EMPLOYMENT TRIBUNALS

Claimants: Mr David Birch

Respondent: Vicars Cross Golf Club Limited

Heard at: Manchester (by CVP) **On:** 19th & 20th April 2021

Before: Employment Judge Newstead Taylor
(sitting alone)

REPRESENTATION:

Claimants: Mr David Birch

Respondent: Ms Peckham (Solicitor)

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. The claimant's claim that he was unfairly dismissed contrary to s.94 Employment Rights Act 1996 ("ERA") succeeds.

2. The claimant's compensation will be determined at a remedy hearing on **7 September 2021** subject to the following:

    2.1. The Claimant has received a statutory redundancy payment and therefore no basic award is payable; s.122 (4) (a) Employment Rights Act 1996.

    2.2. No reduction will be made from compensation in respect of contributory fault and/or failure to mitigate loss.

    2.3. A 30 % reduction will be made from compensation under

the principles set out in **Polkey v AE Dayton Services Ltd 1998 AC 344**.

2.4. As redundancy was the reason for dismissal, the ACAS Code of Practice on Discipline and Grievance does not apply to the claimant's unfair dismissal claim and there is no uplift for unreasonable failure to comply with its provisions

REASONS

Introduction:

1. The respondent is a golf club. On 15 October 2012, the claimant was employed by the respondent as Club Secretary. On 8 January 2020, the claimant was dismissed by reason of redundancy. This claim is concerned with that dismissal.

The Tribunal Hearing:

2. The hearing took place on 19 - 20 April 2021.

3. The claimant represented himself. Mrs. Birch, the claimant's wife, attended the hearing, sitting next to her husband for moral support. At the outset of the hearing, I informed both the claimant and Mrs. Birch that when the claimant was giving his evidence Mrs. Birch could not seek to assist him or answer questions on his behalf. I reminded Mrs. Birch of this, on more than one occasion, during the hearing. The claimant gave sworn evidence.

4. The respondent was represented by Ms. Peckham, solicitor. Mr. Ian Chilton (Director & Redundancy / Grievance Officer), Mr. John Baird (Director & Appeal Officer) and Ms. Wendy Anscombe (Chairman of the Board of Directors) gave sworn evidence on behalf of the respondent. Mr. Mike O'Brien (a Board member) was not called as a witness for the respondent and did not give evidence.

5. A joint bundle of 148 pages had been prepared for the Tribunal. In addition, there was a separate Witness Statement Bundle comprising 4 witness statements. One each from the claimant, Mr Chilton, Mr Baird and Ms Anscombe. The Respondent also provided a Skeleton Argument. I took time to read these documents. I informed the parties that they should refer me to the documents on which they relied regardless of my pre-reading and the cross references in the witness statements. References in square brackets in this Judgment are to the pages of theses bundles unless otherwise stated.

6. At the end of Day 2 of the hearing there was insufficient time for oral closing submissions. I raised with the parties whether there was a preference for either written closing submissions or relisting for a further day for oral closing submissions. Both parties expressed a preference for written closing submissions. However, I was conscious that the claimant was representing himself and had candidly admitted that he was unsure what written closing submissions were. In the circumstances, I directed sequential closing submissions with the respondent going first, but having a final right of reply. This was done so as to give the claimant guidance on the format of written closing submissions and the issues that needed to be addressed. I received written closing submissions from both parties in accordance with my directions. I have considered these submissions. I am satisfied that I understand the arguments advanced by both parties. For the avoidance of doubt, in reaching this decision, I have disregarded any new evidence and/or allegations made in these written closing submissions and/or attached to them which were not part of the parties' pleaded cases, included in the bundle or put to the witnesses.

The Claims & Issues:

7. This is a claim for unfair dismissal. The claimant contends that the real reason for his dismissal was his raising of a grievance against Mr O'Brien (Vice Chairman.) The respondent disputes the claim and contends that it acted reasonably in all the circumstances in dismissing the claimant by reason of redundancy. The respondent accepts, as confirmed by Ms. Peckham, that the claimant:

    7.1. was an employee of the respondent; Ss. 94 & 230 ERA.
    7.2. had been continuously employed for more than 2 years; s.108 ERA.
    7.3. was dismissed by the respondent; s.95 (1) (a-b) ERA.
    7.4. presented the claim in time; s.111 & 207B ERA.

8. The remaining issues were agreed with the parties at the start of the hearing and are set out in Annex A.

9. In addition, I clarified whether or not Mr Birch was also pursuing claims for Age Discrimination and/or Victimisation. I referred both parties to the

documents in the bundle that suggested such claims. Specifically, the claimant's reference to "*Dinosaurs,"* and to *"Forced redundancy following a personal Grievance Complaint against one director who became the leading instigator advocating redundancy."* I also noted that the respondent's Grounds of Resistance acknowledged that the claimant raised a claim of Unfair Dismissal and other claims which had not been particularised. However, Ms Peckham denied that this was a reference to claims for Age Discrimination and/or Victimisation. Also, she contended that such claims were out of time. I explained to Mr Birch, who was not legally represented, that in an unfair dismissal claim there was a compensation cap and that no award could be given for injury to feelings, but that such limitations did not apply to claims for Age Discrimination and/or Victimisation. I also explained that an unfair dismissal claim could be heard by a Judge sitting alone, but a claim for Age Discrimination and/or Victimisation required a full panel so if these claims were pursued the matter would have to be adjourned. In all the circumstances, I stood the matter down for 20 minutes for Mr Birch to consider and discuss with Mrs Birch. After the break, Mr Birch confirmed that he was not pursuing either Age Discrimination or Victimisation. He confirmed that he was content to proceed on the sole basis of unfair dismissal.

Findings of Fact:

10. I make the following findings in this case.

11. The respondent is an average sized golf club. It is a not-for-profit organisation, meaning that it invests all its profits back into the golf club. The respondent's constitution requires that the Board is comprised of 10 Directors. The Directors are volunteers and members of the respondent. A Director usually sits on the Board for 3 years.

