EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no. 4102780/2016 held at Aberdeen on 20, 21 and 22 February 2017

Employment Judge: W A Meiklejohn
Members: Ms E Coyle
Ms G Powell

Mr Kenneth Martin Pinkard — **Claimant**
Represented by:
Mr T Pacey
of Counsel

Technip Singapore PTE Limited — **Respondent**
Represented by:
Ms T Walker
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is that the Claimant's claims of unfair dismissal and automatically unfair dismissal do not succeed and are dismissed.

REASONS

1. The Claimant in this case alleged that he had been unfairly dismissal. He also alleged that his dismissal was automatically unfair under reference to sections 103A and 105(6A) of the Employment Rights Act 1996 ("ERA") (ie that the reason or principal reason he was selected for redundancy was that he had made a protected disclosure). The Respondent's position was that the Claimant had been fairly dismissed by reason of redundancy and that the Claimant's selection for redundancy had not been linked to any alleged protected disclosure.

2. We heard evidence and submissions in Aberdeen on 20, 21 and 22 February 2017. We thereafter held a judge and members' meeting in Dundee on

3 March 2017 as there was insufficient time for deliberations at the conclusion of the Hearing on 22 February 2017. We apologise to the parties for the slight delay this has caused in the promulgation of our judgment.

Evidence and findings in fact

3. We heard oral evidence for the Respondent from –

Mr R Hay	Director of Offshore Personnel Services (T-MOS)
Mr R Gordon	Diving Asset Manager
Ms N Zhuravleva	Marine Lead (formerly Diving Resource Manager)
Mr A Bell	Offshore Construction Manager ("OCM")
Mr D Coulter	Support Services Manager (T-MOS)
Mr A Paterson	Deputy Director of Offshore Personnel Services (T-MOS)

We also heard oral evidence from the Claimant.

4. "T-MOS" is an abbreviation for Technip Offshore Manning Services Limited. T-MOS is part of Technip UK Limited, a company within the same corporate group as the Respondent, and provides HR services in respect of employees of the Respondent who mobilise from the United Kingdom.

5. We had a joint bundle of documents extending to 443 pages. We refer to these by tab/page number as appropriate. We also had a separate mitigation bundle from the Claimant.

6. It was common ground that the Claimant had been dismissed because he had been selected for redundancy. The role of each of the Respondent's witnesses in the redundancy process can be summarised as follows –

    (a) Ms Zhuravleva scored the employees in the pool of selection which included the Claimant.
    (b) Mr Gordon provided input into the scoring process from an operational/technical perspective.

(c) Mr Coulter conducted two individual consultation meetings (by telephone) with the Claimant.

(d) Mr Hay conducted a third and final individual consultation meeting with the Claimant.

(e) Mr Paterson heard the Claimant's appeal against dismissal.

Mr Bell was not directly involved in the redundancy process but conducted the Claimant's 2014 appraisal which was relevant to the redundancy selection.

7. The Claimant's employment began on 1 September 1987, originally with Stena Offshore Limited, as a saturation diver. Through a series of corporate changes he was latterly employed by the Respondent as an assistant offshore construction manager ("AOCM"), otherwise referred to as a mixed gas superintendent. In 1995 the Claimant became a saturation supervisor. In 2001 he became an AOCM and was assigned to the Orelia which was one of the Respondent's diving support vessels ("DSV").

8. In 2011 the OCM position on the Orelia became vacant and the Claimant worked as OCM on the Orelia for six months until, following a selection process, another candidate (Keith Alexander) was appointed to the Orelia OCM position. The Claimant was given feedback to the effect that he would need to get more of a range of experience in order to be appointed as an OCM. The Claimant was then transferred to another DSV, the Skandi Arctic ("Arctic"), as AOCM, with effect from January 2013.

9. The OCMs on the Arctic were Mr Alan Carr and Mr Bell. The Claimant and Mr Bell knew each other well. Mr Bell did not consider that it would be conducive to good working relations to leave the Claimant as AOCM on the Orelia following Mr Alexander's appointment as he had been unhappy that, as acting OCM, he had not been appointed. Mr Bell spoke with Mr Carr about the Claimant becoming an AOCM on the Arctic and Mr Carr was not keen, but Mr Bell persuaded him.

10. The Claimant found the role of AOCM on the Arctic to be different from the equivalent role on the Orelia. He did not share the OCM's office and email

account as he had done on the Orelia. The role was more administrative and less operational than the Claimant had been used to. According to Mr Bell, the Claimant was knowledgeable and competent but spent quite a lot of his time trying to turn the Arctic into the Orelia. Mr Bell said that he teased the Claimant about this initially but it became irritating.

11. The effect of the substantial fall in the price of oil on the offshore oil and gas industry in the North Sea is well known. The Respondent faced a reduction in the number of projects which meant there were fewer days when their vessels were working and fewer employees required to work on these vessels. In 2015 the Respondent commenced a redundancy consultation process across several areas of their business. They engaged in collective redundancy consultation with employee representatives. They decided on selection criteria, pools of selection and the number of redundancies required from each pool. Tab 32, pages 177-186 was a letter from the Respondent to employees advising them of the need for redundancies and the consultation process.

12. The Claimant (who in January 2015 had been transferred from the Arctic to the position of AOCM on another of the Respondent's DSVs, the Achiever) was placed in a pool of selection which comprised nine AOCMs. As the longest serving and, in his view, most experienced AOCM in the pool the Claimant expected to come out high in the scoring.

13. The selection criteria were

    (a) competence,
    (b) appraisal,
    (c) disciplinary/performance and conduct,
    (d) service, and
    (e) added value.

    The scores for criteria (a) to (d) were provided by the Respondent's HR department based on the information they held for each employee in the selection pool. In the case of appraisal, this was based on employees' 2014 appraisal as not all employees in the pool had completed a 2015 appraisal. An

appraisal which “exceeds expectation” scored 2, one which “meets expectation” scored 1 and one which was “improvement required” scored 0.

14. The Claimant scored 3 for competence (the maximum score available), 1 for appraisal (the middle of the scores available), 2 for disciplinary/performance and conduct (the maximum score available) and 5 for service (the maximum score available). He scored 7 for added value. Excluding one member of the pool who subsequently elected to take voluntary redundancy, these scores, totalling 18, placed the Claimant at the bottom of the selection pool.

15. Responsibility for the scoring of the various selection pools was given to the Respondent’s resource managers. Ms Zhuravleva was the resource manager in respect of the AOCMs. She described her role as covering “a wide range of responsibilities in relation to these employees, including: recruitment, competency scheme, supporting them through illness and personal issues, succession planning, logistics, contracts, regional requirements, industry legislation in relation to diving, training and compliance, disciplinaries, payroll etc.” The Respondent had a concern that if the scoring had been done by the OCMs it might have been influenced by friendships built up over the years. In effect this meant Ms Zhuravleva was scoring the “added value” section in the selection matrix as the other sections had already been dealt with by HR. There was no element of moderation of the scoring.

16. Ms Zhuravleva had regular contact with the AOCMs, although this varied from one individual to another. She attended training on the scoring process; this was not documented and there was no document setting out the procedure for the scoring process. Ms Zhuravleva drew on her knowledge of the AOCMs’ performance, she looked at their appraisals (not in this context restricted to the 2014 appraisal) and considered feedback from colleagues. She described “colleagues” as business units, her colleagues in Norway, the asset team and offshore managers, as well as some client feedback. She did not specifically seek feedback but rather she relied on what she already knew. She was not expected to contact clients of the Respondent. She said that on reviewing the appraisals for those in the selection pool it “became apparent that the appraisals were exaggerated and did not reflect reality”.

