EMPLOYMENT TRIBUNALS

Claimant: Mr G Pollard

Respondent: Essity UK Limited

Heard at: Manchester **On:** 27 and 28 March 2018

Before: Employment Judge Feeney

REPRESENTATION:

Claimant: In person
Respondent: Mr J Boyd, Counsel

JUDGMENT

The judgment of the Tribunal is that:

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

2. The claimant was employed from 16 April 2009.

REASONS

1. The claimant by a claim form dated 1 November 2017 brought a claim for unfair dismissal and failure to pay holiday pay following his dismissal by the respondent on 30 June 2017 for redundancy.

2. The issues in this case were:

<u>Unfair Dismissal</u>

(1) What was the principal reason for the dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? It was agreed that the claimant was dismissed for redundancy.

(2) If so, was the dismissal fair or unfair in accordance with section 98(4) of the Employment Rights Act 1996, and in particular did the respondent in all respects act within the band of reasonable responses test? In particular the issues raised in this case were:

(a) Was the dismissal procedurally fair in respect of the scoring of the claimant? In this case –

(i) Did one of the scorers fail to provide sufficient detail of the reasons for their scoring?

(ii) Was the respondent acting outside the band when they refused to provide the claimant with the scores from the individual scorers and only provided him with an average?

(b) In respect of suitable alternative employment, was it outside the band –

(i) For the respondent to utilise only four of the redundancy criteria in respect of the appointments to the utility operative role; and

(ii) Did the respondent fail to properly consider the claimant for the store coordinator role?

Remedy

(3) If the claimant was unfairly dismissed and the remedy is compensation:

(a) If the dismissal was procedurally unfair, what adjustment if any should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed, or would the claimant have been dismissed in time anyway? (See **Polkey v A E Dayton Services Limited [1987]** House of Lords and **Software 2000 Limited v Andrews [2007]**)

(b) What adjustment should be made for the claimant's receipt of a redundancy and pilon payment.

Length of Service

(4) From what date was the claimant employed, bearing in mind –

(a) the gaps in his employment; and

(b) that the burden of proof is on the respondent.

Claimant's Submissions

3. The claimant submitted that the dismissal was procedurally unfair because the respondent did not provide him with the scores produced by the three individual

scorers: he was only provided with an average score, and that one of the individual scorers failed to provide comments regarding why he had scored the claimant as he had in respect of a number of the criteria. Further, that when two jobs of utility operatives had arisen the respondent had adopted different criteria, using only four of the original eleven in the redundancy matrix to decide who to appoint to those two posts, and individuals were appointed who had scored less than the claimant overall in the redundancy exercise. In respect of the store person role, the claimant had been considering this but the respondent had advised him that someone had been selected and thereby discouraged him from applying for that role which was suitable alternative employment.

4. In respect of **Polkey**, if the claimant had been marked properly it was highly likely his job would have been saved as he only required four points to match the lowest scorer whose job was saved.

Respondent's Submissions

5. The respondent submitted that they had sound industrial relations reasons for not providing individual scores as it was not conducive to future working relationships for individual employees to see the negative comments that would necessarily be made in order to assess the employee, and that it was fair to give the average scores of the three scorers. It was accepted that comments had not been made by one of the scorers in some of the boxes but not all, and the respondent submitted that this did not make the overall process unfair. The respondent submitted their process was fair and included the necessary checks and balances; that the claimant appealed his score and a proper procedure was followed for the appeal.

6. In respect of the alternative jobs, the respondent stated it was within the band of reasonable responses to adopt just four essential criteria for the utility operatives. In respect of the store coordinator role the respondent's evidence was that this job was open to the claimant and he did not pursue the option.

7. In respect of **Polkey**, the respondent will say it should be 100% **Polkey** as any alleged procedural defects would have made no difference: the claimant had submitted a cogent appeal and obtaining the information from the individual scorers would have made no difference to the cogency of his appeal which had been properly rejected.

Witness and Bundle

8. The Tribunal heard from the claimant himself and for the respondent form Mrs Katie Hilton, HR Manager; from Mr Mark Jackson, Site Operation Manager; and from Mr John Kirwin, Regional Manager.

9. There was an agreed bundle to which a number of additional pages were added.

Findings of Fact

10. The respondent is a paper making facility making paper for the hygiene industry.

11. The claimant began working for the respondent in May 2008 as an Assistant Winderman on a temporary contract to 31 December. In September 2008 he was given notice of termination from 12 October. He was then offered a further position up to 31 January 2009 but was given notice to end that contract from 3 April 2009. After 3 April he received a phone call from a senior manager asking whether he would take on a Basement Utility role on PM3 starting on 16 April 2009 for two months. He was then given a number of extensions but told his contract would end on 8 January 2010. Again after 8 January 2010 he was told that he was required to start again on 25 January 2010 PM2 Basement Utility role if he wished to do so. Again he began employment with the respondent. That employment ended on 14 October 2010, although by this stage on 1 October he had been offered a new contract to start back on 29 October 2010 as a PM3 Assistant Dryerman.