12. On 15 October 2012, the claimant started work for the respondent as the Club Secretary.

13. The Employee Handbook, dated 23 July 2019, details the Redundancy Policy. It states:

"If a redundancy situation arises, for whatever reason, the club will take whatever steps are reasonable in an effort to avoid compulsory redundancies, for example:

- *Analyse overtime requirement.*
- *Reduce hours.*
- *Lay off with statutory guarantee pay.*
- *Ask for voluntary redundancies, whether anyone has plans to retire or is considering a career move.*

If compulsory redundancies are necessary, employees will be involved and consulted at various meetings to discuss selection criteria, any alternative positions, and be given every opportunity to put forward any views of their own.

Employees will be given the opportunity to discuss the selection criteria drawn up. The club reserves the right to reject any voluntary applications for redundancy if it believes that the volunteer has skills and experience that need to be retained for the future viability of the business."

14. On 16 July 2015, Mr. Peter Robertson, the respondent's Financial Director, resigned. There were no expressions of interest from the membership regarding the vacant Finance Director post. It was agreed that Mr Markham, the then Chairman, would formally approach the claimant to take on the role. The claimant agreed and received an £8,000 salary increase, from £22,000 to £30,000. Thereafter, all department budgets were to be submitted to the claimant by the end of December for agreement through the Board. The claimant was responsible for producing the respondent's accounts and giving the financial presentation at the respondent's AGM. It is the respondent's case that the claimant was not the Acting Financial Director ("AFD"). The respondent refers to and relies on its constitution which precludes employees from being directors. However, it is clear that from at least 1 October 2015, the claimant fulfilled the role of AFD for the respondent. There was no Finance Director on the Board. Accordingly, I find that the claimant was the AFD in all, but name.

15. In July 2019:

15.1. 4 members of the Board resigned at the AGM. The same month, Mr Ian Chilton (Redundancy & Grievance Officer) and Mr John Baird (Appeal Officer) were appointed to the Board.

15.2. The respondent had approximately 469 members. There was a dispute between the parties as to the number of members. The claimant contended that there were 469 in accordance with AGM Notes dated 16 July 2019. However, those notes were not in the bundle. The respondent contended that there were 360 full

playing members. However, Mr Chilton conceded that other categories, such as Juniors and Intermediates, would increase the number. In reliance on Mr Chilton's concession that other categories would increase the number, I accept the claimant's evidence on the number of members.

16. In August 2019, Mr Mike O'Brien was appointed to the Board. At this time there were only 8 Directors on the Board including Ms Wendy Anscombe (Chairman).

17. On 11 September 2019, Mr O'Brien emailed the Claimant seeking to arrange an appointment to commence a review of the respondent's business. On 12 September 2019, the claimant emailed Mr O'Brien saying "*Steady on Mike"* and stating that he was prepared for a general chat not a forensic analysis of all aspects of the respondent's business.

18. In or around November 2019, the respondent employed the following:

    18.1. The claimant.
    18.2. 4 greenkeepers.
    18.3. A House Manager (Martin Betts).
    18.4. An Assistant Manager (Glyn).
    18.5. 2 Club House Staff.
    18.6. A selection of zero hours bar staff.

19. In addition, the respondent engaged a self-employed golf professional (Martin O'Connor). For the avoidance of doubt, at the end of October 2019 one of the greenkeepers left. He was not replaced prior to the claimant's dismissal.

20. On 4 November 2019, Mr O'Brien emailed the Board stating:

    "I am sure we were all completely alarmed by David's cash movement graph. As of October we have approximately £70k less in the bank than 12 months ago. We are moving into the window where cash will be outgoing with little incoming. I am going to ask David to project our cash forward through to end April 2020, based on known expenditure. We are, unless David can tell us differently, going to be digging into our overdraft over the winter period to a level that may cause concern at the bank. We

need to ensure that we are not creating any concern at the bank. Looking at the bank balance graph this has been running at this level for some time. It is concerning that we are finding out this most important measure 6 months down the line. The cash position should be noted in the minutes for this board meeting. We will need to monitor this closely going forwards."

21. The parties disagreed as to whether or not the respondent was in financial difficulties.

21.1. The claimant accepted that revenue was declining, but considered that this was simply a cash flow issue. The claimant noted that the respondent is a not-for-profit organisation. He referred to the fact that the respondent had made a profit over each of the last 7 years, had, at 28 February 2019, retained earnings of £813,000, had net assets of £1.3 million, had paid down its long-term loan from £150,000 in 2012 in to £46,000 in 2019, had a bank overdraft facility of £200,000 and had made significant financial investments in the club in the last four years.

21.2. As to the respondent, Mr Chilton's evidence was that the Board monitored the respondent's financial position and the respondent was £70,000 worse off than the previous year. It had an overdraft of £80,000, but it incurred costs to dip into it and that was no way to run a business. There was uncertainty as to how much would come in in green fees in the new year. Whilst the respondent had the ability to repay loans through cash, it was starting the trading year in deficit. Specifically, Mr Chilton said, the respondent could not simply haemorrhage money year on year.

21.3. Mr Baird's evidence was that the overdraft would be paid by the next year's income and, accordingly, the business would be working at catch up. Therefore, Mr Baird said that the respondent needed to exercise financial prudence in order to maintain the golf course and the club to the best of its ability.

21.4. Ms Anscombe's evidence was that the Board took into account the reduced wage bill for the greenkeepers but still needed to make more financial savings.

22. I find that the respondent was in financial difficulties. I accept the respondent's evidence on this point. In addition, I note that the respondent's Income and Expenditure Account, dated 28 February 2019, shows that net surplus had decreased from £61,821 in 2018 to £14,936 in 2019, this is a reduction even allowing for a VAT Refund of £25,000. The operating surplus had decreased from £69,628 to £23,244, again this is a reduction even allowing for the VAT refund. Also, cash at bank and in hand had decreased from £128,774 in 2018 to £87,965 in 2019. Therefore, the respondent was experiencing a reduction in income

23. On 11 November 2019, Mr O'Brien emailed the claimant requesting, among other things, a copy of the claimant's job description and an agreed date for Mr O'Brien to attend the office to review the business.

