Case Number: 2200937/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr K Edohen	**v**	**Q-Park Limited**

Heard at: London Central Employment Tribunal **On**: 14-16 October 2019

Before: Employment Judge E Burns
Mr D Carter
Ms S Randall

Representation

For the Claimant: In person

For the Respondents: Ms A Niaz-Dickinson (counsel)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:

(1) The claimant's claim that he was subjected to a detriment because he had made a protected disclosure under section 47B of the Employment Rights Act 1996 is dismissed.

(2) The claimant's claim that he was unfairly dismissed for having made a protected disclosure under section 103A of the Employment Rights Act 1996 is dismissed.

(3) The claimant's claim that he was otherwise unfairly dismissed under section 98 of the Employment Rights Act 1996 is upheld.

(4) If the respondent had followed a fair procedure, there is a 100% chance that the claimant would have been fairly dismissed for the reason of redundancy in any event AND this would not have affected the date when his employment was terminated. The claimant's compensatory award should therefore be reduced by 100% and will be nil.

REASONS

CLAIMS AND ISSUES

1. By a claim form dated 1 February 2019, the claimant brought three claims:

   (a) a claim that he had been subjected to a series of detriments because he made a public interest disclosure;

   (b) a claim that he was dismissed because he made a public disclosure; and

   (c) a claim that he was otherwise unfairly dismissed.

2. The respondent denied claim (a) and in response to claims (b) and (c) asserted that the claimant was fairly dismissed for the reason of redundancy.

3. A preliminary hearing was conducted in this case for the purposes of case management on 14 June 2019. Unfortunately, an inaccurate case management order was issued following the hearing which meant that an agreed list of issues was not available to parties or the tribunal at the start of the hearing. The only matter that was not clear at the start of the hearing, however, were the detriments relied upon by the claimant for the purposes of claim (a). We therefore went through these with the parties at the start of the hearing and agreed them.

4. Based on that discussion, the issues were agreed as follows:

Public Interest Disclosure

5. Did the claimant make one or more protected disclosures (section 43B and 43C of the Employment Rights Act 1996) as follows:

   (a) on 14 August 2017 when, believing he was stealing a car, the claimant confronted his line manager, Ciaran Concannon

   The respondent argued that claimant did not make a qualifying disclosure on the first occasion because what he said did not involve the disclosure of information relying on *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] IRLR 38.

   (b) on 14 August 2017, when he informed his supervisor, Mr Marlon Pineda (Senior Parking Host) that he had seen Mr Concannon stealing a car and showed him video footage

   The respondent denied this happened.

   (c) in a letter dated 30 November 2018 in which he appealed against his dismissal for redundancy and at the subsequent appeal hearing held on 20 December 2018 when he informed Scott Malloch, Head

of HR what he had witnessed on 14 August 2017 and showed him video footage.

The respondent accepted this took place and constituted a protected disclosure.

6. What was the principal reason the claimant was dismissed and was it that he had made a protected disclosure?

The respondent argued that the principle reason that the claimant was dismissed was redundancy.

7. Did the respondent subject the claimant to the detriments, set out in the claimant's witness statement dated 27 September 2019 as follows:

(a) Mr Concannon bullied and harassed him for a lengthy period of time and on several occasions after the August 2017 incident, called him "rubbish", "lazy" and "a liar". (paragraph 8)

(b) Mr Concannon refused to pay him in full for one day's overtime that he had worked on either 27, 28 August and 10 and 13 September 2018 (paragraph 9)

(c) On 17 September 2017, Mr Concannon wrote an email in which he mocked the claimant (paragraph 10)

(d) On 22 September 2017, Mr Concannon wrote an email in which he mocked and degraded the claimant (paragraph 11).

(e) Following an incident when the claimant sustained an injury at work on 23 December 2017, Mr Concannon told the claimant that the injury was the claimant's responsibility and not the fault of the respondent (paragraph 13)

(f) Mr Concannon threatened the claimant and used offensive language towards him on one occasion when he was asking the claimant about an apparent gap of 30 minutes in his shift (paragraph 14)

(g) In early 2018, Mr Concannon refused to authorise the claimant's request for holiday on 3 March 2018 in order to deliberately get him into trouble (paragraph 17)

(h) On 18 April 2019 Mr Concannon threatened the claimant in advance of the claimant attending a disciplinary hearing in response to the claimant saying he intended to tell the person conducting the hearing about Mr Concannon's bullying (paragraph 18)

The respondent either denied these events took place or in the alternative, that they constituted detriments.

8. If so was any detriment done on the ground that the claimant made one or more protected disclosures?

   The respondent argued that there was no causative link between any of the alleged detriments and any protected disclosure.

Unfair Dismissal

9. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996?

   The respondent asserted that it was redundancy.

10. If there was a potentially fair reason for the dismissal, then in all the circumstances, including the size and administrative resources of the respondent, and in accordance with equity and the substantial merits of the case, did the respondent act reasonably or unreasonably in treating it as a sufficient reason for dismissing the claimant? In considering this question, the tribunal shall consider, amongst other things, the principles set out in *Williams and others v Compair Maxam Ltd* [1982] IRLR 83 and or whether the respondent acted within the so-called 'band of reasonable responses'?

    The respondent asserted that the dismissal was fair.

11. 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? (*Polkey v AE Dayton Services Ltd* [1987] UKHL 8)

THE HEARING

12. The claimant represented himself at the hearing. The respondent was represented by counsel. Evidence and submissions on liability were heard over the course of two and a half days which left time for deliberations on the third day, but no time to deliver an extemporaneous judgment.

13. The tribunal read two (largely similar) witness statements prepared by the claimant who also gave oral evidence. For the respondent, we had witness statements and heard oral evidence from

    - Marlon Pineda - currently employed as a Night Supervisor by the respondent, but who, at the relevant times was a Senior Parking Host
    - Monaza Salam, Commercial Manager for the respondent
    - Rebecca Dixon, HR Adviser for the respondent
    - Scott Malloch, Head of HR for the respondent

14. There was an agreed trial bundle of 248 pages. We read the evidence in the bundle to which we were referred. We admitted into evidence some additional documents from the respondent with the agreement of the

claimant who accepted they were relevant. Relevant page numbers of the documents are referred to in brackets below.

15. Written submissions were submitted in advance of the hearing by the respondent. The claimant submitted a response to these. The respondent initially objected to the tribunal reading the claimant's response, on the basis that it contained a short paragraph setting out details of without prejudice negotiations that had taken place before the hearing. The tribunal did not read the claimant's document prior to the hearing. With the consent of the respondent, the tribunal did read it on the first morning of the hearing. The tribunal confirmed that it would disregard the information in the offending paragraph. The claimant also provided a written submission before making his closing submissions. We briefly adjourned the hearing to allow the respondent time to read and digest this document.

