EMPLOYMENT TRIBUNALS

Claimant: **Mr Marc Ramsden**

Respondent: **Maldon District Council**

Heard at: **East London Hearing Centre**
(A hybrid hearing with the Respondent's witnesses attending by Cloud Video Platform)

On: **27 & 28 May 2021**

Before: **Employment Judge Barrett**

Representation

Claimant: In person

Respondent: Mrs Emma Holmes, Senior Legal Specialist at the Respondent

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. **The Claimant was unfairly dismissed.**

2. **The Claimant's compensatory award will be reduced by 50% to reflect the chance he might have been fairly dismissed.**

REASONS

This has been a partly in person and partly remote ('hybrid') hearing, which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform ("CVP"). A hybrid hearing was held, because it was not practicable for all witnesses to attend in person, and all issues could be determined in a hybrid hearing.

Introduction

1. The Claimant was employed by the Respondent in its Parks Team from 28 November 2016 to 5 June 2019, when he was dismissed with pay in lieu of notice and a redundancy payment. On 8 September 2019, he presented an ET1 claim form bringing a claim for unfair dismissal.

2. The Respondent says that the Claimant was fairly dismissed by reason of redundancy. The Claimant's case is that the redundancy situation, which he accepts affected the Council as a whole, did not necessitate any job losses in the department where he worked. He further argues that there was a lack of meaningful consultation, the selection process was flawed, and he was selected for redundancy for an ulterior reason, namely because he had previously reported a manager's misconduct.

The hearing

3. The hearing was conducted over two days, 27 and 28 May 2021. The Claimant represented himself. The Respondent was represented by Mrs Emma Holmes, Senior Legal Specialist.

4. The Claimant gave evidence on his own behalf.

5. The following witnesses gave evidence by CVP on behalf of the Respondent:

   5.1. Mr Richard Holmes, Director of Service Delivery;

   5.2. Mrs Julie Hardy, Interim HR Manager;

   5.3. Mr Matthew Wilson, Lead Countryside and Coast Coordinator;

   5.4. Mr Peter Clarke, Parks and Countryside Officer (Supervisor).

6. The Tribunal was presented with a hard copy bundle of evidence numbering 786 manuscript pages, including various inserts. During the hearing, Mrs Holmes asked a colleague to helpfully scan the bundle to provide an electronic version, which numbered 860 pages. Numbers in square brackets in this document refer to the manuscript page numbers in the bundle.

7. The Respondent had objected to including several of the Claimant's documents on grounds of relevance, and these were contained in a section at the end of the bundle. Mrs Holmes confirmed the Respondent was content for these documents to be referred to during the hearing if any of them turned out to be relevant to a line of questioning during the witnesses' evidence, and indeed the Claimant relevantly referred to some pages in that section during the course of the hearing.

8. Two further documents were disclosed during the hearing and admitted into evidence with the consent of the parties:

   8.1. By the Claimant, the screenshot he had taken of a job advertisement published by the Respondent. The advert itself was already in the bundle [629], but the screenshot additionally showed the date the Claimant had seen it, which was 20 June 2019.

8.2. By the Respondent, a scoring matrix spreadsheet showing the final outcome of the interview process for Parks & Countryside Officer roles following the restructure. This was a later version of a document already contained in the bundle [347].

9. Mrs Holmes submitted a skeleton argument in advance of the hearing. After the evidence had been completed, both Mrs Holmes and the Claimant made helpful oral closing submissions.

The issues

10. The issues for determination were set out at a Preliminary Hearing on 20 January 2020 by Regional Employment Judge Taylor. They were:

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

10.2. 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:

10.2.1. The Respondent adequately warned and consulted the Claimant;

10.2.2. The Respondent adopted a reasonable selection decision, including its approach to a selection pool;

10.2.3. The Respondent took reasonable steps to find the Claimant suitable alternative employment;

10.2.4. Dismissal was within the range of reasonable responses.

10.3. Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? If so, should the Claimant's compensation be reduced? By how much?

(I have omitted other issues relating to compensation as these will be addressed, if necessary, at a future hearing.)

11. At the start of the hearing, the Claimant stated that he had also wished to bring a claim of victimisation under the Equality Act 2010, because he had been treated badly after raising concerns about a former supervisor relating to racism and homophobia.

