EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105530/2020

Held in Glasgow (by CVP) on 28-29 April 2021

Employment Judge B. Beyzade

Miss Julie Currie	**Claimant** **In Person**
Transcal Ltd	**Respondent** **Represented by:** **James Thomson,** **Financial Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The judgment of the Tribunal is that:

1.1. the claimant was unfairly dismissed by the respondent, and the respondent shall pay the claimant the sum of FOUR THOUSAND, NINE HUNDRED AND FOUR POUNDS AND FIFTY-FOUR PENCE (£4904.54) by way of compensation.

1.2. The *Employment Protection (Recoupment of Jobseekers Allowance and Income Support and Universal Credit) Regulations 1996* apply to this award. The prescribed element of the award is £4,430.88 (FOUR THOUSAND, FOUR HUNDRED AND THIRTY POUNDS AND EIGHTY-EIGHT PENCE) and relates to the period from 5 September 2020 to 28 November 2020. The monetary award exceeds the prescribed element by £473.77.

REASONS

Introduction

2. On 15 October 2020, the claimant presented a complaint of unfair dismissal. The respondent admitted that the claimant had been dismissed, but stated that the reason for dismissal was redundancy, which is a potentially fair reason for dismissal. The respondent maintained that they acted fairly and reasonably in treating redundancy as sufficient reason for dismissal.

3. A final hearing was held on 28 and 29 April 2021. This was a hearing held by CVP video hearing pursuant to Rule 46. The Tribunal was satisfied that the parties were content to proceed with a Cloud Video Platform (CVP) hearing, the parties did not raise any objections, that it was just and equitable in all the circumstances, and that the participants in the hearing (and the Tribunal itself) were able to see and hear the proceedings.

4. The parties did not file an agreed Bundle of Productions. The Tribunal had in its possession a copy of the Tribunal file which included the claimant's Claim Form, the respondent's Response Form, Notice of Hearing/standard directions, Bundle of Productions (prepared by the respondent), the claimant's statement, Evidence 1 (1 page) submitted by the claimant, Mr Thomson's 'financial loss and failure to mitigate loss' document and 5 attachments labelled A to E, and Evidence 2 (1 page which was supplied by the claimant during the hearing). The respondent was provided with an opportunity to consider Evidence 2 and to comment upon the same.

5. At the outset of the hearing the parties were advised that the Tribunal would investigate and record the following issues as falling to be determined, the parties being in agreement with these:

(1) It is agreed that the claimant was dismissed by the respondent.

(2) Was the claimant's dismissal for a potentially fair reason?

A. The respondent contends that the claimant was dismissed for the reason of redundancy.

(3) Did the respondent act reasonably in treating it as a sufficient reason for dismissing the claimant in all the circumstances?

a. Did the respondent act reasonably in identifying the pool of employees from which redundancies would be made?

b. Did the respondent consult adequately with the claimant or alternatively would such consultation have been futile?

c. Was the selection criteria used to determine who would be made redundant fair and objective and/or the selection criteria applied fairly and reasonably?

d. Were there any suitable alternative employment available and if so, did the respondent offer the claimant the opportunity to apply?

e. Was the claimant's dismissal within the range of reasonable responses?

f. Did the respondent follow a fair procedure in dismissing the claimant?

(4) Has the claimant suffered financial loss? If so what award for financial loss is just and equitable in the circumstances?

(5) Has the claimant acted reasonably to mitigate her loss?

(6) Should there be any reduction in compensation payable on the basis that the claimant would have been dismissed in any event in accordance with the Polkey case?

(7) Should there be any reduction in any compensation payable on the ground that the claimant by her actions caused or contributed to her dismissal?

6. The respondent led evidence from a number of their employees, as follows:

   a. Mr. James Craik Thomson, Financial Director; and

   b. Mrs. Donna Amelia Hornby, Director.

7. The claimant's line manager did not attend the hearing. The respondent advised that he has been unwell. Upon enquiry from the Tribunal on why an application was not made for a postponement with supporting medical evidence, the Tribunal was advised that the respondent took the decision to proceed based on Mr. Thomson's and Mrs. Hornby's evidence.

