Case No: 1806707/2020 (V)

EMPLOYMENT TRIBUNALS

Claimant: Mr Ayannuga

Respondent: SPL Powerlines UK Ltd

Heard at: Leeds On: 4 May 2021

Before: Employment Judge Knowles

Representation
Claimant: In person

Respondent: Mr MacDougall, Counsel

RESERVED JUDGMENT

The judgment of the employment tribunal is that:

1. The Claimant's claim of unfair dismissal is not well founded and fails.

2. The Claimant's claim of breach of contract relating to lost competencies is not well founded and fails.

RESERVED REASONS

Issues

1. This case concerns the Claimant's dismissal from his employment which the Respondent states was by reason of redundancy. The Claimant claims that his dismissal was either not by reason of redundancy or, if it was, that the redundancy was unfair. The Claimant was demoted prior to his redundancy and had some of his competencies suspended and he states the Respondent has failed to keep his training and qualifications up to date. That is a claim of breach of contract.

2. The issues for me to consider are as follows.

3. What was the reason or principal reason for dismissal? The Respondent says the reason was redundancy.

4. If the reason was redundancy, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant. The Tribunal will usually decide, in particular, whether:

    a. The respondent adequately warned and consulted the claimant;

    b. The respondent adopted a reasonable selection decision, including its approach to a selection pool;

    c. The respondent took reasonable steps to find alternatives to redundancy;

    d. Dismissal was within the range of reasonable responses.

5. What were the Claimant's contractual provision as to the maintenance of his competency qualifications and were those terms breached?

Evidence

6. This hearing was held fully remote through HMCTS's Cloud Video Platform.

7. I heard evidence on behalf of the Respondent from Mr Hext, UK Group Safety & Services Director.

8. The Claimant attended the hearing and gave evidence.

9. Both Mr Hext and the Claimant produced written witness statements. Both took the oath by way of affirmation.

10. A joint bundle of documents was produced (137 pages). Numbers in brackets in this judgment relate to the page numbers in the joint bundle unless otherwise stated.

11. The Claimant attached documents to his witness statement (21 pages).

12. The Claimant referred in his questions to Mr Hext to the Sentinel Rules, which the tribunal and the Respondent's representative were able to access online. The Respondent consented to the Claimant utilising these Rules despite them not having been produced (other than a single page in the joint bundle) prior to the hearing.

13. Separate to the bundle of documents, the Respondent produced written submissions.

Findings of fact

14. I made the following findings of fact on the balance of probabilities. This is not a record of all of the evidence which I heard; it is a summary of the core evidence upon which my conclusions are based.

15. The Respondent employs 650 people in Great Britain. They are a contractor used by Network Rail. They hold contracts to maintain overhead power cables on the rail network.

16. Working on railway lines is obviously a safety critical role. The Respondent utilises the Sentinel system, through which workers hold a card which works as a passport to work on the rail infrastructure in the UK, holding details of training, competency and fitness to work.

17. The Claimant commenced employment 10 November 2017. The Claimant was originally employed as an Authorised Person. His final role with the Respondent he terms as "Isolation"; the Respondent states that his role was

Earthing Assistant. I found that the Claimant was demoted to the role of Earthing Assistant on 20 July 2019 (page 88). Both roles are part of the isolation team's work.

18. The Claimant's normal working hours were 40 per week.

19. The Claimant states that in December 2018 he was involved in a near miss incident which led to a Network Rail Level 5 (it was in fact Level 3) investigation and the outcome of the investigation was his demotion and a salary reduction due to the severity of the incident.

20. The Claimant has stated that shortly after the incident, he undertook an assessment of his COSS (Controller of Site Safety) competency on 30 January 2019 (Appendix 4 to the Claimant's witness statement) and that his line manager was "content with me" but that he was still waiting for authorisation at Director level. Mr Hext could not comment on this, it appears he was unaware of that assessment. It was clear that Mr Hext was of the view that even were the Claimant to complete the COSS (Controller of Site Safety) assessment on the ground, there were other reasons why the Claimant would not be granted competency, namely the Claimant's suitability, behaviour and lack of demonstration of competence. In Mr Hext's words in answer to questions in reexamination "I am the ultimate authority, I know my responsibility to make sure everyone goes home safely, I do that without fear or favour".

21. The Claimant was indeed the subject of a near miss incident. The investigation report (30-79) summarises this as follows (31):

"At 23:53 on Wednesday 12 December 2018 at Chalton near Sundon in Bedfordshire, a group of two isolation staff comprising of [the Claimant] and an Earthing Assistant moved clear of the Down Fast line less than a quarter of a second before the passage of 1D91. The train was travelling north and passed the workers at approximately 100mph."