12. The claimant submitted that he was paid rest days owed between the gap in June and the gap in October, and that accordingly these two gaps should not be considered as breaks in continuity of employment. There was no documentation regarding this but this aspect of the claimant's claim (specifically the payment not the continuity of employment issue) had been settled before the hearing.

13. In the summer of 2011 the claimant was again threatened with termination but the respondent advised that they could offer him a post starting on 2 October. The claimant began a permanent role on 2 September 2012. In October 2013 he became a Dryerman on PM2 and stayed in this role until his redundancy at the end of June 2017.

14. In early 2017 the company decided they had to make redundancies as the hygiene industry was changing and the machine PM2 needed to be closed and PM1 which had been mothballed at the respondent's factory in Skelmersdale (called Tawd Mill) would be, as it were, "brought out of retirement" as this produced paper of the quality which was now required. All the individuals in the pool for selection were advised they could obtain roles at Tawd Mill and visits were set up in order that everyone at Stubbins Mill could go and have a look at the conditions in Tawd Mill and consider the travelling time. The claimant made the decision that from north Bury where he lived to Skelmersdale was an unreasonable amount of travelling time as it would be at least an hour each way. The respondent did not query this.

15. The respondent had six consultation meetings with the unions and the procedure to be used for this redundancy was agreed. The selection criteria were adopted as had been on previous redundancy exercises and the respondent agreed to a further change in that they would have three scorers rather than two. All the employees on PM2 and PM3 would be in the selection pools. At the early stage there were 41 employees at risk but this changed with the opportunity to move to Skelmersdale and the agreement of the company to invite applications for voluntary redundancy. It is apparent that this reduced the pool to 33, and a joint statement was made on 31 January 2017 about the process. The claimant was in the union and the expectation was that the union would feedback information albeit the company also held general consultation meetings.

16. Site briefings took place beginning on 15 February 2017, explaining the opportunities at Tawd Mill and also that the respondent's Chesterfield site was being sold. From the pool that the claimant was in the respondent was only intending to retain ten employees. It should also be noted there were vacancies at the

respondent's Trafford Park facility and some people decided to move there, but again for the claimant it was a long way to travel and the respondent does not question this.

17. On 1 March 2017 a further group consultation meeting was held, and again on 8 March 2017. A final group consultation meeting was held on 15 March 2017 and a joint statement issued afterwards. The scorers for the claimant's group were Keith Jones (RST Leader), Mick Birtwistle (Process Leader), and Mark Jackson (Site Operations Manager). The claimant would later be concerned that these were not his direct line managers but the respondent said line managers were not appropriate because:

(1) they were also subject to the redundancy process; and

(2) scorers needed to have a comparative overview; line managers only knew their own team.

18. The claimant also said that he believed Mr Birtwistle knew him the least; however whether this was true or not Mr Birtwistle's scores were not uniformly low for the claimant and therefore there was no correlation between his apparent knowledge and his assessment of the claimant.

19. The selection criteria were:

- Responsibility
- Respect
- Excellence
- Drive results
- Teamworking
- Flexibility
- Application of skills
- Quality of work
- Health and safety
- Disciplinary record
- Absence record

20. Of those eleven criteria, drive results was weighted as a 4, application of skill as a 4, and all the others were a 3 apart from teamworking which was a 2, quality of work which was a 2, health and safety was a 2 and disciplinary record and absence record were a 1, and therefore the scores would be multiplied by that factor.

21. The criteria had to be evaluated in respect of four "rankings" – always (8 marks), usually (5 marks), sometimes (3 marks) and never (1 mark). There was a

final column for the individual to put comments in with the intention that these comments would support their scores. On top of that there were two auditors i.e. checking the scoring for consistency and any anomalies. Mrs Hilton was one of those and she explained that where the scores of the individual scorers differed by a factor of two, so for example where somebody got a 3 and an 8 for the same criterion, those scores would be questioned. Sometimes the scorers would stand by the scores and sometimes they would be changed.

22. Mrs Hilton advised that in respect of the claimant's scores for “drive results” where Mr Jones had given the claimant 1 and Mr Birtwistle had given the claimant 5, they were asked to review the scores and they both came back with a score of 3, but this did not change his average. The claimant’s scores were 9 for responsibility; 21 for respect; 11 for excellence; 12 for drive results; 9 for teamworking; 13 for flexibility; 9 for application of skills; 14 for quality of work; 16 for health and safety; 8 for disciplinary record; and 8 for absence record, giving a total of 130. There were two mistakes on the claimant’s scores as the average score for flexibility should have been 16 not 13, and quality of work should have been 12 not 14. Therefore his total score was 131.