17. Mr Gordon was the person from the "asset team" who was involved in the scoring exercise. As diving asset manager he was responsible for all aspects of the Respondent's diving operations. His role in the selection process was to provide input to the "value added" scores from an operational/technical perspective. He had been in post since 1 July 2015 although he had been employed by the Respondent since 2007. He had had no direct contact with the Claimant since his appointment, no doubt due to some extent to the fact that the Claimant worked night shift. However he knew the Claimant and the other AOCMs in the selection pool from his involvement with the Respondent's vessels. He said that others in the selection pool had been "on more vessels" than the Claimant. He also said initially in his evidence that he was in regular communication with all of those in the selection pool but, under cross examination, he acknowledged that he knew the others better than the Claimant and referred to a lack of contact from the Claimant.

18. The "value added" scores were for (a) leadership behaviours (divided into (i) communication skills and (ii) teamwork), (b) flexibility in approach and deployment requests, (c) versatility in skills, knowledge and experience (including additional relevant qualifications) (divided into (i) knowledge and (ii) experience) and (d) additional criteria to be applied for management positions which comprised (i) delivery focus (ability to deliver on time against deadlines and on budget), (ii) customer/client focus and (iii) creativity, skills, innovation and problem solving.

19. After consulting with Mr Gordon, Ms Zhuravleva scored the Claimant 1 for communication skills (the lowest score available), 1 for teamwork (the lowest score available), 0 for flexibility (the lowest score available being 1, and despite Mr Gordon questioning this), 2 for knowledge (the second highest score available), 2 for experience (the second highest score available) and 1 for additional criteria (the lowest score available).

20. Mr Coulter was tasked with conducting individual consultation meetings with the Claimant. The first of these was a phonecall on 11 November 2015. Tab 36, pages 200-206 was Mr Coulter's record of this call. He advised the Claimant of

his score and that it was one of the five lowest within his pool (at that point still a pool of nine) and that he had been provisionally selected for redundancy. He talked the Claimant through the scoresheet. The Claimant disagreed with his scores and believed that they must be wrong and that the scoring criteria had been incorrectly applied.

21. Mr Coulter wrote to the Claimant after this call (Tab 33, pages 187-196, letter undated) enclosing his selection score report. In the meantime on 13 November 2015 the Claimant emailed Mr Coulter (Tab 37, pages 207-223) challenging his scores and providing supporting documentation. This included his 2007, 2012 and 2015 appraisals. He argued that all of his "value added" scores should be increased. He took particular issue with being scored 0 for flexibility, explaining that he had only once been unable to complete a short notice, non-core trip during a leave period (due to a trip to Spain to meet a builder midway through a leave period which he had not intimated to the Respondent). He gave three examples of times when he had demonstrated flexibility involving interruption to planned holiday arrangements.

22. Mr Coulter forwarded the Claimant's email and attachments to Ms Zhuravleva on 18 November 2015 (Tab 39, page 227). He asked her to review the Claimant's comments and to advise if any change was warranted to the Claimant's scoring, and to provide justification for scores that were not changed.

23. Ms Zhuravleva replied to Mr Coulter on 19 November 2015 (Tab 39, pages 225-227). She acknowledged that a score of 0 for flexibility was "harsh" and should perhaps be changed to 1. She referred to the Claimant booking holidays at school holiday times and things having to be arranged on the vessels around the Claimant's time off which was not always ideal. She also referred to the Claimant being unable to extend an offshore trip in 2015 because he had holidays booked which were not in the Respondent's system. She did not consider that a score of 2 was merited because others were "a lot more flexible with no issues at all". Ms Zhuravleva accepted in her evidence that she had been wrong to give the Claimant a score of 0 for flexibility but did not acknowledge that as a mistake in her email to Mr Coulter.

24. In relation to "knowledge" Ms Zhuravleva commented that the Claimant had been on the Orelia too long, and that things were not going so positively for him as he had expected on the Arctic because he was "stuck in the Orelia way" and was "resistant to change".

25. In relation to experience Ms Zhuravleva commented that the Claimant had a limited exposure to other vessels (which was not his fault) but had never taken the initiative to ask for a transfer as he thought he would be the next OCM on the Orelia and this was "the mentality that carried him through over the years". Referring to the various references and feedback from others which had been included in the documentation the Claimant had sent to Mr Coulter, she said that the Respondent "cannot take" these as they had not done so for others, and references were not part of the criteria. She added "Previous appraisals are not considered".

26. In relation to communication skills Ms Zhuravleva referred to the Claimant's 2014 appraisal and said "he is our next OCM according to Ali Bell, but we do know that the appraisals do not reflect the truth". She said that Mr Carr had issues with the Claimant and produced an extract from an email from Mr Carr (undated but probably November/December 2014, and subsequent to Mr Carr's email of 20 November 2014 to which we refer at paragraph 33 below) which was highly critical of the Claimant's communication and leadership skills. Mr Carr was critical of the way the Claimant spoke to the captains on the Arctic and described him as speaking "dismissively" towards DOF personnel and his team members. DOF was the company which provided the marine crew on the Arctic. Mr Carr's email stated that the Claimant had been involved in two incidents which had not been reported to the OCM. Ms Zhuravleva also referred to negative feedback from Statoil on various personnel from the Arctic including the Claimant.

27. In relation to teamwork Ms Zhuravleva commented that it had become apparent when the Claimant moved to the Arctic that there were deficiencies in his flexibility, communication and teamwork. She said that when the Claimant had moved from the Arctic to the Achiever (as he had done in early 2015) the

Respondent had an issue deploying him to other vessels as nobody wanted to take him apart from [name redacted by Ms Zhuravleva] with some persuasion. She said that these matters should have been fed back to the Claimant by his supervisors but had not. She described the Claimant as being "far behind" the top performers in the selection pool.

28. Mr Coulter conducted a further consultation meeting with the Claimant by telephone on 26 November 2015. Tab 40, pages 229-233 was Mr Coulter's record of this call. He recorded the Claimant (at page 30) as saying that he had worked out that his score should have been 28, and that he did not believe that there was anyone who could possibly have a higher score than himself. According to the Claimant it was "personal". He disputed the allegation about being unable to extend an offshore trip in 2015 and Mr Coulter said he would follow up on this. Page 236 was an email from Jack Waterson to Mr Coulter dated 30 November 2015 stating that the Claimant did not agree to stay on for two weeks when asked to do so.

29. Mr Coulter sent an email to the Claimant on 29 November 2015 (Tab 41, pages 234-235) to advise that his scoring had been reviewed and to comment on the points he had made. The Claimant's score for flexibility was increased from 0 to 1 and his score for additional criteria was increased from 1 to 2. Mr Coulter told the Claimant that the Respondent "cannot take references and feedback from others because we haven't done that for others and References is not one of the criteria's". He also told the Claimant that "Previous appraisals are not considered". The review of the Claimant's scores moved him from a total of 18 to a total of 20 which left him still at the bottom of the selection pool. Tab 42, page 238 showed the revised scores – the top score was 30, there were two 29s, two 28s, a 25, a 22 and the Claimant's 20.

30. Tab 44, pages 240-241 was Mr Coulter's letter to the Claimant following the 26 November 2015 call. This proposed a final consultation meeting, initially scheduled for 9 December 2015 but eventually held on 7 January 2016. Mr Hay was asked to conduct the final consultation meeting and undertake a final review of the Claimant's scoring.

31. The Claimant submitted a data subject access request to the Respondent on 10 December 2015 (Tab 47, pages 244-245). The Respondent sought to provide the Claimant with personal data relevant to his redundancy consultation meeting in advance of that meeting taking place. Tab 55, page 264 confirmed that this documentation was sent to the Claimant on 22 December 2015.

