EMPLOYMENT TRIBUNALS

Claimant: Mr A Goodman

Respondent: Fairfield Farm Produce Limited

Heard at: Manchester **On:** 18 October 2018
3 June 2019
17 June 2019
(in Chambers)

Before: Employment Judge Feeney

REPRESENTATION:

Claimant: Mr Shalom, Solicitor
Respondent: Mr T Wood, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claims of unfair dismissal, breach of contract and unlawful deduction of wages succeeds .

2. The claimant's claim of automatic unfair dismissal fails and is dismissed.

REASONS

1. The claimant brings claims of unfair dismissal, in respect of his dismissal by the respondent on 13 March 2018 on the grounds of redundancy. The claimant submits that he was not dismissed for redundancy and that if he was it was unlawful by virtue of TUPE and also on the basis that the procedure was inadequate, unfair and flawed. He also claimed various contractual and expenses claims and unlawful deduction of wages regarding holiday pay

Respondent's Submissions

2. The respondent submitted that the claimant had been fairly made redundant and that they had an ETO reason for any TUPE related dismissal. They relied on a diminution in sales for justifying the claimant's dismissal. They also contended the claimant was not entitled to the expenses payments he claimed.

Witnesses and evidence

3. I heard from the claimant himself and for the respondent Mr Strathern, Director and co-owner of the respondent, and Mr Richard Glennan, Managing Director of the respondent. There was an agreed bundle.

Findings of Fact

4. The claimant was director of a number of businesses. The one at issue here is Yumsh Snacks Ltd. Yumsh Snacks produced a brand of potato based snacks called Ten Acre. The respondent was interested in purchasing the Ten Acre product line as they were involved in the manufacture of hand-cut crisps and farmed their own land producing the necessary product.

5. In December 2017 the respondent started looking at Yumsh Snacks Limited in respect of a production agreement for their crisp products. Discussions progressed and became a wider discussing about purchasing the company, however after consideration the respondent decided not to purchase the company but certain assets, including the Ten Acre brand, and they entered into an asset sale agreement to that end, which was completed on 16 January 2018.

6. Mr Strathern was familiar with the claimant from ongoing business dealings and had contacted him on 30 December 2017 stating as follows:

> "Dear Tony,
>
> I hope you are well. Whilst this does not constitute a formal offer I would like to express an interest in employing you at Fairfield Farm Produce in the future should you be looking for an alternative role to your current position at Yumsh Snacks. I believe that we would be able to offer you a salary and bonus scheme that I estimate could equal your existing earnings. We are also looking to set up an LTIP for senior members of our team during 2018 and I would be happy to consider you as part of that.
>
> Have a Happy New Year
>
> Kind regards
>
> Robert"

7. The claimant was the Chief Executive and Director of Sales of Yumsh Snacks. He had a contract of employment which allowed him to retain interest in several other companies, including a high end chocolate business called "Bean and Pod". As chief executive of the Ten Acre brand he transferred to the respondent business. Whilst the claimant headed up the brand he was also chief salesman and I

accept his evidence that he personally had brought in two thirds of Yumsch snacks product sales.

8. Despite the positive views expressed at the end of December 2017 about the claimant, it was the respondent's case that things started to go wrong after the transfer in that the claimant was reluctant to attend their offices and he wanted to exercise complete autonomy over the business. However, these were not the reasons given for the claimant's redundancy (obviously they are potentially conduct issues not redundancy factors)

9. Following the purchase nine members of staff were made redundant from Ten Acres. None of the team wanted to relocate to Colchester where the respondent was based, and only four members of staff were therefore retained. A further one was then made redundant a month after the initial redundancies.

10. It was the respondent's case that not only was the claimant reluctant to attend their premises in Colchester and discuss business development, sales were significantly lower than predicted following the transfer. The claimant, however, stated that this was not an accurate representation of what was happening. The claimant said the problem was the respondent's failure to ensure supplies were maintained following the transfer which meant sales orders could not be fulfilled. The difficulty was production was moving from Northern Ireland where Yumsh Snacks had had their production to the Respondent's farm in Colchester.

11. The claimant's time had been taken up following the transfer in trying to ensure existing sales orders were satisfied as the respondent was not geared up to producing the Ten Acre products and therefore there was a significant supply problem following the transfer.

12. This can be documented via an email to the claimant to the respondent on 10 February 2018:

> "…Again, to ensure that these would be available to be worked on first thing Friday. I had a call with Richard at 8:41 yesterday in which these were discussed and ended with him saying he was going to jump on a call with Sarah and Lawrence at 9.00am to make sure they are clear on what needs doing. I also sent through to Lawrence during Thursday and Friday orders with duly completed order forms per the new process you put in place. Seven orders on Thursday, four on Friday. I have not had feedback.
>
> Simon is producing end of day orders and invoice reports together with a stock report which if it is complete (Simon's reservation not mine) is very useful after a fair amount of manipulation. It was only after processing this that I was able to see what had or not been entered.
>
> When I tried to call during the day neither Lawrence nor were at their desks and yet here I am sat at my desk Saturday morning trying to sort what is possible to send out, writing to customers to see if they will take substitutions and generally trying to sort this out while getting stressed out. Clearly this is not working out.