8. The claimant gave evidence on her own behalf.

9. At the outset of the hearing the parties agreed to work to a timetable to ensure that their evidence and submissions were completed within the two days allocated for the hearing.

10. The parties made closing submissions at the end of the proceedings.

Findings of Fact

11. On the documents and oral evidence presented the Tribunal makes the following essential findings of fact restricted to those necessary to determine the list of issues -

12. The claimant was employed by the respondent from 12 July 2010 until 4 September 2020 as a Sales and Office Manager. The claimant was employed by the respondent, Transcal Ltd, a private limited company with its registered office at Firth Road, Houstoun Industrial Estate, Livingston, West Lothian, EH54 5DJ. The nature of the respondent's business was in the manufacturing sector. The respondent employed 210 staff in total and there were 92 staff that were employed at the place where the claimant worked.

13. The claimant was paid £24,636 per annum gross. Her normal working hours were 40 hours per week. Her normal working hours were 08.30am to 05.00pm, although this was somewhat flexible. The claimant was paid monthly in arrears.

14. The claimant's pay amounted to £2053.00 per month before tax and national deductions were made. Her net monthly salary were £1600.00. The claimant's gross weekly salary was £473.77 and net weekly salary was £369.23.

15. The claimant's line manager was Mr. Steve Harvey, Sales Director.

16. A notice was sent to employees of the respondent on 10th June 2020 with the subject '*June 2020 Labour Cost Review/COVID 19*'. This explained the difficulty that the company was in in terms of the long-term sustainability of the business and substantial downturn in sales. There was a desire to attempt to strike a balance between revenues and costs. This meant that the respondent's business had to address employment costs. At that stage it was intended that up to 12 posts would be made redundant. Prior to that, five staff left the business in March 2020. Members of staff were placed on furlough leave.

17. The respondent were engaged in the automotive, rail, aerospace, and defence sectors. The respondent's Livingston site where the claimant worked were involved in automotive, aerospace and rail only. The aerospace and automotive sections of the respondent's business were particularly struggling. Car showrooms were shut down and car sales fell as well as the fact that aircraft were not flying due to the COVID-19 pandemic and restrictions.

18. In the same notice staff were informed that employees at Livingston were at risk of redundancy, that they will be scored using a selection matrix and that the criteria used to score individual employees would include i) skillsets/competences ii) performance in present job (quality and productivity) iii) flexibility iv) qualifications (if applicable) v) disciplinary record and vi) absenteeism. There were no description of the categories or how these matters would be assessed provided to employees. It was also mentioned that there will be a consultation period and that scores would be advised on an individual basis and that the respondent would do its best to obtain alternative employment during the notice period (although this were unlikely). Employees were asked to contact their line manager if they required advice.

19. The process was expected to begin on 11 June 2020 and the respondent expected to provide notice of redundancy to staff by 19 June 2020. This was because of the catastrophic reduction in sales which was expected to last for at least 18 months. They did not want to prolong matters for the staff involved.

20. In terms of the scoring matrix staff were given a grade score out of ten, one being the lowest and ten being the highest. There was a weighting factor to reflect the importance of each of the criteria.

21. In the grouping against which the claimant were assessed there were three employees, who carried out substantial duties within the administration function of the company. This included Ashley Aitken who was a receptionist who met and greeted people, processed purchase invoices, and carried out other administrative duties. Other than the claimant, the other employee included was Catherine Mulligan who was the respondent's dispatch manager

and responsible for arranging transport and paperwork for dispatch of goods and month end assessment and stock. The claimant would take sales enquiries, raise paperwork, and create system logs, and helped with tickets through the factory.

22. The claimant was able to provide cover in terms of the work carried out by the receptionist and the dispatch manager if they were sick, on holiday or placed on furlough leave. However the receptionist and dispatch manager could not cover her role. The claimant contended that she still had orders coming in from the automotive sector and that she were working on the masks and gowns PPE orders that the company had with another employee.

