



## EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Roberts

**Respondent:** Signet Trading Ltd

**HELD AT:** Remotely by CVP      **ON:** 3 & 4 March 2021

**BEFORE:** Employment Judge Holmes

**REPRESENTATION:**

**Claimant:** In Person

**Respondent:** Mr D Piddington, Counsel

### JUDGMENT

It is the judgment of the tribunal that:

1. The claimant was unfairly dismissed.
2. Had the respondent carried out reasonable warning and consultation with the claimant, at an appropriate stage, the claimant would still have been dismissed by reason of redundancy, but at a later date, so that the Tribunal proposes to reduce his compensatory award on the basis of the principles in **Polkey v AE Dayton Services Ltd [1987] IRLR 503.**
3. The Tribunal considers that had reasonable consultation been carried out, whilst the claimant would still have been dismissed, that dismissal would not have occurred for 2 weeks. The claimant having received a redundancy payment does not seek a basic award, and Tribunal accordingly proposes to make a compensatory award equivalent to 2 weeks pay, in the agreed sum of **£893.92.**
4. The recoupment regulations apply. The prescribed period is 1 June 2020 to 15 June 2020, and the prescribed element is £893.92.
5. The claimant's other claims are dismissed upon withdrawal by him

### REASONS

1. By a claim form presented to the Tribunal on 1 August 2020, the claimant brought claims of unfair dismissal, breach of contract and for holiday pay. The

respondent admits dismissal, which the claimant accepts, was for the potentially fair reason of redundancy . Whilst the claimant had brought other claims, upon discussion they are not being pursued, an agreement being reached in relation to the claim for unpaid pension contributions, and the claimant withdrawing his claims for holiday pay, and in respect of the tax treatment of his notice pay.

3. The evidence and submissions were concluded on the first day, and on the second day this judgment was delivered to the parties in draft form. The claimant gave evidence, but called no other witness. The respondent called Sue Lee, Head of HR Operations, and Jemma Sprakes, a District Manager who heard the claimant's appeal. There was an agreed bundle.

4. Having heard the evidence, read the documents referred to in the bundle, and considered the submissions of both parties, the Tribunal finds the following relevant facts:

4.1 The respondent is a company which operates through a number of retail jewellery outlets, two brands (referred to by the respondent as "fascias") of which are H Samuel and Ernest Jones. The claimant was employed by the respondent from 1 August 2005, under a contract of employment which is at pages 31 to 35 of the bundle. He was promoted to Store Manager, at that time to a Bolton store with effect from 13 January 2013 (page 36 of the bundle), and then moved to the Bury Ernest Jones store in 2015.

4.2 He was, therefore, at the time of his dismissal on 1 June 2020 Manager of the Ernest Jones store in the Millgate Shopping Centre, Bury. The respondent also operated another of its stores, an H Samuel store, in the same location, opposite, in fact, its Ernest Jones store. Whilst the claimant's contract of employment provided at clause 4 (page 32 of the bundle) that he could be required to work on a temporary or permanent basis at any store within a reasonable geographical area, apart from some cover with the H Samuel store opposite from time to time, he did not do so, and his place of work, as a matter of fact was the Ernest Jones store in Bury.

4.3 The respondent had, for some time, been reducing the number of retail stores it operated across the UK, Republic of Ireland and the Channel Islands, and across its brands. The number went from around 600 in 2004 when Sue Lee joined the company, to 498 by February 2015, comprising of 302 H Samuel stores and 196 Ernest Jones stores.

4.4 The respondent had (when is unclear, but certainly by late 2019) formulated a transformation programme, the Path to Brilliance, under which there were proposals to reform the business, part of which included further potential review of its retail estate. Whilst store closures were contemplated by this document, no specifics were included, and no stores identified as ones at potential risk of closure. This document was not before the Tribunal

4.5 In May 2020 the claimant was not working in the store, as he was on furlough pursuant to the Covid – 19 pandemic. He had been given no prior warning of any particular risk that the Bury Ernest Jones store was at risk of closure, and first

learned of this in a telephone call at 8.28 a.m. on 19 May 2020 from his District Manager , Claire Maher, from whom the Tribunal has not heard. She asked him to contact all his team, including one on maternity leave, for a telephone conference call at 10.00 a.m. No written material was provided to the claimant at this stage, and what, if anything, was provided to Claire Maher has not been disclosed to the claimant or the Tribunal. The nature of this request put the claimant on notice that there was likely to be some form of important announcement.

4.6 In the conference call at 10.00 a.m. on 19 May 2020 Claire Maher announced that the Bury Ernest Jones store was to close, apparently reading from a statement, which has not been provided by the respondent. One to one consultations , by telephone, were to commence that day, and the claimant had his at 10.30 that day. He was provided with nothing in writing ahead of that call.

4.7 A record of that consultation is at page 54 of the bundle. The claimant is recorded as saying that he was not surprised by the announcement, which he was not, in the sense that he was expecting something from being asked to assemble all of his team for a conference call. He had little else to say, and Claire Maher could not give him any more information. He was told that the next consultation meeting would be on 25 May 2020. It seems likely that the claimant was told that there would be a two week consultation period.

4.8 That meeting was followed by a message , to all staff, from Neil Old, the Manging Director on 20 May 2020 (page 55 of the bundle, sadly a very poor copy in whatever format one attempts to read it ). In it he explained the measures that the respondent was taking in response to the pandemic, and how it was having to change its business to adapt to the changing marketplace. He referred to the Path to Brilliance project , how that had identified that the company's store estate was too large, and how in the light of changing customer behaviour and revised sales estimates the company had identified a number of stores across both H Samuel and Ernest Jones which would **not** (his emphasis) re-open when the lockdown eased. He went on to explain how these were mainly in smaller markets where the respondent had both stores operating, and the reduced footfall and re-forecast sales expectations would make them unviable.

4.9 The claimant was then, on 20 May 202, taken off furlough, and instructed to start the process of shutting the Bury Ernest Jones branch.

4.10 By email of 21 May 2020 from Thahura Khanom, but in the name of Claire Maher, the claimant was invited to his next consultation meeting on 25 May 2020. He was told that as a result of the closure of the Ernest Jones Bury store, his role had been identified as at risk of redundancy. It was emphasised that no final decisions had yet been made about is employment, and a period of consultation had been entered.

