EMPLOYMENT TRIBUNALS

Claimant: Mr C Williams

Respondent: Baker Mallett LLP

HELD AT: Manchester **ON:** 15 and 25 January 2021

In chambers: 4 February 2021

BEFORE: Employment Judge Porter (sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Mr P. Maratos, consultant

RESERVED JUDGMENT

The judgment of the tribunal is that:

1. The claimant was unfairly dismissed.

2. Following a fair procedure would have made no difference to the outcome. It is not in the interest of justice to make any award of compensation to the claimant.

3. The claim of unlawful deduction from wages, failure to pay the correct amount of accrued holiday pay on the termination of employment , is well-founded.

4. The respondent is ordered to pay to the claimant the gross sum of £2,558.78

REASONS

1. This has been a remote hearing which has been consented to by the parties. The form of remote hearing was Code v, each of the parties and the Employment Judge attending by video via CVP . A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

Issues to be determined

2. The parties agreed that the issues were:

Unfair dismissal

2.1 What was the reason for dismissal? The claimant does not accept that the real reason for dismissal was redundancy, as asserted by the respondent;

2.2 If the reason was redundancy, was the pool for selection fair?

2.3 Was the selection criteria fairly applied? The claimant does not challenge the fairness of the selection criteria but does challenge the accuracy and fairness of the scoring;

2.4 Was a fair procedure followed? In particular, did the failure of the respondent to provide him with a copy of the scoring sheets during the consultation period render the dismissal unfair?

2.5 If the claimant was unfairly dismissed because the procedure was unfair, would the following of a fair procedure made any difference to the outcome?

Accrued holiday pay

2.6 What was the claimant's holiday entitlement in the holiday year up to the claimant's termination of employment?

2.7 How many days of annual leave had the claimant taken in the holiday year up to the claimant's termination of employment?

Orders

3. A number of orders were made for the conduct and good management of the proceedings during the course of the Hearing. In making the orders the tribunal considered the overriding objective

and the Employment Tribunals Rules of Procedure 2013. Orders included the following.

4. This claim was listed for hearing for one day. Mr Chris Pasquill was the first witness to be called. During the course of cross-examination of Mr Pasquill the claimant asked questions about the scoring of the selection criteria. Mr Pasquill said that he was unable to answer the question without sight of the score sheets from each of the three scorers. The respondent made an application to disclose the scores sheets. It was agreed and ordered that :

    4.1 the respondent forward the documents to the claimant, who would be given the opportunity to consider the proposed new documents over the lunch break;

    4.2 the application for late disclosure of these documents would be considered following the lunch break.

5. On return after lunch the claimant objected to the introduction of the new documents because:

    5.1 he had not had sufficient time to consider them; and

    5.2 his mental health would be badly affected by any adjournment arising from the introduction of the new documents.

6. Having considered submissions from both parties EJ Porter granted the application for late disclosure because:

    6.1 the scoring sheets were relevant to the issues to be determined;

    6.2 the Respondent had indicated at the outset that one day was not enough time to finish the case because there were 4 witnesses;

    6.3 EJ Porter noted that the tribunal had a backlog of cases and if this claim was adjourned to be heard over 2 days, there would be a significant delay in the relisting of the case. EJ Porter had decided that it was in the interest of justice to proceed and adjourn part heard if necessary;

    6.4 It was now clear that, whether or not the new documents were allowed in, the hearing could not be completed in the one day allocated. It was now 1.45 pm and the first witness had not yet completed his evidence;

    6.5 It was unfortunate therefore that the hearing of the claim would be adjourned to a later date in any event;

6.6 The claimant would have the opportunity to consider the new documents, and to prepare any questions relating thereto, before the next hearing date;

6.7 Therefore, the application for late disclosure was successful, the additional documents would be considered at the adjourned hearing.

7. The following additional documents were allowed in as part of the documentary evidence:

7.1 Redundancy Matrix – scoring sheets for Julia Fidler;

7.2 Redundancy Matrix – scoring sheets for Geoff Woods;

7.3 Redundancy Matrix – scoring sheets for Jamie Gruszka;

7.4 Redundancy Matrix – Master Sumary

8. It was agreed and ordered that the hearing would continue that afternoon with cross-examination of the witness, Mr Pasquill, in relation to the claim for accrued holiday pay only.

Submissions

9. The claimant relied upon written submissions, which are contained in Appendix 1, which the tribunal has considered with care but does not repeat here. In addition, the claimant made a number of oral submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:-

9.1 He did appeal the decision to dismiss in his email exchange with Mr Pasquill;

9.2 He offered to withdraw his claim of unfair dismissal because he did not want to go through the stress of progressing the claim, provided that he was paid his holiday pay;

9.3 He repeatedly requested copies of the scoring sheets so he could challenge the scores. He was never given them until the hearing itself;

9.4 The scorers who have given evidence based their scores on their personal views – for example, the false view that he was a gossip;

9.5 He had been unable to challenge the scoring of Julia Fidler, who was not called by the respondent;

9.6 Other employees received their outstanding holiday pay;

9.7 He never took the holidays as ordered by Neil Griffiths because he was told not to

.

10. Consultant for the respondent made a number of detailed submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:-

Unfair dismissal

10.1 It is not disputed that there was a redundancy situation;

10.2 The reason for the dismissal was redundancy;

10.3 Each of the three candidates in the pool for redundancy were treated equally;

10.4 The successful candidate, MG, had the edge, following a fair scoring process;

10.5 The respondent's witnesses have given honest, clear and credible evidence about the scoring process;

10.6 There is no satisfactory evidence to support the assertion that the scorers were influenced by personal considerations;

10.7 The respondent held the honest and genuine belief that the 3 scorers had sufficient knowledge of the three candidates;

10.8 The scoring system was fair. There was transparency about the method of scoring;

10.9 A fair procedure was followed;

10.10 Each individual case depends on its own facts. The case of **Pinewood Repro Ltd t/a County Print v Page [2010] UKEAT 0028-10-1310** can be distinguished on its facts;

10.11 The respondent considered all alternatives to redundancy including those proposed during the consultation period;

10.12 The claimant was given the right to appeal but chose not to exercise it;

10.13 This demonstrates that the claimant, at the time, had no real concerns about the fairness of the redundancy process. He clearly stated at the time that if his holiday pay was settled to his satisfaction he would not take his challenge of the redundancy any further;

10.14 If there was any unfairness in the selection process then applying the Polkey principle, following a fair procedure would have made no difference to the outcome. The individual scores would not have changed, had the claimant had the opportunity to challenge them;

Holiday pay

10.15 It was reasonable for the Neil Griffiths email to give notice that the holiday must be taken in the specific time, bearing in mind the financial circumstances at that time with the Covid pandemic and shutdown;

10.16 The claimant accepted the terms of the email when he agreed to the reduction in wages and the working week;

10.17 His right to those 10 days holidays was lost; when he did not take them as instructed;

10.18 It is not accepted that the claimant worked on 4 May 2020;

Evidence

11. The claimant gave evidence.

12. The respondent relied upon the evidence of:-

12.1 Mr C. Pasquill, Executive partner;

12.2 Mr Geoff Woods, Managing Partner;

12.3 Mr Jamie Gruszka, Managing Surveyor;

13. The witnesses provided their evidence from written witness statements. They were subject to cross-examination, questioning by the tribunal and, where appropriate, re-examination.

14. An agreed bundle of documents was presented. Additional documents were presented during the course of the Hearing, either in accordance with the Order outlined above or with consent. References to page numbers in these Reasons are references to the page numbers in the agreed Bundle.

Facts

15. Having considered all the evidence, the tribunal has made the following findings of fact. Where a conflict of evidence arose the tribunal has resolved the same, on the balance of probabilities, in accordance with the following findings.

16. The claimant started work with the respondent on 2 May 2006 as a Trainee Quantity Surveyor before qualifying and reaching the level of Senior Quantity Surveyor in 2018. At the relevant time he was employed at the Warrington office. Mr Chris Pasquill was the Executive partner of the Warrington office. Julia Fidler was the claimant's line manager. The claimant had always had very good relationships with his managers and partners. In recent years the claimant perceived that some partners, in particular Neil Griffiths, had become "frostier" with him. However, the claimant had little contact with Neil Griffiths and the claimant continued to receive consistently very good feedback about his performance. He was never the subject of disciplinary action on any grounds. The claimant never raised any complaint about the actions of Neil Griffiths, or any other partner, prior to being told he was at risk of redundancy.