16. We explained our reasons for various case management decisions carefully as we went along and our commitment to ensure that the claimant was not legally disadvantaged because he was a litigant in person or because English was a language he had learned and was not his first language.

FINDINGS OF FACT

17. The tribunal's findings of fact are set out below. Where we have had to reach a conclusion on disputed facts, we have made our findings on the balance of probabilities.

Background

18. The respondent operates car parks throughout the UK. It employs around 350 employees across its car park sites and its head office.

19. The claimant was employed as a Parking Host. His employment began on either 9 or 10 February 2016. It has not been necessary for the purposes of this claim to resolve which of these dates is the correct start date.

20. There was some conflicting evidence regarding when the claimant's employment ended. Our finding is that the effective date of termination was 21 November 2018.

21. The claimant was required to work across a number of the respondent's car parks in the Westminster area in London, known as the "Westminster Cluster". The claimant worked night shifts with his hours of work being 7pm to 7am on a "four on four off" basis. He was required to undertake patrols of the car parks during his shift.

Incidents Involving Ciaran Concannon

22. The claimant's line manager was Ciaran Concannon. The claimant said that Mr Concannon bullied him on an ongoing basis throughout his employment as a result of two incidents that occurred in 2017.

23. The first incident occurred in early 2017 when Mr Concannon offered the claimant the opportunity to purchase a vehicle which was parked at Church Street car park for £2,000. The claimant declined the offer as he believed the car was stolen and purchasing it would be a criminal act. he did not accuse Mr Concannon of anything at the time or tell anyone about the conversation subsequently. The respondent does not dispute that this incident took place.

24. The second incident occurred on 14 August 2017. While the clamant was on duty and undertaking routine patrol of one of the car parks for which he was responsible, he saw Mr Concannon together with some other men near a Bentley. Mr Concannon was on holiday on the relevant date and so was not meant to be be in work. The claimant believed that the Mr Concannon was trying to steal the car.

25. The claimant said that he confronted Mr Concannon and told him that he should not be trying to steal the vehicle. The claimant's evidence, which has not been challenged, is that he said to Mr Concannon, "*So you are here to remove the Bentley."* and *"You can't be doing this; we are supposed to be protecting and securing all properties belonging to customers.*" And "*What you are doing is wrong".*

26. When the claimant returned later that night to the same spot, the car had disappeared. The claimant believed Mr Concannon had stolen it.

27. Senior managers of the respondent later became aware that the vehicle had disappeared from the car park towards the end of August 2017. The vehicle had been identified as a "*vehicle of interest*" because it appeared to have been abandoned and was running up a significant level of parking charges. On 23 August 2017, an email was circulated informing managers that the car had been removed from the car park (116a). The CCTV in the car park was not working at that time so the managers were not able to check when and how the car was taken out of the car park.

28. We note that Mr Concannon would have been aware that the CCTV in the car park was not working because this was well known to the respondent's staff and had been the case for a while.

29. The claimant was wearing a body camera and recorded the incident when he confronted Mr Concannon. The claimant transferred the footage from the body camera to his mobile phone later. Stills from the footage were included in the bundle (110-112).

30. The body cam was a device that the claimant was required to wear while he was undertaking patrols. Body cams were introduced by the respondent in 2017 in order to protect their employees. Their introduction was between the date of the two incidents. The claimant was responsible for his own body cam and controlled it. It was up to him to alert his superiors to any relevant recordings he had made. This did not happen automatically.

Was there a disclosure of information to Mr Pineda?

31. The claimant said that after confronting Mr Concannon he told Mr Pineda about the incident involving Mr Concannon at the end of his shift and showed him the body cam footage that he had captured. Mr Pineda said that the claimant did not tell him about the incident.

32. This dispute is critical to the case as the claimant relies on this conversation as a public interest disclosure. It has been a difficult one to resolve. Our finding, on the balance of probabilities, is that the claimant did not tell Mr Pineda about the incident that morning on 14 August 2017, or at all.

33. We find that the claimant did not tell anyone about the incident until he raised it in his letter of appeal against his dismissal for redundancy written on 30 November 2018.

34. In order to reach this finding, we considered all the evidence presented to us. According to the claimant, no-one else was present when he spoke to Mr Pineda and no contemporaneous documents were created that we could rely on.

35. We heard direct evidence during the hearing, from both the claimant and Mr Pineda. There was a marked difference in the way they gave their evidence generally.

36. The claimant was somewhat volatile and prone to embellishment. For example, on several occasions he accused witnesses of making statements at meetings which they clearly did not make, as evidenced by verbatim transcripts of those meetings. We do not think he did this dishonestly. We formed the view that he believed this is what he had heard at the time and that the embellishments became part of his genuine memories. In contrast, Mr Pineda gave evidence in a quiet and considered way.

37. In reaching our decision we have not relied solely on the observations we made of their behaviour. We have also considered other factors.

38. In favour of the claimant's version of events, was the fact that he has been consistent in his assertion that he told Mr Pineda. He first stated that he did this in his written letter of appeal against his dismissal for redundancy dated 30 November 2018. In that letter he said (158):

    "*Although I reported the matter to the only person I confided in, Mr Marlon, Night Senior Host. In Mr Concannon's word to me on that night was "You never saw me right"? I have kept quiet about it all this while because I was threatened of losing my job, and for the safety of my job I thought it was OK then to keep quiet because I have family under me that I carter for."*

    The same assertion appears in his ET1 and both of witness statements.

39. We sought to explore precisely how, where and when the conversation had taken place by asking questions of the claimant about it. Although the claimant was adamant that he had shown Mr Pineda the body cam footage at the end of his shift, he appeared to struggle to recollect the details requested of him.

40. We also considered subsequent events and why the claimant and Mr Pineda might be motivated to lie about the conversation.

41. Mr Pineda might well be motivated to lie. According to the claimant, Mr Pineda did not want to do anything with the information the claimant shared with him that morning and said it was up to the claimant to escalate the matter if he wished. A few weeks later however, Mr Pineda told the claimant that he had spoken to Mr Concannon and told him to stop stealing cars. We can see that if this is what happened, it would be difficult for Mr Pineda to later admit to his employer that he had not escalated such a serious matter to senior managers.

42. The claimant had his own reason to fabricate the conversation which was to protect himself from criticism when he eventually shared what he knew with senior managers. The claimant had transferred the bodycam footage to his phone by filming it and had kept it for over 15 months without showing it to any senior managers. He told the tribunal that the reason for keeping the footage was in case he needed it.