4.11 The claimant's next consultation meeting was on 25 May 2020, again with Claire Maher, and by telephone. At some point, probably around this time, but again unclear from the documents, the respondent issued two "FAQ" documents. The first is at pages 44 to 46 of the bundle, and the second , updated , version is at pages 47

to 51. These were generic to the exercise that the respondent was carrying out (some 80 stores were being closed in three phases over a 6 to 8 week period in 2020) , and therefore did not refer specifically to the closure of the Bury Ernest Jones store. Neither contains any questions and answers relating to the reasons for closure of any particular stores, nor do they contain any questions relating to whether the pool for selection for redundancy would include employees working in stores which were not at risk of closure, and if not, why not. There were questions and answers about why there was a two week consultation period, and whether there was any potential for redeployment to vacancies in any other stores. The answer to the latter was in the negative, in the first version, as there were no current store vacancies. In the updated version this was varied to provide that there were no vacancies below store manager level (in fact the claimant's level) , and there may be limited temporary opportunities for team members at risk of redundancy , e.g to cover maternity leave.

4.12 Both these documents discuss at length the proposals as to notice, and it was the respondent's intention that notice would not be worked, and all redundant employees would receive payments in lieu of notice.

4.13 The claimant's next consultation meeting was held on 25 May 2020, by telephone, with Claire Maher (the notes are at page 58 of the bundle) . When asked if he had any questions, the claimant said he did not understand why the shop had been selected. Claire Maher was unable to give him any answer, as neither did she. She did not, however, offer to take that issue up on his behalf, but simply proceeded with the process. The details of the claimant's entitlements were discussed, and the date of the next, and final meeting was set for 29 May 2020. This was confirmed in an email of 26 May 2020 , again from Thahura Khanom, but in the name of Claire Maher (pages 59 and 60 of the bundle), in which the claimant was informed that this would be his final meeting, and unless anything new came to light , the likely outcome would be that the claimant's employment with the respondent would end by reason of redundancy.

4.14 On 29 May 2020 the claimant had his final consultation meeting. He had not been provided with any further information (unless it was during this period that the updated FAQ document was provided) , and again little was said (the notes are page 61 of the bundle). The claimant , however, did say how he was still a bit shocked that his store was picked when it had had such a good Q4 (fourth quarter of the financial year). At this meeting it was confirmed that his final day would be 1 June 202.

4.15 The dismissal was confirmed by letter of 5 June 2020 (pages 62 to 63 of the bundle) , again an email from Thahura Khanom, but in Claire Maher's name , in which no more is said about the reason for the claimant's dismissal than it was due to the closure of the Bury Ernest Jones store, and the inability of the respondent to identify any suitable alternative employment for the claimant , nor to find any way in which his redundancy could be avoided. The remainder of the email set out the claimant's entitlements, and other details, and in the concluding paragraphs explains the claimant's right of appeal, and how to exercise it.

4.16 The claimant did appeal , by letter of 9 June 2020 (page 67of the bundle). In his letter the claimant firstly sets out the performance that his store achieved, pointing out that it had won the “Strive for 5” incentive award for Q4 of 2019. He cited figures in support of his contention that , though small, it had performed well. That led him to question the selection process that had been chosen, which he said had not been explained during the process. He referred to the opposite facing locations of the two Bury stores, and how he believed that their leases were due to be renewed at the same time. He pointed out how H Samuel staff had not been involved in the process, and questioned how the respondent had chosen one store over the other. If performance was being considered, why had individual performance not been compared? He went on the refer to the furlough scheme , and how the respondent could have waited until that ended, and then re-open stores with reduced staffing , and see how that went. Instead the respondent had relied upon forecasts, when no one really knew how retail was going to perform.

4.17 The claimant also expressed his concerns at the manner in which the respondent had handled the matter, observing how a two – week consultation period was extremely disappointing. He stated that he considered that it was clear that the decisions had already been taken, and the letters were merely a formality. The utilisation of potentially redundant employees to close their own stores was, he considered, as sign of how little those employees were thought of. Finally, he intimated that he would be presenting an Employment Tribunal claim.

4.18 The appeal was dealt with by Jemma Sprakes , a District Manager from the East Midlands District. A meeting , in person it seems, at this time, was held on 2 July 2020. The claimant had a witness, Gary Spelman, and the respondent had a note taker present, Tee (presumably Thahura) Khanom. The appeal meeting lasted some 51 minutes, and the notes are at pages 68 to 74 of the bundle).

4.19 In this meeting, Jemma Sprakes did not answer the points raised by the claimant, preferring to let him make his points, that she would then take away, investigate and consider. The claimant’s first and main point was why he was selected, as he was not sure how this had happened, He had asked Claire Maher why the Bury Ernest Jones store had been selected, but she could not give him an answer. He went on to explain how the two stores faced each other, sometimes used each other’s staff, and worked together. Why were H Samuel staff not consulted? There were more experienced staff in the Ernest Jones store, and surely the company would want the right people in each store. He felt like it was already planned. He mentioned the Path to Brilliance project, but there had been confusing messages as to whether the reason was that or Covid – 19. He went on to highlight his store’s success in the Strive for 5 competition, and its Q4 performance. He questioned the use of forecasting in these circumstances. He said the process felt cut and dry to shut up the shop, and the consultation process was not meaningful. He also questioned why he could not have been left on furlough, given the continued support that the respondent was received from the Government. He later confirmed that he considered the selection process should have included H Samuel staff. He went on to point out the similarities between the two brands, in practice, in the Bury location, and how the differences were really in the stock that each store sold. He would have argued for a pooling had the situation been the reverse, with only H

Samuel closing. He then raised other issues relating to his PILON payment and holiday pay, which are no longer relevant to the issues to be determined.