17. The claimant had good relationships with clients. One client gave the claimant what he describes as an outstanding testimonial after the claimant did a lot of work for them over the three years prior to termination of employment. The claimant built a good relationship with a client he started working for during the furlough period. The respondent is still working on this same account currently. This client indicated that they did not want the claimant to leave the account he was working on, and had expressed a wish to the claimant to employ him directly after the redundancy process was completed.

18. The claimant was provided with written terms and conditions of employment which included the following:

> We operate an online system for booking holidays via BrightHR. You will be given the rights to request absence online and you will also be able to view your holiday entitlement online at any time. This is to give you the facility to easily plan your holidays throughout the year.
> Once you have registered your holiday request online, you will receive an e-mail from a Partner authorising or declining your request. If you feel that your request has been unreasonably refused for any reason you should refer the matter to a Partner. They will endeavour to ensure that you have every opportunity to take your holidays at the time you request them, but they will need to balance your requests with the needs of the department.

19. On 23 March 2020 Neil Griffiths, Chairman, sent an email (page 131) to all employees concerning measures which needed to be taken following the Covid 19 outbreak and its potential impact on the business. The email ("the Neil Griffiths email") stated that:

19.1 a number of clients had informed them that projects would be either postponed or cancelled and that this would have a significant effect on cash flow;

19.2 the respondent had to take measures from 1 April that would enable them to manage the impact to the business over the next 12 weeks

20. Extracts from the Neil Griffiths email read as follows:

> During the next 12 weeks all staff will be required to take at least 2 weeks holiday as annual leave after consultation with their line manager, to alleviate any potential problems later in the year..
>
> Staff will be paid at 80% of their contractual pay for the next 6 months, based on a four-day week, and pro rata for those who do not work a five-day week (the logistics of which will be discussed in the next few days).
> This will be for six months from 1 April 2020 and includes when the member of staff is on holiday or sick.
>
> Staff must be available for work during the next 12 week period. Staff will be expected to be flexible on training and other duties undertaken during this period…
>
> I appreciate that these steps will mean sacrifices for all of us, and haven't been taken lightly, but I know that you will agree that the steps evidence that we are committed to protecting both permanent employment and the business for the longer term

21. The claimant started working from home on Tuesday 24 March 2020. He was notified by management that each employee would individually receive a call with the next steps. He received this call from his line manager, Julia Fidler, who:

21.1 Confirmed that the claimant would be working a 4 day week and asked the claimant to nominate his preferred day off so that the respondent could organise work for the week amongst the non -furloughed members of staff; and

21.2 Told the claimant that he was the only person to be kept working in the business at his level or below during furlough. The claimant asked why he been chosen over the others, and was advised that this was based on a combination of ability and personal circumstances i.e. because MG (the eventual winning candidate) had children; and

21.3 noted that this will go in good favour for the claimant if any redundancies were to happen further down the line.

22. The claimant accepted the reduction in salary and working week as set out in the Neil Griffiths e-mail. At no time did either Julia Fidler or Chris Pasquill tell the claimant that:

    22.1 he was expected or required to work full contractual hours for 80% pay; or

    22.2 if he did not take two weeks holiday as instructed by the Neil Griffiths email then he would lose that holiday entitlement and the right to holiday pay for those two weeks.

    The claimant did not agree to work full-time for 80% pay, the claimant did not agree to any "holiday sacrifice" as asserted by the respondent.

    [On this the tribunal accepts the evidence of the claimant.]

23. During furlough the claimant had biweekly calls with management. During those calls attended by the claimant and his managers, Julie Fidler and Chris Pasquill:

    23.1 The claimant said that his workdays would generally consist of him working 1-2 hours more than his contracted hours;

    23.2 Chris Pasquill and Julia Fidler told the claimant not to tell clients that any staff had been furloughed and that they were simply 'out of the business';

    23.3 The claimant made it clear that he was uncomfortable doing this and expressed his view that clients should be informed of the true situation;

    23.4 The claimant said that his workload did not really afford for him to take 10 days off over the next 12 weeks, especially with the reduction in working days.

24. Chris Pasquill told the claimant that he must take his two week holiday as this was something Neil Griffiths wanted. Chris Pasquill asked the claimant and other employees not to take the holiday in a one or two week block. As a consequence, the claimant started to book time off over the period of 12 weeks with his first holiday being due to be taken 4 – 8 May 2020.

25. On Friday 1 May 2020 (a non-working day for the claimant, following the reduction in hours) the claimant missed a call from Chris Pasquill. Messages were exchanged and Chris Pasquill said he would call first thing Monday 4 May. By telephone call at 9am on Monday 4 May 2020 Chris Pasquill told the claimant that he could only apologise for the confusion and that both him and Julia Fidler had interpreted the

information given by Neil Griffiths incorrectly, that they did not want any of the non-furloughed staff to take time off, as they were needed in work to support the business. Mr Pasquill did not say that the claimant would be "sacrificing" his holidays, that he would be treated as having taken the holidays whether taken or not. As a result, the claimant cancelled his booked holiday and on the morning of the 4 May 2020 opened his laptop and started to work. He worked his expected working hours that day.

[On this the tribunal accepts the evidence of the claimant as supported by the documentary evidence showing the number of business emails sent on that day.]

26. As a result of the instruction from Chris Pasquill the claimant started to remove the holidays that he had booked on the Bright HR leave system. It was too late for the claimant to remove Monday 4 May as booked holiday leave, even though he had worked that day. He was later told to keep previously booked holidays on the system, so that when the furloughed staff looked at the Bright HR leave system it would appear as though non-furloughed staff were taking holidays as requested by the Neil Griffiths e-mail. The claimant expressed his concern about the Bright HR leave system not accurately recording his holidays and asked Julia Fidler for the true position to be confirmed in writing. However, Julia Fidler told the claimant that there was nothing to worry about, that it would all be sorted at the end of the year.

[On this the tribunal accepts the evidence of the claimant]

27. The respondent's holiday year runs from 1 January to 31 December. The claimant's holiday entitlement was 26 days per year plus public holidays. In the holiday year from 1 January 2020 the claimant took public holidays on I January, 10 and 13 April, 8 and 25 May, and 31 August. In addition, he took two days annual leave on 20 and 24 August 2020. The record of holidays taken on the Bright HR leave system (page 125) is not correct.

[On this the tribunal accepts the evidence of the claimant.]

28. The claimant's terms and conditions of employment do not set out a method for the calculation of accrued holiday pay on the termination of employment.

29. It was agreed during the course of the hearing that on the termination of employment the claimant had an accrued entitlement of 20.44 days, the daily rate being £182.77 gross.

30. During furlough the claimant said in the biweekly management meetings that he was struggling with the amount of work and having time to take off work. As a result, Mr Pasquill asked an assistant quantity surveyor, TM, to come back into the office to assist and support the claimant in the performance of his duties. Some of the work of the claimant was then delegated to TM. TM was not brought in during furlough to replace the

claimant or to handover duties from the claimant to TM in anticipation of the claimant's dismissal by redundancy later in the year. The claimant retained overall responsibility of the accounts delegated to TM.

[On this the tribunal accepts the evidence of Mr Pasquill.]

31. On 11 July 2020, MG, a Senior Quantity Surveyor in the Warrington office, (and subsequently one of the at risk candidates), advised Mr Pasquill that he was unable to work from home as his laptop was not working. On 12 July 2020, Mr Pasquill asked, KR, a Senior Quantity Surveyor in the Warrington office, (and subsequently one of the at risk candidates), to hand her laptop over to Mr Gibson, as she was still furloughed at the time.

[On this the tribunal accepts the evidence of Mr Pasquill.]

32. Due to the impact of the Covid-19 pandemic, the workload at the respondent significantly reduced during the course of 2020. The respondent had implemented the changes to pay and working hours. Members of staff were placed on furlough. However, the respondent had concerns about the financial state of the respondent company.