32. The Claimant described himself as "shocked" to receive the content of the email exchange between Mr Coulter and Ms Zhuravleva of 18/19 November 2015 (Tab 55, pages 282-284 and also Tab 39, pages 225-227 – see paragraphs 22 and 23 above) which was included within the documentation sent to him. He picked up on the phrase "not very objective" in Ms Zhuravleva's email of 19 November 2015, although we believed it was more likely that she was referring to her comments in that email rather than her original scoring of the Claimant.

33. The Claimant also became aware from the documentation he received in response to his data subject access request of an email from Mr Carr to Mr Ken Littlejohn and Ms Zhuravleva dated 20 November 2014 (Tab 21, page 101). Mr Littlejohn's position was vessel operations manager. Mr Carr said –

> "After returning back onboard the Skandi Arctic and learning of the recent events, I have some very strong recommendations to make, the first is that Martin Pinkard is relocated from the Skandi Arctic to another worksite. As we are all aware that the Skandi Arctic is going through some very difficult times, and has been for some time now, I feel we have to undertake some major changes to help us through this period. Martin has never been a team player from day one, and as a manager I feel he is not portraying the Technip way of working, he is very argumentative, negative in his ways, and very single minded. Whilst you might think that these are strong accusations, I can tell you they are true and Martin will never change, I did actually recommend to Ali [Bell] that Martin was not brought to the Skandi Arctic from day one due to his past record."

The "recent events" to which Mr Carr referred related to the content of an email the Claimant had sent to Mr Littlejohn on 17 November 2015 (Tab 20, page 98)

about boat drills on the Arctic and the "spool incident" to which we refer at paragraph 38 below.

34. Boat drills were held regularly on the Arctic. The timing of the drills was determined by the captain. These were held at 1pm which interrupted the sleep pattern of the night shift, particularly after a crew change. This routinely generated hazard observation cards from night shift personnel. The Claimant took matters up with one of the Arctic captains, Thomas Jensen, in October 2014. Captain Jensen was not willing to consider a system of exemptions but agreed that the Claimant should speak to the night shift with a view to accommodating their wishes. The Claimant did so and the outcome was a proposal to change the boat drill timing to 3pm. However when the captains changed over, the timing remained at 1pm.

35. The Claimant had earlier discussed the same issue with the Arctic OCMs, Mr Bell and Mr Carr. According to the Claimant's email to Mr Littlejohn, Mr Carr had issued a notice advising that any person feeling tired from interrupted sleep did not need to turn up for work until they felt able to, but no other action had been taken. The Claimant did not regard that as a satisfactory solution. Mr Littlejohn advised the Claimant by email on 19 November 2014 that he had discussed the issue with Mr Bell and he forwarded to the Claimant an email from Mr Bell saying that he had raised the matter with one of the captains who was to discuss the matter with the other captain (Tab 20, pages 98-99). Mr Carr returned to the Arctic on 19 November 2014 and, as he and Mr Bell shared an email address, he would have seen this exchange of emails. When the Claimant returned to the Arctic on 25 November 2014, he was reprimanded by the other captain, Nils Baadness, who had also seen his email to Mr Littlejohn. According to the Claimant, the language use by Captain Baadness was similar to that used by Mr Carr is his email of 20 November 2014.

36. When the Claimant had transferred to the Arctic he had been concerned to find that the system of diver monitoring in his office was video only whereas on the Orelia the system also provided an audio feed. In addition, on the Arctic the diver monitoring system had a single feed which had to be manually selected to whichever diving bell was submerged and, as switching required the

attendance of technical personnel, there would be times when the video feed was connected to the wrong diving bell. The Claimant did not regard this as satisfactory as he was accustomed to, as he put it, keeping an ear to what was happening in the water or on deck, so that he would be able to intervene and halt an operation to ensure that things were proceeding safely and according to procedures.

37. The Claimant raised his concerns initially with both Mr Carr and subsequently with both Mr Carr and Mr Bell. According to the Claimant, Mr Carr was not overly concerned and explained it was not possible to provide the necessary feeds due to the layout of the vessel. Mr Bell's evidence was that he had experienced audio (in addition to video) diver monitoring only on the Orelia and he had turned off the audio feed. He said that using the audio feed was the Claimant's way of working and was not a legal requirement.

38. The "spool incident" occurred on 6 November 2014. A spool (a section of pipe) had floated up and then fallen to the seabed adjacent to where divers were working, striking the well on its way down. Mr Duncan Lamb, one of those in the AOCM selection pool who was retained by the Respondent, had only very recently joined the Arctic as an AOCM and was working his first night shift with the Claimant when the incident occurred. Following this incident the Claimant was required to attend a formal disciplinary hearing on 17 February 2015. The allegations against him were that he failed to manage the incident appropriately, stop the job and report the incident; the outcome was a finding of no case to answer (Tab 25, page 146).

39. In the course of the disciplinary hearing the Claimant raised the issue of the adequacy of the diver monitoring system in the AOCM office where he and Mr Lamb had been at the time of the incident. According to the Claimant, despite his previously being told that it was not possible to install monitoring equipment, such equipment was installed within days of the spool incident.

40. The Claimant's 2013 appraisal was conducted by Mr Carr (Tab 16, pages 80-86). In preparing for this the Claimant had scored himself as "S" (meaning strength) under every heading which he acknowledged he should not have

done. In any event the outcome was a positive appraisal with a final rating of "ME" (meaning meets expectations). Mr Carr referred to the Claimant as being "Very pro active when it comes to safety. He abides to the standards of Technip". The Claimant was however unhappy about Mr Carr's comment that he would be a "very good third party OCM" which we understood to mean OCM on a vessel chartered by the Respondent rather than one of their own DSVs. The Claimant took his concern to Mr Hay who told him to ask Mr Carr about this. The Claimant was reluctant to do this as it would be seen as challenging Mr Carr, but in the event Mr Bell arrived and the matter was discussed in a good natured way, with Mr Carr saying that this was what he thought.

41. In July 2014 the Claimant met with Ms Zhuravleva and Mr Coulter. He had requested a transfer from the Arctic and in the course of the meeting he told them about his concerns regarding the lack of diver monitoring equipment. According to the Claimant, Ms Zhuravleva told him that he should have escalated his concerns to the vessel onshore manager, Mr Littlejohn. The Claimant had this advice in his mind when he emailed Mr Littlejohn on 17 November 2014 about the boat drills issue.

42. The Claimant's 2014 appraisal was conducted by Mr Bell (Tab 18, pages 89-95). This was again a positive appraisal with a final rating of "meets expectations". Mr Bell in the course of his evidence recalled having been asked by Mr Littlejohn to redo the Claimant's 2013 appraisal but we think he was probably mistaken in that recollection as there was no documentation to confirm this. It was more likely that Mr Bell was thinking of his involvement following that appraisal as referred to at paragraph 40 above.

43. Mr Hay conducted the Claimant's third and final individual consultation meeting on 7 January 2016. He was accompanied by Ms V Lockhart, HR Business Partner at TMO-S, and the Claimant was accompanied by Mr J Molloy, his RMT union representative. The focus was on the "added value" scores. The minutes of the meeting were at Tab 58, pages 308-311. The Claimant provided his meeting notes/list of issues about his scoring (Tab 61, page 342). He was critical of Ms Zhuravleva's lack of knowledge of his past career with the Respondent. He referred to her "unquestioning acceptance" of Mr Carr's

comments (a reference to the terms of Mr Carr's email an extract of which Ms Zhuravleva had included in her email of 19 November 2015 to Mr Coulter) in preference to his positive 2014 appraisal.

