Case Number: 3401280/2016

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss M Whitehead	**v**	**BSS Group Limited**

Heard at: Cambridge **On:** 13, 14 and 15 September 2017

Before: Employment Judge King

Appearances

For the Claimant: Mr Bramell, Counsel.
For the Respondent: Miss Dawson, Solicitor.

RESERVED JUDGMENT

1. The claimant's claim for unfair dismissal fails and is dismissed.

2. The claimant's claim for unlawful deduction from wages fails and is dismissed.

RESERVED REASONS

1. The claimant was represented by Mr Bramell, Counsel, and the respondent was represented by Miss Dawson, Solicitor. I heard evidence over three days from Kerry Hales, Paul Fleckney, Andrew Clarke, Darren Redwood and Alan Masters on behalf of the respondent. I heard evidence from the claimant. There was a bundle of documents agreed between the parties at the outset of the hearing and eventually this ran to 412 pages.

2. There were a number of preliminary matters in this case and issues were raised by both sides during the course of the hearing which meant this hearing did not keep to timetable allotted to it. We lost time dealing with these issues which meant that written submissions were required and it was necessary for Judgment to be reserved. At the outset of the first day the parties were reminded of their duties in respect of the overriding

objective to assist this Tribunal and to co-operate with each other. As a result, it was possible for some of the preliminary matters to be resolved by agreement but also this Tribunal had to adjudicate on some matters such as the late service of one of the respondent's witness statements. Further delays have been caused by administrative issues. The original remedy hearing for 11th December had to be vacated as this was too close to the promulgation of this Judgment. The parties were subsequently notified that the original remedy hearing was vacated and they were asked to provide dates to avoid to enable this to be re-listed. This would allow for the Judgement and any directions as to remedy to be made. As Judgment has been given there is no longer a need for this hearing.

3. At the outset of the hearing I identified that the claimant was seeking to bring an unfair dismissal claim and a claim in respect of an unlawful deduction from wages claim relating to her sick pay. This was a redundancy case and the parties agreed that the claimant has been dismissed and that this was by reason of redundancy. The claimant's main issue was with her selection and the process that was followed. It was agreed that the matter should proceed to deal with liability in the first instance, I therefore heard no evidence on the claimant's attempts to locate alternative employment although I had read her short statement for the purposes of these proceedings which included mitigation information. Her application on the morning of day 3 of 3 to include a further witness statement was withdrawn given the significant likelihood that this would result in a postponement and potentially recall of the respondent's witnesses.

4. On the first day the parties agreed that the correct respondent in these proceedings was the BSS Group Ltd who employed the claimant. At the outset of the hearing the issues were identified as follows.

The Issues

Unfair dismissal

5. It was agreed that the claimant had been expressly dismissed by the respondent. It was agreed at the outset that the reason for dismissal was redundancy which is a potentially fair reason within s.98(2) of the Employment Rights Act 1996. As such the first issue for the tribunal to determine was:

6. Was a fair procedure followed?'. The claimant raised a number of issues concerning as follows:-

    6.1 Unfair selection;

    6.2 Failure to apply properly and fairly its own published criteria for redundancy;

6.3 The decision maker was inappropriate, the claimant having raised a grievance against him;

6.4 The decision was pre-determined, and

6.5 The claimant was not fairly consulted with.

7. If not, what was the percentage chance or period of time in which the claimant would have been fairly dismissed?

8. Was dismissal within the range of reasonable responses?

9. Has the claimant contributed to the dismissal by way of culpable conduct? If so to what extent?

Unlawful deduction from wages

10. This relates to sick pay which pre-dates dismissal. It was agreed between the parties that sick pay is wages within the meaning of s.27 of the Employment Rights Act 1996. The issues therefore to be determined are as follows:-

10.1 Was sick pay properly payable? The issue here is whether the claimant was entitled to sick pay contractually or not and in particular the claimant took issue with the way any discretion was exercised.

10.2 Has the respondent made a deduction?

10.3 Has the claimant suffered financial losses attributable to the non-payment?

10.4 If so, what if any amount is appropriate in all the circumstances for the respondent to pay?

The Law

Unfair dismissal

11. Under s.94 of the Employment Rights Act 1996 the employee has the right not be unfairly dismissed by her employer. Under s.98 of the Employment Rights Act 1996 states 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 reasons 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 of 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.

(3) …

(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.

Unlawful deduction from wages

12. S.13 of the Employment Rights Act 1996 states as follows:-

(1) An employer shall not make a deduction from wages of a worker employed by him unless —

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the workers' contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised —

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

13. Under s.23 of the Employment Rights Act 1996 a complaint may be made to the Employment Tribunal as follows:-

"(1) A worker may present a complaint to an —

(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

(b) – (d) ....

(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments, or

(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

14. S.24 deals with determination of complaints as follows:-

(1) Where a tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer—

(a) in the case of a complaint under section 23(1)(a), to pay to the worker the amount of any deduction made in contravention of section 13,

(b) – (d) ….

(2) Where a tribunal makes a declaration under subsection (1), it may order the employer to pay to the worker (in addition to any amount ordered to be paid under that subsection) such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of.

15. S.27 sets out the meaning of wages as follows:-

(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

(b) statutory sick pay under Part XI of the Social Security Contributions and Benefits Act 1992,

(c) – (j) ….

but excluding any payments within subsection (2).

(2) Those payments are—

(a) any payment by way of an advance under an agreement for a loan or by way of an advance of wages (but without prejudice to the application of section 13 to any deduction made from the worker's wages in respect of any such advance),

(b) any payment in respect of expenses incurred by the worker in carrying out his employment,

(c) any payment by way of a pension, allowance or gratuity in connection with the worker's retirement or as compensation for loss of office,

(d) any payment referable to the worker's redundancy, and

(e) any payment to the worker otherwise than in his capacity as a worker.

16. In the claimant's written submissions, they referred to the case of *British Aerospace v Green [1995] IRLR 433* and *Bascetta v Santander UK Plc EWCA Civ 51*. I have had regard to these authorities before making this decision.

17. The respondent refers to the British Aerospace authority as well as the additional authorities of *Eton Limited v King & Others [2005] IRLR 75, Dabson v David Cover & Sons (UKEAT/374/10), Nicholls v Rockwell Automation Limited (UKEAT/0540/11)* and *Samson Electronics (UK) Limited v Monte D'Cruz (UKEAT/0039/11/DM).* I have had regard to these authorities before making this decision.

Findings of fact

18. The claimant was employed by respondent from 10 October 1994 until she was dismissed on the grounds of redundancy. The effective date of termination was the subject of a preliminary hearing in this case. The matter was determined by Employment Judge Sigsworth on 21 February 2017 and the judgment was that the claimant's effective date of termination was 29 July 2016 and not the 6 May 2016 when the letter was sent. I therefore do not go behind this judgment and for the purposes of this hearing the effective date of termination was treated as being

29 July 2016. Between the 6 May 2016 and 29 July 2016 the claimant was paid for a period of notice.

19. At the time of the claimant's dismissal she was a Regional Stock Controller. There were eleven such roles at the respondent at the time when the redundancy was announced.

20. The respondent is part of the Travis Perkins Group. There were a number of companies within the group. Plumbing Trade Supplies (PTS) and City Plumbing Supplies (CPS) are two such companies and are relevant to these proceedings. These companies supply plumbing and heating merchandise within the plumbing and heating division. A major restructure of the two businesses took place during 2014/2015. This was to create a division between the two companies so that PTS served big contract customers and CPS generally served smaller installation businesses. The major change programme was called 'Building the Best'. At the beginning of 2014 before the change programme PTS had 311 branches and CPS had 188 branches. As a result of a number of branch conversions, closures and mergers at the end of 2015 PTS had 95 branches and CPS had 342.

21. By email dated 15 October 2015 Alison O'Connell, Executive Support Co-ordinator sent out an email invite to all of the eleven Regional Stock Controllers on behalf of Matthew Mycock, Managing Director of PTS, requesting that they attend a business update on 20 October 2015.

22. At the business update on 20 October 2015 the Managing Director of PTS Matthew Mycock made an announcement to the Regional Stock Controller team including the claimant to update them on the 'Building the Best' initiative and the proposed structure of the new team. The proposal was that the eleven PTS Regional Stock Controllers would be restructured to five. The proposed structure was one Regional Stock Controller per region and then a new role to be created for Stock Analyst which was a central role across the regions. As such a number of redundancies were proposed. There was a reduction of 6 posts but the creation of one central post.

