EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100655/2017

Held in Edinburgh on 17 and 18 July 2017

Employment Judge: P Wallington QC (Sitting Alone)

Mr S Tsiapanos	Claimant In person
Oceaneering International Services Limited	Respondent Represented by:- Ms T Walker, Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant's claim of unfair dismissal is not well founded and is dismissed.

REASONS

1. In this case the claimant, Stefanos Tsiapanos, claims unfair dismissal. It is not in dispute that he was dismissed on 2 December 2016, the reason given being redundancy.

2. The respondent underwent a major redundancy exercise in the latter part of 2016 at its Rosyth premises, with some 110 out of 450 employees leaving. The issue in this case is whether the claimant was fairly selected for redundancy, in particular

in relation to the inclusion of a number of trainees in the pool in which he was placed, aspects of the scores awarded to him in the scoring exercise applied to the pool, and the effects of a serious illness he had sustained in January 2016, which had resulted in him being off work for three months and then returning to work on a phased basis.

3. A further issue raised in the course of the Hearing was the fact that three of the employees within the same pool as the claimant, who had originally fallen below the cut off score for being retained, were initially retained on a short term basis and subsequently retained infinitely, following an upturn in the respondent's business.

4. I heard evidence on oath or on affirmation for the respondent from Ms Y Valentine, who until 30 June 2017 had been Manufacturing Manager of the respondent, Mr B Davidson, Senior Supervisor, and Mr C Walker, Deputy General Manager and Financial Controller. For the claimant I heard evidence from the claimant himself and from Mr William Whyte, a former Machine Operator at the respondent. Ms Valentine attended under a Witness Order as she has recently commenced new employment and required evidence of the need to attend the Tribunal to be released by her new employer.

5. Mr Whyte was not able to provide any evidence relevant to the issues in dispute, as he had been dismissed at least a year before the redundancy process in issue in this case began in July 2016. He sought to give evidence of the unfair treatment of the claimant, of nepotism and of the lack of competence of some of

the individuals he had helped to train, who were retained in the redundancy exercise, as part of the pool which included the claimant. These were matters not raised in the claimant's claim, not put to the respondent's witnesses, and not advanced by the claimant himself in his evidence, and I do not consider them to be of any relevance to the issues the respondent can properly be required to address in responding to this claim. I therefore do not refer further to Mr Whyte's very brief evidence.

6. All of the other witnesses, including the claimant himself, appeared to me to be honest and truthful, and there was no substantial disagreement as to the material facts covered by their evidence; the differences (some significant) were of perception and interpretation. The claimant in particular strongly believed that he had been unfairly treated in the way that he had been assessed, and that his treatment had been unfair in comparison with other employees of the respondent within the pool, but was not able to provide evidence demonstrating that this was the case.

7. An unfortunate feature of the case management of this case is that the usual directions routinely issued in unfair dismissal cases, including directions for the service of a Schedule of Loss and for mutual disclosure of documents, were not issued by the Tribunal. The claimant, who has not had representation in this case, had not prepared a Schedule of Loss, and had not disclosed, or brought to the Tribunal, any documents evidencing his losses, any attempts to obtain fresh employment, his current medical condition, which he would wish to rely on as a

reason for not being able to obtain alternative employment, or details of any state benefits he has received since his dismissal.

8. In light of this, I suggested, and both parties agreed, that this Hearing should proceed on the issue of liability only, together with any issue under the well known principles in **Polkey v A E Dayton Services Limited 1998 ICR 142**, as raised by the respondent in its response. The issue of compensation was reserved to a further Hearing, if necessary. In the event, as I have found the claim of unfair dismissal not to be well founded, no further proceedings will be required in relation to remedy.

Findings in Fact

9. The respondent is a UK company headquartered in Aberdeen, which is part of a global engineering company providing products and engineering services primarily to the offshore oil and gas industry. It has a significant manufacturing presence at Rosyth, Fife, where the claimant worked as a Machine Operator. The claimant had a total of 18½ years' service with the respondent over three periods, initially at the respondent's former premises in Leith, then over two periods at Rosyth, most recently from November 2010 until he was made redundant in December 2016. He had previously been made redundant from the Rosyth works in 2008.

10. In January 2016 the claimant suffered a brain aneurism. As a consequence he was absent on sick leave for almost three months, and returned to work in April

2016 on a phased basis, gradually increasing his hours over a period of a month until he resumed full time work in May 2016.