12. In his ET1 claim form, the Claimant had referred to "*victimisation due to whistleblowing*". However, at the Preliminary Hearing on 20 January 2020 the Claimant confirmed that he did not seek to make a complaint about whistleblowing. The above list of issues was sent to the parties following that hearing. At two further Preliminary Hearings on 4 June 2020 and 15 February 2021 it was not suggested that the list of issues was incomplete.

13. I explained to the Claimant that if he wished to argue he had been victimised in breach of the Equality Act 2010, he would need to make an application to amend his claim. We took a 15-minute break for him to decide, and his decision was to continue with the hearing of his unfair dismissal claim and not to apply to amend to add a victimisation claim. I reassured him that he could refer to the same

factual background, which was relevant to his case as to why his dismissal was unfair.

Findings of fact

14. The Claimant first worked for the Respondent Council during 2016 as an agency worker. From 28 November 2016 he was directly employed as a Gardener / Groundskeeper [65]. He passed his probation review in January 2017, with good scores for every performance metric [617]. On 1 June 2017, he was issued with an updated contract and his job title changed to Assistant Parks & Countryside Officer, band C [75]. As with other members of his team, his contract provided for annualised hours with longer hours worked in the growing season. There was a slight reduction in hours in 2018, from 2002 to 1976 contractual hours per year [77].

Background concerning previous supervisor

15. On 21 August 2017, the Claimant emailed the Respondent's Chief Executive, raising concerns about a supervisor in the Parks Team and tendering his resignation [86]. This prompted an investigation into the conduct of the supervisor, who was subsequently dismissed. The Claimant was invited to rescind his resignation and return to work, which he did in September 2017.

16. The Parks Team fell within the remit of Mr Wilson, the Countryside and Coast Manager. Before contacting the Chief Executive, the Claimant had attempted to raise his concerns about the supervisor with Mr Wilson, including by letter of 22 June 2017 [639]. However, Mr Wilson did not respond to the Claimant, but rather discussed the issues raised directly with the supervisor [643]. Mr Wilson's initial reaction when the Claimant escalated his complaint to the Chief Executive was sceptical [89] and he queried why the Claimant's resignation had not simply been accepted [95]. However, I accept Mr Wilson's evidence that when he later learned more about the supervisor's conduct, he changed his mind and recognised that the Claimant's complaint had been fully justified and the supervisor's dismissal was appropriate.

17. On the Claimant's return to work he had further difficulty with a different supervisor, who resented the Claimant's role in triggering the disciplinary proceedings against his colleague. The Claimant raised this informally with Mr Wilson and spoke about it to HR on 23 March 2018 [661]. Mr Wilson did make a change to work rotas to minimise the time the Claimant had to spend working with the supervisor in question. However, he never responded to the Claimant, with the result that the Claimant was left feeling that his concerns had been ignored.

Council restructure

18. In mid-2018, the Respondent contracted with a company called Ignite Management Consultancy to conduct a review of its organisation. A Staff Consultation Document was published on 17 September 2018 [115]. The proposal was to save costs and improve efficiency by streamlining the Respondent's workforce structure. Consultation with the trade union Unison began on the 10 September 2018.

19. The restructure was dealt with in two phases, with the first phase focussing on more senior roles. This phase was concluded, and a further Staff Consultation Document was issued on 4 March 2019 [208.1]. Unison was consulted again.

20. In relation to the Parks Team, the phase two Staff Consultation Document provided for 10.7 full-time equivalent ('FTE') Parks & Countryside Officer roles in the new structure, plus 0.6 FTE capacity for summer staff, a higher-grade Parks & Countryside Officer in a supervisory role and a Lead Countryside & Coast Co-ordinator [208.41]. This reflected the make-up of the current team save for the slight reduction from 11 Parks & Countryside Officers to 10.7 FTE.

Informal complaint

21. On 5 March 2019, Mr Holmes, the Respondent's Director of Service Delivery, held a meeting for staff at which he outlined the latest proposal. Following the presentation, the Claimant approached Mr Holmes and asked him about the criteria that would be used to decide who would go and who would stay following the restructure. The Claimant said he was concerned about lack of access to training, which might affect his chance of being retained.