23. The structure of the business at the time of the announcement was that the claimant was based in the Central region alongside two other Regional Stock Controllers. They all reported to Alan Masters who was Regional Director for the Central region. The proposed structure was that he would remain in role but that there would be a reduction from three Regional Stock Controllers to just one in that region. All other regions were also having a reduction in the number of Stock Controllers except the Scotland and Cumbria area, which already only had just one Regional Stock Controller. A new central role was created of Stock Analyst. This was on a reduced salary compared to the Regional Stock Controller role. It was a more junior role to that of the Regional Stock Controller.

24. The new structure was unveiled to those Regional Stock Controllers at the presentation on 20th October 2015. The Tribunal had the benefit of seeing the Powerpoint presentation delivered to the staff. The presentation set out the timetable for the process and what the process would involve. There was no reference to interviews as a stage but it was stated that selection criteria would be applied which would score attendance, timekeeping, conduct, capability, adaptability, initiative and productivity.

25. After the update on the 20 October 2015, the claimant approached Kerry Hales HR Business Partner to advise that she was concerned about Mr Masters marking her as he did know her well enough. Mr Masters had worked with Clare Evans elsewhere in the business historically but had only line managed all the Regional Stock Controllers for about 12 months by this point.

26. Kerry Hales' evidence was there were no other managers able to undertake the marking of the claimant, as no other manager remaining in the business would be familiar enough with the claimant's past performance. The claimant's prior manager had already exited the business by this point in a previous redundancy exercise. In evidence the claimant accepted that this was the case.

27. The respondent had a redundancy policy which was reproduced for the Tribunal. The redundancy policy set out the selection criteria where there was a pool for redundancy. The policy stated that agreed selection criteria would need to be drawn up to facilitate the selection process. A different process was applicable where collective consultation was in place. This was not applicable in this case.

28. The policy further provided that each colleague in the selection pool would be assessed against the criteria and an assessment form completed for each individual. Colleagues were permitted to request a copy of their assessment form, but the policy stated that assessment forms of other colleagues should not be disclosed or scores discussed unless prior written consent was obtained. The policy further provided that in the event that colleagues subject to the selection criteria scoring identically, advice should be sought from the Employee Relations Department. The policy set out the stages of the consultation process.

29. The respondent also had a redundancy guidance document, this stated that selection criteria would be based on a mixture of objective and subjective criteria and will usually involve; adaptability, capability, attendance/timekeeping, conduct, productivity, initiative, consultation and consideration of alternative employment. Whilst the last two items on the list are said to be criteria they are clearly intended to refer to the process to be followed and consultation and consideration of alternative employment are not criteria. Presumably this is a formatting error.

30. After the announcement was made to the Regional Stock Controllers, the Regional Directors were briefed on the announcement and had sight of the presentation given to the Regional Stock Controllers. At this meeting it

was raised that it would be possible to have a second stage of interview if the scoring did not produce a higher scorer.

31. The first step in the procedure was that all Regional Stock Controllers were asked to express their preference using a Google form for the job role and location. The claimant only applied for the Regional Stock Controller role in the Central region. The two other Regional Stock Controllers also currently in this Central region also showed a preference for this region only. This created a Central region pool of three, the claimant, Clare Evans and Gary Knight. In essence the three Regional Stock Controllers already in position all applied for that one position going forward.

32. Alan Masters was their line manager and so he scored all three against the standard selection matrix provided to him by the Group Employee Relations team on the criteria identified in the presentation. Capability and adaptability had a weighting of three whereas all the other criteria were weighted by two. Mr Knight scored the lowest during this process and at the first consultation meeting he expressed an interest in taking voluntary redundancy without going through the process. The respondent agreed to this and Mr Knight left the business on 1st December 2015.

33. This left the claimant in a pool of two. The claimant scored 51 initially but this was incorrectly recorded on the scoring sheet as 49. Clare Evans scored 57. This meant there were six points between Clare Evans and the claimant. The claimant was the bottom scorer.

34. The selection scoring matrix for each employee was provided to the Tribunal. Both the claimant and Clare Evans had scored the highest mark for attendance, timekeeping and conduct. Both had been marked as having a clean disciplinary record. At this initial stage Clare Evans had scored 12 out of 12 for capability and the claimant 9 out of 12 for capability, both had been scored 6 out of 8 for initiative and both had scored 6 out of 8 for productivity.

35. Mr Masters met with the claimant on 10 November 2015. The purpose of the meeting was for the claimant to discuss their scores and finalise the same. Clare Evans also had a similar meeting although her scores were not altered at her meeting.

36. At this consultation meeting on 10 November 2015 the claimant queried the scores that had been given to her for capability and initiative. Mr Masters increased her mark for capability from 3 to 4 so with the weighting of 3, this took her mark to 12 which was the highest possible for this section. He also did the same for initiative, changing her score from 3 to 4. This criterion had a weighting of 2 so this meant her final mark was 8 which again was the highest possible for this section.

37. The claimant covertly recorded this meeting and the transcribed recording of the meeting was produced for the Tribunal in the agreed bundle.

38. As a result of those amendments the claimant's score rose to 56, Clare Evans score remained at 57 and as such the claimant was still the lowest scorer.

39. As a result of the re-scoring the only criteria where the claimant did not score top marks were adaptability and productivity. Neither candidate queried the scores for productivity. On adaptability Mr Masters looked for evidence to score both candidates. He is criticised by the claimant for his notes referring to the future tense for Clare Evans and the past tense for the claimant. I accept he was looking for evidence here and considering both candidates in the round so I accept his evidence. The notes that he made are simply notes not minutes.

40. Mr Masters was concerned that the score was very close. He had found the marking against the criteria challenging for all the candidates. In particular he recognised that he had had little quality time with the claimant over the previous year and she had only come into his line management just over 12 months previously. In this period the claimant had been involved in the 'Building the Best' programme in converting the branches to different businesses and implementing a re-organisation of stock which was different to her usual duties. Mr Masters was conscious he had not had face to face time with her during the previous year. He also felt that both employees were good employees so it was a difficult task.

41. As the scores were close he discussed this with the Employee Relations team. The decision was taken between Kerry Hales, HR Business Partner and Mr Masters to ask the candidates to attend a structured interview and give a presentation. Both of the candidates proceeded to the interview on an equal footing and the performance at the end of the interview would be marked by Kerry Hales and Mr Masters.

42. The respondent's evidence was that an interview as a second stage was common practice across the group. The tribunal has not seen any documentary evidence to support this contention. Certainly it was accepted that on this occasion the claimant's geographical area was the only one that required such a procedure. I accept however that the idea was floated in the meeting with the Regional Directors once the announcement had been made on 20 October 2015.

43. The plan for the Regional Stock Controller role going forward would be that in the larger geographical region, Branch Managers and branches would need more development to prove their ability to effectively manage their own stock so that they would not require such a hands on input from the Regional Stock Controllers. Clare Evans and the claimant had similar experience and product knowledge.

44. As part of the initial consultation process a job description for the new Regional Stock Controller role was produced. This set out a number of skills that would be required for the new Regional Stock Controller role.

The claimant was notified of this in advance. The interview process was built around eight questions linking the group leadership model (who I am, how I lead, how I think, how I deliver and the requirements of the role). The presentation brief was based around four key questions:-

a) What opportunities do you foresee for a Regional Stock Controller next year?

b) How will you make the opportunities happen?

c) What challenges do you foresee for a Regional Stock Controller next year?

d) How will you overcome these?

45. On 16 November 2015 both the claimant and Clare Evans were emailed inviting them to attend interviews on 19 November 2015. The email advised them that the interview would consist of two activities, a 15 minute presentation and a structured interview. The four questions identified above were set out in the email to prepare the candidates in advance. They were advised that the presentation should last no longer than 15 minutes and that they should bring printed copies of the presentation with them as no projector would be available. The idea behind this was to make the presentation more relaxed as there was no requirement to stand and deliver it to Mr Masters and Kerry Hales.

46. The claimant and Clare Evans both attended the interviews and presentations on 19 November 2015 at the divisional office in Crick. The claimant was interviewed first. The structured interview took place followed by the presentation. Both Kerry Hales and Mr Masters took notes, discussed and scored the candidates at the end.

47. The claimant did not perform well at interview. Her answers to the questions lacked depth and she required a fair amount of probing. Copies of the notes have been provided to the tribunal.

48. The claimant was nervous when delivering her presentation. While she did cover some of the brief, there was too much content which impacted on her delivery and time management. The claimant read from her presentation and spent thirteen minutes out of the total fifteen just on the first section. In evidence she accepted that presentations were not comfortable for her. There was a suggestion by the claimant that Mr Masters deliberately chose an interview/presentation as he knew this was a weakness of hers. I do not accept this. The claimant did not score equally in the first round with Clare Evans so from the start she was bottom scorer at 6 points below Clare Evans and then this was increased. The respondent was under no obligation to look at a second stage but did so in an attempt to ensure a fair process.

49. Kerry Hales' evidence of Clare Evans is at strict contrast to the claimant's performance in that Clare Evans provided more detailed explanations and that Clare Evans did not requiring any probing on the questions put to her. This is evident from the notes of the interview in the detailed answers she gave and not just from her subsequent scores. Clare Evans' presentation stuck to the brief, showed great time management and as a result Clare Evans scored higher than the claimant in this process. I accept that evidence. The claimant scored 14.5 out of a possible 40 and Clare Evans scored 34 out of a possible 40.

50. Both Mr Masters and Kerry Hales gave evidence to the tribunal about how each candidate performed in that process. This was largely unchallenged by the claimant's representative as the claimant accepted that she was not confident in presentation skills. The claimant does not challenge the scores in this exercise as it is her case that there should never have been an interview in the first place.

51. Mr Masters met with the claimant on 23 November 2015 and informed her of the outcome of the process and her scores at this stage. He advised her that she was at risk of redundancy. She did not have any questions for Mr Masters at this stage. They discussed alternative roles and she requested details of the Stock Analyst role and the difference from a financial perspective in the two roles.

52. Mr Masters wrote to the claimant on 23 November 2015 inviting her to a consultation meeting on 27 November 2015. On the same day Clare Evans was notified that she was the successful candidate. Clare Evans cried with relief upon notification.

53. On 27 November 2015 (the day of the proposed consultation meeting) the claimant emailed Mr Masters raising two issues. She felt that the points scoring system adopted for the selection process was inaccurate and unfair. She felt that there were concerns about unscrupulous behaviour by one of her colleagues Clare Evans regarding the redundancy process and that she wished to raise a grievance. She wished to take time to articulate her grievance and suggested a 56 day period taking into account Christmas. She asked for copies of the scores of her and her ten colleagues. She asked that given the rules of natural justice and Article 6 of the Human Rights Act 1998, Mr Masters should withdraw from the decision making process as a whole arising from his statements in March, June, September and October 2015. She would provide further details of this including a recording should the need arise. It is worth noting that no such recording has even been disclosed in the course of this process or these proceedings other than the transcript of the covertly recorded November consultation meeting. She raised issues concerning the financial package which had been given to her colleague Mr Knight. She provided the contact details of her solicitor.

54. As a result of the email the claimant along with her work colleague attended the proposed consultation meeting on 27 November 2015 which

was adjourned pending further investigation into the allegations she had made.

55. By letter dated 3 December 2015 Carol Corker, an Employee Relations Advisor wrote to the claimant concerning her email. She asked for an outline of the points of complaint in order to determine whether these should be addressed with relevance to the consultation process, appeal against redundancy stage or as grievance.

56. By letter dated 10 December 2015 the claimant stated that she was being unfairly selected for potential redundancy and requested documentation concerning her comparators and their scores. She therefore felt that the grievance procedure and redundancy procedure were inextricably linked. The letter sent by email was said to have been seen and approved by her solicitor. Given the language therein it is however clear that it was written by her solicitor.

57. By letter dated 18 December 2015 Carol Corker, wrote to the claimant. This highlighted that the claimant had referred to a dossier of complaints but that she had not provided any further details despite the respondent requesting the same. The company said that notwithstanding this, it was willing to treat her complaint as a grievance. The claimant was invited to attend a meeting with Darren Redwood, Operations Director to discuss her grievance at the Luton PTS depot on 23 December 2015. She was given the right to be accompanied and advised that the redundancy exercise would be postponed pending the outcome of the grievance.

58. By letter dated 22 December 2015 the claimant advised that she had been on pre-arranged leave. She requested for the third time all documentation relating to her comparators and their scores which would allow her to complete her dossier.

59. By letter dated 23 December 2015 Carol Corker again wrote to the claimant advising her that the meeting would be rescheduled at her request and would take place at 3pm on 11 January 2016 at the same depot with Darren Redwood, Operations Director. She was informed that Richard Hadkiss, the Branch Manager would also be in attendance as note taker. The respondent indicated that it would not be disclosing the redundancy selection interview scores of her comparators since it was not obliged to do so and it would be clear breach of confidentiality. It was not prepared to disclose the anonymised copies of the selection scores due to the size of the selection pool of three as this would identify the individuals concerned. The claimant was however invited to discuss the selection scores as part of the redundancy consultation process.

60. By email dated 6 January 2016 the claimant's solicitor Mr Kalaher wrote to Carol Corker stating that "*unless and until such documentation is forthcoming from you to us there seems no point in our client attending a grievance procedure as her grievance has been well ventilated prior to this communication*". The email also requested that Messrs Richard Hadkiss

and Richard Malcolm were excised from this scenario. This was because they were known to the claimant.

61. By email dated 7 January 2016 Carol Corker responded to the claimant's solicitor stating that they would respond directly to their employee. Mr Kalaher responded the same day requesting that all communication come through him as her solicitor.

62. A further email was sent from Carol Corker to Mr Kalaher on 7 January 2016. Carol Corker informed the claimant's solicitor that it was not possible to provide the information required anonymously and therefore overall scores in respect of each aspect of the selection process for the claimant and candidate two (known by this Tribunal to be Clare Evans) were detailed in the attachment. The email requested further details as to why Richard Hadkiss and Richard Malcolm were not to be involved in the grievance meeting. It required confirmation that the claimant would attend the grievance hearing on 11 January 2016.

63. By email dated 8 January 2016 Mr Kalaher replied to Carol Corker stating that the claimant would not attend a meeting until the documentation which she had requested was provided. It asked for more information concerning what the definition of either good conduct or misconduct was and what the company would take into account when assessing the conduct question. It highlighted that there is no anonymity in this case as the claimant was already aware of the identity of the other candidates to whom she was in competition. Again, the matters of Mr Malcolm and Mr Hadkiss were raised, that they were known to the claimant and in particular they had knowledge of matters relating to Clare Evans, the redundancy selection process and its mechanics. The solicitor highlighted his annual leave from Friday 15 to 25 January 2016.

64. By email dated 11 January 2016 Carol Corker reverted to Mr Kalaher in response to his email of 8 January. She said that the respondent was seeking the consent of Clare Evans to disclose her redundancy selection documentation. It highlighted that the claimant had been offered the opportunity on more than one occasion to discuss her scores, selection assessment and weightings. It also confirmed that conduct is assessed by weightings in relation to the number live final written and verbal warnings or the absence of all these. It highlighted that an alternative note taker was being sought. The email outlined that if the claimant failed to attend the meeting then the respondent would re-commence the redundancy process as the solicitor's annual leave was not relevant to internal process. Her grievance would then be dealt with simultaneously.

65. A second email was sent from Carol Corker to Mr Kalaher on the same day stating that consent had been given by Clare Evans to fully disclose the information in relation to the redundancy selection process and that this would follow once collated.

66. By email dated 11 January 2016 Mr Kalaher responded to Carol Corker requesting the material again but this time requesting relevant periods of absence for Clare Evans (presumably to challenge the attendance criteria scoring). He highlighted that enquiries ought to be made of Clare Evans to confirm whether or not she admitted or denied that she had ever sent emails pretending they had emanated from another email address. He highlighted that corroboration from Mr Hadkiss may assist. The email stated that there would be no meeting today and the claimants rights concerning Article 6 of the Human Rights Act 1998 were extant.

67. A subsequent email from Carol Corker to Mr Kalaher of the same date (page 172) confirmed that the grievance hearing would now take place on Friday 15 January 2016 at Luton. An alternative note taker from outside the region would be in attendance if that was possible. The redundancy process would now recommence with immediate effect. The email highlighted that the selection documentation would be disclosed including the selection matrix, interview and presentation scores with the consent of Clare Evans. As Clare Evans was on holiday then it would not be appropriate to contact her again to request additional consent for any detailed absence information. The email highlighted the claimant had had almost seven weeks since raising her complaint on 27 November 2015 to articulate the grounds of her grievance and had thus failed to do so. It suggested that any issues concerning Clare Evans and the emails alleged to have been sent ought to be raised in the grievance hearing on Friday 15 January 2016. It also pointed out that 50 days had elapsed since the grievance was first raised and that the claimant had initially said that any grievance would be fully articulated within 56 days (which the respondent considered to be an unreasonable period to delay the exercise) without any grounds being made to the company to date.

68. By letter dated 11 January 2015 (noted by this Tribunal to be an error as it should read 2016) the claimant was invited to a rescheduled grievance meeting at the same location on Friday 15 January 2016 at 10am. Carol Corker identified that the respondent was attempting to locate an alternative note taker.

69. By email dated 12 January 2016 Mr Kalaher responded to Carol Corker's last email. This time Mr Kalaher advised that the contents of the email were "*unconconsciable*" (assumed to be unconscionable), he also referred to Article 6 of the Human Rights Act 1998 and that no enquiries had been made as to whether or not the appointment given for the grievance hearing was convenient to the claimant. The email went on to state:-

> *"In any event and casting aside the unconscionable manner in which you week (seek) to impose your unitalteral will upon our client, it is very helpful of you to confirm the redundancy procedure will now commence (again please referred to aforesaid act) and you have no knowledge of the Claire Evans email point we have raised. Of course sight of all the documentation is required and it has been*

*asked for numerous times ad nauseam **before** involved our client can be seen to have a fair hearing at reasonable notice.*

One of the points that our client wishes to raise is that she is being considered for redundancy arising from the skullduggery of Claire Evans and therefore the scoring of these comparators could never be accurate. You have said conceded one of the factors is conduct. Given that you acknowledge that you have no knowledge of the point (which we find remarkable) you will probably find it necessary to interview Claire Evans and Richard Hadkiss and present an assessment for us to enable our client to take advice. Would you company really select an employee with a blemished free and good attendace record for redundancy instead of one who has without justification, and against your own rules, sent email correspondence pertaining to be another member of staff. Once you have interviewed Claire Evans and Richard Hadkiss, please come back to us with your assessment the full documentation (including witness statements) and your revised scoring." (sic)

70. By email dated the 12 January 2016 from Carol Corker to Mr Kalaher, the respondent stated that though they had reconvened the grievance hearing at the earliest opportunity taking into account the claimant's right to notice and availability of the grievance hearing manager. The claimant's solicitor's holidays were irrelevant. During this period the respondent wanted to convene the hearing and give the claimant the opportunity to make them aware of the grievance points so the matter could be looked into further. It highlighted that Carol Corker had discussed the matter involving the email from Clare Evans to the claimant with Richard Hadkiss, but that the respondent would not re-assess what the redundancy score was or provide witness statements in relation to the matter which had no relevance to redundancy selection scores. Since the redundancy selection documentation had been provided (from Kerry Hales only by this point) any further attempts to change the criteria would be seen as a deliberate tactic to delay matters further.

71. Mr Kalaher replied to Carol Corker on the same day to state that it was an affront to the rules of natural justice and the definition of unfair dismissal for her to assert the substance of his client's grievance and the reason for instructing the firm had no relevance to the respondent's own policy on redundancy. The respondent was encouraged to speak to Mr Hadkiss before corresponding further.

72. By email dated 13 January 2016 Carol Corker responded to Mr Kalaher setting out that the matter could be discussed at the grievance hearing if the claimant chooses. Her attendance at the grievance meeting was requested to be confirmed.

73. The same day Mr Kalaher responded this time making reference to text messages. Carol Corker requested further information in a further email that day.

74. By email dated 14 January 2016 Carol Corker emailed the claimant direct concerning the grievance meeting and the limited information provided by her solicitor. The claimant was invited to provide further information at the forthcoming grievance hearing. It was this same day that Carol Corker also sent to the claimant's solicitor the redundancy documentation from Mr Masters.

75. Mr Kalaher sent an email to Carol Corker on 14 January 2016 stating "*there was no point in entering into further communication or any equitable value in the claimant attending the meeting as there was evidence to suggest that the claimant's interests were being down trodden in an unjust manner*." The solicitor also raised issue with direct communication from the respondent to the claimant which it said falls below the professional standards expected from the company. It accused Carol Corker of harassing the claimant by leaving voicemail messages on her phone and writing to her directly. It stated that as a consequence she is too ill to remain at work. Indeed the claimant messaged Mr Masters that day to advise that she was feeling unwell and left work. Up until that point aside from annual leave the claimant was still employed by the respondent and in work as usual during this period.

76. By email dated 14 January 2016 Mr Kalaher as a consequence advised the respondent that the claimant was now too unwell to attend the meeting tomorrow. The claimant emailed Mr Masters to notify of her absence at 1.49pm in the afternoon.

77. On 15 January 2016 the claimant sent a text message to her manager to advise that she had attended the GPs and that her doctor had signed her off for a minimum period of one week. Mr Masters tried to call the claimant but she did not answer. Mr Masters replied to the claimant's text stating that the company policy was that texting was not an appropriate way to advise of absence and that she should call him to discuss the circumstances of her absence and agree frequency of updates between them regarding her absence in the circumstances. The claimant did not attend the grievance hearing.

78. By letter dated 20 January 2016 Mr Masters wrote to the claimant setting out that she had advised of her sickness absence by text messages and had failed to make further contact with Mr Masters. The claimant was informed that the colleague handbook clearly stated "*when your absence is going to be for more than one day, you must maintain telephone contact with your manager on a regular basis to keep him/her informed about a regular return to work date*". He requested that she keep him updated on her absence and telephone his mobile number by the end of the day on Friday 22 January 2016. The claimant failed to do so or indeed to contact any other person within the respondent.

79. By letter dated 21 January 2016 the respondent wrote to the claimant concerning her grievance. Darren Redwood, set out that his intention was

to meet with the claimant to explore the grounds of her grievance and conduct a thorough investigation. This was necessary to ensure that the respondent had all the full facts of the claimant's grievance. He set out the attempts to which Carol Corker had made to try to set up the grievance hearing on his behalf and all the additional points raised by the solicitor to which he believed the respondent had responded. He pointed out that it had been seven weeks and the claimant was still unable to meet with the respondent. Indeed, no dossier of complaints had been presented as suggested. He pointed out that attempts were made to resolve the matter but the claimant's solicitor had indicated there was no equitable value in her attending a grievance meeting and could see little point in communicating further.

80. Mr Redwood's letter also set out his response to the issues raised by the claimant's solicitor. He highlighted that the proposed note taker for the grievance hearing Richard Hadkiss had been replaced as requested. The claimant had been provided with copies of all redundancy selection criterion documentation after obtaining the consent of Clare Evans, that Alan Masters was unaware of the alleged statements he had made to the claimant although this was difficult to investigate as no detail had been provided by the claimant. The letter highlighted that likewise no details were provided of the text message the claimant alleged Richard Hadkiss had sent to her, so Mr Hadkiss was unable to shed further light on this issue. It was established that Clare Evans did send an email to the claimant on Richard Hadkiss' email account but that this was done in his presence so the respondent felt that it had no impact on the redundancy selection scores. He therefore could not find any valid reason to reassess the redundancy selection scores based on limited information provided and subsequent enquiries of colleagues.

81. Upon concluding the letter set out that unless it heard from the claimant by 25 January 2016 it would consider the grievance closed.

82. The claimant knew about the email sent by Clare Evans at the time it was sent as Richard Hadkiss had highlighted this to her in what he described now as a "non-event". The claimant did not consider it serious to raise the matter with the respondent at the time and did not raise this until after the redundancy selection had taken place.

83. Mr Kalaher emailed Mr Redwood by email dated 25 January 2016 stating that the claimant was too unwell to attend any meeting.

84. By email dated 30 January 2016 the claimant was invited to contact Darren Redwood directly to arrange an appointment.

85. Mr Kalaher responded to Mr Redwood on 31 January 2016 appreciating the conciliatory tone of his email but that "*the predecessors on the file had caused some rot to set in"*. He suggested a telephone appointment to discuss the matter.

86. By letter dated 1 February 2016 (page 198) Mr Redwood wrote to the claimant stating that since he had had no contact from her whatsoever he considered the matter of her grievance to be closed. He had instructed Mr Masters to recommence the redundancy consultation process to avoid any more unreasonable delays. He advised that whilst the claimant suggested that Mr Masters be removed from the redundancy process due to statements last year, this matter was explored and he cannot find any substantive evidence to support her claim and the claimant had failed to particularise this further. He also pointed out that there was no obligation to correspond with her solicitor about matters concerning the internal redundancy process and that she would be contacted.

87. On 1 February 2016 the claimant's solicitor provided some further information concerning the matters which it felt were still outstanding by way of disclosure. By email dated 3 February 2016 Mr Kalaher emailed Mr Redwood requesting further documentation and setting out that the claimant's human rights had been breached in accordance with Article 6 of the Human Rights Act 1998.