11. Following a significant fall in global oil prices in 2015 and early 2016, there was a reduction in the volume and value of orders received by the respondent, which it decided it would be necessary to address by a reduction in numbers of employees. There was a first round of redundancies affecting office staff, some 20 of whom were made redundant in the first half of 2016. The shop floor was initially excluded from this exercise in the hope that business would pick up, but at the beginning of July 2016 it was decided that there would need to be significant shop floor redundancies; in the event a total of 84 hourly paid staff were made redundant in the second half of 2016.

12. The respondent divided the workforce concerned into pools. Two of those pools were assembly and production. The claimant fell within the production pool, comprising 22 employees in total. These included some operators whom the claimant had helped to train and had recently completed their training. There were also four trainees, each with at least two years' service, who were included within the production pool. Ms Valentine, who took the decision to include these trainees in the pool, explained that the reason for doing so was that they were doing essentially the same job as the qualified operators. In the event, none of these four trainees scored as well as the claimant, and all were dismissed for redundancy.

13. The criteria adopted by the respondent for the purpose of scoring the employees in each of the pools, for the purpose in turn of deciding who would be retained and who made redundant, were the subject of detailed discussions with the trade unions representing the workforce. This led to a decision to use the same 13 categories as had been used in a previous round of redundancies, with the concurrence of the trade union that these were appropriate criteria. The criteria were: job knowledge and experience; qualifications; transferability of skills, special skills, knowledge or competencies; job accuracy; job efficiency; continuous improvement; flexibility; planning and organising; communication; team work; reliability/conduct; absence (page 30). It is to be noted that length of service was not included as a factor to be taken into consideration.

14. These 13 criteria were then given weightings, separately so for each pool, to allow for the relative importance of different criteria in relation to the work done by those in each pool (page 32). The respondent required that the weightings should be 5, 10, 15 or 20 for each factor, subject to the total adding up to 130 (i.e. an average of 10 per factor) (pages 31-2).

15. The marking scheme to be applied, using this weighting, involved three categories, carrying scores respectively of 8, 5 and 2. The categories were given definitions; for instance for job knowledge, a score of 8 required that “job knowledge is extensive and jobholder can work without supervision”; for a score of 5, the requirement was “job knowledge is relevant to current role and jobholder requires minimum supervision”; the criterion for a score of 2 was “job knowledge

in current role is limited and jobholder requires considerable supervision" (page 30).

16. A particular formula used to score absence was what was referred to in evidence as the Bradford factor. This requires the number of absences in a 12 month period to be squared and then multiplied by the total duration of absences. A score of less than 30 using this formula attracted eight points, a score from 30 to 125 five points, and a score of more than 125 two points. Absence was one of the factors given a weighting of only 5, so that the difference between the highest and lowest possible scores for this factor was 30.

17. The period in respect of which the scoring was applied was the year July 2015 to June 2016. In that period, the claimant had two absences, totalling five shifts, in addition to the extended absence following his aneurism (pages 34-6), and taking the three absences together scored a total of 387 points, and thus was in the lowest category of marks for absence.

18. At the beginning of July 2016 the individuals at risk of redundancy were written to individually with details of the numbers within the pool in which the recipient of each letter had been placed and the numbers of redundancies anticipated for the relevant pool, and intimation that the respondent was to commence a 45 day formal consultation period at both group and individual level (page 40). In addition, a question and answer sheet was issued to the affected employees (pages 37-9). It was anticipated at that time that there would be 13 posts lost out of 22 within the claimant's group.

19. Scoring was undertaken over a period of some weeks in August and early September 2016. For the production pool, in which the claimant had been placed, the assessments for each individual were undertaken by a team of four, Ms Valentine, Mr B Davidson, Mr S Davidson and Ms R Davies, an HR Advisor who was one of eighteen recruited externally by the respondent for the purpose of moderating the redundancy exercise and ensuring that it was conducted correctly in accordance with both legal requirements and agreements with the trade unions. Each individual was discussed by the group and scores for each person for each of the 13 criteria were agreed. The scoring took about half an hour for each person scored.

20. The total scores ranged between 920 (out of a possible 1040) and 515 (page 33). The lowest score securing retention was 830. The claimant scored 725 points (page 42). There were four individuals below the threshold for retention but above the claimant (although in the event three of these individuals were retained in employment).

21. Following the scoring exercise, the claimant was invited to an individual consultation meeting on 12th September 2016. The respondent was represented by Mr B Davidson and Ms Davies, and the claimant was accompanied by a union representative, Mr Lyall. The reason for redundancy was briefly explained and Mr Davidson talked the claimant through his score and the scoring matrix. The claimant was given a copy of his individual scoring sheet and the scoring criteria sheet. Mr Davidson explained to the claimant that the scoring had been based

on the twelve months to July 2016. The claimant was assured that his scores were good scores, and reference was made to some of the specific scores and reasons for them. The outcome of the meeting was formally confirmed to the claimant by Ms Davies in a letter of 14 September (page 47; notes of the meeting are at pages 43-5).