23. The respondent allocated responsibility for scoring the claimant to Steve Harvey, whereas James Thomson was to moderate the scores.

24. Of the six criteria, the only one with a metric attached to it was absenteeism.

25. All three employees were long standing and had very high job knowledge. None of the three employees had any current disciplinary issues recorded on their personnel files.

26. Although the respondent did not carry out performance reviews or appraisals, Steve Harvey had been with the company for almost twenty years, and he would be expected to assess the three employees' performances based on his knowledge of them.

27. The claimant's overall score was 353 whereas the other two staff in the same pool scored 362 and 379, respectively. James Thomson observed that the claimant's score compared to other employees was very marginal. Although he did not award the claimant's scores, he was given a copy of the claimant's manager's scores.

28. The claimant met Robert Aitken, CEO on 29 July 2020. His notes of the meeting recorded that he advised the claimant that the scoring process was completed, her job was at risk of redundancy, and that they needed to start

the consultation process, but it were unlikely that the company could change the outcome. The claimant were also advised that having completed the consultation process, she would be told the details of settlement, notice pay and her final pay. It was expected that her statutory redundancy pay would be equivalent to 10.5 weeks' pay based on 10 years' service.

29. On 30 July 2020 James Thomson asked the claimant if she had a spare five minutes to have a meeting. A meeting was held between James Thomson and the claimant shortly thereafter. James Thomson advised the claimant that he wanted to complete the consultation on possible redundancy, confirmed that the claimant's post was under threat, that he wanted to discuss ways to avoid redundancy, to discuss any questions, to consider suitable alternative employment (albeit he pointed out the little scope for this), and to discuss aspects of the selection process. The claimant indicated that she did not understand how she could be selected in comparison to the other two staff. James Thomson advised that the scoring was very narrow, all staff were long serving, and he reiterated that this was a costs saving exercise. He advised he would consider what she had said to him and that it may be necessary to arrange a further meeting. The meeting that lasted 10-25 minutes.

30. No further consultation meeting took place. Approximately 24 hours after the previous day's meeting the claimant was provided with a letter from James Thomson dated 31 July 2020 giving her notice of redundancy and confirming that there was no suitable alternative employment available. The claimant was advised she will receive 11.5 weeks redundancy pay in the sum of £5,439.50 tax-free, 10 weeks' notice, holiday pay and an employment reference. The claimant was provided with a right of appeal, although she chose not to exercise this.

31. On 10 August 2020 James Thomson sent the claimant by email a revised calculation of her redundancy payment, revising her redundancy payment to £5,449.85. The claimant was also permitted to attend job interviews.

32. The claimant replied on the same day asking James Thomson (further to their conversation) to explain her score of seven for disciplinary matters as she had no disciplinary issues recorded on her personnel file. The claimant sent a further email on 12 August 2020 to James Thomson asking for an explanation of her grades and a list of work to be distributed to other staff. James Thomson advised he was very busy, and the claimant should "*speak to Steve who is doing your work. You are not in my accounts team.*"

33. The claimant sent an email in reply on the same day advising that she was not aware that the explanation was not saved with her scoring sheet and that she would speak to her line manager as advised. James Thomson replied also on the same day confirming that he did not do the actual scoring, but he oversaw and ensured rules were consistently and fairly applied. The claimant once again requested an explanation of her scores.

34. That morning James Thomson replied advising that there was no narrative explanation beyond the scores themselves. He advised the claimant that from his knowledge based on best practice and regulations relating to redundancy processes there was no requirement for a narrative to support the scoring.

35. The claimant met her line manager to obtain an explanation in respect of her scores. Her line manager advised the claimant that he had nothing to do with the scoring or the decision, and that he did not agree with the scores.

36. On 27 August 2020, the claimant asked James Thomson to amend the job title on her reference to sales and office manager. As there was no record of this change of job title, the claimant was asked to speak to Steve Harvey.

