EMPLOYMENT TRIBUNALS

Claimants: **(1) Mrs L Gaughan**
(2) Mrs D Metcalf
(3) Mrs C Mortimer
(4) Mrs P Stephenson

Respondent: **Cablepoint Limited**

Heard at: **Leeds by CVP**
On: **7, 10-14 May, 25 June and (deliberations only) 2 July 2021**

Before: **Employment Judge Maidment**
Members: **Mr D Wilks OBE**
Mr M Brewer

Representation
Claimants: **Mr G Williams, union representative**
Respondent: **Mr J Boyd, Counsel**

RESERVED JUDGMENT

1. The claimants' complaints of ordinary unfair dismissal are well founded and succeed. Pursuant to the principles derived from the case of **Polkey**, for the purposes of any compensatory award, there is a 75% chance that Mrs Gaughan would have been fairly dismissed in any event and a 100% chance in respect of Mrs Metcalf, Mrs Mortimer and Mrs Stephenson.

2. The claimants' complaints of automatic unfair dismissal for trade union membership fail and are dismissed.

3. The claimants' complaints of direct and indirect age discrimination fail and are dismissed.

4. Mrs Stephenson's complaints of disability discrimination fail and are dismissed.

5. In circumstances where it is assumed that the claimants have each received a statutory redundancy payment, no basic awards fall to be made. The only remedy issue, therefore, is assumed to be in respect of a compensatory award for Mrs Gaughan. The parties shall notify the tribunal within 21 days of this Judgment being sent to the parties, whether such remedy issue has

been resolved between them, failing which this matter shall be listed for a remedy hearing to be conducted by CVP videoconferencing with a time estimate of 3 hours.

REASONS

Issues

1. The parties had during the case management process agreed a list of issues in respect of the claims which the tribunal was being asked to determine.

2. The claimants, firstly, all bring a claim of ordinary unfair dismissal where the respondent puts forward redundancy as the potentially fair reason for dismissal. That reason is disputed by the claimants. If that reason is accepted the claimants maintain in any event that the dismissals were unfair in respect of a lack of warning and consultation, an alleged failure to adopt a fair basis of selection and unreasonableness in a failure to consider suitable alternative employment.

3. The claimants also all bring a claim of automatic unfair dismissal on the basis that they were in fact selected for redundancy on the grounds of trade union membership.

4. The claimants all claim direct age discrimination pursuant to Section 13 of the Equality Act 2010 in respect of their selection for redundancy and access to training opportunities. In terms of relevant age group, the claimants define themselves as being in an age group of employees aged 48 years and over. In further particulars they point, in particular, to 2 employees in their early 20s who were only, they say, permanently employed from 2019. Reference was made to additional comparators, but no evidence has been adduced or submissions made in respect of them.

5. The claimants then all complain of indirect age discrimination pursuant to Section 19 of the 2010 Act. Three PCPs were relied upon, but the third of those PCPs abandoned as a basis for a claim in Mr Williams in his submissions. Reliance is therefore placed only on the first PCP of “the use of skill and aptitude in the redundancy selection exercise and not long service and experience” and a second PCP of “the use of criteria which considered an employee’s job timings and speed of completing work”. Further particulars placed reliance on a purported age-related deterioration in eyesight, manual dexterity and repetitive strain injury.

6. Mrs Stephenson alone then has separate complaints of disability discrimination. It has been accepted that she was at all material times a disabled person by reason of her difficulties in reading and writing. No additional disability impairment is relied upon. Mrs Stephenson then

pursues an allegation of discrimination arising from disability (section 15 of the 2010 Act). She maintains that her dismissal and in particular her skills matrix scores were lower because of "something arising" from her disability i.e. her difficulties in reading and writing.

7. Mrs Stephenson then brings complaints alleging a failure to make reasonable adjustments reliant on the PCPs of "the requirement that she be sufficiently well to carry out the whole of her job description", "the requirement that she be able to read written instructions" and "the application of the unmodified selection matrix by the respondent". These are said to have put her at a particular disadvantage when compared with persons who are not disabled. At this hearing it was advanced, in respect of what would have been a reasonable adjustment, that effectively allowance ought to have been made in the scoring of Mrs Stephenson for her disability impairment.

