



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Duke

**Respondent:** Siemens

**HELD AT:** Carlisle **ON:** 13 and 14 February 2018

**BEFORE:** Employment Judge Martin

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr A Abernethy (Solicitor)

## JUDGMENT

The judgment of the Tribunal is that the claimant's complaint of unfair dismissal is not well-founded and is hereby dismissed.

## REASONS

### Introduction

1. Mr Darren Wakefield, team leader; Mr Andrew Constable, Project Manager; and Ms Sarah Black-Smith, Head of Operations, all gave evidence on behalf of the respondent. The Tribunal also considered a witness statement provided by Louise Henderson, Manager, who did not attend the Tribunal to give evidence.
2. The claimant gave evidence on his own behalf. Mr Owen Taylor, Mr Martin North and Mr Andrew Newton, all field engineers and former colleagues of the claimant, still employed by the respondent, gave evidence on behalf of the claimant. The Tribunal also considered witness statements for Mr Stephen McArthur, Mr Paul Hudson, Mr Paul Cottam and Mr Dennis Round, all of whom are also still employed by the respondent and former colleagues of the claimant. Their evidence was submitted on behalf of the claimant, but they did not attend to give evidence.
3. The Tribunal was provided with a bundle of documents marked Appendix 1. A couple of additional documents were provided by both the claimant and the respondent during the course of the hearing and added to the bundle.

**The Law**

4. The Tribunal considered the law as follows:-
5. Section 139(1) of the Employment Rights Act 1996:

“For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to:-

  - (b) the fact that the requirements of that business:-
    - (i) for an employee to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish.”
6. Section 98(1) Employment Rights Act 1996 (“ERA”) states:

“In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:-

  - (a) The reason (of if more than one, the principal reason) for the dismissal; and
  - (b) That it is either a reason falling within subsection (2) of some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.”
7. Section 98(2):

“A reason falls within this subsection if it:-

  - (c) is that the employee was redundant.”
8. Section 98(4):

“The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer):-

  - (a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employer, and
  - (b) shall be determined in accordance with equity and the substantial merits of the case.”
9. Section 100(1) ERA 1996:

“An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that:-

(c) being an employee at a place where...[the employee] brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety."

10. Section 103A ERA 1996:

"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

11. Section 43A ERA 1996:

"In this Act a 'protected disclosure' means a qualifying disclosure as defined by section 43B."

12. Section 43B(1):

"In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one of more of the following:-

(d) That the health or safety of any individual has been or is being or is likely to be endangered."

13. Section 43B(2):

"For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere."

14. Section 43C(1):

"A qualifying disclosure is made in accordance with this section if the worker makes the disclosure –

(a) to his employer."

15. Section 47B(1) ERA 1996:

"A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

16. The case of **Williams & others v Compair Maxam Limited [1982] IRLR 83** where the EAT held that in cases of redundancy employers will seek to act in accordance with the following principles, namely to give employees as much warning as possible of impending redundancies; to consult with both the union and in particular the employee about the potential redundancy situation; to adopt a fair selection criteria; to ensure that the selection criteria is fairly and objectively marked in relation to all employees; and finally the employer should consider whether alternative employment can be offered to the affected employees.

17. The case of **Nicholls v Rockwell Automation limited EAT 0540/11** where the EAT held that an Employment Tribunal could not, having found the employer's scoring system to be fair and fairly applied, embark upon a detailed critique of certain elements of the scoring for the purpose of determining whether it was reasonable to dismiss the claimant as redundant. In that regard, the Tribunal cannot substitute its own view as to the scores a claimant ought to have received.

18. The case of **Preston v Saga Holidays Limited EAT 110152009** where it was held that generally Tribunals cannot reassess an employee's redundancy selection scores. However, an Employment Tribunal can find that an employer did not apply selection criteria fairly, which will involve looking at the scores given to the employee.

19. The case of **Polkey v A E Dayton Services Limited [1988] ICR 142** where the House of Lords held that the question for the Tribunal was whether an employer had acted reasonably in deciding that the reason for dismissing the employee was sufficient. It went on to consider the position as to whether there was any procedural deficiency, and if so, whether that would materially affect the outcome, namely whether the employee would still have been dismissed in such circumstances.

### The Issues

20. The issues which the Tribunal had to consider were as follows:-

- (1) What was the reason or principal reason for the dismissal of the claimant?
- (2) Was the claimant dismissed because he had raised an issue about health and safety?
- (3) Alternatively, was the claimant dismissed because he had made a protected disclosure and/or did the making of that protected disclosure amount to a detriment such that it resulted in his selection for redundancy? In that regard the Tribunal had to consider whether the issue relating to health and safety concerns about Nigeria was a qualifying disclosure; who it was made to; whether it was made in good faith; and whether the claimant was dismissed and/or suffered a detriment as a result thereof.

21. Alternatively, the Tribunal had to consider whether the claimant was dismissed by reason of redundancy as asserted by the respondent. In that regard the Tribunal had to consider:-

- (1) Whether there was a redundancy situation;
- (2) Whether the claimant was warned about the redundancy situation;
- (3) Whether the claimant was consulted about the redundancy;
- (4) Whether there was a fair selection criteria;
- (5) Whether the selection criteria was fairly and objectively applied;
- (6) Whether the respondent considered alternative employment.

22. The Tribunal also had to consider whether the respondent followed a fair procedure.

23. Finally the Tribunal had to consider whether the claimant might have been dismissed in any event if it found that there were any issues with regard to the procedure adopted by the respondent.