22. The following day, the Claimant sent an email to Mr Holmes [309] raising various concerns, including that he was being prevented from accessing training because he had triggered the investigation into the former supervisor, and that Mr Wilson had failed to respond to his concerns. He also raised a safety concern about welding practices, and inconsistent treatment in relation to personal use of the Respondent's vehicles. Mr Holmes sought advice from Mrs Hardy, Interim HR Manager [308], which she provided by email of 20 March 2019 [308].

23. Mr Holmes, together with another manager, then met with the Claimant on 3 April 2019 [211]. Mr Holmes' impression by the end of the meeting was that the Claimant did not want to pursue the matter formally and he therefore considered it closed [297]. The Claimant's understanding was that Mr Holmes would investigate the concerns he had raised and get back to him.

24. Mr Holmes did subsequently speak to Mr Wilson about the welding issue and personal use of Council vehicles. However, nobody reported back to the Claimant about these matters.

Consultation meeting

25. The following day, 4 April 2019, Mr Holmes met the Claimant for an individual redundancy consultation meeting [221]. Mr Holmes told the Claimant his job had been ringfenced but that he would still have to apply and be interviewed for a role in the new team. The roles available were Parks & Countryside Officers at levels 1, 2 and 3. Level 1 was equivalent to the Claimant's current grade C role. Staff who did not make an application would only be offered roles if there were any available after the selection process for staff who did apply. (This message had also been communicated in an 'all staff' email on 29 March 2019 [625].)

26. The Claimant asked how many jobs would be lost in the Parks Team. He was told that currently there were 11 FTE roles, and the plan was to reduce this to 10.7 FTE (i.e., a loss of just 0.3 of a FTE role). However, he was also told that those who stayed would be selected through interviews and that it was possible there would be a reduction of more that 1 FTE post. The notes record, "*it is*

possible but can't say either way until after interview process as to how people perform" [223]. The Claimant formed the impression that the number of posts to be cut was being kept deliberately vague so the Respondent could get rid of anyone they wanted to sack. He was deeply sceptical about the proposed selection process.

27. The Claimant was sent an 'at risk' of redundancy letter on the same day [267].

28. The Respondent offered staff two workshops, 'Understanding and Navigating Change' and 'Applications and Interviews' to help them prepare for the redundancy selection process. The Claimant declined to attend [225].

Meeting with Mr Clarke

29. The Claimant requested a meeting with the Parks Team supervisor, who was by this time Mr Clarke. They met on 8 April 2019. The Claimant informed Mr Clarke that he felt work tasks had been removed from him deliberately to give a different colleague a better chance of retaining a role following the restructure. Mr Clarke's note of the meeting included that "*I said to Marc that his work ok but he is a very antagonistic member of staff. I said he could probably still be here after phase 2*" [305].

30. Mr Clarke sent his note of the meeting to Mr Wilson and Mr Holmes, amongst others [305]. The following day, Mr Holmes shared it with Mrs Hardy, commenting "*Disappointing after our discussion which suggests to me more is going on here*" [305].

Final Operating Model

31. Following the consultation process, a document was issued on 17 April 2019 entitled 'MDC Final Operating Model following Staff Consultation'. It confirmed that following the restructure there would be 10.7 FTE Parks & Countryside Officer roles in the Parks Team [248].

32. The job description for the level 1 Parks & Countryside Officer in the new structure [270] was identical or near-identical to the Claimant's existing job description as a band C Assistant Parks & Countryside Officer [81]. Both included: maintaining the Respondent's parks and open spaces to a high standard; working as part of a team; leaf clearance; bin emptying; sweeping; litter picking; strimming; rotary and cylinder mowing; use of associated groundcare machinery and implements; care of beds; basic glasshouse work; marking and overmarking of sports pitches; pesticide applications and calibrations; basic maintenance of vehicles and equipment; litter and bin collection; basic machinery operation and vehicle driving.

Correspondence with Mr Holmes

33. On 23 April 2019, the Claimant sent Mr Holmes an email with subject header "*My employment at MDC"* requesting a meeting with him [303]. Mr Holmes forwarded the email to Mrs Hardy.

34. On 24 April 2019, Mrs Hardy emailed Mr Holmes and another senior manager stating, "*If you get any emails from Marc Ramsden please forward them to me before you send any response!*" [298]. She explained in evidence that this was

because she wanted to ensure that responses sent to the Claimant were consistent.

