EMPLOYMENT TRIBUNALS

Claimant: **Ms G D'Adamo**

Respondent: **Angel of Corbridge Ltd t/a The Angel Inn**

Heard at: **Newcastle CFCTC** **On: 28-29 March, & 8 August 2022**

Before: **Employment Judge Newburn**

Representation:

Claimant: **Ms Hogben (Counsel)**
Respondent: **Mr Searle (Counsel)**

RESERVED JUDGMENT & REASONS ON LIABILITY

1. The Respondent conceded sums are due to the Claimant in respect of her redundancy payment and holiday pay.

2. The Claimant's claim for redundancy payment succeeds. The Respondent is ordered to pay the sum of **£264.42**.

3. The Claimant's claim for holiday pay is well-founded and succeeds. The Respondent is ordered to pay **£456.62**.

4. The Claimant's claim for automatic unfair dismissal pursuant to section 100 of the Employment Rights Act 1996 is not well-founded and is dismissed.

5. The Claimant's claim for ordinary unfair dismissal pursuant to section 98 of the Employment Rights Act 1996 is well founded and succeeds.

6. The Claimant's claim pursuant to section 38 of the Employment Act 2002 is well founded and succeeds.

7. The Tribunal will decide the remedy for ordinary unfair dismissal and a section 38 award at a further hearing on remedy.

8. The parties will be sent a separate case management order setting out required steps for preparing for the remedy hearing.

REASONS

The Issues:

9. We agreed a list of issues at the beginning of the first hearing to be as follows:

    9.1. What was the reason, or, if more than one, the principal reason, for the Claimant's dismissal?

    9.2. If the reason was redundancy, did the Respondent act reasonably within the meaning of section 98(4) of the Employment Rights Act 1996?

    9.3. When these proceedings were begun, was the Respondent in breach of its duty to give the Claimant a written statement of employment particulars or of a change to those particulars?

Hearing

10. The matter was originally listed with both Mr Hogg and the Claimant bringing claims against the Respondent. On the first day, further to some discussion, Mr Hogg confirmed his claims were withdrawn, however he agreed that he would remain as witness for the Claimant.

11. The Claimant and the Respondent were both represented by counsel; I heard evidence from the Claimant and Mr Hogg, and for the Respondent I heard evidence from Mr Laing and Mr Kurdi.

12. I had a bundle totalling 493 pages, and references to page numbers in these reasons are references to page numbers in the bundle.

13. We discussed the Claimant's claims and determined that further to the Claimant providing further evidence regarding her start date with the company prior to its transfer to the Respondent, the Respondent conceded the Claimant's claim for the additional redundancy pay due and accepted the unlawful deduction from wages pay with respect to her holiday. The Respondent confirmed that it accepted the Claimant's calculations with respect to those claims as set out in the Claimant's Schedule of loss. Accordingly, the Claimant's claims for a redundancy payment and for unlawful deduction from wages in respect of her holiday pay succeeded.

14. The case had originally been listed for 2 days and at the start of the second day the Respondent wished to submit two further documents which comprised spreadsheets showing the Respondent's profits from before the pandemic up to June 2021. I accepted them as evidence, adding them as a further 4 pages to the end of the bundle of documents and permitted the Claimant additional time to review and ask any further questions on those points if she wished to do so.

15. Given the issues at the start of the day, it was not possible to conclude the evidence within the 2 days and the matter was extended by a further day to hear the remaining evidence and the parties' submissions. Thereafter, I reserved judgment.

16. This judgment is not a rehearsal of all the evidence heard but is based on the salient parts of the evidence upon which I based my decision.

Finding of Facts

17. The Respondent is a hotel with accommodation, bar and dining areas, a fish and chip shop ("the chippy") on site and street food operations based in Corbridge.

18. The Claimant began working for the Respondent on 27 July 2003 as waiting staff. In or around May 2008 the Claimant was promoted to supervisor.

19. In October 2011 the Respondent business was transferred to Mr Kurdi, and at this time, his cousin, Mr Laing was appointed as Managing Director.

20. On 4 August 2014 the Claimant was promoted to Front of House Manager, and on 20 February 2017 the Claimant was promoted to Operations Manager. In January 2019 the Claimant's job tile was amended to Revenue Manger however her job role remained the same. Notwithstanding this change, the titles 'Operations Manager' and 'Revenue Manager' were used interchangeably to refer to the Claimant's job role.

21. The management staff included: Mr Laing as the Managing Director and thereafter, the Claimant as Revenue Manager, Mr Hogg as General Manager, a Business Development Manager, an Accounts Manager, the Head Chef, and a Food and Beverage Manager. The Respondent held weekly leadership management meetings; as part of the management team, the Claimant was usually in attendance at these meetings.

22. As a result of the coronavirus pandemic, on 16 March 2020 the Government advised the public to stop all non-essential contact and travel, including avoiding bars and restaurants; at this time there was speculation that the UK Government would impose a national lockdown.

23. On 19 March 2020 the Respondent held a manager's meeting. During this meeting, the potential national lockdown was discussed, as well as the effect that the

Government's advice to avoid bars and pubs was having on the Respondent business and the potential national lockdown being imposed. The Respondent decided to close as of 20 March 2020 further to this guidance.

24. On 22 March 2020 Mr Laing invited the management team to a crisis meeting at the premises to take place on the morning of 23 March 2020 (the "23 March meeting").

25. Mr Hogg spoke with a number of staff about this meeting, including the Claimant. The Claimant, Mr Hogg, and the Food and Beverage Manager spoke about this meeting and expressed their concerns about safety relating to the spread of the coronavirus. The Claimant told Mr Hogg that as a result of her safety concerns she did not wish to attend a face-to-face meeting.

26. Mr Hogg informed Mr Laing that he would not be attending the crisis meeting and neither would the Claimant or the Food and Beverage Manager.

27. The Business Development Manager also declined to attend the 23 March meeting.

28. On 23 March 2020, Mr Hogg attended the Respondent premises with his son to return the internal door keys. On arrival he saw Mr Laing was in a room with the Accounts Manager and the Head Chef. Mr Laing left the room to speak to Mr Hogg and during this conversation Mr Hogg's evidence was that Mr Laing was angry and "ranted" at him for a few minutes. Mr Laing was frustrated about the situation, and said he was "trying to run a business" and mentioned staff not attending work.

