EMPLOYMENT TRIBUNALS

Claimant: M Zolecka

Respondent Tavspackaging Limited

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: Manchester (by video platform) **ON:** 4, 5 + 7 May, 7 + 10 June, + 12 July 2021 (and in chambers on 20 September 2021)

BEFORE: Employment Judge Batten
B Hillon
D Mockford

REPRESENTATION:
For the Claimant: In person
For the Respondent: E Singer, advocate

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. the claim of unfair dismissal is well-founded and shall proceed to a remedy hearing on a date to be fixed;

2. the claim of race discrimination fails and is dismissed; and

3. the parties having agreed the figures for the money claims, the respondent is ordered to pay to the claimant **£84.00** in respect of underpaid redundancy pay, together with **£350.00** gross for holiday pay due at termination of employment and **£127.80** gross for underpayment of notice pay entitlement.

REASONS

1. By a claim form dated 2 March 2020, the claimant presented a claim of unfair dismissal, direct race discrimination and unauthorised deductions from wages. On 27 March 2020, the respondent submitted a response to the claim.

2. A case management preliminary hearing took place on 18 June 2020, before Employment Judge McDonald, at which the issues to be determined were identified and a Polish interpreter was arranged to assist the claimant's participation in the hearing. The respondent was represented by Mr Ilie at the case management preliminary hearing. He did not ask for a Romanian interpreter for himself at the time. However, in the course of giving evidence at this hearing, Mr Ilie said that his command of English was not good and so he had not realised what was required when producing letters about redundancy from the internet. At that point, the Tribunal asked Mr Ilie whether he wanted an interpreter to assist him in this hearing but Mr Ilie said no. He was present and represented throughout this hearing and the Tribunal was satisfied that Mr Ilie had been given the opportunity to request an interpreter to assist him if he so wished.

3. The hearing of the evidence took place over 6 days. The hearing on 7 May 2021 had to be adjourned due to the incapacity of the respondent's advocate. Whilst the case was originally listed for 3 days, the oral evidence and submissions were completed only on the sixth hearing day and so the Tribunal reserved its judgment, meeting in chambers on 20 September 2021 to complete its deliberations.

Evidence

4. 2 bundles of documents were presented at the commencement of the hearing, one from each party, although there was a significant amount of duplication. The respondent's bundle was the larger bundle and so was treated as the main bundle. A number of further documents were added to the bundles in the course of the hearing. References to page numbers in these Reasons are references to the page numbers in the main bundle unless otherwise stated.

5. The claimant gave evidence herself by reference to a witness statement. In addition, she called: Angelina Muszynska - her sister and former work colleague; and Milan Ceran – a form work colleague, to give evidence in support of her claim. The respondent called 3 witnesses, being: Octavian Ilie – Managing Director; Daniel Richardson – production manager; and

Liviu Badeata – machine operator. All of the witnesses gave evidence from written witness statements and all were subject to cross-examination.

6. Mr Ilie had originally tendered a very short witness statement, containing very little detail beyond 5-6 bullet points on a single side of paper. He had not been represented at the time and had not appreciated what evidence would be required. On the fourth hearing day, he produced a supplemental and lengthy witness statement, in response to the claimant's evidence which he had by then heard.

Issues to be determined

7. A list of issues had been prepared at the case management preliminary hearing on 18 June 2020. At the outset of this hearing, the Tribunal discussed the list of issues with the parties. After amendment, which later included a claim about underpaid redundancy pay on the fifth hearing day, it was agreed that the issues to be determined by the Tribunal were as follows:

Unauthorised deduction of wages

1. **Was the claimant entitled to be paid in full for 12 February 2020?**

2. **Did the claimant's contract of employment say that she was entitled to full pay if she was off sick?**

3. **If so, was the claimant entitled to be paid her full pay for her periods of absence due to sickness from 13 to 28 February 2020?**

4. **Was the claimant underpaid holiday pay, notice pay and/or redundancy pay at the termination of her employment?**

Unfair Dismissal

5. **Was the claimant's dismissal by the respondent on 12 February 2020 for a potentially fair reason under section 98 of the Employment Rights Act 1996 ("ERA")?**