24. On 12 November 2019, the claimant emailed Mr O'Brien informing him that most job descriptions were on the computer but his was not as he did not prepare his own. For the avoidance of any doubt, I do not accept the implication that the claimant was intentionally refusing and/or failing to provide his job description. This was a document that had been prepared by the respondent not the claimant. The claimant also stated that prior to any further forensic examination of office practices he wanted to have a meeting with Ms Anscombe and Mr O'Brien.

25. On 15 November 2019, there was an informal grievance meeting involving Ms Anscombe, Mr O'Brien and the claimant. The reason for the meeting was that the claimant considered that Mr O'Brien was undermining his position as Club Secretary and AFD. The claimant referred to Mr O'Brien unilaterally removing his car parking space, Mr O'Brien not adhering to the respondent's policies and procedures and Mr O'Brien breaching data protection. At the meeting, it was put to Mr O'Brien that his approach was undermining the claimant's position and seeking to gain information on office workings to farm out the work or change personnel. Mr O'Brien's response was "t*hings have got to change and no job is safe."*

26. On 20 November 2019, Mr O'Brien prepared a Redundancy Proposal, stated to be 'Subject to Consultation,' and a Cost Restructuring document. The Redundancy Proposal proposed to reduce the club management structure, which was said both to have too many layers and to be inefficient, by removing the claimant's role and outsourcing book keeping and reception services. The reason for the redundancy proposal was summarised as follows:

"Vicars Cross Golf Club Limited is a small members golf club providing golf membership and associated activities. Like many small golf clubs the company is facing ongoing difficulties with member retention as golf club memberships decline nationally.

The current year shows a continuation of the decline in revenues. The adverse weather is exacerbating the current losses. The company has no financial reserves and faces ongoing increases in costs, which are unavoidable.

We have therefore had no other option but to consider changes to the structure of the Company in order to protect the business. We have had to consider how we can reduce our overheads and it has been identified that there is an overspend on club management costs. We have investigated the outsourcing of this function and concluded unequivocally that significant savings can be achieved by the use of external accounts and reception functions, combined with unpaid volunteers."

27. Further, the respondent expressly stated that it was *"...keen to consult with all parties to see if any alternative options to redundancy can be found"* and *"We will consult with all concerned to ask for their suggestions on ways to avoid redundancies and will now adopt a process where we will now enter a period of consultation concerning the proposal to reduce the number of Club managers from one to zero. If no alternatives to redundancy can be found, it is proposed to move forward with redundancy immediately."*

28. The Redundancy Proposal related to a selection pool of 1, being the claimant. In light of the number of the respondent's employees, as detailed in paragraph 18-19 above, I enquired as to what consideration had been given, at the time, to making any other roles redundant. Mr Chilton's evidence was that he did not see any other roles that were able to be transferred. This was not an answer to my question. Ms Anscombe's evidence was that she did not believe that the Board considered anyone else in the selection pool. Her explanation for this was that it was not possible as each section was independent and there was only the claimant in management. All of the respondent's witnesses gave explanations for why none of the other roles could have been reduced, for example the greenkeepers could not be reduced because they were already understaffed and it would be detrimental to the respondent. However, there was no documentary evidence to show that these were considerations that had been taken into account at the relevant time. In particular, Ms Anscombe accepted that there were normally minutes prepared for Board meetings and if the selection criteria had been considered that would be evidenced in the minutes. There were no such minutes in the bundle. For the avoidance of doubt,

there was no documentary evidence that any roles, other than the claimant's, were ever considered for redundancy. Accordingly, I find that the respondent did not, either adequately or at all, consider making any employee, other than the claimant, redundant.

29. Further, the Redundancy Proposal and Cost Restructuring documents were inaccurate. First, the Redundancy Proposal suggests outsourcing book-keeping and reception services. It makes no mention of the claimant's role as AFD. This omission is not corrected in the Cost Restructuring document. Accordingly, they are based on incorrect descriptions of the claimant's role. Second, the document assumed that National Insurance was payable in respect of the claimant which was not correct due to his age. Third, it included pension contributions which were also not paid for the claimant. Mr Chilton's evidence was that he took Mr O'Brien's documents 'as gospel.' However, in answer to my questions, Mr Chilton accepted that there were inaccuracies in these documents, but maintained that the respondent still needed to save money. Mr Baird and Ms Anscombe also accepted that there were inaccuracies in these documents. Ms Anscombe's evidence was that that the Redundancy Proposal should have been reconsidered in light of the correct information. She recalled the Redundancy Proposal going back to the Board, but could not identify any minutes proving this. I find that these documents should have been reconsidered in light of the accurate information, but were not.

30. On 24 November 2019, a Board meeting was held at Mr O'Brien's home to discuss the claimant's redundancy. Ms Anscombe's evidence was that she did not agree with the Redundancy Proposal. She spoke in the claimant's favour. However, the majority agreed to go forward with redundancy. I do not accept that this means that the decision to make the claimant redundant had already been made. I find that this was simply a decision by the respondent to pursue a redundancy procedure. Mr O'Brien offered to handle the redundancy procedure and, despite the fact that the claimant had raised an informal grievance against Mr O'Brien, the Board agreed to this. Ms Anscombe's evidence was that she saw no reason for Mr O'Brien not to do this. Specifically, she did not think the informal grievance raised by the claimant against Mr O'Brien was sufficient to preclude him from running the redundancy process.