4.20 Jemma Sprakes duly made enquiries. Those included contacting Leon Chawner, of the finance department, by email on 7 July 2020, to ascertain the rationale for the decision to close the Bury Ernest Jones shop and not the H Samuel shop. He replied on 8 July 2020 (page 75 of the bundle), in these terms, "EJ" being a reference to the Ernest Jones store :

*"Hi Jemma*

*During the lockdown we assessed the viability of all stores on the basis that the reduced footfall would have a material impact on the business. Part of this assessment also took into consideration the potential transfer benefit we would get in locations where we had more than one store, along with the ability to exit stores based on our lease commitments.*

*Pre lockdown both stores made broadly the same profit (HS slightly higher). The EJ store was performing at -3% and the HS at +9%.*

*The lease on the EJ was flexible meaning we could exit the store on 3 months notice. The lease on the HS has a break option on Jan 2021 meaning we could not exit at the time.*

*Over the past few years we have been tracking transfer from closed stores and have demonstrated that customer transfer from EJ to HS is significant. We have not been able to demonstrate the same for HS to EJ.*

*For these reasons we the EJ was selected for closure.*

*Since reopening in June, the HS is performing +64% comp, demonstrating the transfer benefit forecast in the decision to close the EJ."*

4.21. Jemma Sprakes also made enquiries of the claimant's District Manager as to the amount of cross - fascia working that took place between the two Bury stores, and was told that this was only occasional, and staff were clearly employed in one store or the other. She also made an enquiry to compare the claimant's own individual performance against that of his counterpart at the H Samuel store, and found that the latter's had been slightly better for the year leading to lockdown. She did not, however, check any other aspects of how the other manager would have scored against what may have become selection criteria of the nature set out in the respondent's Redundancy Policy document had the two stores been pooled, and the claimant and his counterpart considered on competitive selection criteria.

4.22 Having made these enquiries, Jemma Sprakes reached her conclusions, which she set out in her appeal outcome letter of 30 July 2020 (pages 79 to 81 of the bundle). In relation to the decision to close the Ernest Jones store, she reiterated the rationale that had been provided to her by Leon Chawner, as set out above.

4.23 In relation to the length of the consultation period, Jemma Sprakes referred to the fact that as the number of affected employees was less than 20, no statutory timeframe was applicable. It was believed that the timeframe adopted was sufficient to conduct a meaningful process. The claimant had not raised any such queries or concerns at the time. There was no redeployment opportunity, and no vacancies to discuss. In short, she concluded that the period had been reasonable.

4.24 In response to the furlough point, she set out the respondent's rationale for not keeping the claimant on furlough, which was that the ongoing costs of maintaining the stores as part of the estate would still be incurred, and closure as soon as possible was necessary and appropriate to minimise the long term impact on the business.

4.25 In relation to pooling, Jemma Sprakes said this:

***“Pooling***

*You stated that both Ernest Jones and H Samuel stores should have been treated as one because they were in the same location. You explained that staff should have been pooled as they do similar roles.*

*Although both stores are within the same town, staff are employed to work in either Ernest Jones or H. Samuel, the stores operate entirely independently and as separate brands. The requirements of each brand are different and product range, customer profile and pace of the two operations are different. I have established that resource was managed independently and was not interchangeable. Whilst on a rare occasion, a team member may have covered lunch, staff worked in either Ernest Jones or H Samuel, not across both brands or stores. For these reasons, I believe the decision to treat Ernest Jones as one work location and not to pool staff with those working in H Samuel was correct.”*

4.26 She went on to deal with other matters raised, which are not relevant to the remaining claims, and dismissed the appeal.

4.27 Jemma Sprakes made no reference to, and did not base her decision on pooling upon, any policy or document that the respondent contends was its pooling policy document. There is such a document at page 52 of the bundle. It provides as follows, to summarise, that in pooling scenarios the following guidance should be used when determining whether team members doing the same job should be pooled across a number of stores for redundancy selection.

Same fascia, stores can be pooled, in two instances, namely where;

- a) They are the same grade of store, stores within reasonable travelling distance of each other and team members regularly work in both/ all relevant stores, and;

- b) They are same fascia, stores are the same grade or the adjacent grade, stores within reasonable travelling distance of each other and team members regularly work in both/ all relevant stores; but not
- c) Same fascia, different grade, team members do not work in both/ all relevant stores ( or only on rare occasions)

and different fascia stores cannot be pooled at all, regardless of turnover/grade and whether they are the same or similar .

4.28 This document is undated, but conceded to post – date the claimant’s dismissal. There is no document in the bundle which refers to it, or how and when it came into being. The respondent had been making store closures since late 2019, and Ms Lee’s evidence was that this was the approach, if not written down in this form until after a management re-structure, that had been taken to the issue of polling in other store closures. Jemma Sprakes makes no reference to it, or to the principles it sets out in relation to whether stores can be pooled.

4.29 When staff are deployed to other stores, the cost of their doing so is borne by the receiving store.

5. Those, then are the relevant facts found by the Tribunal. There has not been much dispute as to the facts, and the Tribunal does not consider for one moment that any witness has not told the truth as they saw it

### **The submissions.**

6. The parties have made oral submissions. The respondent, by agreement went first. Much of the submissions made by Mr Piddington will be apparent from the discussion below, but in summary, he reminded the Tribunal of the test to be applied under s.98 of the ERA, and importance of the range of reasonable responses being applied to all the elements of redundancy dismissals identified in the case of **Williams v Compair Maxam Ltd [1982] IRLR 83**. The two issues were consultation and pooling. The business case for the decision which store to close was not a matter for consultation. The respondent has a wide discretion as to these business decisions, and was not obliged to consult with the claimant about this. The Tribunal should not confuse the redundancy consequences of that decision with the decision itself. The two were separate.

7. In any event there was consultation, the FAQs were part of that process, and this was perfectly reasonable way to carry out consultation. There was no fixed period of time for consultation, it all depends upon the circumstances. The claimant was at home for some of the time, and on non – working days, he was afforded sufficient time for the consultation. He did not raise the points he now advances until his appeal.

8. The results of the appeal , in the alternative, demonstrate that there would have been no difference to the outcome if the claimant had raised these matters during the consultation process.



9. On pooling, the major part of the claimant's case, Mr Piddngton took the Tribunal to the relevant caselaw, which is considered in detail below. He urges the Tribunal to accept, on Ms Lee's evidence that the respondent had indeed addressed its mind to the issue of pooling, in which case the claimant was not entitled to go behind it, and nor was the Tribunal. The respondent, on the evidence had applied this policy to a number of store closures since late 2019. On a balance of probabilities the respondent did so in this instance too.

10. The respondent treated both brands, as separate businesses. The cross working between stores was limited, and did not alter that position. The claimant was employed to work at Ernest Jones, and that was the factual position, regardless of any contractual power to require him to work elsewhere.

