EMPLOYMENT TRIBUNALS

Claimant: Mr C Smith

Respondent: IBM United Kingdom Ltd

Heard at: Birmingham (by CVP)

On: 29, 30 and 31 July 2020 and in chambers on 14 September 2020

Before: Employment Judge Miller

Representation
Claimant: In person
Respondent: Ms K Eddy (Counsel)

RESERVED JUDGMENT

1. The claimant's claim for unfair dismissal is successful. Remedy will be determined at a further hearing. Any compensatory award shall reduced by 50% to take account of the chance that the claimant would have been dismissed had a fair process been followed.

2. The claimant's claim for breach of contract in relation to a contractual redundancy payment is unsuccessful and is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent as a Gateway Developer by the respondent. In effect, the claimant provided complex IT support to people who had bought the respondent's products. The respondent is a large international company that sells information technology products including hardware, software and related services.

2. The claimant had been originally employed by a company called Micromuse Ltd since 12 October 1998 and his employment had transferred to the respondent on 1 July 2006. There is no dispute about this and the claimant's continuous employment runs from 12 October 1998.

3. The claimant was dismissed with effect from 16 July 2018. Following a period of early conciliation from 10 October 2018 to 10 November 2018, the claimant brought claims of unfair dismissal and breach of contract in a claim form presented on 4 December 2018. The breach of contract claim was brought on the basis that the claimant was entitled to an enhanced contractual redundancy payment.

4. The respondent says that the reasons for the claimant's dismissal was that he was made redundant. The claimant's case is, broadly, that the redundancy was not genuine – in that there was no need to make anyone redundant and that, in any event, the process by which he was dismissed was unfair.

The claims and issues

5. On 18 October 201, there was a preliminary hearing before Employment Judge McLuggage at which a list of issues was agreed. They were:

6. UNFAIR DISMISSAL

    a. Was the Claimant unfairly dismissed contrary to s. 94 of the Employment Rights Act 1996 ("ERA")? In particular:

        i. Has the Respondent shown a potentially fair reason for dismissal? (The Respondent relies upon redundancy, a potentially fair reason for dismissal under s. 98(2)(c) ERA.
        ii. In the alternative, the Respondent relies upon "some other substantial reason" for dismissal under s. 98(1)(b) ERA)

    b. If so, was the Claimant's dismissal fair in all the circumstances within the meaning of s. 98(4) ERA?

7. BREACH OF CONTRACT - CONTRACTUAL REDUNDANCY PAYMENT

    a. Has the Claimant established that he had a contractual right to an enhanced redundancy payment? (The Claimant contends that he had an "expectation of an implied redundancy package" because he contends that his previous employer, Micromuse (acquired by the Respondent in 2006) "did honour enhanced packages from other TUPE acquisitions".)

    b. If so:

        i. What was the nature of the Claimant's contractual right?
        ii. Did the Respondent breach the Claimant's contractual right to an enhanced redundancy payment?

8. REMEDY

   a. In the event that the Claimant succeeds in any/all of his claims, should the Tribunal make an award of compensation and, if so, for how much? In particular:

      i. What is the amount of the enhanced redundancy payment to which the Claimant contends he was entitled?
      ii. Should any award be reduced to nil or extinguished to reflect:

         1. The fact that the Claimant has already received a tax-free statutory redundancy payment of £10,160;
         2. Any failure on the Claimant's part to comply with his duty to mitigate his losses;
         3. The likelihood that the Claimant would have been fairly dismissed in any event, in accordance with the principle in Polkey v AE Dayton Services [1987] IRLR 503;
         4. On just and equitable grounds.

9. The claimant also explained at teat hearing the basis on which he said that his dismissal was unfair. That was

   a. There was inadequate warning.
   b. No business case was put forward as part of the proposal for redundancy.
   c. Unfair selection criteria had been utilised.
   d. He was not told of the criteria beforehand or what the 'safe score' would be.
   e. He was not scored fairly. In particular he complained:
      i. that the other employee in the pool of two had limited support experience. The Claimant gave as an example the fact that he had to give a handover on the support role to his colleague who survived the exercise.
      ii. That he had a "history" with his manager Mr Neil Bradley who undertook the scoring in relation to a refusal to undertake a weekend support role. This led to an inference that he had not been fairly selected.
      iii. The end of year assessment system was used unfairly.
   f. The consultation was not genuine.
   g. The Respondent did not make adequate attempts to redeploy him but merely referred him to an internal website.

The hearing

10. The hearing was conducted remotely by video conferencing using CVP as a result of the ongoing pandemic. It had originally been listed for three days to include judgment and remedy if appropriate. However, because of the delays inherent in a remote hearing there was only time to hear the evidence. The delay was attributable to both the increased time taken to ensure that everyone was connected and able to hear and because there was a significant delay in some of the connections. I asked the parties if they would

rather have a limited period to present their submissions or provide submissions in writing. The claimant was content either way but the respondent requested the opportunity to make oral submissions. I therefore timetabled the hearing to allow 30 minutes submissions from each party. IN the event, however, the respondent subsequently made a request to present written submissions to which the claimant agreed.

11. The parties were therefore ordered to provide written submissions by Thursday 6 August 2020 and any reply to new matters arising in the other party's submissions by Friday 7 August 2020. The claimant provided written submissions and the respondent provided written submissions and a bundle of authorities followed by a response to the claimant's submissions. The respondent also provided an opening note and a bundle of authorities at the outset of the hearing.

12. The claimant produced a witness statement and gave oral evidence, the respondent called three witnesses who each prepared a witness statement and gave oral evidence in the order set out below:

    a. Abigail Baker – Client HR partner who advised Neil Bradbury on aspects of the redundancy process
    b. Neil Bradbury – Program manager and the claimant's second line manager at the time of his dismissal
    c. Cynthia Ikie – Offering Manger and one of the claimant's previous line managers, but not his line manager until September 2017.

13. I was provided with an electronic and hard copy bundle comprising of 678 pages. The respondent had also produced a spreadsheet of information extracted from its database that it said showed the claimant's workload. This had been created shortly before the hearing but based, Ms Ikie said, on information she viewed directly on the database around the time of the claimant's dismissal. The claimant said he received that spreadsheet on 29 July 2020, but the respondent said it was sent to him on the evening of 27 July 2020. The spreadsheet was sent to the tribunal by email. Initially some of the data was hidden but after expanding all columns it became apparent that it comprised 244 columns of data across two sheets with over 350 rows of data. There was also a title page identifying the report as "PMR Backlog Details".

Findings

14. Although I heard a significant amount of evidence the issues on which I am required to make findings are relatively narrow and span a short period. I have only made such findings as are necessary to decide the claims and where a matter is disputed, I have made findings on the balance of probabilities.

Micromuse

15. The claimant was originally employed by Micromuse before transferring to the respondent in 2006. This is relevant in so far as it relates to the claimant's claim for an enhanced redundancy payment. The claimant said in his witness statement that Micromuse had made some employees redundant in 2003 and at that time the claimant was acting as an employee representative. Some of the employees who worked for Micromuse had transferred to Micromuse from another company, Riversoft.

16. The claimant says that employees who had been employed by Micromuse received an enhance redundancy package at that time of 1 week's wages per year worked up to a maximum of 20 weeks but not subject to the statutory cap plus an extra 6 week's pay. Employees who had transferred to Micromuse from Riversoft received an enhance redundancy package at that time of 1 week's wages per year worked up to a maximum of 20 weeks but not subject to the statutory cap plus an extra 8 week's pay.

17. In his claim form, the claimant described the Micromuse redundancy package as an "uncapped ex-gratia redundancy payment +6 weeks taxed salary". He confirmed in cross examination that by ex-gratia, he meant discretionary. He said that by discretionary he meant over and above the legal statutory payment and in response to a question from respondent's counsel agreed that that meant Micromuse made a payment without any legal obligation to do so.