29. At 12:06 on that day Mr Laing sent an email to the management team staff, including the Claimant, expressing that he had expected everyone to have been at work further to his request for a meeting, and that he has asked Mr Hogg to contact them to arrange a further meeting the following day (page 134).

30. At 13:02, later that day, Mr Laing sent a text to Mr Hogg, saying "*sorry if I seemed to rant. It wasn't aimed at you. If the team could be in in the morning for a final meeting and decide on actions. Phones at also still planned for tomorrow.*" (page 124). Mr Laing then asked Mr Hogg to get the team to attend the hotel site the following morning for a final meeting.

31. Mr Hogg's evidence was that Mr Laing was angry that staff did not attend the 23 March meeting. Mr Laing's evidence was that he was not angry about people not attending and that he understood people's concerns. He stated that he could not remember ranting and thought that the reference in the text message to a "rant" was related to the planned installation of a new telephone system being cancelled.

32. Mr Hogg was clear in his evidence that Mr Laing specifically "ranted" about staff not attending the meeting, whereas Mr Laing stated he was unable to clearly remember. On reviewing the evidence, and given the situation in general, on balance I find it

likely that Mr Laing was angry that staff had not attended the 23 March meeting as well as being frustrated about the phone system and vocalised his frustration about this in a "rant" to Mr Hogg.

33. That evening, on 23 March 2020, the UK Government announced the first national lockdown to take effect from that evening.

34. At 9:35pm on that evening, Mr Hogg responded to Mr Laing's 13:02 text message accepting Mr Laing's apology and recognising that he was stressed. He stated that he had spoken to the Claimant and the Food and Beverage Manager and they all felt that they needed to adhere to Government guidelines by social distancing (page 124).

35. On 24 March 2020 Mr Laing responded to an email to Mr Hogg in which he informed Mr Hogg that the Respondent had suffered severe financial problems as a result of the payment of the March wages which had wiped out the Respondent's bank account and the bank was withholding funding pending a site visit (page 135).

36. On 25 March 2020 the Respondent placed all staff on furlough at 80% pay using the coronavirus job retention scheme. The Claimant agreed to this.

37. The Respondent's evidence was that the business received income of just £1,000 in April and £0 in May 2020 (page 486).

38. The Respondent was able to open the chippy to carry out a takeaway service and provide a small Sunday lunch takeaway service in an effort to gain some revenue.

39. On 10 May 2020 the Government announced a conditional plan for lifting lockdown and on 4 July 2020 the hospitality sector was allowed to reopen in-line with government guidance on safety. In preparation for this reopening on 25 June 2020 Mr Laing sent a text message to Mr Hogg, the Accounts Manager, the Business Development Manager, and the Head Chef regarding a meeting to take place on 30 June 2020. The purpose of this meeting was to discuss safety measures to be put in place surrounding the business re-opening during the pandemic (the "reopening meeting"). The Claimant was not invited to that meeting.

40. Mr Laing stated that the Claimant had not been required to attend the reopening meeting because it was aimed at people who would be returning the work imminently, and the Claimant was not part of that category. During the second consultation meeting with the Claimant Mr Laing stated that in hindsight he felt the Claimant should have been invited and apologised to the Claimant.

41. As the lockdown restrictions began to ease, the Respondent was able to open on a reduced level with limited opening times. The Respondent's revenue had dropped and Mr Laing believed, having spoken with other people in the industry and reviewing industry press, that the effects of the pandemic would not be a short-term

event and the hospitality industry would take a long time to recover. Mr Laing's evidence was that at this time, even using the flexible furlough scheme, the Respondent was still operating at a considerable loss and that there was so much uncertainty surrounding how the furlough scheme would continue and how much employers would need to contribute to the scheme that this led him to consider redundancies.

42. On 12 July 2020 Mr Laing sent employees, including the Claimant, a letter regarding voluntary redundancy. Mr Laing's evidence was that no employees wished to take voluntary redundancy.

43. Mr Laing undertook a review of the business and decided there needed to be a reduction to the wage cost but this must occur in a way that would still allow the Respondent business to operate. Mr Laing established that the management team, as salaried employees, represented the largest proportion of the wage bill, and that work for these roles had reduced as a result of the pandemic. He therefore considered a restructure of the management team as a method of reducing the Respondent's expenditure.

44. Mr Laing's evidence was that to assist in determining how he would achieve assessment and restructure he created a document that he called an "accountability matrix".

45. There was confusion regarding the "accountability matrix". Mr Laing has used the word "matrix" but it is apparent that he did not intend for it to carry the legal connotations that word has with redundancy situations. Mr Laing's "accountability matrix" in the bundle was not a matrix as one would commonly come across in redundancy situations, that being a document created to score all at risk employees against objective criteria with a view to comparing those results and selecting the lowest scoring employee from a pool for redundancy.

46. Mr Laing's evidence weas that the "accountability matrix" he created was a document which identified the tasks and responsibilities of each of the management team's roles and determined which roles could potentially be deleted, because the responsibilities of that role could be achieved using a cheaper alternative such as using technology or they could be absorbed by him personally or distributed to other staff members.

47. This also lead Mr Laing to determine that some salaried management roles could not be deleted because he could not redistribute the associated tasks of those roles to himself or others or remove those tasks by using technology. This included the roles of Head Chef and Accounts Manager.

48. On 15 July 2020 the Respondent wrote to the Claimant stating that the management team had forecasted sales at 35% - 50% of the Respondent's pre-coronavirus

figures and the serious threat to the business resulted in the requirement for the business to take action. The letter went on to state:

> "*Having undertaken a full review of the overall business looking at demand. Both in the foreseeable future and longer term we believe that we are unable to maintain current levels of staffing and given the significant drop in demand believe we will be able to deliver the same level of service without the role of Operations Manager. In a review of the role and available resources it is our current belief that these duties could be redistributed.*
>
> *As part of the proposal we are also looking to make other cutbacks within the business and we believe all these factors put the role of Operations Manager at risk of redundancy."*

49. The Claimant was invited to attend a consultation meeting on 17 July 2020 (page 159).

50. The Claimant attended the first meeting, accompanied by Mr Hogg. During this meeting, the Claimant raised a number of questions regarding the redundancy process, the reasons Mr Laing felt redundancies were necessary, the roles that had been identified, and the reasoning behind the same.

