Case Number: 1400733/2017

EMPLOYMENT TRIBUNALS

Claimant: **Mr T Birt**

Respondent: **Active Power Solutions Limited**

Heard at: **Bristol** **On:** **14 November 2017**

Before: **Employment Judge Mulvaney**

Representation
Claimant: **Mr Isaacs, of Counsel**
Respondent: **Mr Wibberley, of Counsel**

JUDGMENT having been sent to the parties on 28 November 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This is a claim of unfair dismissal brought by the claimant after the termination of his employment by the respondent following a redundancy process.

2. The respondent is a company engaged in the production of kinetic energy storage systems and employs approximately 150 people. It is part of the Piller group of companies within Langley Holdings Plc.

3. The claimant was employed by the respondent as one of four Field Service Engineers and at the time of his dismissal was Lead Field Service Engineer. His line manager up until two weeks prior to notification of his redundancy was David Leatherbarrow, the respondent's Manager of UK Operations.

4. I heard evidence for the respondent from Mark Lee, Managing Director of Piller UK; Bill Muirhead, Service Manager also of Piller UK; and Andrew Dyke, Piller Group Managing Director. For the claimant, I heard evidence from Andy Selwood, a Field Service Engineer and former colleague of the claimant's and from the claimant himself.

Issues

5. The issues that had to be determined were agreed by the parties prior to the hearing. At the start of the hearing the claimant's representative conceded that the claimant did not dispute that there was a redundancy situation and that that was the reason for the claimant's dismissal. The principal issue therefore was:

    5.1. whether the decision to dismiss the claimant was fair or unfair in the circumstances and in accordance with equity and the substantial merits of the case. The claimant indicated that he did not take issue with the respondent's efforts to find alternative employment for him nor with the consultation process save in so far as it affected and impacted upon the selection process which was the principal focus of the claimant's challenge to the fairness of his dismissal.

6. The following issues arose if the dismissal was found to be unfair:

    6.1. Whether the claimant would have been dismissed in any event had a fair process been followed;

    6.2. To what damages is the claimant entitled? In particular it was agreed that the claimant must give credit against his basic award for the redundancy award received (thus reducing the claim for the basic award to £0).

Findings of fact:

7. The claimant started his employment with the respondent as a UK Field Service Engineer in November 2010. The claimant had had a previous period of employment in a service engineer role with Piller UK between 1999 and 2003. Piller UK at that time was a competitor of the respondent. Between 2010 and 2012 the claimant's line manager in the respondent's business was Mr Muirhead. The claimant was one of four Field Service Engineers employed at the time of the events with which these proceedings were concerned. The others were Andy Selwood, Stuart Wilson and Jay Drinkwater.

8. In July 2012, after Mr Muirhead had left the respondent to return to work for Piller UK, the claimant was promoted to Service Supervisor in August 2012 and to Lead Engineer in November 2013.

9. In August 2015 David Leatherbarrow became Manager of the respondent's UK Operations and oversaw the service engineers' work until his departure in November 2016. There were a number of named individuals both in the UK and in the US who had management input into the work of the Field Service Engineers and there was some dispute as to who the relevant manager was at any given time. I found that Mr Leatherbarrow was the person in the UK managing the claimant and the other service engineers in the UK prior to November 2016.

10. In November 2016, the business and assets of the respondent were acquired by Piller Power Systems Inc, the US subsidiary of the Piller Group of which Piller UK is a wholly owned subsidiary.

11. Mr Lee became Director of the respondent in November 2016 having been Managing Director of Piller UK for a year prior to that time and having worked for the respondent between 2006 and 2015. There was a substantial amount of crossover of personnel in this case between the Piller Group of companies and the respondent, both at management and service engineer level. It is fair to say that all of the people giving evidence at the hearing, including the claimant, had knowledge and experience of both Piller UK and the respondent.

12. In November 2016, the Board of Directors of Piller UK decided that changes had to be made within the respondent's business to make it sustainable. The respondent's revenue was in decline and it was in a loss-making position. It was Mr Dyke's evidence that the company was six months away from total collapse. As part of a proposed restructure it was decided that the number of UK based Field Service Engineers had to be reduced from four to two.