Regards

Tony"

13. On 10 February 2018 at 10:37 Mr Strathern had written to Mr Goodman:

> "Tony, if you are frustrated then let me assure you I am also. Perhaps some communication with Lawrence and Sarah from you on Friday morning with what you needed as opposed to at 6.00pm when the day has gone would be more effective. I really don't understand what is so complicated here. You see all the orders anyway so what orders are missing? If something is then ask them during the day, action what's needed, resolve and manage it. I expected you would be owning this transition and taking actions for what is needed to get customers in stock. If we don't have the system yet to do everything then quite simply do what is needed manually but just get the orders out. If you need to speak to our team speak to them during the day to clarify what you need but ultimately deliver the result. This commentary after the event is not achieving the goal of servicing customers. The only thing I need at this stage is for you to process, approve and manage the sales and keep the customers. Telling me after the event there is a problem so we can't do anything about it till Monday is not great. I really think it would have been better, as I suggested, for you to be on site and to physically manage this whole process. That is what I expected to happen next week from Monday. I cannot have another week of this nonsense. On Monday all the cheese needs to be added to the back orders and sent out correctly. Ultimately the priority and focus needs to be about resolving the issues and getting orders out then building a system to service accounts moving forward but not until the customers are in stock. I need you to own and sort problems now not blame people for problems that have occurred."

14. The claimant said that there was an additional problem in that the respondent introduced a new sales software into Ten Acres following the transfer which made it difficult to see exactly what the situation was. The claimant said there was a dip in sales because the supply problem meant they could not keep up but not in orders. He said orders kept coming in. He had been working hard to persuade customers to take substituted products while the problem continued and also he was working on getting kosher and vegan approval.

15. The claimant said that Ten Acre was rapidly absorbed into the administrative organisation of the respondent's business hence the sales software changes. There was no discussion about the claimant's job changing although it was always known that the respondent had a Chief Executive and that the claimant was in effect the Chief Executive of Ten Acre.

16. The claimant had been working very long hours and he became ill on 12 February which lasted for five days and then he had a further illness on 19-25 February. He received a letter on 20 February 2018 stating the dates had been off (12-19, 19-25) and advising that he would get full pay for five days, 50% of basic salary for the second five days and following that it would be SSP if he was still absent.

17. The claimant was then invited to a meeting to take place on 5 March 2018 at the farm in Colchester, and he confirmed he was going to attend on 2 March 2018. There were no minutes of this meeting but the claimant said he knew that it was something serious when he saw the HR person, Louise Tupman.

18. Mr Glennan met with the claimant on 5 March and advised him he was at risk of redundancy. Mr Glennan stated that the claimant's response was "it comes as no surprise", although the claimant denied this and as I found him a credible witness I accept this**.** The only record of the meeting was a letter sent out the same day which said:

> "Dear Tony,
>
> I am writing to confirm our conversation of 5 March 2018 where we advised you that your position may become redundant. This is due to the requirement to ensure operating costs are kept to a minimum and the fact that the need for a CEO for the Ten Acre brand has ceased.
>
> Fairfield Farm has considered and will continue to consider alternatives to redundancy including alternative employment within the company. Unfortunately, at this time no alternatives have been identified. We want to explore with you any alternatives to redundancy and in order to consult sully with you regarding this situation I would ask you to consider any other suggestions or alternatives to redundancy during this consultation period.
>
> A second meeting has been arranged for 2.00pm on Tuesday 13 March 2018 at our offices in Wormingfold. During this meeting we can explore any further alternatives to redundancy and any suggestions or ideas which you may wish to present.
>
> I must also advise you that you may be accompanied at our next meeting by a work colleague or trade union official if you so wish.
>
> For your information and in the event that redundancy has to be confirmed I have enclosed an estimated payment schedule detailing the payment that would be made to you in this event. Should you have any queries or questions before our next meeting please do not hesitate to contact me."

19. The schedule set out that the claimant would receive a redundancy payment of £2,934; that his notice pay would be £5,083.33; his accrued holiday would be five days at £234.62 per day i.e. £1,173.10. This was based on an annual salary of £61,000. It was stated that the car rental would be paid until 13 April 2018, the claimant's notice period being one month. The claimant advised that he would prefer the next meeting to be held by video conference.

20. On 7 March 2018 the claimant wrote to Ms Tutman and asked her about his January and February expenses which totalled £2,382.52 which he said it was assured he would be paid. Mr Strathern replied on 9 March 2018. He said he would be "able to process them on Monday/Tuesday next week when Simon and Laura returned to work".

21. On 11 March 2018 the claimant wrote a longer email to Louise Tutman copied to Richard Glennan, subject: possible redundancy.