35. Mr Holmes replied that he had met with the Claimant previously, had understood then that the Claimant did not want to pursue a formal grievance, and that two of the issues which the Claimant had raised had been followed up with Mr Wilson [297].

36. It does not appear that the Claimant received a reply to his request.

Job application

37. On 25 April 2019, the Claimant completed the job application form as directed [289]. This was the last date for applications, and he was encouraged to apply by Mr Clarke. The Claimant's view was that he should not have to apply for his own job when there was only a 0.3 FTE proposed reduction, and he mistrusted the process. In the box to indicate the position he was applying for, he wrote "Assistant Parks & Countryside Officer". He did not complete the adjacent box for "level (as applicable)".

38. The application form was submitted to the HR department where somebody (identity unknown) spotted the omission and completed the 'level' box with "L3", "L2", "L1", ranked in that order. The rationale, presumably, was that it was assumed any applicant who had not otherwise specified would prefer to be in the highest-grade position possible.

Access to information

39. The Claimant has challenged the way information was provided to staff during the consultation process, saying that the staff intranet was not accessible for Parks Team staff. He points out, correctly, that it can be seen from the documents in the bundle that his colleagues filled out application forms for their own jobs by hand and did not apply for any other jobs which may have been advertised on the intranet.

40. There were consultation 'champions' appointed to support staff through the process and the Claimant acknowledged that the person designated to help the Parks Team (a Community Protection Officer) was helpful and did print out information for them. Mr Clarke's evidence was that hard copies of the relevant consultation information were placed in the staff canteen. All staff were given email accounts in around March 2019 which ought to have enabled them to access the intranet, but in practice there were IT difficulties and access was limited or non-existent.

41. While access was given to consultation information in hard copy, Parks Team staff who did not use computers or the intranet as part of their job roles were disadvantaged in their ability to view and apply for any alternative vacancies with the Respondent. However, there is no evidence that suitable alternative vacancies were advertised at the relevant time, save for as discussed below.

Correspondence between Mr Clarke and Mrs Hardy

42. On 2 May 2019, Mr Clarke emailed Mrs Hardy stating "*Just to advise Marc has been in to see me today and is working opposite the council offices so may be in to ask questions*" [663].

Formal grievance

43. On 13 May 2019, the Claimant submitted a formal grievance [325] in which he complained he had been treated badly since returning to work in September 2017 because he was perceived as having 'got a good man the sack'. He gave a list of examples of matters he felt amounted to deliberate poor treatment, including the access to training issue and that Mr Wilson had not responded to his concerns. On 17 May 2019, the Claimant was invited to a grievance investigation meeting to be held on 28 May 2019 [327].

Selection interview

44. Meanwhile, on 21 May 2019, the Claimant attended the interview for a role in the restructured team. The interview panel comprised his manager Mr Wilson, his supervisor Mr Clarke and Mrs Hardy providing HR support.

45. Each panel member completed a separate scoring form. There were 13 questions in total, of which 11 related to the levels 1 and 2 roles, and the remaining two related to the level 3 role. The level 3 questions were more technical and harder. Each question was scored out of 10 points. Each candidate's final score was calculated as an average across all questions asked; therefore, candidates who were applying for the level 3 role faced a more difficult task in achieving a good average score when compared to those only applying for levels 1 and 2 positions. The provisional pass mark was set at 77% [347].

46. The Claimant felt he was put at a disadvantage by the make up of the panel. Mr Wilson was somebody he had complained about, including in his formal grievance which was currently under investigation. He had also raised directly with Mr Clarke that he felt Mr Clarke was unfairly removing work tasks from him. Mrs Hardy had been involved in providing HR support to the grievance process.

47. I accept that for these reasons, each member of the panel had formed a prior and not wholly positive view of the Claimant. Mrs Hardy had him 'on her radar' since advising on how to deal with his grievances. As noted above, Mr Clarke thought of him as 'antagonistic'. While Mr Wilson had accepted that the Claimant did the right thing to report his former supervisor in 2017, he was also aware of the Claimant's live grievance. However, each made a conscious effort to conduct the interview fairly and professionally and none deliberately scored the Claimant down.

48. Nonetheless, this context and did affect the way the Claimant interacted with the panel and performed at interview, because he did not trust them to give him a fair chance. For example, in reply to the first question, *"How do you handle a challenge? Give an example",* that he simply stated, *"Working here is a challenge"* and was awarded 1/10 by all three panel members.

