



EMPLOYMENT TRIBUNALS

Heard at: Manchester (by video) **On:** 1 June 2021

Claimant: Mr Christopher Webb

Respondent: Lookers plc

Before: Employment Judge Fowell

Representation:

Claimant: Mr B Henry, instructed by Stephenson Solicitors LLP

Respondent: Mr M Palmer, instructed by Actons Solicitors

JUDGMENT ON LIABILITY

1. The claimant's dismissal was unfair.
2. Should the parties fail to reach agreement on remedy within 28 days they are to write to the Tribunal seeking a further half day hearing and providing dates to avoid. The parties will then be notified of a date for the remedy hearing.

REASONS

Introduction

1. These written reasons follow an oral judgment given at the hearing, and are at the request of the respondent.
2. This claim concerns a redundancy. Mr Webb worked for the company, Lookers plc, as the General Manager of one of their car dealerships in St Helens until his dismissal on 26 September 2020. The sole complaint is of unfair dismissal, under section 98 Employment Rights Act 1996, and the question is essentially whether

the company acted reasonably in all the circumstances in making him redundant.

3. In addressing that issue was heard evidence from Mr Webb, and on behalf of the company from:
 - a. Mr Steve Eley, the Franchise Director for the Vauxhall Division, and the decision maker in this case;
 - b. Ms Sarah Johanson, Divisional HR Manager, who handled the process; and
 - c. Mr Michael Scott, the Franchise Director for the Lookers Audi Division, who dealt with the appeal.
4. There was also a bundle of about 150 pages. Having considered this evidence and the submissions on each side, I make the following findings.

Findings of Fact

5. Lookers has an extensive network of car dealerships but we are concerned only with their Vauxhall group in the North West. There were six of these, and each had a General Manager reporting to Mr Eley: Birkenhead, Speke, Chester, Ellesmere Port, Liverpool North and St Helens.
6. The decision was taken to close the sites at Birkenhead and Speke. There were thought to be too many sites in one area. Speke, as a satellite, was an obvious target. Birkenhead was somewhat separate geographically, and it was felt that their customers could go to Ellesmere Port or Liverpool without too much loss of business.
7. So, on 3 September 2020 the Company announced this plan and each of the General Managers was placed at risk of redundancy. Nothing was said about the selection criteria ahead of the first consultation meeting, which for Mr Webb took place on 9 September. He was then told that he was to be pooled with the other general managers in the group and that two of them would be selected for redundancy through a scoring exercise.
8. Mr Webb had been involved in a redundancy processes in 2018 when he was based in Warrington. That site had closed along with and one at Yardley in Birmingham. As general manager of a closing dealership he had simply been made redundant but he had successfully applied for the position at St Helens, which was then vacant.
9. Mr Webb had thought that the same approach would be taken now, and the general managers at Birkenhead and Speke would be the ones to go. (The general manager at Speke was a Mr Dan Talbot, and the selection exercise boiled down to a competition between him and Mr Webb.) However, even with this pooling arrangement, he still felt that he would be safe. His site had good

customer satisfaction scores, both for services and new car sales, as well as financial performance. St Helens had won the 2020 Customer Satisfaction Award, for the first time. He had been short-listed for group General Manager of the Year Awards and was one of ten finalists. And St Helens was one of the top two sites in 2019 and 2020. By contrast, Speke was the worst performing site, and Chester was under possible notification of closure by Vauxhall already.