51. On 20 July 2020, Mr Laing emailed the Claimant with a summary of their discussions from the first consultation and requested a second consultation meeting on 22 July 2020. Mr Laing stated in this letter that the estimated weekly sales were approximately £60,000 per month and wage costs were £55,000 per month and that the Claimant's role, alongside 3 other roles, were at risk of redundancy.

52. Mr Laing then responded to some of the questions the Claimant had raised in the first meeting. The Claimant had asked how her role had been identified, and Mr Laing stated that he had looked at several key roles in the business to see if the tasks and responsibilities in that role could be absorbed or redistributed to other roles or carried out by technology.

53. Mr Laing concluded the letter by asking the Claimant to provide an insight into her ideas and alternative solutions ahead of the second consultation meeting (page 169).

54. On 21 July 2020, the Claimant emailed Mr Laing requesting more time to prepare for the second consultation meeting, asking for the meeting to be heard at 4pm on the Wednesday or to take place on the Thursday instead. Mr Laing responded to that email to offer the meeting time of either 4pm Wednesday or 10:30 on the Thursday as requested.

55. Prior to the second consultation meeting on 22 July 2020, the Claimant sent an

email to Mr Laing with details of points she wished to discuss, including questions regarding why her role had been identified, and discussions surrounding ideas on how to build short-term business in an effort to reduce wage costs and increase income.

56. On 22 July 2020, the Claimant, accompanied by Mr Hogg, attended the second consultation meeting with Mr Laing. At this meeting the Claimant presented a number of ideas she had regarding why her role should not be made redundant and provided alternative proposals on how to support the business, with ideas such as increasing sales by increasing opening hours and food service times.

57. The Claimant also highlighted that if the salaried staff were dismissed, the hourly paid staff would be required to work additional hours, and if the hourly paid staff were to work over 55 hours per week their wage would be app. £27,170 which would be almost equivalent to her Operations Manager fixed salary at £27,500. The Claimant therefore stated that a more suitable proposal would be to leave the hourly paid Front of House staff on furlough and bring back the management team. Alternatively, the Claimant suggested the Respondent should instead consider making redundancies from the junior Front of House staff and the management staff would absorb their tasks.

58. On 23 July 2020, Mr Laing sent a letter to the Claimant with a summary of his notes from the second consultation meeting (page 178). Mr Laing stated the purpose of the meeting had been to hear the Claimant's alternative proposals and summarised what he felt had been the main points for the first meeting. He stated that the sales forecast was 35-50% and that the business needed to reduce payroll to manage wage costs in line with sales.

59. Mr Laing acknowledged the Claimant's point regarding hourly rate staff being comparably expensive if they were to work significant hours and highlighted that if the hourly staff both worked the legal maximum of 48 hours their wages would amount to £47,424, this was £16,676 less than the Claimant and Mr Hogg's combined salary, and £5,076 less than the Claimant and the Food and Beverage Manager's combined wage. Mr Laing stated he appreciated this saving would not be significant, and therefore that this was a good proposal which he would consider, as he recognised that the salaried staff also had greater experience.

60. Mr Laing responded to the Claimant's position regarding making use of the coronavirus job retention scheme for lower rate staff stating why he considered that this may not be a suitable solution.

61. The Claimant had raised queries regarding the weekly sales figures and how they had been calculated, as they formed the basis upon which the Respondent was making sales forecasts, and underlined the reasoning for having to make

redundancies. She believed that the figures had missed out revenue from the chippy, and another street food event from 19 – 26 July 2020 and, including those figures, the sales were higher than had been forecast.

62. The Claimant believed sales were more likely to be between £20,000 - £25,000, and not the £15,000 that Mr Laing had presented. Mr Laing confirmed that the £15,000 weekly sales figure did not include sales made from the chippy which was a further £2,500 per week, making the weekly sales income of £17,500.

63. However, Mr Laing addressed why he did not believe the Claimant's proposed figures of £20,000 - £25,000 to be realistic and invited the Claimant's further comments.

64. Mr Laing highlighted that whilst there were weeks where sales were in excess of the predictions, these weeks were anomalies, for example the first week opening up after lockdown. Notwithstanding that, the average sales did not peak and were not significantly in excess of the forecasted figures.

65. The Respondent's evidence demonstrated that the Respondent's turnover dramatically fell from an average of £160,000 per month to an average of around £33,000 per month from April 2020 – March 2021.

66. Mr Laing acknowledged the Claimant's points that the new opening hours were too restrictive, that she felt the bar and restaurant should open for lunch service, that she would continue to have food service times close to pre-pandemic times, and her fears that residents would not stay loyal to the Respondent if a decent lunch and dinner menu was not offered on Monday – Thursday. At paragraphs 12 – 13 of Mr Laing's 23 July 2020 letter (page 178), Mr Laing summarised the Claimant's suggestions on increasing sales and her comments regarding the current proposed plan. Mr Laing said he would consider those points.

67. At paragraph 17 (page 178), Mr Laing addressed questions the Claimant raised regarding why her role had been selected as being at risk. Mr Laing stated the method by which he selected the roles at risk for redundancy was to look at a "*matrix of accountability*" and the tasks within it to see if they could be absorbed by the team, taken on by another role or replaced with (for example) technology.

68. Mr Laing's letter was a 6 page long response to the points raised by the Claimant. It indicated that Mr Laing intended to consider the points she had raised.

69. In an email on 24 July 2020, Mr Laing provided Mr Hogg with a copy of the "accountability matrix" relating to Mr Hogg's role. Mr Laing stated in the email that he would not reveal to any other person the matrix as it was private and confidential. Mr Laing did not provide the Claimant with a copy of the

"accountability matrix" for her role.