[On this the tribunal accepts the evidence of the respondent. The claimant has not adduced any satisfactory evidence to challenge that evidence.]

33. Mr Pasquill prepared a business case to identify the financial position of the company and any potential cost savings and business restructure. (page 81). Extracts read as follows

Following a significant reduction in profits in the last 12 months, and the projected losses indicated by our current workload report, it has become necessary to make cost savings within the business.

The current workload reports forecasting potential profits for 2020 show a potential loss of around £240,000.

We have taken steps to reduce costs by stopping any non-essential spending etc. and currently all staff are being paid 80% of their base salary.

We are currently exploring all the government support packages available to us such as SBBR and CBILS funding, but unfortunately this support will not fund the forecasted losses for the company in 2020.

The loss has also been compounded by the reduction in spending by our Blue-Chip Clients such as the COOP and Royal Mail. These Clients have supported the business now for several years, and provided good fee income, however, these Clients now only provide a small contribution to the fee income of the Warrington Office and it has been difficult to find other work for the large team that was previously working with these particular clients.

It is therefore apparent that due to the need for cost savings and the changes to this area of our market we are considering making redundancies at the Senior Quantity Surveying level of the business in the Warrington Office.

We have considered and implemented alternative cost saving options such as lowering the employees number of hours and reduction of basic pay, but unfortunately these cuts will not reduce the costs enough to impact on the potential losses.

We have also contacted our other offices and discussed the possibilities of the transfer of staff to other offices. The Managing Partners of these offices have confirmed that currently they have no requirements at this current stage.

The reasons why the position of the three Senior Quantity Surveyors are at risk, opposed to other posts in the business is because we do not have the work for that position and role in the business. The business has operated during the COVID-19 lockdown period with only one senior quantity surveyor, all other work has been undertaken by other senior posts. In addition, we need to make significant cost savings, so to make posts at a lower level redundant would not be appropriate or cost effective. To make senior posts in the business redundant would achieve the cost savings, but would significantly impact the business, as employees in these posts have been pivotal in the continuation of the business to date.

34. Upon completion of the business case, there was a proposal to make 2 out of the 3 posts redundant in the Senior Quantity Surveying role within the Warrington Office.

35. On 4 August 2020, Mr Pasquill invited the three Senior Quantity Surveyors employed at the Warrington office, including the claimant, to the first consultation meeting to be held on 6 August 2020. (page 64). The claimant was not told in advance of the purpose of the meeting and he was taken by surprise.

36. The meeting was held via zoom, due to the guidelines on social distancing at the time. Mr Pasquill conducted the meeting. Mr Geoff Wood, the Managing Partner responsible for the Warrington Office , was initially supposed to attend to minute that meeting, but was unable to attend due to a family bereavement. Mr Pasquill therefore also minuted the meeting. This was explained to the attendees in the beginning of the meeting.

37. During the meeting, the claimant and his two colleagues, MG and KR, were advised that two main clients had considerably reduced their work streams, which in turn had affected the workload for Senior Quantity Surveyors. The three attendees were informed that their position was therefore at risk, and that the meeting was the beginning of the consultation period. The claimant did raise a number of questions including questions on the decision to place only Senior Quantity Surveyors ‘at risk’.

38. By email dated 6 August 2020 (page 68) Mr Pasquill sent to the claimant the minutes from the first consultation meeting, the existing and proposed office structure for the Warrington office, and an "at risk letter" (page 69) notifying that a second consultation would take place on 13 August 2020. Extracts read as follows:

> Baker Mallett has been experiencing difficult trading conditions, and as a result suffered a downturn in work. In particular, certain aspects of the work we do at the senior quantity surveyor level have recently reduced to the point where they have almost totally dried up. Consequently, even looking at the prospects for future orders, it is unlikely that we will be able to sustain the same number of employees at this level. Therefore, regretfully, in order to retain economic viability we now have to make a reduction in senior quantity surveyors.
>
> As you are employed as a senior quantity surveyor in our Warrington office you are potentially affected by this proposal and unfortunately are therefore at risk of redundancy.
>
> As a result the company has now commenced a period of consultation with you, which is envisaged to last for approximately 3 weeks.
>
> Although we have clearly identified a potential redundancy situation, you can be assured that we will do everything possible to formally consult with the workforce over the next three weeks with the aim of avoiding, if possible, any compulsory redundancies. I would ask you to consider and put forward any alternative proposals or suggestions which you may feel are relevant….
> Please also give some thought to any alternative employment, which you deem to be appropriate and this will be considered as part of the consultation process if these measures do not resolve the current appointment situation, it will regrettably be necessary to consider making compulsory redundancies and if this becomes the case the following criteria will be considered as methods of selection
>
> - achievement of performance targets skills
> - experience and knowledge
> - qualifications
> - disciplinary record
> - attendance
>
> The above selection criteria are provisional and further discussion as to their appropriateness will take place at the consultation meeting scheduled for 13 August 2020.

39. The claimant asked if he could bring a legal / professional representative to the meeting on 13 August 2020. (Page 76). The respondent replied that the claimant could not bring anyone other than an internal Baker Mallett representative (Page 77). The claimant held the view that there was no appropriate person in the company to do this, and decided to attend the second consultation meeting alone.

40. During the second consultation meeting the claimant made various suggestions regarding cost savings that could be made elsewhere, to avoid the need for redundancies, including the following:

40.1 The Respondent take advantage of the furlough scheme for the full duration to provide more time for the business to secure additional work for Senior Quantity Surveyors;

40.2 The Respondent undertake a companywide pay cut for all staff;

40.3 The claimant continue to work on 80% of his wages after September 2020.

41. In addition, the claimant raised a few questions relating to :

41.1 Choosing the role of Senior Quantity surveyor for redundancy as opposed to higher or lower earners in the Warrington office, for example, Business development managers or assistant Quantity Surveyors;

41.2 The recent appointment of a project manager.

42. After the meeting Mr Pasquill addressed each of the claimant's suggestions and concluded that they were not viable proposals because:

42.1 The firm had made significant losses in that financial year and the costs provided by the government furlough scheme would not cover all employment costs for employees in the claimant's position;

42.2 Enforcing a companywide pay cut could not occur unless they had the agreement of each employee to this. Moreover, reducing employee's salary would be demotivating to all employees who are expected to work harder during this difficult period;

42.3 The business was already taking this measure as a step to ensure that the respondent had a sustainable business in the future;

42.4 the firm had already planned to utilise the furlough scheme beyond September 2020, but unfortunately this was not a step that would avoid redundancies, the furlough scheme did not cover all employment costs for Senior Quantity Surveyors at the Respondent;

42.5 the work of the Senior Quantity surveyors had diminished because of reducing workload. This had been demonstrated in the furlough period when only one Senior Quantity Surveyor, the claimant, had remained in work. In addition, where necessary, the partners in the business would take over the role of the Senior Quantity surveyors as a cost-cutting measure. The respondent took the view

that, in light of the need to cut costs, the partners would take over these duties as and when the need arose, rather than pursue business expansion/growth. By this reduction in workload and transfer of duties the need for the number of Senior Quantity Surveyors in the Warrington office had diminished. The need for the assistant quantity surveyors would remain the same, but they would now assist the one remaining Senior Quantity surveyor and the partners now performing that role;

42.6 the respondent took the view that, in light of the change in duties of the partners, the business need for 2 Business Development managers remained.

43. Following the second consultation meeting, on 13 August 2020, Mr Pasquill wrote to the claimant providing a copy of the second consultation meeting minutes (page 78) and a blank copy of the scoring matrix. (pages 83 and 84) He provided a summary of the respondent's response to the claimant's proposals and questions by adding notes to the actual minutes. This was indicated in the minutes by the use of blue ink and the reference "Post meeting Notes – in blue".

44. Mr Pasquill included in his post meeting notes his answer to the claimant's question re the recent appointment of a project manager – the respondent had secured work for a senior project/programme manager which required additional resource. None of the Senior quantity surveyors had the specific skill set, knowledge and experience to undertake that role.

45. Following the second consultation meeting the claimant was told that he would be able to review the scoring in the third consultation meeting (Page 32 item 16).