43. The claimant decided to use the footage when he was made redundant, believing Mr Concannon was behind his selection for redundancy. We believe that he knew he should have told his superiors about the footage at a much earlier date and that he was worried about this. When asked why he had not escalated the matter higher than Mr Pineda in August 2017, the claimant's response on several occasions was to say that he had done what he was legally obliged to do by telling his immediate superior, thereby following the chain of command. The way he responded suggested that he believed that he had done something wrong by not telling anyone and he needed to say he had.

44. Our finding is that the claimant told his employer that he had confided in Mr Pineda because he wanted to use the footage and was concerned that revealing he had it and had not told anyone about it would expose him to criticism. We do not think he released the potential significance of this fabricated conversation as a possible protected disclosure at the time of the fabrication.

Allegations of Bullying and Harassment - Background

45. We set out below our conclusions in relation to the specific allegations of bullying and harassment by Mr Concannon cited by the claimant. We have found there some of the incidents did take place on the balance of probabilities.

46. In reaching this conclusion, we preferred the direct evidence of the claimant to the hearsay evidence of Mr Concannon presented to us. This was obtained as a result of an investigation undertaken by the respondent in December 2018.

47. We note that as part of that investigation, the respondent interviewed Mr Concannon, who denied the allegations of bullying and harassment. The evidence Mr Concannon gave the respondent cannot be treated as reliable. The respondent subsequently dismissed him for gross misconduct believing that he had stolen the car that went missing on 14 August 2017 and had lied about it to them. The respondent did not call Mr Concannon to give evidence at the hearing.

48. As part of its investigation, the respondent interviewed several of the claimant's colleagues. The colleagues were unable to corroborate the claimant's version of events, but this was not surprising as the claimant consistently said that Mr Concannon would only use derogatory language when he was alone with the claimant or over the phone to him while he was on patrol.

49. The respondent did not interview the colleagues named by the claimant as able to corroborate, not the actual incidents, but the fact that he had confided in them about how he felt about Mr Concannon's behaviour.

50. In reaching our conclusions, one of the factors we have considered is that there is some limited documentary evidence of Mr Concannon using dismissive language about the claimant (although not to his face) in two emails which are considered further below.

51. Mr Concannon had been confronted by the claimant during the incident on 14 August 2017 and we believe his behaviour towards the claimant was likely to have been motivated by that incident.

52. The claimant told Ms Salam that he was being bullied and harassed by Mr Concannon when he attended a disciplinary hearing with her on 18 April 2018. Ms Salam said, and we accept, that the claimant did not give her details of any specific allegations at the disciplinary hearing. She said she asked him to provide her with details subsequently, but he failed to do this. We have treated the fact that the claimant made a complaint of bullying and harassment against Mr Concannon to Ms Salam, albeit without giving details, as contemporaneous evidence of the claimant making an allegation of bullying and harassment against Mr Concannon.

53. The claimant did not seek to claim that he told Ms Salam, at the disciplinary hearing or at any other time, about the car incident on 14 August 2017. Ms Salam's evidence (which we accept) was that she was not aware of the car incident until the claimant raised it in his appeal letter dated 30 November 2018.

54. We note further that the claimant's allegations of bullying have remained consistent from the time when he first provided details to the respondent

throughout the proceedings across what he said during his appeal, in his ET1 and in his witness statement.

55. We considered whether we should treat the absence of any audio or video recordings of Mr Concannon being abusive towards the claimant as evidence against the claimant's position. It was put to him that he could have recorded Mr Concannon being abusive using his body cam or mobile phone. The claimant explained that his bodycam would not normally be switched on at the times that Mr Concannon spoke abusively to him as this would not be while he was out on patrols. He told us he believed that covertly recording Mr Concannon would be unlawful. We accepted the claimant's evidence on this point. We note that he would not have needed to switch his bodycam on to make the recording of the incident on 14 August 2017 as the incident took place while he was on patrol.

Generalised Allegation

56. The claimant said that on several occasions after the August 2017 incident, Mr Concannon called him "rubbish, lazy and a liar." He said that there were no witnesses to these occasions and he was unable to provide dates or times when this language was used.

57. We find that Mr Concannon did use this language about the claimant to him and that it is likely that this was said face to face and over the telephone on some, but not many, occasions.

Overtime Payment

58. On 27 and 28 August 2017 and 10 and 13 September 2017 Mr Concannon asked the claimant to work overtime. The claimant alleges that Mr Concannon refused to pay him for all days of overtime and only paid him for three days.

59. It is correct that there was a mistake in relation to the Claimant's overtime payments. The claimant spoke to Ms Salam about this on the phone several months later. He followed up his request with an emailed dated 4 December 2017 (119). Ms Salam ensured that the claimant was paid for the missing day. The payment was made around three months late.

60. Ms Salam was unable to confirm whether the failure to pay the claimant was a deliberate act by Mr Concannon or a simply mistake as she did not investigate it. She understood it to simply be a mistake and, in the absence of any evidence to the contrary, we share this view.

Email of 17 September 2017

61. A further allegation of bullying cited by the claimant took place on 18 September 2017. On 17 September 2017, the claimant sent Mr Concannon an email to explain that he had been unable to complete a work task. Mr Concannon forwarded the email to Mr Pineda the following

morning saying "*Is he joking?"* (117). The forwarded email was sent solely Mr Pineda.

62. The claimant claimed in his evidence that Mr Pineda showed him this email and the one referred to below, but we do not accept this was the case. We believe that the claimant came across the emails by accident. This is what he told Mr Malloch during the respondent's investigation. The claimant confirmed that he took photographs of the emails using his mobile telephone. We think it much more likely that he did this when he was alone, rather than when he was with Mr Pineda.

63. We find that the email is disrespectful of the claimant, but we note that it was not sent to him directly and was not personally abusive.

Email of 21 September 2017

64. The respondent had an employee newsletter (ART) in which employees who had performed well could be highlighted. Mr Pineda mentioned claimant and complimented his performance in the newsletter in around September 2017. In response, Mr Concannon emailed Mr Pineda and commented "*I'm not too sure that Kelvin is doing such a fantastic job as ART has indicated lately*." The email is dated 21 September 2017 and was sent solely to Mr Pineda (118).

65. We find that the email is again disrespectful of the claimant, but we note that it was not sent to him directly and was not personally abusive.

Claimant's Injury at Work

66. Following an incident when the claimant sustained an injury at work on 23 December 2017, Mr Concannon told the claimant that the injury was the claimant's responsibility and not the fault of the respondent.

67. We find that this did happen. We would expect Mr Concannon, as the claimant's line manager, to be responsible for reporting information, to the claimant, as to the view the respondent had regarding its potential liability for the accident.