70. On 26 July 2020, the Claimant emailed Mr Laing with the proposals she had discussed with him during the process. The Claimant attached an 11 page email with her notes of the points raised in the last consultation meeting.

71. On 28 July 2020, Mr Laing invited the Claimant to attend a third consultation meeting on 30 July 2020. Mr Laing stated in this letter that he acknowledged the Claimant's email from 26 July 2020 and would be happy to discuss the same during the next consultation meeting. Mr Laing further stated in this letter that due to the impact of the coronavirus pandemic, and the predicted sales, the Respondent could not afford the luxury of a senior management team.

72. On 30 July 2020, the Claimant sent a response to Mr Laing's email regarding the points raised in the second meeting, by adding her comments into Mr Laing's previous letter.

73. On 30 July 2020, the Claimant, accompanied by Mr Hogg, attended the third consultation meeting with Mr Laing. Mr Laing sent his notes of this meeting in an email to the Claimant on 5 August 2020 (page 231). In this letter Mr Laing stated that another member of staff had suggested that one of the 4 managers at risk of redundancy could in fact take on the role of the others which would save one of the management roles. Mr Laing stated he would consider if he believed this would be feasible (page 232).

74. The Claimant stated that nothing further happened with respect to this suggestion. Mr Laing's evidence was that he did consider this but did not believe it would have been feasible as it would not have resulted in the savings in wages that he was seeking.

75. On 6 August 2020, Mr Laing sent a further email to the Claimant inviting her to a fourth Consultation meeting on 10 August 2020 (page 287).

76. On 5 August 2020, Mr Laing emailed the Claimant with a summary of his notes from the third consultation meeting and the Claimant sent an email in response with her comments, marking the same under the paragraphs of Mr Laing's letter of 5 August 2020.

77. On 6 August 2020, Mr Laing invited the Claimant to a fourth redundancy meeting to take place on 10 August 2020. Prior to this meeting, on 9 August 2020, the Claimant sent an email in response to the invitation raising some further points.

78. On 10 August 2020, during the fourth consultation meeting, the Claimant was advised by Mr Laing that she would be dismissed by reason of redundancy.

79. The Respondent also dismissed Mr Hogg and the Food and Beverage Manager by reason of redundancy. Mr Laing's evidence was that the Respondent was also forced to make a further 6 redundancies later in 2020.

80. The Claimant appealed against the decisions to make her Redundant. Mr Kurdi dealt with the appeal and she sent a letter of appeal to him on 25 August 2020.

81. On 26 August 2020, Mr Laing sent an email to the Claimant which stated that there were two jobs available and asking if she was interested in them; one was a role of housekeeper, and the other was a bartender role. The Claimant asked for details of the role, and in an email on 28 August 2020, Mr Laing responded to confirm that both roles were essentially zero hour contract positions on minimum wage, with the housekeeping role at around 20 hours per week and the bartender role at around 40 hours per week (page 334). The Claimant did not accept either role.

82. On 7 September 2020, Mr Kurdi emailed the Claimant inviting her to an appeal meeting on 10 September 2020.

83. During the appeal the Claimant discussed her grounds of appeal and covered the points raised in her letter of appeal. The Claimant confirmed she was able to put to Mr Kurdi all of the points she wished to make and was able to send a further email on 12 September 2020 following the meeting with her calculations of the correct redundancy pay.

84. On 9 September 2020, Mr Laing sent an email to Mr Hogg and another to the Claimant confirming that one of the supervisors had resigned leaving the position available and asking them if they were interested in the role.

85. On 12 September 2020, the Claimant responded saying:

    "*Thank you for the email. If possible could you send over the terms and conditions for the supervisors role*".

86. The Respondent did not deny having received this email from the Claimant. Mr Laing's oral evidence was that he responded to this email. The bundle contained an email he sent to Mr Hogg with details of the post, however it did not contain evidence of a similar email to the Claimant.

87. On 23 September 2020, Mr Kurdi emailed the Claimant with the outcome of the appeal. The letter was 3 pages long and addressed the points raised by the Claimant. Ultimately, however, it did not uphold the Claimant's appeal.

88. In Mr Kurdi's letter, he stated that there were no alternative roles to offer the

Claimant.

89. On 21 September 2020, Mr Hogg emailed Mr Laing requesting details of the Supervisor role. On 28 September 2020, Mr Laing responded by email attaching a job description. Mr Hogg responded on 5 October 2020 as the job description did not contain details of rates of pay etc, and the same day Mr Laing responded to confirm the supervisor was an hourly rate job at £9.25 per hour, and that the Respondent could arrange "guaranteed hours of 49 hours per week".

Written Contract

90. In her appeal, the Claimant requested the signed copy of her employment contract. The Claimant made further requests for the signed contract on 1 and 2 September 2020. The Respondent stated in its Grounds of Resistance that a copy had been sent to the Claimant. The contract of employment that appeared in the hearing bundle was not signed it was a generic document that referred the reader to the "offer letter" for specific details relevant to the employment role in question.

91. Mr Laing's evidence was that when he took over the business he ensured all members of staff had an updated employment contract and that he '*would have*' personally provided the Claimant with a contract and had her sign it. Mr Laing stated that he would then have retained it in his office files, however that signed copy had since gone missing from the office. The Respondent asserted that the Claimant had visited the offices with Mr Hogg sometime in either August or September 2020 and during this visit the Claimant had taken her signed contract from the office in anticipation of this making a claim the Employment Tribunal for in order to increase the value of her claim against the Respondent.

92. The Claimant denies this. The Claimant's evidence was that she simply never received a contract from the Respondent and did not sign a copy of a contract with Mr Laing at any time.

93. I find that reviewing the evidence on this point, on balance it is more likely that the Respondent has not accurately remembered having the Claimant sign a contract than it is that the contract cannot be found because the Claimant stole it in an attempt to fabricate this element of her claim. That is a serious allegation and there is no evidence other than the Respondent's assumption of such to support it.