8. Finally, Mrs Stephenson brought a complaint of indirect disability discrimination pursuant to Section 19 of the 2010 Act based on the PCP of the criteria used by the respondent in selecting employees for redundancy. This was again said to have put Mrs Stephenson at a substantial disadvantage in that she was slow in particular when required to carry out new types of jobs and that a selection based on skill and aptitude disadvantaged her in that she had not been given the opportunity to gain the skills and aptitude required to give her a higher score which might have avoided her redundancy selection.

9. The list of issues had been agreed after the production, on behalf of the claimants, of further and better particulars of the claims. The claims before the tribunal were not necessarily advanced on the exact basis of that particularisation.

Evidence

10. The tribunal spent the first day of the hearing privately reading into the witness statements exchanged between the parties and relevant documentation. Having spent some time then going through the issues with the parties, the tribunal heard evidence on behalf of the respondent from Mr Karl Hendrickson, Operations Manager, Mr Lee Redhead, Workshop Supervisor, Mrs Donna Unitt, Sales Operations Manager and Mrs Angela De Kok, general manager and, from January 2020, managing director. It is noted that Mrs Unitt's evidence was not subject to any challenge by way of cross examination.

11. The tribunal had before it a substantial agreed bundle of documents comprising of some 576 pages. Additional documentation was submitted by both sides during the hearing and accepted in evidence on an agreed basis as described below.

12. Having considered all relevant evidence, the tribunal makes the following factual findings.

Facts

13. The respondent manufactures bespoke cable assemblies, wiring looms and control panels used in a variety of products ranging from domestic wall heaters to military and hospital equipment. It currently employs 32 people at one site in Hull, which is a reduction from the time of the redundancy of the claimants from 43 employees. The claimants were all employed as assembly operatives on the workshop benches where a range of tasks could be performed from a simple link wire, i.e. a small piece of wire with a crimp on the ends, through to very intricate and complex looms, some of which were several metres in length. There were 21 assembly operatives prior to the redundancy exercise.

14. One of the respondent's customers was a business known as 3M. As an additional stream of work, the respondent was successful in 2017 in winning a contract with this customer to assemble and pack industrial masks. This was separate to the respondent's primary cabling business and the work was undertaken by agency workers in circumstances where the flow of work was not constant and could not be controlled by the respondent such that there might be no work to perform at all for several days at a time.

15. Since 2003 the respondent has had a voluntary recognition agreement with the Community trade union.

16. For a number of years, the respondent's system of training involved quality inspectors taking staff off the production line and doing one-to-one or small group training and skills assessments. The respondent then moved from around 2015 (when there also ceased to be any quality assessors) to training on the assembly benches carried out typically by Mr Lee Redhead, Production Supervisor. There were no training records kept by the respondent, but a skills matrix (since at least 2003) where employees were rated for their skill and aptitude in each individual task carried out within the workshop.

17. In 2013, Mr Keith Hazlewood of Community emailed the respondent's general manager, Angela De Kok, offering to send someone in to give the respondent advice on its training system. This, however, never materialised. By email of 19 December 2014 a grievance was raised by the union about training, complaining that members did not feel that the opportunity to enhance their skills was applied in an open, fair and consistent manner. A contrast was made with workers who were not directly employed by the respondent. Mrs De Kok was surprised by the grievance, in particular, given that the respondent then had only 3 agency workers who had been engaged for only a short period of time and who had had minimal training. She responded to Mr Billy McCreight of the union to that effect and suggested a

meeting to discuss matters further. She chased up Mr McCreight for a meeting on 13 January 2015.

18. That meeting was arranged for 6 February 2015. She understood from Mr McCreight that he had asked particular individuals including Denise Metcalf, Penny Stephenson and Carol Mortimer, union branch secretary, to attend to ensure that their concerns were accurately understood. The only employees who in fact attended were Mrs Metcalf and Mrs Mortimer. Mrs De Kok said that she spoke to Mrs Stephenson who said she was not aware of the meeting, was happy with the work which Mr Redhead gave her and was grateful for all his help. The tribunal accepts this uncontested evidence.

19. At the time of this meeting, Mrs Lisa Gaughan was employed as a quality assessor until she returned to the assembly benches at her own request on 1 August 2015.