18. The claimant did not point to any other times when he was aware that Micromuse had paid an enhanced redundancy payment. It was agreed that there were no terms in the claimant's written contract of employment – with Micromuse or the respondent – referring to an enhanced redundancy payment.

19. In his submissions the claimant said that a precedent for enhanced terms can arise after a single occurrence if the employer does not not explicitly indicate to the contrary.

20. Having regard to this evidence, and acknowledging the candour of the claimant, I find that Micromuse offered enhance redundunacy terms on one occasion, there were no written terms in any contract entitling the claimant to enhanced redundancy terms and the claimant believed that the decision by Micromuse to provide enhanced redundancy terms in its 2003 redundancy process was a discretionary decision made in the absence of a legal obligation to do so.

The claimant's job at IBM

21. The claimant's job was as a Gateway Developer and he was also described as a Level 3 (L3) Netcool engineer. Effectively, the claimant's job was to provide the final level of support to customers with the respondent's Gateway software. He had access to the source code for the products on which he worked, and he was responsible for diagnosing software problems, providing coding solutions and maintaining software released to customers.

22. The claimant worked on "PMRs" – problem management reports. PMRs were issues that had been referred to the claimant after the level 1 and level 2 engineers had been able to resolve the issues. A PMR could take a matter of days to resolve or take many weeks or months.

23. Ms Ikie explained the claimnt's role as being "mainly focussed on working with, and finding solutions for, "IBM OMNIbus Integrations Gateway" (commonly referred to as "Gateway") products, which is an IBM software product".

24. Importantly, the claimant worked on "on prem" (on premises) Gateway products. This is software that is installed at the customer's premises. The respondent also had "cloud based" Gateway products that customers accessed remotely via the internet.

25. The broad structure of the department in which the claimant worked, the Netcool Integrations Team, was described by Mr Bradbury as follows.

I was part of Netcool L3, which was headed by Olivier Bonnet, Director, Netcool Development & South Bank Lab Leader. I reported directly to Olivier. Olivier also managed the Gateway development team ("Development") that developed the same OMNIbus Integrations Gateway products as Netcool L3, and dealt with the same product defects for Netcool Integration as Netcool L3. At the time of events referred to in Christian's claim, two engineers (one of whom was Christian) formed part of the Netcool L3 and Development teams. Christian reported to Amit Das (Manager (ITSM), Omnibus L3 Support, Web GUI L3 Support), me (second line management level) and Olivier (third line management level). The other engineer reported to Ethan Han (Development and Release Manager - OMNIbus Integrations), Ahmad Nazri Mohd Jamil (Kuala Lumpur Lab Director) (second line management level) and Olivier (third line management level). Jenny Li Kam Wa (Development Manager, Agile Service Manager) was the other engineer's "in country" manager. Whilst they both had different internal reporting management lines, the work that Christian and the other employee carried out on a daily basis was similar. They were both engineers who fixed defects for Netcool Integrations and worked on OMNIbus Integrations Gateway products.

26. The claimant was uncertain about exactly how the level 1 team fitted into the Netcoool business unit, but he accepted the management structure – He was managed by Amit Das, who was Managed by Mr Bradbury who was in turn managed by Olivier Bonnet.

27. He also agreed that Jonathan Lawder (the other engineer referred to above) worked on the same Gateway products as he did, but he was uncertain a to his precise role. He did not accept that Mr Lawder dealt with product defects. In cross examination, Mr Bradbury – the most senior manager who attended to give evidence – said that Mr Lawder worked as an engineer, and he referred to as a developer in places, for the Netcool Level team and that he

would have been on a rota undertaking Level 3 work but he couldn't say when, or if, he had undertaken such work.

28. Mr Bradbury was unable to give any detailed information to the claimant in cross examination about the work that Mr Lawder did, or the products on which he worked but he did say that, and it did not seem to be disputed, Mr Lawder also worked on "on prem" products.

29. It was clear that Mr Bonnet was the ultimate manager of both the claimant and Mr Lawder and Mr Bonnet managed the Gateway development team.

30. It is relevant to note, also that Mr Lawder had been absent from work with a serious illness from approximately May 2016 to September 2017.

Request for claimant to work weekends

31. The claimant says that in October 2017 he was informed that he would be on the weekend rota for L3 support. He refused to make himself available on the basis that he had not been informed or asked about this and it was not part of his terms of employment. The claimant says that he suspected that his refusal caused some angst amongst management.

32. I was taken to an email chain that the claimant relied on in support of this. On 26 October 2017 the claimant was asked to provide weekend contact information by Chandra Patel and when he did not reply, he was asked again on 9 November 2017. On 16 November 2017, the claimant replied

"*Sorry I haven't been back to you earlier on this.*
My workload on OMNIbus core/ gateways is persistent. I have a number of outstanding cases on gateways, and at least one outstanding case on core, none of which are making much progress. Accordingly, I've not made any progress bringing myself up to speed with CEM.
Regarding weekend contact details, I haven't agreed to do weekend cover. In fact the first I heard about actually doing CEM L3 was when the weekend cover rota was first drafted, so while I had been invited to the CEM deep dives, I didn't at the time pay them much attention as I didn't think I'd have any immediate need for the information.
Given the unpredicatable levels of work from OMNIbus gateways and core, I don't feel covering CEM L3 is feasible for me at this time".

33. Mr Das forwarded this email to Mr Bradbury, saying that the claimant is reluctant to w work weekends and they should leave it if he does not agree. Mr Bradbury replied:

"I am fine with that. The priority is being convinced that he has enough gateway & OMNIbus work on his stack and is productive.
I am not convinced of that as of now".

34. The claimant says that this email presents a hostile view of him by Mr Bradbury.

35. Mr Bradbury said that the email meant what it said – he was fine with Mr Das confirming that the claimant did not have to do weekend work, but the priority was ensuring that the claimant did have enough work to do.

36. It is also relevant to note, from this email exchange, that the claimant refers to unpredictable levels of work. In his witness statement, Mr Bradbury misquotes the claimant as saying he had "unprecedented" levels of work, rather than "unpredictable" levels of work. Mr Bradbury dismissed this as a typo by "whoever had typed the statements" and said it did not alter the meaning of the email – that the claimant had a lot of work to do. He said that although he did not have any direct oversight over the claimant's workload, this was a concern that had been raised in management meetings.

37. I find that Mr Bradbury was no antagonized by the claimant's refusal to work weekends. It is clear from the email from Mr Das that the respondent realise that the claimant needed ot agree and that he had not done. The wording of the email from Mr Bradbury indicates that he accepted the claimant's refusal. It is clear that his main concerns were his perceptions of the claimant's workload.

38. On the balance of probabilities and on the basis of this email and his evidence about it, Mr Bradbury was of the opinion in November 2017 that the claimant did not have enough work to do. That opinion was based on second hand knowledge form the claimant's line managers.

The decision to make redundancies

39. Mr Bradbury sets out, in his witness statement, the basis and circumstances in which a decision to dismiss someone for redundancy was made. He says:

40. "In March 2018, IBM commenced a redundancy programme within Netcool L3 and Development. This was not a decision in which I was involved. I first became aware of the redundancy programme soon after this in March 2018, in a meeting with Olivier. Olivier explained that this action was due to the increased number of businesses/customers moving to the Cloud and Hybrid Cloud business models which meant that there was a diminished need for dedicated Netcool L3 and Development Gateway engineers, who dealt with "on premise" software products, as opposed to "Cloud" based products. In this meeting, Olivier instructed me to take ownership of conducting the redundancy process and to announce the redundancy process to the rest of Netcool L3 and Development".