The Relevant Law

94. Section 98 of the Employment Rights Act 1996 (the ERA) states:

"*(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 dismissal
(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 is… that the employee is redundant."

95. Redundancy is defined in section 139 ERA which says dismissal shall be taken to be by reason of redundancy if it is wholly or mainly attributable to the fact the requirements of the business for employees to carry out work of a particular kind, either generally or in the particular place, have ceased or diminished or are expected to cease or diminish permanently or temporarily, for whatever reason. The "for whatever reason" part comes from section 139(6) ERA and means an employer need not justify objectively a commercial decision to respond to economic circumstances by reducing the number of employees.

96. In Safeway Stores-v-Burrell (affirmed by Murray-v-Foyle Meats) it was held that if there was (a) a dismissal and (b) a "redundancy situation" (i.e. a set of facts falling within the ambit of section 139 ERA) the only remaining question under section 98(1) ERA is whether (b) was the reason of if more than one the principal reason for the happening of (a).

97. Section 98(4) ERA says:

"*Where an 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 all 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

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

98. In Langston v Cranfield University the EAT confirmed the Tribunal must look at all ways in which a dismissal by reason of redundancy may be unfair. Dismissal by reason of redundancy may be unfair if there was (a) inadequate warning/consultation (b) unfair selection and (c) insufficient effort to find alternatives. The main case on fair consultation is R v British Coal Corporation ex parte Price in which fair consultation was defined as (a) discussion while proposals are still at a formative stage (b) adequate information on which to respond (c)

adequate time in which to respond and (d) conscientious consideration of the response.

99. As for fair selection, British Aerospace v Green held that provided an employer sets up a selection method which can reasonably be described as fair and applies it without any overt sign of bias which would mar its fairness, it will have done what the law requires. Taymech v Ryan says in choosing pools for selection it is primarily a matter for the employer, who has a broad measure of discretion.

100. In Capital Hartshead Ltd v Byard [2012] IRLR 814, the following guidance is given:

    100.1. It is not the function of the 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.
    100.2. The range of reasonable responses test applies to the selection of the pool from which the redundancies were to be drawn.
    100.3. There is no legal requirement that the pool should be limited to employees doing the same or similar work.
    100.4. The question of how the pool should be defined is primarily a matter for the employer to determine.
    100.5. The Tribunal should consider with care the reasoning in deciding if the employer has genuinely applied its mind.
    100.6. It is difficult to challenge if the employer has genuinely applied its mind to the problem.

101. In relation to efforts made to find alternative employment, Quinton Hazel 30 Limited v Earl, at para 7, is authority for the proposition that the employer is not required to make exhaustive searches or efforts in this regard but rather only that which would be reasonable for the particular organisation.

102. In Thomas and Betts Manufacturing Co v Harding 1980 IRLR 255, CA the Court of Appeal ruled that an employer should do what it can so far as is reasonable to seek alternative work.

103. Moreover, the EAT confirmed *Fisher v Hoopoe Finance Ltd EAT 0043/05* that an employer's responsibility extends to also providing information about the financial prospects of any vacant alternative positions.

104. In *Ward and anor v Mahle Filter Systems UK Ltd ET Case No.3102701/09* the Tribunal found that even in circumstances where an employer considers that an employee would not accept an alternative post, it may be unreasonable not to give the employee the opportunity to apply.

105. Where the issue of alternative employment is raised, it must be for the employee

to say what job, or what kind of job, they believe was available and give evidence to the effect that he would have taken such a job as this is something that is within their primary knowledge (Virgin Media Ltd v Seddington and Eland [2009] UKEAT/539/08).

106. In Polkey v AE Dayton it was determined that if a Claimant is entitled to compensation for unfair dismissal, their compensation can be reduced or limited to reflect the chance that the Claimant would have been dismissed in any event and that any procedural errors accordingly made no difference to the outcome.

107. Therefore, procedural unfairness will make a redundancy dismissal unfair, but the question of whether the employee would have been dismissed even if a fair procedure has been followed will be relevant to the question of compensation payable to the Claimant.

108. There is relevant guidance on how to approach this issue in Software 2000 Ltd v Andrews and ors 2007 ICR 825, EAT and confirmed the Tribunal 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.

109. Section 1(1) of the ERA provides:

"*Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment*."

110. Section 38 of the Employment Act 2002 provides that where the Tribunal finds in favour of an employee in any claim listed in Schedule 5 of that Act and the employer has not complied with sections 1(1) or 4(1) of the Act and provided the employee with full and accurate written particulars of employment, the Tribunal shall make an award to the employee of a minimum of two weeks' pay and if just and equitable, four weeks' pay.

Conclusions

111. Based on the findings of fact above and considering the relevant law as it applies to the agreed issues I conclude as follows:

What was the reason, or, if more than one, the principal reason for the Claimant's dismissal?

112. The Respondent says it was redundancy.

113. The Claimant says the principle reason for her dismissal was because she raised concerns about attending the proposed management crisis meeting on 23 March 2020, that this meeting posed a serious and imminent danger to her, and this was therefore an automatic unfair dismissal falling within section 100(c) and/or (d) ERA.

114. The Claimant's evidence in support of this position is that Mr Laing had expressed anger and frustration to Mr Hogg that a number of staff had not attended the 23 March meeting, thereafter she felt he did not communicate very much with her until the redundancy process began, and he did not invite her to the 30 June 2020 reopening meeting.

115. Whilst I found that Mr Laing was initially frustrated and angry that a number of staff did not attend the 23 March meeting, I do not find his anger at that time about the meeting was the reason or principal reason for which the Claimant was thereafter dismissed or placed at risk of redundancy.

116. The Respondent did not begin the redundancy process until July 2021, this being almost 3 months after Mr Laing's expression of anger regarding the 23 March meeting. Whilst I found that Mr Laing was immediately upset about the 23 March 2020, the evidence indicates this was an immediate outburst, voiced in the heat of the moment to his colleague Mr Hogg during a stressful time; Mr Laing apologised to Mr Hogg shortly afterwards by text and Mr Hogg acknowledged the outburst was borne out of the stress of the new circumstances and situation at that time. I find it unlikely that, after having quickly apologised for this knee-jerk outburst to Mr Hogg, and thereafter having had over 3 months of accepting the events of the pandemic and its effects, Mr Laing would have held onto resentment to those members of staff who did not attend the 23 March meeting and target them for redundancy. Furthermore, at least one member of staff from the senior management team, the Business Development Manager, also did not attend the 23 March meeting and was not made redundant.