22. The Claimant was not held solely responsible for the incident and the report draws many findings and conclusions. It is not necessary to set them all out here. However, there were findings of safety and procedural failings by the Claimant in this report.

23. In relation to the Claimant, the following "local actions" were recommended:

"The [Claimant] should have COSS (Controller of Site Safety) duties formally suspended and a performance development plan created for him. This plan should include non-technical skills, hazard perception and a focus on the individual's aptitude to understand the limitations of his own ability. It is possible that cognitive behavioural therapy would be beneficial. (See sections A2.1, A3.1, A4.2 & A4.11).

The [Claimant]'s manager should arrange for the plan in section A8.1 to be developed and implemented. Consideration and assessment should be made following the completion of this plan to decide if it is appropriate for the [Claimant] to reacquire his COSS (Controller of Site Safety) competence. (See sections
A2.1, A3.1 & A4.2)."

24. The report was concluded and published in or around May 2019. The Lead Investigator was J Rowberry, Infrastructure Maintenance Engineer, Route Businesses England and Wales.

25. The Claimant attended a disciplinary hearing on 8 May 2019. The hearing was undertaken Mr Britton, Business Unit Delivery Director. The notes of the hearing (80-83) record the Claimant acknowledging that "it is a learning curve and when you make a mistake you need to learn, I realise my mistake and tried to explain what happened on the night… needs to do things the correct wa[y] that [I] was taught, [I] had jumped some rules and was lucky to be alive…".

26. Mr Britton wrote to the Claimant 20 May 2019 (84) as follows:

"The Incident under consideration was as follows:

Breach of Network Rail's Life Saving Rules - always be sure the required plans and permits are in place, before you start a job or go on or near the line.

At the start of the meeting you were reminded of your right to a representative of your choice which you chose to decline.

After considering all the evidence collated during the investigation by Network Rail and the information you provided at the disciplinary meeting, it is clear that the Network Rail life savings rules were broken, putting the safety of the individual and others at high risk of loss of life, these actions will not be tolerated and could have also damaged the reputation of SPL Powerlines UK Ltd.

The decision has been made to issue you with a Final written warning. This warning will remain on your personnel file for 12 months from the date of this letter.
In addition, due to the severity of the safe practice demonstrated as a result of the investigation, until further notice, you will not be allowed to undertake "Authorised Person" duties for the company. I believe that at this juncture that it would be unsafe to do so without some time for reflection and if required, additional training and supervision. This therefore will result in your annual salary and job role being amended to reflect this new status and rate for the job, as an Earthing Assistant.

You have a right to appeal against this decision, and a right to be accompanied to any appeal hearings by either a trade union representative or work colleague."

27. The Claimant appealed. An appeal hearing was heard by Mr Jebson on 18 June 2019.

28. The appeal notes (87-88) suggest that the Claimant was suggesting that the
Nominated Person pushed him to get a job done. The Claimant agreed that he had made mistakes but felt that the outcome was too harsh to affect his salary. He stated there were systematic errors. He stated that he did not want demotion to be an endless affair.

29. The appeal outcome was delivered by letter 19 July 2019 (88) as follows:

"I write to inform you that following your appeal meeting held on 18th June 2019 Brian Jebson, the Chair reviewed all the paperwork and considered the grounds of your appeal and the further points that you raised however it was felt that these had no relevance to the disciplinary outcome.

At the Appeal hearing your position remained that the decision, to not allow you to undertake "Authorised Person" duties for the company was not the right decision, and that you feel you are safe to carry out these duties and that your role and salary should not be affected.

For the avoidance of doubt the chair agrees with the discipline decision to issue you with a Final written warning for a period of 12 months.

The chair also agrees that due to the severity of the breach of safe practice demonstrated as a result of the investigation until further notice, you will not be allowed to undertake "Authorised Person" duties for the company. As a result, your annual salary and job role will be amended to reflect this new status, as an Earthing Assistant effective from 20th July 2019.

Having now exercised your right to appeal, this decision is final and there is no further right of appeal and payroll will be notified of the changes detailed above".

30. On 16 August 2019 the Claimant sent an email to HR stating that he wished his "tickets" to be reinstated ASAP because the Network Rail report stated that his COSS (Controller of Site Safety) ticket was the only ticket that should be officially suspended. He referred to the following "tickets":

AP – Authorised Person

MC – Machine Controller

CC – Crane Controller

OLEC 2 – Overhead lines electrification course.

Machine Operator

31. That email was treated as a grievance and a grievance hearing scheduled to be heard 25 September 2019 by Mr Weallans, Regional Director (91).

32. Notes of the hearing are at pages 92 – 93. An outcome letter dated 14 October sets out the following:

"You specifically raised points against the Network Rail Investigation report and regarding your sentinel competence tickets. SPL Powerlines have a duty of care and safety towards all employees and colleagues; the removal of the associated sentinel competencies except PTS is not in itself a disciplinary outcome.
This relates to demonstrated safety behaviors (sic) whilst conducting safety critical duties, that at this stage we cannot allow you to conduct on behalf of SPL Powerlines.