49. The Claimant scored poorly, achieving a final average score of 48% and ranking lowest of the 11 candidates. The fact that he had, without intending to, been entered for the level 3 role meant that he faced an uphill struggle on the final two questions. The next lowest score was 64%, awarded to a candidate who only applied for level 1 and 2 roles.

50. On some of the score sheets, although not the Claimant's, the panel members struck through scores to amend them both upwards and downwards. I accept this occurred when panel members reflected on the scoring and adjusted as they went through the interview process and does not reflect any deliberate manipulation of scores to achieve a particular result.

51. Once the process was completed for all 11 team members, their performance was reviewed, and an impressionistic conclusion was reached between the panel members that three had interviewed too poorly to be offered a role in the restructured team. There was no predetermined number of roles by which the team needed to be reduced. Had a larger number failed to perform to the desired standard, more than three of the 11 would have been made 'redundant'. Mr Clarke confirmed that if say, eight team members had interviewed poorly, all eight would have lost their jobs.

52. However, one of the three (not the Claimant) had scored 79%. This was above the provisional pass mark of 77%. A decision was taken to raise the pass mark to 80% in order to achieve the desired result. This is reflected in the second scoring spreadsheet disclosed during the hearing, which shows the pass mark was changed from 77% to 80%. It was not disputed by Mr Wilson (who was involved in setting the pass mark) that the reason for the change was to ensure that all three staff members who had been felt to interview poorly would be dismissed.

Grievance outcome

53. The Claimant's grievance investigation meeting on 28 May 2019 was conducted by Mr Paul Dodson, Director of Strategy, Performance and Governance [585]. He sent a grievance outcome letter dated 30 May 2019 rejecting the Claimant's grievance [583]. He concluded there was no evidence the Claimant had been treated less favourably because he had made the complaint against his former supervisor in 2017.

54. On 2 June 2019, the Claimant submitted a further grievance [591]. This was in connection with Mr Wilson's sceptical response to the Claimant's 2017 complaint, referred to at paragraph 16 above. The Claimant had only just seen the relevant correspondence as the result of making a subject access request.

Dismissal

55. On 5 June 2019, the Claimant attended a meeting with Mr Wilson at which he was informed he had not succeeded in the interview process and was dismissed with pay in lieu of notice. He was asked to return his staff ID badge and escorted by Mr Clarke to retrieve his personal items and to the exit. He was handed a letter from Mr Holmes which stated:

> **'Further to the completion of the consultation and implementation of the Future Model Ignite restructure, and our meeting on 05 June 2019, I am writing to confirm**

> **that you have not been successful in the recruitment process for Phase 2 and therefore it has not been possible to appoint you within the new structure. I am writing to give you formal notice that your contract of employment with Maldon District Council will terminate for reasons of redundancy on 05 June 2019.'**

56. The Claimant's 2 June 2019 grievance was rejected by letter of 6 June 2019, the day after he was dismissed, without further investigation.

Advertisement of Parks & Countryside Officer roles

57. As noted above, three members of the Parks Team including the Claimant were dismissed following the interview process. Across the Respondent, total staff numbers were reduced from 223 to 185, of which 26 were dismissals.

58. However, the Parks Team still required 10.7 FTE Parks & Countryside Officers to undertake the ongoing workload. In June 2019, the Respondent advertised for two full-time, permanent level 1 Parks & Countryside Officers to replace staff who had been dismissed. The Claimant saw and screenshotted the advert on 20 June 2019. Two new members of staff were recruited into those roles. The remaining 0.7 FTE role was filled by an apprentice.

59. At the same time, the Respondent also advertised for a full-time Highway Ranger on a fixed-term contract until March 2020. Had the Claimant been told of this vacancy when he was still in the Respondent's employment, he would have applied for it. The Respondent's position was that as this was an externally-funded fixed-term position at a lower grade, it did not amount to suitable alternative employment.

