Case Numbers: 2203859/2019

2203203/2019

EMPLOYMENT TRIBUNALS

Claimants **Respondent**

(1) Mr C Stevens **V** **Assima UK Limited**

(2) Mr A Coates

Heard at: London Central **On**: 28 and 29 January 2020 and 30 January 2020 (in chambers)

Before: Employment Judge Joffe

Representation

For the claimants: Mr T Perry, counsel

For the respondent: Mr K Ali, counsel

RESERVED JUDGMENT

1. The respondent unfairly dismissed the claimants, contrary to sections 94, 98(1) and 98(4) Employment Rights Act 1996.
2. Had the first claimant not been unfairly dismissed, there is a 70% chance that the first claimant would fairly have been given notice of dismissal for redundancy after a period of three months from 19 February 2019.
3. Had the second claimant not been unfairly dismissed, there is a 50% chance the second claimant would fairly have been given notice of dismissal for redundancy on about 1 March 2019.
4. The respondent made unlawful deductions from the second claimant's wages by not paying his salary for the period 1 May to 19 August 2019.
5. The claimants' claims for unlawful deductions in respect of accrued holiday pay are not upheld.
6. The second claimant's claim for a redundancy payment is not upheld.

REASONS

Claims and issues

1. The claimants bring claims of unfair dismissal. Both claimants also bring claims for unpaid holiday pay. The second claimant, whom I refer to as Mr Coates in these Reasons, also brings claims for unlawful deductions from wages and for a redundancy payment. I refer to the first claimant as Mr Stevens.

2. I discussed the issues with the parties at the outset of the hearing and they are agreed as follows:

Unfair dismissal

(i) What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was for reason of redundancy, alternatively some other substantial reason in the form of a business reorganisation carried out in the interests of economy and efficiency. The claimants dispute those reasons.

(ii) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and in particular, did the respondent in all respects act within the so-called 'band of reasonable responses', The respondent conceded at the outset of the hearing that the dismissals had been procedurally unfair. The respondent said it accepted the process as a whole had not met the required standard. That concession embraced the consultation process and the failure to allow the claimants to appeal their dismissals. The remaining live issue on fairness was:
   a. Whether the respondent made reasonable efforts to redeploy the claimants?

(iii) If the claimants were unfairly dismissed and the remedy is compensation: if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimants would still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604.

Unlawful deductions from wages

(iv) Did the respondent make unauthorised deductions from Mr Coates' wages contrary to section 13 of the Employment Rights Act 1996 in the following respect:
   a. failing to pay Mr Coates' salary for the period 1 May to 19 August 2019?

Unlawful deductions from wages: Holiday pay

(v) Did the respondent make unauthorised deductions from the claimants' wages contrary to section 13 of the Employment Rights Act 1996 in not paying the claimants' accrued but untaken holiday pay on the terminations of their employment?

Redundancy payment

(vi) did the respondent fail to pay Mr Coates a redundancy payment, contrary to section 135 of the Employment Rights Act 1996?

Findings of fact

<u>The hearing</u>

3. The evidence was heard over two days. I heard evidence on behalf of the respondent from Lianne Lambert, managing director of Lighter Business Solutions Ltd, Karl Gilbank, a director of the respondent, and Adrian Tomlin, finance director at Insider Technologies Limited. Both claimants gave evidence on their own behalf.

4. I was provided with a bundle of some 646 pages. I understood there had been some issues between the parties about disclosure and during the course of the hearing the respondent produced some further documents and some documents already in the bundle but in unredacted form.

5. The respondent is a company which provides software and related services, which services were described to me as essentially training on the software provided by the respondent and in some cases software produced by other companies. It was and is part of a group of companies; there are a number of other entities in other European countries such as France, Germany, and the Netherlands. The parent company at the relevant times was Assima plc, renamed Klimvest plc on 28 January 2019.

6. Mr Stevens commenced employment with a predecessor of the respondent on 1 June 1991. At the time of his dismissal he was the managing director of the respondent and also EMEA (Europe, the Middle East and Africa) services manager.

7. As managing director, Mr Stevens was responsible for executive control of the respondent and had a range of related duties. In the role of EMEA services manager, which he performed from early 2015, he was responsible for managing and coordinating services across that region. In that role he had thirty-five reports as of November 2018. He spent two thirds to three quarters of his time on the MD role and the remainder on the EMEA role.

8. Mr Stevens' contract of employment includes clause 9, which entitles the respondent to place Mr Stevens on garden leave during his notice period. Clause 6.8 provides that 'however at the Company's absolute discretion it may require the employee to take all holiday that has already accrued or that will accrue during the notice period such times as the company may require during the notice period.'

9. Mr Coates was employed by the respondent from 29 January 2001. His employment contract describes him as 'general manager business development Europe'. At the time of his dismissal his role was in fact chief

alliance officer / alliance manager. That role involved selling software in partnership with other companies in a variety of ways, including reseller and distribution agreements.

10. At the time of Mr Coates' redundancy, his salary was being paid by the Swiss Assima entity rather than by the respondent.

11. Mr Coates became a statutory director of Assima Ltd in May 2005. Assima Ltd became Assima plc in July 2006. Assima plc was renamed Klimvest plc on 28 January 2019. Mr Coates has continued in his role as a director of Klimvest plc to date.

12. Partner One Capital ('P1C'), the organisation which purchased the Assima group of companies, were fully aware of Mr Coates' ongoing role in Klimvest plc because they negotiated the acquisition of the Assima entities with Mr Coates in his role as statutory director. No one from P1C or the Assima group asked him to resign as a director of Klimvest plc and documentary evidence shows that P1C would have been aware throughout Mr Coates' notice period that he was so acting. There was no evidence to suggest that he was working for Klimvest plc as an employee.

13. Mr Coates' contract of employment provided so far as material:

- Clause 9.7 allowed the respondent to place Mr Coates on garden leave during his notice period: 'The Employee may not at any time during this period work for any other person, or company, or on a self-employed basis, without the written consent of the company. Holidays shall not continue to accrue during the period and any outstanding holiday shall be deemed to be taken during this period.'
- Clause 13.2 provided that: 'The Employee shall not in any way directly or indirectly carry on or be engaged in or be interested in or concerned in any way with ay other business or trade which competes with that of the company except as the owner of shares or securities not exceeding 5% of the total shared issued capital in any company quoted on a recognised Investment Exchange.'

14. In 2018, P1C became interested in purchasing the Assima group. P1C is a Canadian private equity fund which has guaranteed funding from a large Canadian pension fund. The CEO of P1C is Dan Charron. Mr Coates, in his role with Assima plc, became aware of P1C's interest in about May 2018 and was involved in the commercial negotiations about the acquisition.

15. Mr Gilbank, who is employed as managing director of a P1C-owned company named Insider Technologies Ltd, was asked by Mr Charron to become involved with the acquisition of the respondent. He explained his role to the Tribunal as an administrative role. He also performs an administrative function in relation to other P1C owned companies.