44. Mr Hay's evidence was that he was influenced by the fact that the two captains with whom the Claimant had worked on the Arctic had negative comments to make about his communication style. He knew about this from an email the Claimant had sent him on 18 October 2013 (Tab 62, pages 343-344) following Mr Bell's "mediation" between Mr Carr and the Claimant (see paragraph 40 above). This described two interactions involving the Claimant and a Norwegian chief officer on the Arctic which had resulted in criticism of the Claimant by the captains. The Claimant provided his explanations for these events in the course of his evidence and, while the Claimant perceived that he had done nothing wrong, Mr Hay was entitled to form the view that the Claimant had caused some degree of offence.

45. The Claimant took issue at his meeting with Mr Hay regarding the extract from Mr Carr's email (Tab 39, page 226). Mr Hay accepted in evidence that he had taken Ms Zhuravleva's email to Mr Coulter (Tab 39, pages 225-227) into account, and that Mr Carr's comments were relevant to the Claimant's communication skills in particular, and "not necessarily incorrect". That was a view shared by Mr Bell who said that he did not "necessarily disagree" with what Mr Carr had said about the Claimant. Mr Hay decided to increase the Claimant's communication skills score from a 1 to a 2 saying that he could see "how it might be construed that for this component an over reliance on the view of one manager" had occurred.

46. In relation to teamwork Mr Hay considered the points the Claimant had made (Tab 57, pages 304-305) including his assertion that the criticisms of his teamwork were connected with the safety issues he had raised in 2013 and 2014. He decided to increase the Claimant's score under this heading from a 1 to a 2 because he believed that, although there was evidence to the contrary, the Claimant was generally a good team worker.

47. In relation to leadership Mr Hay considered the Claimant's arguments that he should have received a score of 3 instead of 2 (Tab 57, page 305). He also considered Mr Molloy's concerns that the Claimant's score had been affected by Mr Carr's reference in his email, quoted by Ms Zhuravleva in her response to Mr Coulter, to the spool incident and a separate incident involving a diving basket (of which the Claimant pled ignorance) when the Claimant had been cleared of any wrongdoing in relation to the spool incident. Mr Hay decided that the Claimant's leadership score should remain a 2 because the Claimant had not provided any evidence which would suggest added value in the "additional criteria to be applied to management positions".

48. In relation to flexibility (Tab 57, page 306), Mr Hay did not believe that the Claimant had provided evidence to show that he had been exceptionally flexible and decided that a score of 2 would be appropriate (increased from a 1). In relation to knowledge and experience (Tab 57, page 306), Mr Hay decided that the score of 2 awarded to the Claimant under each of these headings was appropriate. The result of these adjustments to the Claimant's scores was that his total increased from 20 to 23. This meant that he remained provisionally selected for redundancy.

49. Following the meeting on 7 January 2016 the Claimant emailed his meeting notes to Mr Hay (Tab 63, page 346). Mr Hay emailed Ms Lockhart on 8 January 2016 (Tab 64, page 347) referring to various matters where he intended to make enquiries, and expressing "reservations….regarding the apparent reliance on Alan Carr's comments as interpreted by Natalya and the allegations of other relevant evidence being disregarded in favour of this". He then took time to make some enquiries (for example Tab 65, page 350 being Mr Hay's handwritten note relating to Mr Lamb and Mr Kelly), to speak with Ms Zhuravleva by phone and to consider matters before compiling his report (Tab 57, pages 304-307), the contents of which we have already referred to in paragraphs 45-48 above.

50. In the course of preparing his report Mr Hay considered the Claimant's assertion (Tab 61, page 342, para 7) that Mr Carr's comments about him had been inconsistent. The Claimant's position was that Mr Carr had disagreed

with his transfer to the Arctic, then given him a good appraisal in 2013, and that his change of heart in 2014 could only relate to the issues the Claimant had raised concerning diver monitoring facilities and boat drills. Mr Hay did not believe that Mr Carr's views about the Claimant were only due to the safety issues he had raised. He believed there were other reasons for differences of opinion between them, instancing the Claimant scoring himself as "S" in every section of his 2013 appraisal knowing that this would not be well received by Mr Carr.

51. Mr Hay also considered the Claimant's assertion (Tab 61, page 342, para 5) that Ms Zhuravleva was not qualified to conduct his scoring. His view was that Ms Zhuravleva had the best overall view of the Claimant's selection pool from the Respondent's onshore structure. She was in his view "absolutely capable" of commenting on the communication skills of those in the selection pool. He acknowledged that she was less able to comment on teamwork. In relation to flexibility he said that Ms Zhuravleva ran a team which dealt with mobilisation /demobilisation of personnel to work sites, and concerns would be escalated to her. Mr Hay agreed that he had concerns about some of the language used by Ms Zhuravleva in her email to Mr Coulter at Tab 39, page 225 – her use of the phrase "not very objective" and the word "harsh" – but he observed that she was not a native English speaker.

52. In relation to the scoring of "knowledge" Mr Hay said that Ms Zhuravleva would have the "best and broadest" knowledge of those in the Claimant's selection pool, including their knowledge of the different jurisdictions, legislation and clients. He also said that Ms Zhuravleva and Mr Gordon "knew who could do what" and decided the composition of the crew for the Respondent's vessels.

53. Mr Hay said that he did not believe the Claimant had been "scored down" because he had raised health and safety concerns. He said there had been "no consideration of that sort" for himself. He described the concerns raised by the Claimant as more general and "par for the course" in an industry where health and safety was a top priority.

54. The issue of the Respondent's unwillingness to consider the references which the Claimant had submitted to Mr Coulter arose in the course of his meeting with Mr Hay (Tab 58, page 308). The Claimant believed this was unfair because the Respondent had received a reference for three of those in the selection pool (Mr Baird, Mr Fraser and Mr Kelly) from Mr M Creedon, OCM on the Achiever, in an email dated 11 August 2015 (Tab 50, pages 251-252) and sent to Mr Coulter, Mr Gordon and Ms Zhuravleva amongst others. Mr Gordon had replied to this on 13 August 2015 agreeing with Mr Creedon and stating that he would "ensure my support is known to anyone who needs further comment or if indeed I'm involved in any discussions that may take place". Mr Creedon had subsequently sent a further email to Mr Coulter and Ms Zhuravleva on 14 December 2015 in support of Mr Baird "in his challenge to redundancy" (Tab 53, page 259).

55. Mr Hay had available to him all of the documentation generated during the Claimant's redundancy selection and consultation process up to the point of his involvement at the third individual consultation meeting (as listed at Tab 56, page 303). This included the material the Claimant had submitted to Mr Coulter (Tab 38, page 224) and which Mr Coulter had declined to consider (see paragraph 29 above).

56. Mr Hay was uncertain if the information available to him included Mr Carr's email to Mr Littlejohn and Ms Zhuravleva dated 20 November 2014 (Tab 21, page 101). He said that he was "aware of personal issues" between the Claimant and Mr Carr. He said that in his review he had not relied on what Mr Carr had said (ie the extract from Mr Carr's email at Tab 39, Page 226). He described it as a component, just as the knowledge that Ms Zhuravleva, Mr Coulter and he himself had of the Claimant was a component. He did not accept that Mr Carr's negative views of the Claimant were linked to the Claimant raising health and safety issues.

57. Mr Hay explained that the final decision to dismiss an employee by reason of redundancy required to be taken by a representative of the Respondent and this would normally follow the recommendation of those who had carried out the consultation process. As Mr Hay's review of the Claimant's scores left him

at risk of redundancy the Respondent wrote to the Claimant on 19 January 2016 (Tab 66, pages 351-355) giving him notice of termination of employment effective 18 April 2016 by reason of redundancy. The letter was signed by Jade Tan, Assistant HR Manager with the Respondent but, Mr Hay believed, would have been drafted by Ms V Lockhart, HR Business Partner at T-MOS. The terms of the letter broadly reflected the content of Mr Hay's report.