46. The respondent decided that there should be 3 scorers of the criteria: Mr Geoff Woods, Julia Fidler and Jamie Gruszka. The respondent held the honest and genuine belief that these three managers each had knowledge of the work of the three Senior Quantity surveyors and decided that simply adding the scores of all three would give a balanced score. Mr Pasquill, who also had a good knowledge of their skills, did not get involved in the scoring exercise as he was leading the consultation process.

47. Each of the three scorers were given the scoring matrix (page 84) which contained guidance as to the scoring. They each scored independently. They did not consult about the scores before completing the score sheets for each of the three candidates and forwarding them to Mr Pasquill.

48. In preparing the scoring matrix the respondent decided to apply weighting factors as described in the matrix.

49. The redundancy scoring matrix (page 85) provided guidance as to the scoring in relation to:-

    49.1 achievement of performance targets: the score was in the range 0 – 5, and the guidance given states adjudication criteria has to be extracted direct from the employee performance reviews and therefore each employee should recognise this_reconciles with the performance score including in the employees 2019 performance review. This criteria was given a weighting of 2.5;

    49.2 skills : this was subdivided into 10 areas including :

        49.2.1 has good measurement skills that can be utilised for producing builders quants, tender documents, producing detailed cost estimates and measurement of variations at post contract stage;

        49.2.2 has good communication and negotiation and interpersonal skills;

        49.2.3 time management skills and the ability to work under pressure effectively managing the workload and meeting deadlines.

        Each of these 10 areas carried a score of 0 to 5. Guidance was given as to the level of skill necessary for a score of five, four, three, and nil points. This criteria was giving given a weighting of two;

    49.3 Experience and knowledge: again this criteria subdivided into 10 areas with a score of 0 – 5 for each of those 10 areas. Guidance given as to how to achieve a score mark. This was then given a weighting of 1.5

50. For each of the two criteria : skills and experience, and knowledge , the scoresheet indicated that each of the 10 sub areas should be scored 0 to 5, the 10 scores added together, and then divided by 10. The resultant score would then be given the appropriate weighting.

51. Geoff Woods who, although engaged as an external consultant , performs the role of managing partner for the Warrington office where each of the 3 employees in the pool were employed. He was responsible for the management of all employees at that office. Julia Fidler was the claimant's direct line manager in the Warrington Office and had knowledge of the work of each of the 3 Senior Quantity Surveyors. Jamie Gruszka held the position of managing surveyor responsible for all

surveyors. He did take an active part in the management of the business from the Warrington office.

52. Geoff Woods joined the respondents in an external consultant capacity in July 2016. He became a member of the senior management team and managing partner of the Warrington office in 2018. He had involvement in assigning workload to each of the senior quantity surveyor's and discussed with senior members of the team the work and resource allocation involving each of the three candidates. They have worked in the same office together. In assessing the criteria communication Mr Woods allocated both the claimant and the successful candidate MG 4 marks out of 5. Mr Woods took the honest and genuine view that the claimant did not merit five out of five on this scale because, although he was an excellent communicator with clients, he did get involved in office gossip things he should not have got involved in. He regarded that as part of interpersonal skills which should be scored. He decided he could not give the successful candidate, MG, full marks on this criteria because he was very quiet but was able to demonstrate communication skills in his work. Mr Woods scored performance for the respondent on his own personal knowledge of the claimant's performance not on any appraisal document because the claimant had not had an appraisal the previous year. He worked with the candidate KR a little more than the claimant and MG. He sought to make a fair and objective assessment of each of the candidates.

53. Jamie Gruszka held the position of managing surveyor. He did not manage the claimant on a daily basis but overlooked the work tasks undertaken in the Warrington office. He made his assessment of skills for each of the candidates taking into account his knowledge of their work. He sought to make a fair and objective assessment of each of the candidates.

54. No evidence has been heard from the third scorer, Julia Fidler. Neither party called her as a witness.

55. Each of the scorers completed their score sheets and returned them to Mr Chris Pasquill. He completed the Master Summary document (Appendix 1), which revealed that the total scores were:

55.1	Claimant:	74.4
55.2	MG:	75.75
55.3	KR	64.75

56. The scores of Geoff Woods were:

56.1	Claimant:	25.35
56.2	MG:	26.20
56.3	KR	22.35

57. The scores of Julia Fidler were :

57.1 Claimant: 23.20
57.2 MG: 23.25
57.3 KR 18.95

58. The scores of Jamie Gruszka were:

58.1 Claimant 25.85
58.2 MG: 26.30
58.3 KR 23.45

59. Mr Pasquill did not question the scorers on the scores. He did not check the scores against any documentation or his own personal knowledge of each of the candidates. He accepted the scores from each of the scorers without question and simply placed them in the Master Summary to produce the numerical result: the Senior Quantity Surveyor with the highest score would be retained. Having added up the scores Mr Pasquill noted that there was a very small difference in the scores between the claimant and the successful candidate, MG, but took no action in relation to that.

60. The Master summary shows that the two criteria, disciplinary and attendance, would result in a minus score. Each of the candidates obtained the same mark for these two criteria. Each of the three candidates obtained the same mark from each of the scorers in the qualifying qualifications criteria.

61. The claimant was not given sight of the scoring sheets prior to the third consultation meeting. He was unable to challenge the scores allocated to him prior to being selected for redundancy.

62. On 21 August 2020, with the agreement of the claimant, the third consultation meeting was held via video call, on the first morning of the claimant's holiday to Spain. During that meeting:

62.1 Chris Pasquill informed the claimant that his score was 74.4 compared with the other candidates 75.75 and 64.75;

62.2 The claimant asked to see the completed scoring matrix;

62.3 Chris Pasquill confirmed that he would send the summary page to the claimant;

62.4 Chris Pasquill told the claimant that he remained 'at risk' of redundancy and asked the claimant for more suggestions on how to avoid redundancy. The claimant gave more suggestions including a reduction of hours and or pay for either himself or two of the at risk candidates to enable 2 Senior Quantity Surveyors to be retained;

62.5 Chris Pasquill indicated that these suggestions would be considered before any further action was taken.

63. By a WhatsApp call received on Friday 21 August at 11.30am Helen Hatton, an employee of the respondent, informed the claimant that he had been selected for redundancy and she was preparing the redundancy pack. Helen was a good friend of the claimant, was upset during the call, and said "I'm sorry I have to do this". The claimant questioned the amount of notice and holiday pay and was told by Helen Hatton that:

    63.1 All of his outstanding holiday entitlement would not be paid as 10 days have been deducted;

    63.2 The claimant was being given 4 weeks' pay in lieu of notice.

    The claimant challenged this and stated that he was entitled to 12 weeks notice under statutory regulations. Helen Hatton said that the 4 weeks was correct and that this was Neil Griffiths' understanding also. The claimant asked that this issue be addressed further before issuing his financial statement.

64. By email dated 21 August 2020 (page 95) the claimant was provided with a copy of the Master Summary of the Senior QS Redundancy Matrix, in which the names of the employees had been removed (page 97). This document appears at Appendix 1. The claimant was not provided with a copy of the score sheets from each of the 3 scorers to show how the final scores had been calculated. The Master Summary showed the score for each of the candidates in each of the six criteria. However, it did not in the skills and experience criteria show how those marks had been achieved, what mark in the range 0-5 had been allocated to each of the candidates in the 10 sub sections of each of the criteria, skills and experience.

65. On 24 August 2020 the claimant was provided with Minutes of the meeting on 21 August 2020 (page 91). Once more Mr Pasquill provided his responses to the claimant's suggestions for an alternative to redundancy by adding post meeting notes in blue. Mr Pasquill had considered these suggestions and reasonably rejected them, before deciding that the claimant, as one of the two lowest scoring candidates, should be dismissed by reason of redundancy.

    [On this the tribunal accepts the evidence of Mr Pasquill.]

66. Mr Pasquill held the honest and genuine opinion that the claimant was a highly valued employee whom the respondent was sorry to lose.

67. On 25 August 2020 the claimant emailed Chris Pasquill and queried the scoring criteria, including the attendance score, and asked for the names

of the scorers and a detailed breakdown of the scoring matrix which included explanation to these scores (Page 94) .