31. Prior to and following this meeting, the respondent did not comply with its Redundancy Policy, notably it did not initially invite voluntary redundancies. In reaching this finding I have taken in to account the following evidence:

31.1. Mr Chilton's evidence was that he did not take any of the steps detailed in the Redundancy Policy. As Mr Chilton was a member of the Board, there is a clear implication that if he did not take any of these steps neither did the Board.

31.2. Mr Baird's evidence was that he believed the Redundancy Policy had been followed, but could not refer to any supporting documentation. He stated that over time was not a normal practice at the respondent. He confirmed that the respondent did not want to reduce hours. He was not aware if the Board considered lay off with statutory guarantee pay. Finally, he confirmed that the respondent did not ask for voluntary redundancies.

31.3. Ms Anscombe's evidence was that there was no overtime requirement for any staff so that provision of the Redundancy Policy did not apply. She said that she didn't believe that reducing hours was possible but thought it was considered. However, she accepted there was no documentary evidence to support this. She was unsure if lay off with statutory guarantee pay had been considered. She said it might have been but it was not minuted. Finally, she accepted that the respondent didn't ask for voluntary redundancies.

32. On 25 November 2019, Mr O'Brien met with the claimant and provided him with the Redundancy Proposal and Cost Restructuring document.

33. On 26 November 2019, Mr O'Brien emailed the claimant inviting him to ask any questions or seek any clarification and stating *"At our next meeting Citation have suggested we should share with you the redundancy calculation. Can you please provide your DOB so we can do this."*

34. On 26 November 2019:

34.1. The claimant emailed Mr O'Brien asking (1) What time period is the period of consultation? and (2) What is your designated redundancy date? The respondent never answered these questions.

34.2. The claimant emailed his job description to a number of members of the Board. The claimant asserted that his job description was more complex than the version used by Mr O'Brien and the Board when considering the Redundancy Proposal and Cost Restructuring Document. The claimant contended that many functions could not be outsourced or done by volunteers. Specifically, the claimant emphasised his role as AFD. The claimant stated that *"This should be reviewed again under the period of consultation."*

35. On 27 November 2019, the claimant emailed the Board enquiring whether, in light of his job description, the respondent's intention remained to farm out his financial and secretarial functions. Specifically, the claimant stated:

"Has my accurate job description sent to all members of the Board been reviewed by the Board before this meeting takes place.

If not then it should be.

If that is not the case then the meeting is procedural in nature to be conducted by you at which you have no intention of making any suggestions to avoid my redundancy.

Since the Club should provide Good Governance following the guidance of England Golf and look after its employees you should have looked at alternatives already and come forward with proposals.

Do you have any proposals which may be considered by me

If that is not the case then this meeting should be postponed since I have a full work day and it being the end of the month time is needed to put something together if possible."

36. I find that the Redundancy Proposal and Cost Restructuring documents were not reconsidered in light of the claimant's job description. In his evidence, Mr Chilton confirmed that to the best of his knowledge the

Board, of which he was a member, did not do so. Further, he expressly stated that he did not reconsider the Redundancy Proposal in light of this document. Also, Mr Baird was unable to confirm that the Board had reviewed the claimant's job description.

37. On 27 November 2019, Mr O'Brien erroneously emailed a draft response to the claimant in which he confirmed that the Board had reviewed the claimant's job description. This was incorrect. The Board had not reviewed the claimant's Job Description. Further, he confirmed that the respondent's position had not changed. Also, Mr O'Brien stated *"The purpose of the first consultation meeting is to enable you to bring proposals to the table. You are familiar with the companies structure and job opportunities available. The one position vacant is for a bar and catering assistant to work under Martin Betts. You should have both the job description and remuneration for this position. If you would like to apply please drop Martin your CV."* The claimant was offered the opportunity to take the morning off to consider his proposals.

38. On 27 November 2019, the claimant emailed Mr O'Brien stating:

"...So the meeting is purely procedural as expected.

I am aware that all Board members have not had a further meeting to discuss my actual job description.

You have confirmed that there are no openings in my field of work which you are prepared for me to maintain in house.

Working on Zero hours contracts in the bar under Martin is a form of Constructive Dismissal....

There could be possibilities to outsource work to me but your attitude appears to rule that out."

39. On 28 November 2019, the claimant:

39.1. attended the first consultation meeting with Mr O'Brien and Ms Jennifer Hunt (a Board member) acting as note taker. Ms Anscombe's evidence was that she believed Mr O'Brien discussed the selection criteria with the claimant. However, there is no evidence that the selection criteria were discussed at this

meeting or at all by Mr O'Brien. The claimant was asked if he had any proposals to make. The claimant read out a letter and then got up and walked out. The claimant's evidence was that he closed this meeting because the respondent had not brought anything to the table, meaning it was not a genuine consultation.

39.2. attended a Board meeting and delivered a written document titled 'Response to the Redundancy Proposal.'

40. After the first consultation, the claimant circulated a memo to all Board members noting that Mr O'Brien's suggestion that the claimant apply for a Bar position *"...is deliberately provocative and shows utter contempt for my professional expertise currently provided to this Golf Club. It's verging on Constructive Dismissal."* and insisting that Mr O'Brien be replaced in the consultation process.

41. On 30 November 2019, Mr O'Brien wrote to the claimant expressing disappointment that the claimant left the first consultation before a meaningful discussion could take place. However, Mr O'Brien confirmed that he would step away from the consultation process and Mr Chilton, who had no experience running either redundancy or grievance procedures, would take over both the consultation process and the grievance procedure. This was despite the fact that there were sufficient people on the Board to keep these procedures separate. I do not accept that other commitments of Board members meant that these procedures could not have been run separately. However, the claimant did not object to Mr Chilton conducting both procedures. Mr O'Brien also confirmed that the claimant's 'Response to Redundancy Proposal' would be provided to Mr Chilton. Finally, Mr O'Brien emphasised the importance of exploring other ways to avoid the claimant's redundancy and welcoming his suggestions before or at the second consultation.