22. In the course of the meeting the claimant was advised that if he was made redundant, his employment would be terminated on 2 December 2016. He was also advised that if he wished to challenge any of his individual scores he could do so, but had to do so by close of business on 14 September 2016. With the assistance of Mr Lyall, as he was experiencing difficulties accessing his email account, the claimant disputed four of the scores, job knowledge, job accuracy and job efficiency for each of which he had scored 5, and absence for which he had scored 2 (page 46). At this stage, however, he did not make the point he relied on at the hearing, namely that it was unfair to assess him on the year July 2015 to June 2016 as he had been absent for a significant part of the year and on a phased return to work thereafter.

23. Ms Valentine responded to the claimant's points about these scores by letter of 22 September 2016 (pages 48-9). She explained what was required to achieve a score of 8 in each of the cases where the claimant had objected to a score of 5, and why she considered that the claimant did not meet the relevant criteria. As an example, for job accuracy, the criterion for a score of 5 was 'mistakes are occasionally made'; Ms Valentine drew attention to the fact that the claimant had been involved in an incident where a cable had become over-twisted and had to

be cut out, necessitating a stoppage of production for over a week whilst the cable was cut out, with a loss of production in the region of £1 million.

24. In relation to absence, Ms Valentine confirmed the claimant's score of 2, and mentioned that some individuals had had absences removed under the Equality Act 'as this is a legal requirement'; she explained in evidence that there was in fact only one such case, but could not say whether this was within the claimant's redundancy pool. Had the claimant had the absence due to his aneurism disregarded, he would have scored 8 for absence, but as absence only scored 5 per point, his total score would only have increased to 755.

25. During the period from September to November 2016 there were extensive negotiations between the respondent and the trade unions representing the workforce. Following a strike, agreement was reached on additional payments to be made to those made redundant.

26. The claimant was invited to a second consultation meeting on 8 November 2016 (pages 51-3). The meeting was conducted by Ms Valentine, with Ms Robertson, an HR adviser, in attendance. The claimant was not represented on this occasion. The claimant asserted that he was being unfairly treated because of his nationality, and complained that some employees with only a few years' service were being retained. Ms Valentine disputed that nationality had any part in his scoring, and pointed out that length of service was not one of the criteria.

27. Other points made at the meeting included an offer to the claimant to provide him with contact details for agencies the respondent had contacted, an offer for the claimant to attend a workshop on CV writing, and the claimant's confirmation that he would wish to take pay in lieu of notice if made redundant.

28. A third and final consultation meeting was scheduled for 2 December 2016. The claimant was advised in the letter notifying him of the meeting (page 55) that if no alternative to redundancy was identified at that meeting he would be issued with notice of redundancy at the meeting.

29. This meeting took place as scheduled; it was conducted by Ms Valentine, with Ms Robertson in attendance (pages 56-8). The claimant was accompanied by a Mr Mill. It was confirmed that no redeployment opportunities had been identified within the respondent. The claimant stated that he had obtained a job with Subsea 7, and did not want the vacancy list offered (in the event this job did not materialise). He was then informed of his redundancy payment, and given a letter of termination and a breakdown of the payments he was to receive (pages 59-61). In addition to a statutory redundancy payment of £4,311, there was an additional redundancy payment of £2,075, a payment in lieu of notice of £4,102.38 and a small payment in lieu of untaken holiday, the latter two subject to statutory deductions. The claimant stated his intention to appeal, and go to a tribunal.

30. As foreshadowed at the final consultation meeting, the claimant appealed against his dismissal, by a letter of 7 December 2016 (page 62). It was in this letter that

he first raised the issue of unfairness in scoring him on a period during which he had not been able to work for three months; he also queried why there were trainee operators in the same pool as those with many more years' experience.

31. An appeal hearing was scheduled for 12 December 2016 (page 64); it was subsequently rescheduled to 21 December 2016. The meeting was chaired by Mr Walker, with Ms Easy in attendance to take notes. The claimant was accompanied by a colleague, Mr Burns. Mr Walker had had no prior involvement in the redundancy selection exercise.

32. The appeal meeting was very brief, lasting about 15 minutes (pages 65-7). The claimant pursued the two points he had raised in his letter of appeal. Mr Walker expressed his view that the trainees had been included in the pool because they were doing the same job as the claimant and other lead operators. The claimant also asserted that the reason he had been selected for redundancy was what he described as 'the language barrier', presumably a reference to English not being his first language. No other issues were raised by the claimant; in particular he did not raise the issue that he had trained some of the employees in his pool who were retained.