41. He adds,

> *"When I was first told about the need for this redundancy, I was not surprised, given that I was aware that there was a reduced amount of work in our "on premise" software products for engineers in Netcool L3 and*

Development. This was due to IBM's move away from on premise products towards Cloud based "SaaS" products. Of course, I had the usual concerns about losing someone in the team and how the remaining engineer would handle the workload once the other engineer left. However, I understood that there was a reduced need for Netcool L3 and Development engineers with our move to Cloud based work. There is a different skill set needed to work on "on premise" and Cloud based products because they each utilise a completely different set of technologies and programming languages".

42. The claimant's case is that there was no good business reason for the redundancy – he had seen no business case and no-one was able to provide his with any evidence for a reduced need for people to work on "on prem" Gateway products at level 3. He said he did not understand the business justification for the redundancy. He said that when he spoke to Mr Bonnet, he gave a "waffly" answer and was unable to justify the decision.

43. Neither Mr Bradbury nor Ms Baker were able to say who made the decision to make redundancies. Mr Bradbury said that a decision was made at a very senior level – possibly in the United States, not even the UK, to "lose headcount". He said that Mr Bonnet was told what number of people to lose and in what region, and the only choice he has was where in the organisation he could afford to let someone go.

44. After the selection exercise (see below) Mr Bradbury sent an email to Mr Bonnet informing him of the outcome. Mr Bonnet replied "thanks for doing this, I'm fine with the ranking".

45. Ms Baker also said, in her witness statement, that she was informed of the redundancy process by an HR colleague and was told that the reason for the proposed redundancy programme was due to an increased number of businesses moving to Cloud and Hybrid Cloud products/systems, which meant that there was a diminished need for dedicated Netcool L3 and Development engineers. In cross examination, Ms Baker confirmed that there were no documents before the tribunal explaining the business rationale for the redundancy but she had no reason to believe it was not genuine. She said that there would have to be a genuine redundancy situation in the business for funding to be made available for it.

46. The only document referred to as justifying the redundancy was a document called "1H 2018 workforce plans". This was a document explaining the redundancy process rather than justifying any decision. Ms Baker said, in her statement, that this was a power point presentation prepared by her colleague which was presented to Mr Bradbury and Mr Burnett to check the wording of the justification. It says:

*"With our transformation toward Cloud and Hybrid Cloud we have a diminished need for dedicated Netcool Integration L3, and therefore merging the Dev and L3 missions. This will result to the suppression of our 1 * L3 HC supporting Netcool OMNIbus Integrations (specific skills) - Note that we only have 1 * L3 HC working on Netcool OMNIbus Integrations*

Proposed rationale for communication.

Merging the Netcool Integrations Dev and L3 teams due to diminished need".

47. Having considered the evidence of Mr Bradbury and Ms Baker and the documentary evidence, in my judgment Mr Bradbury believed that the respondent had decided to reduce the number of people it employed to work on "on prem" Gateway products and that that decision arose because of the reduced demand for "On prem" products and a move towards cloud based products. I accept their evidence that the decision to make redundancies would need to be taken at a more senior level than Mr Bradbury's.

48. I cannot say that Mr Bonnet shared that belief, I simply do not know what he thought as he provided no evidence. Similarly, I cannot say whether the decision to reduce the headcount (as it is unattractively and impersonally described) was that of Mr Bonnet or someone far higher up the management structure in the respondent or, evidently, what the person who did make the decision that the number of employees needed to reduce if it was not Mr Bonnet, belied the reason for that decision to be.

The selection criteria

49. It is not clear from the evidence when Mr Bradbury discussed the need for redundancies with Mr Bonnet, but on 20 March 2018, Ms Baker sent an email to Mr Bradbury and Mr Bonnet offering assistance with the redundancy process and saying "I believe you have a target of 1 in a pool of 2". There is an email trail during which a proposed timescale is set out, proposed selection criteria are offered and links to training and guidance are included.

50. The reference to a pool of 2 is to the claimant and Mr Lawder who were the only two people to be potentially dismissed for redundancy. Although the claimant sought to take issue with the pool identification in cross examination, this had not been mentioned in his claim form or identified in the list of issues. The claimant was asked if he wanted to make an application to amend his claim to introduce this issue, but he decided not to. I have therefore not made any findings about the identification of the pool of people who would potentially be made redundant.

51. The proposed timescale was:
26 March (Morning): Announcement Comms
26 March (Afternoon): Ranking
27 March: Ranking & Normalisation with HR
27 March (End of Day): Send invitation to At Risk Meeting
29 March (Morning): Hold At Risk Meeting
30 March - 16 April: Individual Consulation - 2 weeks (we will add an additional 2 days due to the Easter bank holidays)
17 April: Notice of Dismissal Meeting

52. The proposed selection criteria are Business Impact, Performance and Skills for the Future.

53. Mr Bradbury says that he read the guidance and followed the training, and there is no reason to doubt that he did. Mr Bradbury adopted the scoring criteria that Ms Baker suggested. Mr Bradbury said that he adopted these criteria because they seemed fair and appropriate and hey reflected the criteria in the respondent's annual appraisal process called Checkpoint against which employees were regularly assessed. He also checked with Mr Bonnet that he agreed that the criteria were reasonable.

54. The three scores were weighted so that employees could score a maximum of 10 for Business Impact, and 30 for Performance and 10 for Skills for the Future. Mr Bradbury does not explain how or why these criteria are given different weighting. I have seen no further written documentation or guidance as to how these criteria are to be judged and when asked why one score was chosen rather than another, Mr Bradbury said that it was common sense based on the rankings the employee received in the Checkpoint process.

55. I find that the reason that Mr Bradbury chose the scoring categories that he did was because he considered that they reflected the categories used in the respondent's appraisal scheme and that those categories reflected the business needs of the respondent. He said he wanted to check that they were "Appropriate to the business unit". Mr Bradbury has, however, not shown provided reason at all for the weighting criteria he used.

The first consultation meeting

56. On 26 March 2020, Mr Bradbury telephoned the claimant and told him that he along with Mr Lawder, was being considered for a potential redundancy. It was agreed that n this conversation the claimant was not told how the selection would take place. This was followed up by an email which said:

> *I am confirming today that we are looking to optimize the size of the Netcool OMNIbus Integrations team by enacting approximately* (sic) *1 individual redundancy. Employees whose roles will be directly affected by this will be informed by 29/3/18.*
> *Employees whose roles will not be directly affected by this will also be informed by 29/3/18.*
> *Any employee whose role is directly affected will be placed At Risk of Redundancy and will enter into a period of individual consultation. Employees who leave IBM through involuntary redundancy will receive:*
>
> - *A redundancy payment calculated according to statutory redundancy guidelines*
> - *A minimum period of a 10-week period of worked notice.*
> - *Career transition support*
> - *Some employees may have contractual redundancy terms which will apply*

If you have any questions, please approach your manager in the first instance. I would like to thank you for your continued support and commitment.

57. I find that the claimant received 3 days warning that he might be made redundant but that he was not told at that time what criteria would be used to determine whether he would be selected for redundancy, what evidence would be used to make that decision or whether he would be given the opportunity to challenge any aspect of it.

The selection process

58. The selection process adopted was one that was proposed by HR. Ms Baker said

"Usually at IBM, our process involves the in-country manager scoring and carrying out the redundancy process for their direct reports, with the functional manager assisting with this process by giving feedback on the employee's performance. Therefore, following IBM policy, I contacted Neil as he was responsible for conducting the scoring and the redundancy process. Neil was aware that even if he asked other managers for input to support the ranking process, the ultimate responsibility for the scoring would lie with him".

59. It is clear that Mr Bradbury followed this process without any consideration as to whether it was appropriate or not. When asked whether he had given any thought to interviewing the claimant and Mr Lawder he said, "I just followed the process as outlined to me by HR and interviewing proposed candidates were not included". Similarly, when asked whether there was any consultation with the claimant or anyone at his level about the identification of the poll or the selection or scoring process, Mr Bradbury said, "no, I just followed the process. It's very rigidly defined in IBM".