10. At that first meeting there seems to have been little discussion. There are notes at page 60 which simply record that the selection criteria were explained. His own evidence, which was not challenged, was that he questioned why the normal performance measures were not being included and Mr Eley told him that Head Office had chosen these measures and that every site was doing the same thing. I was not in fact given any detail of these normal performance measures, but I take it that they are largely financial.
11. The main performance element was instead to be based on the annual Best Companies survey, given to all member of staff, to explain how positive they were about their work. In addition, there was to be an extra element, taken from this survey, called the MC3 results. These assessed how the manager was rated by their team. Mr Webb objected to this being used. He felt that it was not fair in his case because the reporting lines on the 'My HR' system were incorrect and the feedback he had received was not from his direct reports. Mr Eley decided to remove this element from the assessment.
12. That itself is surprising. On the company's account, he was the only one to raise this objection. It means that at the very first consultation meeting the company changed its scoring system at the request of the candidate who was ultimately the one selected for redundancy. This is more consistent with the view taken by Mr Webb, that he had already been earmarked for selection and the company was simply trying to make it appear fair. Ultimately the selection criteria is a matter for the company, something they have emphasised throughout, so it is surprising that they changed it so soon and so readily.
13. In a later meeting on 16 September, Mr Eley told Mr Webb that he had wanted to use this MC3 data and was told that he could not and had to keep it consistent across the group, so it seems that this had been a non-standard approach which he sought to introduce, which Mr Webb objected to and was then removed. That too is at odds with the statement that Head Office had chosen the criteria.
14. Details of these revised selection criteria were then supplied in writing and a second consultation meeting held on 15 September 2020 to go through with Mr Webb the outcome of the scoring process. This time Sarah Johanson, the Divisional HR Manager, was also there. Mr Eley told him that they had had a request for voluntary redundancy so now they only needed to make one redundancy. However, Mr Webb had scored the lowest, so he was provisionally

selected. Mr Webb responded that he had one of the best performing sites across the business and asked to see the scores given to the others.

15. When the scoring matrix was emailed to him later that day he saw that he had been given just 5 out of 20 for “leadership/management capability”. This was significant. There were five categories, each with marks out of 20. Taking each in turn:
 - a. One column was for absence. The scores were held centrally by HR and everyone got 20/20;
 - b. Another was for disciplinary record, and again everyone got 20/20;
 - c. Another was headed “Customer Outcomes” which appears to be based on survey feedback. Again, this data was held by HR and (somewhat surprisingly), they all got 20/20, so any customer service award for Mr Webb did not show up in the figures;
 - d. A further column was for “brand knowledge” – a subjective assessment by Mr Eley. Here again, everyone got the same score – 15/20;
 - e. The last column was leadership/management capability, and so was the only one to distinguish between the candidates.
16. There was therefore very wide scope for subjectivity here, and assessment of, say, brand knowledge would be very difficult to challenge.
17. Leadership/management capability was therefore critical, and to be based on the Best Companies Scores. The scores were in one of four categories as follows:
 - a. a 2* rating – a raw points score between 696.4 and 737 - meant 20 points;
 - b. a 1* rating – between 659.6 to 696.4 - meant 15 points;
 - c. a rating of “One to Watch” i.e. a score of 600-660 meant 10 points; and
 - d. “Unrated” (less than 600) meant 5 points
18. Mr Webb found that he had received just 5 points in this category. Mr Talbot at Speke got 10, as did two others, and one got 15. Hence their overall totals were 80, 85 and 90.
19. The matrix translated these scores into everyday terms, so, e.g. 20 points meant
“Leads a team and demonstrates our values. Has full backing of the team, frequently coaches and supports the team to maximise opportunity.”
20. At the bottom of the scale (as applied to Mr Webb) it state:

“Does not take an active role within the team or their interaction with customers.”