The law

60. S.94 of the Employment Right Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by his employer.

61. S.98 ERA provides so far as relevant:

> **(1) 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, the principal reason) for the dismissal, and**
>
> **(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.**
>
> **(2) A reason falls within this subsection if it—**
>
> **…**
>
> **(c) is that the employee is redundant …**
>
> **…**
>
> **(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(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 a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

62. A redundancy situation is defined by s.139 ERA.

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

63. An employee may argue that a dismissal for redundancy was unfair either because redundancy was not the real reason; or because, although a redundancy situation existed (and the employee was not selected for an automatically unfair reason) the dismissal was nevertheless unreasonable under S.98(4) ERA.

64. In *Murray v Foyle Meats Ltd* [1999] ICR 827, Lord Irvine approved of the ruling in *Safeway Stores plc v Burrell* [1997] ICR 523 and held that s.139 ERA asks two questions of fact. The first is whether there exists one or other of the various states of economic affairs mentioned in the section, for example whether the requirements of the business for employees to carry out work of a particular kind have ceased or diminished. The second question, which is one of causation, is whether the dismissal is wholly or mainly attributable to that state of affairs.

65. It is the requirement for employees to do work of a particular kind which is significant. The fact that the work is constant, or even increasing, is irrelevant; if fewer employees are needed to do work of a particular kind, there is a redundancy situation (*McCrea v Cullen and Davison Ltd* [1988] IRLR 30). Thus, a redundancy situation will arise where an employer reorganises and redistributes the work so that it can be done by fewer employees.

66. It is not for Tribunals to investigate the commercial reasons behind a redundancy situation (*Hollister v National Farmers' Union* [1979] ICR 542).

67. Where the employer has shown the reason for the dismissal and that it is for a potentially fair reason, the determination of the question whether the dismissal was fair or unfair 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 a sufficient reason for dismissing the employee and must be determined in accordance with equity and the substantial merits of the case.

68. In many redundancy dismissals, the starting-point will be the familiar guidance in *Williams v Compair Maxam Ltd* [1982] IRLR 83 EAT (at para 18 onwards).

> **'18. For the purposes of the present case there are only two relevant principles of law arising from that subsection. First, that it is not the function of the Industrial Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. The second point of law, particularly relevant in the field of dismissal for redundancy, is that the Tribunal must be satisfied that it was reasonable to dismiss each of the applicants on the grounds of redundancy. It is not enough to show simply that it was reasonable to dismiss an employee; it must be shown that the employer acted reasonably in treating redundancy 'as a sufficient reason for dismissing the employee', i.e. the employee complaining of dismissal. Therefore, if the circumstances of the employer make it inevitable that some employee must be dismissed, it is still necessary to consider the means whereby the applicant was selected to be the employee to be dismissed and the reasonableness of the steps taken by the employer to choose the applicant, rather than some other employee, for dismissal.**
>
> **19. In law therefore the question we have to decide is whether a reasonable Tribunal could have reached the conclusion that the dismissal of the applicants in this case lay within the range of conduct which a reasonable employer could have adopted. It is accordingly necessary to try to set down in very general terms what a properly instructed Industrial Tribunal would know to be the principles which, in current industrial practice, a reasonable employer would be expected to adopt. This is not a matter on which the chairman of this Appeal Tribunal feels that he can contribute much, since it depends on what industrial practices are currently accepted as being normal and proper. The two lay members of this Appeal Tribunal hold the view that it would be impossible to lay down detailed procedures which all reasonable employers would follow in all circumstances: the fair conduct of dismissals for redundancy must depend on the circumstances of each case. But in their experience, there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:**
>
> > **1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.**
> >
> > **2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.**
> >
> > **3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.**
> >
> > **4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.**

> **5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.**
>
> **The lay members stress that not all these factors are present in every case since circumstances may prevent one or more of them being given effect to. But the lay members would expect these principles to be departed from only where some good reason is shown to justify such departure. The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim.'**

69. In *R v British Coal Corporation [*1994] IRLR 72, the Divisional Court endorsed the test proposed by Hodgson J in *Gwent County Council ex parte Bryant* [1988] Crown Office Digest 19 HC, namely that fair consultation means (a) consultation when the proposals are still at a formative stage (b) adequate information on which to respond (c) adequate time in which to respond (d) conscientious consideration by an authority of the response to consultation.

70. A tribunal must decide whether the employer's choice of pool was within the range of reasonable responses; it should not substitute its own view as to what the pool should have been: *Hendy Banks City Print Limited v Fairbrother and others* UKEAT/0691/04/TM).