22. The claimant referred to the letter of 5 March 2018 and stated as follows:

> "There appeared to be a number of errors in the calculation as follows:
>
> (1) Salary is £72,000 per annum not £61,000 per annum.
>
> (2) Notice period payment should be £6,000.
>
> (3) I have not had any holiday this year and was necessitated to work on New Year's Day.
>
> (4) I note you have rounded down the holiday entitlement for the period.
>
> (5) The amount shown for holiday pay is incorrect.
>
> (6) Toil: it was necessary to work both extended hours and weekends since 1 January. My employer allowed toil days to be taken by employees.
>
> (7) In addition to the car rental due on 13 April 2018 the following should be added:- car maintenance, - telephones and broadband.
>
> (8) I note that a sum was deducted from my February salary payment in respect of a period of sickness. However, even though sick notes were presented I continued to work for much of the two week period and so this should not have been deducted. This work included but was not limited to – emails – telephone calls with colleagues and customers – monitoring of customer requirements.
>
> (9) Expenses: I am still awaiting payment.
>
> I am interested to hear whether you have identified any alternative employment opportunities."

23. The meeting on 13 March 2018 then took place by Skype. Again there were no minutes of this meeting even though Ms Tutman was present again. There was a letter sent out on 13 March 2018, according to the respondent, which I will quote, but the claimant said he did not receive it. This letter of 13 March 2018 said:

> "Dear Tony,
>
> I write further to my letter of 5 March which advised you that your position may become redundant…to ensure operating costs are kept to a minimum and the fact that the need for a CEO for the Ten Acre brand has ceased…It was established that no alternative to redundancy had been identified by Fairfield Farm Produce Ltd or you during the consultation period. It is therefore with regret that the company must now you with this formal notice of redundancy."

24. It went on to state the date of the redundancy would be 13 March 2018 and then listed the claimant's payments, which they said would be paid by 29 March 2018. They included an increase to the notice pay up to £6,000.

25. On 15 March 2018 the claimant emailed the respondent stating:

> "Dear Louise and Richard,
>
> Further to my email of 11 March 2018 and our two Skype calls on 13 March I note that I have not heard from you with any confirmations. I write to confirm my understanding of the amounts owing:
>
> (1) Salary accruing at the rate of £72,000 per annum from 1 March onwards.
>
> (2) Salary previously deducted from February salary of £916.
>
> (3) Holiday pay accruing from 1 January 2018 at the rate of £276.92 per day. 30 days per annum with no days' holiday taken so far.
>
> (4) Salary for the period of notice £6,000.
>
> (5) Statutory redundancy pay.
>
> (6) Expenses submitted to date £2,382.58.
>
> (7) Expenses to be submitted:
>
> (a) TG expenses incurred in March 2018;
>
> (b) TB car rental and maintenance accruing at the rate of £471.37 per month;
>
> (c) RD car rental at the rate of £241.47 until returned;
>
> (d) Telephone costs and charges for mobile, business, landline and broadband.
>
> I am awaiting contact from you with the next steps."
>
> I accept the claimant's evidence that he had not received the letter as there was no advantage to him in pretending he had not received it when he had.

26. There was no response to his email, so he wrote again on 19 March 2018. He stated he would continue to do what he could for the company but he was without appropriate assignments or work instructions being communicated to him. He stated that he wanted to work and that they were not being fair with him. He stated:

> "I hope we can rectify the situation to mutual advantage but in the meantime I have the following grievances that I need to take up with Fairfield Farm Produce Ltd…"

27. These reiterated matters regarding his expenses, his holiday pay, the deduction from his February salary. He referred to payment for overtime or toil,

which he stated was £12,239.86 as the hours in question were 331 and 42. He stated not all his entitlements were spelt out in his contract of employment but that custom and practice had developed which was explained at the time the respondent took over Ten Acre and indeed were obvious.

28. On 20 March 2018 Mr Glennan replied saying that during the Skype call on 13 March Louise and he had confirmed that his role was redundant and talked him through the redundancy package before moving onto the expenses claim. He went on to say:

> "As we were unable to agree on a position regarding your expenses claim we ended the call and agreed to speak later in the afternoon. We reconvened later that afternoon and once again an agreement could not be met so we put the matter in the hands of ACAS. We are aware that you have had a discussion with ACAS and as such we will rely upon their expertise in brokering a solution.
>
> As explained on 13 March Fairfield Farm will not require you to work your notice and therefore as discussed, the date of redundancy will be 13 March. I attach a letter confirming our decision and outline your route of appeal."

29. The claimant replied by email on 21 May 2018, saying:

> Dear Richard,
>
> I am surprised and shocked that you should tell me that you have before giving me notice of redundancy or that you should intimate that I have received, which I have not, your letter of 13 March prior to it being attached to your email to me of yesterday.
>
> As far as I was aware you had discussed the possibility of redundancy with me and possible terms of termination to see if we could come to a mutually agreed settlement. None was there agreed and I was waiting to hear more from you about this. I did not think you had terminated my employment. I think you are treating me most unfairly and without respect. In any event I hereby exercise my right of appeal."
>
> I accept the claimant's evidence that he had not been told at the meeting on 13 March that his employment was terminated. Again he was a credible witness and his correspondence supported his evidence.

30. Mr Glennan just replied to give Mr Strathern's details as he would hear any appeal. The claimant then asked for the grievance and appeal procedure.