37. On 1 September 2020, the claimant sent an email to Steve Harvey advising that she was offered a position with a new company and they asked her attend work on 2 and 3 September 2020, and that this would mean her last day of employment for the respondent would be on 4 September 2020. If after 3 September 2020 the claimant did not secure the new role she would be happy to work for the respondent until 9 October 2020.

38. The claimant did not subsequently start work at the new company as she found out that she would be working on a commission-only basis. However she did not contact the respondent and arrange to return to work.

39. A letter dated 4 September 2020 was sent advising her last day was brought forward to 4 September 2020 and her final pay arrangements. The claimant was paid to 4 September 2020 and statutory redundancy pay of £5,499.85.

40. On 5 September 2020, the claimant posted online advising she was '…*pleased to announce that she had finally finished at transcal*…'.

41. The claimant started temporary work in early March 2021 earning £944.70 net pay over 3 weeks. The Claimant earned £1786.10 in full time employment from 29 March 2021 over the course of 5 weeks. After she left her employment with the respondent, she received £409 per month Universal Credit.

Observations

42. On the documents and oral evidence presented the Tribunal makes the following essential observations on the evidence restricted to those necessary to determine the list of issues –

43. The claimant's job title according to the respondent's records were Sales Administration and Office Manager. The claimant's ET1 Form stated her role was Sales and Office Manager and the respondent indicated its agreement with this on their ET3 Form. Such inconsistencies could have been avoided if the claimant were issued with a contract of employment, although the respondent advised they did not systematically issue employment contracts. The Tribunal accepted the respondent's description of the claimant's duties which were substantially consistent with being placed in a pool with the other two employees and their respective functions.

44. James Thomson's evidence was clear. He accepted he did not award the claimant's scores on her matrix. He acted as moderator only. He did not have any information as to how the claimant's line manager determined her scores.

45. It was not clear how managers were to assess employees against the selection criteria, and in particular, what guidance or training managers were provided with (if any). Although the Tribunal were told that absenteeism was the only criteria with metrics, it was not clearly explained how this were ascertained. There were no issues highlighted by the respondent in relation to the claimant's attendance and the claimant was a long serving employee.

46. The claimant repeatedly requested clarification as to why she scored 7 under her disciplinary record as she was not aware of any current disciplinary matters. There were no evidence presented to the Tribunal in relation to any disciplinary matters recorded on her personnel file. In the letter of 31 July 2020 the respondent described that she was "exceptionally talented and highly professional"; reference dated 12 August 2020 confirmed she were flexible, hardworking, knowledgeable, reliable, and conscientious; and in their letter of 4 September 2020 the claimant was referred to as "*loyal and diligent*."

47. Given the description of the claimant in her employment reference as flexible and the lack of any supporting material to question the claimant's flexibility, it is not clear how the respondent sought to justify the claimant's score of 6. There were also no performance reviews on the claimant's personnel file to assist the respondent to determine the claimant's score of 5 for performance.

48. The Tribunal noted that the basis of the scores was not clear and there was an apparent lack of explanation of the reasoning behind the same. The respondent did not call the claimant's line manager to give evidence. This was paradoxical given that the respondent appeared to accept that five out of six of the selection criteria were to be based upon his assessment of the claimant and there were no written guidance or descriptors that line managers were provided with. The claimant also gave evidence that she could not obtain any explanation of the scores from her line manager and her line managed appeared to disagree with her scores.

49. There was little evidence of consultation during the meetings on 29 and 30 July 2020. It was unclear why the consultation period was so short and why there was no meeting arranged after the 30 July 2020 to discuss the claimant's concerns and the scoring with the claimant. The respondent confirmed the claimant's redundancy in writing on 31 July 2020.

Relevant law

50. To those facts, the Tribunal applied the law –

51. Section 94 of the Employment Rights Act 1996 ('ERA 1996') provides that an employee has the right not to be unfairly dismissed. It is for the respondent to show the reason (or principal reason if more than one) for the dismissal (s98(1)(a) ERA 1996). That the employee was redundant is one of the permissible reasons for a fair dismissal (section 98(1)(b) and (2)(c) ERA 1996). Where dismissal is asserted to be for redundancy the employer must show that what is being asserted is true i.e. that the employee was in fact redundant as defined by statute.