16. On 14 November 2018, representatives of P1C attended the respondent's offices to carry out due diligence. Mr Stevens had a short discussion with Dan Charron. Mr Charron said that he was impressed with the feedback he had had about Mr Stevens and said Mr Stevens had a key role to play in the respondent going forwards. Mr Stevens asked Mr Charron what his view for the future strategy of the respondent was. Mr Charron said his investments previously had been in software only companies and he would need to think about his strategy for a software and services company. One option he might consider was splitting the services arm from the software arm. He asked what Mr Stevens thought of that approach and whether he would consider at some stage taking on the services arm of the UK business as his own. Mr Stevens said that this was not something he had considered before but that it was an interesting idea.

17. On 19 November 2018, P1C sent an offer to purchase 100% of the shares in Assima plc to Mr Coates and the two other directors of the plc.

18. On 11 January 2019, Mr Charron wrote to Mr Coates telling him that 'Our legal team requires all the directors to enter into employment settlement agreements, therefore Michel, Eric and you'. The details of the offer are difficult to understand but it appears to be an attempt to terminate Mr Coates' employment on payment of six months salary as a lump sum. Mr Coates did not accept this offer. It appears that similar agreements were offered to other directors of the plc who were also employees of group entities.

19. At the beginning of 2019, the respondent had some 24 employees.

20. The respondent had no internal human resources department and made use of the services of a company called Lighter Business Solutions Ltd trading as Lighter HR. Ms Leanne Lambert is the managing director of Lighter HR.

21. On 24 January 2019 Ms Lambert said that Lighter HR were contacted by Ms Alexandra Chabbat, HR manager of P1C, to discuss UK employment law regarding company restructures; this was in relation to the respondent. Ms

Lambert spoke to Ms Chabbat on 29 January 2019. She says that at this stage what was discussed was the process for redundancies at a high level rather than any specific situation that was being dealt with at the time. However, on the following day, Ms Lambert received an email from Mr Charron confirming there was a need to move ahead with a restructure of the respondent. Ms Lambert described Lighter HR's role as being to 'execute' the redundancies. She said she did not provide advice on what was proposed. She said that she advised P1C to take legal advice. Mr Gilbank told the Tribunal that P1C had taken legal advice.

22. An email Ms Lambert sent to Ms Chabbat on 30 January 2019 set out a budget for Lighter HR's work based on making around 15 people redundant. Mr Charron's response to that email set out a list of nine people who would be considered for redundancy. This list included Mr Coates but not Mr Stevens. The description of the work proposed included all the process elements of a redundancy - the calculation of redundancy payments, drafting of letters and attending the consultation meetings - but no provision for any advisory work.

23. Ms Lambert said in her witness statement that she understood from her discussions that the respondent was in serious financial difficulty and that the decision had been made to focus only on software rather than on services. These two factors had led to there being a need to restructure the organisation. It is right to say that that explanation for the restructure does not figure in letters which were sent to Mr Coates and Mr Stevens commencing the consultation process or any of the limited correspondence and contemporaneous documentation presented to the Tribunal. I discuss the view I took of this aspect of Ms Lambert's evidence in my conclusions.

24. Mr Gilbank was appointed as a director of the respondent on 24 January 2019 at a board meeting of the respondent.

25. On 25 January 2019, the assets and share capital of the Assima subsidiaries were acquired by P1C. Assima plc became Klimvest plc and was not acquired. The asset purchase agreement shows that the respondent's shares were valued at £771,238, which was more than any other entity in the group apart from the Swiss Assima company, which owned the intellectual property in relation to the Assima software.

26. There was a Skype discussion between Mr Charron and Mr Stevens on that day. Mr Charron spoke to Mr Stevens about globalising the services arm and again asked if Mr Stevens would be interested in taking on the services arm

of the respondent to run as a business partner alongside the respondent. Mr Stevens told Mr Charron that he did not think that was a good strategy as the software and services arm of the business were, in Mr Stevens' opinion intrinsically linked, successfully supporting each other, and could not easily be separated. Mr Stevens also described to Mr Charron in more detail what the services role consisted of and the types of services the respondent provided. He explained why he thought that software and services should be kept together.

27. Mr Charron said that he would speak with Mr Stevens shortly so he could get Mr Steven's input on the strategic direction of the respondent going forward.

28. On 28 January 2019, P1C chief of staff, Said Hini, sent an email to the respondent's staff introducing P1C and speaking in positive terms about the acquisition and the future of the respondent.

29. On 4 February 2019, Mr Stevens was invited to set up a meeting with Antoine Michaud of P1C in an email from Jonathan Dionne of P1C. The email said that 'Antoine is one of our advisers. **He will be helping us to establish the growth plan for the service division.**' [my emphasis]

30. Mr Stevens had a meeting with Mr Michaud on 5 February 2019. There was a discussion about the services strategy for the respondent. Mr Michaud asked if Mr Stevens would recommend separating the services business from the software business and if so whether he would personally be interested in doing so. Mr Stevens said that he would not recommend it for the reasons he had previously told Mr Charron. He said that the success of the software side was dependent on the services and he recommended that Mr Michaud spoke with the MDs of the German, Dutch and Irish businesses who profitably operated a mixed software / services model. Mr Michaud told Mr Stevens that he was working for Mr Charron in looking at ways of growing the services division. He was shortly going to speak to the German and Irish MDs.

31. When Mr Stevens returned to the office that day, he was met by Jane Heales of Lighter HR and Mr Gilbank. Mr Gilbank had been asked by P1C to become involved in the redundancy consultation process. It was unclear exactly when that happened but Mr Gilbank told the Tribunal that a decision had been made by Mr Charron to make employees redundant, Mr Charron spoke to Ms Lambert to take advice and Mr Charron then brought Mr Gilbank in.

32. Mr Gilbank and Ms Heales told Mr Stevens that they were in the office to speak to four individuals, including Mr Coates, to inform them that their roles were at risk of redundancy. They asked Mr Stevens to gather those individuals together. Mr Stevens was shocked and asked what he should tell staff about what was going on and why. Ms Heales and Mr Gilbank assured him that there was no further restructuring planned and asked him to gather the remaining employees once the 'at risk' employees had left, to confirm what had happened and to reassure them that there were no further plans to put any UK staff jobs at risk.

33. Ms Heales conducted the meeting with the staff put at risk and Mr Gilbank spoke with Mr Stevens. Mr Gilbank told Mr Stevens that he had been asked to come down to London at short notice and knew little of the detail of P1C's strategy going forward, only that no further roles would be put at risk and that he should not worry. He said there were always small adjustments following acquisition. Mr Gilbank then said he had a train to catch back to Manchester and left. Ms Heales and Mr Stevens set up a conference call to explain to the remaining staff what had happened and reassure them about their futures.