Therefore, the company does not uphold any of the points you raised, you will continue to be employed as an Earthing Assistance on the annual salary of £21,000.00

You continue to remain on a Final Written warning with PTS competence ticket only, when working for SPL Powerlines.

We expect you to adhere to the required rules and responsibilities and report any unsafe practices accordingly.

The Company will continue to provide support and guidance in retraining in order that you gain the appropriate qualifications and that process will be completed as soon as the required standards are achieved.

There are no more stages in the grievance process and there is no further appeal stage."

33. The Claimant states that he was forced onto furlough because he would not stay in the hotel given to him for fear of contracting Coronavirus. He complains that he had other placed he could work without staying in the hotel

and still make his contracted hours. The Respondent states that the Claimant was leaving site early to travel home (without authorisation) rather than use the hotel provided. The Respondent states that this shows that the Claimant was not being fully utilised and as a result of that he was furloughed from 22 May 2020 until he was served his redundancy notice. I have noted this context to the Claimant's claims but do not find the circumstances of furlough material to the case.

34. On 6 July 2020, during his absence from work on furlough the Respondent's Head of HR wrote to the Claimant (100) as follows:

"Re: Risk of Redundancy Letter

Due to the recent COVID19 pandemic and the impact this has had on both the current delivery and future resource requirements of the business, the structure of the company is being reviewed. As a result of this SPL Powerlines UK Ltd is considering making redundancies.

Posts as "Earthing Assistant" within the Isolation Department are currently affected.

We are considering all possible ways of avoiding redundancy including, if we are able, to offer suitable alternative roles. The next step is to consult with you, to listen to any alternative proposals, suggestions or comments you may have.

We will hold a meeting with you to be arranged within the next seven working days to conduct a one to one consultation meeting. You are entitled to bring a trade union representative or work colleague with you to this meeting. If you have any queries or need help or support, please do not hesitate to speak to the HR department, your Line Manager or your trade union representative."

35. A letter followed this dated 7 July 2020 arranging a first consultation meeting (101) with Mr Jebson, General Manager SPL RR and Isolations on 13 July 2020. The Claimant is offered the right to be accompanied.

36. The hearing takes place as arranged and the Claimant is represented by his trade union representative (notes 102-104). It is clear that the Claimant raises the issue of his furlough leave and his lack of a development plan to reinstate his authority to work as an Authorised Person. He is told that there are 3 people in the pool and that a skills matrix will be completed.

37. A second consultation meeting takes place 3 August 2020 (105-109). The Claimant is again represented by a trade union representative.

38. Mr Jebson confirms that the Respondent is still looking at redundancies across England and Scotland. He explained that the Respondent was predicting 15-18 redundancies in total.

39. The Claimant queried whether or not all 3 Earthing Assistant roles were potentially at risk and the reply is "potentially yes, cannot pre-empt, process to follow". The Claimant confirms receipt of the spreadsheet of other vacancies and it is recorded that there were no roles which the Claimant felt he was suitable for. The Claimant asked again about COSS (Controller of Site Safety) and AP training and the reply is recorded as "at this time, the company do not deem him suitable and he hasn't demonstrated his non-technical behaviours as we are responsible as Directors for ensuring his health and safety and of others". Further details are given including information from Mr Hext which ultimately confirm that the Respondent does not consider the Claimant suitable to go forwards for further training or assessment. There were also discussions where the Claimant challenged some of the scoring allocated to him in the selection matrix.

40. On 11 August 2020 the Respondent's Head of HR wrote to the Claimant (110-111) as follows:

"Re: Notice of Redundancy

Following the second consultation meeting on Monday 3rd August 2020, we are sorry to have to tell you that, following this period of consultation, the Company is to make your post of Earthing Assistant within the Isolations department redundant.

All Earthing Assistant posts within the Isolations Department are being made redundant.

As SPL Powerlines UK Ltd is unable to offer you any suitable alternative employment, we are hereby giving you notice that your employment with the company is being terminated, this is due to your position having to be made redundant.

The terms of your redundancy are as follows:

You are entitled to 4 weeks' notice to end your employment with SPL Powerlines UK based on your contract of employment. Please note that this amount is subject to usual deductions.

Your notice period will commence on Wednesday 12th August 2020 and your employment will terminate on Tuesday 8th September 2020. You will not be required to work your notice period and remain furloughed. During this notice period you will be paid at your full salary pay not the furlough rate of 80%...."