52. An employee is dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that his employer has ceased or intends to cease to carry on that business in the place where the employee was so employed, or the fact that the requirements of that business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish (s139(1) ERA 1996).

53. In *Safeway Stores plc v Burrell [1997] IRLR 200* the EAT indicated a 3-stage test for considering whether an employee is dismissed by reason of redundancy. A Tribunal must decide:

a. Whether the employee was dismissed?

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

c. If so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

54. If satisfied of the reason for dismissal, it is then for the Tribunal to determine, the burden of proof at this point being neutral, whether in all the circumstances, having regard to the size and administrative resources of the employer, and in accordance with equity and the substantial merits of the case, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee (s98(4) ERA 1996).

55. In applying s98(4) ERA 1996 the Tribunal must not substitute its own view for the matter for that of the employer but must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer.

56. The Tribunal considered the EAT's decisions in *Eaton Ltd v King & Others [1995] IRLR 75* and *E-Zec Medical Transport Service Ltd v Gregory [2008] UKEAT/0192/08,* and *British Aerospace v Green [1995] IRLR 433 in the Court of Appeal*. When considering whether the circumstances of the claimant's dismissal fell within the range of reasonable responses open to a reasonable employer the Tribunal should consider whether the respondent's choice of any selection criteria fell within a range of reasonable responses available to a reasonable employer in all the circumstances and whether based on the evidence before the Tribunal the scoring was applied in a fair and objective manner. The Tribunal's task, however, was not to subject any marking system to a microscopic analysis or to check that the system had been properly operated but it did have to satisfy itself that a fair system was in operation.

57. The House of Lords in *Polkey v A E Dayton Services Ltd 1988 ICR 142* held that "*in the case of redundancy, the employer will not normally have acted reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within its own organisation.*"

Discussion and decision

58. On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows –

59. The Tribunal referred to s98 ERA 1996, which sets out how a Tribunal should approach the question of whether a dismissal is fair. There are two stages: firstly, the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in s98(1) and (2) ERA 1996. If the employer is successful at the first stage, the Tribunal must then determine whether the dismissal was fair or unfair. This requires the Tribunal to consider whether the employer acted reasonably in dismissing the employee for the reason given.

60. The Tribunal referred to the definition of redundancy in s139(1) ERA 1996. That states that an employee is dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that their employer has ceased or intends to cease to carry on that business in the place where the employee was so employed, or the fact that the requirements of that business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish.

61. The Tribunal considered the matters set out in *Safeway Stores plc v Burrell (above)*. It is clear that the claimant was dismissed by the respondent, so the first element was satisfied.

62. It is also clear that the respondent had determined that it required to cut costs and that this would done by reducing wage costs. A conclusion was reached, in relation to the claimant and her two colleagues' posts, that this team could operate with one less member of staff. The requirement for employees to carry out work of a particular kind had accordingly diminished. The second test was accordingly also satisfied. In relation to the final point, the Tribunal was satisfied that the claimant's dismissal was wholly caused by the fact that the respondent determined that, to reduce costs, the number of staff carrying out work substantially of an administrative nature at Livingston would require

to be reduced. The Tribunal were accordingly satisfied that the claimant's dismissal occurred because of a genuine redundancy situation. The Tribunal were also satisfied that the claimant was dismissed solely due to redundancy.

63. The Tribunal then considered s98(4) ERA 1996. The Tribunal had to determine whether the dismissal was fair or unfair, having regard to the reason shown by the respondent. The answer to that question depends on whether, in the circumstances (including the size and administrative resources of the employer's undertaking) the respondent acted reasonably in treating the reason as a sufficient reason for dismissing the employee.

64. This should be determined in accordance with equity and the substantial merits of the case. The Tribunal was mindful of the guidance given in cases such as *Iceland Frozen Foods Limited v Jones [1982] IRLR 439* that it must not substitute its own decision, as to what the right course to adopt would have been, for that of the respondent.