34. Mr Coates received a letter on Assima headed paper dated 5 February 2019 which was signed by Mr Gilbank, described in that letter as 'MD'. The grounds of resistance in Mr Stevens' case described this as having been an 'error'. The explanation given for the redundancy situation in the letter is minimal: 'As we discussed earlier, a review has been undertaken of the structure and cost base of Assima UK and it has been concluded that there is a need for us to make some changes. Review is ongoing, but we have concluded that your role is no longer required.' The letter was drafted by Ms Lambert, who said that Mr Charron and Ms Chabbat told her a review had been undertaken. There was no documentary evidence of a review put before the Tribunal. Ms Lambert in evidence had no explanation as to why the letter said nothing about a decision to focus on software, although she maintained her evidence that she had been told that this was P1C's position. Ms Lambert was not provided by P1C with any structure charts for the respondent going forward. Ms Lambert asked P1C whether there were other roles available and was told there were none but she said she had no 'visibility' on that or indeed whether there were any roles across the Assima group.

35. The vacancies section of the Assima website was inactive during the consultation period. Ms Lambert said she was not aware of that.

36. The letter also stated that ‘consultation is a period of time when you will have the opportunity to discuss this business decision and offer any suggestions that may help avoid the redundancy. You should also inform us if there are any alternative roles within the business which you feel you are appropriately skilled to undertake and for which you would like to be considered.’ Mr Coates was invited to ask questions and put forward ideas to Mr Gilbank or Ms Heales during the consultation period which it was said would last for one week and end on 11 February 2019. He was given the option for a further meeting on 7 February 2019. Ms Lambert agreed in evidence that it would have been appropriate for the respondent to have proactively scheduled meetings with employees mid-consultation.

37. Mr Coates’ letter described his role as being ‘General Manager, Business Development Europe’, a role he had not performed for a decade, and Mr Gilbank in his evidence said that he assumed that that was what Mr Coates was, at least until he spoke to him.

Explanation for the decision to make redundancies

38. It became apparent during the course of evidence that Mr Gilbank was not the decision maker in relation to any of the dismissals which were carried out at the respondent company. I refer to these dismissals as ‘redundancies’ in this section of the Judgment for convenience, since that is how the respondent was treating them. He said that he had no role in deciding there would be redundancies or who would be made redundant. His role appeared to be to carry out meetings in relation to a redundancy process which was created by Lighter HR at the behest of Mr Charron. Although Mr Gilbank did not give a clear answer to the question of when the dismissals were decided on, it appeared that the decisions to dismiss had been made by the outset of the consultation processes in relation to each claimant.

39. The situation therefore is that no witness who was in fact a decision-maker in relation to the dismissals gave evidence to the Tribunal.

40. Mr Gilbank was not privy to the detail of Mr Charron’s thinking but told the Tribunal that P1C would generally look for good businesses which did not necessarily have ‘good people’. Such companies might be bloated and have too many expenses.

41. Mr Gilbank also said that P1C buys enterprise software companies and the plan was to take the software forward and not the services side of the business. Mr Gilbank said that Mr Charron’s strategy was to buy companies

based on the product and then ask whether he had the 'right people'. He had a history of bringing in people that he 'knew and could trust'.

42. Mr Gilbank's account in his witness statement as to the reasons for the redundancies was that the respondent was in a 'precarious financial position'. He said that it was considered that the respondent could be made profitable again with a focus on its software products. Mr Gilbank did not explain in his statement the detailed rationale behind the redundancies and it appeared from his evidence that he was not aware of it at the time when he was asked to become involved in the redundancy process. He had played no part in the due diligence process and had not seen profit and loss statements. He said he was not a financial expert. His role was simply to help administer the company.

43. Mr Gilbank was not in evidence able to respond substantively to points about the accounts. He said he was not a 'numbers man' and it was clear that he had no detailed knowledge of the respondent's finances. He said that he would just look at the bottom line numbers to HMRC.

44. Mr Tomlin had played a role in assessing the respondent's bookkeeping, expenses and accounting functions post-acquisition by P1C and reviewing the respondent's accounts prior to acquisition.

45. The profit and loss account provided indicated a loss of £132,570 for the year ending 31 December 2018. The Tribunal was told that the respondent had made losses in the five years preceding 2018 but not the scale of those losses.

46. There were some subtleties to the picture which Mr Gilbank was not aware of, specifically:
    46.1 A proportion of the loss (over £50,000) was due to fluctuation of exchange rates in relation to intergroup debt; Mr Tomlin accepted that was an arbitrary loss arising from an accounting mechanism in the group;

    46.2 There were significant royalty payments (over £400,000) from the respondent to the Swiss company in the group which held the IP on the software. Clearly the software sales of the respondent represented a profit for the group as a whole.

47. Mr Tomlin told the Tribunal that the royalty charges were offset by the fact that some of the respondent's overheads were picked up by the Swiss entity.

Mr Coates however said that those overheads assigned to the Swiss entity were in fact incurred by that entity.

48. The audited accounts showed a much larger loss of £969,715. The bulk of this was accounted for by an exceptional accounting impairment which related to a £1.1 million intangible asset, which was a customer database. Mr Tomlin had advise on this impairment after an audit showed the bulk of the contracts included in the database were either cancelled or not renewed. Mr Coates described that as 'funny money', a non-cash item.

49. Mr Tomlin in his evidence told us that the parent company had been required to give a guarantee to the auditors to demonstrate that the company was a going concern. Mr Stevens said that that was common practice. Mr Coates said that many of the other entities in the group were operating at a loss, some at a profit and that this suited the parent company.

50. At the time of acquisition by P1C, approximately 75% of the respondent's turnover came from services and the remaining 25% from software sales.

Continuation of the redundancy process

51. On 5 February 2019, Ms Chabbat emailed Ms Lambert and Mr Charron. She said, 'We need to make more retrenchments in the UK. Below are the names of those being cut:' There followed a list of names in Assima UK and Assima plc. The former included Mr Stevens. Ms Chabatt said 'can you please give them notice tomorrow.'

52. On 6 February 2019, Mr Stevens became aware that Ms Heales and Mr Gilbank were present in the respondent's office but they did not come to see him.

53. On 7 February 2019, Ms Lambert and Pritesh Parekh of Lighter HR attended the respondent's offices and had meetings with Mr Stevens and nine other members of staff at which the employees were told that their roles were at risk of redundancy. Mr Stevens received a letter dated the same day from Mr Gilbank which was in very similar terms to that which Mr Coates had received. There were no details of what the restructuring would involve and the only reason given was again that 'the business is in a very difficult financial position'. In this letter, Mr Gilbank was described as 'director'. There was no explanation to the Tribunal as to what if anything had changed between 4 and 7 February 2019 which caused the respondent / P1C to decide that further redundancies were necessary.

54. On 8 February 2019, Ms Lambert emailed Mr Stevens to say that consultation had been extended to 18 February 2019. Ms Lambert's email

suggested that the reason for the extension was that 'additional ideas may emerge around how the redundancies can be avoided'. She said that 'Assima UK is continuing to look for alternatives to these redundancies'.

