EMPLOYMENT TRIBUNALS (SCOTLAND)

5

Case No: 4107116/2020

Held by CVP on 12 and 14 July 2021

10

Employment Judge B Campbell

Ms Nicola France	**Claimant** **In person**
Bannockburn Miners Charitable Society	**Respondent** **Represented by:** **Ms A Forsyth,** **Solicitor**

15

20

25

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the tribunal is that the claimant was not unfairly dismissed and

30 her claim of unfair dismissal is therefore refused.

REASONS

Introduction

1. This claim arose out of the claimant's employment with the respondent.

35 The respondent is a registered charity and operates the Bannockburn Miners Social Club.

2. The claimant's dates of service were agreed to be from 5 March 2018 to 24 July 2020. She was dismissed on the latter date by being given two weeks' notice. The respondent maintains that she was dismissed by reason of redundancy. The claimant's case is that dismissal was for another reason, or that alternatively if redundancy was the reason for her dismissal, the process followed made that dismissal unfair.

3. Evidence was heard for the respondent from Mr Jim Nimmo, Secretary of the respondent, Mr James Richardson of the accountancy firm French Duncan and Ms Liz Sharp, the respondent's bar manager. The claimant gave evidence herself and also called Ms Kayleigh Morton, the respondent's former assistant bar manager. The claimant had also wished to call Ms Sharp in her own right.

4. Although there was a degree of dispute over a small number of details of the evidence, the witnesses were all found generally to be credible and reliable.

5. The parties each provided productions which were combined in a joint bundle of documents. References below in square brackets are to the documents as numbered in the bundle. The claimant provided a schedule of loss and details of her income since dismissal. Closing submissions were delivered orally and noted by the tribunal.

Issues

6. The issues to be determined in the claim were as follows:

    1. Did the respondent dismiss the claimant for a potentially fair reason in terms of section 98(1) and (2) of the Employment Rights Act 1996 ('ERA')?;
    2. If so, did the respondent meet the requirements of section 98(4) ERA so that the dismissal was fair overall?
    3. If the answer to either 1 or 2 is no, what compensation if any should be awarded?

Findings in fact

7. The following findings in fact were made as they are relevant to the issues.

Designation and status of respondent

8. The claimant was employed by the respondent as designated above between 5 March 2018 and 24 July 2020. She had raised her claim against 'Bannockburn Miners Social Club' but Mr Nimmo confirmed in his evidence that the respondent was a registered charity with OSCR having the registration number SC007476, which corresponds to the entity named 'Bannockburn Miners Charitable Society'.

9. Accordingly it is found that this was the claimant's employer and was therefore the correct party to answer the complaints made, with Bannockburn Miners Social Club being effectively an activity or operating name used by it.

10. The respondent is run by a committee of appointed members.

Events of 2019 and early 2020

11. The claimant acted as assistant manager of the bar operated by the respondent at the social club in Bannockburn. She did so from around October 2018 until some time in June 2019 when she began a period of maternity leave. She had also been covering for the bar manager who was on long-term sickness absence.

12. On beginning her maternity leave she agreed to move to a general bar staff position on 16 fixed hours per week. She did so as she could no longer meet the requirement to work the hours or hold the responsibilities required of the assistant manager. It was agreed that her gross and net weekly pay for working those reduced hours was £139.52 and £121 respectively. A new assistant manager, Kayleigh Morton, was appointed. She is the claimant's sister. Her contract required her to work 25 hours per week, although at times she would work less.

13. In December 2019 the claimant raised a number of queries regarding her pay and other terms of employment. Those were as follows:

a. An arrestment order had been served on the respondent in relation to arrears of the claimant's council tax. £6 per week was to have been paid out of her wages to the local authority. Sheriff officers had visited the claimant at home in December 2019 claiming that the arrears subject to the arrestment were not being paid. The payslips the claimant was receiving showed regular deductions and suggested they were being paid;

b. The claimant had agreed to pension contributions being deducted from her pay. She used an online portal for the first time in December 2019 to check the level of her pension fund. This suggested to her that not all of her contributions, or those of the respondent, had been paid into the fund in full. The amounts varied at times despite the claimant's gross earnings being unchanged;

c. As a result of the timing and duration of her maternity leave period, the claimant would have two weeks of accrued annual leave by 31 January 2020, which was the end of the holiday year adopted by the respondent. She had been given an assurance that she would be paid for those holidays in December 2019 but was then told in that month by the respondent's Treasurer, Jimmy Smith, that she would not get credit for them.