65. In considering whether the respondent in this case acted reasonably in treating redundancy as a sufficient reason for dismissing the claimant, the Tribunal had regard to the guidance laid down in Polkey in relation to whether the respondent acted reasonably in treating redundancy as sufficient reason for dismissal. Taking each factor in turn, the following conclusions were reached.

Pool of employees

66. The Tribunal was satisfied that the respondent acted reasonably in determining the pool of employees from which selection for redundancy should be made, namely the claimant, Ashley Aitken (Receptionist) and Catherine Mulligan (Dispatch Manager). All three individuals' posts had substantial duties of an administrative nature. The pool of employees selected by the respondent clearly fell within the range of reasonable responses open to the respondent in the circumstances.

Consultation

67. The first meeting took place with the claimant on 29 July 2020 after the claimant's and her two colleagues' scores had been determined. There could therefore be no consultation with the claimant in relation to the selection criteria or the method of scoring. This meeting was not a consultation meeting, it referred to the start of the consultation process and it was made clear to the claimant that the outcome was not likely to change. This left little scope for any meaningful consultation.

68. Only one meeting took place with the claimant where the possibility of consultation was mentioned. The Tribunal found that the meeting with the claimant on 30 July 2020 amounted to a warning that redundancies may become necessary only (albeit it were mentioned that there would be scope to discuss matters such as suitable alternative employment and the selection process). There was however no consultation with the claimant in relation to the potential redundancy situation, the method of selection or the application of the selection criteria. She was informed of the proposed selection criteria, but not invited to comment on this. There was no evidence that she was afforded any reasonable opportunity whatsoever to challenge the basis for her selection for redundancy or to put forward suggestions for ways to avoid redundancy. Rather, once she was selected, the respondent simply informed her that her role was likely to be made redundant and that the outcome was unlikely to change, without any meaningful or reasonable consultation.

69. The Tribunal noted that despite the claimant stating she did not understand how she could be selected over others at the meeting, there was no attempt to explain the process and the scores she attained at the time and no further meeting was arranged with to address this. The claimant's redundancy was confirmed by a letter sent the next day (31 July 2020).

Selection criteria and its application

70. In relation to the method of selection and the selection criteria used, the Tribunal found that this was largely subjective (the respondent averred in

evidence that only the absenteeism criteria were based on metrics) and based on apparently incorrect assumptions/facts on Steve Harvey's part, rendering it inherently unfair. The Tribunal reached this conclusion having considered:

(i) The Tribunal noted that the respondent's stated intention, as per the letter sent to employees on 10 June 2020 and the scoring matrix provided to managers to score each member of staff, was to use six specified selection criteria. These were not used as the basis for discussions with the claimant. A matrix was prepared by the respondent with a view to enable managers to objectively assess which employee should be selected for redundancy by reference to skillsets/competencies, flexibility, qualifications if applicable, performance, disciplinary record, and absenteeism. It appeared that the claimant's line manager was expected to base his decision on i) his subjective view in relation to the claimant's reliability, evidenced by the evidence provided by James Thomson to the Tribunal; and ii) metrics in relation to absenteeism, although the nature of these was not clear.

(ii) There was no evidence of any guidance or training provided to line managers, without which it is very difficult to demonstrate that a consistent and fair approach was being followed. There were no notes provided by the Steve Harvey evidencing the basis behind his scores. No meeting took place with the claimant's line manager before the scores were awarded. The claimant sent a series of emails to James Thomson after having received the letter dated 31 July 2020 to query her redundancy scores, but she did not receive a satisfactory or reasonable explanation and she was asked to speak to her line manager. In fact when the claimant enquired about these with Steve Harvey (after the redundancy decision was confirmed on 31 July 2020) he did not provide any reasonable explanations and he indicated that he disagreed with the scores. James Thomson was clearly not able to explain the scores the claimant received as he candidly admitted that he did not award these, and he was not provided with any supporting explanations by the claimant's line manager.