23. Individual one-to-ones were then arranged and one was held with the claimant on 13 April. Mark Jackson and Mrs Hilton being present with the claimant's representative, Eddie Baines. A letter of 13 April was given to the claimant. This letter set out the rationale for the redundancy and the procedure they had followed. It advised him that he had been provisionally selected for redundancy but emphasised that, “this does not mean redundancy is a foregone conclusion as there may be alternative options including alternative employment” and they provided details of vacancies. They also went into detail as regarding the option to transfer to Tawd Mill.

24. The claimant's redundancy calculation was set out and three dates had been set aside for Unite officials to advise people on benefits, debt management, career CV writing, self-employment information and funding information for start ups. The letter also set out the criteria used for the redundancy selection and provided the claimant with a scoring summary sheet setting out the average marks he was awarded under each criterion but not each score from each scorer. It also stated that they would meet with him again before his provisional leave date. The letter also advised that the claimant could appeal against his scoring by 21 April, which he did.

25. It should be noted at this point that the claimant was 21st in the list of staff with the first ten only being saved. However, this changed as three people left with voluntary redundancy, three people in the initially “saved” group took other jobs, and two people took other jobs in the initial “non-saved” group. The non-saved group’s top score was138, and the lowest mark in the original saved group was 140. As a result of these changes the claimant’s position changed from 21st to 12th. The position also changed because number 17 was offered a post when a further member of the saved group took voluntary redundancy after the scoring process had been completed. It was noted that the late voluntary redundancy vacancy could have been offered to numbers 17 and 18 as they both had scored 138. Mrs Hilton advised that number 18 appeared to be keen to leave the company having lost morale during the redundancy process. No further information was given regarding the choice between 17 and 18.

26. Mr Jackson rang number 17 to offer him the job on 26th April and this was before the claimant's appeal. The claimant was unhappy that this was done before his appeal, as had the appeal resulted in his scoring increasing to 138 that job would then have been available to himself as well as number 17, albeit the argument for not speaking to number 18 was weak. The respondent stated that it was not unfair to offer it to number 17 before the claimant's appeal as it was made abundantly clear that this was subject to confirmation when the outcome of the appeals was known. Mr Jackson said in ringing number 17 he had definitely told him this.

27. Before the claimant's appeal it became apparent that there would be two vacancies as utility operatives on PM3. The five utility role positions had been confirmed as redundant but the termination date was not until May 2018 as their redundancies were being occasioned not just by the removal of PM2 but by automation of the roles they undertook. Two of the five asked if they could leave early, one taking voluntary redundancy. This left these two posts which the claimant expressed an interest in, along with two others in the "chosen for redundancy" group, Mick Commons and Mark Fleming.

28. Mrs Hilton decided that for the appointment to this role four essential criteria should be used, as it was not a redundancy process but a situation where the company needed to have the most effective individuals appointed for this particular role. Mr Kirwin agreed with her proposal and it was "run past" David Aspinall, the trade union official, who agreed. The four criteria were:

- Drives results
- Teamworking
- Application of skill
- Quality of work

29. Mrs Hilton confirmed that she would have had no idea at the time she decided on those four essential criteria that they would result in the claimant having the lowest points. I accept her evidence on this as it is inherently improbable she would have remembered individual scores. Although she was involved in auditing and producing the page in the bundle which recorded everybody's scores in the claimant's group, this was far too much information for her to have retained, particularly as there were four other redundancy exercises going on in different groups at the same time. Of course she would have been able to check the scores and work backwards but there was nothing in her demeanour or evidence to suggest that she had any reason to deliberately exclude criteria in order to manipulate the situation to make sure that the claimant did not obtain one of these two jobs. On adopting these four criteria Mr Commons scored 48, Mr Fleming scored 55 and the claimant scored 47, so it was extremely close between Mr Commons and the claimant. Mr Commons and Mr Fleming were therefore offered these roles.

30. The appeal then took place with Mr Kirwin. The claimant had set out his appeal in great detail (pages 198-201). One thing in particular that he mentioned was a suggestion he had made in order to assist the company in saving paraffin, which was one of their big objectives. Mr Jackson was cross examined about this and he said that it was a constant issue to reduce paraffin use and many, many people

came up with ideas, some worked and some did not, and although he was not consciously aware that the claimant had come up with this idea he would not see that as anything, in effect, exceptional.

31. At the appeal meeting on 12 May 2017 the claimant stated that he believed he should have scored as follows:

- Responsibility – 5
- Respect – 8 (from all three scorers)
- Excellence – he thought 5, 3, 3 was low
- Drives results – believes he should have scored a 5
- Teamworking – he believed the score should have been higher
- Flexibility – he believed he should have scored an 8
- Application of skill – believes he should have scored 5 (it was questioned why one of the scorers had given him 1 for this criterion)
- Quality of work – the claimant says he should have received 8 from all the scorers

32. It should be noted that the claimant had worked out his three separate scores from the average results he had been given.