58. The Claimant was offered and exercised a right of appeal. Mr Paterson was appointed as the person to hear the appeal. Following representations by the Claimant's RMT representative (Mr C Johnston) at a meeting held on 18 February 2016, it was agreed that the person within the Respondent who would ultimately decide the outcome of the appeal should attend the appeal hearing. Accordingly when the appeal hearing took place on 24 March 2016 Estelle Marais, the Respondent's Managing Director, participated by video conference.

59. The Claimant's grounds of appeal were stated briefly in his email of 23 January 2016 as "insufficient consideration has been given to some of the issues I have raised in regard to my selection while others remain unanswered". At the meeting on 18 February 2016 Mr Paterson understood the Claimant to make the following points – (a) that his subject access request had not been fully complied with, (b) that Ms Zhuravleva had not given due consideration to his appraisal when she was scoring the Claimant and (c) confusion with regard to the Jade Tan letter and reference by the Respondent to a 80-100 day contract.

60. Mr Paterson summarised the key points made by the Claimant as follows –

    (a) The Claimant had been misled over how the scoring process was being carried out, in particular he was told that scores would be based solely on 2014 appraisals;
    (b) the Claimant had been underscored in several categories; and
    (c) Alan Carr's opinion of the Claimant had been given undue weight during the scoring process because of a perception that the Claimant was a "troublemaker" due to raising health and safety concerns.

61. Mr Paterson told us that the documentation available to him comprised (a) the outcome letter and (b) the scoring provided and Mr Hay's process. He said that he had also looked at the evidence which the Claimant presented. It was apparent that he did not have available all of the documentation which had been available to Mr Hay and, in particular, had not seen the email from Ms Zhuravleva to Mr Coulter (Tab 39, pages 225-227) which included the extract email from Mr Carr. Following the appeal hearing the Claimant submitted further documentation to Mr Paterson (Tab 78, pages 406-421).

62. Mr Paterson's conclusions, as recorded in his witness statement, were as follows –

    (a) "The Claimant had been told several times that the 2014 appraisal was only one of several scoring criteria.
    (b) The Claimant did not put forward sufficient evidence to validate his view that his scores for the "Added Value" criteria should be higher, and I was unable to find any evidence supporting these views during my own investigations. In my view the references provided by the Claimant were positive, but were not unusually so. Given that the scores the Claimant had been awarded were good scores, I did not see these references as providing justification to increase the Claimant's scores.
    (c) I found no evidence to support the Claimant's view that Alan Carr's opinion had been given undue weight in the scoring process, or that Alan Carr's opinion of the Claimant was based solely on the fact that the Claimant had raised health and safety concerns."

63. Mr Paterson recommended that the Claimant's appeal should not be upheld and this was confirmed in an outcome letter from Estelle Marais to the Claimant dated 31 March 2016 (Tab 80, pages 425-431).

64. All of the AOCMs in the selection pool were long serving employees. Their service at the time of the redundancy selection process ranged from 16 to 33 years (the Claimant being the second longest serving at 28 years). They were

all of a similar age – the Claimant was the oldest at 64 and the others were all in the range 58 to 61 (Tab 43, page 239).

65. All of the AOCMs in the selection pool were well regarded. To quote Mr Coulter - "Everyone within the Claimant's pool was regarded as a good and competent employee". Mr Bell said – "The reality is that all of the guys in the pool were good at their job. They were all knowledgeable, safe and competent. They are the cream of our Diving Supervisors and selected after many years of experience".

66. Four of the employees in the selection pool which included the Claimant – Messrs Fraser, Kelly, Lamb and Baird – were identified by Ms Zhuravleva as "high performers". The Respondent operated a High Potential Development programme in which Mr Fraser and Mr Lamb had been recognised. Mr Gordon agreed with Ms Zhuravleva's assessment of Messrs Fraser, Kelly, Lamb and Baird. Mr Hay described Mr Fraser and Mr Kelly as "outstanding employees". Mr Bell was asked to rank the selection pool and placed Mr Lamb first, Mr Fraser second and Mr Kelly third. He placed the Claimant fifth and Mr Baird sixth but said that this was possibly "a bit harsh on Mr Baird".

67. Ms Zhuravleva told us that the Wellserver had been awarded Best Performing Vessel of the year in 2014 and the Skandi Achiever had been awarded Best Performing Vessel of the year in 2013. Mr Fraser, Mr Kelly and Mr Baird had each played a key role in achieving this. To her knowledge the Claimant had not played a key role in achieving similar success on the vessels on which he had worked.

68. Each of the Respondent's witnesses stated their opinion of the Claimant (apart from Mr Paterson who said that he did not have any meaningful knowledge of the Claimant or of the others in the selection pool). None questioned the Claimant's competence. Mr Hay said that the Claimant could occasionally come across as arrogant, and that his manner of communication could and did upset people working with him. Mr Gordon said, in the context of the Claimant's move from the Orelia to the Arctic, that his impression was that the Claimant made little effort to adapt to different working practices, and appeared

to expect the practices to change around him. Mr Coulter said that, given the individuals involved, it did not come as a surprise to him that the Claimant's score was at the lower end of his pool. Mr Bell's comments about the Claimant are recorded at paragraph 10 above. Ms Zhuravleva said that the Claimant was not identified as being suitable for the Respondent's High Potential Development programme nor as a "core employee" for the purposes of succession planning.

69. The Claimant had made considerable efforts to secure fresh employment since April 2016 but, apart from becoming a racecourse assistant at Chester Racecourse for the 2017 season at minimum wage, had not been successful. The Respondent sensibly did not challenge on mitigation of loss.

Submissions

70. Ms Walker reminded us, under reference to Chapter 6 of the IDS Employment Law Handbook on Whistleblowing at Work, that in order for a redundancy dismissal to be automatically unfair under section 105(6A) ERA the sole or principal reason for the employee's selection for redundancy must be the fact that he had made a protected disclosure.

71. Ms Walker submitted that the Claimant had not shown that Mr Carr's email of 20 November 2014 had been motivated by the Claimant making protected disclosures. There had been difficulty from the start of the relationship between the Claimant and Mr Carr, at which time no protected disclosures had been made. It would, Ms Walker contended, be a leap of faith to say that Mr Carr had been motivated by the Claimant's protected disclosures.

72. The Respondent's position was that it was admitted that the Claimant had made protected disclosures, but the email in question had been Mr Carr's, ie if there was any link to the protected disclosures it was in his mind and not that of Ms Zhuravleva. In any event, Ms Zhuravleva had been asked about her level of reliance on the email from Mr Carr from which she had quoted and she had said that she was not relying heavily upon it. It formed only one part of her email to Mr Coulter, under communication skills, and she had also referenced

client complaints under that heading. Accordingly, even if Mr Carr had been motivated by the Claimant's protected disclosures, this had not been the principal reason for the Claimant's selection for redundancy.

73. Furthermore, Ms Walker submitted, Mr Hay had looked at the scoring afresh. He had applied his own mind to the issue, and had considered if Ms Zhuravleva had been unduly influenced by Mr Carr's email. Even if the email had influenced Ms Zhuravleva, this was completely negated by Mr Hay's review of the Claimant's scores. Mr Hay had given the Claimant a score of 2 for communication skills which meant he was a good communicator. Any "taint" was removed at the point of rescoring.

74. Ms Walker submitted that the principal reason for the Claimant's selection had been his overall score. Following Mr Hay's review the Claimant's score increased to 23. Even if he had received a score of 3 for communication, his scoring under the other criteria was unaffected and so Mr Carr's email could not be the principal reason for his selection. There was not enough causal connection between the email and the Claimant's selection for redundancy.