42. On 5 December 2019, the claimant attended a grievance meeting with Mr Chilton and Ms Hunt. The claimant raised a number of additional points of grievance against Mr O'Brien. Specifically, the claimant alleged that his request, dated 26 November 2019, about the period of consultation and the designated redundancy date had not been answered. Also, the claimant alleged that the respondent was not prepared to look at alternatives and the bar job was not in his skill set.

43. On 10 December 2019, the claimant attended the second consultation with Mr Chilton and Ms Hunt. There is no evidence that Mr Chilton discussed the selection criteria with the claimant. In fact, Mr Chilton's evidence was that he couldn't recall doing so. The claimant read out his 'Response to Redundancy Proposal' and his proposed alternative plan which involved him working on a 3 day per week, 1 year contract on a retainer basis at a cost of £20,000 with the ability to extend if required. According to the minutes of the meeting, the claimant's alternative plan was not discussed. Mr Chilton simply took the claimant's proposal away with him. The redundancy package was discussed. For the avoidance of doubt, the claimant denies receiving the minutes of this meeting. There is no evidence that the minutes of this meeting were provided to the claimant. I find that they were not.

44. On 12 December 2019, the claimant emailed the Board about Mr O'Brien's unilateral cancellation of the respondent's IDS telephone contract. The claimant stated that as Club Secretary he, and not Mr O'Brien, had responsibility for contracts. The claimant referred to his proposed alternative plan, which he attached, and stated *"I am concerned after yesterday's debacle with the telephones that the Board has already made up its mind to make my Job redundant and therefore me redundant.*"

45. On 18 December 2019, Mr Chilton wrote to the claimant stating that his grievance, in its entirety, was not substantiated. In the letter, Mr Chilton:

    45.1. confirmed that Mr John Gray, the respondent's previous chairman, had provided a copy of the claimant's job description. However, Mr Chilton's evidence was that he had not seen Mr Gray's job description and he could not recall if the Redundancy Proposal had been reconsidered in light of this job description. Further, Ms Anscombe confirmed that no such reconsideration had taken place. Also, I note that no copy of this job description was provided to the claimant.

    45.2. blamed the failure to answer the claimant's questions about the consultation period and the designated redundancy date on the claimant's early exit from the first consultation.

45.3. stated that the bar job was not intended as an insult, but for the claimant's consideration as part of the consultation process.

45.4. stated that the consultation process was a two-way process and it wasn't just for the respondent to *"...take ownership of this process or to find alternative solutions."* However, in evidence, Mr Chilton clearly stated his view that it was not for the respondent to provide proposals.

45.5. informed the claimant of his right of appeal to Ms Anscombe.

46. Also on 18 December 2019, the Board met to discuss the grievance procedure, the consultation process and the claimant's alternative proposal. There was a difference of opinion among the Board members as to the best way forward. Mr O'Brien's view was that the redundancy process should be pursued. However, the majority view was that the best way forwards for the Board, members and the respondent, who wished to be seen to be fair and equitable, was to offer an alternative proposal to the claimant. The alternative proposal was £15,000 for 2 days per week for 9-months commencing on 1 January 2020, subject to approval from Citation. For the avoidance of doubt, if this offer had been made to the claimant, he would have considered it as it would have given him an opportunity to look for further employment whilst remaining in work. In short, as Ms Anscombe accepted in evidence, on 18 December 2019 the Board accepted that redundancy was not the only option.

47. On 31 December 2019:

47.1. The claimant appealed the grievance decision dated 18 December 2019.

47.2. Mr Chilton wrote to the claimant summarising the second consultation meeting. The letter stated that consideration had

been given to the claimant's alternative proposal, but rejecting it *"... because the proposal would give rise to significant concerns relating to tax and employment law and would prevent the Club from discharging their duties in these areas satisfactorily."* In evidence, Mr Chilton explained that the alternative plan was rejected because the respondent was advised that it was not genuine self-employment and still exposed the respondent to the risk of future claims. In the letter, Mr Chilton stated that it was still hoped that the claimant's loss of employment could be avoided and the respondent would continue to look at alternative opportunities within the respondent that arose, but none were suggested. In fact, Ms Anscombe's evidence was that whilst she wished the Board to offer the claimant a variation of his alternative plan on an employed basis, the majority of the Board did not want to remain in an employment relationship with the claimant. A final consultation meeting was scheduled for 6 January 2020. The claimant was also informed of his right to be accompanied and that this meeting could lead to his dismissal. Finally, Mr Chilton detailed the claimant's entitlements if he were made redundant.

48. On 1 January 2020, the Claimant emailed Mr Chilton requesting that any alternative plans were provided to him prior to the final consultation on 6 January 2020 in order for him to have sufficient time to consider them. Alternatively, the claimant invited the respondent to confirm if no such plans were forthcoming. The claimant refused to attend a final consultation without full information and time to consider.

49. On 3 January 2020, Ms Anscombe wrote to the claimant acknowledging his appeal of the grievance decision. An appeal hearing was schedule for 6 January 2020. The claimant was informed of his right to be accompanied.

50. On 4 January 2020, Mr Chilton emailed the claimant confirming that *"There are no current alternative suggestions, viable alternatives or other alternative roles to stop the redundancy."* Mr Chilton confirmed that other than the Bar job no offer of suitable alternative employment was made to the claimant. The final consultation was moved to 8 January 2020.

51. On 6 January 2020, the claimant attended the appeal of the Grievance Decision. The appeal was chaired by Ms Anscombe with Mr John Baird acting as note taker. The claimant referred, in particular, to the absence of any information as to the consultation period, the fact that the Cost Restructuring Document was based on an inaccurate job description and that no realistic alternatives had been put forward by the respondent in the consultation process.