117. Whilst it was acknowledged by Mr Laing that in hindsight he should have invited the Claimant to the reopening manager's meeting, I do not find that the lack of invitation, of itself, or combined with Mr Laing's initial frustration about the 23 March meeting demonstrated that the Respondent had chosen the Claimant to be dismissed as a result of her refusal to attend the 23 March meeting. It is more likely this lack of invitation was an error in judgment or oversight at a time in which the Respondent was focussed on the serious financial issues and uncertain times it was facing. Furthermore, Mr Hogg attended the reopening meeting and was also dismissed, and the Business Development Manager did not attend the 23 March meeting and remained employed, therefore I do not accept that there was a causal

relationship between the Claimant's refusal to attend the 23 March meeting and her later being selected for redundancy.

118. For these reasons, I am not satisfied that the principal reason for dismissal was the Claimant's decision not to attend the 23 March meeting, and the Claimant's claim for automatic unfair dismissal does not succeed.

119. The Respondent says the reason for dismissal was redundancy. The evidence indicates that the Respondent had suffered an immediate and thereafter long lasting reduction in its business income. The Claimant did not seek to argue that the Respondent had not suffered significant losses as a result of the pandemic and the fact that she attended consultation meetings with many ideas on how to help support the business indicates she accepted the situation was serious. The business was closed with limited work for staff to carry out and remained subject to opening restrictions throughout 2020.

120. The evidence indicates that the situation in which the Respondent found itself as a result of the pandemic and national lockdown clearly fell within the statutory definition of redundancy; the Respondent was faced with a swift decline in revenue and acted in response to this situation. I find that the principal reason for the Claimant's dismissal was redundancy.

Ordinary Unfair Dismissal

121. Having found that the principal reason for the Claimant's dismissal was redundancy I must consider the Claimant's ordinary unfair dismissal claim and determine whether, in treating redundancy as the reason for dismissal, the Respondent acted reasonably.

122. The test I had to consider was whether the decision to dismiss the Claimant was within the range of conduct that a reasonable employer could have adopted (i.e. the "band of reasonable responses test"), having regard to section 98(4) of the ERA and the principles of fairness established by case law.

123. I am mindful that the legal test is an objective one: the question is not whether I would have acted differently if I were the Respondent; I must ask myself whether the procedure adopted was within the range of responses open to an employer acting reasonably in the circumstances of the case.

124. I reminded myself of the leading cases on reasonableness in redundancy situations which confirmed that I must consider all the ways in which a redundancy may be unfair which broadly amount to (a) inadequate warning/consultation, (b) unfair selection, and (c) insufficient effort to find alternatives.

125. The Claimant argued that the procedure undertaken by the Respondent was unfair

with respect to all three of the above factors. I will consider the Claimant's arguments in relation to each in turn.

Selection

126. The Claimant's representative's submissions summarised the complaints that the Claimant had with the Respondent's selection pool:

    126.1. Mr Laing refused to expand the pool to include roles that the Claimant believed to be interchangeable with hers;

    126.2. Mr Laing did not include all salaried staff within the pool;

    126.3. Mr Laing's choice to select only salaried staff to create a saving on wages would be undermined if the remaining hourly staff were to work increased hours to cover the additional workload left by the departure of those members of staff; and

    126.4. Mr Laing did not use fair, objective, and transparent selection criteria, and refused to provide the Claimant with a copy of the "accountability Matrix" Mr Laing had created regarding her role.

127. Accordingly, the Claimant asserts Mr Laing did not genuinely apply his mind to the pool, and if he had, the pool would have been expanded.

128. Mr Laing made a business decision to reduce costs by restructuring the senior management team. The approach taken by Mr Laing was to undertake a review of the team and the tasks associated with each role. With respect to the Claimant's role, Mr Laing considered that some of her workload would be eliminated by the use of booking technology and apps, he would personally absorb other parts of her role, and the remaining tasks could be distributed amongst the remaining staff. The Claimant was the only person who carried out her role of Operations Manager and was not therefore in a pool of Operations Managers from which to select.

129. The evidence demonstrated that Mr Laing had considered and addressed a number of the points raised by the Claimant concerning the selection pool. Mr Laing explained that he had not selected all of the salaried staff to be made redundant; he had assessed the tasks associated with each role and determined which roles could potentially be deleted. He explained that in doing this he identified that some roles could not be deleted as no one else shared the expertise required to take on enough of the elements of that role, for example he specifically did not have skills in accountancy or cooking and accordingly he did not find that the Head Chef and Accounts Manager roles were at risk of redundancy.

130. Mr Laing also confirmed he had not expanded the selection pool to include the Front of House supervisors as he believed that the biggest saving would be met by eliminating salaried roles. The evidence demonstrated that Mr Laing had considered the Claimant's point that were the hourly rate staff to work in excess of 55 hours their wage would match hers; Mr Laing's position was that with the uncertainty of lockdown measures, and returning customers in circumstances where people were uneasy about mixing socially, he believed keeping hourly rate staff made more economic sense as if they were not required to work, the Respondent would not incur as much liability as it would keeping the salaried staff.

131. Whilst the Claimant did not agree with the Respondent's business decisions, it is not open to the Claimant or the Tribunal to substitute its own views. The evidence demonstrated that the Respondent had genuinely addressed its mind to the question of the pool for selection. I do not find that the Respondent's method of selection fell outside of the band of reasonable responses.

Consultation

132. The Claimant's representative's submissions regarding consultation were that the Claimant considered the consultation exercise was not carried out fairly because:

    132.1. It was predetermined; the people occupying the roles which were identified at risk were made redundant. The Claimant argues this indicated that the Respondent did not intend to deviate from its original plan to simply dismiss those four people and the consultation was meaningless.