41. The letter goes on to explain some procedural aspect concerning the redundancy and outlines a right to appeal.

42. The Claimant appealed against his redundancy 12 August 2020 by email (112). An appeal hearing was arranged for 20 August 2020 to be heard by Mr Armishaw, Regional Director.

43. Notes of that hearing have not been produced to me.

44. The outcome letter from Mr Armishaw (117-119) is dated 2 September 2020 and provides as follows:

"Following the appeal email dated 12'h August 2020 to the redundancy outcome, I am writing to advise you of the final decision and outcome following the meeting on 20th August 2020 at the Doncaster office.

The appeal was in relation to the outcome of the redundancy notice you were issued with.

You raised 5 specific points:

My sentinel competency.
The actual reasons why I was furloughed.
The reasons why I was not getting a written confirmation from HR regarding my developmental plan (after about 5 times of asking)
The company policy that determine who is to be made 0088 or Not with clear reasons
The change in the scoring outcome

I have fully investigated the points raised and the decision is as follows:

1. The reason for removing Ayo's sentinel competency has been in my opinion communicated at length during the Sundon incident investigation, the subsequent findings and Ayo's final written warning valid until 19th May 2020 plus his appeal outcome. I have not seen any additional information to suggest this wasn't clear.

Additional competency's held by Ayo when he joined SPL Powerlines UK Ltd have now expired, due to, not being used or not having an assessment carried out, as Ayo would have been unable to demonstrate carrying out these duties in the required timeframes with evidence, some competences were taken down as a result of the outcome of the Sundon incident. There is no agreement in place for SPL Powerlines UK Ltd, to uphold all these competencies, a number were not required by the company to undertake the role of Authorised Person in which Ayo was originally contracted to by SPL Powerlines UK Ltd.

2. Ayo was furloughed based on a downturn in work following the COVID 19 global pandemic and the need to reduce costs in line with this reduction. Ayo was rostered along with others to undertake shifts in various locations which required him to lodge away from home. Despite the company providing Ayo suitable accommodation in line with our health and safety policy and working time directive, Ayo decided to travel home on numerous occasions having left site considerably earlier than his rostered hours intended. Ayo failed to communicate this to his Line Manager directly. When questioned, Ayo stated that the accommodation provided was not the usual hotel and felt he was putting himself and his family at risk by using it.

When Ayo was asked if he had checked with the hotel to ensure they were following COVID19 regulations, he had not carried this out, instead he chose to continue to travel for over 4 hours each shift and completing sometimes less than an hour's work on site, before going home to leave his colleagues to carry out his duties. This clearly highlighted that the role Ayo was conducting on this site was not required, subsequently as this was the only consistent work bank at the time to suit Ayo's competence, it resulted in the company accessing the Government retention scheme and Ayo being furloughed, effective from 22.05.2020 until further notice.

3. Ayo stated he emailed HR on 5 occasions relating to his development plan with no response. Ayo has been asked for the dates of these emails which have not been supplied.

Following a search of all emails received from Ayo in relations to his competences we note the following:

Ayo emailed HR on 16.08.2019 and a follow up email on 29.08.2019 to request a meeting with the Management regarding his sentinel tickets being re-instated.

This was responded to on 02.09.2019 and a formal grievance meeting held on 25.09.2019 with the Operations Director, with the outcome to the grievance communicated on 14.10.2019 advising of the following:

> You continue to remain on a Final Written warning with PTS competence ticket only, when working for SPL Powerlines.
> We expect you to adhere to the required rules and responsibilities and report any unsafe practices accordingly.
> The Company will continue to provide support and guidance in retraining in order that you gain the appropriate qualifications and that process will be completed as soon as the required standards are achieved.

Following this, the only other emails relating to competence that have been located are, 11.05.2020 requesting further development which was not responded to and a further email on 29.05.2020 in between Ayo finalising his furlough documentation. We can find no further emails following a full search relating to the request of tickets/re—training or development.

It's regrettable that Ayo received no formal response to these requests, however these are unprecedented times, and as such the business focus has been on dealing with the global pandemic and the impact on all SPL employees.

4. The reasons for removing Ayo's competency are clearly detailed in the Sundon investigation outcome, his final written warning and the subsequent appeal decision. The criteria for individuals operating in a safety critical environment are many and not just in relation to what competency they hold. The close proximity of the Sundon incident in December 2018 to the Luton Station incident earlier in 2018; Ayo's subsequent extended probation and retraining has led SPL Powerlines UK Ltd, to believe Ayo does not display the

necessary behavioral skills to undertake a safety critical role in this business. This has been communicated to Ayo verbally by our Safety and Services Director Chris Hext. Ayo's inability to understand and his failure to acknowledge responsibility, is of concern when working in a safety critical environment and particularly in the role he played in both irregularities, have led to this decision.