6. **If there was a potentially fair reason for dismissal, did the respondent follow a fair procedure in deciding to select the claimant for redundancy?**

Race Discrimination

7. **Did the following things happen?**

   a. The claimant having to work two machine lines instead of one throughout the time when she was employed by the respondent;

b. The claimant being paid less than Danny Richardson, an English employee who started working for the respondent at around the same time as the claimant;

c. On 12 February 2020, Mr Ilie shouting at her because she did not call him when she had a problem with the machine she was operating, telling her, "Next time you have a problem with this fucking machine, turn the fucking machine off, and go fuck off home";

d. Mr Ilie telling the claimant not to speak to Daniel Chodorowski.

8. **If any of those incidents did happen as the claimant said they did, were they less favourable treatment of the claimant? The claimant says that the people with whom her treatment should be compared are:**

a. The other machine operators who she says were not Polish;

b. David Richardson;

c. The respondent's non-Polish employees;

d. The respondent's non-Polish employees.

9. **If the claimant was treated less favourably than the relevant comparator(s), was that treatment because of her Polish nationality?**

Time Limits

10. **Are any of the alleged incidents of race discrimination out of time?**

Remedy

11. **If any of the claimant's claims do succeed, how much compensation should she be awarded for that claim?**

Findings of fact

8. The Tribunal made its findings of fact on the basis of the material before it taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of probabilities. The Tribunal has taken into account its assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts. Having made findings of primary fact, the Tribunal also considered what inferences it should draw from them for the purpose of making further findings of fact.

The Tribunal have not simply considered each particular allegation, but have also stood back to look at the totality of the circumstances to consider whether, taken together, they may represent an ongoing regime of discrimination. The findings of fact relevant to the issues which have been determined are as follows.

9. The claimant was employed by the respondent from 29 May 2017 as a machine operator. She was highly skilled and often worked on a machine which ran 2 production lines at once. This was something that the more inexperienced employees of the respondent were unable to do efficiently.

10. The respondent produces “Jiffy bags” which are padded envelopes for posting materials through the Royal Mail. “Jiffy” is the respondent’s only client and the respondent’s factory is sited on Jiffy’s site.

11. The claimant worked alongside Daniel Richardson, who was a manager at the respondent. Unlike the claimant, he had a financial investment in the business. Mr Richardson had additional responsibilities at work and was able to drive a fork-lift truck and so he was paid more than the claimant to reflect his position and interest in the business.

12. In May 2019, the claimant’s sister came to work for the respondent.

13. It was the respondent’s case is there was a meeting on 25 or 26 July 2019 at which all staff were told they were at risk of redundancy. The respondent’s evidence about this meeting was confused and contradictory, including uncertainty about the date and time of the meeting and who had attended. A letter which appears in the bundle at page 49 was said to have been given out at the meeting. However, it was clear that the claimant wasn’t there at the material time, and her sister’s evidence was that no meeting took place. The Tribunal considered, on a balance of probabilities, that no such meeting took place.

14. The letter produced by the respondent in the bundle at page 49 says that it encloses a copy of the selection process and scores, and also that a further individual meeting would take place on 26 July 2019 at 6pm but no selection criteria or scores were disclosed to the Tribunal and the Tribunal found that individual consultation meetings did not take place. The respondent’s owner, Mr Ilie, candidly admitted in cross-examination that he had taken a sample letter from the internet without realising that it had to be tailored to suit the respondent’s position although he had nevertheless dated the letter. In those circumstances the Tribunal concluded, on a balance of probabilities, that the letter was not given out in July 2019 or at all. The contents of the letter which the respondent relied upon do not reflect events nor any purported consultation process, and the Tribunal therefore disregarded it. In doing so, the Tribunal took account of the fact that Mr Ilie’s supplementary witness statement,

produced on day 4 of the hearing and after seeing all the evidence, contradicts the contents of the letter on page 49 of the bundle.

15. In all the circumstances, the Tribunal concluded that the claimant was not placed at risk of redundancy from July 2019 and rejected the respondent's contention that the claimant had been at risk or on notice of redundancy from July 2019.