68. By email dated 28 August 2020 the claimant was provided with a redundancy letter (page 100) and financial statement. In this letter Mr Pasquill:

    68.1 confirmed the names of the scorers as Geoff Woods, Julia Fidler and Jamie Gruszka;

    68.2 explained how the attendance score had been calculated;

    68.3 confirmed that the respondent had considered all ways of avoiding redundancy but had decided to proceed with the compulsory redundancy;

    68.4 advised the claimant that he had been selected for redundancy and that his employment terminated with immediate effect on 28 August 2020;

    68.5 confirmed that the claimant would be paid pay in lieu of notice;

    68.6 advised the claimant of his right to appeal the decision and was asked to write to Neil Griffiths within 2 days if he wished to exercise that right

69. The financial statement confirmed

    69.1 The payment of a statutory redundancy payment;

    69.2 Notice pay for 12 weeks;

    69.3 Holiday pay in the sum of £913.85 for 5 days accrued holiday.

70. The claimant was not provided with any further Scoring Matrix.

71. The Financial Statement stated that the pay in lieu of notice was for 12 weeks, but the dates of the due notice period were stated as 28 August – 25th September . This was a typographical or administrative error.

    [On this the tribunal accepts the evidence of Mr Pasquill.]

72. By email 28 August 2020 (Page 107), addressed to Chris Pasquill, the claimant

    72.1 referred to the previous request issued on 25 August and again asked for the detailed scoring and explanations;

    72.2 questioned the holiday calculation, stated it was incorrect;

72.3 provided his own calculation that he was entitled to 10 days holiday pay, in addition to the 5 days already paid;

72.4 Indicated that if the holiday pay entitlement was resolved quickly he would not take the matter any further.

73. On 1 September 2020 (page 106) Chris Pasquill replied stating that employees were asked to take 10 days leave by Neil Griffith's email dated 23 March 2020 and therefore 10 days holiday pay had been deducted from the claimant's remaining holiday entitlement. Mr Pasquill did not respond to the further request for detailed scoring breakdown (Page 106) .

74. On 1 September 2020 (Page 105) the claimant replied setting out further information relating to his claim for holiday pay, and detailed the sequence of events regarding his managers asking him to cancel any leave. He again advised that if the issue regarding holiday pay was resolved, he would take no further action regarding his redundancy.

75. Further email correspondence took place between the claimant and Mr Pasquill re the claimant's claim for holiday pay. The claimant did not submit any grounds of appeal against dismissal to Mr Neil Griffiths before contacting ACAS to comply with early Conciliation procedure and presenting his claim to the tribunal.

76. Julia Fidler , shortly after the redundancy period, told the claimant 'you will be fine, you'll walk into the first job you interview for'.

77. The claimant did not raise a formal grievance about the alleged failure by the respondent to pay the correct amount of accrued holiday pay on the termination of employment.

78. Following the submission of supporting evidence for this case, the claimant contacted two former work colleagues, Julia Fidler and Helen Hatton, in order to request witness statements in support of his case, with reference to unused holidays and the redundancy process. The claimant was dissatisfied with their responses, believing that they only reiterated the official Baker Mallett position. He did not call either to give evidence.

79. Following the termination of his employment the claimant created a status on his private Facebook account referring to ex colleagues. He then received an email from Baker Mallett on 17 December 2020 stating that they had been made aware of *"inappropriate and derogatory comments about Baker Mallett and our employees"*, and that they had "*escalated this matter with senior partners" with the claimant's* new employer *"who also share our concerns"*.

80. The respondent's email finished with the statement that they were *"looking into this further and will contact (you) shortly with regards to how Baker Mallett will be pursuing this matter"*.

81. Neil Griffiths did contact the chairman of the claimant's new employer, who was in the same line of business as the respondent, and expressed his concern about the claimant's activity on Facebook, and asked the claimant's new employer to discuss this with the claimant to ensure that there was no repetition of what the respondent thought was unprofessional behaviour by the claimant which could damage the reputation of the respondent.

82. No further action was taken in relation to this matter. The respondent did not inform the claimant's new employer about these proceedings.

83. The claimant has had the opportunity to challenge the scores allocated to him by Mr Woods and Mr Gruszka during the course of the hearing. Both scorers were able to give a satisfactory explanation of their scores and rebutted the suggestions by the claimant that he should have scored more under any given criteria.

The Law

84. An employer must show the reason for dismissal and that the reason fell within one of the categories of a potentially fair reason set out in Section 98(1) and (2) Employment Rights Act 1996 ("ERA 1996").

85. Redundancy is a potentially fair reason for dismissal under Section 98(2) Employment Rights Act 1996 ("ERA 1996"). Redundancy is defined under Section 139 Employment Rights Act 1996. **Safeway Stores Plcv Burrell 1997 ICR 523** [endorsed by the House of Lords in **Murray & anr v Foyle Meats Ltd 1999 ICR 827**] states that the correct approach for determining what is a dismissal by reason of redundancy in terms of Section 139(1)(b) involves a three stage process:-

    a. was the employee dismissed? if so

    b. had the requirements of the employers business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish? if so

    c. was the dismissal of the employee caused wholly or mainly by that state of affairs?

86. In determining at stage 2 whether there was a true redundancy situation the only question to be asked if was there a diminution/cessation in the employer's requirements for employees (not the claimant) to carry out work of a particular kind, or an expectation of such a diminution/cessation in the future. At stage 3 in determining whether the

dismissal was attributable wholly or mainly to the redundancy, the Tribunal is concerned with causation. Thus, even if a redundancy situation arises, if that does not cause the dismissal, the employee has not been dismissed by reason of redundancy.

87. Tribunals are only concerned with whether the reason for dismissal was redundancy and not with the economic or commercial reason for the redundancy itself. **James W Cook & Co (Wivenhoe) Limited v Tipper & ors 1990 ICR 716 CA.** On the other hand, tribunals are entitled to examine the evidence available to determine what was the real reason for the decision to dismiss and to ensure the genuineness of a decision to dismiss for redundancy.

88. The employer having established the potentially fair reason for dismissal, the Tribunal must decide whether the employer acted reasonably or unreasonably in dismissing the claimant for that reason. The burden of proof is neutral: it is for the Tribunal to decide. The tribunal has considered all the circumstances of this case, including those matters referred to in s98(4) Employment Rights Act1996, to determine whether, in all those circumstances, the dismissal of the claimant for the reason stated was fair or unfair. In deciding whether the decision to dismiss was fair or unfair the tribunal reminds itself that it is not for the tribunal to substitute its view for that of the employer. The question is did the respondent act fairly within the band of reasonable responses of a reasonable employer in dismissing the claimant.

89. The Tribunal must be satisfied that an employer has acted reasonably in deciding the appropriate pool from which to select the redundant workers. **Thomas and Betts Manufacturing Limited -v- Harding [1980] IRLR 255** states that the employers have greater flexibility in defining the unit of selection or pool where there is no agreed procedure. The respondents should show that they have applied their minds to the problem and acted from genuine motives. The Tribunals must be satisfied that an employer acted reasonably taking into account all the factors including, whether other groups of employees are doing similar work to the group from which selections were made, whether employees jobs are interchangeable, whether the employee's inclusion in the unit is consistent with his or her previous position, whether the selection unit was agreed with the union.

90. The Tribunal must be satisfied that selection criteria were reasonable. These must be capable of objective assessment by reference to data such as attendance records, efficiency and length of service. Criteria which are themselves less than objective can nevertheless be applied in such a way as to make a dismissal reasonable. It is reasonable for an employer to try to retain a workforce balanced in terms of ability. An individual's skills and knowledge are reasonable considerations, providing they are assessed

objectively. Criteria should be clearly defined. Employee flexibility can be objective criteria for redundancy selection.

91. The Tribunal must be further satisfied that the selection criteria were fairly applied. **Williams and Others -v- Compair Maxam Limited [1982] ICR 156.** It is not the function of the Tribunal to decide whether each mark allocated against the selection criteria is correct but the Tribunal should be satisfied that the method of selection was fair in general terms and was applied reasonably in the claimant's case.

