EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr Fraser McLean	AND	Fiba Tech Industries Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY **ON** 22 December 2021
By Video Hearing Service

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: **In person**
For the Respondent: **Mr Smallwood, Managing Director**

JUDGMENT

The judgment of the tribunal is that:
1. The claimant was unfairly dismissed and the respondent is ordered to pay the claimant compensation in the sum of £769.24; and
2. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 do not apply in this case; and
3. The claimant's claim for unlawful deduction from wages is dismissed.

RESERVED REASONS

1. In this case the claimant Mr Fraser McLean, who was dismissed by reason of redundancy, claims that he has been unfairly dismissed. He also brings a claim for unlawful deduction from wages in respect of underpayment of what he asserts was his agreed wage. The respondent contends that the reason for the dismissal was redundancy, that the dismissal was fair, and it denies the unpaid wages claim.
2. I have heard from the claimant, and I have heard from Mr Neil Smallwood who is the managing director of the respondent company on behalf of the respondent. In respect of the parties' preparation for this hearing, the claimant tried to comply with his obligations on disclosure and the agreement of the bundle, and he was able to serve his witness statement. The respondent did not comply with the relevant Tribunal directions and served a non-paginated bundle of documents the day before this hearing commenced, and it did not serve any written witness statements. In the interests of justice, I allowed Mr Smallwood to give the respondent's version of events in his evidence. However, it is clear that the respondent was not as properly prepared for this hearing as it should have been, which

would not have been the case if the respondent had complied with the previous Tribunal orders.

3. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. The respondent company manufactures plastic products for the oil and gas industries. These are cyclical industries and the respondent faced a downturn in business and financial difficulties from 2018. At that time, it had just over 100 employees. The respondent then went through three rounds of redundancies. The first was in late 2018 when the respondent's workforce diminished by about 25 employees. There was then a second round of redundancies in early 2019 and a further 20 employees either left of their own volition, or were dismissed by reason of redundancy. This left the respondent with about 50 to 60 staff in total by mid-2019. The respondent had also implemented a pay freeze in late 2018 which remained in place during this process. During 2019 the respondent lost approximately £1 million in revenue.
5. The claimant Mr Fraser McLean commenced employment with the respondent as an operative on 11 April 2017. As his skills and experience increased, the level of his salary increased, and from a starting salary of £16,640 per annum, in early May 2019 he was on approximately £21,500 per annum.
6. It seems the claimant became increasingly dissatisfied with his level of salary given what he perceived to be the range and difficulty of the work he was undertaking. There was a salary review during March and April 2019 and on 17 May 2019 the claimant and the respondent signed a letter to the effect that the claimant would be awarded a further pay rise but only when the current pay freeze was lifted. It was also noted that there would be a further pay review at the end of December 2019.
7. The claimant remained dissatisfied and on 30 August 2019 he raised a formal grievance to the effect that he remained underpaid. The respondent investigated the grievance but did not uphold it. The respondent explained the nature of the agreement reached in May of that year to the effect that the pay freeze was still in place.
8. The respondent asserts that it became increasingly difficult to keep the claimant motivated in his work and disciplinary proceedings followed. By letter dated 16 December 2019 the claimant was given a first written warning for disrespectful conduct. The claimant did not appeal against that warning. On 24 April 2020 the claimant was issued with a final written warning for being disrespectful to his supervisors, and the claimant did not appeal against that warning.
9. Against this background the respondent embarked on its third round of redundancies. In about June 2020 the respondent sought volunteers for redundancy. By letter dated 20 July 2020 the respondent commenced a process of consultation in which it notified the claimant and others that their employment was at risk by reason of potential redundancy. There was then a consultation meeting with the claimant on 29 July 2020 at which the claimant was made aware of the selection criteria and the scores against each criteria which the respondent proposed to allocate to the claimant. He was told that he could appeal against the scores. There was then a second consultation meeting in early August 2020 at which the claimant complained to the respondent's HR manager about his scores, but he declined to put in a formal appeal because he feared that the scores would only be rubberstamped by another manager. The claimant was then dismissed by reason of redundancy by letter dated 14 August 2020 and the claimant was given notice of his dismissal to terminate on 31 October 2020. He was offered the right of appeal.
10. The pool for selection for redundancy established by the respondent during this process was all operatives and supervisors. The criteria for selection were generally based on skills, depth of experience, versatility, relevant qualifications, attendance, timekeeping and disciplinary record. The respondent was aiming to reduce its workforce by about 10 employees. After five had volunteered or left for alternative employment, the respondent made approximately five compulsory redundancies, including that of the claimant.