(iii) The claimant stated that in addition to her job she could also perform the tasks of her two colleagues that were placed in the pool with her, but they could not perform her job. There was no evidence that this matter was considered by the respondent or discussed with the claimant during any of the meetings with the CEO or James Thomson.

(iv) There were no evidence on the claimant's personnel file of any current disciplinary matters. In the circumstances, the decision not to award the claimant the full score available in respect of disciplinary issues would not be open to a reasonable employer and the respondent plainly erred in its approach to applying that selection criterion.

(v) In the absence of any performance appraisals or documented performance concerns, it is difficult to decipher how any reasonable employer would provide the claimant with a score of 5 out of 10 for performance. There was no evidence before the Tribunal to support this score and nothing to suggest that this selection criterion were reasonably and fairly applied by the claimant's line manager.

(vi) In the email sent from Steve Harvey to Jim Thomson on 28 April 2020 in response to a request for him to comment on the second version of the scoring matrix provided by the claimant during the hearing, Steve Harvey advised that the only document he could find in his email was the overall list of redundancies and some were marked by a Director, but there was nothing noted against the claimant's name "*other than some weighting scores*." On balance the Tribunal considered this meant that Steve Harvey may not have had a complete set of data in relation to the claimant's scores in his possession.

(vii) The consultation period was rather short. Following the brief meeting with James Thomson on 30 July 2020, there was no further consultation, and the claimant's redundancy was confirmed approximately 24 hours after that meeting. There was no explanation provided to justify this. This did not facilitate a reasonable discussion in relation to the application of the scoring matrix with the claimant.

71. Moreover, no reasonable employer would have proceeded on this basis. In the 12 months prior to her selection for redundancy, there was no evidence submitted noting any performance concerns, disciplinary matters or absenteeism issues that were recorded on the claimant's personnel file. No such evidence were supplied to the Tribunal as part of the productions. Some of the evidence submitted contradicted the respondent's scores, for example the respondent's letters of 31 July 2020 and 4 September 2020 and the employment reference provided were somewhat inconsistent with the scores provided to the claimant in relation to flexibility and performance on the matrix.

72. The Tribunal distinguished this case from *Eaton Ltd*. There was an overwhelmingly subjective system surrounding the assessment of the claimant against the selection criteria, totally unverified by any company documents other than the scoring matrix and indeed unsupported by any notes made by Steve Harvey or any other manager in relation to the claimant's scoring. It was the claimant's low scoring in the areas of flexibility, performance, disciplinary record, and absenteeism in particular, that made the difference in her case. There was a complete absence of any attempt to agree the criteria or method to be adopted with the claimant who were provided with a pre-determined set of criteria on the matrix and the scores. Further consultation may have led to subjective areas being revisited and revised. It is unwise to leave to one person to judge areas such as performance completely devoid of any proper verification by objective means. James Thomson was in no position to have direct knowledge in relation to the claimant's day to day performance of her role and there was no indication that Steve Harvey or any other staff provided any notes they made to him. In *Eaton Ltd* there was consultation on the method of selection, the criteria, and the marking process, which was effectively absent in the claimant's case.

73. Thus, this was an unfair process that fell outside the band of reasonable decisions for the key criteria to effectively be left to one individual who was not able to support his marking by reference to any company documents such as performance appraisals, there was no evidence that he had spoken to any other manager concerning those marks and who had made no notes or given

any indication as to how he made his individual choice. The Tribunal's task is not to subject the marking system to microscopic analysis or to check that the system properly operated but the Tribunal must satisfy itself that a fair system was in operation (paragraph 25 of *E-Zec Medical Transport*). The Tribunal was not satisfied that a fair system was operated in the circumstances.

Availability of any suitable alternative employment

74. There were no redeployment opportunities for the claimant within the respondent's organisation. There were accordingly no steps which the respondent ought reasonably to have taken to avoid or minimise redundancy by redeployment within its own organisation.

Consideration of range of reasonable responses and fair procedure

75. Given these findings, the Tribunal concluded that the respondent accordingly acted unreasonably in treating redundancy as a sufficient reason to dismiss the claimant. No reasonable employer would have dismissed the claimant for redundancy in the circumstances. The claimant's dismissal was accordingly unfair.