92. The Tribunal should consider whether an employee was warned and consulted about an impending redundancy. Whether consultation is adequate in all the circumstances is a question of fact for the Tribunal. An employer will normally not act reasonably unless he warns and consults any employees affected**. Polkey -v- A E Dayton Services Limited [1988] ICR 142.**

93. In **R v British Coal Corporation and Secretary of State for Trade and Industry ex parte Price and Others [1994] IRLR 72** Glidewell LJ said this:

"24. It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in **R v Gwent County Council ex parte Bryant,** reported, as far as I know, only at **[1988] Crown Office Digest p19**, when he said:
'Fair consultation means:
(a) consultation when the proposals are still at a formative stage;
(b) adequate information on which to respond;
(c) adequate time in which to respond;
(d) conscientious consideration by an authority of the response to consultation.'

25. Another way of putting the point more shortly is that 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."

94. The Court of Session in **King and others v Eaton Ltd 1996 IRLR 199** adopted Glidewell LJ"s definition.

95. The definition was also quoted with approval by the EAT in **John Brown Engineering Ltd v Brown and ors 1997 IRLR 90,** in which it was stated that what is required in each case is a fair process which gives each individual employee the opportunity to contest his or her selection, either directly or through consultation with employee representatives. It suggested that this involved allowing employees selected for redundancy to see the details of their individual scoring assessments.

96. In **Mugford v Midland Bank plc [1997] IRLR 208**, HHJ Peter Clark in the EAT said:

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.

97. An employer should do what he can do, as far as is reasonable, to seek alternative work for the employee before dismissing by reason of redundancy. **Thomas and Betts Manufacturing Limited -v- Harding (Supra).**

98. In ***Polkey v AE Dayton Services Ltd 1988 ICR 142, HL,*** it was held that the tribunal will be entitled, when assessing the compensatory award payable in respect of an unfair dismissal, to consider whether a reduction should be made on the ground that the lack of a fair procedure made no practical difference to the decision to dismiss.

99. Section 13 of the Employment Rights Act 1996 states:

"*(1) An employer shall not make a deduction from wages of a worker employed by him unless—*

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion".

100. The Court of Appeal in **Delaney v Staples (t/a de Montfort Recruitment) 1991 ICR 331** held that the non-payment of wages which are properly payable is a deduction. The issue is whether the worker received less than the amount properly payable to him or her. In deciding that issue the tribunal must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion. The question is whether the claimant is contractually entitled to the wages not paid.

101. In determining what wages were properly payable within the meaning of section 13(3), the Tribunal should consider all the relevant terms of the contract of employment.

102. Under Regulation 14 of the Working Time Regulations a worker is entitled to a payment in lieu where:

102.1 his or her employment is terminated during the course of the leave year and
102.2 on the termination date, the proportion of statutory annual leave he or she has taken under regulations 13 and 13A is less than the proportion of the leave year that has expired

103. Where a worker is entitled to a payment in lieu of holiday entitlement regulation 14(3) provides that the sum due shall be determined either by the terms of a relevant agreement or by reference to a statutory formula set out in regulation 14(3) (b).

104. Regulation 14 provides for a worker to be compensated in respect of unused statutory leave under regulations 13 and 13A. If a worker's contractual leave entitlement exceeds his or her minimum entitlement under the regulations than any right to payment in lieu in respect of the extra holiday will depend on the express or implied terms of the worker's employment contract .

105. Regulation 14(3) (b) provides that where no provisions of a relevant agreement apply the sun payable to a worker in lieu of his or her unused holiday entitlement should be calculated under the principles set out in regulation 16 but in relation to a period of leave determined according to the following formula :

(A X B) – C

Where: A is the minimum period of leave to which the worker is entitled under regulations 13 and 13A; B is the proportion of the worker's leave year which expired before the termination date; and C is the period of leave taken by the worker between the start of the leave year and the termination date.

106. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 as amended includes:

(2) if in the case of proceedings to which this section applies, it appears to the employment tribunal that
(a) the claim to which the proceedings relate concerns a matter to which a relevant code of practise applies
(b) the employer has failed to comply with that code in relation to that matter, and
(c) that failure was unreasonable ,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so , increase any award it makes to the employee by no more than 25% .

(3) if in the case of proceedings to which this section applies, it appears to the employment tribunal that
(a) the claim to which the proceedings relate concerns a matter to which a relevant code of practise applies
(b) the employee has failed to comply with that code in relation to that matter , and
(c) that failure was unreasonable ,

the employment tribunal may , if it considers it just and equitable in all the circumstances to do so , reduce any award it makes to the employee by no more than 25% .

This section applies to claims for unlawful deduction from wages.

107. The tribunal has considered and where appropriate applied the authorities referred to in submissions., including the decision in **Pinewood Repro Ltd t/a County Print v Page [2010] UKEAT 0028-10-1310.**

Determination of the Issues

108. This includes, where appropriate, any additional findings of fact not expressly contained within the findings above but made in the same manner after considering all the evidence.

Unfair dismissal

109. The claimant was dismissed and the effective date of termination was 28 August 2020.

110. The first question is what was the reason for dismissal. In determining whether there was a true redundancy situation the tribunal has considered if was there a diminution in the employer's requirements for employees (not the claimant) to carry out work of a particular kind, or an expectation of such a diminution/cessation in the future. On balance the tribunal accepts the evidence of the respondent and finds that there was a genuine business need to reduce costs, as identified in the business case prepared by Mr Pasquill. There was an anticipated loss of £250,000 following the Covid 19 pandemic and lockdown. The fact that some of the claimant's clients continued to provide some work to the respondent does not mean that there was no reduction in actual or anticipated income. The tribunal rejects the claimant's assertion that the error about the amount of notice pay due to the claimant shows that the respondent failed to exercise due diligence in examining the financial circumstances of the respondent which led to the decision to cut costs and declare redundancies. The claimant was paid the correct amount of notice pay and the financial statement contained a typographical/administrative error.

111. In looking at ways in which to reduce costs the respondent made the genuine business decision to reorganise the work of the Senior

Quantity Surveyors and to reduce costs by reducing the number employed at the Warrington Office from 3 to 1. That was a genuine business decision. There may have been different and/or better ways to achieve the equivalent cost saving, as suggested by the claimant, but it is not for the tribunal to challenge the business decision or to substitute its own view as to the best way to reduce costs. On balance the tribunal finds that there was a genuine redundancy situation, there was a diminution in the employer's requirements for employees, Senior Quantity Surveyors in the Warrington office, to carry out work of that particular kind

112. The next question is whether the dismissal of the claimant was attributable wholly or mainly to the redundancy. There is no satisfactory evidence to support the assertion that the claimant had been targeted, that the real reason for dismissal was because of Neil Griffith's "frosty" attitude to the claimant, or because the claimant had expressed concerns about not telling clients that some of his work colleagues had been furloughed, or because the claimant had challenged the respondent's request to leave booked holiday on the BrightHR system when it had been cancelled. The incident after dismissal, when the chairman of the respondent contacted the chairman of the claimant's new employer, is regrettable, and the claimant was justified in his concern that it could have led to the loss of his new job. However, there is no satisfactory evidence that the dismissing officer had any reason or desire to dismiss the claimant for another reason and to achieve that by declaring the claimant as redundant. The claimant was a highly valued employee. The tribunal accepts the evidence of the respondent and finds that the dismissal of the claimant was attributable wholly to the redundancy situation.

113. The next question is whether the claimant was fairly selected for redundancy. The pool for selection , the three Senior Quantity Surveyors in the Warrington office, was a reasonable one. There was a genuine business decision that the directors could take over some of the duties of the Senior Quantity surveyors, assisted by junior surveyors. The claimant has not argued that the respondent could have widened the pool to include Senior Quantity surveyors employed at different offices.

114. The selection criteria were reasonable. It is reasonable to include in the criteria matters such as skills and experience where these are important to the success of the business moving forward. The claimant accepts that the criteria were reasonable. He has raised no challenge to the choice of this criteria. An individual's skills and knowledge are reasonable considerations, providing they are assessed objectively. In this case the criteria were clearly defined in the scoring matrix.

115. The next question is whether the selection criteria were fairly applied. It is not the function of the Tribunal to decide whether each mark allocated against the selection criteria is correct. The Tribunal

should be satisfied that the method of selection was fair in general terms and was applied reasonably.