75. Under reference to **British Aerospace plc v Green and ors 1995 ICR 1006, CA** Ms Walker submitted that the Respondent had a wide discretion in the choice of selection criteria. Where the method of selection was not inherently unfair and was applied in a reasonable fashion, as in the present case, the dismissal should not be found unfair. Ms Walker defended the appointment of Ms Zhuravleva to undertake the scoring – she did have knowledge of all those in the selection pool and reasonably relied on her wider knowledge of feedback about them.

76. Ms Walker submitted that there had been no suggestion that the selection criteria used by the Respondent were unreasonable. She referred to **Mitchells of Lancaster (Brewers) Ltd v Tattersall EAT0605/11** – just because the selection criteria involved matters of judgment, that did not mean that they could not be looked at dispassionately. All of those in the selection pool had lengthy service and it had been reasonable to look at other criteria in a high performing group. Ms Walker referred to **Graham v ABF Ltd 1986 IRLR 90**

where the use of "attitude to work" as a selection criterion had been found not unreasonable on the facts of that case. That was far removed from the well defined criteria in the present case and in any event no objection had been taken to the selection criteria used.

77. **First Scottish Searching Services Ltd v McDine and Middleton EAT 0051/11** was authority for the proposition that an Employment Tribunal should not subject redundancy selection criteria nor their application to undue scrutiny. In that case the absence of moderation where two groups of employees at risk of redundancy had been separately scored was not fatal when determining the fairness of the dismissals. The identification by the Employment Tribunal of a risk in the selection process did not necessarily make it unfair.

78. Ms Walker referred to **Boal and Langley v Gullick Dobson Ltd EAT515/92** – addressing a point raised in a question from the Tribunal about the scoring of another member of the selection pool – as authority for the proposition that there was no obligation on the Respondent to disclose the scores of other members of the selection pool when they were changed. The focus was on the Claimant's scores against the selection criteria which was what Mr Hay had done.

79. If we found the Claimant to have been unfairly dismissed Ms Walker asked us to have regard to **Polkey v A E Dayton Services Ltd 1987 UKHL 8** and submitted that there was good evidence that if a different process had been followed, the Claimant would still have been selected for redundancy. There was positive evidence about others in the selection pool, for example the two employees who had been put forward for the Respondent's High Potential Development programme. There was also Mr Bell's assessment of the selection pool. Accordingly if we found the Claimant's dismissal to be flawed we should apply a 100% reduction in any compensation we might be minded to award.

80. Mr Pacey referred to **Williams v Compair Maxam 1982 ICR 156** – the Respondent required to have a selection system which could be objectively checked and the selection had to be done fairly. In the present case the

selection criteria could have been applied fairly but they were not. The process was fundamentally flawed. It would have been acceptable for Ms Zhuravleva to co-ordinate the scores but it had been wholly inappropriate for her to assess them.

81. Mr Pacey submitted that at no point in her evidence had Ms Zhuravleva given any example of interaction with the Claimant. Her experience of the Claimant was very limited and wholly inadequate for her to be the principal scorer in the redundancy selection process. She had scored the selection pool in areas she was not competent to score. She had taken input from Mr Gordon only in respect of the additional criteria. When Mr Gordon had challenged her score of 0 for the Claimant's flexibility she had not taken heed, only saying on review that it was "harsh". Mr Pacey questioned Mr Gordon's knowledge of those in the selection pool – when asked he had said that others had been on more vessels which was not relevant to assessing those in the selection pool against the selection criteria.

82. Mr Pacey criticised both the methodology and the absence of training in the selection process. There had been no objective framework for the application of the selection criteria – it had been left to personal impression. Ms Zhuravleva said she had received training but there was no evidence of this. Mr Gordon had received no advice or training in relation to his input. Ms Zhuravleva had not spoken with Mr Carr or Mr Bell, and had been told not to contact clients.

83. Under reference to Ms Zhuravleva's email to Mr Coulter (Tab 39, pages 225-227) Mr Pacey submitted that Ms Zhuravleva had accepted that the extract email from Mr Carr was relevant not only to the Claimant's communication skills but also to his teamwork. The email from which Ms Zhuravleva had quoted was similar to Mr Carr's email of 20 November 2014 (Tab 21, page 101) which he described as a "diatribe". Given that Ms Zhuravleva gave no examples of her own interaction with the Claimant, the only relevant assessment of the Claimant came from Mr Carr and this coloured Ms Zhuravleva's assessment of the Claimant. Mr Carr's opinion was "front and centre".

84. Mr Pacey submitted that Mr Carr's comments about the Claimant were linked to his protected disclosures and became the principal reason for the Claimant's dismissal. Mr Bell had said that Mr Carr would have seen Claimant's email of 17 November 2014 about boat drills because they (Mr Carr and Mr Bell) shared an email address. In his subsequent email (the one quoted by Ms Zhuravleva in her email to Mr Coulter) Mr Carr had made reference to the spool incident to which the Claimant believed that absence of diver monitoring was relevant. The grounds for drawing the inference that the Claimant's selection for redundancy was linked to his making protected disclosures were particularly strong in this case.

85. When Ms Zhuravleva received Mr Carr's email (ie the one from which she quoted in her email to Mr Coulter) she must have become aware that there was a major issue between Mr Carr and the Claimant and yet she did not investigate this. She could easily have contacted Mr Carr but did not do so. She effectively discounted Mr Bell's positive 2014 appraisal of the Claimant in favour of Mr Carr's assessment of him. Mr Carr's own appraisal of the Claimant in 2013 had been good. His (Mr Carr's) attitude to the Claimant changed between then and his 2014 emails and the reason was the Claimant raising health and safety issues.

86. Mr Hay was more remote from those in the selection pool and so less well placed to score them. It had been important that the scorers were equally well informed about the candidates for redundancy and Mr Hay had not remedied this. He had, Mr Pacey submitted, applied an "impressionist" view. He should have spoken with the Claimant's offshore managers to get a proper basis for the Claimant's scoring. A reasonable employer would have gathered evidence and Mr Hay failed to put this right.

87. Mr Pacey was critical of Mr Hay's report (Tab 57, pages 304-307) after his meeting with the Claimant on 7 January 2016. There should have been an analysis of the evidence, consideration of the additional evidence presented by the Claimant and reasoning for the recommendation. Instead, the only analysis was Mr Hay's "outcome" in each section of his report. This was simply Mr Hay applying his personal opinion, without any proper objective basis. Mr Hay was,

Mr Pacey contended, alive to the issues – his email of 8 January 2016 to Ms Lockhart (Tab 64, page 347) referred to "reservations" and "evidence being disregarded" – but did not address them.

88. A further element of unfairness to the Claimant had been the Respondent's failure to take proper account of the evidence the Claimant had submitted during the consultation process including testimonials. Mr Pacey referred to Mr Gordon's email in response to the one he had received from Mr Creedon in August 2015 (Tab 50, page 251). This demonstrated that Mr Gordon was biased in favour of certain members of the selection pool. Mr Creedon's email had been "at play" in the selection process but should not have been.

89. Under reference to **Polkey** Mr Pacey submitted that the burden was on the Respondent. He referred to **Software 2000 Ltd v Andrews and ors 2007 IRLR 568**. It was for the Respondent to adduce evidence upon which a Polkey reduction could be based. They had had ample chance to do so. Mr Pacey described Mr Bell as "caught in the middle". He disagreed with the Respondent's scoring of the Claimant and ranked him just outside the top four. There was no conclusive evidence that the Claimant should not have been in the top four. In the absence of such evidence the Tribunal might conclude that no Polkey reduction should be made, or that any reduction should be just and equitable.