33. The claimant raised some specific points. He said he had not been advised teamworking was a criterion and at Tribunal it became clear this could only have arisen because the union did not advise the workforce fully of the criteria as it was the same criteria that had been used in 2011.

34. In respect of the claimant's issue that the scoring had been undertaken by people who did not necessarily know him well, and that they may know other people better which would result in favouritism, Mr Kirwin said this had been catered for by having two people auditing the scores.

35. In respect of not being provided with an explanation or rationale for his scores, Mr Kirwin said this was what the appeal was for.

36. In respect of providing what score was required in order to maintain a position with the company or being advised where he fitted in the selection process, Mr Kirwin said he confirmed it was not appropriate to give ranking information.

37. The claimant said he was extremely upset and disappointed by the scores "and cannot understand why team leader or any senior manager would not bring any concerns around the company values to my attention at an earlier point". Mr Kirwin confirmed there were no concerns with the claimant's performance. A scoring criteria needed to be applied to support the restructure and 34 people were scored for ten positions. Mr Kirwin said he would liaise with the three scorers and arrange a feedback meeting.

38. Mr Kirwin did speak to all three scorers. Mr Jackson was the only one to give evidence to the Tribunal. Mr Jackson did not remember seeing the claimant's detailed appeal letter and Mr Kirwin said it was on the table during their meeting and he went through each point with him. I accept his evidence. Mr Jackson was content after this discussion with the scores he had made. Similarly with Mr Birtwistle who Mr Kirwin met face to face. Mr Kirwin was unable to meet with Keith Jones face to face who had been, in effect, the harshest scorer in some respects, and he skyped him. He also actually provided him with a letter, and on 25 May Mr Jones responded by email headed "Assessment for Graeme Pollard". This said:

> "I have had a look at Graeme Pollard's scoring and those who sit in Band 3 above and below his rank position. I have come up with the following statement that I wish to be my final decision.
>
> 'I have been asked to review my scoring awarded to Graeme during the recent assessment exercise. I have been mindful to consider each person in comparison and not in isolation with their peer group. The process may appear harsh for persons reflecting their own performance isolated in their own team., I have read through Graeme's well written self perceived feedback. However in contrast and fairness to the scores I have awarded I find nothing I need to change'.
>
> Please use this email or part of as feedback for Graeme and I wish him luck in his future career."

39. The feedback was provided to the claimant on 6 June, the outcome being that the scores would not be changed following the feedback from the three scorers. The note stated that:

> "It was highlighted that if GP's score was to be increased to the level that GP felt he should have received then the scores of the other 33 employees in the scoring group would also need to be reviewed. There would have been no changes to the ranking, therefore the outcome would have remained the same."

40. Mr Kirwin in evidence explained that this did not imply that everybody else's scores would be similarly increased to the claimant's, as this was not logical; some people's might, some people's might not. It was a response to a point the claimant made in the meeting that the company had not looked at the jobs he had undertaken in the past which should have contributed to a better score for flexibility at least, and that he could understand why the claimant understood the minutes differently. However, the minutes and there very limited and there was not much detail and this was the reason for that comment. The claimant, when he was cross examined, could not recall whether that was the context in which this comment occurred. I accept Mr Kirwin's evidence. Mr Kirwin, however, did increase Mr Jones' score by 3 in respect of application of skill as he felt a 1 from Mr Jones was too low. This gave an average score of 12 for this and an overall score of 134 which did not change the claimant's situation, meaning that the claimant was still selected for redundancy. At the meeting Mr Kirwin also advised the claimant that the store coordinator role was still free.

41. The evidence regarding what happened to the store coordinator role was not clear. Mrs Hilton stated that she met with the claimant on 7 June to go through the

selection criteria for the utility role and to discuss the store coordinator role. She explained the reasoning behind the selection of Mr Commons and Mr Fleming. She gave evidence that the claimant did indeed say he would consider the store coordinator role but she said she never heard from him about this. The claimant's evidence was not clear. He said that he knew he had only had one meeting with Mrs Hilton but that he had shadowed the store coordinator role for an hour and felt like it was a job he could do even though he did not particularly wish to do it. However, he had had a further conversation he thought with Mrs Hilton where she had told him that actually the firm the role was being outsourced to (Iesa) had selected a potential candidate giving the impression that that opportunity was then closed off. In cross examination Mrs Hilton agreed that she knew the selection process had started but that it had not been finalised, and she believed on 7 June she advised the claimant the role was still open. However, it is not clear how or when this happened as he could not recall a further meeting. From the claimant's witness statement this conversation appeared to arise on 7 June. It was not possible to further obtain any clarity regarding what had happened. I therefore find that there was a discussion about the recruitment process for that role and a misunderstanding arose as Mrs Hilton believed that she had communicated the position was still open and the claimant was to come to her, whereas the claimant believed she had stated that a candidate had been selected and had therefore put him off applying for the role.