5. The scoring assessment based on the consultation meetings was reviewed from an original score of 27 to a challenged score of 33, the increase in points for the Health and Safety compliance has not been agreed therefore, the reviewed score is detailed on the attached as 32.

Whilst the challenged score was reviewed, this unfortunately had no bearing on the result of the redundancy pool, as all roles as Earthing Assistant were made redundant.

Having reviewed the available documentation and listened to the additional information presented by Ayo I am satisfied that SPL Powerlines UK Ltd have followed the appropriate process in making the role of Earthing Assistant redundant.

My decision is to uphold the original outcome of Ayo's role being made redundant and that SPL Powerlines UK Ltd will not be re-instating or contributing towards any costs relating to the re-training of expired competencies.

This concludes the company appeal process, there is no further right of appeal within the company."

45. The Claimant's employment ended 8 September 2020.

46. Early conciliation commenced 1 September 2020 and ended 28 September 2020.

47. The Claimant brought his claim to the employment tribunal 14 November 2020.

48. The Claimant's case is essentially that he was demoted and had his competencies removed; had he been put on a development plan as recommended in the Network Rail investigation report then he would have maintained his competencies and would not have remained an Earthing Assistant and would not therefore have been subject to redundancy.

49. He claims that the Respondent has lied to him about his training and personal development plan. He claims that this has been a witch hunt and that he has been held responsible for the Sundon incident. I found his conclusions to be speculative in this respect.

50. The Claimant has produced no direct evidence of his redundancy being a witch hunt or holding him responsible for the Sundon incident.

51. To the extent that the Claimant is inviting me on the evidence to infer that the Respondent took redundancy as a way of exiting him from their business as a

result of the Sundon incident, I find on balance that this is unlikely to be the case. The Respondent did not dismiss him for his conduct in December 2018 despite the Claimant's failings being significant and placing his own and another employee's lives at serious risk. They are both fortunate to be alive today. Yet the Claimant was retained in employment and the Respondent found him alternative employment for which he did not require COSS (Controller of Site Safety) supervision authority.

52. I conclude on the balance of probabilities that the Respondent had not lied to or mislead him in relation to his pathway to becoming an Authorised Person again. It had been made clear following the incident report being finalised in May 2019 and the Claimant had been expressly notified in the disciplinary hearing outcome on 20 May 2019 that:

"due to the severity of the safe practice demonstrated as a result of the investigation, until further notice, you will not be allowed to undertake "Authorised Person" duties for the company. I believe that at this juncture that it would be unsafe to do so without some time for reflection and if required, additional training and supervision".

53. I conclude, on the balance of probabilities, that the Claimant considered that following the investigation report a personal development plan would be developed for him and that he would then be on a pathway to being reinstated as an authorised person. The Claimant appears to have genuinely believed this through the matters that occurred in 2019 and 2020 culminating in his dismissal.

54. The following grievance outcome sought to underline this on 25 September 2019:

"the Company will continue to provide support and guidance in retraining in order that you gain the appropriate qualifications and that process will be completed as soon as the required standards are achieved."

55. Mr Hext had determined that the Claimant would not be put forward for this training until he had shown the required standards.

56. The Claimant misunderstands this to mean that he would be trained in order to show the required standards.

57. Mr Hext has given evidence that it was up to him to determine whether or not to put the Claimant through further assessment in order that he may demonstrate his competence as an Authorised Person but he had decided that for safety reasons he would not put the Claimant forwards for those assessment.

58. The Claimant found the position extraordinary when put to him in answer to his questions when he cross examined Mr Hext. Mr Hext was nevertheless resolute that that was decision to make, no matter what the conclusions of the investigation report were.

59. As a matter of fact, I concluded that the decision was one for Mr Hext to make because he is ultimately responsible for managing health and safety at the Respondent. The Respondent has responsibility for managing the Claimant's authority and competency, and it their decision who is put forwards for assessment and development.

60. Those decisions may come to be considered in the context of the fairness of a decision to dismiss and I do take those decisions into account when making my conclusions later in this judgment.

61. I also noted that the Respondent had explained the businesses reasons for the redundancy; a downturn in work resulting from the pandemic's impact on train services and consequential maintenance. The Respondent's reason has remained the same during the internal consultation process and the Claimant's subsequent appeal. I noted that the Claimant did not query the business case during his consultation meeting nor was it a matter raised by him on appeal. Nor did his trade union representative.

62. In summary, the Claimant's case that his dismissal was for another reason and not for redundancy is simply not borne out by the evidence that I have heard.

63. On the balance of probabilities, in my conclusion reason for dismissal was redundancy.

64. The Claimant has suggested either in his claim or in evidence that he was not warned or consulted over redundancy. His trade union represented him throughout the process.

65. The Claimant does challenge his selection criteria scoring but it should be noted that at the end of the consultation process all Earthing Assistant roles were removed and all employed Earthing Assistants either redeployed or, in the Claimant's case, dismissed. The impact of that is that no selection was made between Earthing Assistants for redundancy and the selection criteria and matrix became otiose.

66. The Claimant has not asserted in evidence that he was not made aware of alternative employment opportunities. He acknowledged during the internal process that he had received the spreadsheet of vacancies but considered that none of them were suited to him. In effect, the Claimant had stated that he wanted upskilling back to COSS (Controller of Site Safety) and his Authorised Person tickets to be reinstated, i.e. that he be trained back into his former role.

67. The Claimant has relied on the Sentinel rules stating that these place on the Respondent the duty to maintain his competencies. They do in the sense that the Respondent must ensure that its staff are competent and qualified to complete the work that they are employed to do. However, the rules should be read in relation to the Claimant's employment as an Earthing Assistant. The rules do not place on the Respondent a duty to maintain all of the competencies the Claimant had logged on his Sentinel card when he began his employment. Whilst he worked for the Respondent as an Authorised Person, the rules require the Respondent to maintain his training, assessment and mentoring. However the Claimant reads this as meaning that he should be retrained, assessed and mentored and developed from his Earthing Assistant role back into his Authorised Person role. In this respect, having considered the Claimant's evidence in full, I find that he is simply mistaken on this point.

Submissions

68. The Respondent submitted that the fact of a redundancy situation existing was spoken to by Chris Hext in paragraphs 5 and 6 of his witness statement supplemented by his oral evidence. He also gave evidence that there were a total of three (the Claimant being one of them) 'Earthing Assistants' all of whom were made redundant. Some moved to other roles but these were latterly made redundant as well. The fact of all three 'Earthing Assistants' having been made redundant is clear evidence that a genuine redundancy situation did exist. The Claimant seeks to refute that but has not produced any substantive evidence to the contrary. The tribunal is invited to find that a genuine redundancy situation did exist and that was the reason for the Claimant's dismissal.

69. The Respondent submitted in relation to fairness:

a. the selection criteria were objectively chosen and fairly applied. The scoring matrix applied is contained as an appendix to the Claimant's witnesses statement at pages 19 - 21. It is submitted they are entirely standard criteria;
b. the Claimant was warned and consulted about the redundancy. This has all been documented in pages 100 to 122 of the joint bundle;
c. the Claimant was accompanied by a union representative throughout
   - Mr Johnstone of RMT; and
d. the Claimant was not suitable for any other roles within the Respondent because of the previous demotion. In any event, the other Earthing Assistants who were moved to other roles were also made redundant from those other posts as well.

70. In relation to the Claimant's claim for the costs of his competencies the Respondent submitted that in the first place, it is unclear what legal basis the Claimant asserts that the tribunal has to award this type of compensation. The Respondent submits that the tribunal cannot competently make such an award

under the Act and the Claimant has not identified any contractual entitlement to payment of the same. In the second place, even if it could, The Respondent is not liable or responsible for the loss of any competencies. Mr Hext spoke to that in parapets 19-23 of his witness statement and supplemented that with oral evidence on the same. Simply put, the lapse of any competencies cannot be said to have resulted in financial loss to the Claimant.

71. The Claimant submitted that the Network Rail recommendation that he should have a performance plan created for him was for a reason, they would not put that unless they thought it should happen. He states had the Respondent done that he would not have been put in this position and that is why the redundancy is unfair. He states it is a categoric lie that 3 Earthing Assistants have been made redundant. No other company would take him on or do his Sentinel training for him; he has lost everything. The Respondent previously renewed his competencies for areas he did not need to do his job as an Approved Person. He submitted that because of the incident they decided not to do it. He states that they said at page 94 that they would support him. They never told him that they would not train him. They left him working. He asked about training but they did not reply. He emailed them after his redundancy asking to be put back on furlough but they would not do it which shows that it was a witch hunt. His home was under threat of repossession. They took everything from us. All he is asking for is to get the money to retrain and return to what he used to do. He had already studied for a degree and a masters in railway engineering. He needs his ticket and to do his training.

The Law

72. Section 98 of the Employment Rights Act 1996 ("the Act") provides:

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

    a. the reason (or if more than one reason the principal reason) for dismissal
    b. that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
    c. A reason falls within this subsection if it is… that the employee is redundant."

74. Redundancy is defined in s 139 of the Act which says that dismissal shall be taken to be by reason of redundancy if it is wholly or mainly attributable to the fact that the employer has ceased to carry on the business for the purpose of which the employee was employed by him either generally or in a particular place or the fact that the requirements of that business for employees to carry out work of a particular kind, again either generally or in the particular place, have ceased or diminished or are expected to cease or diminish permanently or temporarily and for whatever reason. The case of Safeway Stores v Burrell [1997] IRLR 200 fully explains these matters.