13. Mr Lee instructed Mr Leatherbarrow to start the redundancy process which he did by letter dated 25 November 2016 (p70). That letter warned the claimant of a possible redundancy situation and invited him to a meeting on 1 December 2016. The meeting on 1 December was attended by the claimant, Mr Lee and Mr Muirhead. The claimant was informed of the decision to reduce the number of Field Service Engineers from four to two. He was told that the future proposal was to align the respondent's Field Service Engineers with those of Piller.

14. The 1 December meeting was followed up with a letter dated 2 December 2016 (p75) outlining the consultation process which would be undertaken over a two-week period to end on 15 December. No mention was made in that letter of the selection procedure to be adopted and applied.

15. On the 5 December 2016, the claimant asked to be provided with information on possible alternative roles, which was provided by Mr Muirhead by email dated 7 December 2016 (p79). There were two positions available within Piller UK but these were not held out by the respondent to be suitable alternative employment for the claimant. The claimant did not pursue the positions, his evidence being that they were not roles that he would consider given the nature of the work, the lower salaries and seniority levels that applied to the roles.

16. The claimant wrote to the respondent on 8 December 2016 (p84) asking to be provided with a copy of the selection criteria matrix. It was Mr Lee's evidence that a matrix had already been prepared prior to the claimant's letter of the 8 December. It had been prepared in consultation with HR Support which was being provided by the Langley Group. I accepted that this was the case. A copy of the matrix showing a list of criteria and potential scoring was provided to the claimant on 12 December 2016 (p88) which was a mere three days before the final consultation meeting. Accompanying the matrix was a one page document entitled Guidance for Assessors, a copy of which was also provided to the claimant.

17. Neither the matrix not the guidance document provided information as to what information the assessor would be equipped with to arrive at the scores, or what would justify a lower or higher score against each of the criteria. The claimant did not challenge the criteria, but in the absence of any additional information to assist with understanding how the criteria might be applied that was perhaps not surprising.

18. The assessment against the matrix was carried out by Mr Muirhead who had been asked to undertake the task by Mr Lee. A letter in the bundle indicated that Mr Muirhead was given this task on the 12 December 2016 and asked to complete it by close of business the next day. Mr Muirhead was provided with the Guidance for Assessors but no other written assistance was provided.

19. It was the respondent's evidence that there was no one else within the respondent or within the wider group, who was more suited and/or available to carry out the selection process. Mr Leatherbarrow, the service engineers' line manager was unavailable, having left the respondent shortly after commencing the redundancy process. He had left under a compromise agreement, the respondent concluding that he was not competent to act as a manager in the business. In the circumstances, the respondent did not wish to ask him to carry out or to provide input into the selection process. Previous line managers had also left or were remote, being located in the US, and had no day-to-day knowledge of how the Field Service Engineers operated.

20. Mr Muirhead had managed all four engineers prior to 2012 but had no experience of their work within the last four years prior to the redundancy. Mr Muirhead's evidence was that he had, on being asked by Mr Lee to conduct the assessment, been concerned about his ability to do it. He had raised his concerns with HR. He was told by HR to be as honest and objective as possible and if unsure on any particular criterion to: *"score all four individuals equally to avoid any detriment to them"*.

21. The selection criteria adopted by the respondent and contained in the matrix were as follows:

    - Achievement/targets,
    - relevant qualifications,
    - relevant experience,
    - job knowledge,
    - attendance record,
    - flexibility,
    - efficiency,
    - location to support the business.

    The matrix showed that the service engineers were to be scored from 1 to 10 against the criteria.

22. Mr Muirhead concluded that he had insufficient knowledge to score the four engineers against three of the criteria: achievements/targets; efficiency; and attendance and he therefore awarded equal scores (5) against those criteria to all candidates. Mr Muirhead acknowledged in cross examination at the

hearing that this would not necessarily produce a fair result if a difference in performance existed between the four engineers under these criteria.

23. Against the remaining categories Mr Muirhead said that he applied the criteria fairly and reasonably.

24. I accepted that Mr Muirhead was in a difficult position and I found no evidence that he approached the task with a particular outcome in mind and that was not put to him in cross examination. Nevertheless, the scoring method was at best vague and for the most part, in the absence of any objective data, was based on Mr Muirhead's subjective view alone, based on his experience dating from prior to 2012.

25. There was no documentation provided to Mr Muirhead to assist in the process. The respondent's evidence, which I accepted, was that the employees' personnel records had been lost. Nevertheless, there were other records which could potentially have been obtained and in the absence of personnel records and of input from a current or recent manager, these would have been particularly useful. For example, job descriptions, training records; timesheets; evidence from the individuals themselves; might have been obtained, all of which might have assisted Mr Muirhead in reaching objective conclusions. Mr Muirhead did not request any further information either from the respondent or from the engineers themselves.