42. The claimant indicated in his witness statement that his rights would only be protected for two years if he took the store coordinator role, and then he would go down to Iesa's basic rates of pay and he would lose the enhanced redundancy package he had with the respondent. Therefore, it was not an attractive prospect. The claimant in questioning at the Tribunal said that this was a retrospective view and when his wife asked him in supplementary questions if he would have taken that role he said he would have done. However, I find he would not have taken that job if it had been offered to him as he would have lost a redundancy payment of £16,000 and given his witness statement evidence, albeit he now says it is retrospective, and indications in the bundle that the claimant had some inkling he may be able to obtain alternative employment, which he did quite soon after he left the respondent's employment, on balance taking the redundancy payment and the chance of other employment was a more attractive option.

43. There was a final one-to-one with Katie Hilton on 15 June 2017 where she advised the claimant that he could appeal the decision to be made redundant, which she explained was different from appealing the scores. The claimant's evidence was that she put him off appealing saying there was not much point in doing so. However, she denied this in cross examination and I find this was not said with the intention of putting the claimant off; it was simply exploring what would happen with an appeal. Certainly if there had there been an appeal the issue of the criteria for the utility job and whether the claimant had the skills that would have made him extremely suitable for that role could have been explored and any miscommunication regarding the store coordinator role could also have been considered.

44. The claimant's concern in relation to the utility operative scores was that in relation to the utility operative roles the health and safety criteria on which he scored extremely highly was not used and he would have thought that was a prerequisite for any job at the respondent's factory. However, the respondent explained that where the job was internal health and safety would be a given that everybody was highly committed to health and safety, but where a job was advertised externally this would

be included as essential in the job description to ensure that the right people were recruited. Once somebody was recruited and trained in their ways they did not see the need to have this as an essential criteria. Further the claimant said he had undertaken that same role in the past and recently. In addition he was aware of changes to the protocols affecting how the job was done.

45. A further issue arose regarding the claimant's starting date as this affected his redundancy payment. The respondent agreed to consider that his start date was 29 October 2010 even though the employee liability information provided on the TUPE transfer stated it was 2 October 2011. However, the claimant contends it was April 2008 and that the gap should be discounted, in particular the second gap because he was paid throughout this gap for his rest days.

The Law

46. The claimant was dismissed for redundancy. In an unfair dismissal case the respondents have to establish they had a permissible reason for dismissal in accordance with Section 98(2) of the Employment Rights Act 1996. In this case the reason was redundancy which is a permissible reason. The claimant did not dispute that that was the reason but said his dismissal was unfair for a variety of reasons.

47. In respect of unfairness Section 98(4) of the 1996 Act states that

> "Where the employer has fulfilled the requirements of sub-section 1 the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer):
>
> (1) 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 employer and
>
> (2) shall be determined in accordance with equity and the substantial merits of the case".

48. The normal provisions relating to an unfair dismissal for any other reason applies in that there must be a fair procedure as outlined by ACAS. This includes a fair appeal, **Taylor -v- OCS Group Limited 2006** Court of Appeal.

49. In **Williams and Others -v- Compair Maxam 1982 EAT**, the Appeal Tribunal laid down guide lines as a reasonable employer might be expected to follow in making redundancy dismissals namely:

(i) whether the selection criteria were objectively chosen and fairly applied;

(ii) whether employees were warned and consulted about the redundancy;

(iii) whether if there was a union the unions view was sought;

(iv) whether any alternative work was available.

50. The issues in this case were regarding the selection criteria's application and whether the appeal was unfair.

Selection Criteria

51. Selection criteria should be clear and the employees should be aware of it and how it will be calculated. Criteria must be objective in order to diminish the role of subjectivity which can occur in the process when the criteria are marked by individual line managers etc. Provided that an employer's selection criteria are objective a Tribunal should not subject those criteria to forensic analysis or over minute scrutiny as established in **British Aerospace Plc –v- Green and Others 1995 (Court of Appeal)**.

52. The Tribunal has to satisfy itself that the method of selection was not inherently unfair and that it was applied in the particular case in a reasonable fashion. The length of the assessment period is also important when determining the reasonableness of the application as a short assessment period may not show the true picture, employers would normally be expected to make allowances when an employer's assessment period is truncated by maternity leave, disability or other statutory absences to ensure that he or she is scored fairly as against other employees.

53. Other issues such as how the criteria are applied and any weighting could also be considered. In **Eaton Limited –v- King 1995 EAT** it was established that a Tribunal should be satisfied with the method of selection and that the assessment had been done fairly on the basis of information which there was no reason to question. It would be unrealistic and unreasonable to expect the scorer to double check the information for accuracy in every case.

54. In respect of the scores of other workers the worker is entitled to their own scores but not necessarily those of everybody else's. In the British Aerospace case it was agreed that the worker should have the next nearest score.

