EMPLOYMENT TRIBUNALS

Claimant: Mr. S Baker

Respondent: Engineering Services (Bridgend) Limited

Heard at: Cardiff (by video) **On:** 29 June 2021

Before: Employment Judge G Cawthray

Representation
Claimant: In person
Respondent: Ms Randall, Counsel

RESERVED JUDGMENT

1. The Claimant was unfairly dismissed.

REASONS

Issues

1. Unfair Dismissal

    1. What was the reason or principal reason for dismissal?
    2. If the reason was redundancy, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant. In particular, whether:
    - There was a genuine redundancy situation;
    - Did the Respondent adequately warn and consult with the Claimant;
    - Was a reasonable selection pool and criteria put in place and fairly applied?
    - Did the Respondent take reasonable steps to find the Claimant suitable alternative employment?
      Was the process fair?

2. Remedy

1. If there is a compensatory award, how much should it be? The Tribunal will decide:
    a) What financial losses has the dismissal caused the Claimant?
    b) Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
    c) If not, for what period of loss should the Claimant be compensated?
2. Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
3. If so, should the Claimant's compensation be reduced? By how much?
4. If the Claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?
5. If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?
6. Does the statutory cap of fifty-two weeks' pay or £88,519 apply?
7. What basic award is payable to the Claimant, if any?

Evidence

3. The Claimant provided a witness statement amounting to 9 pages and gave oral evidence.
4. The Respondent submitted witness statements for Kevin Francis, Dean Owen and Steven Davies, and all 3 gave oral evidence.
5. A bundle of 187 pages was provided, together with a small additional bundle.
6. I informed the parties at the outset that I may not read all the documents in the Bundle and that if they wished for me to review a particular document, they should ensure that I was directed to it. Ms. Randall directed me to a number of documents at the outset of the hearing.
7. Both parties gave oral submissions.

Facts

8. The Claimant was employed by the Respondent from 7 February 2018 until 14 August 2020 as a Fitter/Welder.
9. An ET1 was presented on 12 December 2020. Early Conciliation took place, with the Claimant contacting ACAS on 6 November 2020 (Day A) and ending on 20 November 2020 (Day B). The claim was brought in time.
10. On 16 March 2020 Kevin Francis, Managing Director of the Respondent, emailed all staff in relation to the emerging pandemic. In short, the email warned staff of potential adverse consequences to the business as a result of the pandemic and set out a request for all staff to work together to reduce costs in an effort to avoid redundancies.
11. Between 21 March to 29 March the Claimant was required to self-isolate due to him collecting his parents from the airport having returned from abroad. He was paid statutory sick pay (SSP) during his period of isolation. The Claimant maintains that he was put on sick pay, rather than on furlough pay, as

punishment for not attending a job. I do not find this to be the case, and make further findings of fact at paragraphs 17 and 19 below.

12. Mr. Francis sent an email to all staff at 10:53 on 22 March 2020 notifying staff that due to the national lockdown, announced on the same day, the Respondent would "in effect shut down" and notified staff to not attend work until staff receive a further email from himself or Doris Francis, Company Secretary. The email also informed staff that they would be furloughed and that the Respondent would top up the government contribution of 80% of wages by 20% so staff would continue to receive full pay. The email also explained that Mr. Francis had no information about customers plans and may require some staff on an emergency basis.
13. At 12:35 on the 22 March 2020 Mr. Francis sent a further email thanking staff for responses (the Claimant had not replied) explaining he would keep staff informed when he knew what was "happening with jobs and essentials in the factory". He also referenced the fact that a concrete hole was due to be filled and some deliveries were expected.
14. I find that from 22 March 2020 the Respondent largely shut down the site but that in the immediate days following the national lockdown some staff were required to undertake some work to organise the shutdown. The Respondent did not continue with business as usual in the early stages of the first lockdown.
15. At 20:51 on 23 March 2020 Mr. Francis further emailed all staff to inform them that all work was cancelled for the foreseeable future and that he would be in touch when he knows anything further.
16. At 10:19 on 24 March 2020 Mr. Francis further emailed all staff to explain there may be some work coming in and asked any staff who were available to let himself and Dean Owen know, so that should any work become available they would share it out. any they would seek to share work out. The email also refers to Mr. Francis making enquiries as to whether the recycling element could continue and a potential skeleton staff being utilised.
17. The Claimant's evidence is that Mr. Owen, Service Manager, telephoned the Claimant at some time whilst he was self-isolating and asked the Claimant if he was able to undertake a job. The Claimant stated that he was unable to do so because he was self-isolating. I am unable to make a finding on precisely when this conversation took place but find that it must have taken place between 21 and 29 March 2020 whilst the Claimant was isolating. There is no evidence that the Claimant was punished for needing to isolate and not undertake the job. In response to cross-examination the Claimant stated that if Mr. Owen had not telephoned to ask him about a job, he would not have informed the Respondent that he needed to self-isolate.
18. At 10:07 on 25 March Mr. Francis emailed all staff explaining that all customers had cancelled work and within the email stated: *"we are going to put everyone in the company on a notice of potential redundancy".* The email also provided further details about furlough and clearly explained that anyone self-isolating would receive 14 days sick pay and then be moved on to furlough. All staff, apart from Doris Francis- Company Secretary – were put on furlough from 30 March 2020. Mrs. Francis was required to continue undertaking payroll.