60. The selection process was undertaken on 26 March 2018. Mr Bradbury had a telephone call with Mr Das, Ms Ikie, Jenny Li Kam Wa and Ethan Han. Mr Das was the claimant's then current line manager, Ms Ikie was his previous Line Manager, Ms Li Kam Wa was the claimant's manager before that and Mr Han was Mr Lawder's line manager. I set out Mr Bradbury's evidence about this call from his witness statement:

"36. During the call, I firstly asked all managers to provide me with feedback and justification on Christian for each selection category. I asked Amit, as Christian's current functional manager to propose a score for each scoring criterion for Christian. All managers then provided me with feedback on Christian's performance based on their experience of managing him. To assist with the scoring and feedback we referred to Christian's two most recent Checkpoint results, in which he was marked for "Business Results", "Client Success", "Innovation", "Responsibility to Others" and "Skills". We then discussed each proposed score and came to a consensus as to

whether the score should be altered up or down based on the manager's feedback.
37. We then carried out the same process for the other affected employee. However, Ethan was responsible for proposing initial scores for the other employee because he was his functional manager at the time. Again, we all discussed his proposed scores and arrived at a consensus on the call. Jenny would have been responsible for the other employee's redundancy consultation process beyond this point if he was placed "at risk". This is because she was the other employee's "in country" manager, in the same way that I was responsible for Christian's consultation process as his "in country" manager.
38. The call lasted for approximately 2 hours and 30 minutes and we spent around the same amount of time discussing and scoring each individual. For fairness, we firstly discussed feedback and scored each employee separately, and then carried out a comparison exercise to ensure that the selection criteria were applied fairly between the two individuals in the pool. I felt confident that we awarded the most appropriate scores for both individuals, and had sufficient information in terms of written assessments and oral feedback from managers to make an informed decision".

61. I was not shown any notes or record of this conversation, but the scores and some feedback are recorded in a spreadsheet. The scores were as follows:

	Claimant	Mr Lawder
Business Impact	4/10	6/10
Performance	14/30	17/30
Skills for the Future	4/10	7/10
Total	22/50	30/50

62. Mr Lawder's scores were then increased at the normalization meeting on 27 March 2018 (see below) to account for his long term absence thereby increasing his overall total to 33/50.

63. The claimant's scores were said to be evidenced by the feedback he had received in his Checkpoint reviews in 2016 and 2017, the first of which was carried out by Ms Ikie, and the second by Mr Das with input from Ms Ikie. He was allocated a ranking in each Checkpoint of with Expects More (being the lowest); Achieves or Exceeds (being the highest).

64. Mr Bradbury was unable to provide any real clarity as to how he came to the particular score for each category – he said that he asked the managers to propose a score for each person out of the respective maximum scores and then open discussion as to whether the proposed score was fair, too low or too high. Then they came to a consensus. He said that as a foundation to talk around, they had available the Checkpoint documents for previous two years. In Mr Bradbury's view, this was a fair and reasonable basis based on recent and past performance.

65. He said, specifically, that it was not correct to say he arrived at a score – he said it was a consensus.

The Checkpoint appraisals

66. The Checkpoint appraisals are the respondent's annual appraisal process. Employees are rated Expects More (being the lowest); Achieves or Exceeds (being the highest) as referred to above. None of the respondent's witnesses provided any explanation in their witness statements as to the purpose of the Checkpoint appraisals or the use to which they were put.

67. The claimant said that his understanding of the purpose of the Checkpoint results was to determine things like the level of bonus at the end of the year and potential pay rises neither of which, in the claimant's view, were generous. The feedback and assessment in the Checkpoint process was not agreed with the employee concerned – neither of the records were signed by the claimant – but there was a right of appeal. The respondent's witnesses all relied on the fact that the claimant had not appealed against the Checkpoint scores as evidence that he agreed them. The claimant said he was not very money motivated and he was not expecting much in the way of bonus or pay, so he never appealed against them. He also said that he didn't see the point of appealing. Nonetheless, it was clear that he did not agree with all of the assessments.

68. Ms Baker said that if the claimant had not appealed against the Checkpoint rankings it was reasonable for the respondent to rely on them as accurate and Mr Bradbury said that Mr Das had relied on the Checkpoint review in proposing his redundancy score as it had not been appealed.

69. The claimant said that the first time he was aware that his Checkpoint results could be used as part of a redundancy selection exercise was after he had been selected for redundancy.

70. Ms Baker said that she understood that the Checkpoint results would form part of an employee's record and she understood that it would be relevant for a redundancy exercise. She said it would *also* be used for decisions around payrises and promotions. When asked how employees would know that the Checkpoint results could be used in a redundancy selection exercise, she said she was not sure.

71. Ms Ikie "assumed the claimant would know" that his Checkpoint results would be used in a redundancy selection exercise. She said that the claimant had been through training on checkpoint but confirmed that it did not include information to the effect that the appraisals might be used in a redundancy selection exercise. However, she did not tell the claimant that they might be used in this way while undertaking the Checkpoint reviews so it is not entirely clear on what basis Ms Ikie came to the conclusion that the claimant would know.

72. Mr Bradbury said it was "obvious" that the Checkpoint document would be used for assessing the claimant for redundancy selection – although he did not say why it would be obvious.

The claimant's scores

73. The claimant sought to challenge the basis of the scores he was allocated. The respondent's case was that the claimant had failed to proactively learn new skills by undertaking training and should have proactively worked with the 2nd line engineers to identify common problems and propose solutions to them. The claimant's said that the Mr Bradbury's belief that he had time to undertake additional training and proactive work was based on a misunderstanding of how much work he had to do.

74. Specifically, Ms Ikie said that the claimant had an average of 2 PMRs per month and it was clear that Mr Bradbury thought the claimant was not busy enough. He said that he was uncommunicative, difficult to reach and did not respond to customers. Ms Ikie's assessment of how much work the claimant had was based on the information that was set out in the large spreadsheet provided to the Tribunal on the first day. This information was taken from the respondent's database and recorded, the respondent said, the PMRs that had been allocated to the claimant.

75. The claimant said that this was not an accurate reflection of his workload and he had produced a computer program that analysed his "Sametime" chats (an internal messaging application used by the respondent) and this had identified mentions of PMRs in his chats that reflected a much higher level of workload than that indicated by the respondent.

76. The respondent accepted the claimant's analysis that a larger number of PMR's were mentioned in his chats. However, they said that just because of PMR was mentioned in the chat did not mean that it was assigned to the claimant and that the spreadsheet was a more accurate reflection of his actual workload. The claimant had had insufficient time to analyse the spreadsheet but he had concluded from the title of the spreadsheet, which was "backlog PMR's" that this did not record PMR's that were resolved quickly. He said that the workload recorded on that spreadsheet was not consistent with his recollection of how busy he was.

77. I accept the evidence of Ms Ikie that the spreadsheet included all the PMR's recorded on the respondent's system as assigned to the claimant, not just those that took longer to resolve. That the claimant was only getting an average of 2 new PMRs per month was recorded in the 2016 and 2017 Checkpoint records. Ms Ikie said that PMRs could take between days and months to resolve depending on their complexity.

78. The claimant's and Mr Lawder's scores are set out above. Mr Bradbury said that they were based on feedback from Ms Ikie, Mr Das and Ms Li Kam Wa. this comprised of references within the 2016 and 2017 checkpoint documents and the opinions expressed by Ms IK, Mr Das and Ms Li Kam Wa in the

conversation on the telephone on 26 March 2018. There is a summary of that feedback recorded in the spreadsheet page 482 of the bundle.