14. A number of the claimant's colleagues identified and raised similar issues with their pay, and in particular deductions made from it, in December 2019. They were Lynne Sharp - the bar manager, Kayleigh Morton – assistant bar manager, Louise France - bar staff worker (and the claimant's sister) and Jamie-Leigh France - bar staff worker (and also the claimant's daughter).

15. The issues were predominantly raised with the respondent's Treasurer, Jimmy Smith. At times Ms Sharp, as the most senior bar employee, acted as a liaison between the others and Mr Smith.

16. The outcome of the claimant's above queries was as follows:

a. The claimant was unable ultimately to get the respondent to pay her council tax arrears under the arrestment and she ended up

making an arrangement directly with the council's representatives for the sums to be paid out of her own bank account;

b. A lump sum of about £32 was paid into her pension fund by the respondent around August 2020, which the claimant considered was not the full amount of the shortfall;

c. She never received any credit, by way of payment or otherwise, for her accrued annual leave for the holiday year 2019-2020.

17. At some stage around December 2019 or January 2020 the above-mentioned group of bar staff jointly contacted ACAS for advice. This resulted in them raising a collective written grievance with the respondent.

End of maternity leave and furlough period

18. The claimant's period of maternity leave ended on 27 April 2020. In the meantime, all of the bar staff (and other employees of the respondent) had been placed on furlough under the UK government's Coronavirus Job Retention Scheme ('CJRS') and the claimant was also furloughed as of that date. The club had been forced to close to customers as a result of national restrictions introduced in late March 2020.

19. While on furlough the claimant received 80% of her normal pay. This continued until 9 July 2020 when she was given two weeks' notice of the termination of her employment. For those two weeks she was paid at her full rate.

20. As of April 2020, the respondent's bar staff, all of whom were on furlough, were Ms Sharp, Ms Morton, the claimant, Louise France, Jamie-Leigh France and Kimberley Currie, who was the cleaner. The respondent had utilised other staff at various times before that, but they were casual workers who were given shifts on an ad hoc basis to help mainly with functions. Another member of bar staff had been dismissed in February 2020.

Redundancy process

21. The respondent's Chairman, William Hamilton, had brought in his daughter Patricia Hamilton to help with some aspects of the respondent's

operations. It was not made clear to the claimant what her background was or whether she had a particular office or status with the respondent. Nevertheless the claimant had exchanges with her, including over the subject of her grievance.

5 22. In May 2020 Ms Hamilton was in communication with the accountancy firm French Duncan about its affairs. She dealt with a Mr James Richardson there, who specialises in HR advice. He understood her to be some sort of day-to-day manager. She said to him that the respondent was experiencing financial difficulties. One subject of discussion was the
10 possibility of making redundancies based on the forecast for opening and trading. Functions could not be held at the club and the respondent was getting to grips with the terms of the CJRS.

23. Mr Richardson discussed with her some of the principles and practices relevant to conducting a redundancy exercise. This included identifying
15 any rationale for making redundancies and considering if there were alternatives. Ms Hamilton agreed to go away and consider those.

24. Ms Hamilton contacted Mr Richardson again in June 2020, seeking further support. She wanted to move forward with redundancies and asked for his help in arranging consultations with the affected staff. She was
20 considering putting four members of bar staff at risk plus the cleaner. She wanted to retain the bar manager and assistant manager, who were seen as sufficient to cover any required work in the foreseeable future. She did not say anything about any staff having raised a grievance.

25. There was a discussion about alternatives to redundancy but none could
25 be identified which were seen as viable. It was therefore decided to begin consultation with the affected staff.

26. In June 2020 the claimant had heard that the respondent may be reopening the bar and sent a text message to Ms Hamilton to ask about that. The text message was not produced but Ms Hamilton's reply,
30 received on 25 June 2020, was [22-23], which stated:

> *'Don't think its going to open then. Going through all the guidlines [sic] just now but as the clubs revenue comes from mainly functions*

this won't happen for a while. Unfortunately you will all be receiving emails hopefully tomorrow from french and duncan notaries as to possible redundancys being made. As if it opens it will be at reduced days and hours so its not going to be possible to keep everyone on x'

27. Also on 25 June 2020 the assistant manager, Kayleigh Morton, was in discussion with the respondent about her hours. She was asked to commit to 25 hours per week but wanted to work fewer hours.