52. On 8 January 2020, the final consultation meeting took place. Mr Chilton, Ms Hunt and the claimant were present. Again, there is no evidence that Mr Chilton discussed the selection criteria with the claimant. Mr Chilton's evidence was that he couldn't recall doing so. Mr Chilton addressed alternatives and said *"in respect to any alternative suggestion to redundancy that any alternatives that had been put where not a safe for Vicars Cross Golf Club blue to later exposure of redundancy claim again,"* (typographical errors from the original.) Mr Chilton confirmed that there were roles that the claimant was happy to take and the claimant confirmed this. This was not explored. Mr Chilton then confirmed that the claimant was dismissed by reason of redundancy. The claimant immediately presented an appeal letter in which he stated, among other points, that no other positions had been considered and the Cost Restructuring Document was inaccurate.

53. On 14 January 2020, Mr Chilton wrote to the claimant confirming his dismissal by reason of redundancy. In the letter, Mr Chilton stated *"...on December 10th we explored alternatives to your redundancy. Unfortunately, none have been forthcoming, nor have any alternative jobs been identified for which you could be considered/which you wished to consider."* This was incorrect. The claimant had suggested an alternative which had been rejected. No further alternatives were explored at the final consultation meeting.

54. On 15 January 2020, Ms Anscombe wrote to the claimant confirming the outcome of the grievance appeal hearing on 6 January 2020. Ms Anscombe partially upheld the majority of the claimant's grievances. Notably, Ms Anscombe concluded by stating her belief that *"...the majority of these issues would appear to have arisen from a personality clash between [the claimant] and the Vice Chair, Mike O'Brien, which has led to these escalating unnecessarily."*

55. On 17 January 2020, the claimant emailed Mr Chilton in response to his letter dated 14 January 2020. Specifically, the claimant took issue with Mr Chilton's comment that alternative proposals were not forthcoming. He noted that he had provided an alternative that the respondent rejected. He proceeded to state that the respondent "*made no attempt to modify or suggest alternatives which could have been acceptable to both parties had you drafted one and discussed that with me. Therefore, there was never any intention to suggest alternatives which could have been advantageous to both parties.*"

56. On 23 January 2020, Mr John Baird wrote to the claimant acknowledging his appeal against his dismissal. The letter invited the claimant to an appeal hearing on 28 January 2020. It informed the claimant that he had a right to be accompanied if he wished.

57. On 30 January 2020, the appeal hearing, having been delayed due to the claimant's unavailability, took place. The meeting was chaired by Mr Baird and Ms Hunt attended as note taker. Mr Baird handed to the claimant an agenda. Mr Baird's evidence was that he did not discuss the selection criteria with the claimant. He believed that someone else did, but could not be certain. Mr Baird considered whether the claimant was unfairly selected for redundancy and/or whether the respondent did not follow a fair procedure. The claimant stated that he was unfairly selected as Mr O'Brien had a vendetta against him. He alleged that there was no discussion at the consultation meetings, but Mr Baird did not accept this allegedly in light of the minutes of the meetings. The claimant said that he had had no response to his Response to Redundancy Proposal and his alternative proposal had been ignored. Mr Baird denied this. He stated that the alternative proposal had been considered but rejected because it was not true self-employment. In evidence, he said that the claimant's alternative proposal was not workable and alluded to other difficulties and the £20,000 salary. The claimant alleged that no alternatives had been offered. In evidence, each of the respondent's witnesses accepted that, save for the Bar job, the Board did not propose any alternatives. Notably, Mr Baird's evidence was that no consideration was given to offering the claimant his alternative proposal as an employed role. However, Ms Anscombe's evidence was that other alternatives could possibly have been put to the claimant.

58. On 13 February 2020, Mr Baird informed the claimant that his dismissal by reason of redundancy had been upheld. Specifically, Mr Baird

rejected the assertion that Mr O'Brien had a vendetta against the claimant. He rejected the contention that the claimant was unfairly selected for redundancy stating that *"...the Board had no viable options that would provide sufficient saving without compromising the business of playing golf and providing other services to members. As there were no other alternatives than yourself I reject the assertion that you were unfairly selected."* Mr Baird denied that the respondent was financially strong and contended that the claimant's role was redundant. However, he accepted that no response was given to the Response to Redundancy Proposal document, but alleged this was because a response may have led to increased animosity. Finally, Mr Baird denied that the claimant's alternative plan was ignored.

59. On 16 February 2020, the claimant emailed Mr Baird rejecting the appeal decision in respect of his dismissal and contending that Mr Baird should not have heard the appal. This was the first time that the claimant had objected to Mr Baird hearing the appeal. On 19 February 2020, Mr Baird replied by email stating that the internal procedure had concluded and no further response would be made.

The Law:

i) Unfair Dismissal:

60. The burden of proof lies on the respondent to show, on the balance of probabilities, what the reason or principal reason for dismissal was and that it was a potentially fair reason under S. 98 (2) ERA.

61. S.98 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 the dismissal, and

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

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

...

(c)is that the employee was redundant, or …"

62. The respondent contends that the reason for dismissal was redundancy, which is a potentially fair reason within S. 98(2) (b) ERA. Alternatively, the respondent refers to and relies on SOSR which is a category of potentially fair reasons that do not fall within those specified in the Act.

63. The definition of redundancy is set out in S.139 ERA as follows:

"(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."

64. **Hatchette v Filipacchi UK Ltd v Johnson (2005) UKEAT/0425/**05 establishes a three-stage process for determining whether an employee has been made redundant under s.139 ERA as follows:

"It is now well established that a three-stage process is involved in determining whether an employee is redundant under ERA 1996, s.139 (1) (b). First, ask if the employee was dismissed. Second, ask if the requirements of the employer's business for employees to carry out work of a particular kind had ceased or diminished or were expected to cease

or diminish. Third, ask whether the dismissal of the employee was caused wholly or mainly by the state of affairs."

65. If the respondent shows a potentially fair reason, such as redundancy, for dismissing the claimant then the question of fairness is determined by s.98 (4) ERA which states:

"(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..."