33. After the appeal Mr Walker spoke to Mr Davidson, who confirmed that the claimant's absence had not counted against him apart from affecting the score for absence itself. There was a delay in issuing the decision on the claimant's appeal, partly because Mr Walker was on leave for two weeks over the Christmas period.

34. The decision was set out in a letter from Mr Walker dated 13 January 2017 (pages 68-9). Mr Walker did not uphold the appeal. He acknowledged that the period during which the claimant had been seriously ill must have been a difficult one for him, but stated that the scorers had confirmed that the claimant had not been marked down due to his absence, and that the seriousness of his illness had been taken into account. Mr Walker also confirmed that the claimant had been included in the correct pool, and stated that whilst he had some sympathy with the claimant's complaint that the respondent had not retained employees with experience, the criteria had been agreed with the trade union, and the scoring process 'was more focussed on skills and abilities rather than number of years of experience/employed'. Finally he confirmed that the claimant was an experienced lead operator and required minimal assistance, and that 'language is not an issue'.

35. Mr Walker's decision was the final stage in the appeal process. The claimant was in the event able to secure employment with Subsea 7, and remained out of work at the time of the hearing.

36. Two further matters require to be mentioned. The first is that there was one successful appeal against the original scoring of member of the claimant's pool. The individual concerned was awarded additional points to reflect the fact that he had persuaded the panel that its initial scoring was unfair. As a result he moved above the lowest ranked of the employees in the pool who had been within the

nine to be retained. The number retained was increased to 10, and the successful employee kept his job.

37. The second matter is that three of the employees in the claimant's pool whose scores placed them in the group to be made redundant (but each of whom scored more than the claimant) opted to remain in employment during their notice period rather than, as the claimant had done, taking pay in lieu and leaving immediately. During the notice period the respondent unexpectedly received additional orders which necessitated increasing staffing within the production area, and the three employees were offered, and accepted, initially temporary extensions of their employment. These arrangements were subsequently made permanent and the three therefore escaped being made redundant. There was no evidence as to what might have happened to the claimant had he not elected to take pay in lieu. None of the offers of continued employment was made before 2 December 2016, the date on which the claimant ceased to be an employee of the respondent.

Relevant Law

38. It is not in dispute that the claimant had the right under section 94 of the Employment Rights Act 1996 ('ERA'), that he had been dismissed and that he had presented his claim in time. The claimant in turn did not dispute the reason advanced by the respondent for dismissal, namely redundancy.

39. By section 98(1) ERA, it is for the employer to satisfy the tribunal as to what was the reason or principal reason for a dismissal, and that it was either one of the

reasons listed in section 98(2), of which redundancy is one, or some other substantial reason of a kind such as to justify the dismissal of the employee. There is no dispute that the reason in this case was redundancy; the respondent's requirements for employees to undertake work of a particular kind had diminished or was expected to diminish, and the claimant's dismissal was attributable to that circumstance.

40. Once a potentially fair reason for a dismissal has been found, section 98(4) ERA provides that the Tribunal must decide, the burden of proof at this stage being neutral, whether the employer acted reasonably or unreasonably in all the circumstances, having regard to the size and administrative resources of the employer and to equity and the substantial merits of the case, in deciding to dismiss the employee. In approaching this question, the Tribunal must reach an objective judgment of whether dismissal was, both substantively and procedurally, within the range of reasonable responses open to a reasonable employer; in particular, it must not substitute its own view for that of the employer.

41. In cases where the reason is redundancy, further helpful guidance has been given in particular by the decision of the Employment Appeal Tribunal in **Williams v Compair Maxam Ltd [1982] ICR 156**, in particular a page 162 C-H. The guidance identifies five factors: giving as much warning of impending redundancies as possible; consulting the union, and if possible agreeing the criteria to be used for selection; establishing criteria which so far as possible do not depend solely on the opinion of the person making the selection but can be objectively checked against such things as attendance, efficiency, experience or

length of service; seeking to ensure that selection is made fairly in accordance with the criteria; and looking at the possibility of offering alternative employment.

42. Cases since **Williams** have made it clear that employers should also consult with individuals at risk of redundancy, and that employers should act reasonably in identifying appropriate pools from which to make selections. Additionally, whilst not referred to in terms in the guidance given in **Williams,** it would be consistent with good employment practice to provide a means for employees to challenge the fairness of scoring where this method is used to select from a pool. Further the reference to length of service predates by over two decades the introduction into employment law of laws against age discrimination, which have led to a significant reduction in employers' reliance on length of service as a factor in selection; in particular the traditional union demand of 'last in first out' is now no longer regarded by reasonable employers as an appropriate basis for selection.