    132.2. The consultation meetings were called at "extremely short notice";

    132.3. The Claimant submitted that Mr Laing's considerations were unreasonable in that:

        132.3.1. Mr Laing did not consider the Claimant's representations regarding the pool for redundancies;

        132.3.2. Mr Laing had based his decision to make redundancies on figures which did not include the figures from the 1st week of August turnover and income from the Street food event from 19 - 26 July and Mr Laing did not take advantage of the Government 'Eat Out To Help Out' scheme to increase sales;

        132.3.3. Mr Laing did not consider that hourly staff would be required to work additional hours to take on the tasks from those who were made redundant and if they were to work over 55 hours their pay would be equal to the salaried staff;

132.4. Mr Laing changed his position during consultancy, from initially informing the Claimant that the Respondent needed to reduce wage costs and then stating that the Respondent 'could not afford the luxury of a senior management team'; and

132.5. Mr Laing refused to share the Claimant's "accountability matrix" he used or the scoring criteria.

133. The consultation process lasted over a month, during which the Claimant had four consultation meetings with the Respondent and was accompanied to each by Mr Hogg. The evidence demonstrated that the consultation was detailed and lengthy, as could be seen in the correspondence between Mr Laing and the Claimant. During the process the Claimant was given the opportunity to make representations in person and in writing and the evidence demonstrated that the Claimant clearly took advantage of that. She wrote several lengthy statements regarding her alternative ideas, including questions regarding the selection process, and overall business plan being proposed. Mr Laing responded in detail to those letters and addressed the points raised by the Claimant.

134. The Claimant did not agree with the Respondent's business decision to remove a layer of senior management and made alternative proposals. I find that the evidence indicated that Mr Laing did consider the alternative proposals suggested by the Claimant and did address his mind to the numerous points raised by the Claimant during the process as can be seen in his detailed responses to the Claimant's correspondence. Mr Laing however did not decide to amend the pool or pursue alternative business proposals. This was Mr Laing's decision to make, and not a decision for which the Claimant or the Tribunal can substitute its own views. I did not find Mr Laing's decisions on these points rendered the consultation process unreasonable.

135. The Claimant asserts that notice given for the consultation meetings were too short and thus made the consultation process unreasonable. The consultation meetings were usually proposed to take place 2 days after the date of the invitation being sent to the Claimant. The Claimant was permitted to have Mr Hogg attend all of her meetings to assist. The timeline of the consultation process began with the initial letter on 15 July 2020 and culminated in the final consultation meeting which occurred on 10 August 2020 almost a month later. There were 4 consultation meetings in total, and in between each of those meetings the Claimant was given the opportunity, and was able, to provide further questions and make further observations in writing which were then followed up either in the following meeting or in writing by Mr Laing. The evidence demonstrated that on 21 July 2020, when the Claimant requested additional time to prepare for the second consultation

meeting, this additional time was granted. Considering the consultation process on the whole, I do not find the notice of consultation meetings was inadequate, as the evidence demonstrates that the Claimant had adequate time in which to make all of the representations she wanted to make. I do not find in the circumstances this rendered the process unfair or was outside of the band of reasonable responses.

136. I do not find that the fact that Mr Laing initially stated that the purpose of redundancy was to reduce the wage bill, and later he detailed that the Respondent did not feel it could afford the luxury of a senior management team rendered the consultation unfair. Mr Laing's 15 July 2020 letter inviting the Claimant to a Redundancy confirmed to the Claimant that the role of Operations Manager was at risk of redundancy as it was believed that the business did not require this role. I do not find that the information provided to the Claimant regarding the selection of her role for redundancy changed throughout the process. It is without doubt that the Claimant did not accept the business decision to remove her role, however, the reason she was placed at risk of redundancy, i.e. her role no longer being required, was communicated to her at the outset of the redundancy consultation.

137. The Claimant did not assert that she would have raised any other questions or suggested any other alternative options had the Respondent stated it could not afford the luxury of a senior management team at the start of the redundancy process. Therefore I do not find that this rendered the consultation unfair.

138. With respect to the "accountability matrix", the Claimant requested sight of this document and Mr Laing chose not to share it with the Claimant, however Mr Laing did share Mr Hogg's "accountability matrix" with him.

139. There was confusion regarding the "accountability matrix". The Respondent's submissions were that Mr Laing has used the word "matrix" but did not intend for it to carry the more traditional connotations that word has with redundancy situations. The Respondent's use of the word "matrix" resulted in confusion and lead the Claimant to consider she was entitled to review her score in order to challenge it. The Respondent's submissions were that this confusion did not render the consultation unfair as the "accountability matrix" was not a scoring matrix used in the traditional sense of a redundancy matrix.

140. Whilst disclosure of the "accountability matrix" would not have enabled the Claimant to challenge her "scoring" as against others in a pool, the information in the "accountability matrix" was still fundamentally important; it provided the basis upon which Mr Laing determined which roles he would delete.

141. Reasonable consultation requires that the employee at risk is given enough information to understand why their role has been selected for redundancy; by

failing to provide the Claimant with the information in the "accountability matrix", the Claimant was denied the opportunity to consider whether Mr Laing had adequately described her role and tasks, and prevented her from challenging the basis upon which her role had been placed at risk. This information was not provided to the Claimant by Mr Laing or by Mr Kurdi as part of the appeal process.

142. I conclude that the consultation process was flawed. Although the process was lengthy, and detailed, there was a failure to provide the Claimant with important information in the form of the accountability matrix, even in the face of direct requests for this document. Disclosure of the document to the Claimant during the redundancy process would have enabled the Claimant to understand exactly why her role had been selected for redundancy and why this resulted in there essentially being a pool of one. The consultancy discussions were heavily centred around the business forecasts and proposals for alternative business options. The discussions surrounding those forecasts and proposals allowed the Claimant to challenge the commercial need for redundancy, however they did not help her to understand and challenge the basis for her selection personally.

143. I find that the consultation was inadequate because without the information within the "accountability matrix" the Claimant did not have the opportunity to challenge the basis upon which her role was selected for redundancy. I conclude that it was outside of the band of reasonable responses for the Respondent to withhold information from the Claimant that formed the basis for her selection as it deprived her of the opportunity to properly understand and challenge this decision.