66. Further, when considering the question of fairness, the correct approach is that set out in **Williams v Compair Maxam Limited [1982] IRLR 83.** In summary, employers acting reasonably will give as much warning as possible of impending redundancies to employees, consult them about the decision, the process and alternatives to redundancy, and take reasonable steps to find alternatives such as redeployment to a different job. However, the Tribunal must not put itself in the position of the respondent and decide the fairness of the dismissal based on what it would have done in that situation. It is not for the Tribunal to weigh up the evidence as if it was conducting the process afresh. Instead, its function is to determine whether, in the circumstances, the respondent's decision to dismiss the claimant fell within the band of reasonable responses open to an employer.

67. Section 123(1) ERA provides that:

"(1) Subject to the provisions of this section and sections 124 [F1, 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) The loss referred to in subsection (1) shall be taken to include—

(a)any expenses reasonably incurred by the complainant in consequence of the dismissal, and

(b)subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

(3) The loss referred to in subsection (1) shall be taken to include in respect of any loss of—

(a)any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or

(b)any expectation of such a payment, only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122) in respect of the same dismissal.

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland...

(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."

68. Under the principle in **Polkey v A E Dayton Services Ltd 1988 AC 344,** where a Tribunal finds that a dismissal was unfair, it must go on to consider the chance that the employment would have terminated in any event, had there been no unfairness i.e., if a fair dismissal could have taken place in any event – either in the absence of any procedural faults identified or, looking at the broader circumstances, on some other related or unrelated basis. The Tribunal should make a percentage reduction in the compensatory award which reflects the likelihood that the claimant would have been dismissed in any event.

Discussion & Conclusions:

69. Based on the findings of fact above and having considered the relevant law, I conclude as follows.

70. As to the principal reason for the claimant's dismissal and whether it was a potentially fair reason, I am satisfied that the test set out in **Hatchette v Filipacchi UK Ltd v Johnson** is satisfied as follows:

70.1. First, the claimant was dismissed.

70.2. Second, the requirements of the respondent's business for employees to carry out work of a particular kind had ceased or diminished and/or were expected to cease or diminish as a result of outsourcing the book keeping and reception services and utilising volunteers. Outsourcing falls within the definition of redundancy as stated in **Noble v House of Fraser (Stores) Ltd EAT 686/84**. The parties disagreed as to whether or not the respondent was in financial difficulties. As detailed above, I find that the respondent was in financial difficulties. However, I remind myself that it is not my role to investigate the commercial merits of an employer's decision that redundancies were required; **James W Cook & Co (Wivenhoe) Ltd v Tipper [1990] ICR 716 CA.** Further, there is no legal requirement for an employer to show an economic justification or business case for the decision to make redundancies; **Polyflor v Old EAT 0482/02.** The respondent's financial decisions with regard to its business operations are a matter for the respondent.

70.3. Third, the claimant's dismissal was caused wholly or mainly by that state of affairs. I have considered the claimant's contention that the principal reason for his dismissal was the grievances he raised against Mr O'Brien. I accept that there was a personality clash between the claimant and Mr O'Brien. In reaching this conclusion I refer to Ms Anscombe's conclusion in her grievance appeal decision that the majority of the issues appeared to have arisen from a personality clash. I also note the evidence of each of the respondent's witnesses that there was a personality clash, as opposed to a personal vendetta, between the claimant and Mr O'Brien. In light of this evidence, notably the contemporaneous evidence from those who observed these two individuals together at the time, I reject the claimant's contention that the principal reason for his dismissal was the grievances he raised against Mr O'Brien. I do not think that the timing of the Redundancy Proposal, being 5 days after the informal grievance

meeting, is of any particular relevance given that Mr O'Brien's general review of the respondent commenced in September 2019. Further, I reject the assertion that Mr Chilton and Mr Baird were in cahoots with Mr O'Brien. As accepted by the claimant, he has no evidence to support this assertion. At its highest, it is simply the claimant's belief and/or suspicion.

71. Therefore, I find that the claimant was made redundant under s.139 ERA 1996. Further and for the avoidance of doubt, I have considered the respondent's alternative argument that the claimant's dismissal was for SOSR. In light of my finding on redundancy, I reject that alternative argument.

72. As to warning and consultation, I find that the respondent warned the claimant of the risk of redundancy on 25 November 2019 when he was presented with the Redundancy Proposal and Cost Restructuring document. However, I find that the respondent failed to genuinely consult with the claimant about the decision, the process and alternatives to redundancy. I note that in the Redundancy Proposal and the respondent's letters, dated 26 and 30 November 2019, the respondent sought to encourage consultation. However, I find that whilst the claimant sought to engage in a collaborative approach the respondent did not. I refer to and rely on the following points:

72.1. First, the respondent never answered the claimant's questions, dated 26 November 2019, as to the period of the consultation process and/or the designated redundancy date. I reject Mr Chilton's evidence that the reason for this failure was the claimant's early exit from the first consultation. The respondent had numerous other opportunities to answer these questions, but did not do so.

72.2. Second, the Redundancy Proposal prepared by Mr O'Brien was not based on either an accurate or full Job Description. Specifically, the respondent failed to take into consideration that the claimant was the AFD. The respondent received two further Job Descriptions. First, from Mr Gray, a copy of which was not provided to the claimant. Second, from the claimant. Notably, the respondent, despite being specifically requested to do so by the claimant, did not reconsider the Redundancy Proposal in light of the Job Description provided by the claimant or, for the avoidance of doubt, the job description from Mr Gray. Specifically, Mr O'Brien's email, dated 27

November 2019, was untrue when it stated *"The board have reviewed your job description."*

72.3. Third, the Redundancy Proposal was also inaccurate in respect of pension and National Insurance contributions. Despite being aware of these inaccuracies the respondent never reconsidered the Redundancy Proposal in the light of the correct information.