### **Findings of Fact**

24. The respondent is a company which provides products, services and systems to clients in oil and gas development. The respondent works in various countries around the world.

25. The claimant was employed as a field service engineer. He commenced employment with the respondent in May 2011.

26. The claimant's contract of employment is at pages 25-35 of the bundle. He was based in Ulverston in Cumbria, but the majority of his time was spent working at various different client sites globally both on and off shore.

27. At page 32 of the bundle his contract refers to issues relating to health and safety. In particular it states:

“Where you are required to work in hazardous and safety critical environments where safety is of prime importance, you have the right to refuse any work where you identify a serious risk arising from it on health and safety grounds until your concerns have been reviewed or addressed by the company.”

28. The claimant along with other colleagues was required to work in various locations around the world. It appears that one of those locations was Nigeria. In evidence before the Tribunal, Mr Newton indicated that he raised health and safety concerns about working in Nigeria. He said that he raised these matters in about 2014 with Louise Henderson, his line manager. He said he raised them on a number of occasions subsequently, although he did not put any of those concerns in writing.

29. There were difficult market conditions which drove down the price of oil in 2015, which led to a redundancy exercise occurring within the respondent company in December 2015.

30. In December 2015 there were 19 field engineers. As a result of the redundancy exercise in December 2015, that number was reduced to 14.

31. The criteria used to mark employees in the December 2015 redundancy exercise is set out at page 39A of the bundle. It includes the following categories: quality of work; productivity; customer relationships; role specific knowledge; initiative; planning/organisation; adaptability; attendance; disciplinary. The scoring for all the more subjective criteria, namely those excluding attendance and disciplinary, used a range of scores from 3, which was the lowest score, to 15 being the highest score; 12 was the second highest score, 9 was effectively the average score; and 6 was the second lowest score. The guidance set out at page 39A for the marking of those scores in relation to the points from 9-15 was as follows:

Quality of work outstanding –

Consistently exceeds required levels of quality – 15;

Excellent – produces above required quality required at all times – 12;

Produces to required quality at all times – 9;

Customer relationships –

Always engenders the best possible customer relationships – 15;

Generally maintains good customer relationships and provides good levels of service – 12;

Understands the need for good customer relationships, but occasionally fails to deliver – 9;

Role specific knowledge –

Has the highest level of knowledge for this role, others within the team often seek his/her expertise/knowledge – 15;

Has a good level of knowledge for this role – 12;

Has adequate levels of knowledge for this role – 9;

Initiative –

Can work with minimal supervision, is an innovator – 15;

Can be given complex tasks to deliver, often makes suggestions or pre-empts requirements – 12;

Can be given tasks to deliver, occasionally makes suggestions or pre-empts requirements – 9;

Adaptability –

Has skills, knowledge and attitude to fill a number of roles in the business – 15;

Shows good adaptability within and between roles – 12;

Shows reasonable adaptability within or between roles – 9.

32. The other categories, productivity and planning/organisation, were not part of the 2016 criteria. The other criteria were attendance and disciplinary.

33. The claimant's scores in 2015 were as follows:

Performance – 15

Productivity – 9

Customer relationships – 15

Role specific knowledge – 12

Initiative – 12

Planning/organisation – 9

Adaptability – 9

34. Those scores are at page 40 of the bundle. The claimant came sixth in the pool.

35. Five out of the 19 field service engineers were made redundant in 2015. In 2015, the criteria were marked by four managers. These were Andrew Constable, Darren Wakefield, Louise Henderson and another. In evidence before the Tribunal Mr Constable said that they met for a round table discussion and discussed the scores for each employee at that meeting and then collectively agreed on a score for each employee.

36. In his evidence, the claimant said that he did not believe that the people selected for redundancy in 2015 should in many cases have been selected. He said that he thought three of those selected were wrongly selected. He said that two of them appealed against the decision and brought claims in the Employment Tribunal. This included Dougie Henderson who was scored last out of the 19, which the claimant thought was completely wrong, because he thought that Mr Henderson's performance and adaptability were much better than others who were marked higher in the 2015 exercise.

37. The claimant had previously worked in West Africa. He had volunteered to work in Angola, which was a country which the field engineers were not particularly keen to work in because of problems in that country.

38. The claimant said working in Nigeria due to the problems and volatility of that Country was always a problem. He said that none of the field engineers were willing to go to Nigeria because of concerns with safety. Mr Andrew Newton in his evidence indicated that he had raised concerns about working in Nigeria with Louise Henderson in 2014, although he had only done this verbally. He said that he and others were concerned about going to Nigeria because of safety concerns. The claimant said that only Derek Black and engineers in Norway had previously gone to work in Nigeria.

39. In his evidence, the claimant said that when the downturn occurred in work during 2016 he believed that Louise Henderson was starting to apply more pressure on the team to go to work in Nigeria.

40. The claimant said that there was a meeting in March 2016 which he did not attend. He said that, after that meeting, he was told by another engineer that the engineers were told at that meeting that they had to consider accepting work in Nigeria – Port Harcourt – otherwise it was likely that there would be redundancies in the team. Andrew Newton was at that meeting. He said in evidence that the meeting was about taking on work in Nigeria.

41. The claimant says that around this time a visa application had been applied for him to go to work in Nigeria.

42. It was acknowledged by all parties, including the claimant and colleagues who gave evidence as well as Mr Wakefield, that field engineers were selected to go on jobs for a variety of different factors.