31. On 6 April 2018 Mr Strathern replied to the claimant:

> "Dear Tony,
>
> Following our letter to you of 13 March giving you notice of Fairfield Farm Produce Ltd's decision to terminate your employment by reason of redundancy and your subsequent appeal against this decision despite being

> outside the five working day period we usually provide for ex-employees to lodge an appeal, we would like to invite you to an appeal meeting.
>
> At the meeting you will be given a full opportunity to ask questions and put forward any representations as to why your job should not be made redundant. Such representations will be carefully considered by the company.
>
> We propose to hold this meeting on Thursday 12 April at 2.00pm in our offices at Wormingfold. This meeting will be conducted by me and Simon Scott also will be present. You may bring a fellow worker or trade union official of your choice along to the meeting."

32. The meeting was eventually arranged for 16 April 2018 at 1.00pm via Skype.

33. On 6 April 2018 the claimant had emailed Mr Strathern and stated that he did not accept there was a true redundancy situation and believed he was unfairly dismissed both in terms of inappropriate procedure and/or for an insufficient or no proper reason.

34. There was a transcript of the Appeal meeting. Mr Strathern first requested that the claimant explain what he felt was not correct. First of all, the claimant said in relation to the issue of redundancy there was no decline in business, it fact it had substantially increased because of the takeover of Ten Acre so the need for his skills and experience increased and did not diminish, so his dismissal could not have been in the interests of efficiency or economy. The responsibility for sales of Ten Acre products continued to be necessary after the takeover, if not even more important as he was into it with all the customers and distributors and attuned to the market for Ten Acre products, and it was ironic that they were headhunting him before the takeover. His job appears to continue to exist after the takeover. Regarding procedure, it was a pool of one when others should have been included and there was no selection process. He was really not told why the redundancy was necessary and he could not respond in any meaningful way. It was a fait accompli, and discussions were dominated by the redundancy package and money he felt he was still owed to him. There was no proper consultation.

35. The claimant continued to say that he was not in a position to consider what alternative work or hours were necessary within their organisation: they knew whether that was possible. He did not have adequate information in order to decide that, whether there was a job share or an alternative role. Mr Strathern replied saying as he understood it the reasons were explained during the redundancy process and he said, "We are now quite a way down the line from that to hear this". He said he would write back to him.

36. There were some handwritten notes which stated:

> "Explain why he has been made redundant – his absence from work not during sickness but prior to that despite our requests for you to carry…this meant we had to operate without you. It became clear with the business loss that couldn't support and with Richard no need for two."

37. This appears to be a draft of the letter which was then sent on 23 April 2018.

38. Mr Strathern said that he felt that the consultation period beginning on Monday 5 March 2018 and concluding on 13 March 2018 was a reasonable time period. He stated that the business could not commercially justify the claimant's role. This was discussed at length with him during the meeting with Richard Glennan and Louise Tutman on 5 March 2018:

> "…and from the notes I have seen made at this meeting I understand that when the risk of redundancy was communicated with you your response was it comes as no surprise."

(No such notes were ever made available to the Tribunal)

39. Mr Strathern pointed out the claimant had not identified any alternative to redundancy and they were unable to find any. He seemed to be complaining that the claimant had not raised any of these points until after the period for appealing had expired, and that his focus had been about the payments, and that there had been daily dialogue with him and ACAS regarding the payments due. He mentioned that:

> "It was "noted form the start of your employment that you were not prepared to attend site at a time when we felt it was absolutely critical that business continuity was smooth."

40. Mr Strathern therefore said it was the correct decision to make the claimant's position redundant. In tribunal the respondent elaborated that the claimant had insufficient production experience to be retained at CEO level if there had been a pool with Mr Glennan. The claimant disputed this, and stated he had significant production experience but that the respondent did not know this as they had never asked him.

41. In respect of the claimant's contractual claims, he claimed the following:

- His salary from 14 March to 20 March 2018 as he did not receive notice of dismissal until then.
- He asserted he was due a further two days' holiday pay at £276.92 a day;
- Regarding expenses, he was due £189 for mileage; for his train fare (Stockport to London, return) after what he had been paid on account he was owed £118.35 (this was from 21 January 2018);
- His train fare from London to Colchester on the same day was £33.50;
- His car insurance dated 21 January 2018 was £789;
- 5 March for travelling to the respondent's premises £101.22 and subsistence of £7.20;
- £5.90 for the toll road on the same day;
- His car rental for three months was £1,323.78;

- The maintenance plan for three months was £90.33;
- His phone rental, broadband and mobile were £166.56, £104.09 and £127.76 for three months.

42. It was the respondent's case that they were not obliged to pay expenses in relation to the car and in relation to the mobile phone etc. There had been correspondence about it at the end of December 2017 going into January during the asset sale when the claimant had said that the Lexus contract was in his name, paid by the company, and the insurance was on a personal policy charged(to the business and the contract hire costs were £367.72 a month, with maintenance of £25 per month. It was a 36 month term from 12 December 2016. The contract produced at tribunal was with Yumsch snacks. In respect of the phones, he said his Vodafone, his home business phone and broadband were charged to the company. Again in the email exchange at the end of December 2017 he said that he had amobile phone ,landline phone and broadband charged to the company.