21. But Mr Webb pointed out that his dealership had over 600 raw points, and so he should have scored 10 points. Mr Eley said he would need to look into this and brought the meeting to a conclusion.
22. They met again the next day to discuss it. This time Mr Webb secretly recorded the meeting. I was not asked to exclude this evidence although I was not referred to it during the evidence, only in submissions. But the relevant facts are set out in Mr Webb’s witness statement and were not challenged. Firstly, Mr Eley accepted that Mr Webb should have been given 10 points, bring him to the same score as two others. He then went on to mention two issues which he felt also affected the overall score, i.e. as reasons for not increasing it. The first was that in a discussion via Zoom between general managers regarding staff rewards, Mr Webb had suggested that they double the commission, something Mr Webb did not accept – he thought he must have been misheard. The second related to allegations of bullying and other matters. There had been an email with a Facebook post and then a follow up voicemail to HR, both anonymous. Hence, with no one to contact and no details, it was not taken any further. According to Sarah Johanson’s statement, this had been discussed between her and Steve Eley and they decided that if there was any unhappiness at St Helens with the management it would show up in the Best Companies Score.
23. Mr Eley also said in that meeting that he had not received any complaints about any other general manager’s. Mr Webb has since raised the fact that two sales managers had complained to Mr Eley about Mr Talbot, saying that if he was given Liverpool, they would leave the business. Mr Eley says that this was not the case, and there was some tension while Mr Talbot was engaged in some project work, looking at the data in the branch. I accept that that was the upshot.
24. Finally, in that meeting Mr Webb raised the fact that he did not know what raw scores other general managers had received, to know if they had been placed in the correct category.
25. It became quite heated. C clearly thought it was all a nonsense given his financial performance. Mr Eley was at pains to explain that it was ultimately a “judgement call” for him to make, based on all the factors, including such intangible factors as the bullying issue (see for example the final paragraph on page 128)
26. After this meeting Mr Webb emailed Sarah Johanson to challenge the increasing reliance of Steve Eley’s subjective view. He quoted two remarks from Mr Eley (page 92), the first to the effect that the company had chosen this mechanism to take away any subjectivity and emotion, secondly that he should forget the words in the boxes (quoted above), it was the points that counted, and they were using the Best Companies score to work it out. Hence, he alleged, Mr Eley had been emphasising the objective nature of the exercise when it led to Mr Webb being

dismissed, and then when the figures were corrected it became a subjective exercise.

27. Ms Johanson replied (page 93) simply reiterating that there was a subjective element and that Mr Eley had been through with him examples of why his Leadership/management capability was not as strong as others – presumably a reference to the zoom call and bullying allegations.
28. Later that day she emailed Mr Webb to say that the extra 5 points put him on the same score as three other colleagues, on 85 points, but explained that since it was tied, the decision would be based on length of service, and so he was still the one selected.
29. It is not clear to me when exactly the other raw scores were provided to Mr Webb, but the fact is that Mr Talbot actually came in the bottom category, and should (objectively) have scored 5, making him the lowest scoring candidate.
30. Mr Eley says that he gave Mr Talbot a 10 from the outset and that this was not a mistake, and not a case of simply mixing up the scores: he felt that the score of 5 points did not reflect Mr Talbot's performance. He had worked on a 'Click and Drive' project and a 'Relaunch' document for the re-opening of business, which Mr Eley viewed as successful, and so had increased his marks as a result.
31. That explanation was not however given to Mr Webb at any stage of the process. Mr Webb, unaware of this, raised a grievance on 18 September but the company took the view (understandably) that this should be dealt with as part of the redundancy process, which had a right of appeal.
32. Mr Webb was then dismissed by letter dated 25 September. He did appeal, citing the pooling process, the scoring and the failure to address his grievance.
33. The appeal meeting took place on 7 October 2020. It was held by Mr Scott, at the request of Mr Eley. They had a telephone discussion about Mr Webb's case before the appeal meeting. At the meeting he was supported by another Divisional HR Manager, Ashley Gibson, who took notes. These show that Mr Webb raised these various points, including that he felt that the outcome was pre-ordained and that Mr Eley had wanted to keep certain managers. He also mentioned that he had been nominated for General Manager of the Year Award in 2018 and had won the Customer Excellence Award for 2020. Altogether he felt that the process was predetermined and unfair.
34. The meeting ended with Mr Scott saying that he would look into these points, and he then asked Ms Gibson to do so for him. He also had a further meeting with Mr Eley to go over things again. Armed with those views and further information he sent the outcome letter, dated 23 October 2020, [pages 119 to 122] maintaining that the company had conducted a fair and transparent process. This too was

drafted by Ms Gibson. It stated in short that pooling of general managers was the practice adopted across the group, stated that the performance of the dealership was not relevant, and said that on the information available he was not able to say whether the scoring of the management/leadership capability criteria had been amended or was unfair. Again, although the letter stated that there was a discretionary or subjective element to the process, it did not explain that Mr Talbot had had his score increased by 5 marks, or why.