43. The claimant says that he approached Louise Henderson about the application for a visa for him to work in Nigeria. He indicated to her that he was not comfortable with going to Nigeria. He said that she asked him to put his concerns in writing, which he did.

44. On 4 April 2016, the claimant sent an email to Louise Henderson which he copied to Mr Wakefield. In that email, which is at page 43 of the bundle, the claimant raised a number of concerns about travelling to Nigeria which he said left him anxious about his safety in that region. He indicated that he was concerned that security had not shown up for a previous engineer's visit; security had been demanding payments; he refers to an incident for a previous engineer's visit when a person was allowed access to a secure compound; and he raised concerns about the region being particularly bad for kidnappings. He referred to a previous incident in West Africa where he had felt helpless due to poor planning and insufficient plans. He indicated in the email that he did not know what the implications were for him declining work in the region, and that if he had to go, he would go against his will.

45. Louise Henderson replied to that email on the same day and indicated that she had passed the concerns to a Corporate Security Officer ("CSO") for comment and that she had arranged a live meeting for the following day. She acknowledged that there were challenges associated with travelling to certain countries and that there may be an increased activity in Africa. She said that she needed to ensure that travel was reviewed and approved by the relevant security office. She goes on to indicate that she wants to deliver a business which at the end of the financial year justifies the same number of personnel. She did not want to discuss consequences, but she does acknowledge that it is good that he is actively engaging in raising these issues. Her email is at page 42 of the bundle.

46. A meeting was then arranged with the CSO which was attended by the claimant, Darren Wakefield, Owen Taylor, Derek Black and the CSO in Nigeria. Louise Henderson dialled into the conference call.

47. The claimant said that he did not feel that the CSO really addressed his concerns which Owen Taylor also confirmed in evidence. The claimant said that the CSO appeared unprofessional and that he indicated that he would "pray for security to turn up". Mr Wakefield said that he could not recall that comment being made, but Mr Taylor said that he could recall the comment.

48. The claimant said that the meeting did not do anything to allay his concerns about his safety when travelling to Nigeria. He said that he spoke to Louise Henderson straight after the meeting, indicating that he did not feel that his concerns regarding his safety in Nigeria had been addressed.

49. The claimant said that Louise Henderson suggested the matter be put on hold. He said that he fully expected that he would then be asked to go ahead with



the visa application and go to Nigeria, which he made it clear he was not happy about.

50. The job in Nigeria was cancelled. The claimant was not subsequently requested to go to Nigeria or apply for a visa for that country at any stage, before he left the respondent's company.

51. The claimant said that he joined a trade union in July 2016 because he says he was concerned that he might be selected for redundancy. He acknowledged in evidence that other colleagues had also joined a trade union at around the same time.

52. The claimant said that, after the meeting with Louise Henderson, she started to ignore him. Mr North said in evidence that he noticed that the claimant was being ignored by Louise Henderson.

53. During 2016 there was a further downturn in work in the oil and gas sector which led to the respondent looking to make further redundancies. They undertook a global restructure, which applied to various roles across the UK, including at Ulverston, where the claimant was based.

54. As part of that restructure, the respondent decided to reduce the number of field engineers from 14 to 9. A further redundancy exercise was commenced towards the end of 2016.

55. As the respondent had done in the redundancy exercise in 2015, the pool of employees to be considered was all the field engineers which included grade 2, grade 3 (the level which the claimant was) and grade 4 engineers.

56. The criteria for redundancy had changed from that followed in 2015. This was due to learning which the respondent had taken from the earlier exercise.

57. The process/criteria used in 2016 were largely the same as that used in 2015 but productivity and planning/organisation were removed from the criteria. The criteria for relationships were amended to cover both internal and external relationships. The scoring bands were changed, although there were still five levels of scoring. The scoring bands now ranged from 5 to 25, with 5 being the lowest and 25 being the highest.

58. The guidance issued for scoring was also different. It is set out at page 49 of the bundle.

59. The scores for each of the categories for 15-25 are as follows:-

Quality of work –

Outstanding – actively promotes and participates in quality improvements across the whole business and produces the expected quality level at all times – 25;

Excellent – actively promotes and participates in quality improvements across their department and produces the expected quality level – 20;

Produces to expected quality level at all times – 15;

Relationships/collaboration –

Always maintains and actively promotes the best possible internal and external relationships across the business – 25;

Always maintains good internal and external relationships and provides good levels of service – 20;

Generally demonstrates good internal and external relationships – 15;

Role specific knowledge –

Has the highest level of knowledge for this role, others within the team often seek their expertise/knowledge and they regularly mentor others for training purposes – 25;

Has the highest level of knowledge for this role, others within the team do (not) seek their expertise/knowledge – 20;

Meets all knowledge requirements for their role – 15;

Initiative –

Can work with minimal supervision and is also an innovator, someone who introduces new methods, products, ideas or is in an active voluntary business role with additional responsibilities – 25;

Can be given complex tasks to deliver and makes improvement suggestions, or has previously held a voluntary business role with additional responsibilities – 20;

Can be given tasks to deliver, occasionally makes suggestions or pre-empts requirements for improvement/change (for example STOP cards) – 15;

Adaptability (job role) –

Excellent adaptability, for example has a high number of demonstrated transferable skills within current and other departments and regularly seeks out and accepts other duties and tasks – 25;

Good adaptability, for example has a number of demonstrated transferable skills within current and other departments and regularly accepts other duties and tasks – 20;

Reasonable adaptability, for example has some transferable skills within current and other departments and on occasion has accepted other duties and tasks – 15.