Undated Threatening Conversation

68. A further incident relied on by the claimant concerns an occasion when Mr Concannon asked him to provide an explanation for an apparent thirty minute gap in his day. The claimant alleges that Mr Concannon used threatening language towards him and behaved aggressively towards him before giving the claimant a chance to explain that he was attending to a customer during this period.

69. Our finding is that Mr Concannon did behave in this way towards the claimant. Although the claimant cannot recall the date the incident took place, his recollection of the language used and the way the conversation

made him feel lead us to believe that the claimant did not fabricate this incident.

70. The claimant has been consistent about this incident and it is plausible that Mr Concannon would speak to the claimant in this way, given the background of the incident of 14 August 2017.

Holiday incident – 3 March 2018

71. The respondent operated a policy that only one employee on the night shift could be absent on holiday at a time. This was necessary as the night shift was staffed by a small number of employees. If more than one of them was absent, staffing levels became ineffective. Employees of the respondent are therefore required to obtain authorisation from their managers before booking flights.

72. The claimant needed to travel to Africa for a family reason. He spoke to Mr Concannon verbally and explained this to him. The claimant's evidence was that Mr Concannon told him that this would be ok and so he booked flights for travel between 21 February and 7 March 2018. The claimant admitted that, when he checked the dates on the respondent's system, he saw that Mr Pineda had one of the days booked off, namely 3 March 2018.

73. When the claimant sought authorisation for this holiday, Mr Concannon authorised all the dates, except 3 March 2018, as Mr Pineda already had this day booked off. The claimant nevertheless went on the holiday and so was absent without authority on 3 March 2018.

74. The claimant alleges that Mr Concannon deliberately sought to get him into trouble in connection with the holiday booking. He said that, having given him the impression that the holiday would be fine, Mr Concannon should have authorised it and assisted him to find cover for 3 March 2018 rather than treat him as absent without authorisation on that day.

75. The claimant also alleges that, in the circumstances, it was not appropriate for the respondent to give him a verbal warning for this offence.

76. Our finding is that the claimant did not follow the correct procedure for booking holiday. The difficulty he experienced was self-created rather than deliberately created by Mr Concannon in order to get the claimant into trouble.

77. Our further finding is that the respondent was justified in giving the claimant a verbal warning for taking a day off without authorisation. The respondent followed a fair procedure in relation to the warning which included inviting the claimant to attend a disciplinary hearing conducted by Ms Salam. The claimant had the opportunity to fully explain his position at the disciplinary hearing. We reviewed the transcript of the hearing and note that the claimant admitted to Ms Salam that he had made a mistake when booking the holiday as he had not got formal authorisation before

boking his flights. We consider a verbal warning was a fair penalty in the circumstances.

Threat Before the Disciplinary Hearing

78. The claimant alleges that prior to the disciplinary hearing, which was held on 18 April 2018, Mr Concannon threatened him with the sack. The threat was made in response to the claimant telling Mr Concannon that he intended to tell Ms Salam about Mr Concannon's bullying behaviour.

79. The claimant's evidence was that Mr Concannon said, "*You better have all your facts otherwise you're out of the door*."

80. We find that this did occur. It is entirely plausible that Mr Concannon would make a remark of this nature in response to what the claimant said.

Redundancy

Initial Announcement

81. The respondent announced a redundancy exercise involving the parking hosts based in the Westminster cluster on 10 October 2018. The redundancy exercise was UK wide and it was driven by a need to reduce costs. Headcount was to be reduced by five posts.

82. The initial announcements to the parking hosts assigned to the day and night shifts were made at collective meetings by Ms Salam. She used a script for this purpose which was provided to her by HR. The script used for the day shift was contained in the bundle (136).

83. The script makes it clear that the employees were told that was a need to reduce parking hosts on the day shift by 4 in number and those on the night shift by 1. There was also to be a change in the shift patterns of the day shift employees so that all employees would work a 12 hour shift pattern on a "four on four off" basis.

84. The script also explains that there would be a three-week consultation period to allow individual consultation meetings to be undertaken and that the respondent would consider applications for voluntary redundancy during this period.

First Consultation Meeting

85. Each of the parking hosts were invited to an initial individual consultation meeting. The letter inviting the claimant to his meeting was contained in the bundle (138). It was from Rebecca Dixon, HR Adviser and reiterated much of the information included in the announcement script. The letter invited the claimant to attend an individual consultation meeting with Mr Concanon and advised him of his right to be accompanied to the meeting by a trade union representative or work colleague.

86. The consultation meeting took place as planned on 16 October 2018 and was conducted by Mr Concannon. Mr Concannon was accompanied by Ms Dixon who prepared a note of the meeting (144). The claimant did not exercise his right to be accompanied and attended the meeting alone.

87. The claimant was not informed that he had been selected for redundancy at this meeting nor was he provided with any information about how the respondent intended to select employees for redundancy. He was asked if he wished to consider making an application for voluntary redundancy (he said he did not). He was provided with proposed redundancy figures showing how much he would receive if he was made redundant with a termination date of "*around 21 November 2018*".

88. The possibility of an alternative role was discussed with the claimant at the meeting. He was provided with a vacancy list of redeployment options that were currently available across the business. The claimant expressed an interest is the role of operations night supervisor in Heathrow.

89. A letter dated 23 October 2018 was provided to the claimant following the meeting (147). The letter confirmed what was said at the meeting and attached a schedule showing how the proposed redundancy payment was calculated. The letter advised the claimant that the deadline for applications for voluntary redundancy was 9 November 2018 and that if he wished to be considered for the Heathrow job he should formally confirm this in writing to Mr Concannon or Ms Dixon via email. The letter was signed by Mr Concannon.

Alternative Employment

90. Although the claimant had expressed an interest in the role of operations night supervisor during the initial consultation meeting, he did not pursue this option. He explained to us that this was because the distance to Heathrow was double the distance to his place of work in Westminster. He also said that he had lost "trust and confidence" in the respondent by this point in time and no longer wanted to work for the respondent. This was because of Ms Salam's failure to "tackle the bullying and harassment" of him by Mr Concannon.

Selection Process

91. The claimant believed that Mr Concannon was responsible for deciding who should be selected for redundant. The claimant believed that Mr Concannon had been looking for a way to get rid of him since the car incident on 14 August 2017 and used the redundancy to do this.

92. Given that Mr Concannon had conducted the initial consultation meeting and had signed the letter to the claimant, it was not surprising that the claimant believed that Mr Concannon was responsible for selecting him for redundancy. Mr Concannon later conducted the meeting where the claimant was dismissed and signed the letter terminating the claimant's

employment. Ms Dixon told us that Mr Concannon was responsible for preparing that letter himself.