79. The claimant challenged those scores by seeking to demonstrate that they were based on factual inaccuracies. He put it to Mr Bradbury that it was not an appropriate part of this role to seek to provide wide solutions to common problems because, in part, of the absence of a testing environment. He said, effectively, that it was not appropriate for him in his role to be producing "fixes" for general release - this was the role of the development team. Ms IK said that any specific fixes created by the claimant would need to go through a test team prior to general release, but at the claimant's level he did have the remit to work on code issues.

80. The claimant also suggested that it was not appropriate for him at level 3 to be seeking problems to fix - he could only work on the issues that were passed to him from level 2 so that the respondents suggestion that he proactively work with level 2 was misconceived. The claimant also pointed to a specific interaction which the respondent relied on as indicating that the claimant was unhelpful in his responses. The claimant says that this interaction in fact demonstrated that he had provided a helpful response.

81. Mr Bradbury answered these points to an extent, but predominantly referred back to the checkpoint documents and the feedback that he had received from Ms Ikie and Mr Das. Mr Bradbury had very little direct personal knowledge of any of these issues.

82. The claimant suggested to both Mr Bradbury and Ms Ikie that it was reasonable for him not to take on additional product roles if he was, contrary to Ms IK's assessment, very busy. Ms IK said that had the claimant in fact been busy, he could have raised it in the checkpoint meetings or in the regular conversations while she was managing him. The claimant conceded that he did not provide regular updates on his work.

83. The claimant also pointed to specific training that he had undergone contrary to the assessment that he was unwilling to learn new skills. Specifically, in the scoring spreadsheet, it says "he has also shown little interest or application in learning and applying himself to cloud skills to support our new offerings". While it is recorded both in the 2017 checkpoint and the scoring matrix that the claimant undertook CEM training, the respondent says he did not then go on to apply it. The claimant says he was too busy doing his job to expand into these new areas.

84. In my judgement, it was reasonable for Ms Ikie to hold the views that she did about the claimant's workload based on the checkpoint feedback and Ms Ikie's supervision of the claimant. It was also reasonable for Ms Ikie and Mr Bradbury to consider that at the claimant's level he could be more proactive in undertaking training, implementing what he had learned from that training and suggesting enhancements in response to common problems, even if he did not personally implement them. Again, it was reasonable to hold these

views on the basis of the recorded workload of the claimant set out in the checkpoint records and on the basis of Ms Ikie's understanding of the claimant's workload. Given the claimant admitted lack of reporting to Ms Ikie of his workload it is not surprising that she held these views.

85. It is not the role of the tribunal to re-score the claimant. What is clear is that from the claimant's perspective each of these scores were based on insufficient information. In my view, despite the reasonable beliefs of Ms IK and Mr Bradbury, it was not reasonable for Mr Bradbury to base his decision to select the claimant for redundancy on feedback from the managers - and I note that I have only heard from Ms Ikie and there is no record of any feedback given by any other managers - because the information on which those beliefs was based was obtained in a wholly different context to redundancy selection exercise.

86. I accept the claimant's evidence that he decided not to challenge the checkpoint reviews because there was no point. By the claimant's own account he was busy but not too busy and, as far as he knew, he was working adequately. There was no suggestion of any capability process and the evidence from the respondents was that the claimant was a technically competent computer engineer.Concsequently, there was no good reason, fromt eh claimant;s perspective, for him to challenge the Checkpoint scores or his manager's view ofhim, I also accept the claimant;s evidnece that he did not know the Checkpoint scores might be used to decide his future employment – if he hadn't been informed of this then, despite Mr Bradbury's view that it was obvious, there was no reason why he would think they might be.

87. Because the Checkpoint assessments were not an agreed record, and because the claimant had never been told that they might be used for a redundancy selection exercise it was not, in my judgement, reasonable for the respondent to treat them as agreed by the claimant and then rely on them as a reason to select him for redundancy. The decision was based, effectively, on the subjective opinions of the claimant's line managers.

Mr Lawder

88. The claimant raised as an issue specifically the fact that Mr Lawder had limited support experience. The claimant said in evidence that he was unsure exactly what job Mr Lawder was doing but he referred ot the fact that he was required to train Mr Lawder on a number of aspectso the role on handover.

89. Mr Bradbury said that Mr Lawder was in a team where the engineers undertook support on a rota but he was unaware when he had done that recently. However, Mr Bradbury also confirmed, and I accept, that the selection process was aimed at identifying who would be suitable for the role going forward and on the premise that there would be a reduced need for "on prem" support.

90. Mr Bradbury accepted that Mr Lawder had less experience with Java than the claimant but that Mr Lawder underestimated his own skills and, unlike the claimant, was enthusiastic about developing new skills. It is, therefore, likely that Mr Lawder had less support experience in the Gateway products than the claimant.

Normalisation

91. After the scores had been allcocated to the claimant and Mr Lawder, Mr Bradbury said that he went through a "normalisation" process with Ms Baker. The purpose of this was said, by Mr Bradbury, to be

"to consider the scores again and to perform a check and balance so we could all be satisfied that a fair approach was taken to the scoring. I wanted to make sure that I was happy with the scores that we awarded to Christian and the other employee and that none appeared to be anomalous. It was also an opportunity to check that a consistent approach was taken to the ranking process and to take any special circumstances into consideration which might have required adjustment to the scores".

92. Ms Baker said that she had a call with Mr Bradbury to consider whether a fair approach was taken. However, she confirmed that she could not comment on the feedback given and the scoring meeting was not recorded in any way so it is not entirely clear what input Ms Baker was usefully ble to give.

93. At that meeting, Mr Bradbury decided to increase Mr Lawder's score by 3 points (2 for performance and 1 for skills of the future) to account for his absence. He did not explain how he came to that score in his witness statement and in cross examination he said, when asked how he came to that score that it was a subjective judgment – just what seemed fair.

94. However, I find that there was no objective justification provided by the respondent for the outcome of the normalisation process. It is difficult to see how, in light of Ms Baker's evidence about it, the normalisation could have been anything other than a rubber-stamping exercise by her.

95. I accept that it was appropriate to consider adjusting Mr Lawder's scores to account for his absence which the respondent considered was likely to be the result of a disability. However, the respondent has not shown any good reason for increasing Mr Lawder's scores by the amount that they were increased. Conversely, it is also clear that Mr Lawder had been scored more than the claimant even without the addition of three points.

Consultation

96. The claimant was informed of the outcome of the redundancy selection exercise in a meeting with Mr Bradbury on 29 March 2018 and he was provided with a summary of his scores and the reasons for them. It is agreed that this was the first time the claimant was told of the selection criteria and

the scoring mechanism. I was taken to a script of that meeting. This covered a number of key points under the following headings:

- open the message and set the scene
- deliver the message
- provide the employee their employee score summary sheet
- involuntary separation (sic): key dates and separation figure
- redeployment
- close the meeting
- allow employee time to ask any questions-refer to the Q&A as required
- draw the meeting firmly to a close

97. The key part of this meeting, being the first time that the claimant knew the basis of his selection, is the section under "give the employee their employee score summary sheet". This says

"Discuss the scores with the employee. Ensure you can articulate the detail behind the scores so that you can have a meaningful discussion and provide sufficient granularity for the individual to understand why they have been selected. Deal with any points the employee raises as best you can. If necessary, you should say that you will need time to consider the employee's points and you will therefore come back to them at a further meeting".

98. Ms Baker said that this was the part of the meeting at which the claimant could challenge the score. Mr Bradbury says that it doesn't explicitly say the claimant could appeal or that that would have been the point to question the scores. Mr Bradbury said that the claimant did not ask any questions or challenge to the scores at that point. However, when questioned by the claimant as to how he would know whether he could challenge scores without any explicit reference to an appeal, Mr Bradbury said "I don't know that there is an official appeal I'm not an HR expert, can only tell you what I see in the script". He did say that if the claimant had said they seem unfair it was taken back to HR but that he didn't say that. Further on Mr Bradbury added he was not aware if the claimant could challenge the scores, but he could have asked questions or appealed. He agreed that he did not tell the claimant in that meeting that he could appeal.