60. The process also changed from 2015. In 2016 there were three scoring managers who all independently marked the pool of field engineers according to the criteria. There was then a meeting arranged where the scoring managers presented

their scores for each employee. A levelling manager was also in place to review those scores with the scoring managers. There was also an overseeing manager who was responsible for ensuring that a reasonable process was adhered to. The levelling and overseeing manager attended the meeting when the scores were discussed.

61. That process is set out at pages 46-48 of the bundle and was agreed with the Employee Consultative Forum (“ECF”). It states at page 48 that where possible evidence should be supported by documentation and that verbal comments should be specific and contain examples.

62. Louise Henderson was the claimant's line manager. Her assessment sheet for the claimant is at pages 55-59 of the bundle. She scored the claimant 15 for quality of work. She refers to the fact that there are no NCRs or customer complaints and that he produces work of a good standard of workmanship and is a steady performer. She also notes that he produced good work on the Aker project in Norway. She scored the claimant 20 for relationships and noted that he delivered good levels of service to customers and has had no complaints from customers or other personnel who interact with him on a regular basis. She also notes that he has worked with UK senior technicians on jobs and with the Norway personnel. He positively interacts with all personnel. She scored the claimant 15 for knowledge specific role using the skills matrix to which we will refer further in due course. She scored the claimant 15 for initiative and notes that he supported some complex projects under the guidance of more senior engineers at grade 4, and proactively uses Dennis Round for training and support. She also refers to him collecting information regarding Nigeria to raise concerns, and noted that his expenses were 75% accurate. She scores the claimant 15 for adaptability and notes that he has not previously held another role in the business other than through his induction. She also notes that he was awarded a champion award on a job and has some transferable skills.

63. Darren Wakefield was the team leader. He reported to Louise Henderson. He was responsible for allocating jobs to engineers when they came in, and for maintaining and developing their skills and experience in relation to those jobs. His assessment sheet for the claimant is at pages 67A-70 of the bundle. He scored the claimant 20 for quality of work and noted some examples. He scored the claimant 20 for relationships and said that he had good interpersonal skills and is able to work with colleagues, and that he is good with customers. He refers to the Aker project in Norway. He scored the claimant 20 for role specific knowledge and noted his part in the Edradour and support for Siemens Norway. He scored the claimant 15 for initiative. He noted that there was no evidence of process improvement suggestions. He scored the claimant 15 for adaptability and noted that he refused the assignment to Nigeria and did not serve his time in production but can cover other projects.

64. Mr Constable was the other manager and responsible for leading projects. His assessment sheets for the claimant are at pages 61-67 of the bundle. He scored the claimant 15 for quality of work. He notes that the claimant delivered to an expected quality and refers to a number of projects that he had worked on. He scores the claimant 10 for relationships and comments that the claimant can occasionally have a stand off approach with the team. He refers to the claimant's work with Siemens Norway team and says that he communicates well with customers and clients. He scored the claimant 15 for role specific knowledge and comments on his knowledge

of DigiTRON and connectors. He scored the claimant 15 for initiative and refers to him being capable of working alone with minimal supervision and remaining on site until jobs are completed successfully. He scored the claimant 10 for adaptability. He notes that there are transferable skills with production and has good adaptability with the new test equipment. He does, however, say that the claimant is not positive about working on shore or off shore in West Africa.

65. In evidence to the Tribunal, Mr Wakefield said that he was looking at a 12 month period for the reference period. Mr Constable, who was at times very unclear in his evidence and at times contradicted his evidence, said that he was also looking at a 12 month period too. He initially thought that this had been agreed, but then suggested that no guidelines had been given for the reference period. Mr Wakefield could not recall any guidelines being given for the reference period and was not sure of the reference periods Mr Constable and Louise Henderson were looking at.

66. A levelling meeting took place where the scores undertaken by the three scorers were discussed and adjusted. The claimant's final scores agreed at this meeting were 20 for quality of work, so his score was adjusted upwards; 15 for relationships, so his score was adjusted downwards; 15 for role specific knowledge (this was based on the skills matrix); 15 for initiative; and 15 for adaptability, which was adjusted upwards.

67. At the levelling meeting it became clear that Louise Henderson and Andrew Constable were using the matrix (page 114 of the bundle) on which to base their scores for the category of role specific knowledge. This matrix was completed by employees after they had finished jobs on site. Mr Wakefield said that he had marked his criteria on a more subjective basis using his knowledge of the skills, qualities and experience of the field engineers. He said, however, in evidence that he agreed at the levelling meeting to accept the matrix as a way forward. It is noted, and this is confirmed in comments made by Louise Henderson at the third consultation meeting at page 78, that the scoring on the matrix was based on the number of reds that an employee achieved. If they got five reds they would get a score of 25. If they got 6-10 reds they would get a score of 15. All employees were marked using this same matrix, although it is noted that this had not been discussed or agreed with the ECF.

68. The claimant said in evidence, as did Mr Taylor, that this matrix does not take account of different situations, for example where an employee was on a job for substantial period of time as opposed to a short period of time. He gave an example of where he had done a job for 13 weeks and would then only receive a minimum mark which really did not take account of the period that he had been on site; but if somebody had done a number of jobs they would get more marks. Mr Wakefield acknowledged in evidence, and indeed as part of the review of the scores, that that was a potential flaw of the matrix. He said that he accepted at the levelling meeting that this was a more objective way of marking the employees, who were all marked in the same way, and on that basis he agreed to this as a way of marking that criterion. The claimant suggested in evidence that the matrix was not up-to-date, but the respondent indicated that it was updated and that the employees had all been asked to update it.