20. At the meeting on 6 February there was discussion as to how the respondent's training matrix worked. There was an acceptance that those skills assessed would be reviewed annually and it was agreed that employees could ask to see a copy of their matrix at any time. Mr McCreight asked if the matrix might be used in any redundancy process and was told that there was no consideration of any redundancies at that time, but it had been used to select those to be made redundant in the past.

21. Mrs Metcalf's position was that she tended to work on one customer's work all the time and therefore wasn't expanding her skills. Mr Redhead explained that working mainly for one customer could still be beneficial and it was explained that there ought to be a focus on the skills which were being learned and which were transferable, rather than the customer.

22. It is accepted that Mrs De Kok had previously offered additional training to employees on soldering, but outside of normal working hours on an unpaid basis. The offer was never taken up by any of the staff.

23. During the meeting Ms Metcalf asked to be trained on the ATM which is a complex piece of machinery which usually took around 2 years to train someone upon, assuming a sufficient degree of engineering knowledge and ability. She was asked to put such request in writing, but never did. Mrs De Kok said that if there was unhappiness with the matrix, the union could come up with an alternative suggestion which the majority of the production employees agreed upon. No suggestion was ever thereafter forthcoming. There was a reference during the meeting, from the employee side, to a belief that either an employee's age or health was of relevance to the provision of training.

24. Following the meeting, the union issued a Summary of Discussion as effectively a joint statement between it and the respondent. This noted an agreement to put in place a programme which would give greater visibility of how the skills matrix worked, allow each individual an input into how their scores were collated and establish a rolling review with individual employee involvement in the process. The respondent confirmed its intention to recommence IPC 620 training (which led to a certificate after a theory test and which was only offered to employees with a high skills matrix score as they were the ones considered likely to be able to successfully complete it) and to consider a training and skills process which would provide the opportunity for pay progression within a banded pay structure relating to training and skills. It was agreed to meet regularly to review issues.

25. The respondent did not act upon this statement. Neither the claimants nor the union raised the issue of the training matrix again. Mrs De Kok did, however, chase up with the union the arrangement of a follow up meeting, but without success. Meetings with union representatives became more infrequent with no meeting at all during 2018 until then a meeting with the latest full-time officer assigned to the respondent, Mr Matthew Cooke, in early 2019.

26. Since 20 April 2015 the skills matrix became a management tool which was no longer discussed with individual employees – as it had been previously when updated. Mr Hendrickson explained that it had become a false representation of skills because the stronger and more vociferous employees pressurised the quality assessors, who had previously completed the matrix, with some success, to obtain higher scores. Since then, the skills matrix had been updated privately by Mr Redhead and Mr Hendrickson without the involvement or knowledge of the employees.

27. During 2018 the respondent had a strong year in terms of sales in cabling and by December 2018 the respondent was ending the year with a strong order book for the first quarter of 2019. Nevertheless, it became evident that some of the activity was unprofitable against the production hours available. National minimum wage increases had not been passed on to customers, jobs were consistently not being manufactured within the given production times and the charge out rate for the respondent had not increased in 5 years. Donna Unitt, Sales Operations Manager, was tasked by Mrs De Kok with systematically going through each customer reviewing material costs, job history data to ascertain an average manufacturing time and then generating new pricing proposals. A staff meeting was held to explain this on 11 December 2018. Staff were encouraged to work hard, accept individual responsibility and help the respondent move forward.

28. Customers were then approached to discuss new pricing proposals. In January and February 2019 orders were extremely strong, in part due to an element of pre-Brexit stockpiling. However, in March/April the order book declined and there was a forecasted drop in future orders. At least 6

customers had indicated that they would not accept the new pricing proposals and would not continue to place work with the respondent.

29. The work lost typically represented work requiring low skill levels. The more profitable work coming into the business was of a more intricate and complex nature, in particular from the military, health and high-voltage sectors.