55. There was no evidence before the Tribunal that the respondent was looking for alternatives to redundancies.

56. On 11 February 2019, Mr Gilbank wrote to Mr Coates telling him that a decision had been made to extend consultation and again asking for ideas Mr Coates might have to ensure that any opportunity to avoid the redundancies was not missed.

57. Mr Stevens replied to Ms Lambert's email on 14 February 2019 saying inter alia that he was happy to discuss ways of avoiding redundancy and believed his skills and experience could be of great value to the company going forward.

58. On 15 February 2019, Mr Coates emailed Lighter HR and set out a number of detailed suggestions to free up funds 'to retain talent in the UK'. Three of his suggestions involved cost savings and the fourth was a suggestion that what appeared to be a decision to make reductions in some Assima entities rather than others be revisited. Mr Coates said in evidence that the measures he suggested could have saved £250,000 although he did not set out that figure in his email.

59. Less than two hours after Mr Coates sent that email, Ms Lambert wrote to Mr Charron setting out what Mr Coates had said in his email. She said, 'Below is a list of suggestions from Tony as to how redundancies could be avoided along with planned response. Can you just confirm you're okay with what I'm saying.' At the end of the email she set out a proposed draft answer: 'Whilst the suggestions you made are solid cost control measures in business best practice the suggestions alone simply would not be sufficient to deliver the cost savings needed. Business practices and cost control measures overall within Assima have been looked at and remedial actions are needed but these are in addition to the redundancies rather than instead of.'

60. Ms Lambert said that before drafting that email she had had a conversation with Mr Charron and the information which formed the substance of her answer came from Mr Charron. Mr Charron replied to Ms Lambert's email saying, 'yes this is fine'.

61. Bearing in mind the fact that Mr Charron was in Canada and Mr Stevens' email would have arrived with Ms Lambert in the early hours of the morning Canadian time and that Ms Lambert's email was also sent before 6 am Canadian time, given the way in which the email is drafted and also bearing in mind the way in which the redundancy consultation process was being conducted overall, I concluded that Ms Lambert's recollection was likely to

be mistaken and that she had drafted the response to Mr Stevens with no specific input from Mr Charron.

62. Later on 15 February 2019, Pritesh Parekh wrote to Mr Coates including the text which Ms Lambert had proved. Mr Coates wrote back in relation to that response saying: '…please provide your analysis so that I may compare it with my own'. He received no response to that part of his email.

63. On 18 February 2019, Mr Stevens received an email from a colleague, Andy Campbell, who said that he had spoken to a business contact, Mr Cocker. Mr Cocker in turn reported that when he spoke to some Assima employees and asked where Mr Stevens, Mr Coates, and Mr Campbell were, Mr Cocker was told that Assima had 'done away' with consulting services and was focusing on the software.

64. On 18 February 2019, Mr Stevens emailed Mr Parekh and said he was disappointed that the company had not communicated to him any information about its plans or strategy going forward and that it had no explanation as to why his role had been put at risk of redundancy. Ms Lambert accepted in her evidence that it was inappropriate for consultation to have been concluded without Mr Stevens being provided with that further information.

65. Both Mr Coates and Mr Stevens had their final consultation meetings with Mr Parekh on 19 February 2019.

66. Mr Coates asked Mr Parekh what his position was, as his consultation letter had addressed him as General Manager Business Development Europe. Mr Parekh was unable to tell Mr Coates what his role was. Mr Parekh told Mr Coates there was no right to an appeal hearing. At the end of the meeting, Mr Coates was told that he was being made redundant and given a letter confirming his redundancy signed by Mr Gilbank. This letter referred to the respondent's 'very difficult financial position'. Mr Coates was given the 26 weeks' notice required by his contract of employment and told he would be on garden leave. He was also told he would receive statutory redundancy pay in the amount of £13,208. Mr Coates was not paid that redundancy payment.

67. In his meeting, Mr Stevens was also made redundant and was also told there was no opportunity to appeal. He received a similar dismissal letter to that received by Mr Coates with a notice period of 12 weeks and a statutory redundancy payment of £13,716. Mr Stevens received his redundancy payment.

68. The dismissal letters stated: 'holiday pay – as per your contract of employment, any outstanding annual leave you have will be allocated during the notice period.'

69. Mr Stevens' evidence to the tribunal was that he interpreted that as meaning that the respondent would contact him to allocate leave during his notice period.

70. Ms Lambert accepted in her evidence that, given the nature of the consultation prior to this point, the claimants should have had the opportunity to appeal. Lighter HR ceased to be involved in February 2019 and did not have further involvement with the respondent until further redundancies were planned in June 2019.

Mr Gilbank's role

71. Mr Gilbank was a statutory director of the respondent but remained employed as managing director of Insider Technologies Ltd.

72. For a period after Mr Stevens was dismissed, Mr Gilbank was also the Customer Success Manager for the respondent, a role which involved him scheduling consultants to ensure that contractual obligations were met. An organisation chart from April 2019 shows him heading up EMEA services as well as line managing some services staff in the US, Mr Chasten who had reported to Mr Stevens in the UK, the Netherlands technical account manager, and a new recruit. This role appears to have been very similar to the EMEA role performed by Mr Stevens and Mr Gilbank accepted that he had taken over that part of Mr Stevens' role.

73. The Customer Success Manager role, Mr Gilbank said in his witness statement, was consolidated with that of a more experienced manager in Assima France, Fabien Vigne, after about three months. Mr Gilbank told the Tribunal that this was because Mr Charron felt Mr Gilbank needed to focus on work at Insider Technologies Ltd and had too much to do. Mr Vigne's existing role involved running the services team in France and helping out with the Spanish and Dutch entities. It appeared, after late disclosure of an email announcing Mr Vigne's appointment, that in fact his appointment to the Customer Success Manager role had not taken place until October 2019. Mr Gilbank did not know whether Mr Vigne received additional remuneration for this appointment but said that he thought it unlikely. Although the EMEA role includes "services" in the title, Mr Gilbank said that the services element had disappeared and that Mr Vigne's role was to schedule time with contractors to implement software products.

74. Mr Gilbank also had some functions in relation to the day-to-day business of the respondent. Mr Gilbank said he assisted in the communication to customers in order to give assurance to the customer base and suppliers.

75. There was an email dated 12 April 2019 which showed Mr Gilbank setting up a weekly catch up with UK staff. Mr Gilbank said that he conducted approximately three such catch up calls in total.

76. There was an email dated 16 May 2019 showing Mr Gilbank contacting a customer to get feedback on staff of the respondent for whom he was conducting appraisals. There was an email dated 28 May 2018 showing that Mr Gilbank was writing to staff about bonuses.

77. There was an email dated 6 June 2019 which showed that Mr Gilbank was negotiating contract extensions and consultancy day rates with a customer.

78. Mr Gilbank used the title 'MD' on at least one letter about a novation agreement on Assima headed notepaper sent on 14 October 2019. His explanation to the Tribunal was that the expression 'MD' did not really mean anything to him and that an 'MD' in North America is a medical doctor. Given that Mr Gilbank is the managing director of Insider Technologies Ltd, this explanation was unsatisfactory. I concluded that Mr Gilbank was being held out as the managing director of the respondent for at least some purposes until at least October 2019.