11. The claimant had had some issues with his timekeeping and attendance, but more importantly had a poor disciplinary record. He scored poorly in this context with the result that he was selected for redundancy ahead of others in the pool.
12. Although the claimant was working out his notice, another incident arose on 11 September 2020 when one of his managers reported "potentially dangerous behaviour". This might have led to another disciplinary process, but in the event respondent decided to send the claimant home on gardening leave so that he could work out his notice away from the respondent's premises.
13. In about mid October 2020 the claimant then appealed against the decision to dismiss him. It seems there may have been a telephone acknowledgement from the respondent, but the respondent failed to process the claimant's appeal as requested. His employment ended on 31 October 2020. The claimant was paid his statutory redundancy entitlement and accrued holiday pay in full.
14. The claimant subsequently issued these proceedings complaining of unfair dismissal and underpayment of what he perceived to have been the agreed pay rise. The respondent resists the claims.
15. Having established the above facts, I now apply the law.
16. The reason for the dismissal was redundancy which is a potentially fair reason for dismissal under section 98 (2) (c) of the Employment Rights Act 1996 ("the Act").
17. The statutory definition of redundancy is at section 139 of the Act. This provides that an employee shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to (section 139(1)(b)) "the fact that the requirements of (the employer's) business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish"
18. I have considered section 98 (4) of the Act which provides "…. 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".
19. I have considered the cases of <u>Williams & Ors v Compair Maxam Ltd</u> [1982] IRLR 83; <u>Safeway Stores v Burrell</u> [1997] IRLR 200 EAT, and <u>Polkey v A E Dayton Services Ltd</u> [1988] ICR 142 HL. I take these cases as guidance, and not in substitution for the provisions of the relevant statutes.
20. It is clear to me in this case that given the financial difficulties which the respondent faced, its requirements for employees to carry out work of a particular kind diminished. The statutory definition of redundancy is met. In addition, the claimant's dismissal was attributable to this redundancy situation.
21. Turning now to the procedure adopted by the respondent, the respondent first sought volunteers for redundancy rather than compulsory redundancies, and then there was both group and individual consultation. During this consultation process,the claimant was informed of his potential selection, the criteria to be adopted, and entitled to give his input before the decision was made. The pool of employees from which the redundancies would be selected consisted generally of operatives and supervisors, which cannot be criticised as being unreasonable or capricious. The respondent then applied selection criteria which were both objective and reasonable. It is not for this Tribunal to rerun any detailed scoring process against which employees were selected against those criteria, but given that the claimant was the only employee with a poor disciplinary record the selection of the claimant against these criteria cannot be said to have been unreasonable or capricious.
22. Where in my judgment the respondent committed a procedural breach is in its failure to process the claimant's appeal. It was not within the band of reasonable responses open to the respondent to decline to deal with the claimant's appeal. In my judgment the claimant's appeal should have been processed, and in not allowing an appeal, and bearing in mind the size and administrative resources of the respondent, the dismissal was not fair and

reasonable in all the circumstances of the case. I therefore declare that the claimant was unfairly dismissed.

23. However, in general terms an appeal would only be likely to have extended the claimant's employment by up to a further two weeks. It also seems clear to me given the scoring that there is 100% probability that his appeal would have been unsuccessful, and he would have remained dismissed in any event. The claimant is not entitled to a basic award because he has already received a statutory redundancy payment. By way of the compensatory award, I find that the claimant should be compensated in the sum of two weeks' pay only which at £384.62 per week is a total of £769.24. The respondent is therefore ordered to pay the claimant compensation for unfair dismissal in the sum of £769.24. I consider that this award is just and equitable in all the circumstances of this case.
24. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 do not apply in this case.
25. With regard to the claimant's claim for unlawful deduction from wages, I find that the agreed pay review was subject to the respondent lifting its pay freeze which it did not do during the claimant's employment. There was therefore a condition precedent for the claimant's pay rise, which was not fulfilled. In my judgment the claimant is not entitled to rely on this putative pay rise. The claimant's claim for unlawful deduction from wages based on his perception that he should have been paid this increased pay is therefore dismissed.
26. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 14; a concise identification of the relevant law is at paragraphs 16 to 19; how that law has been applied to those findings in order to decide the issues is at paragraphs 20 to 25; and how the amount of the financial award has been calculated is at paragraph 23.

Employment Judge N J Roper
Date: 22 December 2021

Judgment sent to Parties: 31 December 2021

For the Tribunal Office