30. As a result, Mrs De Kok, Mrs Unitt and Karl Hendrickson, Operations Manager, discussed the respondent's options. The problem was in not having enough work for every employee coming through and having staff with the skill levels required to undertake the work which was available and more profitable. Mrs De Kok set up a meeting with the union for 16 May which was cancelled on the day due to work pressures of the union officer. The respondent had by then identified the possibility of up to 5 redundancies out of its 21 production assemblers. The staff were warned of potential redundancies in early June 2019 and the respondent did eventually meet with Mr Cooke of the union on 17 June. There was a discussion of the state of the respondent's business and the need for up to 5 redundancies was explained. Mr Cooke agreed that maintaining the highest skilled workforce able to carry out the range of available work was the right thing to do for the business. The use of the respondent's skills matrix as the tool for selection was agreed, with Mr Cooke seeing this as sensible given the need to retain the highest skilled personnel.

31. There was further consultation with the workforce to explain the situation and the use of the skills matrix as the proposed method of selection. Thereafter Mr Redhead and Mr Hendrickson carried out the process of scoring.

32. Mr Hendrickson had worked for the respondent since 2000 progressing to the role of supervisor in the workshop and thereafter beyond. He spent still a significant amount of time within the workshop area and covered for Mr Redhead, the current workshop supervisor, in his absence. Mr Redhead himself had started with the respondent in 2000 working in the workshop throughout and as supervisor for the previous 7 years. The tribunal accepts that he had a good level of knowledge about all the jobs being undertaken on the assembly benches and had daily contact with the claimants. He was the first person to speak to if any individual was looking to enhance their skills and receive additional training. He explained to the tribunal that, to progress, it was important for an individual to show an interest in wanting to learn more, although he had to make an assessment as to an individual's level of confidence and whether they were likely to be able to move on to more challenging jobs and still produce good quality work. There was no desire, however, within the respondent for anyone to be held back and work allocation became simpler for him if employees were able to carry out a wider range of tasks.

33. Mr Hendrickson explained that if a new product was introduced into the workshop, the respondent would use one of the more highly trained operatives to complete the work initially and expect that they would eventually cascade that knowledge down to the lesser trained operatives. This could take longer for some products if they involved particular complexity. The respondent tried to increase individual skills, but it came down to individual operatives' capability and whether they could realistically produce the product in a given time period. When asked if he could give examples of attempts to train the claimants which had failed he said that he had given them work which they had completed but the question was the manner in which they had done so – whether they had done it "out of time" or incorrectly. He could not give any specific examples and said that the respondent had "no real record of training procedures". Essentially, Mr Redhead gave employees the opportunity to progress but there was a glass ceiling with some people and they just managed the workshop on the basis of people's abilities. The tribunal accepts, however, that Mr Redhead was responsive to requests for help and not dismissive as has, at times been alleged.

34. The respondent's skills matrix had been created in around 2003 and had evolved over time. Mr Hendrickson explained that the skills matrix had a purpose in enabling the business to show that it had audited skills including to customers, particularly on any site visits. It was also a tool to know where people were in terms of skills and to enable them to be managed. He agreed that it could be a tool in identifying skill gaps, but did not explain that as a primary purpose for the matrix. The tribunal was told that employees were reassessed and the skills matrix updated every 3 months, with a more formal annual review where particular skills assessed might be added or removed from the matrix depending on their continuing relevance to the business.

35. The matrix sets out the key skills required by the respondent. The operative is then rated between 0 – 5 for the skills and then separately for the aptitude they have within them. A single scale was set out explain what the points scores signified. A score of 0 was applicable if the task had not been undertaken or if the total had been reduced under quality review. A score of 1 point represented "in training" with the operative's performance not meeting target or acceptable criteria or the total having been reduced under quality review. A score of 2 points represented an "acceptable" rating with the operative described as less confident and requiring trainer guidance. A score of 3 denoted again an acceptable rating with "acceptable confidence". A score of 4 points represented a "good" rating with the operative showing good acumen and being regarded as better than acceptable. A score of 5 points represented, in addition, an individual being regarded as a key operative. The respondent's witnesses did not, however, explain their scoring to the tribunal by reference to this scale. The scores are then given a weighting of 1 – 10 to reflect the difficulty and importance of each skill. For example, stripping a straightforward cable could be given a skill level of 1 and soldering work on a military product a difficulty in skill grading/weighting

of 10. After the weightings were applied to the operatives' skill and aptitude scores, an overall score was generated for each of them.