26. In relation to the 'relevant qualifications' criterion, no document was produced to show what qualifications were or were not relevant to the Field Service Engineer role, neither was there any information produced to indicate what qualifications were or were not held by the individual engineers. Mr Muirhead based his assessment against this criterion on his own personal knowledge of the qualifications held, but when asked at the hearing, was not entirely sure what these were. In any event he had no up-to-date knowledge of recent qualifications acquired. Mr Muirhead scored the claimant, Mr Wilson and Mr Drinkwater, 5 against this criterion. He scored Mr Selwood, 7. The claimant had a high-grade City & Guilds qualification in electrical installation, which Mr Muirhead discounted as being not relevant.

27. Mr Selwood's evidence which I found to be credible and which was largely unchallenged by the respondent was that the claimant was of 'equal ability and experience' to him and that the claimant had received 'equally as much product training' as him and that they had both received more training than any other members of the department.

28. It was the claimant's and Mr Selwood's evidence that the claimant also had a higher level of in-house qualification than Mr Wilson. Mr Muirhead made no enquiries of the engineers themselves or of the respondent as to the engineers' qualifications. I accepted the claimant's and Mr Selwood's evidence that they had achieved an in-house qualification that Mr Wilson had not. I found that at appeal stage the respondent was given incorrect information about Mr Wilson's and the claimant's attendance on in-house courses by personnel in the US. The respondent acknowledged at the hearing that the company records were in a mess and unreliable.

29. Mr Muirhead assessed 'Relevant Experience' on the engineers' work experience both with Piller and with the respondent. Although the claimant had a similar level of service as Mr Selwood and Mr Wilson working for the respondent (5 – 6 years) he had had a gap of seven years between 2003 and 2010 when he did not have directly relevant experience with either company. He nevertheless had 17 years' experience working in the role for Piller and then for the respondent. Mr Wilson and Mr Selwood, both had 28 years unbroken experience working with UPS equipment within the two companies. Mr Drinkwater had less than 2 years relevant experience. Mr Muirhead scored Mr Selwood and Mr Wilson 8, the claimant 5 and Mr Drinkwater, 3 against this criterion.

30. In the light of the respondent's intention to align Piller and the respondent Company in respect of their Service Engineer provision the claimant conceded that the scoring against this criterion was possibly justified. However, it is difficult to understand why the claimant, with 17 years' experience as a Field Service Engineer working with UPS equipment and four years' experience as a lead engineer, would be scored three less than Mr Selwood and Mr Wilson, and only 2 more than someone with less than 2 years' experience in the role. The scoring differential was not adequately explained. In his evidence to the tribunal, which I found to have been credible, Mr Selwood said that all technical issues were reported to the claimant as lead engineer; if Mr Selwood was unable to sort out technical issues he would call the claimant who was the only one with the same amount of knowledge as Mr Selwood. It was clear that for Mr Muirhead the 'experience' criterion was in essence the same as length of service, there being no material difference between Mr Selwood's, Mr Wilson's and the claimant's recent experience in the role with the respondent.

31. 'Job knowledge' was scored by Mr Muirhead in the same way as relevant experience, based on Mr Wilson's and Mr Selwood's years of unbroken experience of working with UPS equipment in Piller and APS. This in fact meant that both of those criteria were judged the same, in essence on length of service. The problem was a lack of a clear basis for the scoring process. How was job knowledge to be assessed? The claimant's apparently broad knowledge which led to his promotion as a Lead Field Service Engineer was not considered. Mr Muirhead's knowledge of how the engineers worked was four years out of date. He had not been employed throughout the time that the claimant had been fulfilling a role as Supervisor and Lead Service Engineer. Mr Muirhead scored the claimant 5 against this criterion. He scored Mr Selwood and Mr Wilson 8, and Mr Drinkwater, 3. Once again the explanation for the scoring differential was unsatisfactory.