11. If the Tribunal was against the respondent on the issue of fairness, in the alternative a reduction on the basis of **Polkey** was clearly warranted, and it should be 100%. The claimant would have been dismissed in any event, at the time that he was dismissed. On further pressing on this aspect, Mr Piddington submitted that the respondent, had the claimant raised these issues still have proceeded to give him notice, whilst the consultation continued, and then retracted it if the claimant's position could be retained. If the Tribunal were not so minded, and finds the claimant should and would have been pooled with his opposite number at the H Samuel store, his best chance of being retained would have been 50/50, probably less.

12. Finally, and in the further alternative, there should be a reduction under s.123(6) of the ERA for the claimant's contribution in not raising these issues during the consultation process.

13. The claimant, not being a lawyer, was content to be brief in his submissions. Although offered the opportunity to consider them overnight, he declined that, and made them orally at the end of the first day of the hearing. His points were that the consultation was rushed, and the decision to close his store was made before the process was started. If there had been proper consultation, the outcome could have been different. His store had performed well in Q4, over a 19 week period. His store on those criteria would have come out above the H Samuel store. The consultation with his manager was not sufficient, and the respondent had not made sure that he understood fully the reasons why he was being made redundant.

### **The Law.**

14. The relevant statutory provisions are set out in the Annex to this judgment, unless set out in the body of the judgment. In relation to relevant caselaw, on redundancy dismissals, the leading relevant cases are set out below in the discussion of the claims and the issues.

### **Discussion and Findings.**

15. The first issue is whether the respondent, upon whom the burden rests, has shown that the reason for the dismissal was redundancy. Redundancy is defined for these purposes in s.139 of the Employment Rights Act 1996, which provides:

**139 Redundancy**

(1) *For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—*

(a) *the fact that his employer has ceased or intends to cease—*

(i) *to carry on the business for the purposes of which the employee was employed by him, or*

(ii) *to carry on that business in the place where the employee was so employed, or*

(b) *the fact that the requirements of that business—*

(i) *for employees to carry out work of a particular kind, or*

(ii) *for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.*

16. The respondent relies upon the latter, s.139(1)(a)(ii) in this instance. If it is established that there was a redundancy situation, the Tribunal then has to be satisfied that this was indeed the reason for the claimant's dismissal. If so, the next issue, however, upon which the burden is neutral, is whether the decision to dismiss the claimant was fair in all the circumstances. The leading case on the approach to fairness of redundancy dismissals is **Williams v Compair Maxam Ltd [1982] IRLR 83**, where the EAT set out the standards which should guide tribunals in determining whether a dismissal for redundancy is fair under s 98(4). Browne-Wilkinson J, giving judgment for the tribunal, expressed the position as follows:

*"... there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:*

1 *The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.*

2 *The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a*

*selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.*

3 *Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.*

4 *The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.*

5 *The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.*

*The lay members stress that not all these factors are present in every case since circumstances may prevent one or more of them being given effect to. But the lay members would expect these principles to be departed from only where some good reason is shown to justify such departure. The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim.'*

17. In relation to warning and consultation, in the House of Lords in **Polkey v AE Dayton Services Ltd [1987] IRLR 503, [1987] ICR 142**, Lord Bridge said this:

*"... in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative"*

18. The decision of the EAT (Judge DM Levy QC presiding) in **Rowell v Hubbard Group Services Ltd [1995] IRLR 195** also strongly emphasises the importance of consultation. In that case the employees had been warned of impending redundancies, and were informed in their letters of dismissal that any relevant matters could be discussed. The Tribunal held that the dismissals were fair but the EAT overturned this decision and substituted a finding of unfair dismissal. The EAT stressed that the obligation to consult is distinct from the obligation to warn, and that there were no justifiable reasons for not consulting in this case. Moreover, whilst accepting that there were no invariable rules as to what consultation involved, the Tribunal stated that so far as possible it should comply with the following guidance given by Glidewell LJ in the case of **R v British Coal Corp and Secretary of State for Trade and Industry, ex p Price [1994] IRLR 72**, at para 24:

*'24. It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in R v Gwent County Council ex parte Bryant, reported, as far as I know, only at [1988] Crown Office Digest p 19, when he said:*

*'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;*
- (d) *conscientious consideration by an authority of the response to consultation."*

19. These words were quoted with approval, in the context of stipulating what was involved in consulting a trade union, by the Inner House of the Court of Session in **King v Eaton Ltd [1996] IRLR 199.**

**The fairness of the dismissal.**

20. The Tribunal has no hesitation in holding that there was a redundancy situation, and there was no issue taken on that.

21. It is not open to an employee, or this Tribunal, to second guess the decision to make redundancies. It may be a good, bad or indifferent decision, but if it is a genuine decision, the Tribunal cannot interfere with it (see **Moon v Homeworthy Furniture (Northern) Ltd. [1976] IRLR 298**, an EAT authority, and **James W Cook & Co (Wivenhoe) Ltd. v Tipper [1990] IRLR 386**, a Court of Appeal decision). The Tribunal has no hesitation in finding that there was a redundancy situation in May 2020 affecting the work that the claimant was employed to do in the place he was employed to do it.

22. The second issue is what was the principal reason for dismissal? Again, there is no issue on this.

23. The next issue to be addressed therefore is whether the dismissal, though potentially fair, was actually fair in all the circumstances. The caselaw cited above sets out the various factors that need to be considered in assessing fairness. Some can be disposed of at an early stage. In carrying out this exercise, however, the Tribunal reminds itself that it is not standing in the shoes of the employer, and deciding what it would have done in the same circumstances, it is reviewing the actions and decisions of the respondent to determine whether they fell within the band of reasonable responses open to the employer, as it is required to do by the established caselaw such as **Foley v Post Office** and **Midland Bank v Madden [2000] ICR 1283.**

24. The main bases of challenge to the fairness of this redundancy dismissal are lack of consultation, and the selection of the pool of potentially redundant employees.

25. The first issue to be considered relates to consultation. As the caselaw shows, an employer will not be found to have acted reasonably in dismissing an employee for redundancy if he has not engaged, in good time, in meaningful consultation with

the affected employees collectively, and the individual claimant. The Tribunal therefore needs to examine the warning and consultation that occurred.