69. At the levelling meeting the claimant was given 15 for adaptability, which all the scorers took to reflect the fact that he could some do work in other parts of the

business, but had not demonstrated that he had been able to or worked in another part of the business. On cross examination, the claimant conceded that he had not worked in any other departments and could not demonstrate that he had done so.

70. In evidence before the Tribunal, Mr Constable said that he had marked the claimant down on adaptability because of his refusal to travel to Nigeria. Mr Constable said that he considered that assurances had been given about the health and safety aspect, and that he viewed the claimant's refusal to travel to Nigeria as being "not a team player", because he was willing for others in the team to do so. Although Mr Constable scored the claimant at 10, the score was subsequently at the meeting agreed to be levelled at 15, therefore this score was adjusted upwards.

71. Mr Constable also said that he took account of the fact that the claimant was not able to work in another department. This was taken into account by both Louise Henderson and Mr Wakefield. They had all scored the claimant 15 and the claimant accepted on cross examination that he did not meet the criteria and could not have got above 15 in that category.

72. At the levelling meeting the score of 15 remained for initiative for the claimant as all the markers had scored him 15. They said that he had not produced evidence to show he had undertaken improvements, which the claimant contested.

73. The claimant's final score was 110 as is noted at page 71 of the bundle. The closest score to the claimant for an employee who was not selected for redundancy was 120. The final scores took account of attendance and disciplinary records.

74. The first consultation meeting with the claimant took place on 5 January 2017. The notes from that meeting are at pages 72-73. At that meeting it is noted that the claimant asked for information about the 2015 redundancy process. He also disputed the absence figures.

75. The second consultation meeting took place on 18 January. The notes of that meeting are at pages 74-75. At that meeting, the claimant argued that senior engineers should have had some input into the marking. It is noted at the meeting that Louise Henderson explains the process that was undertaken for the marking of the criteria. The claimant makes it clear that he wants to contest his score. A further consultation meeting took place on 18 January. Notes of that meeting are at pages 76-77, where it is noted that the claimant asked about redeployment within the respondent company. An explanation is also provided about the difference in the 2015 scoring.

76. A third consultation meeting takes place with the claimant on 26 January 2017. Notes of that meeting are at pages 78-79 of the bundle. At that meeting the claimant provided a written document raising concerns about his scoring and the redundancy process. That document is at pages 80-90 of the bundle. He included some character references from colleagues. During the third consultation meeting, the claimant compared his scores with his previous scores for 2015. He indicated that he did not believe that the scoring had been carried out by the right people, as the people who had marked him were not on site and did not know his work. He also commented on his specific scores with regard to the various categories. During the course of the meeting, he raised concerns about the marking by Mr Constable. A

discussion also took place about the marking with regard to expenses and weightings. Ms Henderson indicated that she had concerns about someone being scored highly on complex jobs, when they were not getting the basics right.

77. The respondent agreed to take the claimant's comments and review them. They agreed to arrange of further meeting with him.

78. In his written document, the claimant raised issues about each of the categories and his scoring for the previous year. He also raised an issue with regard to whether or not he was being marked down for refusing to go to Nigeria. He pointed out that he had gone to other parts of West Africa.

79. A fourth consultation meeting took place on 31 January 2017. The respondent responded in writing and discussed their written response to the claimant's written concerns with him at that meeting. Their written response is at pages 91-94 of the bundle. They explained why the scoring had changed from the previous year. They commented on the issues raised by the claimant in relation to his comments about the scores given to him in relation to each of the criteria.

80. In relation to relationships they noted that Mr Constable had marked the claimant at 10 and did raise some comments about the claimant, in particular disagreements with Derek Black and Dougie Henderson. They noted that the claimant had produced some emails from other engineers. They said that, although they had been taken them into account, they did not think that the scores should be increased, as they would then have to look at the scores for all the others in the pool. They noted that in any event any change to the score on relationships would not affect the claimant being at risk or redundancy.

81. In relation to initiative, they noted the claimant's comments with regard to the Giri project but noted that others were involved on this project as well. They also noted that there was no evidence produced of any quality improvement projects which the claimant had been involved in.

82. In relation to adaptability, the respondent noted the claimant's comments with regard to Nigeria but rejected those comments. They also made the point that the claimant would have to hold another role in the business in order to score 20.

83. The claimant's employment was terminated on 31 January 2017 by reason of redundancy. The respondent wrote to the claimant on 2 February 2017 to confirm his dismissal on the ground of redundancy. He was given the right to appeal against that decision (pages 95-96 of the bundle).

84. The claimant appealed against the decision on 5 February 2017 (page 97). He produced a detailed letter of appeal on 20 February 2017 (pages 99 -102 of the bundle). In his appeal, he disputed each of the scores given to him save in relation to quality of work, which he said he would not dispute unless another grade 3 engineer got a higher mark than him. As it happened at grade 2 engineer did get a higher mark, although the claimant was not aware of that at the time of his appeal.

85. An appeal hearing took place on 23 February 2017. It was chaired by Ms Black-Smith. The claimant was represented by his trade union. Notes of the meeting are at pages 103-108 of the bundle.

86. At the appeal hearing, the claimant said that he believed that the criteria were very similar in 2016 to that used in 2015. He said that he did not know how he could have achieved lower scores to that which he had achieved when he was in the top six the previous year. He contested the other scores other than quality of work which he said he would not contest unless another grade 3 got a higher score.