16. On 12 February 2020, there was an altercation between the claimant and the respondent's owner, Mr Ilie, about a machine which had not been fixed the previous day. Mr Ilie had challenged the claimant about why an order was not ready. The claimant said that the order was not due and that she knew this because she had spoken to a Mr Chodorowski, who worked for Jiffy, the respondent's client, in another building on the same site as the respondent. Mr Chodorowski had told the claimant that the order she was working on was not due for another week.

17. Upon hearing this, Mr Ilie became angry and began shouting at the claimant. He told the claimant that she was not getting her work done because she was on her mobile during work hours. Mr Ilie also told the claimant not to speak to Mr Chodorowski.

18. The incident between the claimant and Mr Ilie on 12 February 2020 resulted in a memo being issued to the claimant and to other staff about mobile phones which is headed "Addendum to Contract". The memo appears in the bundle at page 42 and includes a space at the bottom for employees to sign to acknowledge the memo. The claimant would not sign it there and then, but took it away. This also enraged Mr Ilie. In the course of the renewed argument, Mr Ilie declared that he was closing the company down. A number of staff were shocked by this statement, including Mr Badeata, and a number of employees who were living in the respondent's house at the time.

19. On 13 February 2020, the claimant told the respondent that she was not coming to work and she was subsequently signed off sick. The claimant had become frightened of Mr Ilie. The claimant's partner delivered the claimant's sick note to the respondent at 10am on 14 February 2020.

20. That day, the claimant and Mr Ilie engaged in a series of WhatsApp messages in which the claimant said that she was fearful to come into work and was feeling stressed. In response, Mr Ilie said he would prefer to pay sick than pay a salary. The messages are about the phone usage at work. There is no mention of the business closing, as might be expected. The Tribunal found this to be a reference to the contractual change regarding use of mobiles –the respondent messaged the claimant, "*Staying on the phone hours every day is bad too for me. Take your time,*

but the notice period is starting from yesterday since we had the meeting. I prefer to pay sick leave than pay a salary for staying on the phone."

21. On 14 February 2020, at 12:51, the respondent produced a letter of dismissal for redundancy which it sent to the claimant. In the claimant's bundle at page 15, the letter which she received from the respondent is dated 12 February 2020, but there is a website mark at the top which has the date 14/2/2020. In cross-examination on his supplemental witness statement, Mr Ilie confirmed that he had printed it later than 12 February 2020, and from the internet. The Tribunal therefore found that 14 February 2020 was the date on which the respondent produced the letter which it sent to the claimant, having printed it on that date.

22. On 17 February 2020, the claimant wrote to the respondent to appeal her dismissal. Her letter of appeal appears in the bundle at page 58. The claimant said that the process of redundancy had been "unfair and possibly discriminatory". She referred to the fact that there was no meeting with her, there was no pool of employees and no fair selection procedure, and she says that she had been given no statement of her redundancy payment. It was apparent, from the evidence before the Tribunal, that the claimant had not, in fact, been paid all her statutory entitlements at the termination of her employment.

23. Mr Ilie did not conduct any appeal process and instead replied to the claimant's letter of appeal by a brief letter which appears in the bundle at page 59, and is headed "Confirmation of Dismissal". The letter is undated, and simply declares that the process had not been unfair or discriminatory, and that Mr Ilie had had a meeting with every employee and that the selection used was fair. There is no mention of the company closing. The Tribunal considered that Mr Ilie had no meeting with the claimant and there was no evidence of any meeting with other employees and the Tribunal therefore rejected the picture painted in the respondent's letter, of a redundancy process having been followed.

24. On 5 March 2020, the claimant's employment was terminated by the respondent when her notice period ended. She had remained off sick since 13 February 2020, and had not returned to work.

25. When the claimant received her final pay, she found that her redundancy pay entitlement had been underpaid, as had her accrued holiday pay. The claimant had been paid for her notice period on the basis of statutory sick pay only and this had been paid for 3 weeks rather than for her contractual entitlement to notice, being a month's notice.