32. The assessment of 'flexibility' was based on the subjective view of Mr Muirhead; on his experience of working with the engineers which had ended four years previously. There was no real attempt to define flexibility or to justify the different scores awarded with any sense of objectivity. It was the claimant's and Mr Selwood's evidence that Mr Wilson was reluctant to and did not undertake work overseas. Mr Muirhead did not dispute this but justified Mr Wilson's higher score against this criterion on his experience of Mr Wilson's flexibility in attending work at short notice in the UK. The claimant's evidence, which was supported by Mr Selwood, was that in addition to his UK work, he undertook work at short notice overseas on a frequent basis, which

involved sometimes lengthy stays away from home and working long hours. Mr Muirhead's evidence was that there would be less call for overseas work going forward but his explanation for scoring the claimant lower than Mr Wilson and Mr Drinkwater against this criterion was unsatisfactory. Mr Muirhead scored Mr Selwood and Mr Drinkwater, 7 and Mr Wilson and the claimant, 6 against this criterion.

33. The 'location' of service engineers was assessed based on where the four employees lived and how long it would take each to reach UK Service sites. Based on that assessment the claimant scored lowest from amongst the four engineers. Mr Wilson was the only engineer located in the north of England and the other three were located either in the Midlands or south of England. The claimant believed that the decision made by Mr Muirhead was based on the respondent's wish to retain one engineer based in the north and one engineer based in the south. He contended that other ways of analysing the data would have led to a different and fairer result. Mr Muirhead scored the claimant 4 against this criterion. He scored Mr Selwood 5, Mr Drinkwater 6 and Mr Wilson 7.

34. The overall scoring resulted in Mr Selwood achieving a score of 50, Mr Wilson a score of 49, the claimant a score of 40 and Mr Drinkwater a score of 39. As a result, the claimant and Mr Drinkwater were identified as the two engineers selected for redundancy.

35. The claimant was informed of the fact that he was one of the two Field Service Engineers selected for redundancy on the basis of Mr Muirhead's scoring at a meeting on 15 December 2016. He was not, at that stage, provided with his scores against the criteria although he was told that Mr Muirhead had undertaken the assessment.

36. The claimant appealed the outcome on 20 December 2016 and an appeal meeting took place on 11 January conducted by Mr Dyke. The claimant was accompanied at the meeting by his union representative. Prior to the meeting the claimant was provided with his completed score sheet. At the appeal, the claimant queried the appropriateness of Mr Muirhead conducting the scoring, in the light of his lack of recent knowledge of the work of the Field Service Engineers. He also queried the effective removal of three of the criteria from the matrix and he queried his relative scoring particularly as against Mr Wilson who he believed should have scored lower than him on most of the criteria, including efficiency, which had been removed as a criterion and/or against which they had both been scored equally.

37. Mr Dyke agreed to look into the claimant's concerns and to obtain Mr Muirhead's reasons for the scores awarded as well as a training record for the four individuals in respect of in-house training from personnel in the USA.

38. Mr Muirhead provided his explanation for the scoring to Mr Dyke by email dated 13 January 2017 (119). It was clear from this document that Mr Muirhead had not identified with any particularity the scope of each criterion or the factors that would merit a higher or lower score. He stated that he had no knowledge of specific certified UPS qualifications or courses that any of the engineers had attended; that the 'Job Knowledge' category was marked based on time served as a UPS engineer, the same as for 'Relevant

Experience'; that his assessment of 'Flexibility' was based solely on his own experience as their manager (which had ended four years' prior the assessment.

39. Mr Dyke's query to US personnel about in-house training attended was answered by email dated 13 January 2017. I accepted that Mr Dyke had no reason to believe at the time that the information provided was incorrect but I accepted the claimant's and Mr Selwood's evidence that it was incorrect based on their own knowledge of when courses had been attended by the four engineers.

40. In the light of the further information provided and in the light of his own considerations Mr Dyke increased the claimant's score under the job knowledge criterion to 8 but made no change to the other scores, concluding that the scores were appropriate based on the information he had been given by Mr Muirhead. The claimant's overall score was increase to 43 but that increase did not affect the outcome of the claimant being one of the two lowest scored employees. As a result, the claimant's redundancy was confirmed and his employment ended on 26 January 2017.

Conclusions

41. In reaching my conclusions I considered all the evidence that I heard and the documents to which I was referred and which I considered relevant. I also had regard to the submissions from the two representatives, which were very helpful in rehearsing the legal basis for determining the fairness or otherwise of a redundancy dismissal.