26. One fundamental issue advanced on behalf of the respondent is whether it was under any obligation to consult with the claimant in relation to the decision to close the Bury Ernest Jones shop. The respondent accepts that it did not consult with the claimant, or indeed, any of the other potentially affected employees about this decision. Mr Piddington submits that this is a business decision, entirely a matter for the respondent. It was, as the Tribunal can see from the evidence, taken by the finance department, and its rationale can be seen from the email of 8 July 2020 that Leon Chawner sent to Jemma Sprakes in response to her enquiry as part of the claimant's appeal (page 75 of the bundle). That was not, submits Mr Piddington, a decision to make redundancies, or relating to the claimant's employment. It was separate business decision, made upon a financial analysis, therefore the obligation to commence redundancy consultation with the claimant was not engaged.

27. With respect, the Tribunal cannot agree with what is a flawed analysis. It is correct that a decision to close a shop is not, *per se*, necessarily one that will give rise to a redundancy situation. If the staff of that shop, for instance, were expected to be absorbed or redeployed into other shops or other roles, or were agency workers, and not directly employed, then the closure of the shop may not have redundancy implications. That was not the case here. It must have been obvious to the respondent that the closure of the shop was likely to result in redundancies, whether the employees who worked in the shop were pooled with any others or not. The respondent cannot realistically argue its case any other way. Its case is that the staff of that shop were employed to work there, regardless of any terms in the claimant's contract, whereby he could be required to work elsewhere, or whether he, or any of his colleagues ever did from time to time work in the H Samuel shop.

28. Thus, the situation fell squarely under s.139(1)(a)(ii) the respondent did indeed intend to cease "*to carry on that business in the place where the employee was so employed*", the place in question being the Ernest Jones shop in the Millgate, Bury. It is totally artificial to seek to divorce the decision to close that shop from the inevitable redundancies that were the obvious consequences of it.

29. That means that the consultation obligations upon the respondent, if it was to act fairly in making the claimant redundant, were engaged once the proposal was considered by the respondent. It has been, however, impossible to find out when that was. Leon Chawner's email to Jemma Sprakes of 8 July 2020 does not reveal when this exercise was carried out by his department. The statement in his email is this occurred "during lockdown", by which the Tribunal understands him to mean some time after 16 (or 23, there are two possible dates) March 2020. He says that he "assessed the viability of all stores" at this time. Clearly, that would be a financial assessment. At some point thereafter, however, someone, presumably fairly senior in management, took the decision, from those assessments, which stores would be actively considered for closure, and which would not. That would then have become a proposal, and it is at that point that this would also have become a proposal to dismiss for redundancy all of the employees in the affected stores.

30. That, when these proposals were still in a formative stage , was the point at which the obligation to consult arose. As is clear from the dicta in *R v Gwent County Council ex parte Bryant* cited in *King v Eaton Ltd [1996] IRLR 199* referred to above, that required , consultation when the proposals are still at a formative stage, adequate information on which to respond, adequate time in which to respond and conscientious consideration by an authority of the response to consultation.

31. That lack of consultation, and any information about the reasons why the Ernest Jones shop had been chosen over the H Samuel shop, upon which the claimant could at least have raised some question, rendered this dismissal unfair.

32. Whilst Mr Piddington points to the consultation that did take place, and relies upon the FAQ documents (pages 44 to 46, and 47 51) of the bundle as satisfying the consultation requirements , which the Tribunal accepts , to some extent, they do, neither of them contain the question “Why is the Ernest Jones shop being closed but the H Samuel shop is not?”, both simply refer to the discussions “*regarding the closure of the store and what it means for you personally*”. The closest that the second FAQ document comes to providing any information is under the heading relating to extension of the CJRS scheme, and extension of furlough, where this is said:

*“Given the ongoing change in customer behaviour and our revised sales estimates in the post lockdown trading environment, we have identified a number of stores, across both HS and EJ which will **not** re-open when lockdown eases. These are mainly stores in smaller and/or secondary markets which become unviable based on forecast sales expectations.”*

33. That is, of course, highly generic, and provides no detail of the particular case in respect of the two Bury stores. It does not, further, reflect the reasons for the decision relating to the Bury stores as provided by Leon Chawner on 8 July 2020. He does not say that the Ernest Jones store was unviable, he says that it was easier, made more economic sense to close , and have potential transfer business to H Samuel, rather than the other way round. That does not, however, greatly matter, the point is that at no point in the consultation process was the claimant provided with any relevant information upon which there could have been meaningful consultation as to the decision on which of the two Bury stores to close. It would have been hard for the claimant to have any consultation on this decision, because, the respondent did not consider that he was entitled to it. The emphasis on the word “**not**” in Neil Old’s communication of 20 May 2020 makes it clear that this was not a matter for debate, as far as the respondent was concerned.

34. Mr Piddington seeks also to rely upon the claimant’s failure in his three consultation meetings to raise this issue , and not doing so until the appeal, as excusing the respondent’s failure to consult on this issue. The Tribunal does not accept that. The decision as to which Bury store to close appeared to be, and the Tribunal finds was, a *fait accompli*. The language of all the respondent’s communications confirms that this was a decision , not a proposal. The word “proposed” is not used in conjunction with the word “closure” anywhere. There was no hint to the claimant that consultation upon the decision which store to close was

available to him for the simple reason that it was not. Further, it lies ill in the mouth of an employer who has failed to provide the necessary information when the proposal to close the Bury Ernest Jones store was in its formative stages, to then blame the claimant for not raising in his consultation matters upon which he was not given any information, and about which he was not invited to make any representation. Whilst it is correct that the claimant was off work and had some time to consider and respond to the consultation, it is worth noting that the total period of the whole process, ignoring the date of termination, was 10 days, not even two weeks as stated. The claimant was provided with very little, other than the emails and the FAQ and Managing Director's letter of 20 May 2020, in this period. In any event, it is not accurate to say the claimant did not raise the issue of why his store had been selected, he did so in his second consultation meeting on 25 May 2020, but Claire Maher could not help him, nor, critically, did she take away his query for further enquiry with senior management.

35. The Tribunal does not seek to be critical of the respondent, and does not believe for one moment that there was anything deliberate or cynical in these failings. These are difficult times for all businesses, and there was doubtless a need to move quickly. The Tribunal has also not lost sight of the need to avoid substitution, and to judge the respondent by the standards of the reasonable employer. A moment's thought, however, would or should have made the link between the proposal, whenever and by whoever it was made, to close the Bury Ernest Jones store and the concomitant proposal to make redundancies. Whilst the scales are obviously different, a car maker's proposal to close an entire factory would obviously trigger collective consultation requirements, and the Tribunal can see no difference between that situation and the proposal to close an entire shop, with a dedicated workforce. Perhaps the fact that the collective redundancy provisions were not engaged in this exercise (because each shop would be a separate "establishment" for these purposes) led to the respondent missing this connection in these smaller scale redundancy situations, but whatever the cause, the lack of consultation in this aspect alone renders the dismissal unfair.