26. The respondent did not close its business on 31 March 2020 or at all. Production has continued since then without interruption. There was no evidence that any other employee has in fact been made redundant.

The applicable law

27. A concise statement of the applicable law is as follows.

Redundancy and unfair dismissal

28. Under section 98 (1) and (2) of the Employment Rights Act 1996, the Tribunal must first decide what was the reason for the claimant's dismissal. The respondent has advanced redundancy as the reason for the claimant's dismissal. Redundancy is a potentially fair reason for dismissal under section 98 (2) (c) of the Employment Rights Act 1996.

29. The definition of redundancy is set out in Section 139 (1) of the Employment Rights Act 1996:

> *… 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 the 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.*

30. A reason for dismissal has been described by the Court of Appeal as 'a set of facts known to the employer, or beliefs held by the employer which caused it to dismiss the employee', see *Abernethy v Mott, Hay and Anderson [1974] ICR 323*. The burden of proving the reason for dismissal is upon the respondent as employer.

31. If the respondent can show a potentially fair reason for dismissal, the Tribunal must then consider the test in section 98(4) of the Employment Rights Act 1996: namely whether in the circumstances including the size and administrative resources of the respondent's undertaking the respondent acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the claimant; and the Tribunal must make its decision in accordance with equity and the substantial merits of the case.

32. In assessing the reasonableness of a dismissal for redundancy, the Tribunal must follow the guidelines laid out in Williams and others v Compair Maxam Ltd [1982] ICR 156 having regard to the question of whether the dismissal lay within the range of reasonable conduct which a reasonable employer could have adopted. The factors to be considered are:

    32.1 whether employees were warned and consulted about the redundancies;
    32.2 whether the pool for selection was drawn appropriately;
    32.3 whether the selection criteria were objectively chosen and fairly applied;
    32.4 the manner in which the redundancy dismissal were implemented; and
    32.5 whether any alternative work was available.

33. The Tribunal must also consider whether the dismissal falls within the band of reasonable responses available to an employer in the circumstances of the case.

Direct race discrimination

34. The complaint of race discrimination was brought under the Equality Act 2010 ("EqA"). Race is a relevant protected characteristic as set out in section 9 EqA.

35. Section 39(2) EqA prohibits discrimination by an employer against an employee by subjecting her to a detriment. By section 109(1) EqA an employer is liable for the actions of its employees in the course of employment.

36. The EqA provides for a shifting burden of proof. Section 136(2) and (3) so far as is material provides as follows:

    (2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.

    (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

37. Consequently, it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the EqA. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

38. In *Hewage v Grampian Health Board [2012] IRLR 870* the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in *Igen Limited v Wong [2005] ICR 931* and was supplemented in *Madarassy v Nomura International PLC [2007] ICR 867*. Although the concept of the shifting burden of proof involves a two-stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Direct discrimination

39. Section 13 EqA provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. The relevant protected characteristics include race.

40. Section 23 EqA provides that on a comparison for the purposes of section 13 there must be no material difference between the circumstances relating to each case. The effect of section 23 EqA as a whole is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person not of the claimant's race.

41. Further, the Employment Appeal Tribunal and appellate courts have emphasised in a number of cases, including *Amnesty International v Ahmed [2009] IRLR 884*, that in most cases where the conduct in question is not overtly related to a protected characteristic, the real question is the "reason why" the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator. If the protected characteristic (in this case, race) had any material influence on the decision, the treatment is "because of" that characteristic.

Time limits - EqA

42. The time limit for a complaint of unlawful discrimination is found in section 123 EqA, which provides that such complaint may not be brought after the end of: -

(a) the period of three months starting with the date of the act to which the complaint relates, or

(b) such other period as the Employment Tribunal thinks just and equitable."

43. Conduct extending over a period of time is to be treated as done at the end of that period and a failure to do something is to be treated as occurring when the person in question decided on it*, or does an act inconsistent with doing it,* or on the expiry of the period in which that person might reasonably have been expected to do it. A continuing course of conduct might amount to an act extending over a period, in which case time runs from the last act in question.