42. The first principles of a fair redundancy dismissal and the factors to be considered when looking at the reasonableness or otherwise of the decision to dismiss under s98(4) Employment Rights Act 1996 were identified in the case of ***Williams v Compair Maxim Ltd [1982] IRLR 83***, which identified the following factors:

- *whether the selection criteria were objectively chosen and fairly applied*
- *Whether employees were warned and consulted about the redundancy*
- *Whether if there was a union, the union's view was sought, and*
- *Whether any alternative work was available*

43. The approach the Tribunal should adopt when considering the fairness of a redundancy was succinctly set out by Lord Bridge in ***Polkey v AE Dayton Services Ltd [1988] AC344***:

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

44. In relation to the redundancy process, case law suggests that provided the steps identified in Polkey are taken the Tribunal will not interfere with the conclusion reached by the employer, in the absence of overt unfairness in the selection criteria adopted or in the application of that criteria in the particular process, per Waite LJ in ***British Aerospace v Green [1995] IRLR 437***:

    "…in general the employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt sign of conduct which mars its fairness will have done all that the law requires of him."

45. The points of challenge made by the claimant to the fairness of the respondent's procedure were on the failure to consult over the selection criteria and scores; on the meaning of the criteria for selection; and on the fairness of the system adopted for selection.

46. The respondent urged me to consider the context of the redundancy exercise. The respondent is a small Company; it was in a difficult financial position and it needed to act with some urgency. There was a lack of appropriate personnel to carry out the assessment. Mr Muirhead was the only person available. I accepted those points as to the context of the redundancy process and had that in mind when considering the fairness of the process overall.

47. However, I also took into account the fact that the respondent did have access to HR support from the Langley Group, a substantial and well-resourced company; that it had senior managers and Directors of associated Companies engaged in the redundancy process; and, although there was a degree of urgency in relation to implementation of the redundancy due to financial pressures, that is a common factor in any redundancy situation and by no means unique to the respondent.

48. I accepted that there appeared to be no-one other than Mr Muirhead to carry out the scoring process. However, I did not accept that there was no evidence aside from Mr Muirhead's own knowledge available to assist in the process. No consideration was given by the respondent as to the availability of other information which might have been obtained to ensure that the assessment was not based solely on Mr Muirhead's subjective view from his own experience of working with the engineers which was four years out of date.

49. Taking the points of challenge made by the claimant in turn, I first considered the failure to consult on the selection criteria. I did not accept that there was a failure to consult on the selection matrix. The matrix was provided to the claimant during the consultation process. Although the time allowed for the process was short and the matrix was not supplied until the last week of the consultation process, the claimant was seeking advice from the union and could have asked Mr Muirhead or Mr Lee for further information as to how the scoring would be applied, which he did not do. I concluded that the respondent was not obliged as part of a fair process to consult individual employees on their scores unless they made a request that it do so. When the claimant appealed the outcome of the selection process, his scores were revealed to him, although not those of the other engineers. At appeal stage the claimant was able to comment on and challenge the scoring as it had

applied to him. I concluded that in the circumstances the respondent's actions in relation to consultation were reasonable.

50. Turning to the claimant's challenge on the meaning of the criteria I accepted the claimant's submission that the majority of the criteria were vague and unclear and remained unclear even at appeal stage. This goes to the basic principle as to the fairness of the selection criteria. Whilst the criteria in themselves reflected reasonable factors to be assessed, without additional clarification as to their scope and what would be taken into account they lacked specificity.

51. I accepted that 'Relevant Qualifications' is an appropriate and reasonable criterion for selection for a specialist role. However, unless it is identified which qualifications are deemed to be relevant and which not relevant, a fair assessment cannot be made. This was not done. No consideration was given as to whether there was an argument for weighting the scoring so that essential qualifications would attract a higher score whereas others that were still relevant but less critical to the role would still be scored but weighted less.

52. 'Relevant Experience' again needed to be defined. Was it solely experience as an engineer with Piller and with the respondent, measured simply by length of time over which the role of Field Service Engineer had been undertaken? If so, then 'Job Knowledge' required some different basis of assessment, otherwise an element of double counting is introduced. If a different basis of assessment was to be used then what specifically was being considered under 'Job Knowledge'? Were there some key elements and some less significant elements? Although Mr Dyke adjusted the claimant's score against this criterion at appeal stage, it was still not clear how 'Job Knowledge' was being measured, so there was no explanation of the scoring differential. It appeared that the claimant's knowledge or experience as Lead Field Service Engineer did not form part of the assessment against any criteria. Similarly, there was no explanation given as to how 'Flexibility' was to be assessed.