19. From 30 March 2020 the Claimant was moved from SSP to furlough. I find that the Claimant was only moved to furlough following the end of his period of self-isolation. I find that the move to SSP was due to the need to self-isolate and was not related to any request to work. The Claimant was then moved to furlough at the end of his isolation period.
20. At 09:56 on 3 April 2020 Mr. Francis emailed all staff for the purpose of updating staff since his last email communication and explained how the industry was suffering due to the pandemic and asked staff to contact him for the purpose of operating a skeleton crew.
21. On 21 April 2020 Mr. Francis emailed all staff to explain that some work was required making and shipping parts and that two employees, were being taken off furlough and returning to work. The staff were chosen as they had the requisite skills for the job.
22. On 4 May 2020 Mr. Francis emailed all staff to provide an update and that a few staff would be taken off furlough to get the workshop ready for when it was able to be fully reopened and to undertake site work.
23. The Claimant worked between 6 and 11 May 2020 despite being on furlough. The Claimant willingly worked and was paid full pay for this period. Mr. Francis acknowledged that he has since become aware that the terms of the furlough scheme did not permit furloughed staff to work and have repaid the sums to the Coronavirus Job Retention Scheme (CRJS)].
24. The Claimant's evidence was that he was contacted by a colleague at short notice to attend a job, and the Claimant refused as he had other commitments and the request was made on short notice. Only during the course of cross examination did the Claimant reveal the identity of the person who he says contacted him to undertake a job, a Mr. Ben Gillen. None of the Respondent's witnesses were aware of the Claimant being contacted by Mr. Gillen to undertake a job in this way. On the evidence provided I am unable to find whether or not such a conversation took place, but I find that the Claimant was not penalised or punished for not accepting any offer to work made by Mr. Gillen, and this did not factor into the redundancy selection process.
25. On 13 May 2020 Mr. Francis emailed all staff updating them on the current situation but also explained that the Respondent could not afford to top up the furlough pay by 20% so that moving forward furloughed staff, including the Claimant, would receive 80% of their wages.
26. The Claimant was paid full pay between 30 March and 18 May 2020, with the Respondent topping up the funds received under the CJRS. From 18 May 2020 the Claimant was paid 80% of his basic wages.
27. During cross–examination the Claimant stated that he had visited the Respondent's site on his motorbike and saw more than 10 people at the workshop. No time frame was given by the Claimant and this information was not included in the Claimant's witness statement. I find that between March and June 2020 the Respondent operated at a very limited capacity, with the vast majority of staff being furloughed and staff being brought back to work as and when there was work required.
28. I accept the evidence given by Mr. Francis that the turnover of the business had reduced from £11 million to £5 million and the Respondent needed to consider ways to make costs savings following the impact of the pandemic, notwithstanding the furlough scheme, given the other costs of running the

business. Mr. Francis considered alternatives to redundancies such as recruitment restrictions and implementing part-time working.