79. Mr Gilbank told the Tribunal that he spent between two hours and half a day per week on the respondent's business over the period since Mr Stevens' dismissal, although it was not clear whether that included the EMEA role and when this role ceased.

Employees of the respondent after dismissals

80. Mr Gilbank's evidence was that the respondent only had four employees after a second round of redundancies in June 2019. It was suggested that all of these were focussed on sales of software but it appears that one was employed on services.

The ongoing role of services in the respondent and the wider group

81. Screenshots from the Assima website as at November 2019 still referred to provision of services. Mr Gilbank said that he thought the website had only been updated recently. He said that services had not been promoted but the respondent had to honour existing contractual obligations with a couple of clients. The respondent did not seek to renew those customers.

82. Mr Gilbank's evidence was that a large number of the employees who had been involved in services within the Assima group had been made redundant. Mr Stevens gave evidence that his contacts in the industry had suggested the respondent was still undertaking services but he had no

detail. I concluded that the group was providing services but on a reduced scale.

Alliance manager post

83. On or before March 2019, a role was advertised by "Assima – Montreal' for an alliance manager.

84. It was said that the ideal candidate would 'already possess relationships within Accenture, IBM, Salesforce'. The position was described as remote and the candidate could be based anywhere in the United States or Canada.

85. Mr Coates was not informed about the post by the respondent but he saw it advertised on 1 March 2019, at a time when he was on garden leave. He did not apply for the post. He said that he thought his dismissal had been premeditated and effectively that there would be no point in him applying. An individual named Chip Buerger did apply and was successful. Mr Buerger had previously worked for IBM for a number of years.

86. Mr Gilbank's evidence was that this role was created after Assima had won an accolade in December 2018 in relation to an AI product sponsored by IBM. The job was created to promote that product and work with IBM. Nothing Mr Gilbank said suggested that the role was significantly different from that carried out by Mr Coates, save in respect of the partner organisations to be focussed on. The job holder was to be based anywhere in North America. Mr Gilbank said that the reason for the requirement to be based in North America was that international plane fares for travel in the role would be significantly more expensive. Mr Gilbank was not involved in the recruitment process for this role.

87. Mr Coates' evidence was that he would have discussed with his wife the possibility of a move to Canada had he been offered this role or considered for it. He said that his wife has family connections with Canada. Mr Coates has two teenage sons, one he described as 'fledged' and the other at agricultural college.

88. Mr Coates had previously worked with IBM in the UK in his role with the respondent and he had experience with Salesforce and Accenture.

Mr Coates' notice period

89. Mr Coates received his salary in the usual way for February, March and April 2019. The respondent did not pay his salary in May or June or thereafter. The respondent did not contact Mr Coates about why it was ceasing to pay his salary. Mr Gilbank's evidence was that it 'came to light' that Mr Coates

was working for Klimvest plc during his garden leave and this was considered to be a breach of clause 9.7 of his contract of employment.

The claimants' evidence about holiday entitlement

90. Both claimants gave evidence that they were not told during their notice period that they should take holiday at any particular time. Mr Stevens' evidence was that he had carried over a number of days holiday from a previous year and was owed a total of 20 days leave. Mr Coates' evidence was that he was owed 56.5 days of leave from previous years plus his 2019 entitlement.

The pleadings

91. There are a number of relevant averments in the grounds of resistance presented by the respondent. In both grounds of resistance, the reason for redundancies is said to be the financial difficulties of the respondent. The grounds of resistance also say: 'Partner One Capital is an enterprise software acquisition firm. Software has always been its focus.' Nothing more is said about how that focus related to the dismissals. It is asserted that the respondent had a loss of around £464,000 in 2018, a figure which was not supported by the evidence produced. In the grounds of resistance in relation to Mr Coates, it was said that 'it was not clear to the respondent as to whether the claimant was actually responsible for managing alliances nor were enquiries being received from organisations asking for assistance in managing their partnership going forward. The respondent therefore had genuine concerns about the viability of the claimant's role and as such considered that his role was at risk of redundancy.' No evidence was called in support of these averments. In the grounds of resistance for Mr Stevens, it was said that 'it should also be added that the claimant had previously been offered the services arm of the business for a token sum and he chose not to take it. The claimant also met with a prospective buyer of the services arm of the business but the prospective buyer walked away from the possible deal due to the negative attitude of the claimant regarding making the business profitable.' No evidence was called by the respondent in support of those averments and Mr Stevens told the Tribunal, and I accepted, that they were incorrect.

Disclosure

92. In submissions, Mr Perry brought to my attention that very little of the documentation in the bundle had been disclosed by the respondent and the

bulk had been disclosed by the claimants, some the result of subject access requests. Mr Ali did not dispute that account. This reinforces the conclusion I draw from the fact that the respondent chose not to call evidence from a relevant decision-maker that the respondent did not wish to expose the redundancy process to close scrutiny.

Unfair Dismissal

93. The test for unfair dismissal is set out in section 98 Employment Rights Act 1996.

Reason for Dismissal

94. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal and 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.'

Redundancy

95. Redundancy is one of the potentially fair reasons for dismissal: section 98(2)(c).

96. The definition of redundancy is found in section 139 of the Employment Rights Act 1996. It has a number of elements. The provisions which are relevant for the purposes of these claim are s 139(1)(b):

'*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 employer's] business -

(i) for employees to carry out work of a particular kind …
(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.'

97. A decision to replace employees with outside contractors may give rise to a s 139(1)(b) redundancy situation: Noble v House of Fraser (Stores) Ltd EAT 686/84.

98. When considering redundancy dismissals, tribunals are not normally entitled to investigate the commercial reasons behind the redundancy situation. The reasonableness of the business decision which leads to a redundancy situation is not a matter on which the Tribunal can adjudicate: Moon and ors v Homeworthy Furniture (Northern) Ltd [1977] ICR 117, EAT. This does not mean, however, that I am obliged to take the employer's stated reasons for the dismissal at face value. In order to establish that the reason for the decision was genuinely redundancy, an employer will usually have to adduce evidence that the decision to make redundancies was based on proper information and consideration of the situation: Orr v Vaughan [1981] IRLR 63, EAT, and Ladbroke Courage Holidays Ltd v Asten [1981] IRLR 59, EAT.

Reasonableness

99. Once an employer has established a potentially fair reason for dismissal, the determination of the question whether the dismissal is fair or unfair, having regard to that reason '…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 that question shall be determined in accordance with equity and the substantial merits of the case.' (Section 98(4) of the ERA).

100. When considering reasonableness, a tribunal cannot substitute its own view. Instead it is required to consider whether the decisions and actions of the employer were within the band of reasonable responses which a reasonable employer might have adopted. The test applies to the procedure followed by the employer and to the decision to dismiss.