53. The retention in the matrix of three criteria on which Mr Muirhead was unable to make an assessment raised questions about the reasonableness of the matrix as a whole. The respondent decided to simply leave those criteria in the matrix but to score each individual the same against them, which did not necessarily achieve a fair outcome. If they were significant components, then consideration should have been given to replacing them with something that was measurable, or of finding a way to measure them.

54. It was not reasonable or sufficient for the respondent to simply make a list of factors and not to be able to explain what was meant in respect of each of those factors, and to identify how individuals might be assessed against them. Without that clarity, all of the criteria were in effect subjective criteria based on what Mr Muirhead considered was relevant. This made challenge extremely difficult. For example, in relation to 'Flexibility', the claimant's evidence was that he was very flexible, prepared to go abroad at short notice and work long and unsocial hours. However, what was meant by Flexibility and what would attract high or low scores was not defined, so the claimant's challenge was met by Mr Muirhead's explanation that he could only base his assessment on his own experience as a manager, considering the engineers' approach to the

job, their willingness to work at short notice and their willingness to work at weekends and outside of normal hours. These were all attributes demonstrated by the claimant but Mr Muirhead said that working abroad would no longer be necessary and so the claimant's demonstrated willingness to do so was not of any value and did not indicate flexibility.

55. I concluded that although the criteria as a whole were not obviously unfair, there was a complete lack of definition as to what each criterion comprised. This lack of definition meant that the scope of each criterion was left to the judgment of Mr Muirhead, which inevitably allowed a large element of subjectivity to be introduced into the process. Some subjectivity in a redundancy selection process is inevitable and will not be fatal to the fairness of it, and if subjectivity in the criteria can be balanced by some objectivity in the assessment process, this may achieve fairness overall.

56. Turning to the third aspect of the claimant's challenge which was on the application of the criteria, the claimant submitted that the application of the criteria was unfair. The respondent referred to a line of authorities that indicate that provided the criteria adopted are fair and the process is fairly administered it is not open to the Tribunal to embark on a reassessment exercise.

57. Case law suggests that respondents are given a relatively free reign to adopt criteria appropriate to their business and to apply those criteria to their employees provided there is no obvious unfairness. I accept that there is a measure of subjectivity allowed both within the criteria themselves and in the application of those criteria. However, I concluded that the combination of the subjectivity of the selection criteria and the subjectivity of the assessment process led to an unfair process when considered overall.

58. I accepted the constraints that the respondent was under and that Mr Muirhead was the only available person to undertake the process. However, I concluded that there were ways in which the assessment could reasonably have been made more objective and robust. Firstly, there needed to be greater clarity as to the meaning of the criteria, secondly there needed to be specificity about what would be considered against those criteria and some logic in the scoring differentials that pertained; thirdly it would have been appropriate to identify whether any documentation or independent source of information existed that would provide recent factual data to counterbalance Mr Muirhead's subjective view.

59. In this particular exercise, where there was a lack of objective evidence in relation to specific criterion, the gaps in Mr Muirhead's knowledge could and should have been augmented where possible during the consultation process. The individuals could have been asked to supply CVs to indicate qualifications held; they could have been asked to provide a list of types of work carried out over the past 1-2 years; and they could have been asked whether there were any restrictions on their flexibility, just by way of example. To this extent and in the particular circumstances of this case, I believe that consultation prior to and to inform the scoring would have been fair and reasonable.

60. I concluded that it was not within the range of reasonable responses for the respondent to adopt criteria which it failed to scope out sufficiently to provide an objective basis for assessment; and in addition to rely solely on Mr Muirhead's subjective opinions based on his experience which was four years out of date. More could and should have been done to consider what other documentation could have been obtained to assist in the assessment process and steps taken to obtain it, for example, job descriptions, CVs, timesheets, appraisals, information from the employees.

61. Mr Muirhead would have benefited from assistance from another individual from HR or from management who could have worked with him to identify the scope of the criteria, the evidence that would fall to be considered based on that scope and how the scores would be applied. Some subjectivity in the process is inevitable, however, the assessment in this instance was almost entirely subjective save in respect of the 'Location' criterion.

62. I understood the claimant's challenge on the 'Location' scoring but I concluded that the respondent was not unreasonable in its conclusion on 'Location' nor in the manner in which it reached that conclusion.