87. In the appeal hearing, the claimant said he thought that he had achieved lower scores because he had raised the issue about Nigeria regarding health and safety in that country. He said that that issue appeared to influence his scores, particularly on relationships and adaptability. He also said that he did not consider that the skills matrix was the proper way of assessing an employee's knowledge of the job. He said that there were no performance appraisals. The claimant also stated that he thought he should get a higher score for initiative, because he did make proposals about improvements. At the end of the appeal the claimant indicated that he would not be able to work with Louise Henderson again. The appeal hearing was adjourned.

88. Following the appeal hearing, Ms Black-Smith arranged to interview each of the scorers in the light of the claimant's comments. She said that this was to get a better understanding of their rationale for the scores given. Her notes of those interviews are at pages 108A-108K. She also interviewed Dennis Round and asked him for his comments in relation to the skills matrix (pages 108M-108N).

89. In his interview, and indeed in his evidence before the Tribunal, Mr Wakefield said that the skills matrix was based on the number of visits that an employee undertook, and that if somebody was at work on a project for a long time, then their scores would be affected, and that that was a flaw in the matrix. Mr Wakefield said in evidence to the Tribunal that he knew the engineers well from allocating jobs to them. He knew all their skills and competencies. He said that that was the way he had marked the engineers in the first instance, using a more subjective approach from his own knowledge of their skills and experience (pages 108A-108B). However, he said in evidence that at the levelling meeting he had agreed with Louise Henderson and Andrew Constable that the skills matrix should be used and was a more objective way of marking those criteria. That matrix was used for all the engineers and he explained how it worked, namely in accordance with the comments made by Louise Henderson at the appeal hearing.

90. In her interview, Louise Henderson said that the skills matrix was used for scoring and that all engineers were marked according to that. She said it had been updated before the redundancy exercise (page 108D). Louise Henderson also confirmed that no-one queried all the engineers being in the same pool during the consultation process (page 108D).

91. Louise Henderson was asked about the Dougie Henderson situation. She said that she understood that there was a problem between them and she thought it was a couple of years ago (page 108F).

92. Louise Henderson said that the claimant's reluctance to travel to Nigeria was not being used against him individually. She said it was mentioned. Mr Constable admitted in evidence that it was a large factor in his thinking in marking the claimant on relationships. He also admitted that he had taken it into account in marking the claimant for adaptability. Mr Constable did however say that he took account of other

factors and the claimant's relationship with other colleagues. He did not have any difficulty with the claimant's relationship with customers.

93. Louise Henderson confirmed that she used expenses as part of her marking on initiative (page 108F). She said that she did not consider the Giri project. She acknowledged it was a complex job. She said the claimant was involved with others on the project, although he may have spent more time on it. In evidence the claimant admitted that the Giri project was in 2014, some two years earlier.

94. Mr Constable was asked about his marks for the claimant on relationships. He said that he was not happy that the claimant had indicated that he was not happy working with senior people and did not want to work with Paul Cottam. He also said that he took account of the fact that the claimant did not want to work in Nigeria, but was willing to let others go, so he considered that he was not a team player. He admitted that his scoring on relationships was influenced by the claimant's comments about not wanting to go to Nigeria (page 108H).

95. Louise Henderson produced a document showing how the scores had been undertaken on the skills matrix (page 108J). She also indicated the areas that she had taken into account for initiative and improvements, and said that she had considered the submission of expenses. The claimant had scored 70% of weightings. His score was similar to most of the others, many of whom had scored lower than him (page 108L).

96. The claimant said that he did not think that should be taken into account and that Louise Henderson seemed to be taking it into account. He said that he had made improvements in products and procedures; however the respondent said that there was no record of those improvements (page 108N).

97. Following those further investigations Ms Black-Smith considered that certain criteria for the claimant should be re-scored. This related to the criteria for relationships and adaptability. In her request seeking re-scoring of those scores at page 163 of the bundle, she asked that the claimant's comments be considered as well as the examples referred to. In relation to the issue of adaptability, she asked whether Nigeria was a factor and to what degree.

98. The three managers met to undertake the rescoring process. They met with the levelling manager and overseeing manager on 8 March to undertake this rescoring.

99. A response was sent to the appeal manager following this meeting. That response is at page 166 of the bundle. In that response, Louise Henderson indicated that the claimant had indicated to her and Darren Wakefield that he did not want to work with other engineers. She referred to Mr Derek Black which she said occurred in 2015. In evidence before the Tribunal the claimant admitted that he did say that he did not want to work with Mr Black. He said that he considered him to be incompetent. He said that another engineer replaced Mr Black in working with him on a job after he had asked not to work with Mr Black.

100. In the response at page 166, Ms Henderson also said that they considered that the reference period for relationships should be wider than the 12 months, and they had applied the same reference period to all employees. Neither Mr Constable



nor Mr Wakefield was particularly clear as to exactly what was discussed at this meeting about the reference period. Their recollection seemed to coincide with a note of this meeting, albeit that both of them had initially suggested that the reference period would be for a 12 month period, but that they had looked at a wider period. Mr Wakefield seemed to think it was for all of the employees whereas Mr Constable suggested it might have just been for the claimant; albeit that he indicated that he was not really looking at the Derek Black situation which was outside the 12 month period.