93. The claimant's understanding was not correct, however. It was actually Ms Salam who made all the relevant decisions about the redundancy. She made the critical decisions as to the selection criteria to be used, whether applications for voluntary redundancy should be accepted and ultimately who should be selected for compulsory redundancy. Mr Salam confirmed this in her evidence and explained how she made these decisions. Her evidence was corroborated by Ms Dixon.

94. We note that the claimant was not told about Ms Salam being the decision maker during the redundancy consultation process or later when he appealed against his dismissal for redundancy. Mr Malloch did not confirm the true position to him despite having every opportunity to do so when responding in writing to the appeal. We can understand why the claimant believed that Mr Concannon was responsible for his dismissal and connected the decision making to the car incident on 14 August 2017. This belief is the reason why he has pursued this claim.

95. Ms Salam explained that she considered the applications for voluntary redundancy and who to select for compulsory redundancy at the same time. She said that she considered the voluntary applications on a case by case basis taking into account a range of factors. The compulsory selections were undertaken on the basis of two objective criteria, namely attendance and disciplinary record during the previous 12 month period between October 2017 and October 2018.

96. A copy of the scoring matrix used by the respondent was included in the bundle (135). It corroborates the evidence given by Ms Salam. It is possible to clearly see from it who applied for voluntary redundancy and whether the application was accepted or not, although it does not provide any information why particular applications were accepted or rejected. The matrix contains details of the number of days that each employee was absent during the period from October 2017 and October 2018 and includes details of any disciplinaries during that period. Scores and weighting for these criteria are not shown and were not used.

97. The selection matrix reveals that the day shift and night shift were treated as entirely sperate pools. The day shift pool contained 17 employees with the night shift containing 6 employees.

98. Two applications for voluntary redundancy were made by night shift employees, Obed and David. Both were rejected by Ms Salam. This meant that it was necessary to make one compulsory redundancy from the pool of night shift parking hosts.

99. The claimant was the person selected for compulsory redundancy from the night shift as he had the highest number of sickness absence days (8 in total) and he had been given a verbal warning during the preceding 12 months. In fact, he was the only night shift parking host with a disciplinary

warning. Two of the other night shift parking hosts had had no sickness, one had had 4 days off, one had had 2 days off and the final one had had 5 days off. When applying the criteria of absence and disciplinary to the six employees that made up the night shift, the claimant was clearly the "lowest scoring" albeit that scores for and weighting of the criteria were not used. The criteria of attendance and disciplinary record are clearly objective rather than subjective.

100. The reason for rejecting Obed's application for voluntary redundancy was, according to Ms Salam, because "*he had had no sickness absence and nothing on his disciplinary record. Obed was also a great asset to the night shift team. He was very highly regarded and he was a good fit to the business*." This is subjective rather objecting reasoning.

101. The reason for rejecting David's application for voluntary redundancy was, according to Ms Salam, because "*David had worked for Q-Park for many years and he was very good at his job. David was trustworthy and had been very loyal to the business.*" Ms Salam also said that "*she knew …. that due to his length of service, David's redundancy payment would be considerably higher than other night parking hosts and this was a factor that was taken into consideration too*." The first part of Ms Salam's reasoning is subjective rather than objective.

102. Seven applications for voluntary redundancy were made by day shift workers. Four of these were accepted and three were rejected. Ms Salam explained some of the reasons for this in her evidence. As with the night shift applications for voluntary redundancy, her reasons were subjective rather than objective.

103. Although the respondent accepted four applications for voluntary redundancy from the day shift, one compulsory redundancy was also made from this pool. We did not explore why the head count reduction for this pool was greater than the number announced at the start of the redundancy process.

104. Although the claimant was clearly the lowest scoring employee among the night shift parking hosts, it is less clear matrix whether the claimant would have been selected for compulsory redundancy if the day shift and night shift had been pooled together. Giving particular weightings to the criteria used may have made a difference. For example, one of the day shift workers, Anthony, who had made an unsuccessful application for voluntary redundancy, had 5 days sickness absence, but had also had a written warning rather than a verbal warning. This appears to be comparable to the claimant's scoring depending on the weight given to his written warning compared to the weight given to the claimant's verbal warning. Anthony was not selected for compulsory redundancy however and instead a different employee in the day shift, Olufemi, was. Olufemi had 4 days sickness absence and a clean disciplinary record.

Second Consultation Meeting

105. Once the respondent had made its selection decisions these were communicated to the relevant employees. The claimant attended a meeting with Mr Concannon and Ms Dixon on 21 November 2018. Mr Concannon used a pre-prepared script for the meeting (151-153)

106. According to that script, at the meeting the claimant was asked if he had any alternative proposals or suggestions to avoid the respondent having to make redundancies. He said he did not. He was then informed that the company had decided to proceed with the proposal. Mr Concannon then said:

> "*After careful consideration, unfortunately we will be terminating your employment on the grounds of redundancy with your last day of employment being 30 November 2018 which will be your last working shift. It was a difficult decision however we looked at the criteria and you have the highest absence record and a verbal warning on your disciplinary record which meant that you were chosen for redundancy*."

107. The claimant had not been told what the selection criteria were prior to this. He was not given time to digest this information. There was no discussion about potential redeployment opportunities at all at the meeting.

108. Although the script refers to the claimant working up to the end of November 2018, this is not what happened. Mr Concannon escorted the claimant off the respondent's premises immediately and he did not do any further work. The respondent wrote to him on 28 November 2018 (154 – 156) to confirm the termination of his employment. The letter gives a termination date of 21 November 2018 rather than 30 November 2018. The claimant was paid two weeks' pay in lieu of his entitlement to notice and received a statutory redundancy payment of £1,330.56 based on the illustration calculation that had been previously provided to him.

Appeal

109. The termination letter referred to a right to appeal to Mr Malloch, Head of HR. The claimant submitted an appeal and, as noted above, in it he informed the respondent that he had video evidence from 14 August 2017 which appeared to show Mr Concannon's involvement in stealing a car.

110. In his appeal letter, the claimant also questioned his sickness absence record used by the respondent as the basis for his selection for redundancy. The claimant said that he did not believe that he was the employee with the highest sickness absence record. He also questioned why he had had to be be selected for compulsory redundancy when an employee had put themselves forward for voluntary redundancy.

111. The claimant also asserted that the disciplinary warning he had been given (for the holiday issue) was based on personal hatred of him by Mr Concannon. He said that he had been subjected to bullying and

harassment by Mr Concannon, which he had reported to Ms Salam, but nevertheless continued. He asserted that he believed he had been selected for redundancy by Mr Concannon because of this personal hatred which dated back to the incident with the car on 17 August 2017.