36. Mr Hendrickson, in his witness statement evidence, sought to explain the difference between skills and aptitude. If two individuals were able to complete a task, they would both have the skill, but one who produced a product to a high standard of capability and at a consistent level would score higher for the skill. The aptitude score was then based on efficiency at completing the work within the time specified on a Bill of Material, the care applied when producing the work, their concentration, their confidence and their ability to complete the work without help from others.

37. In examination in chief, he was asked what the difference was between skill and aptitude. He said that skill was rated at 0 to 5 points with 0 signifying that the employee couldn't perform the skill and 5 points that they could make a high quality product. Aptitude was an assessment of the capability and care in what they do, efficiency, concentration, how much input was needed from other people. When asked if there was any crossover between skill and aptitude, he said that with skill there was a need for a quality product. With aptitude there was a need to apply that skill to get a quality product. When asked, if a person was capable of performing an excellent piece of work, but didn't do that regularly, how would that affect their score, he said that it shouldn't affect their skill score unless the quality came down. Aptitude was an assessment of how well they achieved the quality product. The skills were already there. The respondent's assessment would be, for example, whether the work was carried out in time and with anyone else's help. When asked how someone would be scored if they did an excellent job on 10/10 occasions versus only 1/10, he said that this would impact on the aptitude score.

38. He said in cross examination that he tried to make the assessment in the skills matrix as objective as possible, but that it was difficult to be fully objective – he accepted that an assessment of an individual's confidence was subjective.

39. In his witness statement Mr Hendrickson described identifying the "most highly skilled/performing operative with the base skill… we were assessing and use this as a benchmark for comparison." He confirmed in cross examination that the highest performing operative was used as a benchmark for each base skill. The highest skilled person would be at the top and then they would cascade down for each other operative from that base skill level.

40. When asked initially why they had not used the existing skills matrix, completed, on Mr Hendrickson's evidence around 3 months previously, he said that it was important that all of the assessments were up-to-date. They did not look at the previous skills matrix assessment. Whilst he recognised

that some of the scores would involve changes from what was there previously, they did not want to rely on a document which was 3 months old.

41. When asked by the tribunal how he decided upon the actual point scores awarded he said that they identified the top operatives then cascaded down to who was the next most skilled. When asked how that cascading worked in terms of scoring people 0-5, Mr Hendrickson said that that was more about aptitude. Skills was the ability to do something with someone who couldn't do a task at one end of the spectrum and someone who could do it very well at the other. As regards aptitude, the issue was how people could do the task in terms of time spent and materials used, patience and attention, the performance from the start to completion of a job and the input of others required. When pressed as to how scores from 0-5 had been awarded he said that this was the subjective part. He based this on his own observation looking at the top operative. When asked whether using that system everyone could still theoretically achieve a maximum score of 5 points, if they merited such score, he maintained that they could.

42. It was pointed out to Mr Hendrickson that under the heading of aptitude Mrs Mortimer had been scored 2 points for all 21 skills she was assessed as possessing, Mrs Gaughan for 21 out of her 23 skills and Mrs Metcalf, again for 21 out of her 23 skills. In response he said that there would have been an employee within the workforce who was rated as 5 under aptitude and that these were the claimants' scores when compared to that person. He was questioned as to whether there had really been 63 individual calculations of aptitude scores of 2 points. He said that the pattern of performance for these individuals was level.

43. Mr Hendrickson and Mr Redhead in their witness statements both referred to them having scored the employees with reference to data the respondent held on quality non-conformances and job time efficiency the previous year and current year-to-date. They did not, however, refer back to that data when asked to explain how specific scores were awarded and the tribunal has no explanation as to how the data translated to or influenced any particular score. The tribunal considers that the data was used as a form of sense testing.

44. As regards Mrs Stephenson, it was noted that Mr Redhead had said that she needed a lot of support. She had received 5 points under aptitude on 7 occasions, 4 points on 7 occasions 3 points on 4 occasions and 2 points on 3 occasions. He was asked how such scoring had been achieved in respect of someone who was said to struggle. In response, Mr Hendrickson said that she struggled more with skills and in picking them up but, what she was able to do, she was doing at a good level. She only struggled when the respondent tried to increase the level of the skills.