43. Case law has also built on the general principle that it is not for the Tribunal to substitute its view for that of the employer, by making it clear that it is not appropriate for the Tribunal to attempt to re-score employees or re-run the selection process: see for instance **British Aerospace Ltd v Green [1995] ICR 1006**, in which the Court of Appeal held that the assessment forms of employees who had not been dismissed were irrelevant, and would be disclosable only in the most exceptional circumstances. Millett LJ commented that 'it is sufficient for the employer to show that he set up a good system of selection and that it was fairly administered, and ordinarily there is no need for the employer to justify all the assessments on which the selection for redundancy was based' (page 1019H).

Conclusions

44. If sympathy for the claimant's sense of unfairness was the primary criterion, it would be difficult not to support his claim. But it is not. I have no hesitation in concluding in this case that the claimant was not unfairly dismissed.

45. The respondent comfortably met all of the elements in the guidance in **Williams**. The union, and individuals potentially at risk or redundancy, including the claimant, were forewarned of the risk as early as the beginning of July 2016, five months before the redundancies were effected. There was then a programme of consultation, and negotiation, with the recognised union, leading to agreement as to the criteria to be used for selection. The matrix of factors, and the scores allocated, are all matters for the employer, and in this case there can be no serious basis for suggesting that the choice of criteria, or the weightings attached to the criteria, were unreasonable.

46. The claimant would dispute the lack of any weighting for experience or length of service, but apart from the questionable legality of using length of service as a factor, given its potential to lead to indirect age discrimination, it could not be said that a reasonable employer would not adopt criteria accepted by the recognised union, and which had been successfully used on a previous occasion.

47. I am also satisfied that the scoring process was fairly conducted. There was a team of scorers, including a senior manager who had shop floor experience working with the claimant and the other employees in the pool, and also including

an external professional HR adviser. Ms Valentine was well able to justify the specific scores the claimant disputed, including attendance. Inclusion of criteria such as attendance also ensured that the selection did not depend solely on one person's opinion; attendance, in particular, was assessed solely by reference to absence records.

48. There was individual as well as collective consultation; the claimant had the opportunity to dispute his scores, and when he did so, his points were considered, and reasoned explanations were given for the disputed scores.

49. There was no issue raised in the claimant's case of any failure to offer alternative employment. The respondent offered the claimant assistance in signing on with agencies, and access to the vacancy list. By the time he was dismissed he had elected to leave immediately, and advised the respondent he had a job to go to; in these circumstances the respondent's obligations to try to redeploy him were plainly fulfilled. Moreover the claimant was afforded the opportunity to appeal against his dismissal, and his appeal was properly and conscientiously considered by a senior manager.

50. None of the matters raised by the claimant affect the clear conclusion that the respondent acted in an objectively reasonable way in implementing its decision to reduce numbers of employees in the claimant's case. The fact that people whom he had trained, and who had considerably less service than him, were included in the same pool, and that some of the former were retained, was the result of a permissible judgment by the respondent that the pool should comprise those who

did the same work. It was also entirely permissible for the respondent to place emphasis on skills rather than experience in the scoring matrix.

51. The choice of the period of 12 months up to the end of June 2016 as the period in relation to which the employees in the pool were scored was equally a permissible choice. Nor, apart from the score for absences, did this disadvantage the claimant. He clearly believes that it was unfair to score him on the basis of less than nine months' work, but it was the quality not quantity of work that was being scored, and I accept Mr Walker's conclusion that the assessors had had the seriousness of his illness in mind. I also accept that the claimant's mastery of the English language was not an issue.

52. As to the retention of three of the employees in the claimant's pool who had originally fallen below the threshold for redundancy, they had chosen to stay on the books during their notice period, whilst the claimant had left immediately with pay in lieu of notice. He was therefore at the time that an opportunity to retain some of the employees arose no longer an employee, and the decision to retain them is irrelevant to the fairness of his dismissal.

53. I repeat my sympathy for the claimant, and understanding of his sense of unfairness that as a skilled, loyal and long serving employee he should have lost his job, but it is inescapable that the scale of the redundancies meant that good as well as less good employees would lose their jobs; the claimant was regarded by his managers as a good employee, but they permissibly concluded that he

was not as good, judged by the criteria agreed with the union, as others who scored more highly.

54. This claim is not well-founded, and is dismissed.

5

Employment Judge: Peter Wallington

Date of Judgment: 8 August 2017

Entered in register and copied to parties: 11 August 2017