Reasonableness in redundancy cases

101. In cases of redundancy, an employer will not normally be deemed to have acted reasonably unless it warns and consults any employees affected, adopts objective criteria on which to select for redundancy, which criteria are fairly applied, and takes such steps as may be reasonable to consider redeployment opportunities.

102. In R -v- British Coal Corporation and Secretary of State for Trade & Industry (ex parte Price) [1994] IRLR 72, Glidewell LJ approved the following test of what amount to fair consultation: 'Fair consultation means (a) consultation when the proposals are still at a formative stage; (b) adequate information

on which to respond; (c) adequate time in which to respond; and (d) conscientious consideration by an authority of the response to consultation.'

Polkey reduction

103. Section 123(1) ERA provides that

'…the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in the all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.'

104. A tribunal will be expected to consider making a reduction of any compensatory award under section 123(1) ERA where there is evidence that the employee might have been dismissed if the employer had acted fairly (see Polkey v AE Dayton Services 1988 ICR 142; King and ors v Eaton (No.2) 1998 IRLR 686).

105. The authorities were summarised by Elias J in Software 2000 Ltd v Andrews and ors [2007] ICR 825, EAT. The principles include:

105.1 in assessing compensation for unfair dismissal, the employment tribunal must assess the loss flowing from that dismissal, which will normally involve an assessment of how long the employee would have been employed but for the dismissal;

105.2 if the employer contends that the employee would or might have ceased to have been employed in any event had fair procedures been adopted, the tribunal must have regard to all relevant evidence, including any evidence from the employee (for example, to the effect that he or she intended to retire in the near future);

105.3 there will be circumstances where the nature of the evidence for this purpose is so unreliable that the tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. Whether that is the position is a matter of impression and judgement for the tribunal;

105.4 however, the tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The

mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence;

105.5 a finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary (i.e. that employment might have been terminated earlier) is so scant that it can effectively be ignored.

106. As Elias J said in Software 2000:

> 'The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed. For example, there may be insufficient evidence, or it may be too unreliable, to enable a tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the tribunal to conclude that on any view there must have been some realistic chance that he would have been. Some assessment must be made of that risk when calculating the compensation even though it will be a difficult and to some extent speculative exercise.'

Unlawful deductions from wages

107. Section 13 of the ERA 1996 provides that an employer shall not make unauthorised deductions from a worker's wages, except in prescribed circumstances. Wages are defined in section 27 as 'any sums payable to a worker in connection with his employment', including 'any fee, bonus, commission, holiday pay or other emolument referable to [the worker's] employment, whether payable under his contract or otherwise', with a number of specific exclusions.

108. The prescribed circumstances include where the deduction is required or authorised by a provision of the worker's contract.

109. On a complaint of unauthorised deductions from wages, a tribunal must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion: Greg May (Carpet Fitters and Contractors) Ltd v Dring [1990] ICR 188, EAT

Holiday pay

110. Under regulation 13 of the Working Time Regulations 1998, a worker is entitled to four weeks' annual leave in any leave year and under regulation 13A, a worker is entitled to a further 1.6 weeks' of annual leave.

111. Under regulation 14, where a worker's employment is terminated during the course of his leave year and 'the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu…' calculated in accordance with the formula set out in regulation 14(3).

112. Regulation 15(2) allows an employer to specify when an employee shall take leave. An employer's notice may be contained in the contract of employment and need not specify actual dates: Craig v Transocean International Resources [2009] IRLR 519

113. By regulation 16, a worker is entitled to be paid for any period of annual leave he or she is entitled to at the rate of a week's pay in respect of each week's leave.

114. There is ECJ authority to the effect that an employee may lose his or her right to a payment in lieu of untaken holiday if the employer has informed the employee accurately and in good time of the risk of losing that leave if it is not taken before the employment terminates: Kreuziger v Land Berlin Case C-619/16, ECJ, and Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Shimizu Case C-684/16, ECJ.

Submissions

115. The parties made oral submissions. I have carefully taken into account all of the parties' submissions but refer to them below only insofar as is necessary to explain my conclusions.

Conclusions

Issue (i) What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was for reason of redundancy, alternatively some other substantial reason in the form of a business reorganisation carried out in the interests of economy and efficiency.

Redundancy

116. For redundancy to have been the reason for the dismissals, there has to be a redundancy situation. I have to consider whether there were genuine

business decisions made by the respondent which led to a redundancy situation and whether that situation was, in turn, the reason for the dismissals in question.

117. So the questions for me are;

- whether at the time decisions were made to dismiss the claimants there was a redundancy situation, regardless of whether the business reasons which led to that situation were wise or unwise, which is not a matter for the Tribunal to determine;
- whether each of the claimants was dismissed because of that redundancy situation.

118. In the absence of any evidence from a decision-maker or any document which recorded the thinking of the decision-maker, I have had to look at the evidence with which I have been provided and form a view as to whether the respondent has satisfied me that there was a redundancy situation and that that situation was the reason for the claimants' dismissals. I have to consider the position at the time when the decision to dismiss was taken, which I conclude to have been at the date when a decision was made to commence a consultation process for each individual claimant at the latest.

119. I consider each of the claimants in turn since their circumstances and roles were different.

Mr Stevens

120. In considering the situation as it was as at 5 February 2019, by which date I concluded that the decision to dismiss Mr Stevens had been taken, I have taken into account a number of factors.

<u>Financial position of the company: did that lead to a redundancy situation?</u>

121. This was the reason relied upon by the respondent at the time of dismissals. It is obvious that the bottom line for HMRC, i.e. the declared losses, did not present a full picture of what the financial position of the company was. I concluded that some of the reporting really reflected shuffling of money between the different entities in the group. In the profit and loss account, there was substantial payment of royalties by the respondent to the Swiss company, which was in effect a profit for the group as a whole. The impairment was a one-off event which did not reflect the respondent's profitability in the past or predict its profitability in the future.

122. It was clearly part of P1C's plan for the Assima group to increase its profitability, but I concluded that the alleged financial difficulties were significantly exaggerated at the time of the dismissals and to the Tribunal.

123. There was no evidence of a particular level of savings required by the respondent or as to how any such savings related to the dismissals which occurred.

124. In the circumstances, I was not satisfied that the decision to dismiss Mr Stevens arose from a decision by the respondent / P1C that the respondent could and should operate without a managing director / EMEA services manager in order to save costs.

Decision to focus on software not services

125. In the witness statements of Ms Lambert and Mr Gilbank and at the hearing, another reason for the dismissals emerged, which was the plan to wind down the services element of the respondent's business and concentrate on software. Did the respondent decide to remove or reduce the services part of the business and did that decision, alone or in tandem with a desire to save costs, lead to a situation where the respondent no longer required an employee to carry out the work of a managing director / EMEA services manager?

126. Although this was not mentioned to the employees as a reason for the restructuring at the time and the matter was only raised obliquely in the grounds of resistance, the evidence of Mr Stevens' discussions with Mr Charron is some evidence that this was a matter in Mr Charron's mind at the time. What Mr Charron said to Mr Stevens suggests that P1C was at least uncertain about whether it wished to be involved with provision of services; the content of these discussions, however, suggests that there was no definite plan either way up to and including on 5 February 2019.