36. Turning to the issue of pool, this too was another matter upon which there was no consultation. Again, Mr Piddington observes that the claimant did not raise this in his consultation meetings. There is, it is true, no specific requirement to consult on pool, but it would be usual for an employer in making proposals to make redundancies to state what the pool of employees from which redundancies will be made will be. Again, nothing in the FAQ documents addresses this issue. There is no "Will any other employees at shops which are not closing be at risk of redundancy?" or similar question. The closest question and answer which touches upon the issue is that in both documents relating to whether the employee can be considered for vacancies in other stores. That is not the same issue. To some extent the pooling issue is related to the store closure issue. Had there been consultation on the latter, questions as to pooling with staff in stores which were not closing, as an alternative, would have been likely to have arisen at that stage.

37. Whilst pooling is not identified specifically in the matters upon which there should be consultation in the examples set out in **Williams v Compair Maxam Ltd [1982] IRLR 83** cited above, it is but, the Tribunal considers, simply a facet of

selection. It is selection, firstly, of the pool of those from whom redundancies will be made. It is a form of pre-selection, which may or may not lead to the need for selection criteria to be devised. A pool is a form of selection criterion in itself. If all the members of the pool are to be made redundant, as here, it is the only selection criterion. It is a matter therefore for consultation. Again it was not in this case, and it was not suggested to the claimant that it could be. Again, any argument that the claimant never raised the issue in his consultations until his appeal, is undermined by this lack of information, and invitation to comment. Whilst the respondent has subsequently provided an explanation of its rationale for the decision it says it took not to expand the pool to employees in the H Samuel shop, that was not provided to the claimant as part of any explanation for the pooling decision at the time.

38. In terms of the other aspect of the pooling issue, the Tribunal does take Mr Piddington's point that, if it is satisfied that the respondent did address its mind to the issue, then, as the caselaw makes clear, it will be very rare that a Tribunal will be entitled to find that the decision it took was outside the range of reasonable responses, the test applicable to this issue. Mummery J in Taymech v Ryan EAT/663/94 said '...the question of how the pool should be defined is primarily a matter for the employer to determine'. and: "It will be difficult for the employee to challenge it where the employer has genuinely applied his mind to the problem". That has been interpreted as meaning that (a) the tribunal does have the power and right to consider the genuineness requirement and (b) ruling against the employer's choice of pool may be difficult but not impossible.

39. Whilst Mr Piddington cited Wrexham Golf Club v Ingham UKEAT/0190/12, that judgment really repeats and endorses the judgment in Capita Hartshead Ltd v Byard [2012] IRLR 814, from which it quotes passages which were in turn repeated to the Tribunal. On the facts of the case, the Tribunal had not overstepped the mark and had come to a defensible decision on the facts. Having reviewed the case law, Silber J at para 31 gave this summary of the true position:

*"Pulling the threads together, the applicable principles where the issue in an unfair dismissal claim is whether an employer has selected a correct pool of candidates who are candidates for redundancy are that*

(a) *"It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted" (per Browne-Wilkinson J in Williams v Compair Maxam Limited [1982] IRLR 83);*

(b) *"...the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn" (per Judge Reid QC in Hendy Banks City Print Limited v Fairbrother and Others (UKEAT/0691/04/TM);*

(c) *"There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to*



*challenge it where the employer has genuinely applied his mind [to] the problem” (per Mummery J in Taymech v Ryan EAT/663/94);*

*(d) the Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has “genuinely applied” his mind to the issue of who should be in the pool for consideration for redundancy; and that*

*(e) even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it.”*

40. Mummery J's judgment in **Taymech** was cited with approval by the Court of Appeal in its short judgment in **Samels v University of the Creative Arts [2012] EWCA Civ 1152**.

41. The primary issue for this Tribunal therefore is whether it is satisfied that the respondent did in fact apply its mind to the issue of pooling before the claimant was dismissed. There was no direct contemporary evidence that it had done so before the claimant's dismissal, in that no document was produced to the Tribunal showing that the issue had been considered, when, and by whom. Ms Lee, however, gave evidence that this had been the approach taken since late 2019 and early 2020 , and had been applied to other store closures prior to this round.

42. Mr Piddington invites the Tribunal to accept on a balance of probabilities that the respondent did apply its mind to the issue of pooling. It was more likely than not that it had done so, and the evidence at page 52 of the bundle, whilst after the event, was good evidence of what the respondent had already been applying in practice for some time, as Ms Lee's evidence had confirmed.

43. This evidence is less than satisfactory, and the Tribunal would have expected a rather better papertrail (or virtual footprint) of this policy on pooling , and a much clearer account of just when and by whom it was formulated. Particularly suspicious is the *ex post facto* emergence of this undated and unprovenanced document. Whilst the Tribunal does not doubt Ms Lee's evidence that this was the respondent's approach to previous store closures , it is not satisfied that it more likely than not that it was applied to this exercise, at least not until it was addressed after, and perhaps as a result of , the very points that the claimant raised in his appeal. That this was so is strongly suggested by the absence of any reference to this policy in Jemma Sprakes' appeal findings. She did not hear the appeal until 2 July 2020, and did not send the outcome to the claimant until 30 July 2020. If such a policy was in existence by then, and had been applied to the redundancy exercise in Bury in May 2020, one would have expected her to have known of it, and to have referred to it.

44. In , however, neither her witness statement nor her appeal outcome letter does she make any reference to the policy identified at page 52, nor does she provide the claimant with a copy of it. Para. 27 of her witness statement is particularly illuminating, as she therein sets out her investigations into the pooling issue for the purposes of the appeal. She records how she made enquiries as to the

amount of “cross – fascia” working there was between the two Bury stores. She did so by contacting the claimant’s line manager . The result of her enquiries was that she considered there was not much. This was the only aspect that she looked into, and , as set out in her outcome letter (page 81 of the bundle) this formed the basis of her conclusion that there was no reason to treat the two stores as one, and she says that she believed that the “decision” to treat the Ernest Jones store as one location, and not to pool , was correct.