90. Mr Pacey referred to **Royal Mail Group Ltd v Jhuti UKEAT/0020/16** at paragraph 34 – "…as a matter of law, a decision of a person made in ignorance of the true facts whose decision is manipulated by someone in a managerial position responsible for an employee, who is in possession of the true facts, can be attributed to the employer of both of them." Accordingly, in the present case, manipulation by Mr Carr could be attributed to the Respondent.

91. Finally Mr Pacey referred to **E-Zec Medical Transport Service Ltd v Gregory UKEAT/0192/08** as authority for the proposition that subjective marking by one person in a redundancy selection exercise could render the dismissal unfair.

Applicable law

92. Section 43B(1) ERA provides as follows –

> In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health and safety of any individual has been, is being or is likely to be endangered,
>
> (e) that the environment has been, is being or is likely to be damaged, or
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."

In terms of section 43A ERA a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H ERA. Section 43C covers disclosures made by the worker to his employer.

93. Section 103A ERA provides as follows –

> "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

94. Section 105 ERA provides as follows

"(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if –

(a) the reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant,

(b) it is shown that the circumstances constituting the redundancy applied equally to one or more other employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer, and

(c) it is shown that any of subsections 2A to 7N applies…

(6A) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was that specified in section 103A."

95. Section 98 ERA provides as follows –

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

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

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

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment…

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

Discussion and disposal

96. It was not necessary for us to decide whether the Claimant had made protected disclosures to the Respondent as it was accepted by the Respondent that he had done so. However, had it been necessary for us to decide the point we would have found that the Claimant's actions in bringing to the Respondent's attention his concerns about the adequacy of the diver monitoring equipment and the timing of boat drills on the Arctic did constitute protected disclosures, relating to health and safety.

97. We considered whether the Respondent had shown the reason for the Claimant's dismissal. The background was as set out in paragraph 11 above. There was a reduction in the Respondent's requirement for employees to carry out work of the particular kind which the Claimant and the other AOCMs performed. We were satisfied that the Respondent had shown that the reason for the Claimant's dismissal was redundancy, which was a potentially fair reason.

98. We then considered the "substantial merits of the case" with a view to deciding whether the Respondent had acted reasonably or unreasonably in treating the Claimant's redundancy as a sufficient reason for dismissing him. We considered whether the Respondent had chosen an appropriate pool of selection for the redundancy exercise. We were satisfied that they had done so. There were a number of levels in the Respondent's hierarchy of personnel involved in their offshore diving operations including OCMs, AOCMs and diving

supervisors. It was a reasonable management decision to identify the AOCMs as a separate group of employees where there required to be a reduction in headcount.

99. We considered whether the Respondent had adopted appropriate selection criteria. They had engaged in collective consultation with employee representatives. Their chosen criteria (as detailed in paragraph 13 above) contained both objective and subjective elements. This accorded with what the Employment Appeal Tribunal said in **Williams** –

> "…the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service."

It could not be said that no reasonable employer would have adopted the selection criteria which the Respondent adopted in this case. They were appropriate criteria.

100. We considered next whether the scoring had been done by the appropriate person. We believed that Mr Pacey's criticism of Ms Zhuravleva being chosen as the person to undertake the scoring of the AOCM selection pool was overstated. The Respondent had decided that it should be the resource managers who did the scoring, and that was the role occupied by Ms Zhuravleva in relation to the AOCMs. The Respondent had articulated their reason for not having the scoring done by the OCMs (see paragraph 15 above). They arranged that Mr Gordon would provide input from a technical/operational perspective. Again, it could not be said that no reasonable employer would have arranged for the scoring to be done in this way. Ms Zhuravleva, with input from Mr Gordon, was an appropriate person to undertake the scoring.

101. Before leaving this issue, we considered the criticism that Ms Zhuravleva and Mr Gordon had little or no contact with the Claimant. While we took Mr Pacey's point about the lack of evidence of interaction between Ms Zhuravleva and the Claimant, we were satisfied that in their roles as resource manager and diving

asset manager respectively Ms Zhuravleva and Mr Gordon had a sufficient degree of oversight of the activities of the Respondent's AOCMs and knowledge of their employment history (at least since they respectively joined the Respondent) to be in a position to assess them in the context of the AOCM redundancy selection exercise. In so finding we accepted the evidence of Ms Zhuravleva and Mr Gordon respectively at paragraphs 15 and 17 above.

102. We considered next whether the scoring had been done fairly. We looked firstly at the scoring undertaken by Ms Zhuravleva with input from Mr Gordon. It was immediately apparent that Ms Zhuravleva's score of 0 for flexibility had been incorrect. The lowest available score was 1, not 0. To describe her score of 0 as "harsh" and uplift it to a 1 without admitting that she had made a mistake fell short of what might be expected of a reasonable employer.

103. We then considered whether Ms Zhuravleva's scoring of the Claimant had been unduly influenced by the input from Mr Carr. This formed part of the "feedback from colleagues" (see paragraph 16 above) of which she took account. She was aware of what Mr Carr had said about the Claimant in his email to Mr Littlejohn and herself of 20 November 2014 and what he had said in his subsequent email an extract from which she included in her email of 19 November 2015 to Mr Coulter. Mr Carr wanted the Claimant to be removed from the Arctic, and that is what happened when he was transferred to the Achiever in early 2015.

104. We believed that Ms Zhuravleva had attached undue weight to Mr Carr's negative view of the Claimant. There was no evidence that she had sought any input from any of the other OCMs who had worked with the Claimant. While the redundancy process adopted by the Respondent did not expressly require Ms Zhuravleva to do so, we felt that the strident terms in which Mr Carr was critical of the Claimant might have led a reasonable employer to investigate whether that criticism was justified and whether it was truly reflective of the Claimant's communication skills, teamwork and leadership (all of which were criticised by Mr Carr). That view was reinforced by the contrast between Mr Carr's opinion of the Claimant and the terms of the Claimant's 2014 appraisal conducted by Mr Bell.

105. We were uncomfortable with Ms Zhuravleva's assertion that the appraisals of those in the selection pool were "exaggerated and did not reflect reality" (see paragraph 16 above). If true, that might not have tainted the element of the scoring which was based on the 2014 appraisals and which was undertaken by the Respondent's HR department because arguably no individual would be disadvantaged if all the appraisals were exaggerated to the same degree. However, it did create a measure of doubt in our minds as to Ms Zhuravleva's impartiality in her approach to the scoring exercise.

106. We also had a concern that Ms Zhuravleva's assessment of the Claimant was based on her view that he had been too long on the Orelia (see paragraph 24 above) and did not reflect his range of work experience during his 28 years of service. This concern was also based on Mr Gordon's view that others in the selection pool had been on more vessels that the Claimant. On the other hand, and in fairness to Ms Zhuravleva and Mr Gordon, they were dealing with a selection pool comprising AOCMs and applying the selection criteria to persons performing that role so that work experience in more junior roles was less relevant.

107. We had a further concern about the position Ms Zhuravleva and Mr Coulter had taken in relation to the evidence the Claimant had submitted with his challenge to his initial scoring. How else was the Claimant to persuade the Respondent to change his scoring other than by submitting evidence to support his argument that the scoring had been incorrect? It was unreasonable of Ms Zhuravleva and Mr Coulter to take the position that the Claimant's references and feedback from others could not be accepted "because we haven't done that for the others".

108. Looking at matters in the round, we believed that (a) Ms Zhuravleva's assessment of the Claimant had been unduly influenced by the reliance she had placed on the view of the Claimant expressed by Mr Carr and (b) the refusal to consider the material the Claimant submitted to challenge his scoring was something no reasonable employer would have done. Judged at this point, the scoring had not been carried out fairly.