45. Mr Hendrickson was also referred back to the descriptions given in the skills matrix against the scores of 0-5 points for skills. On the basis of those

descriptions, it was suggested that it was fair to say that anyone scoring 0 or 1 point for skills had not done the task or was still in training, so that presumably they couldn't be scored more than 0 or 1 point for aptitude. Mr Hendrickson said that was not necessarily the case. How could that be the case if someone had done nothing on which to base that assessment? Mr Hendrickson responded that aptitude could be high if someone was very good on one aspect of a skill.

46. At the commencement of the second day of the hearing, there was some additional disclosure from the claimants of copies of historic matrices for them which they had discovered at home. There was no objection to such further documents being accepted in evidence. The tribunal was also informed that the skills matrix was a working document which had been overwritten when inputting the new scores for the redundancy exercise. It was pointed out by the tribunal that if the scores were overwritten, the person doing the overwriting would see the scores already there - which was in conflict potentially with the evidence Mr Hendrickson had given. It was explained to the tribunal by Mr Boyd that 2 blank versions of the skills matrix were printed out for Mr Hendrickson and Mr Redhead to complete in the redundancy assessment. The numbers they then agreed were inputted into the current working version which was overwritten at that point.

47. At the commencement of day 3 of the hearing, additional documents were produced by both sides, with again no objection to their inclusion in the evidence.

48. Arising out of that disclosure, Mr Hendrickson was recalled to give evidence. He referred to a document which was produced/used in a redundancy exercise which took place in 2008 and which provided some description of scores to be awarded in an assessment exercise. Mr Hendrickson confirmed that he had not been involved in that exercise himself. He said that it did describe the respondent's usual requirements when evaluating aptitude (called "application" in this document"). Scores then (in 2008) had been awarded on the basis of improvement required, satisfactory, meets expectations, exceeds expectations and excellent. A mid-point score of meets expectations was said to denote that the employee produced results at a good level with a good level of concentration and required a degree of supervisory input/guidance. He said that he had failed to get his point across previously to the tribunal asking for appreciation of the stress he felt he was under. When then cross-examined he referred back to his previous explanation regarding benchmarking staff from top to bottom, then said that the way he had answered the questions previously was unfortunate. It was raised that the document referred to the making of notes on each employee's assessment for "application" and Mr Hendrickson confirmed that no notes had been made in his and Mr Redhead's redundancy assessment by way of an explanation of the scores. It was also noted that there was nothing in the previous document regarding speed. Mr Hendrickson said that they did look at speed as well in assessing aptitude

in the redundancy exercise. Mr Hendrickson confirmed that he himself had inputted the scores electronically. He was able to see the scores in the existing skills matrix. He said that there was not much change to the scores, although quite a few of the higher scores were reduced which brought the workshop operatives closer together.

49. Mr Redhead in his evidence described the claimants as having issues in carrying out work on new jobs where there was no process sheet telling them what to do. He said that he did not wish to be derogatory, but some of the claimants were happy to do what they knew and would bypass opportunities to work on different lines which suggested to him someone who did not want to learn. He said that this was particularly the case with Mrs Metcalf. He said, in answer to questions from the tribunal, that if someone wanted to increase skills they would be expected to make their own request and Mr Redhead would then consider this and if necessary discuss it with the management team. Opportunities were there and sometimes it came down to whether the employee wanted to challenge him or herself. When put to him that, if an individual did not ask, they would just be left on whatever they were doing, he said that depended on the size of the job. When put to him that his view was subjective, he said that he had a complete view of the workshop operatives, he knew his staff, what they could and couldn't do and what they would struggle with. He was able to judge an employee's confidence by the number of times the same questions were raised by them regarding a production process.

50. He said that he tried to give everyone the same opportunities, but some people didn't want to take them, for example, if it would cause them stress or they felt they might do something wrong. It was in his own interests to get everyone trained up to the higher skill level, making his own job easier when it came to him distributing the work. He didn't ask the claimants if they wanted to do more different types of work, but said that he was approachable and got on well with them all.

51. When asked how, for example (by way of illustration), Mrs Gaughan had been scored specifically with 3 points for skill in laying wires and 2 points for her aptitude in doing so, he said that didn't know. When asked to describe what he was looking for under the heading of aptitude he said that the first 2 things were confidence and quality. Then came care and later there was an expectation to show greater efficiency.