28. Mr Richardson telephoned the affected staff on or around 26 June 2020. He called the claimant on that day to introduce himself and explain he was managing a redundancy consultation process on the respondent's behalf. The purpose of the call was to make her aware that the respondent planned to make redundancies and her role was at risk. He was given no indication that the claimant was uncomfortable having the conversation.

29. Mr Richardson drafted a letter which went to the claimant dated 26 June 2020 [1]. He obtained the approval of Ms Hamilton and added the name of the Treasurer, Mr Smith, to it. He understood Mr Smith to be the ultimate decision maker for the respondent. It was emailed to the claimant by a colleague of Mr Richardson as he was on leave. The other affected staff got a letter which was substantially identical.

30. The letter confirms that the club had sustained difficulties caused by the Covid-19 pandemic and that measures now had to be taken. A redundancy consultation process was now beginning. The claimant was being provisionally selected for redundancy as the respondent intended only to retain the management team. An individual consultation meeting was proposed for 30 June 2020 by telephone or videoconference. It would be conducted by Mr Richardson and the claimant could be accompanied by a colleague.

31. Mr Richardson held a call with the claimant on 30 June 2020 as proposed. Mr Richardson could not meet with the claimant face to face due to travel, distancing and meeting restrictions.

32. During the call the claimant suggested two alternatives to her redundancy, namely (i) she could work reduced hours, possibly as low as six per week, or (ii) the manager or assistant manager could reduce their hours to allow another member of bar staff to be retained. Mr Richardson did not have enough information to respond and undertook to speak to Ms Hamilton and then come back in answer to the claimant.

33. The details of the call on 30 June 2020 were contained in a letter Mr Richardson sent to the claimant on 3 July 2020 [2]. He signed this letter himself on behalf of Mr Smith. By that time he had discussed with the respondent the claimant's two suggestions for alternative measures and he replied to them. The response was that it was not agreed that either would be feasible. This was said to be so because there were additional staff costs associated with retaining another employee, essentially irrespective of how few their hours were, and also because reducing time spent by the manager and/or assistant manager on management duties was seen as potentially detrimental in the long run. It was viewed as more difficult to have a member of general staff cover for a manager than vice versa.

34. Again, save for the passages dealing with specific alternatives raised by the claimant, the other affected staff received an identical letter.

35. Mr Richardson proposed to hold a second and final meeting with the claimant on 9 July 2020. The discussion went ahead, again by telephone. No further alternatives were raised and Mr Richardson confirmed that the claimant's role would become redundant and her employment would therefore end. This was to be confirmed in writing.

36. Mr Richardson drafted a further letter to the claimant which went to her on 9 July 2020 [3]. As with his previous letters it was approved by the respondent. It confirmed that she was being given two weeks' notice at full pay, to end on 24 July 2020. She would also receive payment for any accrued holidays and a statutory redundancy payment of £348.80.

37. In the letter the claimant was given the option to appeal against her dismissal by confirming her reasons to Mr Richardson within 5 days. She

was also invited to get in touch with him if she had any queries with the terms of the letter or the payments she was to receive.

38. Along with the letter, or around the same time, the claimant received a breakdown of her redundancy and notice pay [4].

5 39. The claimant did not appeal against her dismissal.

40. In the course of the consultation process the claimant raised three issues with Mr Richardson:

a. She queried the respondent's record of her start date. He discussed this with the respondent and the date was agreed;

10 b. She raised the issue of her accrued holidays during her maternity leave period in 2019, which had not been carried forward. He raised this with Ms Hamilton who told him not to take it any further with the claimant. It was not included in her final pay;

c. She brought up the issue with the arrestment order. Again 15 Mr Richardson spoke to Ms Hamilton and she told him it had been resolved.

41. The claimant did not raise with Mr Richardson that the redundancy process was an artificial exercise, or that her own selection for redundancy was for an ulterior motive.

20 42. The claimant in her evidence confirmed that she had no issue with the process followed by French Duncan, and that her complaints were to do with the respondent's own actions before that.