116. It fell within the band of reasonable responses for the respondent to decide that there should be three scorers and that their scores would simply be added together, without question or moderation by the dismissing officer, Mr Pasquill. It fell within the band of reasonable responses to choose as scorers the three managers with knowledge of the work of the three Senior Quantity Surveyors in the Warrington office. Some had more direct knowledge of the candidates' skills and experience. However, having three scores from the different managers made for a more balanced scoring across the pool.

117. The tribunal has considered the assertion that the successful candidate, MG, was chosen in advance of the scoring, as evidenced by the transfer to him of the lap-top of KR and/or the delegation of some of the claimant's duties to TM prior to the selection exercise. On balance the tribunal is satisfied that there was a genuine selection exercise and that each of the scorers did score each of the candidates in a fair and reasonable fashion against the selected criteria. The tribunal is satisfied and finds that they followed the guidelines for marking as set out in the scoring matrix. The tribunal has heard evidence from Mr Woods and Mr Gruszka. Evidence has not been heard from Julia Fidler. However, her scoring is fairly consistent with the scores of the other markers. Further, the claimant approached Julia Fidler to give evidence but did not call her because he thought her evidence would be to reiterate the respondent's position. In these circumstances the tribunal is not prepared to draw any adverse inference from the fact that Julia Fidler has not given evidence. It is noticeable that there was not a huge difference in the scores of each of the scorers. The tribunal is satisfied and finds that each of the candidates was scored fairly against each of the stated criteria and that no different or personal criteria were applied. The tribunal notes the claimant's objection to his marks being affected by a scorer's belief that the claimant unnecessarily engaged in "office gossip". The tribunal is satisfied that this was the genuine opinion of the marker, Mr Woods, who reasonably considered that participation in office gossip was a relevant factor in assessing communication skills. The tribunal is not satisfied either the comment of Julia Fidler (see paragraph 76 above) or Helen Hatton (see paragraph 63 above) showed that personal circumstances had affected the scoring or that the scoring was manifestly unfair. There is no satisfactory evidence to support the assertion that the claimant was selected for redundancy because the respondent and/or scorers thought he had the better chance of securing employment elsewhere. A redundancy exercise is an upsetting exercise for everyone involved in it because employees with good employment track records lose their jobs because of financial circumstances and not because the employees are poor performers or not wanted in the workplace. The tribunal accepts the evidence of Mr Pasquill that the claimant was a highly valued employee whom the respondent was sorry to lose. Clearly Helen Hatton shared that opinion and was upset by the dismissal of the claimant.

118. The claimant has suggested that he should have been chosen for the one remaining job because he was the one who was asked to work during lockdown, whereas the other two Senior Quantity Surveyors were furloughed. He suggests that he was told by Julia Fidler that it would stand him in good favour in case there was a redundancy and the claimant questions why this should change and MG be the successful candidate. However, the claimant is in essence suggesting that he should be given preference over the other candidates for a criteria which did not appear on the skills sheet. It is understandable that the claimant was disappointed that he should not be chosen as he was highly regarded by both his employer and its clients. However, retention during the lockdown may have been decided on different criteria in which personal circumstances, such as having children to care for in the school shut down, were taken into account. It was reasonable for the respondent not to include participation in work during lockdown as a selection criteria.

119. On balance the tribunal finds that the selection criteria were fairly applied.

120. The next question is whether a fair procedure was followed. The tribunal has considered all the circumstances including the following:-

120.1 The claimant was advised of the reason for redundancy in consultations meetings and given the opportunity to put forward alternatives to redundancy;

120.2 The fact that the claimant was not advised in advance of the reason for the first redundancy meeting does not render this dismissal unfair;

120.3 The respondent did consider the alternatives suggested by the claimant and advised him of the reasons for not accepting them. The tribunal accepts the evidence of Mr Pasquill and finds that he did consider the claimant's alternatives to redundancy as suggested at the third consultation meeting before reaching the decision to dismiss. That is why, at that meeting, Mr Pasquill informed the claimant that he was still at risk of redundancy, rather than confirm dismissal at that stage;

120.4 The respondent provided the claimant with a copy of the selection criteria for comment;

120.5 The failure of the respondent to advise the claimant of the number and names of the scorers in advance of the decision to dismiss does not render the decision to dismiss unfair.

120.6 The claimant was advised of the right to be accompanied at the consultation meetings. It was reasonable to reject the claimant's request to be accompanied by a legal/professional advisor from outside the company;

120.7 The claimant was given the right of appeal but did not formally exercise that right. He continued to exchange e-mails with the dismissing officer, Mr Pasquill. He did not seek to challenge the decision to the appeal level;

120.8 It was unreasonable and fell outside the band of reasonable responses for the respondent to refuse the claimant the opportunity to challenge his scores before he was selected for redundancy and dismissed. As stated in **John Brown Engineering Ltd v Brown and ors 1997 IRLR 90** the respondent needs to adopt a fair process which gives each individual employee the opportunity to contest his or her selection. An essential part of that is to give the claimant the opportunity to challenge his scores. He was not given the completed Master Summary sheet (Appendix 1) until after the 3rd consultation meeting and confirmation of his dismissal. That document did not give the claimant the opportunity to challenge his scores for the two more subjective criteria, skills and experience, because he was never given the scores for each of the 10 questions under those criteria. It was critical to the fairness of this process that the claimant be given this opportunity because the difference in scores between the claimant and the successful candidate was so small, and there had been no monitoring of the scores during the scoring process.

In all the circumstances the tribunal finds that the dismissal was procedurally unfair by reason of the respondent's failure to provide the claimant with the opportunity to challenge his scores.

121. The claimant was unfairly dismissed.

122. The claimant is not entitled to a basic award as he received the statutory redundancy payment.

123. The tribunal has considered whether it is in the interest of justice to make a compensatory award. It has applied the **Polkey** principle and considered whether following a fair procedure would have made any difference to the outcome. On balance the tribunal finds that it would not. The claimant has had the opportunity to challenge the scores at this tribunal. The scorers, Mr Woods and Mr Gruszka, have given satisfactory evidence as to the reasons for their scores. As stated above, the tribunal is not prepared to draw any adverse inference from the respondent's failure to call Julia Fidler to give evidence. The claimant had the opportunity to call her but chose not to do so. The tribunal is

satisfied and finds that if a fair procedure had been followed, if the claimant had been given the opportunity to challenge his scores prior to the third consultation meeting, his scores would have remained the same. He would still have been selected for redundancy and dismissed. In all the circumstances it is not in the interest of justice to make any award of compensation.

124. Further, and in the alternative, if the tribunal is incorrect in stating that the failure of the respondent to advise the claimant of the number and names of the scorers in advance of the decision to dismiss does not render the decision to dismiss unfair, the tribunal finds that informing the claimant in advance would have made no difference to the outcome. The respondent has provided a satisfactory explanation for its choice of the number and identity of the scorers. If the claimant had had the opportunity to challenge that choice prior to dismissal, it would have made no difference –the scorers would have remained the same and he would still have been dismissed.

125. Further, and in the alternative, if the tribunal is incorrect in stating that the respondent was reasonable in choosing three scorers, as opposed to a single scorer-the claimant's line manager, the tribunal notes that the selection of Julia Fidler as the single scorer would have made no difference to the outcome - her score for MG was higher than her score for the claimant. The claimant would still have been selected for redundancy.

Holiday pay

126. The parties have agreed that at the termination of employment the claimant had accrued the right to 20.44 days holiday in the final holiday year. The daily rate of pay is agreed at £182.77 gross.

127. The contract of employment does not provide a method of calculation for the payment of accrued holiday beyond the statutory entitlement. Both parties have calculated the entitlement in accordance with the statutory definition contained in the Working Time regulations. The respondent has not sought to distinguish between the statutory entitlement to holidays and the contractual entitlement. The dispute relates to the number of days under "C", that is, is the period of leave taken by the worker between the start of the leave year and the termination date. The respondent asserts that the period of leave taken must include the 10 days annual leave which every employee was instructed to take by the Neil Griffiths email, whether or not the claimant actually took those days.

