RM

EMPLOYMENT TRIBUNALS

Claimant: **Ms P Waldie**

Respondent: **Lloyds Pharmacy Limited**

Heard at: **East London Hearing Centre**

On: **23 November 2018**

Before: **Employment Judge Ferguson (sitting alone)**

Representation

Claimant: **In person**

Respondent: **Mr S Liberadski (Counsel)**

RESERVED JUDGMENT

It is the judgment of the Tribunal that:

1. **The Claimant's claim of unfair dismissal succeeds, but no compensatory award is made.**

2. **The Claimant is awarded £629.52 pursuant to s.38 of the Employment Act 2002.**

REASONS

INTRODUCTION

1. By an ET1 presented on 20 July 2018, following an early conciliation period from 1 June to 11 July 2018, the Claimant brought a complaint of unfair dismissal against the Respondent. The Respondent defended the claim, asserting that the Claimant was dismissed fairly by reason of redundancy.

2. The issues were agreed at the start of the hearing as follows:

2.1 Has the Respondent proved that there was a potentially fair reason for dismissal under section 98(1) ERA? The Respondent relies on redundancy or some other substantial reason.

2.2 Did the Respondent act reasonably in treating that reason as a sufficient reason for dismissal?

2.3 If the dismissal was unfair: what is the percentage chance that but for procedural or other default, the Claimant would have been dismissed in any event (*Polkey*)?

3. In relation to remedy, it was agreed that the *Polkey* issue outlined above and mitigation would be dealt with at this stage, but that a separate remedy hearing would be listed if necessary.

4. I heard evidence from the Claimant and, on behalf of the Respondent, from Amarjit Nandhra and Charley Mitchell.

FACTS

5. The Respondent operates a network of retail pharmacies across the UK. The Claimant commenced employment as a Healthcare Assistant at the Valkyrie Road pharmacy in Westcliff-on-Sea on 4 February 2014. She initially worked 24 hours per week but this was later reduced to 22 hours.

6. The Claimant asserted that she had never been given a contract of employment or any written statement of initial particulars of her terms and conditions of employment. The Respondent did not dispute this and no document complying with s.1 of the Employment Rights Act 1996 was produced.

7. In January 2018 the Respondent conducted a review of its operating model and identified branches whose contracted staff hours exceeded budgeted hours. Such branches were required to implement a "Contracted Hours Reduction Programme", which gave rise to potential redundancies. Charley Mitchell, who has been employed by the Respondent since September 2007 and was Area Manager for Area 3I (covering West London and Surrey) at the time of the Claimant's dismissal, said in his oral evidence that he estimated more than 100 branches were affected nationally.

8. The evidence of Amarjit Nandhra, Cluster Manager for the region which includes Westcliff-on-Sea, was that the Valkyrie Road branch had to reduce its contracted hours by 21.5 hours in order to meet its target.

9. Both Mr Nandhra and Mr Mitchell said that the Respondent decided, in each branch were a potential redundancy situation had been identified, to apply selection criteria to employees potentially affected and identify those provisionally at risk of redundancy before consulting with the affected employees. This was intended to minimise disruption and prevent upset.

10. Mr Mitchell's evidence was that a single scoring system was used across the company. Employees were given points under the following headings: qualifications, "MyPaD" ratings, flexibility and adaptability, ability to engage with customers, disciplinary (conduct), disciplinary (absence) and disciplinary (performance). The

overall score was known as the "IDR" score. Neither of the Respondent's witnesses was sure what IDR stood for, but Mr Mitchell believed it was "Independent Development Review". His evidence was that the "IDR" system was first used in 2017 when a new role (Trainee Healthcare Partner) was introduced and employees were assessed for suitability for the new role. It had not been used for a redundancy exercise before 2018.