75. In Abernethy v Mott Hay and Anderson [1974] IRLR 213 Lord Justice Cairns said the reason for dismissal in any case is a set of facts known to the employer or may be beliefs held by him which cause him to dismiss the employee. In ASLEF v Brady [2006] IRLR 576 it was said "Accordingly, once the employee has put in issue with proper evidence a basis for contending that the employer dismissed out of pique or antagonism, it is for the employer to rebut this by showing that the principal reason is a statutory reason. If the tribunal is left in doubt, it will not have done so."

76. Section 98(1)(b) requires the tribunal to consider the reason established by the employer and to decide whether it falls within the category of reasons which could justify the dismissal of an employee – not that employee but an employee – holding the position which that employee held (Dobie v. Burns International Security Service (UK) Ltd [1984] IRLR 329 CA).

77. Whilst it is a matter for the tribunal to determine whether the reason for dismissal was redundancy or another reason, that is a question of whether or not the decision was genuine as opposed to whether or not the decision was a sound and sensible one. There is ample authority from higher courts who have underlined that the obligation upon the employer is not too high, they must show a good commercial reason but a tribunal is not at liberty to investigate the commercial and economic reasons behind the decision (for example see Hollister v National Farmers' Union 1979 ICR 542, CA, and James W Cook and Co (Wivenhoe) Ltd v Tipper and ors 1990 ICR 716, CA). This guidance in important in ensuring that a tribunal does put itself into the position of the employer. An employer is at liberty to close a business or part of a business if it chooses to do so and provided that is genuinely the reason for redundancy, then that is a potentially fair reason for dismissal and the tribunal must go on to consider fairness under Section 98(4) of the Act.

78. Redundancy is a potentially fair reason for redundancy, and if an employer has satisfied the tribunal that on the balance of probabilities the reason, or if more than one the principal reason, for the dismissal was redundancy, the tribunal will then go on to consider whether the dismissal was fair or unfair for the purposes of section 98(4) which:

    a. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee, and
    b. shall be determined in accordance with equity and the substantial merits of the case. Case law has given further guidance on how the question of fairness may be addressed by a tribunal in redundancy cases.

79. In Langston v Cranfield University [1998] IRLR 172 the EAT said we must look at all ways in which a dismissal by reason of redundancy may be unfair. They are (a) inadequate warning, (b) inadequate consultation, (c) unfair selection and (d) insufficient effort to find alternatives.

80. In R v British Coal Corporation ex parte Price [1994] IRLR 72 fair consultation was defined as (a) discussion while the proposals are still at a formative stage, (b) adequate information on which to respond, (c) adequate time in which to respond and (d) conscientious consideration of the response.

81. In British Aerospace v Green [1995] IRLR 433 it was said that provided the employer sets up a selection method which could reasonably be described as fair and applies it without any overt sign of bias the tribunal should find the dismissal fair. On choosing a pool of employees from which to select again the tribunal should only ask whether the choice made is reasonable after the respondent has given adequate thought to the question (see Taymech v Ryan EAT 633/94).

82. In all aspects substantive and procedural we must follow the clear rule in Iceland Frozen Foods v Jones [1982] IRLR 439 (approved in HSBC v Madden [200} IRLR 827) and Sainsburys v Hitt [2003] IRLR 23 that we must not substitute our own view for that of the employer. In UCATT v Brain [1981] IRLR 224, Sir John Donaldson put the matter as follows:

"Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, "would a reasonable employer in those circumstances dismiss", seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question "would we dismiss", because you sometimes have a situation in which one reasonable employer would and one would not. In those circumstances, the employer is entitled to say to the Tribunal, "well, you should be satisfied that a reasonable employer would regard these circumstances as a sufficient reason for dismissing", because the statute does not require the employer to satisfy the Tribunal of the rather more difficult consideration that all reasonable employers would dismiss in those circumstances."

83. The Employment Tribunals have jurisdiction to hear complaints of breach of contract through the powers given in the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

84. The right not to suffer unauthorised deductions from wages is contained in the Employment Rights Act 1996, Section 13.

Conclusions

85. What was the reason or principal reason for dismissal?

86. Given my findings of fact, in particular paragraphs 49 to 63 above, it follows that I find that the reason for dismissal was on the balance of probabilities redundancy. I do not consider that the Claimant has put in issue with proper evidence a basis for contending that the Respondent dismissed him over the Sundon incident, but even if I were wrong on that I find that on the balance of probabilities the Respondent has rebutted this by establishing that the reason was redundancy. The Respondent faced demand issues

caused by the pandemic which caused them to review the structure and remove all of the posts of Earthing Assistants.