55. In **Buchanan -v- Tilcon (1983) Court of Session** it was stated that the Industrial Tribunal had imposed too higher standard of proof upon employers when it had said that the employers should prove the accuracy of the information upon which they acted in assessing the claimant. It stated that all the employer has to prove is that their method of selection was fair in general terms, that it was applied reasonably in the case of the employee. In doing so it is sufficient to call witnesses of reasonable seniority to explain the circumstances in which the dismissal of the employee came about.

56. In **Thomas and Betts Manufacturing Limited –v- Harding 1980 Court of Appeal** established that an employer should do what it can so far as is reasonable to seek alternative work for the claimant. An employer should not necessarily assume an employee would not wish to accept an inferior position.

57. In **Mitchells of Lancaster Breweries Limited -v- Mr P Tattersall 2012 EAT** which concerned how objective a criteria actually be can be and said that in assessing senior employees the fact that the assessment was based solely on the views of directors was not a matter which could be criticised as "inevitably such

criteria involve a degree of judgment in the sense that opinions can differ, possibly sometimes quite markedly as to precisely how the criteria are to be applied and the extent of which they are satisfied in a particular case".

58. I was referred to three cases: **Boal & another v Gullick Dobson Limited** (1994) EAT; **Nicholls v Rockwell Automation Limited** [2012] EAT; and **Pinewood Repro Limited v Page** [2010] EAT. In relation to **Pinewood Repro** I advised the parties this was an appeal against my own decision sitting with members where the original decision was upheld at the EAT.

59. The issue in this case was how much information should be provided to the claimant, and which details should be examined regarding how the scoring had been arrived.

60. In **Boal** the claimant said that the industrial tribunal should have held that the consultation was unfair "for how could employees challenge to correct the decision of the employers if they did not know about their rivals for redundancy, did not know their marks, did not have the opportunity to go through their rivals' names and say 'well here I should have been preferred to…'."

61. In conclusion the court stated that the appellant's proposal was:

> "That consultation with the employee involves furnishing the employee with all the material virtually on which the employer has acted so that the employee can say to the employer I think you've made a mistake here. I've been through the list. I've considered over the past week or so all 98 redundancies. I have prepared a schedule showing possible errors and I have prepared a list of men who I say marking it as best as I can should be put above me in the list for redundancy. Is that something which could possibly be commended to an employer something which he should do? We all however are reluctant to say it is conceivable there might be circumstances, and it would be for the industrial tribunal to say so, in which some very limited class of case it would be thought desirable, even perhaps necessary, to take the employee into the confidence of the employer to that extent, but to say that in general such an operation is necessary seems to us to be wholly misconceived. The duty upon the employer is to carry out this operation fairly himself. Not merely could he not carry it out fairly if this suggestion was seriously adopted he could not carry it out at all. It would be, it appears to us, to abandon all common sense and would lead to an intolerably protracted and utterly impractical process."

62. In **British Aerospace v Green [1995]** was quoted where Waite LJ stated:

> "Employment law recognises pragmatically that an over minute investigation of the selection process by the Tribunal members may run the risk of defeating the purpose which the Tribunals were called into being to discharge, namely of swift informal disposition of disputes arising from redundancy in the workplace. So in general the employer sets up a system of selection which can reasonably be described as fair and applies without any overt signs of conduct which mars its fairness will have done all that the law requires of him."

63. Regarding scoring, they went on to say:

"One thing however is clear: if such a system is to function effectively its workers are not to be scrutinised officiously. The whole tenure of the authorities to which I have already referred is to show in both England and Scotland the Courts and Tribunals (with substantial contribution from the lay membership of the latter) moving towards a clear recognition that if a graded assessment system is to achieve its purpose it must not be subjected to an over minute analysis. That applies both to the stage when the system is being actually applied and also at any later stage when its operation is being called into question before an industrial tribunal."

64. In **Rockwell** they found the Tribunal had fallen into error because:

"The Tribunal has erred in law in embarking upon a detailed critique of certain individual items of scoring for the purpose of determining whether it was reasonable to dismiss. Once granted that there is a fair system of selection applied with overt signs of unfairness it is not for the Tribunal to embark on a detailed critique of individual items of scoring. This it seems to us is what the Tribunal has done. It has concentrated upon a small number of scores accounting for a very small proportion of the total points available. It does not seem to have been referred to the line of authorities approved in **British Aerospace v Green** and to our mind it erred in law in its approach to this part of the case."

65. In **Pinewood Reproduction Limited** the EAT held that:

"Fair consultation during a redundancy selection exercise included the provision of adequate information on which an employee could respond and argue his case. That had the claimant been able to challenge the marking in the way he sought to do his comments could have been reported back to the markers for their consideration and if they had then chosen to adhere to their original scores it would have been difficult for the Tribunal to interfere with that decision, but that since the claimant was not been given that opportunity the Tribunal were entitled to find that there had not been proper consultation."