11. By February 2018 it had been decided that there was a potential redundancy situation at the Valkyrie Road branch and the roles of Trainee Healthcare Partner, Healthcare Assistant and Dispenser were selected as the pool from which employees would be identified as being at risk. There was no Pharmacy Manager in place for the branch at the time, so the most senior member of staff was a Supervisor called Katy Rainbird. Ms Rainbird conducted the scoring process for the pool of four employees, one Trainee Healthcare Partner, one Dispenser and two Healthcare Assistants. The scores were as follows:

	Qualifications	MyPaD rating	Flexibility & Adaptability	Ability to Engage with Customers	Total
Candidate A	0	12	8	10	30
Candidate B	6	12	10	10	38
Candidate C	6	12	4	4	26
Claimant	3	6	0	0	9

The sections on disciplinary action were left blank for each candidate.

12. According to the score sheet, a zero score under Flexibility and Adaptability applies if the candidate "shows no willingness to do anything other than the job she/he was employed to do". Under Ability to Engage with Customers, a zero score applies if the candidate "demonstrates a lack of interest in talking to customers to establish their needs".

13. The MyPaD score, so I understand from the evidence, refers to a score given following a one-to-one discussion with a supervisor conducted on an iPad. The Claimant's evidence was that she had never undergone this process at any time during her employment. That was not directly challenged by the Respondent, but I was invited to infer from that the fact a score existed that such a meeting must have happened. I am not prepared to draw such an inference. The evidence suggested that the IDR scoring process was often not scientific – an example was given of no information being available and all employees being given maximum marks. I accept the Claimant's evidence that she was never aware of any MyPaD score and never had a meeting with a supervisor which could have formed the basis for such a score.

14. After the scoring process the Claimant was provisionally selected for redundancy.

15. On 27 March 2018 Andrew Gibb, Retail Operations Manager, wrote to the Claimant to inform her that she was at risk of redundancy. The letter refers to "your recent briefing and individual consultation meeting", but it appears that both the staff briefing and the individual meeting with the Claimant took place the following day, 28 March 2018. On that day the Claimant had a meeting with Matthew Nimmo, Area Manager, and Mr Nandhra. Mr Nimmo read from a script, advising the Claimant that

the company had identified a need to reduce the contracted staff hours in the store and that she had been provisionally selected for redundancy. The script includes the following:

> "Selection criteria has been adopted to determine which colleague[s] in your store [is/are] to be placed at risk of redundancy. Unfortunately, your scores are such that you have been identified as being provisionally redundant. Here is a copy of the criteria and the scores given to you. Please have a careful look at this and let me know if you have any questions you would like to ask and/or representations that you would like to make, either now or in the coming days."

16. It is not in dispute that the Claimant was not in fact given a copy of her score sheet. Mr Nandhra's evidence was that Mr Nimmo attempted to explain it to the Claimant during the meeting but she was not interested. The Claimant denied that in her evidence, but said that was that she was in shock at the meeting and did not know what to say. It is not in dispute that she queried why there was a need to reduce hours when the store was already understaffed.

17. The Claimant was handed a letter inviting her to a consultation meeting on 4 April 2018. It appears that the wrong pro-forma letter was used for this since it refers to the proposed meeting as the "First Formal Individual Consultation Meeting". Mr Nandhra's evidence was that the first individual consultation meeting was the one that had taken place that day with Mr Nimmo and the letter should have referred to a second individual consultation meeting. The letter informed the Claimant of her right to be accompanied, but did not warn her that her employment could be terminated by reason of redundancy at the meeting. It expressly states, "Please note that at this stage we are not saying that your role at [Valkyrie Road] is redundant". The Claimant was also given a letter advising her of the Employee Assistance Programme.

18. Also on 28 March 2018 Mr Rainbird briefed the rest of the staff about the redundancy situation. No-one else had an individual consultation meeting because the Claimant was the only employee placed at risk of redundancy.