87. In note the Claimant's submissions that this was a lie and that he was the only Earthing Assistant dismissed by reason of redundancy. However, the Claimant misunderstands what the Respondent actually told him, which was that all of the roles of Earthing Assistant were subject to and placed at risk of redundancy. The fact that the two other Earthing Assistants were redeployed does not impact upon the reason for dismissal for those who were not redeployed.

88. Did the respondent adequately warn and consult the Claimant?

89. The Claimant has not suggested that he was not adequately warned and consulted over his redundancy. There was an at risk letter sent to him 6 July 2020. A first consultation meeting took place on 13 July 2020 and a second consultation meeting took place on 3 August 2020. The decision to dismiss was made by letter 11 August 2020 and over a month had then elapsed since he was warned of the risk of redundancy. This was adequate warning. The Claimant appears to have been afforded the opportunity to raise points concerning his potential redundancy. He was afforded the right to be accompanied throughout the consultation process. He was afforded a right to appeal and did not raise inadequate warning or consultation as a ground of appeal nor was it mentioned during the appeal hearing. In my conclusion, there was discussion at the formative stage of the proposals, adequate information on which to respond, adequate time to respond and conscientious consideration of the Claimant's points. In my conclusion the Respondent's warning to and consultation with the Claimant was adequate and within the range of reasonable warning and consultation that a reasonable employer might adopt.

90. Did the respondent adopt a reasonable selection decision, including its approach to a selection pool?

91. Whilst I do not criticise specifically the Respondent's selection criteria or matrix approach, and note that the Claimant was afforded the opportunity to challenge his scores and have them reviewed, there was by the conclusion of the process no selection to undertake because all Earthing Assistant roles were removed from the Respondent's structure.

92. It was reasonable for the Respondent to decide that all Earthing Assistant roles be removed and send instead only Approved Persons to undertake railway works. It is ultimately for the Respondent to determine how it structures its workforce and it is clear that they applied their mind to the question of selection.

93. The Claimant's case might be seen as one challenging his inclusion in the category of Earthing Assistants given that he had been recently demoted from the role of Approved Person. However, the Claimant has never suggested that the Respondent was not within their contractual rights in demoting him to an Earthing Assistant he has only ever questioned the

period that demotion may last and the Respondent's efforts to put in place a development plan to bring him back to the role of an Approved Person.

94. I have set out in my findings of fact my conclusions that the Claimant had misunderstood the Respondent who had sought to make clear to him that they had decided not to put in place a development plan. The Respondent has sought to make that clear to the Claimant and it appeared to me not unreasonable for the Respondent to decide not to put in place a development plan until the Claimant had shown the required standards. I find that it follows that it was not unreasonable to treat the Claimant as employed as an Earthing Assistant for the purpose of determining how he would be treated in the process concerning his redundancy.

95. Did the Respondent take reasonable steps to find alternatives to redundancy?

96. In my conclusion the Respondent took reasonable steps to afford to the Claimant opportunities to apply for alternative employment but the Claimant found none of them to be suitable.

97. The Respondent declined the Claimant's suggestion that he be trained back to COSS (Controller of Site Safety) and his Authorised Person tickets to be reinstated, i.e. that he be trained back into his former role.

98. I do not consider that it would have been a reasonable step for the Respondent to have trained the Claimant back to Controller of Site safety and reinstate him to employment as an Approved Person. In my conclusion, that would be an unreasonable step to require of the Respondent in the circumstances they have explained i.e. that whilst the Claimant may be able to complete the courses he lacks the behavioural skills to undertake a safety critical role for the Respondent. I do not consider that their conclusions, as explained by Mr Hext, can be interfered with simply as an alternative to redundancy. The duty to find alternatives to redundancy does not extend, in my conclusion, to affording an employee the opportunity to progress into a safety critical role which the employer reasonably considers would be unsafe for them.

99. Looking at the case in the round, in all of the above circumstances, in my conclusion dismissal by reason of redundancy was within the range of reasonable

responses and the Respondent acted reasonably in treating that as a sufficient reason to dismiss the Claimant.

100. The Claimant's claim of unfair dismissal is not well founded and fails.

101. The Claimant has not identified any obligation, contractual or otherwise, upon the Respondent to train and develop him to maintain his Sentinel card. The Sentinel rules require them only to train and develop him to maintain his competencies to undertake the role in which he is employed. There is no suggestion that the Respondent did not support the Claimant in retaining the competencies he needed to undertake the role of Earthing Assistant.

The Respondent was not obliged under contract or otherwise to maintain the Claimant's competencies to undertake other roles or duties, including those of an Authorised Person. The Claimant was no longer employed as an Authorised person. The Claimant's claim of breach of contract relating to recovering the costs of retraining is not well founded and fails.

Employment Judge Knowles

Date: 4 May 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON
7 May 2021

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FOR THE TRIBUNAL OFFICE