88. By letter dated 4 February 2016 the claimant was notified that the respondent was in receipt of her sick certificate dated 29 January 2016 for four weeks which was sent by her solicitor. It reminded her of her absence reporting procedures and that the last time the respondent had any contact from the claimant was the 29 January 2016 by text message. She was asked to call the respondent. She was notified that until she adopted the correct procedure for reporting her absence should would be placed on statutory sick pay only and asked that she contact Mr Masters by Monday 8 February 2016. She was reminded that failure to follow company procedure may result in disciplinary action. The job vacancy for the role of Stock Analyst was also brought to her attention in the same letter.

89. The claimant's contract of employment specified at paragraph nine that "*provisions relating to notification of absenteeism due to sickness or injury together with detail of payments (if any) made to you whilst you are absent from work as a result of sickness or injury are contained in the employee handbook."*

90. The respondent's rules concerning absences and other leave were outlined in the respondent's handbook. This also provided that further guidance on interpreting the health and absence guidance policies could be sought by contacting the Employee Relations Department on 01604 685268. This policy set out the procedure as to what to do if you felt unwell. In the cases of absence from work for poor health the claimant should have in person notified her manager by telephone by her normal start time on the first day of her absence. The policy expressed that text messaging a line manager was not an acceptable way of communicating your absence. It specified that where the claimant's "*absence was going to be for more than one day you must maintain regular contact with your manager on a regular basis to keep him/her informed about a likely return to work date. In such circumstances you should agree with your manager*

the frequency of contact that he/she requires e.g. daily, every few days, weekly etc."

91. The procedure then contained a written notification procedure that in order to claim sick pay an employee would need to produce a company self-certification form. Where incapacity exceeds seven continuous days a medical certificate (MED3) from a doctor must be obtained and submitted to the company.

92. There is also a section on payments contained in the policy. This set out the company sick pay. "*Payments are made at the complete discretion of the company and there is no entitlement for you to receive pay (even in circumstances where a doctor's MED3 has been provided)*".

93. Section 5.4.2 of the policy set out the circumstances when company sick pay may be withheld. "*The company reserves the right to withhold company sick pay in given circumstances including:*

- *where absence is due to injury sustained in a hazardous activity*
- *where injury and subsequent absences are due to recklessness or a failure to comply with Health and Safety Rules*
- *if you act in a way that could delay your return to work*
- *the reason for absence is considered unacceptable by the company*
- *it is considered reasonable in circumstances not to pay company sick pay*
- *where there is a failure to follow verbal or written notification procedure*
- *you are still under your probationary period*
- *you have exhausted any entitlement*
- *you currently have outstanding allegations against you which are being addressed through the company's disciplinary procedure*
- *no company sick pay will be paid for Saturdays (unless Saturday is part of your contractual hours) or Sundays."*

94. By email dated 9 February 2016 Mr Kalaher emailed Mr Masters and others again requesting documentation and raising further issues in relation to the process. He also raised that the company handbook set out that the company sick pay was an absolute discretion but that it was subject to the Wednesbury test and a contractual term. It denied that the claimant was in breach of any process and stated that the claimant was prepared to consent to a medical examination.

95. By email dated 10 February 2016 Mr Kalaher wrote to the respondent raising the issue that the claimant had been excluded from the celebratory lunch and evening event for the project in which she had been involved. Given that the claimant was at risk of redundancy and off work sick at the appropriate time, it was highly unlikely the claimant would have attended any event.

96. I accept Mr Fleckney's evidence that by September 2015 the guest list for the 'Building the best' programme celebratory lunch included all 109

names including the claimant's, all the other PTS Regional Stock Controllers and Regional Directors as well as the CPS Regional Directors and General Sales Managers. This invite list grew to 174.

97. The 'Build the best' celebratory lunch took place on 11 February 2016. The evidence was that it was not possible to invite all the people involved in the project to the celebration. Whilst theoretically possible this had cost implications for the respondent.

98. Up until January 2016 all the Regional Stock Controllers were included including the claimant. As a result of the redundancy exercise a number of employees who were already redundant or were at risk of redundancy were removed from the list on 5 January 2016. This included the claimant but also Gary Knight, David Kostrzewa, Shaun Furminger and Paolo Fierro. The decision concerning the invite process was not one taken by Mr Masters but by Paul Fleckney alone. He explained that he considered that it would be inappropriate to invite those still at risk and those that had left the business.

99. By letter dated 12 February 2016 the claimant was notified that her continuing absence continued to breach the company procedure for notification. It suggested that the cause of her absence would remain unchanged while as the process was continuing. The respondent therefore proposed that the redundancy consultation process should continue. The claimant was invited to attend a first consultation meeting on Monday 22 February 2016. The letter set out that if the claimant was unfit to attend then the company would like to request an access to medical record report from an occupational health advisor Merrygold to establish her fitness to attend any such further meetings. The claimant was requested to complete the necessary forms and return them to the respondent. The letter set out that the claimant had not expressed an interest in the Stock Analyst vacancy. The claimant was referred to the company website for additional roles which may be of interest. The claimant was advised that if she was unable to attend the meeting and would prefer to consult with the respondent in writing then this could be arranged.

100. By email dated 16 February 2016 Mr Kalaher emailed Mr Masters concerning that letter. He again requested copies of documentation. Highlighted that the claimant had considered being excised from the project celebratory lunch last week, means that "*the die was already cast to make her redundant*". She confirmed that she would consent to a medical assessment and that she would be too unwell to attend the consultation meeting and that the claimant's solicitor would be in contact in due course. The email also highlighted again that any deductions from her salary would constitute unlawful deductions from wages.

101. By email dated 7 March 2016 Mr Kalaher emailed Mr Masters stating that the claimant was unable to successfully complete the medical consent documentation sent to her on more than one occasion on account of her

current symptoms. A further copy was requested for the claimant's solicitor to complete on her behalf. A further email was sent on 8 March 2016 by Mr Kalaher, requesting details of the medical practitioner whom the respondent had in mind.

102. By letter dated 16 March 2016 the respondent made a further attempt to contact the claimant. It sent out the background and the number of attempts which had been taken to date to resolve the issue. It set out that the claimant had failed to return the medical consent forms, set out that the claimant had failed to follow the sickness absence reporting procedure and therefore the company sick pay would be withdrawn. She would continue to be eligible for SSP for absence covered by a fit note. She was advised that the company sick pay had been withdrawn with effect from 4 February 2016. The overpayment for February salary would be taken in March's salary. As she had failed to respond to the vacancy for Stock Analyst, the window for the application had now closed. It invited her comments as to how the respondent should proceed with the consultation process and enclosed further medical consent forms as requested. It requested a response by the 21 March 2016.

103. By email dated 21 March 2016 Mr Kalaher raised a grievance against Mr Masters concerning the redundancy process, the unlawful deduction from wages and his conduct in the matter to date.

104. By letter dated 24 March 2016 Lynn Randall, Head of Employee Relations wrote to Mr Kalaher concerning that grievance. It advised that the matters raised were appropriate to be dealt with as part of the ongoing process. The letter set out that the respondent was expecting to receive the medical report from the claimant in due course. A further series of email exchanges took place between Lynn Randall and Mr Kalaher on the process. This resulted in a letter from Lynn Randall to Mr Kalaher dated 30 March 2016. This set out the company's position with regard to the sick pay.

105. By letter dated 30 March 2016 the claimant was invited to formal consultation meeting on Wednesday 6 April 2016. The claimant was given the right to be accompanied to that meeting, and the meeting was with Mr Masters and Kerry Hales as HR Business Partner. The claimant was given the option of completing the attached document with any comments she wished to make. The attached document was a template for the redundancy consultation meeting which was provided to her in advance to enable her to see what the substance of the meeting would be. This redundancy template consultation meeting also provided a link to the 'we recruit' site for any vacancies.

106. The meeting went ahead in the claimant's absence. By letter dated 6 April 2016 Mr Masters wrote to the claimant stating that she had failed to attend. A copy of the notes taken at the meeting was enclosed for her attention. It was highlighted that had she attended then a discussion would have taken place concerning the overview of the consultation period

which would take place, possible options to try and avoid risk of redundancy and an initial discussion about the redundancy payment. The claimant was informed that the consultation process would continue until 6 May 2016 and to that end a further consultation meeting was proposed for the 20 April 2016. Again, the claimant was given the right to be accompanied, given the opportunity to provide written representations to that meeting and given the contact details for both Mr Masters and Kerry Hales including mobile numbers should she have any queries.

107. That proposed meeting which was the second consultation meeting, took place on 20 April 2016. Again, the claimant failed to attend. Again, the respondent wrote to the claimant by letter from Mr Masters dated 20 April 2016 setting out that the claimant had failed to attend the meeting. A further consultation meeting invitation for 3 May 2016 was sent. The claimant was once again given the right to be accompanied and invited to make written representations for that meeting. A second consultation meeting document with the relevant questions was provided along with a draft schedule outlining the redundancy payments.