19. Mr Nandhra's evidence was that between 28 March and 4 April 2018 he and Mr Nimmo went through a list of vacancies in the company, none of which was suitable for the Claimant. The Claimant had said that she would only be interested in jobs within walking distance of her home, which meant either the Valkyrie Road or Southend branches. Southend was itself subject to the Contracted Hours Reduction Programme and two employees there were being made redundant.

20. On 4 April 2018 the Claimant had a meeting with Mr Nandhra. The Claimant was accompanied by a colleague. Mr Nandhra informed the Claimant that no suitable alternative employment had been found and that the Claimant was being made redundant. The notes of the meeting state, "Pamela accepts outcome of this meeting". Mr Nandhra's evidence was that he attempted to discuss the Claimant's score sheet again at this meeting, but she was not interested. He accepts that she was not given a copy of it. The notes also record that the Claimant's last working day would be 4 April 2018 and she would be paid a redundancy payment and pay in lieu of notice.

21. The Claimant's redundancy was confirmed by letter dated 6 April 2018. The Claimant was informed of her right of appeal within 7 calendar days.

22. On 24 April 2018 the Claimant appealed against her notice of redundancy. She argued that she had requested a voluntary reduction in her hours due to ongoing medical problems and this had been refused. She also claimed that the reason for her dismissal was the fact that she had objected to changes in her hours and taking responsibility for opening the store at 8am and closing at 8.30pm. She said she believed that the premises should always be overseen by an employee of at least the grade of supervisor. She said she had been bullied as a result of refusing to alter her hours and that this bullying was "not recorded by my supervisor despite my stated wishes". She acknowledged that Mr Nimmo eventually agreed to discuss her complaint of bullying, but claimed he did not consider the matter properly. She also complained that other members of staff who were "of junior seniority" to her were not served with redundancy notices. The appeal letter concludes, "I therefore believe that I have been unfairly discriminated against by reasons of my age, medical condition and my refusal to have my hours of work continuously altered."

23. An appeal hearing took place on 21 June 2018 at the Southend store, conducted by Charley Mitchell. At the meeting the Claimant complained about the lack of consultation or consideration of other roles for redundancy. The minutes of the meeting record the Claimant asking why she was chosen for redundancy and Mr Mitchell explaining that there was a scoring matrix "based on scoring system around HCP role two years ago". He said that the system focuses on qualifications, MyPaD reviews, flexibility, adaptability, willingness to progress skill and customer service. The Claimant asked who completed the scoring and was told it was Katy Rainbird. The notes record the Claimant saying "customers enjoy PW's service". The Claimant said she was not happy with the process and that the scoring was biased. She also raised the bullying matter set out in her appeal letter. I accept the evidence of Mr Mitchell that he showed the Claimant her score sheet and talked through it with her.

24. After the appeal hearing Mr Mitchell spoke to Mr Nimmo and Mr Nandhra. Mr Nandhra said that he agreed with the IDR scores that were completed by Ms Rainbird. He also confirmed that a copy of the score sheet was offered to the Claimant and it was explained during the meeting.

25. By letter dated 11 July 2018 the Claimant was informed that her appeal was dismissed. Mr Mitchell said that he had reviewed the IDR matrix and "it is transparent that your overall score was below the satisfaction requirement in comparison to other colleagues affected by this redundancy process". He also said that a further review of the Claimant's IDR scoring had been undertaken by "an independent manager familiar with your store and its colleague (sic)", and that the independent manager had reaffirmed the original scoring. He was satisfied that Mr Nimmo followed a fair and transparent process.

THE LAW

26. Pursuant to section 98 ERA it is for the employer to show the reason for the dismissal and that it is one of a number of potentially fair reasons, or "some other substantial reason". Redundancy is a fair reason within section 98(2) of the Act. According to section 98(4) the determination of the question whether the dismissal is fair or unfair "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 "shall be determined in accordance with equity and the substantial merits of the case."

