed that he could take 8 days as time off in lieu for working 3 bank holidays and excessive overtime on promotions in China). He was also entitled to an additional 5 days' unpaid leave. The Claimant's outstanding holiday entitlement (ignoring the bank holidays) at that stage was 26 days.

18 At the beginning of June the Claimant put his name down to be considered to take part in a training exercise in California, known as Exercise Black Alligator. He was not obliged to undertake that exercise but volunteered to do so as an Additional Duties Commitment ("ADC") He knew at the time that it would be a seven week deployment from 26 August to 16 October.

19 On 28 June just before 4 pm the Claimant received an email that he was required to attend at a shooting range on 30 June and five days' training from 4 to 8 July as a precursor to taking part in Exercise Black Alligator. Ms Stuart-Robinson was in the London office at that time and at about 5 pm as she and the Claimant were leaving the office to meet with a developer, whom they were proposing to take to China in September, the Claimant said to her that he needed to talk to her about dates because something had come up with the Marines and that he had to have time off on Thursday, the whole of the following week and 7 weeks from the middle of August to the middle of October. He did not tell her that he had volunteered for a training exercise and that it was not mandatory. He presented it to her as something that he had to do and she interpreted what he said to mean that he was being called up for active service which they had to accept. She told him that they would require something in writing. She also said that they would tell the developer that she would be going to China with him. She said jokingly that she could push the Claimant down the stairs for landing her with the trip to China. There was no further discussion about the matter that evening.

20 On 1 July 2016 the Claimant filled in application for leave forms for 30 June and for five days from 4 to 8 July 2016 and sent them to Ms Stuart-Robertson, and she approved that leave as part of the time off in lieu that he had accrued. The Claimant did not fill in any leave application forms for the seven weeks' leave and did not provide anything in writing to confirm the time off that he required during that period.

21 On 15 July 2016 the Claimant received the paperwork that he needed to complete to take part in Exercise Black Alligator. That comprised an application for service under an additional duties commitment and an additional duties commitment form. By signing the latter the Claimant would commit himself to undertaking the Additional Duties Commitment from 26 August to 16 October that year.

22 Ms Stuart-Robertson was concerned about the impact that the Claimant's seven week absence during one of the busiest times for the company would have on the Respondent's fledgling business which, for a variety of reasons, was not performing to the level that had been anticipated when it was set up. She sought

legal advice as to the Respondent's obligations when reservists were called up for active service. Her understanding was that employers were given some financial assistance when reservists were called up for active service and she though that they might be able to use that to take on a temporary employee to cover the Claimant's absence. On 18 July she telephoned the Ministry of Defence helpline to inquire about the forms that she needed to complete to seek such assistance. The person to whom she spoke said that there was nothing in his book regarding active duty call-up and suggested that she call the London Chapter of Marine Reservists.

23 She then spoke to someone in the London Chapter of Marine Reservists. He too was not aware of any active duty call-up and said that it was probably a training exercise. He took her details and the Claimant's details and said that he would get someone to call her back. On 19 July Captain Burlton, the Claimant's Training Officer, telephoned her. He explained that the Claimant had volunteered to do the seven weeks' training and that there was no obligation on the employer to agree to it, but they were encouraged to support it as it was a good training opportunity for the Claimant and would make up part of his yearly training. He also explained to her what the Claimant's minimum training requirements were.

24 Captain Burlton informed the Claimant of the telephone call from Ms Stuart-Robertson. The Claimant told him that there was nothing to worry about as he had requested permission to apply for the ADC before doing so and had had both verbal and written confirmation. The Claimant informed Ms Staurt-Robertson by email that Captain Burlton would provide her with a letter by the end of that week. She responded that she had contacted the Ministry of Defence to find out what their requirements and obligations were for extended leave periods as part of his enrolment with the Reservists. The Claimant and Ms Stuart-Robertson also had a brief telephone conversation that day which was along the same lines as the email exchange between them.

25 On 20 July the Claimant asked Captain Burlton to provide a letter to his employers. In his email to Captain Burlton he said,

> "*It may also just be worth mentioning that the importance of this type of continuous training and the benefits the employers receive as a result. Probably not worth going into the details of my 28 day minimum requirements too much but it could be mentioned that this type of training would constitute a large portion of* my *minimum requirement for the new financial year."*

26 On 22 July 2016 the Claimant signed and returned both the application for service under an additional duties commitment and the additional duties commitment form.