43. She considered that the committee of the respondent at the time of her redundancy were 'corrupt' and that by the raising of the collective 25 grievance by the bar staff they realised they had been exposed. This came to a head around March 2020, by which the individuals had involved ACAS. The claimant considers that the redundancy process was viewed by the respondent as an opportunity to be rid of some problematic employees including herself.

30 44. She made the following points in criticism of the respondent:

a. Affected staff could have been notified about the risk of redundancy earlier, potentially as far back as May 2020 when Ms Hamilton was first seeking advice from French Duncan;

b. There was a lack of consultation specifically by the respondent over ways to avoid her redundancy (it being acknowledged that this was covered by Mr Richardson);

c. The request by Kayleigh Morton to reduce her hours was not fully considered or alternatively it was unreasonably rejected, given that the claimant was suggesting she could effectively make up the shortfall; and

d. The respondent should have retained the redundant staff until at least October 2020 by using the CJRS, to see if the situation improved.

45. Between the end of March 2020 and May 2021 the respondent only reopened twice – once for around a week in July 2020 and then for two weeks in early October 2020.

46. As Ms Morton could not reach agreement with the respondent over the number of her working hours she resigned. She did so some time in July 2020, knowing that the respondent was planning to reopen later that month and so to take effect in advance of that. The position was given to Tracey Laird who had previously been a casual worker for the respondent. It was not specified when this happened, although she was in place by the beginning of October 2020, as on 5 October she sent a text message to another member of casual staff, Megan Finlay, offering some shifts at the club as Ms Sharp was on holiday [24].

47. The entire committee of the respondent resigned in early October 2020 and on 18 October 2020 a new committee of eight members was appointed, including Mr Nimmo as its chair.

48. The respondent did not recruit any further staff until shortly before May 2021. It recruited two part time bar staff at that time. There is still a manager and an assistant manager, making four staff in total.

49. Following her dismissal the claimant did not seek alternative work. Her evidence was that she was caused too much stress by the process to be able to pursue another job. She also believed that it would be difficult to be taken on by a new employer if it was known that she was pursuing her former employer by way of a tribunal claim.

50. The claimant's only change in income since her dismissal was that she now receives income support at a rate of £263.69 every two weeks.

Consideration of the legal issues

The reason for dismissal

51. It is necessary to consider whether the claimant was unfairly dismissed under section 94 and, in particular, section 98 ERA.

52. First the reason for dismissal must be established, and whether this is a permitted reason within section 98(1) and (2) ERA. The onus is on the dismissing employer to do so.

53. The respondent contends that the claimant was dismissed by reason of redundancy within section 98(2)(c), which would therefore be a fair reason. The claimant does not agree this was the reason for her dismissal. She maintains that as a result of her and her colleagues persisting with their grievance, it became easier to dismiss them (or some of them) than to resolve the issues which had been raised. The claimant considers that effectively she and her colleagues had identified incompetent or unscrupulous practices operated by the then management committee of the respondent, and the latter got into a position where it was impossible to put things right.

54. There was a quantity of evidence in support of redundancy being the reason for the claimant's dismissal, both documentary and oral. Some of that evidence was specific to the circumstances of the claim and some was more general, given that the predominant reason for implementing redundancies was said to be the effects of the Covid-19 pandemic, which are widely known.

55. It was clear that the respondent had experienced a significant downturn in its trade from late March 2020 onwards as it could not hold functions or other events, or allow members and their guests to use the bar. It is also plausible that if a significant proportion of the respondent's business came from functions which involved large groups of people, as Ms Hamilton had said in her text message to the claimant, then any re-opening would involve only modest levels of customers to begin with.

56. There was clearly a reduction in work for employees to do as from March 2020 until May 2021, with the exception of no more than three weeks, the bar was closed. At no time up until the redundancies were implemented would the respondent have been able to expect a return to its pre-March 2020 levels of business. The respondent was entitled to conclude that it needed fewer employees.

57. The requirements of section 139 ERA, which reads as follows, are relevant:

> ***139 Redundancy.***
>
> *(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—*
>
> *(a) the fact that his employer has ceased or intends to cease—*
>
> *(i) to carry on the business for the purposes of which the employee was employed by him, or*
>
> *(ii) to carry on that business in the place where the employee was so employed, or*
>
> *(b) the fact that the requirements of that business—*
>
> *(i) for employees to carry out work of a particular kind, or*
>
> *(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,*
>
> *have ceased or diminished or are expected to cease or diminish.*

58. On the face of it at least, the evidence suggests that redundancy in this statutory sense was the reason for the claimant's dismissal.