108. There continued to be during this period an email exchange requesting documentation from Mr Kalaher sent to Lynn Randall. Most relevant of which was an emailed dated 26 April 2016 in which Lynn Randall stated that the claimant was failing to attend the consultation meetings. She had been given the opportunity to provide written representations and was encouraged to attend the next meeting if she feels well enough to do so or alternatively provide any written representations which can be taken along/into account at the next meeting. During this period the medical report promised by the claimant failed to materialise.

109. A further consultation meeting was held on 3 May 2016 but again the claimant failed to attend. The respondent wrote by letter from Alan Masters dated 4 May 2016 confirming the claimant's role was redundant with effect from 6 May 2016. The claimant was given twelve weeks notice of redundancy and a company redundancy payment was made to the claimant. The earlier judgment in this case means that the effective date of termination was 29 July 2016.

110. By email dated 17 May 2016 Mr Kalaher wrote to Lynn Randall advising that the letter dated 4 May 2016 had only recently been received by the claimant but that the claimant wished to appeal against her dismissal. This email was treated as an appeal against her dismissal by the respondent.

111. By letter dated 20 May 2016 the claimant was invited to attend an appeal meeting on Wednesday 1 June 2016 with Andy Clarke, Operations Director. The claimant was given the right to be accompanied and informed that a note taker would be present.

112. The claimant did attend the appeal meeting on 1 June 2016. Minutes were taken of that meeting which were produced for the bundle. The meeting lasted approximately two hours with a number of breaks.

Following the meeting the claimant emailed Mr Clarke directly on 3 June 2016 to set out that she felt the notes were incomplete. She provided further information concerning the statements made concerning the email sent by Clare Evans. The claimant then sent her corrections of the minutes to the respondent. The respondent then conducted an investigation into the issues around the issues raised. The respondent interviewed a number of its employees (and indeed ex-employees) in respect of the allegations made; Emma Bradford, Gary Knights, Alan Masters, Kerry Hales, Giles Lush, Clare Evans, Paul Fleckney, Paolo Fierro and Richard Hadkiss. The statements of which were in the bundle for the Tribunal.

113. As part of the grievance Mr Clarke investigated the telephone conversation concerning the Solihull radiators which the claimant had finally provided further details to him about in the grievance/appeal meeting. This was the conversation whereby it is alleged that Mr Masters' statement was indicative of his way towards her. This was said to be one of the examples alluded to in the 27 November 2015 email from her solicitor.

114. The respondent concluded that Mr Masters in the scoring meeting with the claimant on 10 November discussed this with her. When she queried the mark he had given her for initiative, Mr Masters referred to the Solihull radiators matter as evidence that she did not actively seek potential alternatives when dealing with problem stock. The claimant raised that she had in fact progressed the problem to the supplier which Mr Masters had not realised so he increased her score for initiative to eight which is the maximum achievable for that criteria. As such the respondent concluded that there was no substance to this allegation around Mr Masters.

115. By letter dated 24 June 2016 (page 321) the respondent set out all the enquiries and interviews that had taken place, and the grievance and grounds of appeal. The appeal and grievance were not upheld and the decision to make her role redundant was confirmed. The claimant was not given any further right of appeal. The letter set out in full the rationale for that decision.

116. The claimant submitted her ET1 to the Tribunal on the 3rd November 2016.

Conclusions

Unfair dismissal

117. Taking each of the issues in turn:

Was a fair procedure followed by the respondent?

Unfair selection

118. The claimant is asking the employment tribunal to find that the subjective criteria were unfair. The Tribunal's role is not to carryout a rescoring

exercise. The claimant's case was that not only should the claimant's score have been higher than it was, in fact the colleague to whom she was in competition should have been lower. Therefore, it should not have been necessary for a selective interview and presentation process as the claimant would have scored higher. In essence the claimant was asking this tribunal to carryout a rescoring exercise for not only her but the second individual. I may understand the claimant's position had she been the top scorer in the initial scoring process and she then scored the lowest on the interview and presentation. In effect the claimant was selected twice for redundancy, so the claimant is asking this tribunal to conclude that it was wrong of the respondent to do so on both of those occasions and that her selection was unfair.

119. Selection should be fair in general terms and reasonably applied to the employee concerned. I do not find in this case that the method of selection was inherently unfair pr that it was applied in an unreasonable manner. This is in respect of the original criteria in stage one and the decision to proceed to stage two. This is not a case where an inference can be drawn from the markings that there was something unfair about the application of the selection process. Both candidates scored highly at the first stage and the scores were adjusted following her input in two areas.

120. Where the criteria were subjective the respondent has tried to look for evidence to support the scores and approached it in an objective way. I cannot say that no reasonable employer could have chosen this particular method in this particular case. Clear evidence would be needed of unfair or inconsistent scoring which is absent in this case, for the Tribunal to review the scores in any detail.

121. Nevertheless, in respect of the conduct issue the claimant invites the tribunal to consider that the disciplinary record of both candidates was inaccurate. It is not in dispute that Clare Evans sent one email from another person's email account but the circumstance of this are dealt with in the meeting with Mr Clarke. The respondent's clear evidence which I accept was that this was not a disciplinary matter and it had no knowledge of the same at the relevant time. And in the event, even if it was, the claimant had been selected by that point.

122. The claimant's evidence was that she was aware that Clare Evans had previously used a colleague's email. She took no action in this regard at the time of the incident presumably because she did not consider it relevant or a matter of conduct to raise with her employer at that time. This was only raised after she had been selected for redundancy on two occasions. Had she genuinely been concerned as to the conduct of Clare Evans no doubt she would have raised this at the relevant time instead. It is therefore disingenuous to then criticise the respondent for not having been aware of this matter and for not having disciplined Clare Evans accordingly.

123. I therefore find that at the relevant time when the claimant was selected for redundancy the respondent's process of looking at the disciplinary records was indeed a fair one. It was an objective criteria.

124. I remind myself that I am not here to rescore the claimant as highlighted above and I cannot substitute my view but nevertheless I have gone on to consider that whether this remained the case once the respondent was on notice of the matter. I have in mind the fact that following the investigation by Mr Clarke no disciplinary action was taken against Clare Evans. The respondent did investigate the matter and found that this was not a disciplinary offence for the reasons set out in the letter of Mr Clarke. As such, it is entirely appropriate that Clare Evans had the score she did for conduct even if I had been persuaded of the need to rescore the parties.

125. The claimant now accepts the Tribunal's caution that its role is not to conduct a re-assessment exercise of the selection criteria carried out by the respondent. The claimant's position is that the selection criteria were inappropriate in the perspective in which they were applied. To draw these conclusions the claimant is asking this tribunal to rely on the simple hand written comments on the selection form and disregard the evidence of Mr Masters.

126. I accept the evidence of Mr Masters in respect of his considerations when carrying out the redundancy scoring exercise which extends beyond a few notes. This was not a scenario where the claimant scored equally with her counterpart. Indeed, notwithstanding the fact that she was the lowest scorer, Mr Masters has recognised that a different approach needed to be adopted in order to be fairer. The claimant then seeks to criticise the respondent for taking this view. Given the difficulties that the respondent recognised with the process and those which the claimant now seeks upon to rely it is difficult to see what other alternatives were open to the respondent in this scenario. Even if I had found any issue with the scoring process the fact the respondent then have the claimant a second bite at the cherry would have in my view overcome any issues with the scoring process had I found any such concerns of unfairness.

127. The claimant accepts that she did not perform well at the presentation or interview. No alternative suggestions had been made by the claimant as to how or instead this process should have been adopted other than to increase her scores at the initial selection exercise and reduce those of her counterpart. This tribunal simply does not have the power to do that. I am satisfied that the respondent carried out a fair assessment of Clare Evans and the claimant on the information before it. Indeed Mr Masters' evidence was very candid that both were excellent employees and he had a difficulty choosing between the two of them. The claimant should take some comfort in this fact.

Failure to apply properly and fairly its own published criteria for redundancy.

128. The redundancy policy and guidance do not say that the process cannot be deviated from. In fact, they expressly state that selection criteria will be used to score the individuals. This is exactly what happened in this case. The claimant scored lower and she should have been dismissed. If indeed that was the case at that point and the respondent had not embarked on the second stage procedure I would have difficulty from the evidence I have heard undermining that process.

129. Notwithstanding the fact that the claimant and Clare Evans were not in fact equal under the selection criteria, the policy clearly provided for there to be an adaption in such a scenario as this policy provided that guidance should sought from the Employee Relations team. This is exactly what happened on this occasion.