27 On 25 July Captain Burlton sent Ms Stuart-Robertson a letter. The Claimant had had an input into the drafting of that letter. He explained in the letter the benefits of the training exercise to the Claimant as marine and to his employer. He also said that it would form a large part of his mandatory minimum training requirements for that financial year.

28 On Monday, 1 August, the Claimant sent Ms Stuart-Robertson an email telling her that he needed to take that Wednesday off as there were some things that he needed to complete prior to leaving on 26 August. She responded the following day

by approving his leave for Wednesday, but continued that she was concerned about his request for extended unpaid leave to carry out his reservist training. She said that when he had first mentioned his need for leave he had not made it clear that he had volunteered to do it but had presented it as something which he was obliged to do and which they, as his employers, were obliged to accommodate. Since then, she had spoken to his Commanding Officer and now understood that the Respondent had no legal obligation to agree to his request. She also reminded him that she had not received anything in writing from him in respect of his request. She suggested that they meet to discuss his request.

29 The Claimant responded to that email by saying that the training (32 business days) constituted a large part of his minimum mandatory training. He said that over the past 11 months he had worked 14 weekends and had, therefore, not been able to do the required training on the weekends. He continued,

> "*As such, I am therefore obligated to undertake this training (and if not this then another). I am by nature a reservist and therefore a volunteer but I do not think it fair or reasonable to suggest that I presented this in any other way than as part of the training I am required to undertake during the year."*

He said that she had not raised any concerns when it was first discussed and had verbally agreed to his request. Furthermore, she had said that he would be paid during that period. He was, however, happy for any days that exceeded his annual leave entitlement to be unpaid. It was clear from the Claimant's response that regardless of any concerns that his employer had, he was going to undertake the seven weeks' training.

30 On 5 August Ms Stuart-Robertson invited the Claimant to a meeting. At that meeting she told him that they had decided to make his role redundant. She and Joseph Zaja had discussed the matter and they felt that there was too much of an overlap between her role and his and that the business was too small to accommodate that. She also said that while they had been aware of his commitment to the Marines when he had joined them they had not expected it to be as significant as it had turned out to be; he was 25% of the workforce in London and they could not accommodate his absence from the business for seven weeks. There was further discussion about both those aspects.

31 Ms Stuart-Robertson said that they would never approve seven weeks' leave to be taken in one go. She pointed out that the Claimant had only had one brief conversation with her about it and had presented it to her as something which he was obliged to do and it was only when she had contacted the Marines she had found out that he had volunteered for it. In those circumstances he should have applied for leave in the same way he would if he was planning a holiday. However, she had not received anything from him. If she had received an application, it would have been refused. She said that it was coming to the busiest time of the year for them and with the forward planning which they did the impact of his absence would be felt beyond October. It was not sustainable for the business to have the most experienced person in sales out of the business for that period of time.

32 She said that she and Joseph had been having discussions about the output and the cost of his team. He was the most expensive employee in London and his output was not as great as it could have been in terms of developing new

relationships and strategies. She said that in three years' time they would regret that they had not been in a stronger position to maintain him. The Claimant said that he thought that the real issue was that the business had not grown as much as she and Mr Zaja had hoped and he cost too much, and that the Marine thing was a convenient excuse.

33 Ms Stuart-Robertson said a number of times in the meeting that the reasons for terminating his employment were that they could not at that stage afford to have him out of the business for that long and they could not justify the expense of his role when there was so much overlap between what the two of them did. She emphasised that they had liked him personally and had not found it easy to make the decision to terminate his employment.

34 Ms Stuart-Robertson told him that his employment was terminated as of that date and that he would be paid one month's pay in lieu of notice and that they would exercise their discretion to pay him commission. She handed him a letter confirming the termination of his employment. It said,

> "*The reason for the termination of your employment because* [sic] *there is considerable cross over between the work that you do and that which I do and the upside that you would be independently developing leads and other opportunities has not taken place to the extent anticipated.*
>
> *This, coupled with your commitment to the Marines, which is far more extensive that we understood when we recruited you (1 weeks'* [sic] *extra leave unpaid), has meant that we, as a small employer in the UK, cannot sustain continuing you employment."*

The Claimant was advised of his right of appeal against the decision to dismiss him.