29. In early July 2020 Mr. Francis, together with other senior managers, Dean Owen – Service Manager and Steven Davies Workshop Foreman, considered and discussed the Respondent's position and determined that cost cuts needed to be made. It was determined that it would be necessary to make four redundancies initially. Prior to determining that redundancies were necessary the Respondent considered alternatives such as restricting recruitment and introducing part-time working. Mr. Francis gave clear evidence that in relation to potential part-time or short-time working, given the nature of the work (largely undertaking jobs to fix machines and working from client sites) this was not a practical solution. I find that the Respondent did give consideration to whether there were alternative ways of working but that measures such as restrictions on overtime and short time working were not practicable
30. It was decided that the fairest way to select staff for redundancy was to pool all staff together, save for management and engineers, as there was a diminished requirement for each role and the work staff undertook was versatile. Staff were not consulted at this stage, and Mr. Francis explained that he felt staff had already been warned of potential redundancies but that he was also embarrassed by the situation.
31. On 10 July 2020 Mr. Francis, Mr. Owen and Mr. Davies separately undertook a scoring exercise. Mr. Francis provided Mr. Owen and Mr. Davies with a blank scoring sheet containing 14 categories: performance, knowledge, skills, experience, qualifications, attendance, disciplinary, quality of work, productivity, colleague relations, client relations, communications, cost of redundancy and length of service. However, the last two categories were not scored against by Mr. Owen and Mr. Davies as they did not have the requisite information but Mr. Francis scored for length of service. Mr. Davies allocated a 0 score for all staff in relation to qualifications as he was not aware of the qualifications held by staff and similarly, he allocated 0 for client relations. The Respondent's witness statements explained the reasons for the scores they gave the Claimant within their witness statements and in response to questioning.
    In total 31 staff were scored, and each category was awarded a score up to 10. Mr. Owen and Mr. Davies completed their scoring sheets by hand and Mr. Francis typed his scores into an electronic copy on the administrator's computer.
32. Mr. Francis awarded the Claimant a total score of 55, this was the lowest score awarded by Mr. Francis. Mr. Owen awarded the Claimant a total score of 68, this was the third lowest total score awarded by Mr. Owen. Mr. Davies awarded the Claimant a total score of 51, this was the second lowest awarded by Mr. Davies.
33. Mr. Francis, Mr. Owen and Mr. Davies then met to discuss the scoring, to ensure a consistent approach had been adopted. No changes to any scores were made and the three sets of scores were combined. The four lowest scoring individuals were selected for redundancy. The Claimant had the second lowest total score. The lowest scoring employee was leaving the Respondent in any event. The Claimant was one of two people with job title

Fitter/Welder on the scoring matrix, and the Claimant's scores were considerably less than the other Fitter/Welder.

34. The Claimant suggested that the Respondent has subsequently manufactured the scoring sheets, but based on what I considered to be clear and honest evidence from the Respondent's three witnesses I find that the scoring was undertaken individually on 10 July 2020. I accept Mr. Francis' evidence that the hard drive for the administration computer was destroyed when the member of staff that operated the computer left employment and therefore the original of the typed scoring sheet completed by Mr. Francis was no longer accessible.
35. There was no chance for selected staff to comment on the pool or proposed scoring matrix, or actual scoring.
36. The Claimant asked the Respondent's witnesses questions regarding a disciplinary matter relating to his driving manner sometime previously. The witnesses had not recalled the matter at the time of undertaking the scoring exercise. I do not find this was evidence of a general approach to inappropriate scoring, but that the event hadn't been recalled due to passage of time. Had the event been scored, I consider that it would have resulted in a higher score for the Claimant.
37. On 17 July 2020 Mr. Francis held individual meetings with the four lowest scoring employees. The Claimant was told that due to the impact of the pandemic on the Respondent he was being made redundant on the grounds of redundancy and was given four weeks' notice in accordance with his contract of employment. Mr. Davies was also present at the meetings. The Claimant was upset by the news and did not ask any questions or make any comments, either during the meeting or at any time during his notice period. The Respondent provided a letter confirming the Claimant was being made redundant dated 17 July 2020.
38. No right of appeal was offered.
39. There were no other vacancies at the point of notifying the Claimant of redundancy and no vacancy arose during the notice period.
40. The Claimant contends that he was the highest paid fitter/welder. Mr. Francis confirmed during cross examination that the Claimant had received three pay rises since commencing employment but that the Claimant was not the highest paid bracket of employees. In the absence of any other evidence, I accept Mr. Francis' evidence on this point.
41. The Claimant's employment with the Respondent ended on 14 August 2020, notice was served whilst on furlough. The Claimant was paid a statutory redundancy payment, a payment in lieu of one day accrued but unused holiday and a payment in respect of outstanding expenses. In addition, following a request by the Claimant to cover the cost of a welding course, the Claimant was also given a payment of £1,500 to cover the course costs.
42. The Claimant considered that the reason, or one of the reasons, why he was dismissed was because the Respondent believed that he was undertaking work for another company whilst furloughed. Mr. Francis had been informed by other staff that the Claimant had been working for another company and Mr. Francis was aware from the vehicle tracker that the Claimant had been visiting other sites. I accept Mr. Francis' evidence that any attendance at

other work sites or work for other companies was not a reason why the Claimant was made redundant.

Remedy

43. Mr. Francis understood from a colleague that the Claimant had commenced a new role in a factory, and congratulated him in an email dated 6 August 2020.
44. Following the Claimant being made redundant the Respondent subsequently had a need to recruit for several job roles:
    - Service Technician – advertised on 26 October 2020
    - Fitter/Welder - March 2021
45. The Claimant did not have the requisite skills and experience to undertake a role as Service Technician and was therefore not contacted by the Respondent about the vacancy.
46. The role of Fitter/Welder became available in March 2021 following the Respondent obtaining a new contract. The Respondent contacted the Claimant, via solicitors, on 12 March 2021 offering the Claimant the role. The Claimant did not return to work for the Respondent.
47. Since the Claimant was made redundant three employees have commenced employment at the Respondent:
    - an Electrician who started on 18 January 2021
    - a Specialist Machinist who started on 15 February 2021
    - a Technician on 1 March 2021
    - and on 26 April 2021 another former employee who was made redundant at the same time as the Claimant.
48. The Claimant considered that a vacancy for a Mechanical Fitter and Welder (as at page 175 of the Bundle) was for a vacancy at the Respondent. The advertisement shows no company name and I accept Mr. Francis' evidence that this was not a role advertised by the Respondent.
49. The Claimant made some attempts at securing employment but decided to-train as a gas engineer. He started trading as a sole trader in November 2020 and set up a limited company on 28 April 2021.

Law

50. Under Section 95 (1) Employment Rights Act 1996 (ERA), an employee is dismissed by his employer if …(a) the contract under which he is employed is terminated by the employer (whether with or without notice)… or (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.
51. Under section 94(1) ERA an employee has the right not to be unfairly dismissed by his employer.
52. Under section 98(1) ERA, 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 sub-section

(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.

53. Under section 98(1) ERA, the potentially fair reasons for dismissal include redundancy.
54. Under section 98(4) ERA, 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.
55. Where the employer has shown the reason for the dismissal and that it is for a potentially fair reason, the determination of whether the dismissal was fair or unfair 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 must be determined in accordance with equity and the substantial merits of the case.
56. In *Williams v Compair Maxam Ltd [1982] ICR 156,* the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. The EAT stated that it was not for the tribunal to impose its own standards and decide whether the employer should have acted differently. Instead, it should ask whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. The factors which a reasonable employer might be expected to consider were:
    - Whether the selection criteria were objectively chosen and fairly applied.
    - Whether employees were warned and consulted about the redundancy
    - Whether, if there was a union, the union's view was sought
    - Whether any alternative work was available
57. In *Polkey v AE Dayton Services Ltd 1988 ICR 142*, their lordships decided that a failure to follow correct procedures was likely to make the ensuing dismissal unfair unless the employer could reasonably have concluded that doing so would be futile. This meant that the employer would not normally act reasonably unless he warns and consults any employees affected, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment. Further, on the issue of quantum, the decision holds that whether procedural irregularities actually made any difference to the decision can be taken into account when calculating compensation.
58. Under s139 ERA, an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that his employer has ceased or intends to cease to carry on the business for the purposes of which the employee was so employed, or to carry on the business in the place where the employee was so employed, or the fact that the requirements of the business for employees to carry out work of a particular kind, or 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.

Conclusions

What was the reason/s for dismissal?

59. I conclude that the reason for the Claimant's dismissal was redundancy. I do not accept the Claimant was dismissed because of any of the reasons put forward by the Claimant: namely that he refused to work when furloughed and/or because of any use of the works van and/or undertaking any work elsewhere and/or because he was previously disciplined. The Claimant was dismissed because of the score allocated to him following the scoring exercise.
60. The redundancy situation arose because the Respondent determined that it needed to cut costs. It is not the function of the tribunal to decide how a business should be managed and when and where it needs to make cuts. The existence of the furlough scheme did not mean that the Respondent was prevented from making redundancies. The Respondent needed to make cost savings at the relevant time.
61. There was in fact a reduction in the number of employees required, and I conclude there was a genuine redundancy situation. As per the definition in s139 ERA, the requirements of the business for employees to carry out work of a particular kind had diminished. It is the Respondent's prerogative the decide that the work in question could be performed by fewer employees.

Whether the dismissal was unfair?

Warning and Consultation

62. In the early days of the pandemic Mr. Francis did warn staff about the potential consequences and the potential need for redundancies and sent a number of detailed and clear emails as set out above. However, there is more to consultation than mere warning.
63. However, Mr. Francis openly admitted that other than sending his emails, which I consider to warn staff of the potential need for redundancies, he did not consult with the Claimant, and this was due to embarrassment. Although I acknowledge that this was a difficult situation for Mr. Francis, consultation in redundancy situations is required, and no form of consultation took place. Consultation with individual employees is fundamental to the fairness of any dismissal for redundancy.
64. Further, I note that the Claimant was not offered any right of appeal.

Selection Pool and Criteria

65. The Respondent had a diminished requirement for all workshop roles and made a decision to pool all roles together, given the flexibility and overlap between workshop roles. There are alternative approaches to pooling that the Respondent could have taken, for example using a number of smaller pools

based on roles and job titles, but it is not for me to substitute my own view as to what the pool should have been, and I do not consider that the existence of other options rendered the decision in relation to pooling unfair and conclude that the selection pool chosen by the Respondent was within the range of reasonable responses.

66. Indeed, I have also concluded that any different approach to selection pooling would not have changed the outcome. The Claimant scored second lowest out of all employees, and as the lowest scorer was leaving in any event, the use of smaller sub-pools would not have changed the fact the Claimant scored in the lowest four.
67. The selection criteria were reasonable and considered a wide range of aspects of employment. The scoring exercise was undertaken independently by three senior individuals with appropriate experience to score. I found there was no collusion or inappropriate behaviour in relation to scoring, that each individual scored independently based on their own knowledge against a sensible criterion. However, the fact the Claimant was unable to discuss, comment or challenge the selection criteria was unfair.

Search for suitable alternative employment

68. There were no vacancies available in July and August 2020.

69. In reaching my conclusions I have considered all of the circumstances, noting that the Respondent was a small employer with approximately 45 employees and that the pandemic caused challenges for the Respondent, as it has done for many employers.

70. Accordingly, I conclude that the dismissal was on the grounds of redundancy but the dismissal was procedurally unfair due to the lack of consultation, which is a key element of a fair redundancy process. I conclude that Respondent's conduct in managing the redundancy process did not fall within the band of reasonable responses.

Unfair dismissal quantum

71. The Respondent argued, on the basis of *Polkey,* that the Claimant would have been dismissed in any event even if a fair procedure been followed. I agree with this. The Respondent was in financial difficulties in June 2020 as a result in a downturn in work due to the pandemic and had experienced a significant reduction in turnover. As noted above, it is not for the tribunal to attempt to second guess the employer's business decisions unless there was something manifestly absurd about them which mean they lacked credibility.

72. Having, considering the principles set out in *Polkey* I conclude that the Claimant would have been dismissed in any event. The Claimant put forward no suggestions on how his redundancy may have been avoided until these proceedings, and it was clear that measures such as an overtime ban, short time working, a recruitment ban (all of which could have been discussed and raised by the Claimant before his dismissal took effect during a consultation

process) would not have been practicable and would not have changed the outcome. Accordingly, I do not consider that proper consultation would have resulted in a solution to avoid the Claimant's redundancy dismissal.

73. The Claimant cannot recover both a Basic Award and a redundancy payment, and he was paid a redundancy payment by the Respondent. As such, no Basic Award will be made.

74. The calculation of the Compensatory Award for unfair dismissal will be limited to pay and benefits for the period of time which I consider would have been reasonable to go through a proper redundancy consultation with the Claimant, and I determine that a reasonable process would have taken no longer than three weeks. In short, a reasonable consultation process involves the following: initial meetings to warn employees (at which selection criteria is explained), a scoring exercise, a consultation meeting (at which scoring is explained), consideration of any comments/proposals made by the employee, consideration of alternative employment, a meeting to confirm the outcome and written confirmation of redundancy dismissal and as best practice the right to appeal. I consider that following such a process would take between 2 to 3 weeks, and therefore conclude that a payment equivalent to 3 weeks is appropriate in the circumstances.

75. I have made a separate case management order in relation to the remedy hearing.

Employment Judge G Cawthray

Date - 12 August 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 16 August 2021

FOR EMPLOYMENT TRIBUNALS Mr N Roche