72.4. Fourth, initially Mr O'Brien was in charge of the redundancy process. The respondent was well aware that the claimant had raised a grievance against Mr O'Brien. I do not accept the respondent's evidence that there was no reason for Mr O'Brien not to conduct the redundancy process. There was a very clear reason, being the grievance. At the very least, the respondent knew that there was a degree of antagonism between the claimant and Mr O'Brien. This antagonism impeded the consultation process and led, in part, to the claimant walking out of the first consultation meeting.

72.5. Fifth, the respondent did not reply to the claimant's Response to Redundancy Proposal. I do not accept Mr Baird's explanation for the respondent's failure to respond to this document, being that a response may have led to increased animosity. This was a consultation process. The claimant had presented an alternative. It should have been considered and responded to accordingly.

72.6. Sixth, the claimant suggested an alternative proposal. On 18 December 2019, this was, with slight modification, agreed to by the Board subject to advice from Citation. In light of the advice received from Citation, the respondent dismissed the claimant's alternative proposal. However, the respondent did not seek to engage constructively with the claimant to see if the claimant's alternative proposal or another proposal could meet the requirements of both parties. Specifically, the respondent never put to the claimant the suggestion of a job working 2 days per week for 9 months at £15,000. This being a job that the claimant would have considered.

72.7. Seventh, save for the Bar Job no offers of alternative employment were made by the respondent. For the avoidance of doubt, I accept the claimant‘s argument that the Bar Job was not suitable alternative employment for him. I have considered the respondent’s argument that there was no alternative employment available which would enable it to make the necessary savings which were required. However, I reject this argument. First, I note that in the final consultation meeting the claimant confirmed that there were roles that he was happy to take, but these were not explored. Second, it was Mr Chilton’s view, wrongly, that it was not for the respondent to make proposals. Third, I rely on Ms Anscombe’s frank concession that other alternatives could possibly have been put to the claimant. Fourth, the respondent simply did not wish to remain in an employment relationship with the claimant. In these circumstances, I find that the respondent did not take reasonable steps to find alternatives.

72.8. Eighth, I accept the claimant’s evidence that the consultation meetings were not substantive. In particular, no substantive discussion of the claimant’s Response to Redundancy Proposal was ever undertaken. Further and contrary to the dismissal letter, no alternatives to redundancy were explored. This is evidenced by the brief minutes of the meetings which do not record any substantive discussions.

73. As to whether the respondent adopted reasonable selection decisions, including its approach to a selection pool, I find that it did not for the following reasons:

73.1. The respondent failed to follow its own Redundancy Policy. Notably, the respondent did not make any enquiries about voluntary redundancies before proceeding to commence the redundancy process.

73.2. The respondent failed to consider any other roles for redundancy. In evidence, the respondent explained why other roles were not suitable for redundancy. However, there is no primary evidence, such as minutes of Board meetings, that any such analysis was undertaken at the relevant time.

73.3. The respondent did not discuss either the selection criteria or the selection pool with the claimant and/or give him an opportunity to discuss these. I note that the claimant was in a selection pool of 1, but consider that it was still incumbent on the respondent to explain how the selection pool had been determined. If, as alleged by the respondent, other roles had been considered then the respondent would have been able to explain the selection criteria and pool. It did not do so.

74. In all the circumstances, I find that the claimant's selection for redundancy was not carried out after a proper and fair consideration of the 'pool of employees' from whom the selection could have been made following a fair selection process and, accordingly, was not within the range of reasonable responses.

75. Therefore, the claimant's claim for unfair dismissal succeeds. However, the claimant's basic award is extinguished by the statutory redundancy payment of £5,512.50; s.122 (4) (a) ERA.

76. As to contributory conduct and/or mitigation of loss, I do not consider that the claimant caused or contributed to the dismissal by any blameworthy or culpable conduct. Further, the respondent has not sought to argue that the claimant failed to mitigate his loss.

77. As to **Polkey**, I must look at what is just and equitable. I do not accept that the claimant's employment would necessarily have been terminated either after a flawless procedure or due to the COVID-19 pandemic. In respect of a flawless procedure, I note that following consideration of the claimant's accurate job description along with proper consideration of alternatives the claimant may have remained in employment with the respondent. In respect of the COVID-19 pandemic, I accept the claimant's position that he could have carried on working, especially undertaking his AFD role, from home and/or, as other employees were, he could have been furloughed. However, there is clearly a risk that he might not have remained in employment. In the circumstances, I find that the claimant's compensatory award should be reduced by 30% to reflect the chance that his employment would still have been terminated either after a flawless procedure and/or as a result of the COVID-19 pandemic in accordance with the principles in **Polkey v A E Dayton Services Ltd.**

78. As redundancy was the reason for dismissal, the ACAS Code of Practice on Discipline and Grievance does not apply to the claimant's unfair dismissal claim and there is no uplift for unreasonable failure to comply with its provisions.

79. In light of my decision, a remedy hearing will be listed and a notice of hearing and case management directions will be sent in due course.

Employment Judge Newstead Taylor
Date: 12 July 2021

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON 19 JULY 2021
FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

ANNEX A

Agreed List of Issues

1. What was the reason or principal reason for the claimant's dismissal and was it a potentially fair one?

    1.1. The claimant contends that the reason was his raising of a grievance against Mr. O'Brien.

    1.2. The respondent contends that the reason was r redundancy or some other substantial reason ("SOSR.").

2. If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will usually decide, in particular, whether:

    2.1. The respondent adequately warned and consulted the claimant;
    2.2. The respondent adopted reasonable selection decisions, including its approach to a selection pool;
    2.3. The respondent took reasonable steps to find the claimant suitable alternative employment;
    2.4. Dismissal was within the range of reasonable responses.

3. If the reason was SOSR, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

4. If the dismissal was unfair did the claimant cause or contribute to the dismissal by any blameworthy or culpable conduct and, if so, to what extent and/ or did he mitigate his loss?

5. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any award to reflect the possibility that the claimant would still have been dismissed in any event had a fair and reasonable procedure been followed?