109. We then considered the review of the Claimant's scoring undertaken by Mr Hay. We bore in mind Mr Pacey's criticisms as set out at paragraph 87 above, but we did not believe that these were well founded. We agree with Mr Pacey that Mr Hay was "alive to the issues" but we disagree that he "did not address them". Mr Hay increased the Claimant's communications score from a 1 to a 2, stating that "I can see how it could be construed that for this component an over reliance on the view of one manager has occurred". A score of 2 reflected (per the selection matrix) "good communicator appropriate to the role". There was a reference to "communication skills" in section 3.5 of the Claimant's 2014 appraisal (Tab 18, page 93) where both the Claimant and Mr Bell had marked "ME" (for meets expectations) rather than "S" (for strength). It was not in our view a fair criticism of Mr Hay to say that there was no objective basis for his opinion of the Claimant's communication skills.

110. Mr Hay increased the Claimant's teamwork score from a 1 to a 2. In the selection matrix a score of 2 reflected "good teamworker appropriate for the role". In his report Mr Hay referred to (a) the Claimant acknowledging that "there were tensions with the DOF captains and some marine crew on the Arctic", (b) the Claimant's assertion that the criticisms of his teamwork skills were linked to his safety challenges and (c) the Claimant refuting that he spoke dismissively to colleagues or managers but noting that the Claimant exhibited "some of the over-confident behaviour that Alan Carr referred to". Mr Hay's conclusion was that the Claimant was "generally a good team worker" but that there was "evidence to the contrary". We believed that was a reasonable conclusion for Mr Hay to reach on the evidence available to him.

111. Mr Hay maintained the Claimant's score of 2 for leadership (meaning the additional criteria to be applied for management positions). It was apparent from his report that Mr Hay considered the matters raised by the Claimant and his trade union representative and decided that a score of 2 would not be unreasonable. He did not believe that the Claimant had provided evidence such as to justify a higher score. Again that was a reasonable conclusion for Mr Hay to reach.

112. Mr Hay increased the Claimant's flexibility score from a 1 to a 2. The selection matrix did not specify what a score of 1, 2 or 3 reflected. Mr Hay recorded the gist of the discussion which had taken place and decided that a score of 2 – the mid score for this component – would be appropriate. Given that there was input from Ms Zhuravleva that "others have been more flexible with no issues" and that this was not an area in respect of which there was negative comment from Mr Carr, it was not unreasonable for Mr Hay to conclude as he did.

113. Mr Hay maintained the Claimant's knowledge score of 2. That reflected "displays the core knowledge required for the role" in the selection matrix. To achieve a score of 3 the Claimant would have to "display a broad range of knowledge over and above requirements for the role". Mr Hay decided that the Claimant had not advanced any additional information to warrant a "beyond the requirement" score. We found nothing in the evidence to persuade us that this was an unreasonable conclusion for Mr Hay to reach.

114. Mr Hay maintained the Claimant's experience score of 2. In the selection matrix this reflected "has a good range of experience, gained in relevant settings, relevant to the role". The requirement for a score of 3 was "has broad and varied experience which is highly relevant to the role". Mr Hay noted the Claimant as acknowledging that "his experience was not as great as that of others who had gained experience of different vessels and work scopes". Again we found nothing in the evidence to persuade us that this was an unreasonable conclusion for Mr Hay to reach.

115. We believed that Mr Hay had undertaken a reasonably thorough review of the Claimant's scores. In doing so, we believed that he had addressed our concerns about the selection process prior to his involvement. He had recognised the issue of "over reliance" on the views of Mr Carr and had taken a more balanced approach when reviewing the Claimant's scores. Where he had not increased the Claimant's scores he had considered what would have been required to merit a higher score before deciding that it was not appropriate for the Claimant. He had considered the evidence provided by the Claimant. Accordingly, again looking at matters in the round, we believed that the scoring of the Claimant had been carried out fairly following Mr Hay's involvement.

116. We next considered the appeal process. It was not entirely satisfactory that Mr Paterson was dealing with an appeal against what was, in effect, the decision of his own immediate superior, Mr Hay. We also found it surprising that all of the documentation available to Mr Hay was not also available to Mr Paterson. It was difficult to understand how Mr Paterson could come to a view on whether Mr Carr's opinion had been given undue weight in the scoring process and whether his opinion had been based on the fact that the Claimant had raised health and safety concerns without having the relevant evidence (particularly Mr Carr's two emails) in front of him.

117. In our assessment of whether the Respondent had acted reasonably or unreasonably in dismissing the Claimant as redundant the manner in which the appeal was conducted weighed against the Respondent for the reasons stated in the preceding paragraph.

118. We reminded ourselves of the terms of section 105(6A) ERA – was the reason or principal reason that the Claimant was selected for redundancy that he had made a protected disclosure? If the Claimant's dismissal had been decided upon prior to Mr Hay's involvement we might well have been persuaded by Mr Pacey's argument that the grounds for drawing the inference that the Claimant's selection for redundancy was linked to his making protected disclosures were particularly strong in this case. The timing of Mr Carr's email of 20 November 2014 – having returned to the Arctic the previous day and having seen the Claimant's email to Mr Littlejohn of 17 November 2014 – suggested that Mr Carr was prompted to seek the Claimant's removal from the Arctic and express his views about the Claimant as a result of the terms of the Claimant's email. His negative comments about the Claimant in his subsequent email might well, on balance, have been similarly motivated.

119. Our finding that Ms Zhuravleva had attached undue weight to Mr Carr's negative view of the Claimant might well, on balance, have led us to conclude that the catalyst for Mr Carr's emails – the Claimant's protected disclosure regarding the timing of boat drills on the Arctic – so tainted Ms Zhuravleva's scoring of the Claimant as to make it the underlying, and principal, reason for

that scoring and so for the Claimant's selection for redundancy. However, the Claimant had not been dismissed prior to Mr Hay's involvement and the reason or principal reason for his dismissal required to be determined with Mr Hay's involvement taken into account.

120. Proceeding on that basis we found that the reason for the Claimant's selection for redundancy was the result of his scoring under the matrix of selection criteria used in the redundancy selection process adopted by the Respondent, and that his scoring after Mr Hay's review was not tainted or influenced by his having made a protected disclosure. We did not believe that Mr Hay had been unduly influenced by Mr Carr's views about the Claimant. The claim of automatically unfair dismissal under section 105(6A) ERA had to fail.

121. Unfortunately for the Claimant he found himself in a selection pool composed of high performing employees – see the comments of Mr Coulter and Mr Bell quoted at paragraph 65 above. Amongst those in the selection pool the four employees who were retained stood out – see paragraphs 66 and 67 above. The selection criteria were appropriate and in no sense rigged in favour of those who were retained. Similarly there was no evidence that the scores awarded to those who were retained were not appropriate. It was, on balance, unlikely that the Claimant would have escaped selection for redundancy if none of the elements upon which he based his criticism of his selection had been present.

122. We decided the question of whether the Respondent had acted reasonably or unreasonably in treating the claimant's selection for redundancy as sufficient grounds for his dismissal in favour of the Respondent. There were significant matters which in our view counted against the Respondent – see paragraphs 102-107 and 116-117 above. However these were not in our view sufficient to render the Claimant's dismissal unfair when balanced against the factors which weighed in the Respondent's favour. There had been a genuine redundancy situation. There were appropriate selection criteria applied to an appropriate selection pool. The scoring was done by an appropriate person and was, in the end of the day, done fairly. Accordingly the Claimant's claim of unfair dismissal had to fail.

Employment Judge: Mr WA Meiklejohn
Date of Judgment: 07 March 2017
Entered into the register: 10 March 2017
and copied to parties