101. In relation to adaptability, in her email reply at page 166, Louise Henderson says that Nigeria was considered but was not weighted individually against the claimant. She said that the claimant's score of 15 was in line with other field engineers who had not previously held another role in the respondent company. She said that other engineers who had gone to Nigeria or indicated they would go to Nigeria were also scored a 15. She said that only employees who had demonstrated transferable skills by working in another department were able to score 20. In his evidence, Mr Newton who scored 25 said that he had not worked in a previous role in the business but had been an apprentice and spent time in other departments. In his evidence, Mr Wakefield confirmed that he gave the claimant a score of 15. He said that the issue of Nigeria was not a factor that he took into account either in relation to relationships or adaptability. He said that the reason he gave the claimant a 15, was because he had not shown that he could work in another department. Following this rescoring exercise, no change was made to the claimant's scores.

102. On 13 March 2017 Ms Black-Smith wrote to the claimant. Her letter is at pages 109-113 of the bundle. In her letter she responds to all the issues raised by the claimant during the appeal hearing and as set out in his letter in support of his appeal. She also explains in that letter that she has undertaken further investigations and asked for certain criteria to be rescored.

103. In her reply she states that the scoring system and definitions for marks are different in the 2016 process, than that adopted in 2015 and that they cannot be compared. She explains the scores that she had asked to be reviewed and the reasons why. She goes on to note that the claimant requested not to work with Mr Black and states that Nigeria was not a factor, except in relation to Mr Constable's marking in that he was looking at the claimant as a team player in that context.

104. In her letter in response to the appeal, she says that the claimant did not produce any additional evidence to explain why he should be given a higher mark for initiative. She outlines how the role specific knowledge was marked. She also explains that she asked for adaptability to be reconsidered with reference to Nigeria. She states that Nigeria was not a factor in relation to the claimant and that the score of 20 was only given to employees who had worked in other departments, and that other engineers who had worked in Nigeria or were willing to work in Nigeria had also received a score of 15.

105. Ms Black-Smith then goes on to explain that the claimant's scores did not change following the rescoring exercise. Accordingly she informs him that the appeal is dismissed and that his dismissal will be upheld.

106. In evidence before the Tribunal, the claimant said that he should have scored higher marks in most of the categories, namely he said that he should have got 20

and not 15 for initiative; and 20 for relationships. He also said that he should have got 20 for role specific knowledge and 20 for adaptability.

107. During cross examination, the claimant conceded that his scores for 2016 were in some cases the equivalent of his scores for 2015, namely he got the second highest score for quality of work and the same equivalent score for adaptability. He also acknowledged during cross examination that the criteria for making relationships were wider. In 2015 it only related to customer relationships, whereas in 2016 it was extended to include both internal and external relationships.

108. He also accepted on cross examination that, the definition for adaptability between the scores of 15 and 20 in that category, indicated that an employee had to demonstrate that they had worked in another department, which he acknowledged he had not done.

109. During his cross examination, the claimant acknowledged that he did not dispute that there was a redundancy situation. He also conceded that he had been consulted about the redundancy and did not take issue with the selection criteria which had been adopted, which he accepted had been agreed with the ECF.

110. During cross examination, the claimant also acknowledged that the respondent had considered redeployment with him, but he said that he did not want to consider it at that time.

111. All of the witnesses whom the claimant called, and indeed most of those who submitted witness statements, indicated that they would have given the claimant a higher score, largely equivalent to the scores that the claimant believed he should have received. Those who gave evidence indicated that they thought that the system for scoring the criteria was wrong. They were concerned that it was the wrong people who were undertaking the scoring, because the managers had not actually been on site to assess the employees. Indeed, Mr Newton suggested that a supervisor should have been on site to mark the employees. He went further and suggested that one way of the employees being marked was that they all marked each other, so that they were being marked by their peers, whom they worked alongside on site all of the time. He said they would have a better idea of what skills and competencies each of them had.

### **Submissions**

112. The respondent's representative submitted that the claimant was dismissed for redundancy. He submitted that the only real issue in this case was whether or not the criteria had been fairly and objectively marked. He submitted that the marking of the skills matrix was a more objective way of marking. He also went on to submit that even if the claimant was given a higher mark for relationships. He had received a mark of 15, although two of his managers had marked him 20, he would still have been selected for redundancy. He referred to a number of cases, being the cases of **Williams** and **Nicholls** and **Polkey** as referred to above.

113. The respondent's representative submitted that, although the email sent on 4 April could amount to a protected interest disclosure, he submitted that it was not a qualifying disclosure. He said the issue related to the claimant's reluctance to go to Nigeria, not the health and safety issues as such. He further submitted that the

claimant did not suffer a detriment as a result of his refusal to go to Nigeria. He acknowledged that Mr Constable was influenced by the issue of Nigeria when he was marking the claimant, albeit in a different context. However, he said that the other two managers did not score the claimant taking any account of the Nigeria issue; their scores were higher and that the levelling process had worked because the claimant's score had in fact been adjusted upwards.

114. The claimant submitted that the reason for his dismissal was on health and safety grounds. He submitted that it was because he had raised an issue about health and safety and the security issues around working in Nigeria. He said that it did amount to a qualifying disclosure. He submitted that it was the reason why he was selected for redundancy.

115. The claimant further submitted that the scoring system was not fairly or objectively applied. He relied on his scores for the previous year. He also argued that all of the scores were incorrect, save in relation to one category. He particularly referred to the scores relating to relationships and adaptability. He referred the Tribunal to an Employment Tribunal case, namely the case of **Preston v Saga Holidays**, again as referred to above.

### Conclusions

116. This Tribunal finds that the reason for dismissal was redundancy. Redundancy is a fair reason for dismissal under section 98(2) of the Employment Rights Act 1996.