45. What Jemma Sprakes did not do, therefore, was ascertain who made the decision not to pool, when, and why . Rather, she made her own decision. That decision was made however, without any reference to , or apparent awareness of, the policy at page 52 of the bundle. Given that she too was a District Manager who had carried out this exercise, her lack of reference to this policy is surprising. As can be seen, her reasons for not pooling the two stores are in fact not the same as those which would apply if that policy was in fact applied. As can be seen, under that policy whether there was or was not any regular cross fascia working was wholly irrelevant, as the two final boxes which relate to whether pooling can be considered where different fascias are involved make no mention of whether there was any regular cross working , as there is a total rejection of pooling between different fascias, regardless of any regular cross working. Rather, under these criteria, cross – working is only relevant to pooling across same fascia stores. Grading is also relevant to those stores as well.

46. Thus, not only was Jemma Sprakes’ rationale for not pooling given in apparent ignorance of the policy, it was not justified on the same basis as provided in that policy.

47. The Tribunal’s conclusion, therefore, without casting doubt upon the honesty of Ms Lee’s evidence , but rather its accuracy, is that it is not satisfied on a balance of probabilities that the issue of pooling for the Bury stores specifically, or as part of the exercise that was being undertaken in May 2020 as a whole , was actually addressed by the respondent prior to the decision to dismiss the claimant for redundancy. This therefore does entitle the Tribunal to find that as the respondent had not addressed its mind to the issue of pooling, it cannot have addressed fair selection criteria, and this too renders the dismissal unfair. As Mummery J observes in Taymech , this is also another facet of consultation, as:

*“ .. the employers had not even applied their mind to the question of a pool, consisting of people doing similar administrative jobs. As the employers had never applied their mind to anything except Mrs Ryan’s actual job of telephonist/receptionist, they had not applied their mind to a pool , and there was therefore no meaningful consultation as to who was in the pool, with whom comparisons could be made with Mrs Ryan’s position, and as to who should be selected.”*

48. Thus, in summary, the Tribunal finds that the dismissal was unfair for lack of consultation, and also by reason of the respondent not considering the issue of pooling , and thereby further not consulting meaningfully with the claimant .

### **Remedy**

49. The respondent, however, argues that even if the Tribunal finds the dismissal was unfair, the claimant should not be awarded any compensation, or should only be awarded reduced compensation, on the basis that her employment would have ended in any event. This is based upon a principle established in the case of **Polkey v AE Dayton Services Ltd [1987] IRLR 503**, (referred to above in a different context) .

50. How a Tribunal should approach assessing what, if any, reduction to make on this basis was considered in some detail in the case of **Software 2000 v Andrews [2007] IRLR 568** by Elias LJ as he then was. One possibility is that the Tribunal comes to the conclusion that if the defects had not been present in the dismissal process, it would have made no difference at all, in which case a 100% reduction should be made. Alternatively the Tribunal may conclude that the position is not as clear cut , and consequently a percentage reduction somewhere between 0 and 100% is appropriate. Elias LJ said this:

*"(1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.*

*(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future.)*

*(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.*

*(4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just 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.*

*(5) An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.*

(6) *[Now irrelevant following repeal of s 98A(2) ERA] .....It follows that even if a Tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.*

(7) *Having considered the evidence, the Tribunal may determine*

(a) *That if fair procedures had been complied with, the employer has satisfied it—the onus being firmly on the employer—that on the balance of probabilities the dismissal would have occurred when it did in any event. ....*

(b) *[N/a]*

(c) *That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the O'Donoghue case.*

(d) *Employment would have continued indefinitely.*

*However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."*

51. Thus it is clear that the range of options open to a Tribunal is considerable. It may make a 100% reduction in an appropriate case, a lesser reduction if it thinks the chances of the claimant being fairly dismissed were less than 100%, or may make none. Further, a Tribunal may conclude that the dismissal would have occurred in any event, but not at the time that it did.

52. The Tribunal does not consider that this is a per centage case. The unfairness does not relate to the selection pool, or criteria, and the Tribunal does not have to assess the chances of the claimant retaining his employment had a wider selection pool been applied. It only has to do so had fair warning and consultation taken place.

53. Mr Piddington invites the Tribunal to find that , having seen how matters played out on appeal , even with a longer period of warning and consultation , the outcome would have been no different. The Tribunal agrees, in terms of what the ultimate outcome would have been. It is clear that had the claimant been able as part of the consultation process , having been provided with the information (that was subsequently provided on appeal) as to the rationale for closure of the Ernest Jones store, and of the decision not to pool, the result would have been the same. The respondent could, and would, quite fairly, have maintained its position on both these aspects, and the claimant would still have been dismissed.

54. The Tribunal therefore agrees that had there been proper consultation, on both issues, it would ultimately have made no difference. The respondent's position on the rationale for closing only the Ernest Jones store would have remained, as

would its rationale (on either the basis of the Policy, or Jemma Sprakes's rationale) on pooling the two stores also have been maintained. Both those decisions would fall within the band of reasonable responses open to the respondent.

55. What fair consultation would have meant, however, the Tribunal considers is that the dismissal would have been delayed. Whilst putting a timescale on such an exercise is not a precise science, the Tribunal considers, given that there were two separate issues to be considered, and upon which the claimant should first have been provided with the necessary information, and then been allowed to make representations, there would inevitably have been some delay, not least of all because it was clear that his manager at local level would not have been able to deal with either of these issues, as she herself did not have the necessary information.

56. Whilst appreciating that the appeal was not working to a tight timetable once the claimant had been dismissed, it is noted that it took from the hearing of the appeal by Jemma Sprakes on 2 July 2020 until 7 July 2020 to make the enquiry of Leon Chawner, who replied the following day, and then until 30 July 2020 for her to send the appeal outcome letter. Her statement refers to the other post – meeting investigations she carried out, though she is not specific about how long those investigations took, the impression the Tribunal has is that they would have taken a little time as well.

57. On balance, therefore, and taking a broad approach, the Tribunal's conclusion is that with proper information and consultation the process was likely to have taken a further two weeks, as a reasonable period.

58. That is not, however, the end of the matter, as Mr Piddington in the alternative invites the Tribunal not to award two weeks pay, as the respondent could still have given the claimant notice when it did, have continued the consultation process, and could then have reversed its decision had the consultation resulted in any change of approach.