44. The case law on the application of the "just and equitable" extension includes *British Coal Corporation –v- Keeble [1997] IRLR 336*, in which the Employment Appeal Tribunal ("EAT") confirmed that in considering such matters a Tribunal can have reference to the factors which appear in Section 33 of the Limitation Act 1980. As the matter was put in *Keeble*:-

"that section provides a broad discretion for the court to extend the limitation period of three years in cases of personal injury and death. It requires the court to consider the prejudice which each party would suffer as a result of the decision to be made and also to have regard to all the circumstances and in particular, inter alia, to –

(a) the length of and reasons for the delay;
(b) the extent to which the cogency of the evidence is likely to be affected by the delay;
(c) the extent to which the party sued had cooperated with any request for information."

45. In *Robertson –v- Bexley Community Centre (T/A Leisure Link) [2003] IRLR 434* the Court of Appeal considered the application of the "just and equitable" extension and the extent of the discretion and concluded that the Employment Tribunal has a "wide ambit

46. In the course of submissions, the Tribunal was referred to a number of cases by the representative of the respondent, as follows:

- Polkey v AE Dayton Services [1987] IRLR 503
- Octavius Atkinson & Sons Ltd v Morris [1989] IRLR 158
- Sougrin v Haringey Health Authority [1992] IRLR 416
- Zafar v Glasgow City Council [1998] IRLR 36
- New Century Cleaning v Church [2000] IRLR 27

- Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285
- University of Huddersfield v Wolff [2004] IRLR 534
- Madden v Preferred Technical Group CHA Ltd and another [2005] IRLR 46
- Virdi v Commissioner of Police for the Metropolis and another [2007] IRLR 24
- Ayodele v CityLink [2017] EWCA Civ 1913

47. The Tribunal took these cases as guidance but not in substitution for the statutory provisions.

Submissions

48. The claimant made a number of detailed oral submissions which the Tribunal has considered with care but do not rehearse in full here. In essence it was asserted that:- there was no redundancy situation and the respondent did not close its business; there were no meetings and no consultation or selection process; the claimant contended that she was singled out for dismissal; Daniel Richardson was not a manager and no employees were told this; Mr Ilie shouted at the claimant and was abusive; Only the claimant was told not to speak to Mr Chodorowski; the claimant believed that her treatment was because she was Polish unlike other employees; and that the claimant's treatment and dismissal had made her ill and the underpayments had caused financial difficulties for her family.

49. The representative of the respondent tendered written submissions, in a format which, usefully, the claimant was able to have translated, and also made a number of detailed oral submissions which the Tribunal has considered with care but do not rehearse in full here. In essence it was asserted that:- the respondent had a fair reason for the claimant's dismissal, being redundancy because, at the time, Mr Ilie had believed he would be closing the business at the end of March 2020 and only kept it going because of negotiations with Jiffy; the claimant was liable to be dismissed because she was on full-time hours and had to be paid irrespective of what work was available; Mr Ilie's poor English meant he did not complete letters and procedures as well as might be expected; even if a flawless procedure had been carried out, the claimant would still have been dismissed; the claimant went off sick because of being notified of her redundancy; the claimant had not established facts from which the Tribunal could find unlawful race discrimination; the claimant had not been treated less favourably as there were non-discriminatory reasons for each of the acts contended for; and that the first 2 acts relied upon for the discrimination complaint were substantially out of time in any event.

Conclusions (including where appropriate any additional findings of fact)

50. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way.

The money claims

51. At the conclusion of submissions, the parties were able to agree the amounts by which the claimant had been underpaid at the termination of her employment in respect of her statutory redundancy pay entitlement, notice pay and holiday pay. The figures are incorporated in this judgment above. No further determination is therefore required from the Tribunal.

Unfair dismissal

52. First, the Tribunal considered whether the respondent had shown a fair reason for the claimant's dismissal. The respondent's case was that the claimant was dismissed for redundancy. Where a dismissal is asserted to be for redundancy, a respondent must show that what is being asserted is true, unlike in cases of capability or conduct where the ERA only refers to a reason which "relates to" either of those grounds.