127. Mr Gilbank's evidence that P1C's mode of doing business was to seek profitability by acquiring software companies and that it was not interested in services might have supported the view that a decision to wind down the services arm led to a redundancy situation and in turn the dismissal of Mr Stevens, if there had not been the background of the discussions which suggested that Mr Charron was undecided about what to do with the services arm.

128. I also had to bear in mind Mr Gilbank's evidence that it was Mr Charron's modus operandi to acquire companies and install people he knew and trusted. My overall impression of Mr Gilbank's evidence was that Mr Charron had not shared the reasons for his decisions to make dismissals

at the time and that Mr Gilbank was largely speculating as to his reasons based on his experience of P1C and Mr Charron.

129. It seemed to me that if, as a matter of fact, the decision to dismiss Mr Stevens arose from a decision that the services element of the respondent's business was going to be stripped out / run down and the reduced business would as a result have no requirement for a managing director and EMEA services manager (and others of the staff dismissed in February 2019), it was surprising that Mr Stevens and others were not told at the time that that was the rationale for the alleged redundancy situation which led to their dismissals. No reason was put forward by the respondent for not telling the staff that this was a driver for the reorganisation that led to their dismissals. It therefore seemed to me that this was further evidence that there was no or certainly no concluded decision to wind down the services arm at the time the decisions to dismiss were made.

130. Ms Lambert's evidence that she was told that the decision had been made to focus on software rather than services and that this was one of the factors leading to the restructure was, I found, inexplicably inconsistent with the redundancy consultation letters which make no reference to that as a reason for restructuring. I bear in mind that Ms Lambert is a seasoned HR professional who was clearly aware of deficiencies in the process she was asked to conduct and would no doubt have been careful to do the best job she could with any information she had. I concluded that Ms Lambert had misremembered when she had been told about the decision to focus on software and that it was likely that this occurred later than late January or early February 2019.

131. Forced as I am to speculate on Mr Charron and P1C's reason for dismissing Mr Stevens, the evidence which I have makes it impossible for me to conclude, on the balance of probabilities, that P1C decided to dismiss Mr Stevens because, at that point in time, it had a concluded intention to wind down the services arm of the business and had made a decision therefore that the respondent did not require an employee to carry out the work of a managing director and EMEA services manager. The fact that Mr Dionne emailed Mr Stevens on 4 February 2019 to invite him to discuss 'the growth plan for the service division', yet on 5 February Ms Chabbat was writing to Ms Lambert to say Mr Stevens was 'being cut' and should be given notice is further evidence that the decision to 'cut' Mr Stevens was not connected with a settled decision to wind down the services arm.

132. I have borne in mind the fact that the evidence shows that as a matter of fact the services business of the respondent and the Assima group is now at least substantially reduced, but I am not persuaded on balance that that

decision had been made at the time of Mr Stevens being notified that he was at risk of redundancy or that this decision led to Mr Stevens' dismissal. Further, although there is some evidence that employees of the respondent were saying that the respondent had 'done away' with consulting services later in February 2019, that is not clear evidence that a decision had been made to that effect or that it had been made at the time Mr Stevens' dismissal was decided on.

133. If there was any clear evidence that the respondent / P1C, having considered the matter, had, at the beginning of February a plan to reduce the services arm of the respondent and that this (or this and the need to make savings to increase profitability) had led to the conclusion that there was a reduced need for an employee to carry out the work which Mr Stevens had been performing, that could amount to a redundancy situation. Even if there was still a need for some of that work to be carried out, there would still be a redundancy situation if the respondent had taken a business decision that that reduced need could more economically be met by utilising Mr Gilbank, who was in effect a free resource from outside the respondent business.

134. However, I find that it is more plausible on the basis of the evidence which I have set out, that P1C and Mr Charron decided that Mr Stevens was not someone Mr Charron felt he knew and could trust and that he was engaging in a clear out of management in the respondent whilst more fully articulated plans were developed for the respondent's business. The discussions between Mr Stevens and Mr Charron and Mr Stevens and Mr Michaud would fit with that account.

135. Another possibility is that Mr Charron and others at P1C had decided to strip out the services business by early February and the discussions with Mr Stevens were aimed at feeling out whether he was the person to head up the respondent whilst this was done, whatever the ultimate fate of the role of managing director / head of EMEA was going to be. The discussions with Mr Stevens in which he defended the services arm and in effect said it was integral to the respondent's business might have persuaded them that he was not the appropriate person.

136. In these circumstances, the respondent has not shown that redundancy was the reason for Mr Stevens dismissal.

Mr Coates

137. Did the respondent have a diminution in its requirement for employees to carry out chief alliance officer / alliance manager work in the UK at the time when the decision was made to dismiss Mr Coates and was that

diminution the reason for his dismissal? I concluded the decision to dismiss Mr Coates was made was at the very latest by 30 January 2019, but it may have been as early as the point when it was decided to offer him a settlement agreement.

138. There was no evidence before me that the Assima group as a whole no longer required an alliance manager and in fact the evidence that one was recruited after an advertisement posted by 1 March 2019 pointed in the opposite direction. There would, however, still be a redundancy situation if a decision had been made that the alliance manager was not required to be based in the UK and employed by the respondent.

139. Whether there was no longer a need to have such a manager based in the UK because a business decision had been made that the role could more conveniently be done in North America by this stage was entirely unclear on the evidence presented by the respondent. In the absence of any evidence from the decision maker, it did not seem to me that there was evidence from which I could conclude that such a decision had been made at that point.

140. I was not persuaded that a redundancy situation existed in respect of Mr Coates' role at the time when a decision was taken to dismiss him. I was therefore not persuaded that this was the reason for Mr Coates' dismissal.

141. The business reasons put forward by the respondent for the redundancies generally – saving costs, slimming management (which was an aspect of saving costs) and disposing of services - provided no explanation for Mr Coates' dismissal in the circumstances. It was not suggested that it was important to P1C which entity in the group employed an alliance manager because of where the costs would fall. The role itself was about software rather than services. There was still a need for an alliance manager and one was ultimately employed, so there was no slimming of management or saving of costs in that respect so far as the group as a whole was concerned. In the circumstances, it appeared that Mr Coates was dismissed either because of a misapprehension as to what his role was or because P1C simply wanted to remove all of the UK entity's management, without consideration of whether the work required by Mr Coates' role still required to be performed.

142. In Mr Coates' case, the respondent has not satisfied me that redundancy was the reason for dismissal.

SOSR

143. It was pleaded in the grounds of resistance that the dismissals were in the alternative for some other substantial reason, namely a business organisation

carried out in the interests of economy and efficiency. It was clear from the respondent's submissions that this was another label for the state of affairs alternatively labelled redundancy.

144. The findings of fact I have made do not support this reason for dismissal.

145. Since there was no potentially fair reason for the dismissals established by the respondent, I find both dismissals unfair on that basis.