63. I concluded, in summary that the majority of the criteria adopted, although they were not obviously unfair, lacked specificity as to how they would be applied and scored. Mr Muirhead's explanations as to his methodology were vague for the most part. I concluded that the assessment process adopted was unfair being reliant on Mr Muirhead's personal knowledge and feelings about the team both of which were four years out of date. The respondent could and should have addressed that deficiency by other means, obtaining documentation or further information where possible, assisting with clarifying the requirements for the role, the parameters to be applied and providing an HR professional to provide assistance by way of feedback and support in the introduction of some objectivity.

64. I did not find that the defects in the process were corrected on appeal. The training information provided was not checked back with the individuals and in the light of the respondent's poor record keeping were inaccurate. Mr Dyke did not address the lack of clarity apparent in the remaining criteria and only one change was made to the scoring, but the basis of the scoring remained unclear.

65. In the circumstances, it was not possible to say that the criteria adopted were fair or that the process was fairly administered. I concluded for these reasons that dismissal of the claimant for redundancy was unfair. I reminded myself that it was not for me to stand in the shoes of the employer and decide what I would have done, but to consider whether the decision to dismiss was within the range of responses of a reasonable employer. I concluded that it was not and the claimant's claim of unfair dismissal succeeds.

66. Finally, I considered the question as to whether a fair procedure would have made a difference and if so to what extent, applying the principle established in ***Polkey v A E Dayton Services Ltd 1988 ICR142***. Based on the evidence and my conclusions I assessed the probability of the claimant having been fairly selected for redundancy as 50%, which will result in a 50% reduction in any award made. My reasons for reaching that conclusion are set out below.

67. The claimant did not challenge Mr Selwood's position as the person who achieved the highest score in the redundancy selection process nor that of Mr Drinkwater who scored least. He asserted that had a fair assessment been carried out, he should have scored higher than Mr Wilson. It was submitted on behalf of the claimant that no deduction should be made under Polkey, it being impossible to predict what the outcome would have been had a fair procedure been followed. However, the claimant did not challenge that there was a redundancy situation, nor that the requirement for Field Service Engineers had reduced from four to two.

68. I was satisfied on the evidence that Mr Selwood's employment was secured, and that Mr Drinkwater was most at risk. The two individuals between whom the selection was likely to be close were Mr Wilson and the claimant. I concluded that there was therefore at least a 50% chance that the claimant would have scored higher than Mr Wilson and therefore retained his employment, had a fair process been carried out.

69. The claimant's evidence in relation to Mr Wilson and his challenge to Mr Wilson's scoring supports my conclusion that a 50% reduction is appropriate. I did not consider that it was possible to say that the claimant had a greater chance of retaining his employment than Mr Wilson nor that he was less likely than him to do so on the basis of the evidence put forward. I also considered the fact that two of criteria were more objectively and reasonably assessed by the respondent and were decided in Mr Wilson's favour, those related to 'Location' and 'Relevant Experience' (although I had some concerns about the assessment of 'Relevant Experience' as indicated in my findings of fact).

70. The remaining six criteria may have favoured the claimant, had a reasonable and fair assessment been carried out based on some objective information. I concluded that there was evidence that the claimant might have scored higher than Mr Wilson against the Flexibility criterion (the claimant's willingness to undertake work abroad) as well as against the Job Knowledge (Mr Selwood's evidence and the claimant's role as Lead Engineer) and Relevant Qualifications Criteria (the claimant's and Mr Selwood's evidence as to the additional in-house qualification).

71. There was limited evidence as to what the outcome would have been had an assessment been carried out against the three criteria which were effectively removed from the process, but it is possible that had these criteria been properly scoped and time sheets, appraisals etc been consulted to inform the scoring process, then the claimant may have scored higher. I recognise that this "*is inevitably an exercise about which there can be no absolute and scientific certainty. It is a predictive exercise. Evidence is needed to inform the prediction. It is important that a Tribunal should spell out, as best it can, what factors it takes into account in determining why it adopts a particular percentage. ……. It is, and has to be a process of assessment.*" Per Langstaff J in ***Contract Bottling v Cave & McNaughton [2014] UKEAT 0100.***

72. My assessment of the evidence as set out above led me to conclude that a 50% reduction under Polkey was appropriate.

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Employment Judge Mulvaney

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Date 14 December 2017

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE