EMPLOYMENT TRIBUNALS

Claimant: Roger Harsley

Respondent: Cummins Engines Limited

Heard at: **On: 8th December 2020**

Before: Employment Judge AE Pitt

Representation
Claimant: In person
Respondent: Mr J Morgan of Counsel

RESERVED JUDGMENT

1.The claimant was unfairly dismissed

REASONS

1. This is a claim by Roger Harsley, the claimant in relation to his employment as a Temporary Production Operative with Cummins Limited, the respondent, at its Darlington Plant. He commenced his employment on 20th March 2017 and the effective date of termination was 31st December 2019. The claimant who was born on the 7th March 1962 was 57 years of age at the date of his dismissal, his weekly wage was £701 which included a shift allowance.

2. The claimant makes a claim for Unfair Dismissal, under section 98 Employment Rights Act 1996, namely that he was unfairly selected for redundancy. I had before me a bundle of documents which included the claimant's Contract of Employment; appraisal documents; a scoring sheet for temporary operators; a spreadsheet showing the scores for others across three shifts, and documents relating to the claimant's appeal. I read witness statements and heard evidence from the claimant and Stephen Morley, Operations Leader with the respondent. The claimant appeared in person and the respondent was represented by Mr J Morgan of Counsel.

Findings of Fact

3. In making my findings of fact I have taken account of the witness statements and oral evidence of the witnesses, and the contemporaneous documents I have been provided with. Where there was a conflict of evidence, I determined it on the balance of probabilities. In determining the facts, I note that I did not have a witness statement nor heard evidence from Mr Clitheroe, the claimant's Team leader, nor Mr Buckley who moderated the scores.

4. Cummins Engineering Ltd is an engineering company and the claimant was employed at its Darlington site. The respondent operated a 3-shift system within each shift were 6 'Teams' carrying out a variety of duties. The workplace operated a production line where an engine would move from one Team to the next before completion. The claimant was employed as a Temporary Production Operator on a diesel engine production line in the Electrified Monorail System (EMS) team. The Claimant had been employed for over 2 years but was still classed as a temporary employee having been employed on a series of fixed term contracts and having failed to secure a permanent position. On one occasion he applied to become a Customer Services Representative. Temporary employees worked alongside a team of permanent employees on each shift. The shift the claimant was working on consisted of 25 to 30 operators, working on a number of engines that the Company was building. The Claimant's day-to-day role involved picking engine components from material locations or a kitting box and installing them onto a diesel engine.

5. There was a recognition agreement between the respondent and the 'Unite' Trade Union. The claimant was a member of the Trade Union. There was a downturn in the respondent's work starting in late 2018. A redundancy process was undertaken by the respondent during June and July 2019 and a number of redundancies were made. The claimant was not selected for redundancy at that time although he was part of the pool of employees 'at risk of redundancy'.

6. The downturn in work continued and I have seen slides from a presentation showing the state of the company as of the end of October 2019. I am satisfied, despite Mr Morley's assertion that this presentation was made to the relevant employees in mid late October early November, that in fact the presentation to the employees did not take place until after 14th November 2019. I conclude this because I am satisfied that the claimant was absent at the time the meeting was held and, in the documents, 'First Individual Consultation Meeting', and the HR1 the date for the start of consultation is 22nd November**.** Taking account of the speed of the consultation process it is unlikely that the respondent waited three weeks after its announcement to commencement the individual consultations. At the time of that meeting the claimant was absent through ill health having been absent since 14th November. I have seen the sick note produced by him to his employees dated 20th November 2019**,** which indicates that the claimant was not fit for work for a period of 10 days to the 29th November 2019. I conclude therefore the claimant was not present at the meeting where the redundancies were announced, and a presentation made to the employees as a whole.

7. It was the respondent's intention to reduce from three shifts to two. The procedure which was to be used had been agreed with Unite. The pools

consisted of temporary employees only and in order to maintain a balanced work force each shift was considered separately**.** Each pool consisted of employees in the same Team. The documents at pg 165-170 set out the Shifts and the Teams within them and the scores for each individual employee. It may be that an employee on Shift D would score lower than an employee on Shift B but not be made redundant if he scored higher amongst members of his own team and shift. Each temporary employee would be assessed against the same criteria by their team leader. The assessment document agreed was the 'Probationary Operator Assessment'. There were nine criteria to be assessed including 'housekeeping', 'productivity', and 'reliability'. The criteria were assessed on the scale of the Level of Performance as follows; Below, Meets, Above. The assessments were then reviewed by Mr Buckley who 'moderated' each assessment and attached a score to each criteria. The criteria were weighted but how each criteria was weighted was not communicated to those being assessed or the team leaders. This was to reduce the risk of team leaders trying to influence selection for redundancy and to encourage the operators to be good all-rounders. The weighting of the criteria was developed with Unite and reflects the criteria which the employees can control, for example productivity and attitude. The individuals at risk of redundancy were to have three individual consultation meetings. An appeal process was in place.

8. Following the announcement in November individual consultation commenced on 22nd November with letters of dismissal being issued on 4th December and the first dismissals taking place 31st December. The claimant's letter of dismissal refers to his last working day as 24th December**,** the respondent having decided to bring the date the last working date for all those made redundant his last working day was in fact 11th December. This was to prevent any adverse actions by those made redundant**.**

9. The claimant, at his own request attended at work on 29th November 2019 to discuss his situation with a member of staff, Kathryn Taylor. He tells me at this time he became aware of the document HR1 which was displayed in an area which Mr Morley referred to as The Cube. The claimant told me, and I accept that it was only the second page of this document which was displayed. The document shows that consultation was to start on the 22nd November and that the proposal was that 97 of 577 manual workers would be selected for redundancy.

10. At the meeting the claimant discussed the issues which had led to his being absent from work from 14th November. He says he was concerned about the redundancy and the last thing he wanted was to lose his job as well as losing his wife. The respondent indicated it would be appropriate to arrange an occupational health appointment for the claimant. However, the claimant indicated he would return to work on Monday, that is to say 2nd December 2019 and so this was not pursued. This behaviour is indicative of an employee concerned about losing his job.

11. Upon his return the claimant tells me, and I accept having heard no evidence to the contrary that Mr Clitheroe told him they needed to do his appraisal. There was no indication as to the nature of or reason for the assessment.

12. They did not leave the shop floor and the conversation took place in 'The Cube'. I accept the claimant's evidence about this conversation, in particular

that the 'crib sheet' (page 171) was not referred to nor were any of the topics listed discussed in any way. I accept that he was unaware that this appraisal was to be the basis for redundancy selection. I also accept it was prepopulated, and indeed in most of it the wording is similar to the appraisal conducted on 11th November 2018 (page 130.) The claimant I accept had no input into the document and the meeting was short.

13. I also accept that the claimant had no further meetings with any other person from the respondent with regard to his redundancy and the next he knew was when he was handed his letter of redundancy on 4th December by his line manager Mr Clitheroe. His final working day was 11th December with his employment terminating on 31st December. Despite Mr Morley's assertions to the contrary there was very little time for further consultation, indeed only one day.

14. The claimant appealed the decision by way of letter on 5th December. In his letter he makes a specific request

> *In order for me to formulate a substantial appeal I need to be more aware of the short listing process you use. In the letter you mention the "latest assessment and attendance data". How is this used? Colleagues talk about a "weighting" system, but no one seems to understand how it works. Are your decisions based on your work area or your overall score within the facility? As I said previously, I have many questions to ask therefore before I put my appeal together, I need to learn more about the process. If you can forward me any details or direct me where to look in the employee's handbook it would be much appreciated*.

15. Initially the respondent responded by first Ms Taylor and then Ms Marie Robinson speaking to the claimant, as shown by the emails. In an email from Nicola Teasdale to Mr Buckely he, Buckley, was asked to go through the process with the claimant**,** Mrs Teasdale commenting**;**

> *Hi Steve,*
> *Please can you sit down with Roger to discuss his questions and that might help him understand the process – I thought this would have been discussed during the assessment discussion.*
> *Thanks Nicola*

16. Mr Buckely delegated this to Ms Taylor and then Ms Marie Robinson who both spoke to the claimant. Following the first meeting sent Ms Taylor an email to Mr Buckley**;**

> *I sat down this evening and clarified all points in the appraisal process. However, he has asked for information on the scoring for each area within the appraisal. I have the scoring we used in the summer but did not want to show him this in case anything had changed. Roger is on dayshift tomorrow and is going to pop into HR to ask about an extension in order for him to prepare his appeal, please can you give him a copy of the scoring when he comes in?*

17. The claimant then met with Ms Robinson and I have seen the notes of the meeting. The claimant was not cross examined concerning this meeting, but the contemporaneous notes show that the claimant was angry. I accept this and whilst I cannot condone any type of bullying behaviour it is perhaps understandable. He has made a direct request and it seems he was rebuffed

with respondent opting for people to verbally explain the position. I note on page 213 the claimant states: 'Are you telling me there are no appraisal criteria, you have not answered my questions' the response is 'I've shown you where to find them'. This is a reference to the contract of employment and the document sent with it 'Explanation of Criteria'.

18. The claimant made a further request for disclosure of information

> *Could you please forward the official Appraisal Policy Document. This document should explain in detail the whole appraisal process and in most cases the forms used and lots of other information. Apologies for going into detail but I want to make sure you know what policy document I mean. Not just a one page document which tells you the criteria measured and attainment your team leader thinks you have met. The document I require will also detail what to do if you disagree with the outcome of your appraisal.*

19. The only additional information the claimant was provided with was the document at page 258, which answered some queries and attached his contract which sets out the appraisal system. He was never given the information in relation to how the weighting was carried out by Mr Buckley. The claimant finalised his appeal document without the information he had requested and submitted it on 10th December 2019.

20. The appeal was conducted by Mr Morley and the claimant was represented by his Trade Union representative. The meeting lasted about an hour. The claimant raised a number of issues as set out in his appeal letter and a schedule attached to it (284-289) but his primary concerns were; historically the appraisal system was not being used properly, his line manager Mr Clitheroe had a grudge against him and may have scored him lower than he deserved **and** he did not understand how the scoring process worked.

21. As a result of the issues raised by the claimant, following the meeting Mr Morley spoke to both Mr Clitheroe and Mr Buckley**. I** have not had the benefit of any minutes of those conversations nor was the claimant given the opportunity to consider any conversations and comment upon them. Mr Morley did not carry out any investigation into the allegation of bias concluding that if that were the case the claimant would have been made redundant earlier in the year.

22. Mr Morley, although modifying one score did not uphold the Appeal.

23. The claimant was advised shortly before 11th December that he was no longer required to attend work and his last working day was 11th December 2019. He received his redundancy pay and outstanding holiday pay and bonus in the following months.

The Issues

24. The Issues were identified at a case management hearing conducted by Employment Judge Aspden as follows:

1. Did the respondent act reasonably or unreasonably in treating redundancy as sufficient reason for dismissing the claimant, taking into account all the

circumstances, including the size and administrative resources of the respondent? Relevant considerations are likely to include:

a) whether the employer acted reasonably in identifying the pool of candidates for redundancy and the criteria for selecting from that pool.
b) whether selection criteria were fairly applied.
c) whether employees were warned and consulted about redundancies.
d) whether any alternative work was available and considered.

2.If the dismissal is found to be unfair, the Judge will go on to consider appropriate compensation, based on the loss sustained by the claimant in consequence of the dismissal, so far as that loss is attributable to the respondent. That will include considering matters such as:

a) whether there was a chance that the claimant would have been fairly dismissed in any event had a different process or selection method been adopted.
b) whether the claimant has taken steps to reduce his loss.

The Law

25. Section 98 Employment Rights Act 1996 governs the issue of fairness in a dismissal. In particular it is for the employer to show the reason for the dismissal and that it is a reason falling within section 98(2) of The Act or some other substantial reason which would justify the dismissal of the employee. Redundancy is a reason falling with section 98(2) of The Act and may found a fair dismissal.

26. The Tribunal must then apply section 98(4) of The Act and consider whether the dismissal was fair or unfair which depends on
Whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in it as a sufficient reason for dismissing the employee and it shall be determined in accordance with equity and the substantial merits of the case.

27. Counsel referred me to R v British Coal Corporation and Secretary of State for Trade and Industry ex parte Price and ors [1994] IRLR 72, Div Ct., which makes reference to fair consultation as follows

"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"

28. Polkey v AE Dayton Services Ltd 1988 ICR 142 **sets** out guidance for a redundancy but also establishes that if a dismissal is unfair procedurally the Tribunal may consider if a claimant would have been dismissed if a fair procedure had been followed.