71. Similarly, a tribunal may not substitute the selection criteria it would have chosen for those used by the employer. The Tribunal should consider if the criteria fall within range of reasonable responses: *Post Office v Foley* [2000] ICR 1283.

72. Tribunals will not generally get involved with the minutiae of how individual scores are arrived at, unless there are exceptional circumstances such as bias or obvious mistakes: as indicated by the Court of Appeal in *British Aerospace Plc v Green and others* [1995] IRLR 433, and again by the Court of Appeal in *Bascetta v Santander* [2010] EWCA Civ 351. Instead, a tribunal should focus on whether the employer has a good system in place for assessing employees against the criteria.

73. If the issue of alternative employment is raised, it must be for the employee to say what job, or what kind of job, he believes was available and give evidence to the effect that he would have taken such a job: that, after all, is something which is primarily within his knowledge: *Virgin Media Ltd v Seddington and Eland* UKEAT/0539/08/DM.

74. Where a Tribunal finds that a dismissal was unfair, it must go on to consider the chance that the employment would have terminated in any event, had there been no unfairness (the *Polkey* issue).

75. In *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274 the EAT (Langstaff P presiding) noted that a *Polkey* reduction has the following features:

> **'First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between the two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer would have done) … The Tribunal has to consider not**

> **a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand.'**

Submissions

76. The Claimant submitted that the job he applied for was identical to his existing job and the only thing that was different was a slight change to the job title. He accepted that there was a genuine staffing review driven by the Respondent's need to make financial savings. However, at some point the plan to reduce headcount by 0.3 FTE changed into an opportunity to make people the Respondent wanted to get rid of redundant, which is what he believed happened. His team all worked flexible annualised hours which meant the 0.3 FTE could easily have been accommodated without making any compulsory redundancies. His score had been deliberately manipulated to be so low that he would definitely be at the bottom of the list and it would be impossible for him to successfully appeal. If the process had been above board, he would still be there.

77. I have also referred to the criticisms raised in the Claimant's witness statement, including at paragraph 23:

> **'The redundancies carried out by MDC were unlawful. To carry out redundancies lawfully MDC needed to carry out a meaningful consultation which must include a genuine attempt to minimise the number of job losses. MDC did not do this they in fact increased the number of job losses in my department from 0 to 3.'**

78. For the Respondent, Mrs Holmes submitted that there was a genuine need to reduce headcount across the Respondent and that placing the entire Parks Team in the pool for selection was fair. The Claimant was treated in the same way as other staff and was not unfairly targeted. The Claimant had seen the consultation documents and attended a consultation meeting. It was reasonable to conduct a selection exercise because the roles in the new team were sufficiently different that staff could not simply be slotted in (as per the consultation document at [208.44] which showed the roles were ring-fenced not slotted). As the Claimant and two others did not meet the competency requirements for the new roles, they were fairly made redundant. Whether the pass mark was 77 or 80 had no bearing on the Claimant's case as he did not meet either threshold. Even if his marks relating to the additional questions for the level 3 roles were disregarded, his average score would still be well below the necessary competency standard. Further, if there was any defect in the process then the Claimant's low interview score was evidence that he would have been dismissed in any event had a fair process been followed.

Conclusions

79. The first question is whether there was a genuine redundancy situation. Did the requirements of the Respondent for employees to carry out work of a particular kind done by the Claimant cease or diminish? I accept they did to the limited extent that the requirements for employees to carry out the type of gardening and maintenance work undertaken by Parks & Countryside Officers were expected to diminish from 11 to 10.7 FTE posts after the restructure.

80. If so, was the Claimant's dismissal wholly or mainly attributable to that state of affairs? I conclude it was not. The Claimant's dismissal was attributable to his low score in the competency-based assessment process which the Respondent

undertook in relation to the 11 members of the Parks Team. The competency standard applied was unrelated to the needs of the redundancy situation, which is why a reduction of 3 posts not 0.3 FTE posts was made, and a larger number of dismissals might have occurred had more staff performed poorly at interview.

81. The Respondent has not argued that the Claimant could have been fairly dismissed by reason of capability. Given that there has been no suggestion the Claimant performed poorly in his job (only at the interview), there was no fair basis for a capability dismissal.

82. In case I am wrong in concluding that redundancy was not the reason or principal reason for dismissal, I will go on to consider whether the dismissal was fair in all the circumstances. Did the dismissal lay within the range of conduct which a reasonable employer could have adopted?