112. Mr Malloch conducted an appeal hearing with the claimant on 20 December 2018. By consent the hearing was recorded, and a transcript was provided in the bundle (161-182). The claimant expanded on the information in his appeal letter at the hearing. In particular, the claimant went through the car incident and made his various allegations that he had been bullyied by Mr Concannon. Following the appeal hearing, Mr Malloch investigated the claimant's concerns.

Sickness Absence

113. Mr Malloch checked that the information about the claimant's absence record used in the selection process was correct and confirmed that it was. The claimant did have a higher number of days off sick than any of the other employees in the redundancy pools.

114. At the tribunal hearing, the claimant explained that he believed that two employees, whom he named as Mr Pineda and another employee, Greg Wallace had higher sickness absences than him. The respondent's witnesses confirmed that these individuals were both employed as Senior Parking Hosts and were therefore not included in the redundancy exercise involving parking hosts. A redundancy exercise involving Senior Parking Hosts had taken place earlier in the year.

115. The claimant also referred to an employee who was a night parking host, Hasheem, as having a higher sickness absence record than the claimant. The respondent explained that Hasheem was not included in the redundancy pool for night parking hosts because just prior to the redundancy announcement he had transferred to another area. We accept the respondent's evidence on this.

Disciplinary Record

116. Mr Malloch also investigated the claimant's disciplinary record and confirmed that he had been given verbal warning as described above. Mr Malloch felt that the warning was appropriate in the circumstances.

Voluntary Redundancy

117. Mr Malloch acknowledged this element of the claimant's appeal and explained to him, during their meeting on 20 December 2017, his (Mr Malloch's) understanding that an employer does not have to accept all applications for voluntary redundancy and that refusing voluntary redundancy applications is not unusual or inappropriate. In his evidence at the hearing, Mr Malloch went into more detail on this point. He told us when he investigated the claimant's appeal, he focussed on the voluntary redundancy applications made by the night shift staff.

118. Mr Malloch said that he had investigated whether there were robust business reasons for not accepting the two applications for voluntary redundancy made by the night shift parking hosts David and Obed. He was satisfied that their applications were rejected for legitimate reasons which included both their experience and the possible cost associated with making them redundant. He told us that David had many years of experience and an excellent reputation while Obed had uniquely valuable experience with using a certain type of equipment.

Bullying and Harassment

119. Mr Malloch also investigated the claimant's allegation that Mr Concannon had bullied and harassed him. He interviewed Mr Concannon, who denied the allegation. He also interviewed Ms Salam, Mr Pineda and two of the claimant's colleagues who were night shift parking hosts, Wayne Giscombe and David Aboagye.

120. Ms Salam confirmed to Mr Malloch that the claimant had said that he was being bullied by Mr Concannon at the disciplinary hearing. She told him that as the claimant had not, at that time or subsequently, provided any details, she did not investigate the allegations.

121. Each of Mr Pineda, Mr Giscombe, and Mr Aboagye told Mr Malloch that they had not witnessed any bullying behaviour by Mr Concannon towards the claimant.

122. Mr Malloch admits that he did not interview the specific colleagues which the claimant had asked him to interview. Mr Malloch explained to the tribunal that he had interviewed people who he felt might have been able to provide eye-witness evidence to any bullying and harassment. The people he interviewed worked alongside the claimant as night shift parking hosts. In contrast the people named by the claimant were day shift parking hosts. In addition, one of them was no longer employed by the respondent.

123. The claimant reiterated at the tribunal hearing that there had not been any eye-witnesses to the bullying, but he had confided in certain colleagues and these were the ones that he had asked Mr Malloch to interview. He asserted that they would have been able to confirm that he had confided with them.

Car Incident

124. Mr Malloch also investigated the claimant's allegations regarding the car incident on 14 August 2017. Mr Pineda told Mr Malloch that the claimant had not told him about the incident, nor shown him any footage. Mr Malloch's investigation about the car subsequently led to Mr Concannon's dismissal for gross misconduct.

Appeal Outcome

125. Mr Malloch wrote to the claimant with an outcome letter on 24 January 2019 providing the findings of his investigations. Mr Malloch upheld the claimant's dismissal for redundancy saying:

"*I am satisfied that the process followed by which you were made redundant was a fair and reasonable exercise and, whilst it is a regrettable path for an employer to go down, I am also satisfied that a legitimate business reason existed for the redundancy."*

Mr Malloch also thanked the claimant for bringing the car incident of 14 August 2017 to the respondent's attention and told him that it was now being dealt with under the respondent's disciplinary procedures.

Additional Allegations

126. Finally, the claimant gave evidence to the hearing that in May 2019 he learned that the respondent had employed two new people as parking hosts shortly after making the redundancies.

127. Ms Salam confirmed that two new day parking hosts were recruited between Christmas 2018 and May 2019. This was to replace two day shift parking hosts who left several months after the redundancy process was concluded. They were Dean who resigned in March 2019 and Tozan who resigned at a similar time. We accept her evidence.

PUBLIC INTEREST DISCLOSURE

Law

128. The term "protected disclosure" is defined in Section 43A of the Employment Rights Act 1996 as a "qualifying disclosure" (as defined in Section 43B) which is made in accordance with sections 43C to 43H.

129. Section 43B states that 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 or more of the following:

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

130. A disclosure may concern new information, in the sense that it involves telling a person something of which they were previously unaware, or it can involve drawing a person's attention to a matter of which they are already aware (section 43L(3), ERA 1996).

131. There must, however, be a disclosure of information. In *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] IRLR 38, the EAT held that to be protected a disclosure must involve information, and not simply voice a concern or raise an allegation.

132. The court of appeal has subsequently cautioned tribunals against treating the categories of "information" and "allegation" as mutually exclusive in the case of *Kilraine v London Borough of Wandsw*orth [2018] EWCA Civ 1436. At paragraphs 30 -31, Sales LJ says:

"*I agree with the fundamental point …….. that the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. ……..Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other. ……*

On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision."

133. He goes on to say at paragraph 35:

"*In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection [43B](1).*"

134. Section 43C(1)(a) ERA 1996 confirms that a qualifying disclosure made to an employee's employer attracts protection. A qualifying disclosure can be made to a former employer post-termination of employment (*Onyango v Onyango v Berkeley (t/a Berkeley Solicitors* [2013] IRLR 338)

135. Section 47B ERA 1996 gives an employee the right not to be subjected to a detriment on the ground that he has made a protected disclosure. The term "detriment" is not defined in ERA 1996 and tribunals have therefore looked to the meaning of detriment established by discrimination case law. In *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 it was held that a worker suffers a detriment if a reasonable

worker would or might take the view that they have been disadvantaged in the circumstances in which they had to work.