130. Whilst I accept the presentation to the claimant and others in the pool did not mention a second stage and in fact this was only required in the claimant's geographical region, I accept the respondent's evidence that the directors were notified that this would be an option open to them if they were unable to reach a decision between two candidates.

131. I find the respondent to be faultless for proceeding to the next stage. In essence this gave the claimant a second bit of the cherry. Had the claimant had the highest score at the selection stage based on the criteria she may well have had a cause for complaint since as this was not done when those scored were equal. The claimant was already behind. This is the real difficulty with the claimant's case. The respondent acted more than fairly in giving her the second chance to retain her job. Whilst she was not comfortable with the presentation, she had a chance to prepare for this in advance and I accept that these skills would be required in the new role in any event. She attended and did not raise any issues at that point that she had concerns that this was not due process.

132. The respondent acted as a reasonable employer would do in adopting a second stage. In fact had they not done so the first stage was still not unfair. As such I do not find that there was any such failure to apply properly its published criteria.

The decision maker was inappropriate, the claimant having raised a grievance against him.

133. I am invited by the claimant to consider this within three periods:

133.1 Up to the 27 November 2015 (i.e. from the announcement of the restructure to the raising of the first grievance);

133.2 From the 28 November 2015 to 1 February 2016 for the duration of the consideration of the first grievance; and

133.3 Lastly from 18 March 2016 to 4 May 2016 from the raising of the second grievance to dismissal.

Up to 27th November 2015

134. Taking each of these in turn and dealing with the first period up to the 27th November 2015 from the announcement of the restructure to the raising of the first grievance. It is undisputed that the claimant raised with Kerry Hales how Mr Masters would score her given his knowledge of her was limited. The claimant attended all the meetings requested of her by Mr Masters during this initial period. She did not raise orally in any of those meetings that she considered that he was an inappropriate person or suggest any other alternative people. There was no alternative manager who knew both employees equally. The claimant engaged in this process and Mr Masters took on board her comments and adjusted her score upwards.

135. It is not correct to say that the respondent had not already turned its mind to this issue. Mr Masters' evidence was clear that he himself had concerns that he had limited knowledge. He could have adopted the selection policy in a strict sense and dismissed the claimant as redundant due to her score in the selection process. He did however recognise the issues and invite her to attend an interview and presentation as part of stage two which I have dealt with above.

136. The scoring for this process was carried out by both Kerry Hales and Mr Masters. The difference between the two candidates was significant. During this period, I therefore follows that I do not find it inappropriate for Mr Masters as the claimant's line manager to make the decisions on the selection, contribute towards a decision on the scoring for the selection matrix and notify to the claimant that she had been selected for redundancy. At no point during this period did the claimant raise a grievance with him.

1st November 2015-1st February 2016

137. Dealing with the second period, between 1 November and 1 February 2016 – no decisions had been taken during this period. By this time the claimant was already selected for redundancy and the consultation period was ongoing. Even the decision concerning sick pay had not been taken during this period (which is dealt with below). The claimant's grievance was being investigated so far as the respondent was able to do so.

138. Much is made of the respondent's evidence on the grievance issue. This is not particularly relevant to the issues that this tribunal have to determine. I do however find that the respondent did what it could with the limited information it had. The claimant did eventually meet with Mr Clarke which allowed an investigation to take place but it is not clear why she refused to meet with Mr Redwood who was independent of the matter.

139. It is submitted that Mr Redwood's failure to follow the process meant that the claimant had no confidence in the process. This cannot be right and I do not accept this. She had completely failed to articulate her grievance with the 'dossier' as promised by this time or even any substantive letter of

complaint outlining all of her points. Numerous requests for different information were made none of which she had the right to see but which were in some cases provided. It was therefore entirely reasonable and proper that the respondent invite her to a meeting to find out what all her issues were before fully investigating. The respondent did what it could in the circumstances. Yes it could have taken statements and sent them to the claimant but until she set out in full here complaints (which at this time she never did) the respondent could not take the necessary steps. It has shown that when the claimant did engage with the process later for Mr Clarke it did all those things. At this stage the claimant simply failed to engage in the process.

140. In any event, I find the conduct of the claimant through her solicitor quite astounding during this period. Notwithstanding the fact that she requested 56 days to articulate her grievance, throughout this entire period the claimant failed to do so. For much of the period she was in work and able to continue her duties. It was only towards the end of this period did she go off sick. Had she met Mr Redwood initially to allow an investigation to commence whilst she was waiting for the documentation, this would have assisted both sides.

141. The solicitor clearly had enough instructions to send a series of emails to the respondent, none of which properly and fully dealt with the issue. Had the claimant fully particularised the grievance at the outset providing further details of the statements Mr Masters was alleged to have completed, the issues over the 'skulduggery' of Clare Evans and the other issues concerning documentation, the grievance could have been resolved a lot sooner. This may well have avoided the need for the claimant to subsequently go off sick but also would have meant that the claimant's dismissal would have been far sooner. There was no right to receive the documentation of Clare Evans at any point in this process. Provided the claimant knew of the score and what she needed to do to improve this was all the information she required and this is trite law. The respondent's frustrations during this period at the delays are understandable given the piecemeal approach adopted to requests for information and the failure to articulate all the issues clearly which the respondent saw as an attempt to delay matters.

<u>18 March 2016 - 4 May 2016</u>

142. Dealing next with the final period from 18 March 2016 to 4 May 2016 and the raising of the second grievance to dismissal, again the subject of the grievance procedure could arguably have been dealt with as part of the consultation process. The issues raised were all those which related to the scoring process so there was no real need to hear it as a grievance although the respondent cannot be criticised for taking this approach which was safer.

143. It is of course to be remembered as I will outline below the claimant failed to engage in this process until the appeal. The dossier of evidence to support the first grievance had not materialised during this period.

Therefore, the only decisions that were taken during this period were in respect of the claimant's sick pay which I will come onto below, her dismissal (her having already earlier been selected but not successfully secured alternative employment) and the decision to continue the consultation process.

144. I will deal with the issue of sick pay below. In relation to the decision to proceed with the consultation process, I do not find that this was unreasonable. Perhaps the only criticism here that could be raised towards the respondent is that it could have continued that consultation process with a different manager rather than Mr Masters. However, given the claimant's unwillingness to even engage with Mr Redwood who was independent of the process, it is unlikely that this would have made any difference to the outcome. The claimant was invited to partake in the consultation process in other ways such as by written submissions. She failed to sign the consent forms or produce the medical report her solicitors indicated she would obtain so the respondent had very few options. In this situation where the claimant has caused considerable delays in articulating her grievance, the process had continued (and indeed concluded) for other at risk employees in her absence, I see no reason why the respondent should or ought to delay that process further. The claimant did not say that she would attend if the meeting was not with Mr Masters just as she had raised that Mr Hadkiss was not appropriate. She was represented throughout this period but still failed to articulate her grievance.

145. Concerning the decision to dismiss, this was taken by Mr Masters. The claimant did however fail to engage in that consultation process. There were alternative vacancies that were notified to the claimant in writing on numerous occasions. She expressed no interest in any such vacancy. As such, it is difficult to see how anything other than dismissal could have resulted during this period. Since I have already found that the matters raised as part of the second grievance ought properly to have been considered or raised as part of the consultation process (which the claimant had failed to engage in) it is difficult to see how the decision maker was inappropriate at this time.

146. Even if it could be said that the claimant did not want to meet with Mr Masters, until the second grievance was raised there was no live process that the claimant was engaging in. The respondent could have adapted the process once the second grievance arose but I can understand why they chose not to given the claimant had failed to articulate her earlier grievance for 7 weeks. Even if they had changed the person holding the meeting the outcome would have still been the same. In the case where the claimant was failing to engage, failed to apply for other roles, failed to provide the medical evidence or even send written submissions dismissal was inevitable.

The decision was pre-determined.

147. Much evidence was heard around the issue of the 'Build the best team' celebration invite. The claimant wanted this tribunal to read into this that

the decision had already been predetermined. This is somewhat of a red herring given that the claimant had already been selected by redundancy according to the selection process in November 2015. She then underwent the interview and presentation on 19 November 2015 referred to as stage 2 and the outcome was advised to her on 23 November 2015. Certainly by January 2016, whilst consultation was continuing the focus of this was in locating the claimant alternative employment and indeed she had become signed off and taken sick leave during this period so would have been unable to attend in any event.