99. The claimant said that he seemed to remember asking questions but that Mr Bradbury had said he had to follow the script so even if he could answer it he wouldn't be in a position to. That was, however, around the justification for the redundancy. The claimant also said he couldn't remember if he challenged the scores are not as there was no context for them and no information about how they'd been arrived at.

100. Mr Bradbury then, on the same day, sent the claimant an email confirming that the claimant had been put "at risk" of redundancy. The email explains the reason for redundancy, being the reduced need for "dedicated Netcool integration L3", explains that the respondent is now entering a period of individual consultation and providing details of redundancy payments, potential for redeployment and further support.

101. The email does not mention the right to appeal against the decision or challenge the scores in any way.

102. I find that the claimant was not informed at this stage that he had the right or ability to challenge the scores or the decision to select him for redundancy. I also find that, on the balance of probabilities, the claimant dd not ask any questions about his scores – his focus appeared to be on the justification for the redundancies.

Further consultation

103. The claimant attended a further consultation meeting with Mr Bradbury on 11 April 2018. I have not seen any notes of that meeting but Mr Bradbury says that he tried to discuss redeployment opportunities with the claimant, but he seemed uninterested and the meeting was over in a few minutes. The claimant says he couldn't recall what was discussed but remembers being bemused by the whole thing. A further meeting was scheduled for 16 April which the claimant did not attend.

104. On 23 April 2018 there was a further meeting between the claimant and Mr Bradbury at which the claimant was told of his dismissal, effective from 16 July 2018. Mr Bradbury again followed a script prepared by Ms Baker. This script does not contain any indication that the claimant was informed of his right to appeal or what that might mean.

105. The claimant was given a two page letter of dismissal which set out provisions relating to his entitlement to redundancy and other payments, confidentiality and other matters and, at paragraph 8, said "You have the right to appeal the decision to give you this notice of the termination of employment by reason of redundancy. Dismissal appeals should be sent to [email address] within 10 calendar days of the date of this letter and should clearly specify the reasons why you consider the decision in your case was not correctly reached". That letter is dated 23 April 2018.

Appeal

106. The claimant did not appeal against the decision. He said that the reason he did not appeal was because he was waiting for the information to be provided by the respondent in response to his subject access request and he did not in any event believe that the redundancy was genuine and there was no point in appealing. He also said that he had sought to compare his score with Mr Lawder but he had not been given his scores. Mr Bradbury confirmed this.

107. I accept that this is the way the claimant felt and that this presented a perceived barrier to the claimant appealing. However, as I have found above, the claimant was given some information about his scores at the first meeting a month earlier.

Grievance

108. The claimant did, on 12 July 2018, submit a grievance about the redundancy selection process. He complained about

    a. the lack of justification for a redundunacy situation and/or discussion on how it could be avoided;
    b. the fact that the checkpoint results were relied on without him having a chance to review them
    c. lack of consultation with L2 as to his actual performance
    d. the failure ot provide information about the redunduncy process under a DSAR
    e. the absence of any previous complaints about his performance
    f. that the role was not redundant; and
    g. it was orchestrated to select him.

109. These were broadly the concerns raised at the Tribunal. The claimant did not ask any questions about the grievance process nor bring any evidence, the respondent said it relies on the grievance as part of the redundancy procedure. The grievance was not upheld. There is no evidence from the grievance outcome that any consideration was given to the points the claimant raised and I did not hear any evidence from the grievance officer. The outcome was no more than a recitation of what had happened and a decision that the redundancy process was dealt with appropriately.

Redeployment

110. The final issue that the claimant raises is that he was not given adequate support to find alternative employment but was instead referred to an internal website.

111. The claimant was referred to the respondent's internal website on which all vacancies within the respondent are advertised (Global Opportunity Marketplace (GOM)) at the meeting on 29 March 2018 and further details were provided in the email of the same date. The referral to GOM was reiterated in the meeting on 11 April and referred to again at the meeting on 23 April 2018. Mr Bradbury said that he tried to arrange further meetings to focus on redeployment after then but the claimant declined any further meetings.

112. The claimant said in evidence that he did look on GOM, but there were no jobs suitable for home working, in his view, which was important to him.

113. Ms Baker said that redeployment is the manager's responsibility and they should encourage the employee to look on GOM and the manager may speak to any potential hiring managers if there is a potentially suitable job.

114. I accept Ms Baker's and Mr Bradbury's evidence on this point and find that the reason more support was not given to the claimant was because he

effectively disengaged from the process and did not identify any suitable jobs from those available within the respondent.

The law

Unfair dismissal

115. Section 98 (General) of the Employment Rights Act 1996 (ERA) provides

> (1) 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 (or, if more than one, the principal reason) for the dismissal, and
> >
> > (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> > (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
> >
> > (b) relates to the conduct of the employee,
> >
> > (c) is that the employee was redundant, or
> >
> > (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
>
> (3) In subsection (2)(a)—
>
> > (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
> >
> > (b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.
>
> (4) [Where] the employer has fulfilled the requirements of subsection (1), 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 employee, and
> >
> > (b) shall be determined in accordance with equity and the substantial merits of the case.
>
> (5) . . .
>
> (6) [Subsection (4)] [is] subject to—

(a) sections [98A] to 107 of this Act, and

(b) sections 152, 153[, 238 and 238A] of the Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal on ground of trade union membership or activities or in connection with industrial action).

Reason

116. It is for the employer to show the reason. In *Abernethy v Mott Hay and Anderson* [1974] ICR 323, [1974] IRLR 21, Cairns LJ said "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee".

117. In *The Co-operative Group v Baddeley* [2014] EWCA Civ 658, at paragraph 41 and 42 Underhill LJ held that

"…Cairns LJ's exact language may not be wholly apt in every case, but the essential point is that the "reason" for a dismissal connotes the factors operating on the minds of the person or persons who made the decision to dismiss. The same approach applies to the "ground" for a putative detriment contrary to section 47B.

42. That requires the identification of the decision-maker(s). It was accepted before us, and appears to have been accepted by the ET, that the relevant decision-makers – that is, the persons with whose motivation we are concerned – are Mr Atkinson and Mr Logue. In principle, therefore, it is immaterial what Mr Berne may have thought or wanted except to the extent that that operated on their minds. There was some discussion before us of whether that approach was applicable in all cases or whether there might not be circumstances where the actual decision-maker acts for an admissible reason but the decision is unfair because (to use Cairns LJ's language) the facts known to him or beliefs held by him have been manipulated by some other person involved in the disciplinary process who has an inadmissible motivation – for short, an Iago situation. Mr Carr accepted that in such a case the motivation of the manipulator could in principle be attributed to the employer, at least where he was a manager with some responsibility for the investigation; and for my part I think that must be correct".

118. This requires, therefore, the identification of the decision-maker – the person who took the decision to dismiss the claimant – and the identification of the facts known or beliefs held by them in order to identify the reason for the decision to dismiss the claimant. In *Baddeley*, the distinction was also made, at paragraph 43, between the reason for a dismissal and the fact that an employer welcomed the dismissal because of their perception of the employee. So that, in this case, if the reason for dismissing the claimant **was actually** redundancy, but the respondent was pleased that the claimant had been selected because they perceived him to be underperforming, that dismissal is still because of redundancy.

Redundancy

119. Section 139 ERA provides that

(1) 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—

(*a*) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(*b*) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

(2) For the purposes of subsection (1) the business of the employer together with the business or businesses of his associated employers shall be treated as one (unless either of the conditions specified in paragraphs (*a*) and (*b*) of that subsection would be satisfied without so treating them).