Issue (ii) was the dismissal fair or unfair in accordance with ERA section 98(4), and in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

146. In the alternative and in any event, I find, as was conceded by the respondent, that the dismissals were unfair due to there having been no meaningful consultation and, there having been no proper consultation, no opportunity to appeal.

147. I find on the evidence that the entire consultation exercise was cosmetic. There was insufficient information provided about the reasons for potential redundancies for there to have been any meaningful consultation. In any event, the decision to terminate Mr Stevens' and Mr Coates' employment had been made prior to consultation starting.

Alternative employment

148. Since I have found that there was no genuine redundancy situation leading to either dismissal, the question of redeployment does not arise, although it is an issue which in relevant to the question of what if any reduction should be made to compensation on Polkey principles.

Issue (iii): should there be a Polkey reduction and if so, to what extent?

149. Given the paucity of evidence produced by the respondent, the exercise I have to perform involves a high degree of speculation. This is partly a function of the fact that no decision maker gave evidence. Mr Gilbank and Ms Lambert were executing dismissals which they had no role in deciding and appeared from their own evidence to have received no detailed explanation of. The only real insight into what appears to have been the respondent's thinking was Mr Gilbank's evidence as to P1C's modus operandi.

150. Because I have concluded that the respondent has not established that redundancy (or a business reorganisation in the interests of economy and efficiency) was the reason for the dismissal of either claimant, I am not obliged

to consider whether and when the claimants might have been fairly dismissed as part of a consultation exercise which commenced in early February 2019 and was then fairly conducted, since those dismissals would inevitably have been unfair, given that there was no potentially fair reason for them.

151. I am obliged, however, to look at all of the pieces of the jigsaw puzzle available to me and consider whether I am able to conclude that the employment of each of the claimants would have continued indefinitely or whether there is a chance that that employment would have terminated at some point.

Mr Stevens

152. In Mr Stevens' case, I have regard to the fact that the fate of the services arm was uncertain at the time when a decision was made to dismiss him and the fact that there has been at least a substantial reduction in that business. By June 2019, the number of employees employed by the respondent was a fraction of what it had been. There is clearly a reduced need for someone to act as a managing director since the respondent has been operating with Mr Gilbank as effectively a part-time managing director. The EMEA work, which was a smaller part of Mr Stevens' role, has now been absorbed by Mr Vigne.

153. There must therefore be a prospect that Mr Stevens would, at some point over the period of contraction of the respondent and reduction of the services business within the group generally, have been fairly dismissed for redundancy, although I have no hard evidence as to when the business decision which led to the reduction in the services arm was made. I have to bear in mind that there was at least some 'managing director' work being performed by Mr Gilbank and some EMEA work being performed by Mr Gilbank and then by Mr Vigne. The latter is still apparently performed by Mr Vigne. This does not represent a full role for Mr Stevens.

154. However, I also need to bear in mind that if Mr Stevens had been retained for a further period and then properly and meaningfully consulted with once it was clear that there was a redundancy situation in respect of his role, there may have been other opportunities for him within the group possibly including the EMEA role as part of a wider role. In a changing business, there is some flexibility as to how work is apportioned, as evidenced by Mr Vigne's absorption of the EMEA role. Set against that of course is the fact that the respondent itself and the services element of the group as a whole were shedding employees.

155. Doing my best with the evidence which I have, I assess that

155.1 A redundancy situation with respect to Mr Stevens' role would have developed and consultation have taken place by three months from the date when Mr Stevens' was notified of his dismissal, 19 February 2019;

155.2 Thereafter, I assess he had a 30% chance of being redeployed / retained within the group, possibly performing a role which included the EMEA services functions.

Mr Coates

156. In relation to Mr Coates' situation, it seems to me that I have the following significant pieces of evidence to work with:

156.1There was a continuing need for an alliance manager within the group;

156.2 Mr Coates had the skills and experience to continue a role as alliance manager;

156.3 There were business reasons for the respondent to want to establish that role in North America in particular the desire to foster the relationship with IBM;

156.4 Mr Coates was open to considering a role in North America, but would have had to consider the views and needs of his wife and at least one dependent child;

156.5 Mr Coates has reached a stage in his career where equivalent alternative roles are not necessarily easy to find.

157. In Mr Coates' case, it seems to me that, once a decision was made to move the alliance manager role to North America (by 1 March 2019), a fair process would have involved Mr Coates being offered the opportunity to be considered for the role in the first instance without competition from external candidates. Doing the best I can to speculate on the outcome of such a process, it seems to me that there is a 50% chance that Mr Coates would both have demonstrated that he was suitable for the role and that he would have decided to take it.

Issue (iv) Did the respondent make unauthorised deductions from Mr Coates' wages contrary to section 13 of the Employment Rights Act 1996 by failing to pay Mr Coates' salary for the period 1 May to 19 August 2019?

158. The respondent's case was that they withheld Mr Coates' salary because he was in breach of the clause 9.7 of his employment contract in working for Klimvest plc. If it had been necessary to make a finding on that point, I would not have found that there was a breach in circumstances where the respondent was aware of and consented to Mr Coates acting as a director of Klimvest plc.

159. Even if Mr Coates were in breach of clause 9.7, there was nothing in his contract which authorised a deduction from his wages in those circumstances.

160. I conclude therefore that the respondent unlawfully deducted Mr Coates' entire salary for the period 1 May to 19 August 2019.

Issue (v) Did the respondent make unauthorised deductions from the claimants' wages contrary to section 13 of the Employment Rights Act 1996 in not paying the claimants' accrued but untaken holiday pay on the terminations of their employment?

161. The claimants were notified, in accordance with their contracts of employment, that they were expected to take their holiday entitlement during their garden leave.

162. I conclude that either the contracts themselves or the dismissal letters in conjunction with the contracts constituted notice by the respondent of when the claimants should take their leave. Although the letters were clumsily worded, it seems to me that the sense was clear, particularly when read in conjunction with contracts of employment. The respondent was not obliged to specify particular days when the claimants should take that leave. In the circumstances, the claimant are not entitled to claim for accrued but untaken leave. That entitlement to a payment under regulation 14, had I found the claimants to have been entitled to such a payment, would have been limited to a payment in lieu of pay accrued during the relevant leave year and not leave carried over from previous years.

Issue (vi) did the respondent fail to pay Mr Coates a redundancy payment, contrary to section 135 of the Employment Rights Act 1996?

163. I have found that Mr Coates was not dismissed for redundancy and he is therefore not entitled to a redundancy payment. I have also found that it is possible that he would have been made redundant fairly had he remained employed at a later stage when a decision was made to move the alliance manager role to North America. If the parties are not able to agree remedies amongst themselves, I will hear submissions on whether the loss of a future redundancy payment should form part of Mr Coates' compensatory award.

164. If the parties are unable to agree matters relating to remedy, they should apply to the Tribunal for a remedies hearing.

Employment Judge Joffe
London Central Region
11 Feb 2020

Sent to the parties on:
14/02/20

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For the Tribunals Office