Financial loss and mitigation

76. The claimant was advised that she would receive payment in respect of her 10 weeks' notice, and she would work up to 9 October 2020. However as she told the respondent she was starting a new role, by agreement, the claimant brought forward her termination date to 4 September 2020.

77. As the claimant received a statutory redundancy payment, no basic award is payable.

78. With regards to compensatory award, the claimant's employment terminated on 4 September 2020. With effect from March 2021, the Claimant chose to take up a three-week temporary role, followed by a permanent post towards the end of March 2021 and she had worked there for approximately five weeks at the date of the final hearing. The salary in the claimant's new role was broadly similar to her net pay she received while working for the respondent.

The claimant did not provide any documentary evidence of her salary by way of a pay slip.

79. There was no evidence or sufficient evidence provided by the claimant that she applied for any other employed position (other than the commission-only role which she declined in September 2020). As such, the evidence indicates that the claimant did not take sufficient and reasonable steps mitigate her losses.

80. The claimant's employment income from March 2021 being broadly equivalent to her income with the respondent, there is no financial loss after approximately the first six-month period. Having regard to the claimant's failure to mitigate her losses fully and reasonably, the Tribunal considered it appropriate to award compensation for a period of 12 weeks, representing 12 weeks of the Claimant's inability to find work, reflecting also, the receipt of the Redundancy Payment of £5,499.85. 12 weeks' net pay amounts to £4430.77 and is payable by way of compensatory award.

81. In addition the claimant is entitled to an award in respect of loss of statutory rights of £473.77 based on 1 week's gross pay, bringing her total compensatory award to £4904.54.

82. The Tribunal took into account that under section 123(1) of the ERA 1996 an award of compensation must be just and equitable in all the circumstances.

Polkey reduction

83. In determining what sum would be just and equitable in the circumstances under section 123(1) the Tribunal have considered the likelihood that the claimant might have been fairly dismissed in any event per *Polkey v A E Dayton Services Ltd 1988 ICR 142 HL*. There was no evidence before the Tribunal to demonstrate that even if the respondent had carried out the selection and consultation properly the claimant would have been dismissed. As there were two available roles for the three members of staff within the

pool in which the claimant was placed, it was difficult for the Tribunal to say with certainty that the claimant would still have been dismissed if a fair procedure was followed. Indeed it was put to the claimant in cross examination that had she appealed, her position could have been reassessed (the claimant chose not to appeal as this would upset her and any appeal would be to the CEO who was previously involved in the process).

Whether claimant caused or contributed to her dismissal

84. The respondent did not seek to argue that the claimant caused or contributed to her dismissal and there was no evidence before the Tribunal to suggest that any award made ought to be reduced due to the claimant's conduct.

Recoupment regulations

85. The claimant was in receipt of benefits by way of Universal Credit in the period 5 September to 28 November 2020 and so the *Employment Protection (Recoupment of Benefits) Regulations 1996* ('recoupment regulations') as amended apply. The prescribed period is the period between 5 September and 28 November 2020. The judgment contains information as regards recoupment and advises of the amount by which the monetary award exceeds the prescribed element in terms of the appropriate regulations.

86. As the claimant has been in receipt of Universal Credit, the relevant department will serve a notice on the respondent stating how much is due to be repaid to it. In the meantime, the respondent should only pay to the claimant the amount by which the monetary award exceeds, if any, the prescribed element. The balance, if any, falls to be paid once the respondent has received the notice from the Department for Work and Pensions.

Conclusion

87. The claimant's claim that the respondent has unfairly dismissed the claimant succeeds and the claimant is awarded the sum of £4904.54 for the reasons set out above (such award being subject to the recoupment regulations).

I confirm that this is my judgment in the case of Miss Julie Currie -v- Transcal Ltd 4105530/2020 and that I have signed the order by electronic signature.

Employment Judge: Beyzade Beyzade
Date of Judgment: 24 May 2021
Entered in register: 28 May 2021
and copied to parties