148. I do not find that by any constructive reading of the documentation and the evidence of Paul Fleckney that the decision to exclude the claimant from that was in any way a predetermination of her dismissal. It is to be remembered by that at this point she had already been selected as redundant on two separate occasions and indeed had she been invited to the event whilst at risk of redundancy and off sick no doubt the claimant would have stated that this was insensitive. It was entirely appropriate that she should not be asked to celebrate at the time when she was potentially going to lose her job. She was not treated any differently to other employees who had left or were at risk of redundancy.

149. It is submitted that the appointment of Mr Masters as the claimant's line manager in the Central region in October 2014 followed by his decision in March 2015 to place Gary Knight and the claimant on the 'Building the best' project was done to orchestrate a situation whereby by the time the redundancy situation came about Clare Evans would be in a better position to succeed.

150. The claimant moved onto the project work away from the day to day function by agreement. At no point did the claimant apply for the management course at Cranfield which was applied for by Clare Evans. I do not find it credible to suggest that this is a pre-determiner for a decision. The redundancy criteria had not yet been published and the claimant had not yet been scored. She was not at risk. Mr Masters was not the decision maker with regard to the overall structure of the team.

151. Whilst it was apparent that at some point further changes may be made, it was not at the time of the project decision decided what or when. It is also entirely conceivable that the skills the claimant acquired during that period would have indeed placed her in a better position had the re-structure looked different.

152. The subsequent steps by Mr Masters to score the claimant, adjust her scores and then give her a second chance with the second stage do quite the opposite than support the suggestion that Mr Masters contrived the whole thing. Further, it is clear from the transcript of the 10 November 2015 meeting that Mr Masters found the task of scoring hard as they were both good employees. This was made covertly so Mr Masters had no way of knowing that this was being recorded. This makes it even more frank and reliable in my view.

The claimant was not fairly consulted with.

153. I do not accept the claimant's submission that by continuing the redundancy process in light of a grievance raised by an employee the claimant was not fairly consulted. The statement that she could not attend a consultation while her grievance was outstanding or have any confidence that the process would be fair in light of the fact that she had raised concerns, I do not accept.

154. Much of the matters raised in the claimant's grievance (bearing mind that it had not yet been fully particularised by this point) were matters which ought normally to have formed part of the consultation process. The claimant chose not to engage in that process.

155. Whilst I accept the claimant was ill during this period which would have made her face to face attendance difficult, she at no point suggested any alternatives to allow the process to continue. For example she did not suggest that she should be able to attend with more supportive companion than a work colleague. She did not provide any written representations. She was expressly invited to do so. Throughout this period the claimant's solicitor was able to take instructions from the claimant and write long and numerous emails to the respondent. Those efforts would have been more constructive engaging with the consultation process and preparing the written submissions or the documentation requested of the claimant.

156. Whist the claimant was signed as unfit to attend work, she did not complete the medical consent form requiring her to provide the access to the respondent to a medical report to determine whether or not she was fit to attend the consultation process. Instead her solicitor suggested that a GPs report would be forthcoming. It never was. Apart from deciding to not hold the consultation process whilst the claimant was off sick, there was not much more that the respondent could have done to alleviate the situation.

157. As I have identified above, the respondent could have replaced Mr Masters with somebody else to conclude the consultation process, however it had already taken steps to ensure that Kerry Hales was present during those meetings to re-assure the claimant. The claimant had also failed to engage with other senior managers within the business such as Mr Redwood and the grievance process by this point and accordingly I find it more likely than not that the claimant would still have refused to engage in this process had a different manager other than Mr Masters been appointed. By this time, it was clear that the claimant was not going to attend any such meeting when you review the correspondence sent on her behalf.

<u>What was the percentage chance or period of time in which the claimant would have been fairly dismissed?</u>

158. Since I have not found that there are procedure faults which make this dismissal unfair, it is not necessary for me to consider the issue of Polkey under this heading.

159. For completeness given the two points I have raised as things the respondent could have done differently, I have gone onto consider how if this had impacted on the fairness of the dismissal this would have changed thing. This is of course not the correct test as there is often things that a respondent could do differently to improve a process but the test is whether it acted reasonably which I have found that it did.

160. However, I would say that had I found there to be any procedural unfairness in the above, I would have found that save for a finding under unfair selection, that it would be a 100% likely that the claimant would have been dismissed in any event or within a very short period of time of less than one week. In my view, the time over which this dismissal process took place was more than reasonable.

161. In looking at selection, the primary difficulty with the claimant's case is that she did score lowest in the selection exercise. The only way for the claimant to establish that this was wrong was to ask the tribunal to carry out a rescoring exercise which as for the reasons set out above would not be the correct approach. It was fair in general terms and reasonably applied by the respondent. As the claimant was in a pool of two (the third employee having taken voluntary redundancy) at best here the claimant had a fifty percent change of dismissal which was not applicable in this case as I have found that the selection was fair and I can only interfere if the selection falls outside the realms of reasonableness.

Was dismissal within the range of reasonable responses?

162. In view of the fact that the claimant was selected twice for redundancy, this was a genuine redundancy situation and the claimant failed to engage in the alternative employment process, I find that dismissal was within the range of reasonable responses. Indeed, it was an inevitable outcome once the claimant had been selected and then failed to engage in the consultation process or indeed apply for any of the alternative roles which were being highlighted to her.

Has the claimant contributed to her dismissal by way of culpable conduct?

163. The respondent accepts that the causation issue here relates solely to the unreasonable refusal to deal with Mr Masters and Kerry Hales. The claimant was given the mobile number for Kerry Hales so could have contacted her instead. I accept that the claimant's approach in this case reduced her chance of finding alternative employment and therefore her consideration to alternative roles within group, however it is not necessarily for me to make any conclusions under this heading given my conclusions for all the other issues for unfair dismissal above.

Unlawful deduction from wage.

Was sick pay properly payable?

164. The respondent's company sick pay is therefore discretionary. There is no contractual entitlement to the same.

165. I accept the claimant's evidence that her sickness attendance was prior to this incident good. However, it is undisputed that the claimant failed to follow the company sick pay notification procedure. She failed to personally notify her manager by telephone and to keep him updated. This was even in circumstances where she had been written to expressly requesting her to do so more than once. At no point did she respond to that letter (or her solicitors on her behalf) and state that Mr Masters was an inappropriate contact and that she should be given another contact. The claimant now submits that the respondent should have realised this and of its own initiative offered someone else to report to. The onus is on the claimant to follow the procedure, had she of followed the process with Kerry Hales for example I may have had to examine the discretion in more detail.

166. In any event the claimant had the mobile phone number of Kerry Hales, and contact details of the Employee Relations team. She chose neither avenue in which to notify the company of her absence. This was not withstanding the fact that she had been written to on several occasions about the matter. The claimant did send in fit notes from her GP during the period. On one occasion, the certificate was significantly delayed. These were always sent by her solicitor. Nevertheless the policy requires more and it is quite explicit that just sending in MED3's does not result in payment.

167. The claimant failed to consent to the access to the medical report by an occupational health advisor to determine that she was unfit to attend the meetings and to allow the respondent to further investigate the reasons for her absence. The claimant also failed to provide the GPs report which was referred to by her solicitor.

168. Whilst I accept that the claimant has long service with the respondent, and that there is a need to exercise one's discretion in making such a payment reasonably, I do not find that the respondent failed to exercise that discretion properly on this occasion. Faced with these particular facts, it is not surprising the respondent chose not to make payments to the claimant. This was not unreasonable. The claimant failed to co-operate during this period, yet was nevertheless well enough to provide instructions to her solicitor to send a wealth of correspondence to the respondent. This did not have or extend to the key documentation of the consent form or in it's absence, the GP's report. At no point did the claimant pick up the phone to anybody (even someone else other than Mr Masters) to explain her absence or ascertain how regular she should keep in contact. It is therefore clear that it is not the grievance against Mr Masters that resulted

in the non-payment of sick pay but in fact the claimant's own failings to follow process or cooperate which led to the sick pay not being paid. In circumstances where she had neither consented to a medical report or provided her own as she indicated she would the respondent was not so obliged to exercise its discretion in her favour.

169. It therefore follows that as a result of the above, I do not find that the sick pay was properly payable.

Has the employer made a deduction?

170. Given my conclusions about whether the sick pay is properly payable, I do not need to go onto consider the other issues under this heading.

Summary

171. In light of these conclusions, it therefore follows that the claimant's claims for unfair dismissal and unlawful deductions from wages fail and are dismissed.

172. The parties had been invited to provide dates to avoid to the tribunal. At the time of promulgating this judgment it is not clear whether these had been received or not. Any listing for a remedy hearing will be vacated in light of the above conclusions and the parties are no longer required to provide their dates to avoid.

_____
Employment Judge King

Date: 5 January 2018

Sent to the parties on: .....

.....
For the Tribunal Office