83. The Respondent satisfied some of the requirements for a fair redundancy process:

83.1. The Claimant was given fair warning of the risk of redundancy.

83.2. Collective consultation was undertaken with Unite.

83.3. There was a sufficient opportunity for individual consultation, including at the consultation meeting with Mr Holmes.

83.4. The Claimant was provided with the relevant information about the process in hard copy and via the consultation 'champion'.

83.5. While the criteria for selection may not have been the most apt way of assessing practical competence in the Parks & Countryside Officer role, it cannot be said that the competency-based interview fell outside the band of reasonable approaches open to the Respondent.

84. However, there were also flaws in the process:

84.1. The Claimant was mistakenly interviewed for a level 3 role, with the result that he was asked the more difficult and technical questions, putting him at a scoring disadvantage. Although I have found this was an innocent mistake, it was not a reasonable one. The Claimant had written on the form he was applying for the 'assistant' Parks & Countryside Officer role, i.e. the same level 1 role he was already performing.

84.2. Mr Wilson sat on the Claimant's interview panel even though the Claimant had a live grievance against Mr Wilson which was then under investigation. A reasonable employer ought to have given serious consideration to this issue and at the least warned the Claimant in advance and given him the opportunity to object. I have found that Mr Wilson made no deliberate attempt to mark the Claimant down. However, his presence affected the Claimant's ability to perform well in interview.

84.3. The selection criteria were not applied in a fair and objective manner in order to select the candidate or candidates who could not be accommodated in the new structure. Rather, the panel's subjective impression of who performed poorly at interview was used as a basis to determine: (a) the pass mark; and (b) the number of posts that would be

cut. This was not within the range of reasonable approaches to a redundancy selection exercise.

84.4. No attempt was made to avoid redundancies by finding those at risk suitable alternative employment. Information about vacancies was not made available to staff who could not readily access the intranet. The Claimant was dismissed with pay in lieu of notice, depriving him of the opportunity to apply for alternative roles during his notice period. The Highway Ranger role was not considered as a potential suitable alternative. Most importantly, the two permanent full-time level 1 Parks & Countryside Officer roles that were advertised in June 2019 were certainly suitable alternatives because they were in all practical respects identical to the job the Claimant had been fulfilling. Having reviewed the job descriptions, I do not accept that there were any relevant differences between the roles. It was not reasonably open to the Respondent to dismiss the Claimant and his two colleagues, ostensibly for redundancy, and immediately advertise vacancies for new staff to take over the work they had been doing.

85. Given these flaws, I conclude it was not within the range of reasonable responses open to the Respondent to dismiss the Claimant by reason of redundancy.

86. The last issue to consider is the *Polkey* question: could the Respondent fairly have dismissed and, if so, what were the chances that the Respondent would have done so?

87. The Claimant argues that the proposed 0.3 FTE reduction could have been achieved through adjustment of the annualised flexible hours the Parks Team staff worked, and without any compulsory redundancies. Mr Clarke agreed this would be possible although it was a matter for a manager at a higher grade to organise. Mr Wilson also accepted this was a possible course of action, although in his view not without difficulties. I conclude that it would have been practicable for the Respondent to have achieved the 0.3 FTE reduction without making any redundancies. However, it was also reasonably open to the Respondent to decide to reduce the headcount in the team by one Parks & Countryside Officer, to be replaced by a 0.7 FTE apprentice role, as was the eventual outcome.

88. Had this been done through a fair process, what are the chances the Claimant would have lost his job? The Respondent argues that because the Claimant scored the lowest, he would inevitably have been the person who was dismissed. However, it is not inevitable the Claimant would have scored the lowest had a fair procedure been followed throughout. Had there been a transparent explanation at the consultation stage that one redundancy would be made, the Claimant would not have been suspicious and distrustful, and he may well have performed differently at interview. A different approach to Mr Wilson's involvement in the interview panel, interviewing the Claimant solely for the level 1 job he had applied for, and providing information and support regarding alternative vacancies including the Highway Ranger role, might also have had a bearing on the

outcome. I conclude that had a fair process been followed, there was a 50% chance that the Claimant would have been fairly dismissed by reason of redundancy.

Employment Judge Barrett
Date: 28 June 2021