43. The respondent said under the asset sale agreement they were not obliged to pay for the car costs which at paragraph 2.3 stated:

> "For the avoidance of doubt and without limitation the following items are not included in the sale under this Agreement:
>
> (h) any motor vehicles owned or used by the seller."

44. In respect of employers at paragraph 8.1 the agreement stated that:

"The seller's rights, powers, duties and liabilities under or in connection with such contracts of employment shall be transferred to the buyer under TUPE at the effective time."

45. Schedule 4 of the Asset Agreement set out the employees, their job title and various other matters such as annual salary, annual car allowance, notice period, commission and notes. Clearly this was advising the respondent of the existing contractual terms of the employees who were transferring to them. The claimant is stated to earn £72,000, to receive no car allowance; it said his notice period was one month; he did not receive commission, but the notes said, "lease car, various expenses, company credit card". The respondent appeared under due diligence to ask no further questions in relation to what " various expenses" might mean

46. . In respect of the train fares, the respondent denied that this expense was incurred in the course of carrying out the respondent's business and that the mileage claim for 5 March and expenses claim had never been received, as suggested in respect of the other expenses for that date, and as said before, in respect of the car and the broadband etc there was no contractual entitlement as these did not transfer. The email exchange at the end of December 2017 again referred to travel expenses being paid in accordance with the employee handbook and stated it had to comply with HMRC rules.

47. Finally it should be noted the claimant's grievance was never responded to .

The Law

Tupe

48. Under the Transfer of Undertakings (Protection of Employment) Regulations 2014 ("TUPE"), regulation 7(1) of the TUPE Regulations states that:

> "A dismissal will be automatically unfair if the sole or principal reason for the dismissal is the transfer, unless the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer."

49. Regulations 7(2) of the 2006 Regulations, as amended by the 2014 Regulations, states that:

> "This paragraph applies where the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer."

Regulation 7(3) goes on to say:

> "Where paragraph (2) applies:
>
> (a) Paragraph (1) does not apply;
>
> (b) Without prejudice to the application of section 98(4) of the 1992 Act for the purposes of section 98(1) and 135 of that Act –
>
> (i) The dismissal is regarded as having been for redundancy where section 98(2)(c) of that Act applies; or
>
> (ii) In any other case the dismissal is regarded as having been for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

50. Therefore there is no automatic unfair dismissal where the employer can show a Regulation 7(2) "ETO" reason.

51. An economic reason can be on relating to the profitability or market performance of the transferee's business.

52. In respect of an organisational reason, this can arise where duties are subsumed into the transferee's existing structure or were, for example, following a transfer the business is to concentrate on an area in which transferred employees have no expertise.

53. In respect of the "entailing changes in the workforce" point, this means that changes in the workforce must flow inextricably from the ETO reason rather than be a possible end result of the employer's ETO reason.

54. If an ETO defence succeeds the dismissal, however, can still be unfair under the general unfair dismissal provisions of the Employment Rights Act 1996. The employer has to establish the reason for the dismissal and that it was a permissible reason, such as redundancy. Further that it was a fair dismissal for that reason in accordance with section 98(4).

Redundancy unfair dismissal

55. Section 139(1)(b) of the Employment Rights Act 1996 sets out the definition of redundancy and includes situations where the requirements of the 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 they are employed have ceased or diminished.

This covers three separate situations:

(1) Where work of a particular kind is diminished so that employees have become surplus to requirements;

(2) Where work has not diminished but fewer employees are needed to do it,

-either because employees have been replaced by independent contractors or technology or

- because of a reorganisation which results in a more sufficient use of labour."

56. Where an employee argues that their dismissal was not by reason of redundancy but for a reason which was not potentially fair under the Employment Rights Act 1996, the statutory presumption under section 164(2) of the 1996 Act is that a dismissal for redundancy will not operate i.e. that there is a presumption of redundancy, and it will fall to the employer to show the reason for dismissal. For a dismissal to be by reason of redundancy, a redundancy situation must exist. However, it must be stressed it is not for the Tribunal to investigate the reason behind such situations.

57. However, the employer is required to show that the decision was based on proper information and consideration of the situation, as the absence of such information and consideration throws into question whether the dismissals were by reason of reason of redundancy at all. (**Ladbroke Courage Holidays Limited v Asten [1981] EAT**).

58. The Court of Appeal in **Hollister v National Farmers Union [1979]** and **William W Cook & Co (Wivenhoe) Limited v Tipper** where the Court of Appeal said that a good commercial reason was enough to justify a decision to make redundancies, and in **Tipper** that Tribunals are not at liberty to investigate the commercial and economic reasons behind a decision to close an undertaking. It did accept, however, that Tribunals could question whether the decision to dismiss was

genuinely on the ground of redundancy and could therefore require that the decision to make redundancies was based on proper information, as this is put in the IDS redundancy book: whether the decision to make the redundancies were genuine, not whether it was wise.

59. For unfair dismissal purposes once the reason has been established the dismissal for redundancy is unfair within section 98(4) Employment Rights Act 1996 a tribunal should consider the following issues – the pool for selection, the selection criteria, whether meaningful consultation has taken place and whether alternative jobs have been properly considered including with associate companies.