53. The respondent sought to suggest that the claimant had been placed at risk of redundancy from July 2019. However, the respondent brought no evidence of a redundancy situation arising in July 2019 or that the respondent believed that a redundancy situation arose at that time and the Tribunal has found that the claimant was not placed at risk from July 2019.

54. There was also no evidence of a redundancy situation arising on or around 12 February 2020. The respondent's submissions were that Mr Ilie believed, at that time, that he would be closing on 31 March 2020 and in the course of evidence, Mr Ilie suggested that his accountant had been telling him for some time that the business was not making money. However, the respondent brought no evidence from its accountant, nor was the Tribunal referred to any figures or documents to support a belief in a redundancy situation. The respondent admitted that the business did not close; it continued to trade and still does so. There was no evidence that any preparatory steps towards closure had in fact been taken despite that, on the respondent's case, the business was to have closed within a matter of weeks.

55. Mr Richardson was asked about production levels at the material time and after the claimant went off sick. His evidence was that the respondent had experienced a "slow period" of 3-4 weeks; he then thought about this and changed his evidence to say 3-4 months. Mr Richardson did not mention any redundancies nor any process towards redundancy. He said that the respondent's production now ran on one shift only but he also said that the

shift time had been lengthened which meant working for 10 hours rather than 8 hours per shift as before and the number of employees said to be engaged by the respondent was never ascertained. The respondent also suggested that members of Mr Ilie's family had been "helping out" from time to time which suggested that more workers may have been engaged. Given that Mr Richardson had a financial interest in the business which he stood to lose, the Tribunal was concerned that the possibility of redundancies or closure was not mentioned in his evidence.

56. In all the circumstances, the Tribunal considered that the respondent had not shown that a redundancy situation arose nor that the respondent believed such. Rather, the Tribunal considered that Mr Ilie had said, in a fit of temper, that he would close the business because he was angry with the claimant's conduct on 12 February 2020 and he later sought to use this in an effort to justify the claimant's dismissal, after the event. The Tribunal considered that the suggestion of closure in March 2020 does not accord with contemporaneous documents such as the respondent issuing a memo to all employees about use of mobiles at work, as an "addendum to contract" when those contracts were to end shortly, on the respondent's case. The WhatsApp messages are silent as to closure and, importantly, the respondent's letter in response to the claimant's appeal against dismissal does not mention closure of the business, when closure would be the most obvious reason to reject the claimant's appeal.

57. As the respondent has not shown that redundancy was the reason for the claimant's dismissal, the dismissal is unfair.

58. Nevertheless, the Tribunal also considered that the respondent had not followed any or any fair procedure in respect of the claimant's purported redundancy. There was no consultation, nor individual meetings with the claimant nor any of the employees. The letter dated 26 July 2019 mentions selection criteria and scores but the Tribunal found this letter was not given out and that there was no procedure followed in July 2019. The respondent sought to rely on that letter and its contents as evidence of some procedure and therefore the Tribunal considered that the respondent was aware of what was required. The letter dated 14 February 2020 describes the same procedural steps as the letter of July 2019. However, the Tribunal has found that no such procedures were followed in February 2020 and if a redundancy procedure had been carried out, it would have taken place, or at least started before 14 February 2020. Neither before nor after the claimant was sent the letter of 14 February 2020, the respondent did not contact the claimant for any consultation and there was no individual meeting with the claimant, who was by then off sick. The letter of 14 February 2020 seeks to paint a picture of procedures having been followed when they were not and in that regard the dismissal is also procedurally unfair.

59. The claimant's evidence was that the respondent had 8 employees of which 2 were on guaranteed hours, the claimant and Mr Richardson. The other employees were on zero hours contracts and they remained on zero hours contracts. That included the respondent's witness, Mr Badeata. There was no evidence that he was made redundant or even subjected to any consultation or selection procedure. In his witness statement, Mr Badeata sets out a list of redundant employees which he suggested Mr Ilie had simply announced but he is not one of the names. The Tribunal considered that, if the business had been due to close, all employees would have been on the list. Mr Richardson's evidence was that there had been a meeting to let employees know who would be let go, so again not a consultation meeting nor a meeting to announce that the business was closing down.