59. The claimant's counter argument must be considered, however. This directly raises the question of whether either the whole redundancy process was effectively a sham, or whether it was at least legitimate in a general sense but used by the respondent as an opportunity to remove the claimant from her employment.

60. The claimant appeared to recognise that the effect of the pandemic was to force the respondent to close to customers in March 2020, and that this resulted in there being less work for the bar staff to do. That was a reasonable position for her to maintain in light of the well documented consequences for many employers, especially in the hospitality sector, from March 2020 onwards.

61. The claimant believed that her redundancy, and that of her bar staff colleagues, was the only alternative course of action for the respondent when faced with increasing pressure over alleged irregularities in relation to their pay and benefits. As that was not admitted, it is necessary to consider the available evidence.

62. It can be seen that there are a number of potential difficulties with the claimant's assertion. First, two of the bar staff, Liz Sharp and Kayleigh Morton, had been part of the collective grievance and so in that respect were no different from the claimant, or the other staff made redundant. Ms Morton confirmed that she still had outstanding issues with her pension contributions by the time the redundancy consultation was underway. The claimant acknowledged this and considered that the respondent could not dispense with everyone, and needed a minimum level of staffing, and so had to retain two of them. Whilst that might be the case, it is a weaker argument.

63. Secondly, there was evidence of the respondent's former committee attempting to rectify any irregularities. It was by no means certain that it was hiding from any errors it might have made. Further, embarking on a formal redundancy process involving external accountants would not seem to sit consistently with the claimant's perception of what was going on in the minds of the committee members at that time. If they had something to hide then that process would be more rather than less likely

to draw attention to the fact. They would have been better to continue with their attempts at resolving the issues directly rather than escalating the situation in that way. Dismissing the individuals would not realistically make any problem go away.

5 64. Additionally, as argued by the respondent, had there been a motive to remove problematic employees under cover of a redundancy situation, that could have been done in March 2020 rather than June.

65. Considering all of the available evidence therefore, and noting that the claimant did not challenge the reason given for her dismissal during the 10 consultation process or by way of an appeal, it is determined that the respondent has satisfied the onus of proving that the claimant's dismissal was for the potentially fair reason of redundancy.

Was the claimant's dismissal reasonable under section 98(4) ERA

66. Next the requirements of section 98(4) must be considered, namely 15 whether, given its size and resources, the respondent acted reasonably in implementing the claimant's dismissal for the reason it held. This assessment should be made *'in accordance with equity and the substantial merits of the case'*. The onus is neutral in establishing whether this is the case.

20 67. It is found that the respondent satisfied this statutory requirement in these claims. That conclusion is supported in general by the following:

a. The respondent undertook individual consultation with affected employees;

b. The claimant's queries and suggestions were noted and answered;

25 c. She was offered the right of appeal against her dismissal.

68. More specific issues raised are dealt with in turn below.

Pooling of employees at risk

69. The question of how to pool potential redundancy candidates is largely one for the employer in question and the scope for an employment tribunal 30 to interfere in that is limited.

70. In ***Capita Hartshead Ltd v Byard [2012] IRLR 814*** Silber J described the role of the tribunal as follows:

> *'It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted' (per Browne-Wilkinson J in Williams v Compair Maxam Ltd [1982] IRLR 83 [18]);*
>
> *…*
>
> *'The employment tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has 'genuinely applied' his mind to the issue of who should be in the pool for consideration for redundancy; and*
>
> *'Even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it.'*

71. Therefore it may be the case, and often is, that employees could be pooled in more than one way, each justifiable on its own merits. Provided the employer adopts one of those reasonable approaches, the fact that an affected employee would prefer a different pooling approach does not in itself render the employer's actions unfair.

72. A similar approach must be taken to an employer's chosen process for assessing and ranking affected employees, although that is less of an issue in this claim as all bar staff in the chosen pool were made redundant. There was not a need to devise and apply a method of separating some being retained from others who would be dismissed.