60. In respect of the pool for selection, if an employer dismisses an employee without first considering the question of a pool, a dismissal is likely to be unfair. (**Taymech Limited v Ryan EAT [1994]**) The issues to be considered are:

(a) whether other groups of employees are doing similar work to the group from which selections were made;

(b) whether employees' jobs were interchangeable;

(c) whether the employee's inclusion in the unit is consistent with his or her previous position; and

(d) whether the selection unit was agreed with any union.

61. The Tribunal must take care not to substitute their own view for that of the employer. If a respondent genuinely applies its mind to the formulation of the pool and its decision is within the range of reasonable responses it is generally unimpeachable.

62. In **Capita Hartshead Ltd v Byard EAT 2012** the EAT upheld the Tribunal's decision that a redundancy was unfair where an actuary was made redundant in a pool of one because the pension fund she managed declined due to no fault of hers; there were three other actuaries doing the same work but they were not included in the pool. The Tribunal found this was unfair.

63. In respect of the selection criteria must be objective and fairly applied.

64. Regarding consultation, in **Polkey v A E Dayton Services Limited [1998]** House of Lords, it was said that:

> "The employer will normally not act reasonably unless he warns and consults any employees affected or the representative adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid of minimise redundancy by redeployment within his own organisation."

65. The matter of the consultation should be a warning that the individual has been provisionally selected for redundancy, confirmation of the basis for selection, an opportunity to comment on the redundancy selection, consideration of alternative positions and an opportunity for the employee to address other matters. Consultation must be meaningful.

66. Finally, alternative employment must be properly considered.

Relevant Contract Law

67. Employment Tribunals have jurisdiction to hear breach of contract claims outstanding on termination of the contract of employment by virtue of section 3 of the Employment Tribunals Act 1996 and the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. A contractual claim can only be heard in the Tribunal under this provision: the claim has to arise or be outstanding on the termination of the employee's employment, and must relate to, inter alia, "a claim for damages for breach of contract of the employment or other contract connected with employment, a claim for a sum under such a contract and a claim for the recovery of a sum in pursuance of any enactment relating to the terms and performance of such a contract". The limit on claims is £25,000.

68. In order to determine the relevant contractual terms any contract of employment will be the first port of call however the terms of a contract may be oral or written. Where oral it will be a question of fact to establish what the terms are. Where it is claimed that a term should be implied, there are specific rules to decide whether it should be implied or not. This would be a matter of the court looking at the presumed intention of the parties at the time the contract was made. The legal tests are to be considered are:

(1) The term is necessary in order to give the contract business efficacy; or

(2) It is the normal custom and practice to include such a term in contracts of that particular kind; or

(3) An intention to include the term is demonstrated by the way in which the contract has been performed; or

(4) The term is so obvious the parties must have intended it.

Unlawful deductions of wages

69. Section 27(1) of the Employment Rights Act 1996 defines wages as "any sum payable to the worker in connection with employment". This includes any fee, bonus, commission, holiday pay or other emolument referable to the employment. These must be payable under a contract or otherwise i.e. by some statutory provision, for example. So holiday pay is payable; obviously straightforward wages or salary are also payable. Excluded payments, however, include expenses; this is excluded under section 27(2)(b) and must be dealt with by way of a breach of contract claim.

70. Section 13(1) of the 1996 Act defines deduction as "where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated…as a deduction made by the employer from the worker's wages on that occasion". The "after deductions" refers to statutory deductions such as tax and national insurance payments. The Tribunal, of course, has to determine what is properly payable, which often involves a construction of the worker's contractual entitlement, including any implied terms.

Claimant's Submissions

71. The claimant submitted that the respondent has not made out a redundancy situation as the level of sales reduction was only assessed for six weeks (16 January to 5 March 2018). Where there was a diminution it only related to Ten Acre and not the rest of the respondent's business of which it was now part. It was not a decline in relation to the respondent's business when the whole of the respondent's business is taken into account.

72. Neither were sales discussed during the transfer. When the business was acquired there was no level of sales predicted, no expectations of a certain volume of sales or a warranty given that there would be a certain amount of sales. The claimant's salary was not dependent on sales: his salary was maintained; neither was the job location a factor. This had never been discussed, there had never been a suggestion that the claimant should work out of Colchester. The claimant had attended the Colchester premises on a couple of occasions when asked.

73. In relation to the procedure, the claimant could have been put in a pool with Mr Glennan, although it was noted he was not a director at the time of the claimant's dismissal. The claimant submits that Mr Glennan's job was similar to the claimant's and that they should have been in a pool together.

74. Regarding selection criteria, the claimant did have extensive experience of production and of financial matters. The respondent never bothered to find out what his experience of that was.

75. In respect of the consultation procedure, the claimant was first told on 5 March and was dismissed one week later this was far too short a period to be meaningful consultation.

76. There were no notes from the first meeting or the second meeting which put the claimant at a serious disadvantage.

77. The claimant did not have any information in order to consider whether or not there were alternative job prospects with the respondent; they did not provide him with any information about current jobs with them and possible vacancies. They did not discuss how they were going to undertake sales without him. There was simply not enough time for all the options to be considered.