29. Mugford v Midland Bank Plc[1997] I.C.R. 399. In relation to consultation HHJ P Clark stated;

(1) Where no consultation about redundancy has taken place with either the trade union or the employee the dismissal will normally be unfair, unless the industrial tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.
(2) Consultation with the trade union over selection criteria does not of itself release the employer from considering with the employee individually his being identified for redundancy.
(3) It will be a question of fact and degree for the industrial 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 termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy.

Submissions

30. Both the claimant and Counsel provided me with written submissions which I do not rehearse in their entirety but may be summarised as follows.

31. The claimant relies on the lack of procedure; in particular that he was not consulted as suggested by the respondent. The process was flawed because there is no definitive procedure for temporary employees to follow in an appraisal dispute or appeal process. Despite requesting it he when went into the appeal he had no knowledge of the redundancy selection criteria which put him at a disadvantage. There was confusion even at that stage as to which appraisals should be used for the redundancy process and whether the latest or a number were taken into account.

32. The respondent's case is that it fully consulted with the recognised Union about the redundancy, the process, the pools, and the criteria. The claimant was consulted**. If** there were any flaws, they were remedied by the appeal hearing.

33. Turning to remedy Counsel raises the issue of Polkey, that is to say if the dismissal is unfair would the claimant still have been dismissed if a fair procedure had been carried out.

Discussions and Conclusions

34. In determining this claim I remind myself that I must consider the actions of the reasonable employer and not impose my views or opinions of the process upon the facts as I have found them.

35. It is not disputed that the claimant was dismissed for redundancy, which may found a fair reason for dismissal under section 98(2) of the Act. Nor has the claimant challenged the procedure used including the pools and the criteria. I am, however, satisfied that the procedures described by Mr Morley were procedures which a reasonable employer could use to select for

redundancy. In particular I note that it had been agreed with the recognised Trade Union, there had been a similar process adopted in earlier redundancy consultations, and there was had a sound economic/business basis of maintaining a balanced workforce for the pools used.

36. I am satisfied that the respondent consulted with the Union.

37. I am not satisfied that the claimant was engaged by the respondent in any meaningful consultation. In fact, there was no consultation with the claimant at all. He was absent from work for the period 14th November 2019 until 2nd December 2019. He was therefore not present at the meeting where the redundancies were announced. There was no attempt by the respondent to inform the claimant of the situation**.** The first contact between the claimant and the respondent was two weeks following his absence starting and at the claimant's request. I do not accept that he only became aware of the redundancies when he arrived at the premises. It is clear to me that one of the reasons why the claimant attended on 29th December was because he was aware that there might be redundancies. This is clear from the note of this meeting.

> *Concerned with redundancy situation, I know I'm temp and never had day off sick since I've been here. I need to work for my own mental attitude. Last thing I want is to lose my job as well losing my wife*.

38. I am satisfied that the reason behind the meeting was to show commitment if redundancies were about to be made. Having said that I am satisfied that he did not know the detail and it is likely he was only aware of rumours of redundancy. He certainly did not know the details of the process and no attempt had been made by the respondent to bring the information to his attention nor to consult with him between 222nd November and 2nd December.

39. I have heard evidence concerning the relationship between the claimant and Mr Clitheroe, but I am satisfied the manner of scoring by him was not as a result of any breakdown in their professional relationship. I have concluded that Mr Clitheroe was in fact simply lazy, this is evidenced by comparing the appraisal documents at pages 130-131 and 179-180. The assessment document used for the redundancy selection clearly has matters which have the appearance of duplication or of being copied and pasted as suggested by the claimant. Further the claimant's account of his previous appraisals supports this conclusion. I concluded that it is likely on the balance of probabilities that he used the same approach to all his employees.

40. I have not seen any policy applicable to Temporary Staff and the Appraisal process**.** As I understand it there is not one. The respondent's assertions therefore that any problems with an employee had with an appraisal could be raised by way of an appeal cannot be sustained, nor can its assertions that employees would simply know they could appeal.