35 On 13 August the Claimant sent an email to Joseph Zaja, Mark Morcos (Managing Director) and Harry Jin in Australia. He disputed that the two reasons given by the Respondent were the real reasons for his dismissal and set out his reasons for so doing. In respect of the second reason given, he said that the training time which he had requested from Ms Stuart-Robertson and which had been granted without issue was to make up the days that he had failed to make up earlier in the year. All that she had said at the time was that she required a letter from his CO confirming the dates. He had sufficient holiday remaining to cover most of the training. Had there been an objection earlier, he would have made alternative training arrangements to make the days required before April 2017. No objection had been raised until he was made aware by his Commanding Officer that phone calls had been made to him. He then set out what he thought were the real reasons for his dismissal. He concluded by saying that he would not be exercising his right of appeal.

36 On 25 August the Claimant sent an email to Mr Zaja that he had decided to exercise his right of appeal. He said that the matter had come to the attention of not only Royal Marines senior personnel but also Fleet Legal at the Royal Navy. He asked for further clarification of the reasons given for his dismissal and then said,

> "*Thus far, there have been questions about Ausin generally as an organisation and its intentions in the UK. There will be further questions that will be asked if*

this continues and I have no choice but to raise this appeal in order that we can come to a 'compromise agreement' to prevent further action being taken by Fleet Legal and any cooperation with the Home Office to establish if there have been breaches of work visa applications or visit visas."

He then set out the compromise which he proposed, which was (1) two months' pay plus the reinstatement of his position and (2) four months' redundancy pay, It was not clear whether those were being proposed as alternatives or a single package.

37 Mr Zaja replied the following day that as his appeal comprised an invitation to enter into a financial settlement couple with veiled threats as to the consequence of not doing so, the Respondent would not entertain his appeal.

Conclusions

Reason or principal reason for the dismissal

38 I considered first what the reason, or principal reason, for the dismissal was. That question has to be answered both for the jurisdiction issue and the substantive issue, if I decide that I have jurisdiction to consider the claim for unfair dismissal. I accept that there were concerns at the time as to whether the cost of the Claimant's role could be justified or sustained in light of the revenue that it was generating and the financial state of the business at that time. However, no final decision had been made in respect of that in July and August. If it had been, there would have been no reason for Ms Stuart-Robertson to contact the Ministry of Defence to inquire about how to apply for funding to get a temporary cover for the Claimant. I concluded that the reason for the dismissal was that the Claimant was going to be absent from work (without having properly sought or obtained permission for such an absence) for a period of seven weeks at a crucial time for the business and that the Respondent could not sustain such an absence.

Jurisdiction

39 It follows from that that the Claimant's membership of the Royal Marine Reserves was not the reason or principal reason for his dismissal. The Respondent had not had a problem with the fact that the Claimant was a reservist. It had recruited him knowing that and had given him an additional week's unpaid leave to facilitate his training commitments. The real issue was whether the reason for his dismissal, as set out above, was "connected with" his membership of a reserve force.

40 It was submitted on behalf of the Respondent that if the reason for the dismissal was the manner in which the Claimant had approached his absence and/or the impact that it would have on the business, that could not be said to be connected with his membership of the reserve forces. I accept that the manner in which the Claimant approached his absence with his employer (not informing them it was voluntary and not mandatory, not putting in an application for leave, not providing any supporting documentation from his Commanding Officer until after Ms Stuart-Robertson had spoken to him) was not connected with his membership of the Royal Marines reserve force. I accept that the manner in which he approached it played a part in the decision to dismiss him. However, it was not the sole or main reason for his dismissal. It was secondary to, and very closely connected with, the fact that he was going to be absent for seven weeks. It was not separable from the absence but

very closely intertwined with it. Equally, the impact which the Claimant's absence would have on the business was a not a separate and distinct feature from the absence itself.

41 The issue, therefore, for me was whether the seven weeks' absence (which was the main reason for the dismissal) was "connected with" the Claimant's membership of the Royal Marines reserve force. The Claimant was during those seven weeks going to be undertaking training that was available to him as a Royal Marine and would be of benefit to the Royal Marines and to him as a member of that reserve force. The fact that he had volunteered for it and it was not mandatory does not, in my opinion, make a difference to the issue of whether his absence was "connected with" his membership of that reserve force. If the absence from work which led to his dismissal was for an activity which he was undertaking as a member of a reserve force, it must follow that the absence was "connected with" his membership of that reserve. Having considered all the above, I concluded that the principal reason for the Claimant's dismissal (the Claimant's absence from work) was connected with his membership of a reserve force and that the Tribunal has jurisdiction to consider his complaint of unfair dismissal.