128. The tribunal has considered the Neil Griffiths email. The respondent relies on that document as a variation to the terms and conditions of employment. No other document was sent. Individual managers explained the terms and their effect to the employees. That document does not support the respondent's assertion that employees

agreed to book 10 days holiday and to lose entitlement to them if they chose not to take them. That is a draconian measure and requires certainty, especially when the respondent assumed consent to the new terms by silence – a failure to challenge the memo was taken as consent to the variation in terms. However, there was some uncertainty as to the new terms and conditions as the situation with the lockdown and furlough developed. For example, Mr Pasquill asserts that the memo established that employees were asked and agreed to a reduction of 20% in pay but it was anticipated that the employees would continue to work 100% of their contractual hours. The memo does not say that. It clearly anticipates that the 20% reduction in pay would be matched by a 20% reduction in working time. That matches the claimant's evidence, which the tribunal accepts, that the line manager asked each employee to nominate which day out they would take, to try to coordinate each employee's absence from the office. On balance the tribunal accepts the evidence of the claimant. He booked 10 days leave as directed in the email. He was then told not to take those holidays because he was not furloughed. He was the 1 out of 3 Senior Quantity Surveyors who remained in work and he was obliged to take on a heavy workload. The claimant was not told that by failing to take those holidays he would lose his entitlement to them. He never agreed to that. It is not appropriate to deduct the 10 days from the claimant's entitlement.

129. The claimant is entitled to the number of days holiday entitlement having deducted the amount of holidays actually taken. The tribunal has accepted the claimant's evidence that the BrightHR system did not contain an accurate record of the holidays taken by him. The claimant only took 2 days annual leave in the last holiday year. He was therefore entitled to 19 days accrued holiday pay on the termination of employment. He was paid 5 days accrued holiday pay.

130. The claim for unlawful deduction from wages therefore succeeds. There was a failure to pay of total of 14 days holiday at the daily rate of £182.77 – a deduction in the sum of £2558.78 gross.

131. The tribunal has considered whether it is in the interest of justice to apply an uplift under 207A of the Trade Union and Labour Relations (Consolidation) Act 1992. It has decided that it is not appropriate to do so as the claimant did not raise a formal grievance in relation to the underpayment of accrued holiday pay.

132. The respondent has not sought a reduction in the award. However, the tribunal has considered this. In an exchange of emails with Mr Pasquill the claimant made his case for the outstanding holiday pay very clear, and the respondent made its position clear – it was not prepared to pay any more than 5 days. In light of this it was reasonable for the claimant not to pursue a formal grievance before presenting the claim. The respondent has persisted with its argument in relation to the so-called holiday sacrifice. It is simply not credible that pursuing a formal

grievance would have made any difference to the respondent's position on that. In all the circumstances the tribunal finds that it would not be in the interest of justice to make any reduction in the award.

Employment Judge Porter

Date: 25 February 2021

RESERVED JUDGMENT SENT TO THE PARTIES ON

25 February 2021

FOR THE TRIBUNAL

Appendix 1

Closing written submissions of the claimant

I believe that it is quite clear that I only used two days' paid annual leave from my entitlement for the period 1st January 2020 – 28th August 2020 (ETD) and that my managers were fully aware of this throughout this period, but have now given me no choice but to pursue this matter through tribunal unnecessarily, leading to months of stress and anxiety.

I can fully appreciate the unprecedented nature of the downturn in work as a result of the pandemic, and that this may result in the need to reduce staff levels by means of redundancy, however it seems clear that no reasonable alternatives were fully considered, and that this was used as more of an excuse to remove certain staff. It is my sincerely held belief that Baker Mallett's decision to terminate my employment was not purely a business decision, but was made based on personal factors, with the decision being made prior to the at-risk process and the scoring matrix manipulated to justify this outcome. Two of the three people providing scoring were not directly involved in my work, with one being an external consultant subcontracted by Baker Mallett. They have demonstrated a lack of consistency and fairness throughout this redundancy process which has been procedurally unfair for numerous reasons:-

· their repeated failure to comply with the ACAS Code of Conduct and provide the detailed scoring requested or engage reasonably with me following the decision; they refused to participate in the ACAS conciliation

· no explanation was given during the consultation period that 3 members of staff would be conducting the scoring. Two of the three people providing scoring were not involved directly in my work

· failure to conduct the necessary due diligence prior to the decision and understand the cost implication of redundancy (eg. incorrect statutory Pay In Lieu Of Notice – page 102) against the cost of retaining my employment;

· failure to seriously consider any other alternative cost-cutting exercise such as reduced hours/salary

· failure to consider reducing staff levels elsewhere, such as assistant Quantity Surveyors on lower salaries (but with a lack of experience and ability, and the significantly lower costs of making these employees redundant), or Business Development roles on significantly higher salaries (who worked throughout lockdown but yet seemingly failed to secure enough work to sustain salaries);

· failing to continue to use the furlough scheme as much as possible as an alternative to redundancy; Stating the furlough scheme doesn't cover the salary of a senior which they had used for 5 months prior but quite clearly the salary top up would cost less than making two staff redundant and the associated costs;

· bringing back the successful candidate from furlough just 2 weeks prior to commencing the ‘At Risk’ process;

· hiring new staff whilst stating a need to cut costs due to lack of work;

· bringing back other staff from furlough despite claiming a lack workload and the continuation of the scheme, and instructing me to prepare for handing over numerous workloads to these staff, even before the consultation period started;

I believe the conduct of Baker Mallett throughout the process and since has demonstrated that this decision was at least in part based on personal factors and not based on my abilities. If the detailed scoring matric had been provided at the time requested this would have allowed me to appeal this decision through the appropriate channels rather than a five-month process which has caused a great deal of stress and anxiety. The scoring matrix shows that a proportion of these scores where reached based on second-hand information and negative personal associations. Again, this demonstrates that the redundancy process as conducted was procedurally unfair. I would also highlight the fact my line manager Julia Fidler one of the three people conducting the scores and the person with the most direct day to day involvement in my work was not presented as a witness when the other two scorers where.

As per my witness statement I would like to draw your attention to the case of Pinewood Repro Ltd v Page 2010 (appellant was not given a full explanation regarding how scores were reached and the opportunity to challenge them and that his subsequent redundancy was unfair). The employment tribunal sided with the Claimant and stated when handling a redundancy situation, the ‘consultation’ process must involve a full explanation of the individual selection scores. This allows the employee the “fair and proper opportunity” to fully understand the employers reasoning and to express their views. Without such steps a genuine consultation process can’t take place

Appendix 2

Master Summary

Factor	At Risk Candidate No1	At Risk Candidate No2	At Risk Candidate No3	Notes
Achievement of Performance Targets	10.00	10.00	7.50	
Skills	8.20	8.60	8.00	
Experience	6.15	6.60	5.85	
Qualifications	3.00	3.00	3.00	
Disciplinary	0.00	0.00	0.00	Note: Minus Score
Attendance	-2.00	-2.00	-2.00	Note: Minus Score
Sub Total	**25.35**	**26.20**	**22.35**	
Achievement of Performance Targets	10.00	10.00	7.50	
Skills	6.80	7.00	5.80	
Experience	5.40	5.25	4.65	
Qualifications	3.00	3.00	3.00	
Disciplinary	0.00	0.00	0.00	Note: Minus Score
Attendance	-2.00	-2.00	-2.00	Note: Minus Score
Sub Total	**23.20**	**23.25**	**18.95**	
Achievement of Performance Targets	10.00	10.00	7.50	
Skills	8.40	8.40	8.20	
Experience	6.45	6.90	6.75	
Qualifications	3.00	3.00	3.00	
Disciplinary	0.00	0.00	0.00	Note: Minus Score
Attendance	-2.00	-2.00	-2.00	Note: Minus Score
Sub Total	25.85	26.30	23.45	

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2415484/2020**

Name of case: **Mr C Williams** v **Baker Mallett LLP**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding discrimination or equal pay awards or sums representing costs or expenses), shall carry interest where the sum remains unpaid on a day ("*the calculation day*") 42 days after the day ("*the relevant judgment day*") that the document containing the tribunal's judgment is recorded as having been sent to the parties.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant judgment day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: **25 February 2021**

"the calculation day" is: **26 February 2021**

"the stipulated rate of interest" is: **8%**

For and on Behalf of the Secretary of the Tribunals