41. Counsel on behalf of the respondent argues that in light of the collective consultation individual consultation was not required in this case. I have considered whether a reasonable employer would dispense with individual consultation and concluded it would not for the following reasons. The

respondent had established a procedure in consultation with the recognised Trade Union, this included three individual meetings with those 'at risk'. All of the employees, except the claimant were consulted. Taking account of the guidance in Mugford, the respondent having set up a procedure then ignored it in relation to the claimant. The consultation with the Trade Union was only as to the procedure including the selection criteria. This was against the background of an employee who is absent through ill health on the date the redundancies were announced who was never formally informed about them or the procedure to be adopted.

42. The claimant criticises the respondent for not being transparent in its scoring system. I am told by Mr Morley there 'will be an agreement' between the respondent and Unite but it has not been produced. Further the claimant requested further information into the scoring and how the 'attainment' in the Probationary Assessment Document became the 'score' on the spreadsheets. If I have understood Mr Morley correctly this information does exist, clearly it must if Mr Buckley was applying it, but the respondent refused during the appeal to disclose this to the claimant. The explanation that if employees were aware of the 'weighting' they could work towards ensuring those areas with a higher weight are achieved whilst perhaps neglecting other areas. I accept that to prevent any bias by Team Leaders it may be reasonable to for an employer to withhold the information. However once the process is complete to continue to withhold the information is not reasonable as both reasons fall away. This is especially so when the claimant has requested the information and other documents in order to mount an effective appeal. The refusal was unreasonable as the respondent may have requested that the claimant does not disclose the information disclosed to him.

43. Turning to the appeal itself whilst on the face of it the claimant was able to put his case, it is clear that he was distressed because of his personal issues and may have become confused. He was at a disadvantage because he did not know the weighting system used by Mr Buckely. Mr Morley did not explore the disagreement between the claimant and Mr Clitheroe to understand it more fully. Whilst he spoke to Clitheroe and Buckley**, he** did not report back to the claimant on those discussions.

44. I do not accept Counsels argument that the Appeal rectified the earlier problems**.** The claimant was unable to mount an effective argument in relation to his scores because of the information which was withheld.

45. I conclude therefore that;

a) the respondent acted reasonably in identifying the pool of candidates for redundancy and the criteria for selecting from that pool.
Whilst I accept that the criteria as applied by Mr. Clitheroe were sloppily done this is likely to have been across all the appraisals he carried out. They were moderated by Mr Buckley, in accordance with the scheme agreed.

b) although the workforce as a whole was informed about the redundancies the claimant was never formally told because of his absence from work. There was no consultation with the claimant at all.

c) As there was no consultation there was no consideration of the available work, especially taking into account the claimant's adaptable skills

d) The appeal did not rectify any earlier flaws

The claimant was unfairly dismissed.

Polkey

46. If a fair procedure had been followed would the claimant still have been dismissed? Whilst the evidence of Mr Morley is that with the large scale number of redundancies there was unlikely to have been any alternatives I note that the HR1 shows that redundancies were only amongst 'manual workers' and I note that the respondent has an administrative section.

47. The procedure which would have been followed by a reasonable employer is as follows: being aware of the claimant's absence through ill health a reasonable employer would have taken steps to bring the redundancy and the procedure to the attention of the claimant. For example, the respondent had the perfect opportunity at the meeting on 29th November when the claimant came into work. To consult with the claimant, individually, on three separate occasions as set out in the crib sheets. During the appeal process to allow the claimant access to the scoring/weighting system used by Mr Buckley to moderate the scores.

48. The respondent if, it had conducted a consultation with the claimant would be required to consider suitable alternative employment. The respondent clearly has an administrative team, as shown by the claimant's application to become a Customer Services Representative and it may be that the claimant had skills that were transferable as evidenced by his CV and his application for that position.

49. There were no redundancies to be made in the administrative team. The respondent should not assume that as a manual worker the claimant had no other skills.

50. I conclude therefore that there was a prospect, although small, that the claimant may have secured alternative employment if the respondent had considered it.

51. Counsel argues that a proper procedure would simply have extended the claimant's employment by a couple of weeks and therefore any award should be limited to two weeks pay. I do not agree with this argument. **There** is a prospect that the claimant may have obtained employment in another department.

52. I assess that possibility as 25% and any compensatory award will be reduced by 75%.

Case No: 2500871/2020

Employment Judge Pitt

Date 5th January 2021