78. Regarding alternative work, the respondent did not consider whether any alternative work was available within their own business. There was no evidence that there were no vacancies within their own business. Further, they did not consider whether the other sales representatives who were still employed who had been brought over with Ten Acre, such as Amanda Whitehouse, should be made redundant and the claimant moved into that job.

<u>The Appeal</u>

79. Regarding the appeal, the claimant submits that the appeal was unfair as matters such as reduced hours were suggested. There was no discussion of whether there was a lesser job available and there was no proper consideration of the situation.

80. The claimant submitted that there may have been other reasons why the respondent dismissed him. They had accused him of wiping the computers, that he had not driven the business sufficiently after the transfer, he had not attended their premises sufficiently, that he went off sick; there was potential misconduct in him running his other businesses in their time; there was an alleged lack of engagement.

Automatically unfair dismissal

81. The claimant states that the respondent has failed to show an ETO reason and therefore the dismissal is automatically unfair.

Unlawful deductions/breach of contract claims

82. The claimant's contract of employment (schedule 4) shows his benefits in relation to the car and they should have been TUPE'd over by operation of the law. It was the same with the phones and the broadband, etc. His holiday should be recalculated based on the later termination date.

Respondent's Submissions

83. There was a reduced need for a senior person within the Ten Acre brand. Other employees of the Ten Acre brand were also dismissed and therefore the claimant had less reports to justify his position.

84. The ETO reason is that when the claimant was absent due to sickness the respondent managed well and it was clear to them there was no need to have that senior position anymore. As this was an issue within Ten Acre, not the respondent's business, it was reasonable to consider the claimant. The claimant was not undertaking work for the respondent's business other than for Ten Acre.

85. It is accepted the consultation was basic but it is a small employer. No alternative employment was proposed by the claimnat. The claimant just seemed concerned with the financial package and expenses. There was no alternative employment anyway.

86. **Polkey** also applied. A fair procedure would have made no difference.

87. Regarding the car, there was no contractual entitlement, and the same was in relation to the broadband. There was no agreement that the respondent would cover the cost.

Claimant's Reply

88. In respect of the car contract and the asset sale agreement, this was about what the respondent was buying from Yumsh, it was not about what the claimant was entitled to as part of his contract of employment, and the respondent knew this.

Conclusions

Did a redundancy situation exist?

89. In this case the respondent eventually gave different reasons for the claimant's dismissal. In the original documentation it was said that it was "due to the requirement to ensure operating costs are kept to a minimum and the fact that the need for a CEO for the Ten Acre brand has ceased". There was no further explanation, but other explanations were proffered during the Tribunal hearing, mainly the respondent said that sales had significantly diminished in the period immediately after the respondent's acquisition, and this was the main plank they relied on to justify the redundancy; although they did also mention that with other members of Ten Acre staff being made redundant the claimant had less people reporting into him and therefore there was less justification for a CEO role.

90. I find that the respondent has not established that there was a redundancy situation as, relying on the **Ladbroke** case, they had insufficient information to reach the conclusion that there was a long-term decline in sales. They based their decision on only six weeks' information when there were specific reasons for the reduction in sales in that period. In any event I accept the claimant's evidence that in fact sales had not reduced and that he was obtaining a number of sales. What did reduce was that the orders were not being fulfilled due to production difficulties at the respondent's end. The respondent had no evidence to countermand this suggestion and I therefore accept that this was not just a failure to meet the **Ladbroke** guidelines but also that it was a sham given that there was no evidence whatsoever to support this information or counter what the claimant said.

91. The respondent different reasons for the claimant's dismissal, in the course of the Tribunal the respondent said, " we noticed we could manage without him when he was off sick", although again this would not be a proper information or consideration based on two one week absences. There was the mention in the appeal letter about the claimant being reluctant to attend their premises and not driving the business forward in Tribunal; again matters which had never been pleaded or put to the claimant during the redundancy process, and were in fact not matters relevant to redundancy but suggesting potential misconduct. Obviously the claimant was never investigated for misconduct, etc.

Pool for Selection

92. In respect of the pool for selection there was no evidence that the respondent had addressed its mind to a pool for selection. Two potential issues arose in respect of this i.e. should the claimant have been pooled with Mr Glennan, or with the other Ten Acre staff who were more junior, for example sales staff as clearly the claimant was highly experienced in sales?

93. Accordingly, the respondent fails on the pool for selection point.

Selection criteria

94. There was no selection criteria in this case save that the respondent took the view that the claimant did not have sufficient production experience.

95. However the respondent did not genuinely address its mind to this as the claimant did have considerable production experience.

96. So insofaras there was a selection criteria it was defective.

Consultation

97. The respondent did warn the claimant about redundancy on 5 March and relied on the same meeting as consultation. There were no minutes, however, of this meeting and therefore the only record is the letter which went out to the claimant after the meeting. The only point made was that the respondent "had considered and would continue to consider alternatives to redundancy, including alternative employment within the company but no alternatives had been identified", and they stated there would be a further meeting. There was a further meeting on 13 March. Again, there were no minutes of this; this was a second consultation meeting.