Consideration of alternatives

73. Likewise, an employer is generally entitled but not bound to adopt any method of mitigating the effect of a redundancy situation proposed by an employee, such as 'bumping' another employee, reducing or suspending pay or other benefits, job sharing or reduced hours, unpaid leave and so

on. Therefore, whilst the claimant's suggestions of her dropping down to six hours per week, or either (or both) of the managers reducing their hours as a means of retaining another employee may appear to her to be reasonable, and even in fact be reasonable when objectively considered, if the respondent's preferred alternative was equally reasonable it is entitled to choose that.

74. In any event it is found that the respondent, by way of the evidence of Mr Richardson, was able to demonstrate why it reasonably considered the claimant's suggestions to be less preferable. In short, by retaining a further employee the respondent would be incurring ongoing costs in relation to any contribution to furlough pay, national insurance, pension contributions and accrued annual leave which it deemed an expense that needed to be avoided. Although the CJRS initially covered essentially all employee expenses (save accrued leave), by August 2020 employers were required to pay pension contributions and employer national insurance contributions, and by September of that year they would have to pay 10% of wages as well.

75. Secondly, the time spent by the management staff in managerial duties could not be reduced beyond their anticipated level.

The circumstances of Kayleigh Morton

76. Part of the claimant's case, which went to the question of the fairness of her dismissal under section 98(4), related to evidence heard from and about Ms Morton.

77. In doing so it is recognised that the claimant did not foreshadow any lines of argument taken in relation to Ms Morton in her claim form, although it was drafted without legal input. Nor did she put specific questions to the respondent's witnesses, although in that respect it is difficult to see how any of them would have been in a position to dispute Ms Morton's evidence. These issues were also noted by the respondent who objected to consideration of the evidence.

78. On balance, given the potential significance of the evidence, it was considered appropriate to admit the relevant evidence discussed

immediately below, but at the same time giving it no more than appropriate weight in light of the fact that the respondent had not been given proper notice of it.

79. Essentially, there were two matters relating to Mr Morton which were potentially relevant.

80. The first was that she stated she had told the respondent via Ms Hamilton in late June 2020 that she wished to reduce her weekly hours from 25 to as little as 16. In her evidence she said she suggested that by accommodating this request the shortfall in hours could be given to another member of staff at risk, allowing them to be retained. This of course fitted with the claimant's own suggestion that she reduce her hours to six per week. It is likely that both individuals were aware of what the other was saying at this time, both being affected employees and also sisters. Ms Hamilton told Ms Morton that on the basis of legal advice that could not be accommodated. 25 hours per week was her contracted working time and as part of the management she would be needed for potentially all of those hours.

81. Essentially that matter is dealt with above under 'Consideration of alternatives'. The arrangement may have suited both the claimant and Ms Morton but the respondent had sufficient reasons to prefer a single role to two in the circumstances.

82. The second matter was that Ms Morton resigned from her employment some time in July 2020. She did so in advance of the club reopening in that month and it is almost certain that she did so before the claimant's dismissal took effect. That raises the question of whether the claimant should have been made aware of the vacancy which would be created and offered the opportunity to express an interest in the role which she had performed before. It also potentially re-raised the question of whether the claimant, or another member of affected staff, could be retained as a member of general bar staff given the saving in employee costs for Ms Morton which would be made.

83. A consequence of the lateness of this issue arising is that there was not an opportunity to obtain all potentially relevant evidence on which to make

an assessment. Mr Richardson was able to confirm in his evidence that he knew nothing about the resignation of Ms Morton or the timing of her being replaced by Ms Laird. He therefore cannot be criticised for anything he did or didn't do in relation to that situation. No members of the former committee gave evidence as the indication from Mr Nimmo was that they were not on good terms with the current committee, having effectively been ousted by them. As stated, none of the witnesses confirmed when Ms Laird took up her role, and so it is unclear whether the respondent filled Ms Morton's position promptly or some time after. A further consideration is that had Ms Morton's resignation required the respondent by law to consider what opportunity that presented to the other affected employees, there was no guarantee that the claimant would have been offered, and would have accepted, the role. She may not have been able to fulfil the requirement to work 25 hours per week, or the role may have justifiably been given to another employee at risk.