66. The EAT in **Pinewood** referred to **John Brown Engineering Limited v Brown [1997] EAT** where it said that:

"It confirms to our mind that in each case what is required is a fair process where an opportunity to contest the selection of each individual is available to the individual employee who can nevertheless achieve that opportunity through his trade union. Lack of consultation implies a loss of opportunity not that the opportunity given would have made necessarily any difference. Obviously individual consultation is the easiest way to assert even-handedness on the part of the employer, but we would not wish to suggest that it is necessarily required in every case. On the other hand, a policy decision to withhold all markings in a particular selection process may result in individual unfairness if no opportunity is thereafter given to the individual to know how he has been assessed. We recognise it may be invidious to publish the whole identified league table but in choosing not to do so the employer must run the risk that he is not acting fairly in respect of an individual employee. It also has to be re-asserted that it is no part of the industrial Tribunal's role in the context of redundancy to examine the marking

processes as a matter of criteria under a microscope, nor to determine whether intrinsically it was properly operated. At the end of the day the only issue is whether or not the employer has treated their employees in a fair and even-handed manner. Against that background we have considered in the context of the present cases that the industrial tribunal was entitled to conclude that the withholding of the actual marks from each individual employee since the assessment had taken place did render the appeal system a sham and as such constituted unfairness in the manner in which the agreed and acceptable criteria were being applied."

67. In my view **Pinewood** can be distinguished from the situation here on the following grounds:

(1) Only three people were involved in the Pinewood situation and all three had extremely close marks.

(2) That the respondent in Pinewood did not go back to the scorers and put to them the claimant's points whereas in this case that was done.

(3) The witness evidence of the scorers was wholly unsatisfactory at the Tribunal and reinforced a belief that the scoring process undertaken at the time had been unfair and unsatisfactory. That was not present in this case where Mr Jackson's evidence was perfectly sound.

Continuity of employment

68. Section 210(3) of the Employment Rights Act 1996 provides that:

"In computing an employee's period of continuous employment any question of whether the employee's employment counts as a period of continuous employment or whether periods – consecutive otherwise – are to be treated as a single of continuous employment must be determined week by week. This is because of the general rule contained in section 210(4) that continuity is broken by a complete week which does not count as a continuous employment. However some weeks which do not count as continuous employment nevertheless do not break continuity."

69. There is a presumption in favour of the employee that any period of employment is continuous so that if an employer claims an employee has overestimated their length of service then the burden is on the employer to prove this.

70. In an unfair dismissal case the effective date of termination is:

- where a contract is terminated by notice the date on which that notice expires;
- where the contract is terminated without notice the date on which the termination takes effect;
- where the employment is under a limited term contract which terminates by virtue of the limiting even without being renewed under the same contract the date on which termination takes effect.

71. When calculating the amount of a basic award for unfair dismissal an EDT is artificially postponed beyond the date on which an employee actually stops working by the length of the minimum statutory notice period stipulated in section 86 of the Employment Rights Act 1996 i.e. the point at which the proper statutory notice would have expired.

72. In respect of a break in continuity there must be a week. A "week" means a week ending on a Saturday (section 235(1)), so that there must be a gap of at least a complete week from a Sunday to a Saturday.

Conclusions

Was the claimant's dismissal for redundancy procedurally unfair?

73. I find it was procedurally fair:

(1) The respondent had adopted a robust procedure whereby any unusual variation in scores between the three scorers would be challenged, and this was indeed done in the claimant's case.

(2) It was also instructive that although Mr Jones was a low scorer Mr Birtwistle (who the claimant in evidence thought knew him less) had given him very varying scores.

(3) Further, on appeal each of the three scorers were challenged their scoring and all three of them confirmed that they stood by the scoring process. As Mr Jones observed, an individual self assessment of someone who only knows some of his fellow workers will be very different from a manager's assessment who knows a considerably greater number of workers working in different scenarios, and so is in a better position to make a comparative analysis which is what has to be undertaken in this situation.

(4) In addition, of course, Mr Kirwin did give the claimant three more points under application of skills and therefore there was some adjustment to his scores as a result of the appeal process, which in my view showed again the innate fairness of the procedure adopted by the respondent.

(5) In respect of Mr Jones not having made some comments, my view is that this is balanced by the fact that the other scorers did and that where there was a disparity in scores the scorers were challenged in any event by the auditors and also by the appeals process.

(6) The claimant relies heavily on the fact that he was not given the scores each individual scorer arrived at but rather an average. The respondent stated they did this in order to ensure that nobody would be affected by any negative comments which would necessarily arise in a situation where people would not get perfect scores but yet might still be working with the individual scorers going forward. I accept that is a reasonable reason for not providing the claimant with individual scores. After all, he may have been scored just by one person and be provided with their scores and therefore no such issue would have arisen, which is the

case in many redundancy processes. I find it was within the band of reasonable responses of the respondent to adopt the procedure they did of providing the average scores for what were in fact 11 different criteria. The procedure complies with the guidance given in the case law, in particular **John Brown**.