<u>Failure to consider alternatives:</u>

144. The Claimant asserts that there were viable alternatives to her redundancy which the Respondent failed to consider, including making further use of the furlough scheme, offering her the supervisor role that became available, or bumping a more junior Front of House supervisor to allow her to retain employment.

145. The bartender and housekeeping roles that became available in August 2020 were low rate hourly paid roles that were significantly junior to the role the Claimant had held; they were not suitable alternative roles.

146. With respect to the Supervisor role which became available in September 2020, before the Claimant had concluded her appeal: the Respondent asserts the Claimant would not have accepted this role because it was junior in position to her role and paid hourly at a low rate, similar to the bartender and housekeeping roles. Furthermore, having asked for the job specification and after the Respondent failed to provide it to her, the Respondent's evidence was that the fact that the Claimant failed to chase that information from the Respondent demonstrated that she could not have truly been interested in the role.

147. Mr Laing's oral evidence had been that he had provided these details and the document simply was not in the bundle. On balance I find that Mr Laing did not send the information concerning the supervisor role to the Claimant. The bundle did contain the email Mr Laing sent to Mr Hogg containing the details of the Supervisor role. The Respondent's submissions on this point were not however that the Claimant *had* rejected this role, but that she *would have* rejected it.

148. The Respondent did not deny receiving the Claimant's email request for information. At best it seems the Respondent suggests she should have either immediately agreed to take the role with no further information, or she should have continued to chase the Respondent.

149. Case law indicates that the Respondent was tasked with doing what it could, so far as that was reasonable, to seek alternative work; after having received a request for information concerning the alternative role, it would have been reasonable for the Respondent to provide that information. The Respondent does not suggest it did not receive that request, only that it did not believe the Claimant would ever have accepted the position. I find that it was unreasonable for the Respondent not to respond to the Claimant on the basis that it simply assumed she would not accept the role, especially in circumstances where she requested the job specification. It ought to have been reasonably apparent to the Respondent, given the dire economic circumstances at the time for the hospitality industry, that there would have been few employment opportunities for someone whose experience came from that industry and the Claimant might therefore consider accepting a more junior role.

150. I conclude that the Respondent's actions did fall outside of the band of reasonable responses with respect to considering alternatives to making the Claimant redundant.

151. Accordingly, for the reasons explained above, I am satisfied that the process adopted by the Respondent fell outside of the band of reasonable responses open to the employer in the circumstances, and the Claimant's claim for ordinary unfair dismissal succeeds.

Polkey

152. Having found the redundancy to have been procedurally unfair I considered the chances that the Claimant would have been dismissed in any event had the Respondent followed a fair procedure.

153. With respect to the consultation, whilst I find that the Respondent ought to have provided the information contained within the "accountability matrix" to the Claimant, having reviewed the evidence I find that on balance, the provision of this

information would not have resulted in the Claimant retaining her position. The evidence did not indicate that the Claimant significantly disagreed with Mr Laing's assessment of her tasks within the "accountability matrix", she simply did not believe that it was feasible that they would be as easily absorbed as Mr Laing had suggested. If the "accountability matrix" had been provided to the Claimant, I do not believe that it would have extended the time frame for the consultation period; the evidence indicated the consultation period was long enough to enable the Claimant to raise concerns in person and in detailed correspondence with the Respondent and she would have been able to ask further questions on that issue within the time frame provided.

154. The Claimant's witness evidence is that had she been provided with the information about the Supervisor's role she would have been able to give it proper consideration before deciding whether it was potentially a suitable alternative for her. Essentially the question is, would the Claimant have accepted the supervisor's role had the Respondent provided her with the details of it?

155. The Claimant was still fighting for her position in the appeal process as at the time the supervisor role became available, indicating that despite her disappointment with the redundancy process, she would have continued to work with the Respondent had her role not been made redundant. The evidence also shows that the Claimant had considered that if the supervisors had to work significant additional hours in circumstances where the Front of House managerial staff had been made redundant, the supervisor's hourly rate at 55 hours a week would have been comparable to her salaried wage.

156. However, the supervisor role was at a junior level to the Claimant's position and would have involved a demotion to an uncertain hourly wage where there was no guarantee that the supervisors would in fact work 55 hours a week. The Claimant had already rejected other junior roles on hourly pay as she stated that they were not suitable alternatives. Whilst the Claimant asserts that she had suggested "bumping" during the redundancy process, the evidence indicates that rather than suggesting "bumping" a more junior employee into redundancy and accepting that job, the Claimant was instead suggesting that a more junior member of the Front of House staff should be made redundant and, as manager, she would simply absorb their roles rather than accepting a more junior job role. This did not demonstrate the appetite for accepting a more junior, hourly rate role as was being suggested by the Claimant.

157. Considering the evidence and my findings above, as well as all of the circumstances of the case, I find that it is 70% likely that had the Claimant been provided with the details of the supervisor role she would have accepted it and would have remained employed with the Respondent.

Written contract

158. I have found that the Claimant did not sign a contract of employment given to her by Mr Laing.

159. The employment contract produced in the hearing bundle contains no specific reference to the Claimant or details surrounding her employment, the Respondent is unable to adduce a signed copy of the Claimant's contract, and there is no cogent evidence to support the allegation that the Claimant stole her signed contract; therefore I find that on balance it is more likely than not that that the Claimant did not receive a copy of her employment contract or written particulars from the Respondent.

160. Accordingly the Claimant is entitled to an award under section 38 of the Employment Act 2002.

Remedy

161. The Claimant's claims for ordinary unfair dismissal and an award under section 38 of the Employment Act 2002 are successful and the issue of remedy will be considered at a remedy hearing. A Notice of Hearing and Case Management Order will be sent to the parties under separate cover.

162. The parties are encouraged to enter dialogue in the meantime with a view to reaching agreement if possible. Should agreement be reached, the remedy hearing will be vacated.

EMPLOYMENT JUDGE NEWBURN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 8 October 2022