84. Therefore, whilst the resignation and subsequent replacement of Ms Morton may have had a bearing on what it was reasonable for the respondent to do in relation to the claimant, a determination cannot be made on the partial evidence available. Given that the onus applicable under section 98(4) ERA is neutral rather than one falling on the respondent, this matter cannot result in a finding that the respondent's conduct as a whole was unreasonable.

Individual consultation

85. When assessing the fairness of an employer's redundancy process it can also be relevant to consider the way the employee participated in it.

86. The claimant engaged with Mr Richardson, the respondent's representative, over three calls spanning approximately two weeks. She had the opportunity to have her say and did so. Her queries and suggestions were answered. She did not challenge the process, and does not do so now. She did not appeal her dismissal.

87. Whilst it is the respondent's process that needs to be assessed in terms of fairness, the extent of the employee's acceptance of that at the time (or

otherwise) is of some relevance. The claimant participated actively and willingly.

The claimant's specific criticisms of the respondent

88. As detailed above, the claimant stated four ways in which she considered the respondent acted unreasonably:

a. **Affected staff could have been notified about the risk of redundancy earlier**

   Whilst that may be the case, it does not render the respondent's actions unreasonable. At an earlier stage Ms Hamilton was still considering redundancy as an option, on the advice of Mr Richardson. It is possible that some alternative solution would have been found. Putting employees at risk for a longer period is not necessarily a good thing. What is more relevant is that they had adequate time to participate meaningfully in the process when it did commence. Clearly in the claimant's case she did.

b. **There was a lack of consultation specifically by the respondent over ways to avoid her redundancy**

   It is the respondent's conduct as a whole which must be judged. That includes the actions taken by Mr Richardson as its advisor and agent, and the input provided by the respondent itself. The dynamic involved was that Mr Richardson was using his expertise to operate the process, but with business-specific input from the respondent via Ms Hamilton. The evidence suggests that it was the latter who decided on which redundancies would be made and how to respond to the claimant's suggestions in relation to mitigating the effect of the situation. There can therefore not be said to be a lack of specific consultation by the respondent.

c. **The request by Kayleigh Morton to reduce her hours was not fully considered or alternatively it was unreasonably rejected**

   This has been addressed above under the heading 'The circumstances of Kayleigh Morton'.

d. **The respondent should have retained the redundant staff until at least October 2020 by using the CJRS, to see if the situation improved**

Whilst there was a possibility of this making a difference it was slight and the respondent was not obliged to keep staff on in the hope that things might improve. UK government guidance emphasised that the CJRS should not be used to artificially prolong the service of employees when realistically there was no longer enough work to sustain their role. As discussed above, retaining staff was not a cost-free situation even standing the CJRS and employee costs were set to rise by August 2020. At the time of the redundancies the CJRS was expected to be would up at the end of October 2020. Therefore, whilst this was a possible option it was not one that the respondent had to follow in order to act reasonably in these circumstances.

Conclusions

89. For the reasons above, it is found that the claimant was dismissed by reason of redundancy and that the respondent conducted itself reasonably in all of the circumstances, given its size and administrative resources, in dismissing the claimant for that reason. She was not unfairly dismissed and the claim is refused.

90. It is therefore not strictly necessary to consider aspects of losses, mitigation and remedy. However, for completeness, it is found that had the claimant been unfairly dismissed, she had not demonstrated adequate efforts to mitigate her loss, or justification for not doing so. By her own admission she had not attempted to secure alternative employment. Her reasoning for not doing so was twofold.

91. Firstly she did not expect a prospective employer to take her on in the knowledge that she was pursuing a claim against the respondent. This justification is inadequate. Frequently individuals secure alternative employment in those circumstances. If the claimant had the courage of her convictions she would be able to explain why she believed she was

entitled to pursue a claim, and a reasonable employer would be expected to accept that.

92. Secondly, whilst it is accepted that the whole process caused the claimant stress, it is insufficient to expect a tribunal to accept that as justification for not pursuing alternative work up to a year after her dismissal, without producing any medical evidence to that effect.

93. Therefore, had the claimant's dismissal been found to be unfair, it would not have been appropriate to grant a compensatory award. As she received a statutory redundancy payment in the correct amount no basic award would have been due, and therefore no sum at all would have been deemed payable to her by the respondent.

Employment Judge:	**B Campbell**
Date of Judgment:	**22 July 2021**
Date sent to parties:	**23 July 2021**