117. All the parties acknowledged that there was a redundancy situation due to a downturn in business in the oil and gas sector.

118. This Tribunal finds that the respondent followed a fair procedure in relation to the redundancy process. They consulted with the Employee Consultation Forum ("ECF") about the redundancy situation, the pools for selection and the selection criteria to be adopted, as well as how the criteria would be marked. The respondent also consulted with the claimant and held four consultation meetings with him and took account of his comments. He acknowledges that he was fully consulted.

119. The claimant also accepts that the selection criterion was a fair and objective selection criterion. He does not take issue with the criteria adopted, which includes a mixture of subjective and objective criteria. The claimant also acknowledges that the respondent did consider alternative employment.

120. The Tribunal took account of the fact that the claimant was given and exercised his right of appeal. A further rescoring exercise took place as a result of this appeal. The claimant's further comments in relation to a number of the criteria were considered during the appeal process.

121. The real issue in this case is whether the criteria were fairly and objectively marked. The Tribunal noted that three managers scored the employees independently. They then met at a levelling meeting where it is noted that adjustments were made to the scores. In the claimant's case, his score for relationships was levelled at 15. Two of the managers had given him a score of 20

and one of them had given him a score of 10. His score for quality of work was uplifted to 20. Two of the managers had given him a 20 and one had given him a 15.

122. The Tribunal acknowledged the comments made by the claimant and his fellow employees that the markers appeared to have little knowledge of any of the field engineers' skills or competences, as they did not visit them on site, where virtually all their work was undertaken. However employees could not, as suggested by one of them, mark themselves as there would clearly be conflicts of interests. Accordingly, it was fair for the managers who were familiar with their work, or as familiar as they could be, to undertake the marking.

123. The Tribunal considered whether the claimant's marks were fair. The claimant received similar scores in some categories as he had received the previous year. He had not objected to the scores at that stage when he had been retained following the redundancy exercise. In relation to the criteria for initiative the Tribunal notes that the claimant received the same score from all three managers. In relation to adaptability, although he received a lower score from one of the managers it is levelled out to the average score of 15 and it was noted that he could not, as he himself acknowledged on cross examination, have received a higher score, as he did not meet the criteria for the higher score.

124. In relation to the criteria for job specific role, the claimant was marked in exactly the same way as all the other employees by the managers using the skills matrix which, although it is acknowledged had flaws, was effectively an objective of marking employees in this category.

125. The only criteria where there was a significant difference between the scores was in relationships. However, the claimant's scores in that category were levelled out to 15 at the levelling meeting, although he had received a higher score of 20 from both of the other managers.

126. The criteria from 2015 to 2016 had changed in relation to this category. By 2016, the respondent was looking at both internal and external relationships. It was clear from the comments made by all three managers that the claimant's relationship with customers was not an issue. However, it did appear that there was an issue with regard to the claimant's relationships with some other colleagues, which appears to be why his score was lower.

127. In any event, even if the score for relationships was incorrect and the claimant scored 20, as he indicated should have been his score; he would nevertheless have still been selected for redundancy. Those extra 5 points would not be sufficient for him to be retained. Accordingly, taking account of the case of **Polkey**, it would have made no difference in the claimant's selection for redundancy in that regard.

128. Accordingly this Tribunal finds that the scoring was undertaken in a fair and objective manner.

129. The Tribunal went on to consider whether the issue relating to Nigeria was a factor in the selection of the claimant for redundancy.

130. In that regard, the Tribunal takes the view that the email sent by the claimant to the respondent, which was made in good faith, was a qualifying disclosure. It

raised issues about health and safety, namely the security arrangements in Nigeria, as a result of which the claimant was indicating his reluctance to travel to Nigeria.

131. Whether or not the claimant's concerns were addressed subsequently or not, the question is whether the concern raised by him about that issue, impacted on his selection for redundancy.

132. It is clear that one of the scorers took that into account when he was marking the claimant on certain categories. However, it is equally clear that the other scorers did not take that into account. Mr Wakefield and Ms Henderson both gave the claimant a score of 20 for relationships, and both consistently scored the claimant the same mark for adaptability where the issue of Nigeria seemed to be a factor, but where they appear to have based their decision on a different issue as referred to below.

133. Mr Wakefield made it clear in evidence that the issue of Nigeria was not a factor in his marking of the claimant on the criteria of relationships. Ms Henderson's written comments following the rescoring exercise on appeal also confirm that it was not a factor. The levelling process raised the score to 15, and even if the claimant had scored 20 he would still have been selected for redundancy.

134. Both Mr Wakefield and Ms Henderson gave the claimant a score of 15 on adaptability. Both indicated that was because the claimant could not meet the criteria for the higher score. He could not demonstrate transferable skills, namely work in another department in the respondent company. The claimant himself acknowledged that he could not demonstrate those skills and meet those criteria. Accordingly it does not appear that Nigeria was a factor, (it was certainly not a major factor), in the minds of at least two of the scorers. Further, the claimants' score for this category was adjusted upwards as a result of the levelling process.

135. This Tribunal therefore concludes that the issue of Nigeria was not a factor in the claimant's selection for redundancy.

136. Accordingly the claimant did not suffer a detriment as a result of raising a protected interest disclosure.

137. For those reasons the claimant's complaint of unfair dismissal is not well-founded and is hereby dismissed.

Employment Judge Martin

Date 5 March 2018

Reserved Judgment and Reasons  
Sent to the parties on  
20 March 2018

For the Tribunal Office