27. In redundancy cases, the employer will not normally 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 deployment within his own organisation" (Polkey v AE Dayton Services Ltd 1988 ICR 142, HL, per Lord Bridge).

28. In Williams v Compair Maxam Ltd 1982 ICR 156, the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. The EAT emphasised, however, that the Tribunal should not impose its own standards and decide whether the employer should have behaved differently. Instead it should ask whether "the dismissal lay within the range of conduct which a reasonable employer could have adopted". The EAT suggested that a reasonable employer might be expected to consider the following factors:

28.1 whether the selection criteria were objectively chosen and fairly applied

28.2 whether employees were warned and consulted about the redundancy

28.3 whether, if there was a union, the union's view was sought, and

28.4 whether any alternative work was available.

29. As to the first factor, in Eaton v King [1995] IRLR 75 the EAT held that an employer need only prove that the method of selection was fair in general terms and that it was applied reasonably. In the absence of some reason to think that the work has not been properly done, there is no reason why a senior manager should not rely on assessments of employees made by those with direct knowledge of their work. Further, it was not necessary for those who actually carried out the assessment to give evidence before the Tribunal to explain why an employee was marked in a particular way. As regards consultation, it was not necessary to details of the assessments to be disclosed to and discussed with the employees.

30. If the Tribunal finds that the dismissal unfair, it should assess the chance that the employee would have been dismissed in any event and take that into account when calculating the compensation to be paid (Polkey).

31. Section 38 of the Employment Act 2002 provides, so far as relevant:

> **38 Failure to give statement of employment particulars etc**
>
> (1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule 5.
>
> (2) If in the case of proceedings to which this section applies—
>
> (a) the employment tribunal finds in favour of the employee, but makes no award to him in respect of the claim to which the proceedings relate, and
>
> (b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996 (c 18) (duty to give a written statement of initial employment particulars or of

particulars of change) [or under section 41B or 41C of that Act (duty to give a written statement in relation to rights not to work on Sunday)],

the tribunal must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the employee and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.

(3) If in the case of proceedings to which this section applies—

(a) the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996 [or under section 41B or 41C of that Act],

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) In subsections (2) and (3)—

(a) references to the minimum amount are to an amount equal to two weeks' pay, and

(b) references to the higher amount are to an amount equal to four weeks' pay.

CONCLUSIONS

32. As to the reason for the Claimant's dismissal, I accept that the Respondent has established that redundancy was the genuine reason. There is no basis to doubt its evidence that there was a national "Contracted Hours Reduction Programme" and that the Valkyrie Road branch was identified as requiring a reduction of 21.5 hours. That was a reduction in the need for employees to carry out work of a particular kind.

33. I also accept that the Respondent adopted a method of selection that was fair in general terms and was applied reasonably. Although the Claimant has suggested that the process was targeted at her, and that her dismissal was related to her past allegations of bullying, there is no evidence that anyone involved in the process had an ulterior motive. The Claimant's real complaint is that her zero scores for flexibility/ adaptability and customer engagement were so obviously unfair that there must have been another reason for her dismissal.

34. The Claimant's bullying allegations were not against Ms Rainbird herself, so there would be no obvious motive for her to give the Claimant a deliberately unfair score in order to ensure that she was selected. Further, if Ms Rainbird had been so motivated, it was not necessary to give the Claimant a zero scores; she could have given a mid range score for each and the Claimant would still have scored the lowest and been selected for redundancy. In fact the zero scores are not necessarily as damaging as they appear at first. They reflect conduct that it not ideal, but nor is it the type of conduct that is so poor that it would be likely to lead to disciplinary action. The Claimant accepted that she had refused to alter her hours when asked to do so. She suggested that this was because her arthritis prevented her from working longer shifts,

but she accepted in her evidence that it would not necessarily involve longer shifts. She said that had not been explained to her. It appeared that her real objection was that she believed a more senior member of staff ought to be present when opening or closing the store. In light of that background, Ms Rainbird's assessment that the Claimant had an inflexible attitude was not obviously unreasonable. As to the score for customer engagement, the Claimant has not demonstrated that it was obviously unfair or biased. She relied on statements from two customers saying that she has always been cheerful, helpful and friendly, and on the fact the she has only had one customer complaint. She may consider that the score is a harsh assessment, but it is partly a subjective assessment and the evidence produced is not sufficient to make Ms Rainbird's score incapable of being relied upon.