136. Section 103A ERA provides that **"**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".

137. Section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower, whereas section 103A requires the protected disclosure to be "the principal reason" for the dismissal. In both cases, an enquiry into what facts or beliefs caused the decision-maker to act is necessary.

Our Analysis and Conclusions

Did the Claimant Make any Qualifying Protected Disclosures?

138. The claimant's case for automatic unfair dismissal and detriments because of having made a protected disclosure relies on him having made a l qualifying protected disclosure.

139. We judge that the claimant did not made a qualifying disclosure during the incident on 14 August 2017 when he confronted Mr Concannon about stealing the car. What he said lacked the essential element required for a qualifying protected disclosure because he did not convey factual information to Mr Concannon. All he did was accuse Mr Concannon of failing to comply with his obligation to protect customer's property. We make no criticism of the claimant for this, but we cannot find in his favour that the requirements of a protected disclosure were met.

140. Our finding of fact is that the claimant did not tell Mr Pineda about the confrontation with Mr Concannon and therefore the claimant did not make a protected disclosure at this time.

141. The respondent accepts that the claimant made a qualifying protected disclosure when he shared the details of the car incident of 14 August 2017 with Mr Malloch. We agree with that this is correct, and the claimant did make a protected qualifying disclosure in his letter of appeal dated 30 November 2018 and at the appeal hearing. The disclosure was made to his former employer and so meets the requirement in section 43C ERA 1996.

142. The difficulty the claimant has in relying solely on this as his qualifying protected disclosure is that it came after the treatment the claimant alleges was because of the protected disclosure. It also came after his dismissal. This has the result that neither of his claims under section 47B or section 103A Employment Rights Act can succeed.

Detriment Claim

143. There can be no causative link between Mr Concannon's behaviour and the claimant's qualifying protected disclosure made on 30 November 2019, as all of Mr Concannon's behaviour pre-dates the qualifying protected disclosure. His claims under section 47B Employment Rights Act cannot therefore succeed.

144. Our view is that some, but not all, of the behaviour of Mr Concannon towards the claimant does appear to constitute bullying to a degree. This does not assist the claimant within his claim however. Ass the causative link between that behaviour and the claimant's protected disclosure is not made out, it is therefore not necessary for us to consider if the behaviour he complains of, and that we have found took place, meets the threshold of subjecting the claimant to a detriment.

Was the claimant's dismissal automatically unfair?

145. As the decision to make the claimant redundant was made after the claimant's qualifying protected disclosure there can be no causative link between his dismissal and that disclosure. His claim under section 103A of the Employment Rights Act 1996 must therefore fail.

146. In any event, we have found that it was Ms Salam who was responsible for deciding that the claimant should be dismissed for redundancy. We have found that she was not aware of the car incident prior to claimant's appeal letter and the claimant accepts that this is the case. If our conclusions about the claimant's protected disclosures are incorrect, and he did make an earlier protected disclosure that predated his dismissal for redundancy, there can be no causative link between the earlier disclosures and his dismissal because Ms Salam was not aware of the earlier protected disclosures.

147. For the sake of completeness, we have considered whether Mr Malloch's approach to the claimant's appeal was adversely affected by the claimant's qualifying protected disclosure. Our conclusion is that it was not. We judge that he dealt properly with the appeal and considered all of the points raised by the claimant. We believe that Mr Malloch was satisfied that the claimant had been fairly selected for redundancy on the basis of the objective criteria of attendance and disciplinary record. He made his decision to reject the claimant's appeal for this reason.

UNFAIR DISMISSAL

Law

148. The test for unfair dismissal is set out in section 98 Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection 98(2). Redundancy is one of the fair reasons in that section.

149. Once an employer has shown a potentially fair reason for dismissal, the determination of the question whether the dismissal is fair or unfair, having regard to that reason "…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 that question shall be determined in accordance with equity and the substantial merits of the case." (Section 98(4) of the ERA).

150. The question is to be considered by the objective standards of the hypothetical reasonable employer, rather than by reference to the Tribunal's own subjective views. The question is not whether we think that the dismissal was fair, but whether the process followed and the decision to dismiss falls within the range of reasonable responses available to an reasonable employer in the circumstances.

151. In cases of redundancy, it is well-established law that an employer will not normally be deemed to have acted reasonably unless he warns and consults any employees affected, adopts objective criteria on which to select for redundancy which are fairly applied and takes such steps as may be reasonable to minimise the effect of redundancy through consideration of redeployment opportunities.

152. An employer will need to identify the group of employees from which those who are to be made redundant will be drawn. This is the 'pool for selection' and the choice of the pool should be a reasonable one or one which falls within the range of reasonable responses available to a reasonable employer in the circumstances. The definition of the pool is primarily one for the employer and is likely to be difficult to challenge where the employer had genuinely applied his mind to the problem. (*Capita Hartshead Ltd v Byard* 2012 ICR 1256 (EAT)).

153. In selecting employees for redundancy, the selection criteria must be reasonable and not merely based on the personal opinion of the selector. Provided the selection criteria are objective and applied fairly a Tribunal should not seek to interfere in the way the individuals are scored or engage in a detailed critique of the scoring (*British Aerospace v Green* [1995] ICR 1006, CA and *Nicholls v Rockwell Automation Ltd* EAT/0540/11).

154. There is very little (if any) case law dealing with the criteria to be applied by employers when deciding whether or not to accept applications for voluntary redundancy. We consider that it must be permissible for employers to undertake a subjective assessment when considering this question. Although not exactly the same, the position is similar to the situation where employers are able to use subjective criteria to decide between potentially redundant candidates applying for entirely new roles as found in the cases of *Morgan v Welsh Rugby Union* [2011] IRLR 376 and *Samsung Electronics (UK) Ltd v Monte-D'Cruz* UKEAT/0039/11.

155. In one case *Stephenson College v Jackson* UKEAT/0045/13 an employer's decision not to accept a voluntary redundancy application from one of the claimant's colleagues, affected the fairness of the claimant's redundancy. In that case, the colleague had scored only one point more than the claimant and was known by his employer to be unhappy at work. The ET found that the employer's decision to dismiss the claimant for redundancy when his colleague had volunteered for redundancy was one that no reasonable employer would have taken and was therefore unfair. We do not consider that this case establishes a principle that we must follow, but that it is useful for us to be aware of it, when reviewing the reasonableness of the respondent's process and decision-making overall.