98. The claimant said there could be no meaningful consultation as he was not provided with any information, for example whether there were any vacancies with the respondent company or an organisational structure for him to consider, whether he should be pooled with someone else.

99. There was no discussion regarding the fact that given so many workers at Ten Acre had been made redundant there was no justification for a Chief Executive's post.

100. There was also very little time between the two meetings for the claimant to explore any issues.

101. Accordingly, I find there was insufficient consultation and it was not meaningful.

Alternative Jobs

102. Although the respondent stated they had explored alternative jobs, there was no evidence of this other than assertions. It would have been entirely reasonable in this situation for jobs with (in effect) the parent company to be considered for the claimant, and/or whether the claimant could have taken over a sales role.

103. The claimant also made suggestions to work part-time in the appeal (see the appeal below).

104. Therefore. the respondent did not do enough to explore the issue of alternative jobs.

Procedural issues re the Appeal

105. There was a transcript of the appeal and it is clear that the claimant brought up a number of issues in the appeal but none of them was followed up; the claimant simply received a letter turning down his appeal which also included extraneous matters such as that he did not attend the premises in Colchester.

106. The appeal, therefore, was defective in itself as it was not a meaningful appeal. Neither did it cure any of the defects established above.

Conclusion

107. Accordingly, the claimant's dismissal was unfair substantively and procedurally and the matter should proceed to remedy where I will consider any issues of **Polkey**, potential contributory conduct and an issue alluded to regarding potential misconduct of the claimant in using the respondent's time on his other businesses.

Application of TUPE and ETO Reasons

108. I find this was a TUPE related dismissal as from the respondent's comments in Tribunal it arose out of the acquisition of Ten Acres and the situation which then arose of having two CEOs. The respondent believed they could manage without the claimant as they came to believe the Ten Acre business could be run between the remaining Ten Acre sales people and Mr Glennan and there was no need for two CEOs within the business. This is an organisational reason.

109. The reason does give rise to changes in the workforce as the number of CEOs is reduced to one from two.

110. Accordingly, there is no automatic unfair dismissal.

Unlawful Deduction of Wages Claims

111. As I have accepted that the claimant did not receive his notice of termination until 20 March, the claimant is entitled to a further five days' pay at £276.92 per day.

112. The respondent said this formed part of his notice pay but in fact the notice would not run until the claimant received it and so would end one week later.

Holiday Pay

113. The claimant's contractual entitlement to holiday pay mirrored the working time regulations statutory holiday (20 plus 8 bank holidays) plus he could accumulate up to two extra days through service (one day per year - he had 4 years complete service but it was capped at two).

114. Accordingly, the claimant was entitled (for January to 20th April 2018) to 8.3 days plus part of the extra two days. I suggest this would be 8.9 days rounded up to 9 but it will be determined at the remedy hearing.

Breach of Contract Claims

115. The claimant claimed expenses for travelling on business for the respondent, either by train or mileage where he travelled by car, and for subsistence for those days when he was out all day. He also claimed for the toll charges. He has provided receipts for the items claimed.

116. In respect of all these matters I find that the claimant had a legitimate expectation that these would be paid. It would be almost impossible to have a job like the claimant's without having implied into your contract that you would be paid any expenses, (indeed it is almost not possible to have a job where one would expect a worker to pay for their own expenses, as basically this could undermine an individual being paid the National Minimum Wage although this was not the case in

the claimant's situation). Any Sales Chief Executive role would, for business efficacy, and on the basis of the 'obvious' test, have this implied into any contract. Further I accept the claimant's evidence it was custom and practice.

117. In respect of the claimant's car, this was clearly flagged up in Schedule 4 and I find that the Asset Agreement was about what the respondent was acquiring in terms of assets from Yumsh Snacks (in any event it was a leased car and not an asset) not what employees were entitled to, which was set out in Schedule 4. Accordingly, the claimant was clearly entitled to be provided with a car and the most business efficacious way of doing that was to have a rental. It must be implied into any similar situation that a maintenance plan would also follow for the relevant car.

118. There was a contract between Yumsch Snacks and Lexus I am satisfied on the claimant's evidence that he paid these expenses. Accordingly in principle the claimant is contractual entitled payment for the provision of a car

119. Regarding the telephone line, again under any test for an implied term if that is necessary, in a job of the nature of the claimant's, these would be matters that would be paid for by an employer. We had no evidence regarding any element of personal use and therefore whilst I have determined that there would be amounts payable it will be for the remedy hearing to determine whether any of the charges included personal use as it is not obvious that the claimant would be entitled to be paid for any personal use of the telephone, but obviously the basic rental payment and business calls would be covered.

120. Again, in any event, "various expenses" in Schedule 4 would be sufficient to cover this, and in my view if the respondent failed to investigate this further the burden is on them to prove that the claimant was not entitled to these payments, which they have failed to do.

121. The sums to be awarded for breach of contract will be determined at the remedy hearing. The claimant should set out clearly for example the purpose of each journey for which expenses are claimed.

122. Orders will be given separately for the remedy hearing for a bundle and further witness statements.

Employment Judge Feeney
Date 17 July 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

22 July 2019
FOR THE TRIBUNAL OFFICE