Applicable Law

35. There is no dispute here that this was a redundancy situation and that that was the reason for dismissal. A fair procedure is also very important in showing that an employer has acted reasonably. In **Williams and ors v Compair Maxam Ltd** 1982 ICR 156, the Employment Appeal Tribunal (EAT) laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. It stressed that it is not for the employment tribunal to impose its standards in deciding whether the employer should have behaved differently, instead it had to ask whether 'the dismissal lay within the range of conduct which a reasonable employer could have adopted'.
36. This test, has been emphasised in a number of cases cited to me. In **Eaton Ltd v King** [1995] IRLR 75 Lord Coulsfield commented that it was sufficient for the employer to have set up a good system for selection and to have administered it fairly.
37. This was endorsed in **British Aerospace plc v Green** [1995] ICR 1006 CA where Waite LJ stated (1010 A -B):

"So in general the employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt signs of conduct which mars its fairness will have done all that the law requires of him."
38. And again in **Inchcape Retail v Symonds** [2009] UKEAT 0316/09 His Honour Judge McMullen QC stated at paragraph 15:

"Once that the criteria are fixed, the scope for complaint by a redundant employee is quite narrow. But there can be challenges where objective factors come into play and simple mistakes can be corrected, such as length of service wrongly calculated or absence record unfairly attributed. It would be unreasonable to dismiss a worker whose scores were based on demonstrably wrong figures. However, absent an allegation of actual bias in a manager, criticisms of a points allocation for work performance or job knowledge will be difficult to make in fact and law."
39. Those are the main propositions relied on for the company, which need to be applied to the selection criteria in use and how they were applied.

Conclusions

40. The first criticism of the process is the decision to pool all six general managers rather than simply make redundant those in charge of the dealerships which closed. That however appears to be an altogether reasonable decision since the redundancies would otherwise be rather arbitrary, and depend on the performance of the branch which, I accept, is not solely down to the manager. It may depend on the location, size and no doubt many other factors. The point was investigated at the appeal stage and this pooling of general managers appears to be or have been standard practice within the company, which had recently undergone a number of restructuring exercises, not confined to the Vauxhall dealerships. There is a clear business case for pooling managers in this way to ensure that the best of them is retained, particularly where, as here, they were in a small area. They could then be redeployed to other dealerships, unlike when the Yardley site closed. On any view therefore, this decision was within the range of reasonable approaches.
41. The rationale for excluding any usual measure of performance from the selection exercise, is less clear. Performance is almost always a vital consideration. It is about how well the person does the job. Any employer will want to keep the best people, if it can. Normally in a redundancy selection exercise the question is not so much whether to include performance in the criteria, but how best to do so, and to what extent other factors should be relied on. The company says that finance was not a reliable measure because many factors may affect the successful profitability of particular dealership, which is no doubt true, but the purpose of the financial performance measures (and awards) was presumably to identify as precisely as possible how far the individual manager was contributing to the overall performance. However, I accept too that this was the approach applied across the group, and so reliance on the Best Companies Score data was the standard approach and so that must also be within the range of reasonable approaches.
42. That does not however remove the need for objectivity. The Best Companies score was really the only measurable yardstick in this exercise, and so it was all the more important to place reliance on it. If it could simply be overwritten by subjective elements, there would be no objective factor left at all. That is what seems to have happened here.
43. There are a number of causes for concern leading to that view. Firstly, Mr Webb was given the wrong score and placed in the bottom category, which itself shows a lack of care in dealing with his case.
44. Secondly, Mr Eley clearly saw nothing wrong with placing him in this lowly category. His evidence was that he reviewed each person's scores before making his judgment call about where to place them, so it is surprising, given the other

indications in the form of awards, that he did not see anything wrong in Mr Webb coming out bottom of the group and in the lowest category.