156. In *R -v- British Coal Corporation and Secretary of State for Trade & Industry (ex parte Price)* [1994] IRLR 72, Glydewell LJ approved the following test of what amount to a fair consultation: "Fair consultation means (a) consultation when the proposals are still at a formative stage; (b) adequate information on which to respond; (c) adequate time in which to respond; and (d) conscientious consideration by an authority of the response to consultation." We take from this that fair consultation involves ensuring that the person consulted has a fair opportunity to understand fully the matters about which he is being consulted and to express his views and the person consulting him is obliged genuinely to consider, though not necessarily to accept, those views.

157. In *Mugford -v- Midland Bank* [1997] IRLR 208, the EAT stated that it would be "…a question of fact and degree for the employment tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of determination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy."

158. In *Pinewood Repro Limited v Page* UKEAT/0028 the EAT held that fair consultation during redundancy also involves giving an employee an explanation for why they have been marked down in a scoring exercise. Although a case primarily concerned with the now repealed statutory dismissal procedures in *Alexander v Brigend Enterprises* 2006 IRLR 422 the EAT held that for an employee to understand the basis of the election made by the employer – the employer should tell the employee the selection criteria and the scores.

159. When considering the question of the employer's reasonableness, the tribunal must take into account the process as a whole, including the appeal stage (*Taylor v OCS Group Limited* [2006] EWCA Civ 702).

Analysis and Conclusions

Genuine Redundancy

160. We have found that the respondent genuinely needed to and did reduce the headcount of the parking hosts in employed in the Westminster Cluster. The subsequent employment of two day shift parking hosts after the redundancy exercise was completed, does not undermine this finding. The new recruits were needed because of subsequent resignations. We are satisfied that the redundancy was genuine and not a sham exercise designed to target the claimant. We conclude therefore that the employer had a fair reason for dismissal, namely redundancy.

Fairness of the Dismissal

161. We have reviewed various aspects of the respondent's redundancy process in order to judge whether the process followed was fair and reasonable and whether the decision to dismiss the claimant fell within the range of reasonable responses of a reasonable employer.

Pool

162. We first considered whether the respondent's decision to treat the day shift and night shift parking hosts as two separate pools was within the range of reasonable responses of a reasonable employer. We judge that it was. Clearly there was a huge similarity between the work being carried out by day shift and the night shift parking hosts and, as such, treating them as one pool would have been an option. In our analysis, however, it is significant that the employees were assigned to their day or night shifts on a permanent basis. Treating the day and night shifts as separate discreet pools avoided any complication associated with moving employees working on permanent days to permanent nights and vice versa. Such changes would have been very significant in the lives of the employees involved and it was not unreasonable for the respondent to avoid this.

163. We also consider it was reasonable to exclude the two senior parking hosts from the pool on the basis that they had already been through a separate redundancy process earlier in the year.

164. Finally, it was also reasonable to exclude the employee, Hasheem, who had applied for a transfer to a different area prior to the commencement of the redundancy process. As at the date the redundancy process was announced, he had already moved and was no longer working within the Westminster cluster. We note that he had not been replaced. If he had not been transferred, there would have been a need to reduce the number of night shift parking hosts by two rather than one. Even if Hasheem had a higher sickness absence rate than the claimant, under these circumstances, this would not have prevented the claimant from being selected for redundancy.

Voluntary Redundancy Applications

165. There is no doubt that the respondent's refusal of the two applications for voluntary redundancy from night shift parking hosts resulted in the claimant being made compulsorily redundant. Had the respondent decided to accept either one of these applications, it would not have been necessary for it to make the claimant compulsorily redundant.

166. We do not judge the failure to accept the voluntary applications to be outside the range of reasonable responses in this case. The respondent had sound business reasons for wanting to retain the two night shift employees who had applied for voluntary redundancy. This is not a case like *Stephenson College v Jackson* referred to above where the differential between the employees applying for redundancy and the claimant was marginal. The respondent valued the two night shift parking hosts who had applied for voluntary redundancy highly and did not want to lose them.

167. The respondent's reasons were subjective rather than objective, but we do not judge this to be unlawful based on our understanding of the case law.

Selection Criteria

168. When selecting the claimant for compulsory redundancy, the respondent made its selection by applying two selection criteria, namely attendance and disciplinary record. We agree with the respondent that these were objective. In addition, we are satisfied that the information the respondent used when assessing the claimant against these criteria was accurate. The claimant was clearly the employee with the worst record in his pool when assessed against the two criteria. The absence of actual scores and weightings did not prevent this being obvious in his case.

Consultation Process

169. There were, however, a number of significant flaws in the respondent's consultation process. Although the consultation process was a reasonable length (3 weeks) the respondent failed to consult with the claimant about critical matters.

170. Although the claimant (and his colleagues) were provided with information about the rationale for the redundancy situation and invited to put forward proposals to avoid the redundancy situation this, and the possibility of redeployment were the only matters on which they were actually consulted. The claimant and his colleagues were not provided with information about the pools for selection, the selection criteria or the identity of the decision-maker undertaking the selections.

171. On 21 November 2018, the claimant was informed, in one single sentence, that his employment was being immediately terminated as he had been selected for redundancy on the basis of the selection criteria of attendance and disciplinary record. He was not provided with an anonymised copy of the selection matrix nor even told how many days he had been absent

according to the respondent's records. He had no time to digest the information about his selection and no opportunity to challenge it before his dismissal for redundancy became effective.

172. Although the claimant was able to challenge aspects of his selection at the appeal stage of the redundancy process, this was still without having been provided with the full information. He was never given an anonymised copy of the selection matrix, told about the pools or told that Ms Salam was responsible for making the selection decision.

173. Our conclusion is that the consultation process was so defective that this renders the dismissal procedurally unfair. The conduct of the consultation meeting on 21 November 2018 fell outside the reasonable range expected of reasonable employers. The defects were, in part, remedied at the appeal stage, but not sufficiently to make the overall process fair.

174. We therefore find that the claimant's dismissal for redundancy was unfair.

Polkey

175. Having found the claimant's dismissal for redundancy to be procedurally unfair on the basis of the poor consultation process followed by the respondent, we have asked what difference a fair consultation process would have made to the outcome.

176. We have concluded that it would not have made any difference. Ultimately, the claimant was selected from the pool of night shift parking hosts on the basis of objective criteria. We believe the outcome would have been the same had the claimant had been provided with all of the information he required to fully understand the basis for his selection and had a reasonable opportunity to question and challenge it.

177. We do not believe that following a fair consultation process would have added any extra time to the overall consultation process as carried out reasonably, the respondent would have met the claimant once and possibly twice between 16 October and 21 November 2018.

178. Our view is therefore that the Claimant would have had a 100% chance of being made redundant if there had been a fair process and that his compensatory award should be reduced to nil to reflect this.

Employment Judge E Burns
11 November 2019

Sent to the parties on:
13/11/2019.....

For the Tribunals Office