Unfair dismissal

42 I then considered whether the reason for the dismissal (set out paragraph 38 above) amounts to some other substantial reason of a kind such as to justify dismissal of the Claimant. The Respondent's case was that that reason, together with other reasons, amounted to some other substantial reason. I concluded that it was a substantial reason, in that it was a serious and potentially valid reason for terminating someone's employment. I also considered whether it fell within section 98(2) or outside it, in other words, whether it was a reason relating to conduct or something different from that. I concluded that it was more appropriately classified as "some other substantial reason" rather than a "reason relating to conduct" because although there were some concerns about the manner in which the Claimant had approached the whole issue and they fed into the decision to dismiss, the primary concern was the Claimant's absence from the business for seven weeks. The main issue was not whether the Claimant had behaved improperly, but whether the Respondent could continue to employ someone in the Claimant's role at his salary if he was going to be absent from seven weeks at a crucial time for the business.

43 Having concluded that there was a potentially fair reason for the dismissal, I considered whether the Respondent acted reasonably in all the circumstances of the case as treating it as a sufficient reason for dismissing the Claimant. In doing so, I took into account the following factors. In his emails of 1 and 2 August the Claimant made it clear to the Respondent that he was going to be absent from work from 26 August to 16 October that year. It was clear that nothing was going to make him change his mind about that. Although the Respondent was not aware of it at the time, he had on 22 July signed and returned his Additional Duties Commitment form and had thereby committed himself to the exercise. At that stage the Respondent had been in business for only one year and it was not performing as well as had been expected. It had only four employees, of whom the Claimant was the most senior and the most expensive. It was coming up to the busiest time of the year for the business and the Claimant's absence would have an impact on the business beyond the period of his absence. A small, new, not very successful business could not continue

to employ a Business Development Manager at £70,000 a year if that Manager was going to be away from work for seven weeks at a crucial time for the business.

44 I considered whether the failure to hold a meeting before the decision to dismiss was made or to give the Claimant notice of the meeting on 5 August made the dismissal unfair. By the time the decision to dismiss was made, the Claimant had already decided that he was going to undertake the exercise and had committed himself to it. It is difficult to see what a meeting before the decision to dismiss was made would have achieved. There was nothing in the evidence to indicate that if the Claimant had been warned that he would be dismissed if he insisted on going to the exercise in the US, he would have changed his mind. He did not at any stage in the meeting of 5 August say that he would not attend the exercise if that would prevent his dismissal. Holding a meeting before the decision to dismiss was made would not have made any difference to the outcome. Equally, had the Claimant been given more notice of the meeting on 5 August or the purpose of the meeting, it is difficult to see what difference it would have made. The parties had come to an impasse. The Claimant was going to the exercise in the US for seven weeks. The Respondent could not continue to employ him if he was going to be away for that length of time at that juncture. A parting of the ways was inevitable.

45 In considering whether the Respondent acted reasonably in all the circumstances, in treating the Claimant's impending absence as a sufficient reason for dismissing him, I also took into account the way in which he had approached the issue with his employers. He did not discuss the matter with his employer before putting his name down for the exercise. He first informed his employer of it in passing and conveyed it as something which he had to do as opposed to something which he had chosen to do. He never filled in a leave application form for the period. He did not provide anything in writing from the Royal Marines to confirm that they required his presence elsewhere at that time. He committed himself to the exercise on 22 July without having sought and obtained permission from his employer to be away for that period.

46 Having taken into account all those circumstances, I concluded that the Respondent acted reasonably in treating the Claimant's impending absence of seven weeks from work as a sufficient reason for dismissing him and that the dismissal was fair. In case I am wrong in that decision and any procedural flaw (such as the failure to hold a meeting before deciding to dismiss) makes the dismissal unfair, I would not have awarded any compensation on the basis that rectifying that flaw would not have had any impact on the outcome.

Employment Judge Grewal
6 June 2017