52. In questions from the tribunal as to whether it was fair to say there was a strong relationship between skill and aptitude i.e. if the score was high on skill, it was likely to be high on aptitude, Mr Redhead said this was what he was struggling to get across. It was hard to talk about their skills without talking about their aptitude in them. An employee, he said, couldn't score 1 point in a skill and 5 in aptitude because they did not have the broad range of skills.

53. When asked how long it had taken him to score the 21 operatives he said that himself and Mr Hendrickson had worked on this over 2 weeks setting aside around 1 hour each working day, estimating 10 hours in total had been spent on exercise. He agreed it was a big exercise to do from scratch. When he discussed the scoring with Mr Hendrickson, they looked at each individual and the entire scores for that individual under each skill and aptitude together. They didn't match up on every score, but he did not feel that there was a massive difference between them. Any differences were resolved by discussion and coming to an agreement. It was pointed out that with 21 operatives, 29 skills and 29 aptitudes to assess, each of them was having to consider 1280 different scores. He was challenged as to how much time could have been spent on each score given the total amount of time taken on the exercise, but rejected any suggestion that they marked employees on the basis simply of a "feeling".

54. Ms Stephenson's relatively high aptitude scores were raised with him in the context of Mr Redhead having said in his witness statement that she was very needy, lacked confidence and needed to ask for help. He said that when she knew what she was doing she was very fast, took care and her quality/concentration was good.

55. He was referred to a score for Mrs Mortimer for back shell tightening, where she had been awarded 2 points for the skill and 2 points for the aptitude. This contrasted with a 2012 skills matrix which had been disclosed where she scored 5 points in each. He had said in evidence that once someone had a skill, they didn't lose the skill. He could not, therefore, explain that difference in scoring. On re-examination he was asked about back shell tightening and said that over the years most jobs had become harder.

56. On 2 July Mrs Unitt, Mr Hendrickson and Mr Redhead met with Mr Cooke, together with Mrs Mortimer. The union asked why the respondent wouldn't release more recent employees who had been of the business for less than 2 years given the minimal cost of doing so. Two individuals had been offered permanent employment contracts in January, albeit they had been with the respondent in excess of a year previously on an agency basis. Mrs Unitt explained that, although the redundancies would save costs, they needed to reduce staff, but at the same time ensure that they retained those who had the skills and ability required for the work they had coming in. There was then a discussion of how the skills matrix scores would be ascertained. On 3 July Mr Cooke was provided with a blank copy of the skills matrix.

57. On 4 July individual consultation meetings were conducted by Mr Hendrickson, Mr Redhead and Mrs Unitt with the 5 employees identified from the scoring as at risk of redundancy. They had all been provided with the skills matrix and scoring in advance. This group consisted of the 4 claimants and an employee called Kinga. At this stage Mrs Metcalf had scored 410 points on the skills matrix, Mrs Mortimer 478, Mrs Gaughan 482,

Mrs Stephenson 488 and Kinga 516. The sixth highest score was 539 points. The claimants were represented by Mr Cooke with Mrs Stephenson accompanied in addition by a colleague Mrs Robertson.

58. At the commencement of the first consultation meeting Mr Cooke read from a prepared statement which was handed to Mr Hendrickson. He stated that the union had concerns about the matrix which used current skill levels, but nothing more, against a clear history of the workforce raising concerns about the lack of training opportunities. Reference was made to the meeting back in 2014 which led to the grievance heard in February 2015. Any skills gap was said to be by virtue of inaction on the part of the respondent. Complaint was also made regarding the hiring of staff in January, failing to seek flexible working and not taking into consideration, for instance, attendance, length of service or disciplinary record. Staff ought also to have been allowed a period of retraining.

59. Similar issues were raised by or on behalf of all of the claimants. They queried the amount of training given and that whether the data used on performance, timings and quality, had involved group or individual job data. The data sheets were disclosed to the claimants. Mr Hendrickson undertook to consider their representations.

60. As a result, he considered that they should look at quality and timings for employees on individual jobs only. Also, the selection criteria were adapted to include disciplinary record, attendance (based on employees' Bradford factor scores) and work-related qualifications.