(3) For the purposes of subsection (1) the activities carried on by a local education authority with respect to the schools maintained by it, and the activities carried on by the [governing bodies] of those schools, shall be treated as one business (unless either of the conditions specified in paragraphs (*a*) and (*b*) of that subsection would be satisfied without so treating them).

(4) Where—

(*a*) the contract under which a person is employed is treated by section 136(5) as terminated by his employer by reason of an act or event, and

(*b*) the employee's contract is not renewed and he is not re-engaged under a new contract of employment,

he shall be taken for the purposes of this Act to be dismissed by reason of redundancy if the circumstances in which his contract is not renewed, and he is not re-engaged, are wholly or mainly attributable to either of the facts stated in paragraphs (*a*) and (*b*) of subsection (1).

(5) In its application to a case within subsection (4), paragraph (*a*)(i) of subsection (1) has effect as if the reference in that subsection to the employer included a reference to any person to whom, in consequence of the act or event, power to dispose of the business has passed.

(6) In subsection (1) 'cease' and 'diminish' mean cease and diminish either permanently or temporarily and for whatever reason.

120. In *Murray and Another (A.P.) v Foyle Meats Limited (Northern Ireland)* 1999 ICR 827 HL), Lord Irving of Laird explained that in order to detimne whether the the requirements of a business for employees to carry out work of a particular kind, or have ceased or diminished requires the tribunal to ask two questions of fact:

"The first is whether one or other of various states of economic affairs exists. In this case, the relevant one is whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second question is whether the dismissal is attributable, wholly or mainly, to that state of affairs. This is a question of causation".

121. In *James W. Cook & Co (Wivenhoe) Ltd v Tipper and others* [1990] I.C.R. 716, Neill L. J. held that an Employment Tribunal is entitled to consider whether a redundancy situation is genuine, but is not permitted to investigate the commercial and economic reasons behind the redundancy situation.

Fairness

122. In respect of Redundancy, the leading case is *Williams v Compair Maxam Ltd* [1982] IRLR 83 in which the EAT set out the standards which should guide tribunals in determining whether a dismissal for redundancy is fair under s 98(4). Browne-Wilkinson J, giving judgment for the tribunal, expressed the position as follows:

> *"… there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:*
>
> > *1 The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.*
> >
> > *2 The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.*
> >
> > *3 Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.*

> *4 The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.*
>
> *5 The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.*
>
> *The lay members stress that not all these factors are present in every case since circumstances may prevent one or more of them being given effect to. But the lay members would expect these principles to be departed from only where some good reason is shown to justify such departure. The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim'.'*

Selection

123. As is clear from *Williams*, the selection criteria must be objective, and decisions made under the criteria must be justifiable. This means that any criteria used must be as advertised, clear and transparent. The respondent relies on *British Aerospace plc v Green* [1995] ICR 1006 as authority for the uncontroversial proposition that the obligation on an employer in a redundancy exercise is to set up a selection exercise that can reasonably be described as fair. They also refer to the following passage:

> *"The use of a marking system of the kind that was adopted in this case has become a well-recognised aid to any fair process of redundancy selection. By itself, of course, it does not render any selection automatically fair; every system has to be examined for its own inherent fairness, judging the criteria employed and the methods of marking in conjunction with any factors relevant to its fair application, including the degree of consultation which accompanied it. One thing, however, is clear: if such a system is to function effectively, its workings are not to be scrutinized officiously. The whole tenor of the authorities to which I have already referred is to show, in both England and Scotland, the courts and tribunals (with substantial contribution from the lay membership of the latter) moving towards a clear recognition that if a graded assessment system is to achieve its purpose it must not be subjected to an over-minute analysis. That applies both at the stage when the system is being actually applied, and also at any later stage when its operation is being called into question before an industrial tribunal".*

124. This case is authority for the following propositions: that the selection process must be judged overall for its fairness; and that the operation of the selection process must not be analysed in too much minute detail. It is not the role of the tribunal to analyse in detail the application of the selection criteria to the claimant and then undertake it again.

125. In respect of the selection criteria, I was referred also to *Mental Health Care (UK) Ltd v Biluan* (UKEAT/0248/12/SM) and particularly paragraph 35 in which Underhill J held

"Mr McCracken's points are well-founded. It is inevitable that the character of the consultation that is reasonable and appropriate may differ to some extent in cases where there is collective consultation with a trade union or other representatives and in cases where there is not. The scope for useful consultation on such issues as avoiding the redundancy situation altogether or the choice of selection criteria may well be less in the latter case; the focus for individual consultation will normally be on the circumstances involving the individual's particular case, and in particular – though not necessarily only – the chances of alternative employment. It seems to us that the Tribunal took no real account of this. The process described by the Tribunal as summarised at para. 5 above seems to us to reflect very much the sort of consultation exercise that we would expect an employer to carry out".

126. The first of the points referred to was this: "He accepted that there was no consultation about selection criteria; but he contended that that was not necessary in a case where there was no consultation at a collective level."

127. The respondent seems to imply that this means that consultation with individuals on selection criteria is never necessary. I do not read this as being so definitive – read together with *British Aerospace* (above) the extent to which the selection criteria are consulted on may be relevant to the fairness of the selection process, along with other factors referred to.

Consultation

128. In *Polkey v AE Dayton Services Ltd 1988 ICR 142, HL* Lord Bridge stated that:

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

129. The respondent referred to paragraph 43 of *Pinewood Ltd v Page* [2011] ICR 508 which held:

"We agree with Mr Forshaw's analysis. In R v British Coal Corpn, Ex p Price [1994] IRLR 72, as Glidewell LJ made clear, fair consultation involves the provision of adequate information on which an employee can respond and argue his case or, as he put it, at p 75:

"Fair consultation involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted

and to express its views on those subjects with the consultor thereafter considering those views properly and genuinely""

130. The EAT went on, at paragraph 46, to say

"It is, in our view, for a tribunal to decide whether an employee has been given a fair and proper opportunity to understand fully the matters about which he is being consulted and to express his views on those subjects and with the consultor thereafter considering those views properly and genuinely and that may well include being given sufficient information to be able to challenge the scores given to him in the completion of a redundancy exercise. In the modern climate much of this information would hopefully have been available to an employee via a previous appraisal process".

131. The role of the tribunal is, therefore, to consider whether the consultation provided the claimant with a fair and proper opportunity to understand the reasons for his selection and to comment upon them and challenge them if necessary.

132. I was referred also to *Taylor v OCS Group Ltd* [2006] EWCA Civ 702 in which it was held that Tribunals should apply the statutory test in s 98(4) and

"should consider the fairness of the whole disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care. But their purpose in so doing will not be to determine whether it amount to a rehearing or a review but to determine whether, due to fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage".

Redeployment

133. Employers are expected to take reasonable steps to mitigate against the effects of redundancy by considering whether suitable alternative employment is available. (*Williams v Compair Maxam Ltd* [1982] IRLR 83)

General

134. Finally, the range of reasonable responses applies to all aspects of the fairness decision (*Turner v East Midlands Trains* [2012] EWCA Civ 1470) and "it is not the function of the industrial tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted". (*Williams v Compare Maxam Ltd* [1982] IRLR 83).

135. I must, therefore, not substitute my own decision but seek to assess whether each aspect of the dismissal process was in the range of reasonable responses of a reasonable employer.

Contractual redundancy payment scheme

136. The issue in respect of the claimant's claim for an enhanced redundancy payment is whether a term is or has become incorporated into his contract of employment that he is entitled to payment of particular benefits on being made redundant in excess of his statutory entitlements.

137. The question to be answered is that set out in *Park Cakes Ltd v Shumba* [2013] EWCA Civ 974*; "whether, by his conduct in making available a particular benefit to employees over a period, in the context of all the surrounding circumstances, the employer has evinced to the relevant employees an intention that they should enjoy the benefit as of right"*.