60. Given that the Tribunal has found that there was no redundancy situation, and the respondent has not advanced any alternative reason for dismissal, the question of whether the claimant would have been dismissed whether in any event or had a fair procedure been followed does not arise.

Race Discrimination

61. In respect of this claim, the Tribunal considered the 4 acts which the claimant contended amounted to less favourable treatment.

62. The Tribunal considered that the claimant was working 2 machine lines instead of one throughout the time when she was employed by the respondent. However, the Tribunal found this to be because the claimant was a skilled and experienced machine operator. Her comparators were other machine operators who were not Polish. It was unclear precisely who the claimant compared herself to although the Tribunal heard unchallenged evidence that the other machine operators were less skilled and experienced than the claimant. The Tribunal noted that the claimant was more productive and, for this, she was rewarded with a permanent contract with guaranteed hours whereas the other, less skilled machinists were on zero hours contracts and were called upon to work when necessary without guaranteed hours. In those circumstances, the Tribunal considered that the fact that the claimant worked 2 machine lines did not amount to race discrimination and the claimant was in any event rewarded for her skill and experience.

63. The claimant was paid less than Mr Richardson, an English employee. However, the Tribunal found there were material factors for the difference in pay which had nothing to do with race. Mr Richardson had a financial interest in the business, he was in a managerial position, above that of the claimant and was also able to operate a fork-lift truck, unlike the claimant.

As a result of these material factors, Mr Richardson was rewarded at a higher rate than the claimant and this had nothing to do with race.

64. The Tribunal has found that, on 12 February 2020, Mr Ilie shouted at the claimant because she had not called him when she had a problem with the machine she was operating. He was angry. The Tribunal considered that he probably also swore at the claimant but there was no evidence to corroborate the words contended for. In any event the Tribunal considered that Mr Ilie's intemperate language was not used because of race. In this regard the Tribunal noted that the evidence of the claimant's sister was that Mr Ilie had a quick temper and often shouted at everybody with no suggestion that he just shouted at Polish employees or otherwise.

65. The Tribunal accepted that Mr Ilie told the claimant not to speak to Daniel Chodorowski. His agreed that he had done so. However, the Tribunal accepted Mr Ilie's evidence and the respondent's submissions to the effect that the context of this instruction is important. There had been a specific incident from which Mr Ilie believed that the claimant had been talking about the respondent's business and how it was run, with an employee of the respondent's client. Mr Ilie did not want his employees to talk about his business in a way that might jeopardise his relationship with his client or undermine him. The claimant had been discussing orders and the timescales for them which resulted in the claimant telling Mr Ilie that she did not need to do an order immediately. Mr Ilie reasonably objected to what he perceived to be insubordination from the claimant. The Tribunal considered that, given the context, Mr Ilie would have issued the same instruction to any employee who challenged him, regardless of race, there being no evidence to support the claimant's contention that Mr Ilie had picked on her because she was Polish.

66. In light of all the above, the Tribunal considered that the claimant has not shown facts from which the Tribunal might conclude that she was treated less favourably than the relevant comparators, or because of race or her Polish nationality. The respondent had also brought evidence in each case of a different and non-discriminatory reason for the treatment about which the claimant complains.

Time Limits

67. As the 4 allegations of race discrimination have failed, there is no need to consider time limits. However, the Tribunal noted that the first 2 matters, being the requirement to operate 2 machine lines and being paid less than Mr Richardson, are matters which arose at the commencement of the claimant's employment. The claimant could therefore have complained about such matters years ago, but the claimant had not formally complained about these at any time during her employment with the respondent.

Remedy

68. As the claim of unfair dismissal succeeds, the case will be listed for a 1-day remedy hearing, with a Polish interpreter for the claimant, on a date to be fixed.

Employment Judge Batten
30 September 2021

JUDGMENT SENT TO THE PARTIES ON
4 October 2021

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2401670/2020**

Name of case: **Mrs M K Zolecka** v **Tavspackaging Ltd**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

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

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

"the relevant judgment day" is: 4 October 2021

"the calculation day" is: 5 October 2021

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

Mr S Artingstall
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.