74. In respect of number 17 being offered the job before the claimant's appeal and the utility roles also being offered before the outcome of the appeal, I find this was fair as it was clear throughout that individuals were told that these offers were subject to the outcome of any appeals as the claimant's appeal was not the only appeal (there was another one although I heard nothing about it) and it was clear from the paperwork that the situation may rapidly change. Although it would not be ideal for number 17 to learn that in fact he was not getting that job because the claimant's scoring had been changed, it was, I find, not a matter which was a bar to the claimant ultimately being given that job if his scoring had changed.

75. I accepted Mr Kirwin's evidence regarding the point about reviewing all the other employees and I have accepted his evidence that he discussed the appeal with all three scorers as this was supported by Mr Jackson and the email from Mr Jones.

76. It is inevitable that matters will be raised in the scoring process for a redundancy that have not been raised with the individuals as they are not a matter of sufficient importance to merit any critical discussion with an individual employee, but only become relevant when the employer has unfortunately to undertake an exercise of distinguishing between a large number of competent employees.

<u>Suitable alternative employment</u>

77. I have accepted Mrs Hilton's evidence that in deciding to use four essential criteria she was not seeking to exclude the claimant from obtaining one of these posts; in fact nothing was suggested as to why she would have done that in any event. Quite clearly she was dealing with a large number of redundancies, and she would not have retained the claimant's scores over four particular criteria in her head although of course she could have looked it up, but I find there was no reason why she would have done that. I accepted the reason why health and safety was not included.

78. Accordingly I find it was reasonable of the respondent to use just four criteria out of the 11 as they would assume the employee knew about health and safety and that their adherence to the company's core values would again be internalised but was not necessarily something that had to be scored highly in for a 12 month temporary role.

79. In respect of the store coordinator role, which has emerged as the more important issue during the course of the Tribunal than had been highlighted in the claimant's claim form, and indeed the claimant's witness statement appeared to dismiss this as a possibility although he clarified in evidence that this was a retrospective view and in response to a supplemental question from his wife stated he would have taken this role. This however smacked of self-serving evidence, this plus the confusion about when and how he was told that somebody had been selected for this role leads me to find that the claimant was not truly interested in this role at the time as he had had plenty of time to pursue this role prior to 7 June. If I

am wrong on this then the failure to offer this job to the claimant would have made the decision to dismiss the claimant unfair.

Polkey

80. If I am wrong in saying that the claimant's selection for redundancy was fair, then in respect of **Polkey** I would say that the following matters at issue made no difference:

(1) If the claimant had had the individual scorers' scores I agree with the respondent's submission that his appeal would have been no different. Whilst in supplementary questions the claimant's wife suggested that had he known someone had awarded him an 8 for flexibility he would have more strongly argued that the other scores were low, he did that anyway, and therefore I find that his appeal would have been the same whether he had received the individual scores or not. Accordingly there would have been no change to the outcome and the claimant would still have been dismissed.

(2) In respect of the stores coordinator role I have found above that the claimant would not have accepted this role had it been offered to him.

(In respect of this also the claimant should bear in mind that had been appointed to the store coordinator role he would not have received his redundancy payment, and if he had succeeded on this point in respect of unfair dismissal and in respect of persuading me to reject the respondent's **Polkey** argument, that redundancy payment would be have been set off against any claim for compensation.)

81. However, if I am wrong about the essential criteria being adopted for the utility role, then obviously this is an area where it would not be possible to say that it would have made no difference as if the original 11 criteria had been adopted then the claimant would have succeeded in obtaining one of these roles.

Claimant's length of service

82. There were two potential breaks in the claimant's service: one was 3 April 2009 to 16 April 2009 and the other was from 14 October 2010 to 29 October 2010. The claimant relied on the fact that he was paid his rest days, certainly in October.

83. On the basis that the burden of proof is on the respondent and very little evidence has been provided by the respondent, who of course was not the employer at the relevant time, in order to enable me to ascertain whether proper notice was given or whether statutory notice needed to be added on to these periods and/or any evidence that the claimant was paid during these gaps and/or that the gaps in effect were accumulated rest days, I find this point in favour of the claimant and find that he was employed from 16 April 2009.

84. I find that the evidence that the gap from 3 April to 16 April 2009 which ostensibly broke continuity was bridged for any reason has not been established.

85. Accordingly, there will need to be some adjustment to the monies paid to the claimant under the respondent's redundancy payment scheme, and if this matter

cannot be settled it can be determined at the remedy hearing which has been listed for 20 August 2018.

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Employment Judge Feeney

Date 20th April 2018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
23 April 2018

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