138. In answering that question, the following matters are likely to be relevant:

    a. On how many occasions, and over how long a period, the benefits in question have been paid.
    b. Whether the benefits are always the same.
    c. The extent to which the enhanced benefits are publicised generally
    d. How the terms are described
    e. What is said in the express contract
    f. Equivocalness.

139. The burden of showing that an enhanced redundancy payment is, or has become, contractual is on the claimant.

Conclusion

Reason for dismissal

140. In my judgement, the reason for the claimant's dismissal was redundancy. Mr Bradbury was the decision maker and he held the belief that the respondent had a need to reduce the number of engineers working on "on prem" products. This belief was a result of what he was told by his manager, who had in turn been told to "reduce headcount", and it coincided with his own understanding of the situation. This may have been an insensitive way of referring to people losing their livelihoods, but I am satisfied that it was the genuine belief of Mr Bradbury that there was a reduced need for people undertaking the claimant's role.

141. I have not considered whether that decision was justifiable – it is immaterial whether it was a sound commercial decision. The question is whether it was a genuine decision and, having regard to the evidence of Mr Bradbury and the global nature of the business, I am satisfied that it was.

Selection

142. I am required to consider whether the selection process was, in all the circumstances, one which a reasonable employer could reasonably adopt. I

am not satisfied that it was. On the face of it, the process adopted is a common enough one. The respondent says that the selection criteria broadly reflected the criteria against which employees were judged in their annual appraisals. I accept that they were and that this was the reason why it was chosen.

143. I also accept that it is not always necessary to consult with individuals about the selection criteria to be used prior to using it. This, as the case law suggests, is a matter for collective consultation.

144. However, the absence of any consultation or discussion with the claimant about the proposal to rely on the previous CheckPoint scores introduced into the scheme an element of unreasonableness in these particular circumstances. The claimant said, and I accept, that while he did not agree with the CheckPoint outcomes, he did not see any point in challenging them at the time and he was unaware that they might be used in a redundancy selection exercise at some point in the future. It is also perfectly clear that the claimant had no reason to consider that the CheckPoint results might be used in this way. Despite Mr Bradbury's and Ms Baker's assertions that it was obvious, I do not agree. The CheckPoint assessments were not agreed by the employees at the time and they could only be challenged on appeal. If they were likely to have wider implications for employees' continuing employment in a future redundancy situation this ought to have been made clear at the time.

145. It was not reasonable to rely on an assessment produced for one purpose (potential bonuses and career progression) for a wholly different purpose (redundancy selection) without first discussing this with the people likely to be affected or, at the very least, giving some serious consideration as to whether this was fair.

146. Further, the allocation of scores was not transparent or obviously objective. Mr Bradbury was unable to articulate why one score had been given rather than another, he could not explain the basis on which the additional scores had been awarded to Mr Lawder and there was no evidence from Mr Das, who had proposed the initial scores for discussion, so it was not possible to see whether the scoring had changed from that initial proposal or whether the decision had, *de facto*, been made by Mr Das.

147. Although the claimant sought to argue before me that his scores were incorrect, I have not undertaken the process of re-scoring them. However, that evidence about disparities in the assessment and the claimant's evidence or experience is relevant to the extent that there was clearly a dispute between the claimant and the respondent about the score he should have had. This demonstrates, in my view, the unfairness of relying on the unagreed CheckPoint outcomes and manager's views without giving the claimant an opportunity to comment on those assessments before the scoring decisions were made.

148. For these reasons, the selection and scoring process adopted was one which no reasonable employer would have adopted.

Consultation

149. There were three consultation meetings between the claimant and Mr Bradbury after the decision to select the claimant for redundancy had been made: they were on 29 March 2018, 11 April 2018 and the final one at which he was handed his notice on 23 April 2018.

150. In my judgement, the claimant was not at the first meeting given a fair and proper opportunity to understand the reason for his selection nor an opportunity to challenge the scores. It was clear that Mr Bradbury did not explain to the claimant explicitly or clearly that he could challenge the scores and the script was, in my view, worded in such a way so as to not encourage (even if not actively discourage) open discussion about and/or challenge to the scores. Nowhere in the script, for example is the claimant told of his right to appeal against, or even challenge, the scores. Even if the claimant had sought to at that stage, in the context where he had just been handed the scores without an opportunity to consider them in his own time, it is perfectly clear that Mr Bradbury did not know whether the claimant was permitted to challenge the scores or what the process or that would be.

151. Having made the decision on scoring without telling the claimant how that would be done and without allowing the claimant to make representations about the scores, no reasonable employer would then fail to give the employee a proper opportunity to consider and challenge those scores.

152. There is no suggestion that the scores were discussed at the subsequent consultation meetings, but at the final meeting the claimant was given the right to appeal in his dismissal letter. The claimant did not appeal. However, he did submit a grievance which was to all intents and purpose, treated as an appeal. This was not adequate to remedy any default in the process as there was no evidence that any consideration was given to the points the claimant raised. This process was certainly not adequate to resolve any unfairness arising from the earlier selection process (*Taylor v OCS Group Ltd* [2006] EWCA Civ 702). The grievance officer did not properly engage with the claimant's points and I conclude that an appeal would have been conducted in a similar way.

153. The other two consultation meetings were concerned with potential redeployment.

Redeployment

154. The respondent's process for identifying suitable jobs is reasonable. All jobs within the respondent were available to the claimant to identify as potentially suitable and he did not. As the respondent said, the claimant effectively disengaged from the process. I do, however, accept that the claimant did not identify any jobs that he considered were suitable for him.

155. The respondent did take reasonable steps to try to identify suitable alternative employment for the claimant but there was no suitable employment available.

Unfair dismissal conclusions and Polkey

156. For the foregoing reasons, the decision to dismiss the claimant for redundancy was not within the band of reasonable responses.

157. There was a genuine redundancy situation and the identification of the pool was not in issue before me.

158. There was clearly a substantial dispute between the claimant and the respondent about the application of the selection criteria to him and his suitability to remain employed as against Mr Lawder's. I cannot, having regard to the evidence I have heard, say whether had the process been conducted fairly – namely had the claimant been given a proper and timely opportunity to challenge his scoring – he or Mr Lawder would have been selected for redundancy.

159. There was, in effect, a 50% chance that the claimant would have been selected for redundancy and a fair process been adopted is it was always going to be between the claimant and Mr Lawder. Thre were no other suitable jobs available for the claimant, so if he had been fairly selected, he would still have been made redundant.

160. For these reasons, any compensatory award will be reduced by 505 to reflect the fact that had a fair process been followed, there was a 50% chance that the claimant would have been dismissed for redundancy in any event.

Redundancy payment

161. Finally, I consider the claimant's claim for a contractual redundancy payment.

162. I have considered the factors referenced above (*Park Cakes Ltd v Shumba* [2013] IRLR 801) in determining whether a contractual redundancy term has arisen:

    a. On how many occasions, and over how long a period, the benefits in question have been paid. – it was paid once
    b. Whether the benefits are always the same. – it was only paid once, so it is not possible to say whether the benefits would always have been the same
    c. The extent to which the enhanced benefits are publicised generally – there was no evidence that the terms were publicized at all
    d. How the terms are described – the terms were described as "ex gratia" which the claimant accepted meant discretionary.
    e. What is said in the express contract – there were no express terms
    f. Equivocalness - Specifically, the Court of Appeal said "The burden of establishing that a practice has become contractual is on the employee,

and he or she will not be able to discharge it if the employer's practice is, viewed objectively, equally explicable on the basis that it is pursued as a matter of discretion rather than legal obligation." The claimant has not shown any facts from which I could conclude that this was anything other than a discretionary one-off payment.

163. As is clear from my findings above and considering these factors, there was no contractual term entitling the claimant to an enhanced redundancy payment and the claimant's claim for a contractual redundancy payment is unsuccessful.

Employment Judge **Miller**
14 September 2020