35. As noted above, there is a limit to how far the Tribunal should scrutinise the scores in a redundancy exercise of this kind. The assessment was carried out by the person the Claimant accepted was best qualified to comment on her work. In the absence of anything obviously unfair or wrong, the Respondent was entitled to accept that the scoring was reliable. Although the MyPaD score may not have been fair in the Claimant's case given that she had not undergone the MyPaD process at any time, it was not an inherently unfair factor to take into account and the decision-maker, Mr Nanhdra, was not aware of the Claimant's individual circumstances. This is relevant to procedural fairness and consultation, but not to the fairness of the Claimant's selection.

36. As to consultation and procedural fairness, I note that the EAT confirmed in Eaton v King that an employer is not required to provide individual employees with details of their assessments, provided they are adequately consulted and given an opportunity to comment on the proposal to make them redundant. On the facts of this case, however, I consider that the Respondent did not adequately consult the Claimant. She had no notice at all of the "first individual consultation meeting" on 28 March, by which time she had already been selected for redundancy. I accept her evidence that she was in shock at that meeting. It cannot reasonably be regarded as an effective part of the consultation process. Nor was she warned that the meeting on 4 April could result in her dismissal for redundancy. On the contrary, the invitation letter said that the Respondent was not at that stage saying that her role was redundant. The meeting consisted of Mr Nandhra reading a script and telling the Claimant that she would be made redundant because no suitable alternative employment had been found. He may have attempted to discuss the scoring process, but the decision had been made and it was not effective consultation. The first time the Claimant had any real understanding of the process that had been adopted to select her for redundancy was at the appeal hearing, when her scores were discussed. It appears that she challenged the customer engagement score only. She was not provided with a copy of the score sheet until these proceedings, and now queries every aspect of it except for the qualifications score.

37. Looking at the procedure as a whole, I do not consider that the Claimant had fair warning of her dismissal and nor did she have a fair opportunity to comment on the decision to make her redundant. It was not necessary for the Respondent to provide a copy of the score sheet, but she at least needed to know what criteria were used sufficiently in advance to be in a position to comment. If she had known, for example, that one of the criteria was the MyPaD score she could have objected on the basis that she had never had a one-to-one meeting for that purpose. That was not corrected on appeal because the first time she was aware of it was at the appeal hearing itself so she did not have a fair opportunity to consider the matter. The Claimant's dismissal

was therefore unfair.

38. I must consider, however, whether the Claimant would have been dismissed following a fair procedure, involving adequate consultation, and I conclude that it was inevitable, given the scoring system that was adopted, that she would have been selected. Even if she had had a fair opportunity to challenge the use of the MyPaD scores in her case, by being informed of the selection process and warned of possible dismissal prior to the 4 April meeting, she was so far below the other candidates on the other elements that she was bound to be selected for redundancy notwithstanding any comments she may have made. I consider that any compensatory would have to be reduced by 100%.

39. I do make an award, however, under s.38 of the Employment Act 2002, on the basis that the Respondent breached s.1 of the ERA by failing to provide the Claimant with a written statement of initial employment particulars. I award the higher amount of four weeks' pay because the breach was serious. The Claimant was employed for more than four years and was never given a contract or written statement in compliance with s.1. The Claimant stated in her ET1 that her gross pay was £682 per month, which equates to £157.38 a week. These figures have not been disputed by the Respondent. I therefore award the Claimant £629.52.

Employment Judge Ferguson

Dated: 17 December 2018