59. Whilst an ingenious argument, it does not find favour. The Tribunal, in assessing compensation assesses what, on the probabilities, would have happened had a fair process been followed, not what could have happened. The claimant's dismissal, as was everyone else's in this exercise, as can be seen from the FAQs, was always going to be without notice. There is nothing in the Redundancy Policy which suggests that the respondent would give notice, but continue with consultation, and none of the emails inviting the claimant to the various meetings suggest that he would be given notice of dismissal on 1 June 2020, come what may. No evidence has been led as to why that date was so crucial. This argument also runs contra to what Thahura Khanom's email of 26 May 2020 (page 59 of the bundle), which convened the final consultation meeting on 29 May 2020, says. The possibility that something new may come to light is expressly considered in that email, and the claimant is told that unless it did, the likely, but, therefore, not inevitable, outcome of the meeting would be his dismissal for redundancy.

60. Finally, had the respondent given the claimant notice on 1 June 2020, but then sought to withdraw it, it could have found itself in the perilous position of

seeking to withdraw notice that had been given, which would require the claimant's consent. The rule that notice of termination, once given, cannot be unilaterally withdrawn, is long established (see for example *Willoughby v CF Capital plc* [2011] 985) and the Tribunal considers it most unlikely that the respondent would have pressed on with notice of termination, rather than simply extend the consultation period by a couple of weeks. The Tribunal is therefore not satisfied that the claimant would still have been dismissed on 1 June 2020 had proper consultation taken place, and proposes to award him 2 weeks pay to reflect the delay that would have ensued.

61. The final argument in relation to any reduction in the compensatory award, although not pleaded in the response, which was pleaded by professional representatives, raised by Mr Piddington, is a potential reduction in the compensatory award by reason of contributory conduct pursuant to s.123(6) of the ERA. The conduct relied upon is the claimant not raising in his consultation meetings the matters he raised on appeal, and which form the basis of his claims. The Tribunal rejects any such argument. For conduct to justify such a reduction it must be blameworthy, in the sense of being perverse or foolish, or unreasonable in the circumstances. There was no such conduct here. The failure of the claimant to raise these issues until his appeal was the result of the limited information provided to him, and the limited scope of the matters upon which the consultation was taking place.

62. To be complete, had the consultation period been extended to allow for the additional information and to be meaningful, the claimant would still have received his full notice pay, and would presumably still have started his new job when he did. Given that the Tribunal is making no award beyond the two weeks further consultation period, any further losses are academic. It also follows that given the Tribunal's findings, there is no requirement for it to make any assessment of the claimant's prospects of retaining employment if pooled with his opposite number in the Bury H Samuel store.

63. As the claimant's employment would have ended in any event, it is not appropriate to make an award in respect of loss of statutory rights. The redundancy payment he received, of course, satisfies the basic award element.

64. The parties were able to agree the amount of the award, as set out in the judgment. As, however, the claimant did receive benefits following his dismissal, the recoupment regulations are likely to apply, and the respondent will have to account to the DWP for any recoupable benefits, paying the balance to the claimant. This was not, the Tribunal appreciates, explained in the hearing, but is, on the face of it, the legal position.

Employment Judge Holmes  
Dated: 4 March 2021

JUDGMENT SENT TO THE PARTIES ON

16 March 2021

FOR THE TRIBUNAL OFFICE

## **ANNEXE**

### **98 General**

(1) *In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*

(a) *the reason (or, if more than one, the principal reason) for the dismissal, and*

(b) *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

(2) *A reason falls within this subsection if it—*

*[(a) – (b) N/a]*

(c) *is that the employee was redundant, or*

*[(3) N/a]*

(4) *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*

(a) *depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

(b) *shall be determined in accordance with equity and the substantial merits of the case.*

### **123 Compensatory award**

(1) *Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in 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.*

*[(2) – (5) N/a]*

(6) *Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.*





## NOTICE

### THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2409499/2020**

Name of case: **Mr M Roberts** v **Signet Trading Ltd**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding discrimination or equal pay awards or sums representing costs or expenses), shall carry interest where the sum remains unpaid on a day ("*the calculation day*") 42 days after the day ("*the relevant judgment day*") that the document containing the tribunal's judgment is recorded as having been sent to the parties.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant judgment day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: **16 March 2021**

"the calculation day" is: **17 March 2021**

"the stipulated rate of interest" is: **8%**

For and on Behalf of the Secretary of the Tribunals

**Claimant**                    **Mr M Roberts**  
**Respondent**                **Signet Trading Ltd**

**ANNEX TO THE JUDGMENT  
(MONETARY AWARDS)**

Recoupment of Benefits

The following particulars are given pursuant to the Employment Protection (Recoupment of Benefits) Regulations 1996, SI 1996 No 2349.

The Tribunal has awarded compensation to the claimant, but not all of it should be paid immediately. This is because the Secretary of State has the right to recover (recoup) any jobseeker's allowance, income-related employment and support allowance, universal credit or income support paid to the claimant after dismissal. This will be done by way of a Recoupment Notice, which will be sent to the respondent usually within 21 days after the Tribunal's judgment was sent to the parties.

The Tribunal's judgment states: (a) the total monetary award made to the claimant; (b) an amount called the prescribed element, if any; (c) the dates of the period to which the prescribed element is attributable; and (d) the amount, if any, by which the monetary award exceeds the prescribed element. Only the prescribed element is affected by the Recoupment Notice and that part of the Tribunal's award should not be paid until the Recoupment Notice has been received.

**The difference between the monetary award and the prescribed element is payable by the respondent to the claimant immediately.**

When the Secretary of State sends the Recoupment Notice, the respondent must pay the amount specified in the Recoupment Notice to the Secretary of State. This amount can never be more than the prescribed element of any monetary award. If the amount is less than the prescribed element, the respondent must pay the balance to the claimant. If the Secretary of State informs the respondent that it is not intended to issue a Recoupment Notice, the respondent must immediately pay the whole of the prescribed element to the claimant.

The claimant will receive a copy of the Recoupment Notice from the Secretary of State. If the claimant disputes the amount in the Recoupment Notice, the claimant must inform the Secretary of State in writing within 21 days. The Tribunal has no power to resolve such disputes, which must be resolved directly between the claimant and the Secretary of State.