45. There is then the reliance on what seem to be trivial or unfair reasons to justify the view that 10 points was fair. These concerns were not raised to change Mr Webb's scores, but they show that Mr Eley was casting around for reasons to undermine his score. The reasons selected seem in fact to show a degree of imbalance, if not bias. The comment on a zoom call appears minor and unclear. The bullying allegations were not proceeded with and there is an obvious unfairness in placing any reliance on them in these circumstances. And if not relied on, it begs the question why they were raised.
46. Overshadowing these considerations is the fact that the score for Dan Talbot was increased, over and above the outcome of the customer survey, reflecting Mr Healey's subjective view of his performance based on project work. He was the only one whose score was adjusted. There is nothing to show, even in the case of Mr Webb, that any subjective element entered the equation before the first scores were applied. Finally, and most significantly, project work is untypical of the role of a general manager. It is unrelated to the scheme of the Best Companies Scores, which relate solely to line management ability. In those circumstances the uplift appears quite arbitrary and outside the Best Companies scheme.
47. No explanation was given to Mr Webb at any stage about this uplift for Mr Talbot, so he was unable to respond. That also shows a degree of reluctance by the company to admit what it had done. Even in the appeal letter, Michael Scott did not make clear why Dan Talbot had had his score increased.
48. Overall I accept the criticism made by Mr Webb at the time, that the emphasis shifted from the process being objective to subjective only at the point when objective measures (such as they were) advantaged him. In essence therefore the company has set up a scoring process which would have resulted in Mr Webb being retained, and then artificially interfered with it in order to obtain a different result.
49. A further concern relates to the use of length of service as a tiebreaker. For the reasons already given, a tiebreaker should not have been necessary. But even if it had been, length of service was not announced at the outset, even if it had been used on other occasions in the group. Relying on it here was particularly problematical, where the only objective measure was the Best Companies Score. Those scores had been altered by Mr Eley's discretion, to level things up, effectively removing any real objective evidence. It might have been thought at that stage that some further process was required to assess performance, or at least to give each candidate the chance to put forward any reasons why they felt that the Best Companies Score did not properly reflect their performance.
50. Returning to the words Waite LJ in British Aerospace plc v Green, he referred to

an

“employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt signs of conduct which mars its fairness”

51. It is difficult in those circumstances to apply the guidance referred to above, and each of these concerns mars its fairness. Similarly, the remarks of HHJ McMullen that - "Once that the criteria are fixed, the scope for complaint by a redundant employee is quite narrow" - has little application in the absence of any real fixed criteria. There are strong indications here that Mr Talbot was simply preferred, and essentially chosen, by Steve Eley ahead of Mr Webb, and that is my conclusion. In those circumstances, the basis requirement of a fair system is lacking.
52. It is not for me to say why that occurred, or for the claimant, only to identify that it has. It may have been a slight personal preference; it may have been that Mr Talbot was reassured prematurely that his position was safe; it may have been a reluctance to change his mind' or simply that he was swayed by irrelevant factors such as the anonymous allegations of bullying. Regardless of the reason, the system, or the application of the system in this case, was clearly flawed.
53. For all the above reasons therefore I find that the dismissal was unfair. It was unfair for matters of method and approach rather than simply procedure and so I apply no discount for the risk that a fair application of the process would have led to a different outcome. Had the system been applied fairly he would not have been selected. It remains to consider the extent of compensation to be awarded.

Employment Judge Fowell

Date 1 June 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

21 June 2021

FOR THE TRIBUNAL OFFICE