61. The claimants had argued that they should receive a nominal score for skills they did not possess because they felt it was unfair that they had not been trained in all skills. The respondent did not view this to be a reasonable approach and considered that scoring someone for a skill they did not have would lead to an artificial result which would not have achieved the respondent's aim of retaining the most skilled workforce. Length of service was also not to be included as it was not felt to be relevant to assessing the abilities of the workforce. Initially the respondent, in terms of work related qualifications (added to the assessment at the union's request), was looking at first-aid, fire warden training and health and safety related qualifications. It was explained that in the event of a tie break the skills matrix score would be the determining factor. The respondent in fact did not have a significant issue with sickness absence or disciplinary warnings amongst the assembly operatives.

62. Mr Hendrickson wrote to those at risk on 22 July saying that they were considering including disciplinary record, attendance record and work-related qualifications in addition to the skills matrix. He attached a proposed redundancy selection assessment form stating that in the event of a tie-break, the skills matrix score would be the determining factor. Comments

were requested by 29 July. The aforementioned form made available a score of 10 – 70 points, increasing in 10 point increments, benchmarked against a range of skills matrix points divided into hundreds from 350 to 950 and above. A score of 0 would be applicable if there was no current disciplinary record with a deduction of 20 points for a first written warning and 40 points for a final written warning. A sliding scale of points was provided for based on a Bradford factor score with the highest score of 40 points available for a rating of 0. An additional 10 points were available for each work-related qualification up to a maximum of 40 points.

63. Mr Cooke replied on 29 July disagreeing that training had been accessible to all employees. He questioned looking back over a period of 5 years when assessing the disciplinary record and believed that as with the Bradford factor scoring the review period should be no longer than 12 months. He gave his view that had the respondent actioned the points in the agreed statement after the grievance regarding training, staff would have been better skilled. He also noted that some employees selected had been used in the past to train some of those employees who had now outscored them. He maintained the stance that the redundancy criteria remained fundamentally unfair and unjust.

64. ***Mrs De Kok responded to Mr Cooke disagreeing with his comments regarding the attainment of skills. The skills matrix scores were still to be used as part of the selection criteria. She agreed however to limit the time in respect of disciplinary records to the previous 12 months. Work related qualifications were said to be open to everyone and would be scored as previously proposed.***

65. The scoring was then redone by Mr Hendrickson and Mr Redhead. Mr Redhead and Mr Hendrickson reviewed the quality and efficiency data they held so that they considered only individual jobs, rather than where faults had simply been identified attributable to a group of employees which included the individual at risk. However, the scores of the claimants relating to the skills matrix remained the same. The process indeed resulted in the same 5 individuals receiving the lowest scores. Their considerations had involved initially Mrs Mortimer being penalised by 20 points for a disciplinary issue which then fell out of the new 1 year period of consideration. Ultimately, Kinga achieved a score of 20 points, Mrs Mortimer, Mrs Metcalf and Mrs Stephenson 50 points and Mrs Gaughan 60 points. This put Mrs Gaughan in a tie-break situation, but she was still provisionally selected for redundancy on the basis of her skills matrix score of 482 points compared with the other person with 60 points who had a skills matrix score of 539 points.

66. The 5 lowest scoring individuals were notified by letter dated 8 August with a breakdown of their individual scores attached.

67. A second round of individual consultation meetings took place with Mrs Mortimer, Mrs Metcalf and Mrs Stephenson on 15 August. Mrs Gaughan was seen on a later date due to holiday absence. At the meetings, the quality and efficiency data considered by the respondent was provided. The claimants were again given an opportunity to question and challenge their scores. Despite representations of the contrary, the respondent did not feel it appropriate to score individuals under work qualifications if they had undergone manual handling training, as it was health and safety requirement that all employees undertook such training. However, it was agreed that NVQs could be looked at if certificates could be provided. Such qualifications had been taken when the respondent was struggling in production around 2008/2009. The scoring was then recalculated following receipt of NVQ certificates. The outcome was, however, still not affected. Kinga remained on 20 points, Mrs Metcalf, Mrs Mortimer and Mrs Stephenson scores increased to 60 point and Ms Gaughan then tied on 70 points with 4 other employees but in circumstances where each of those 4 employees had a higher skills matrix score.

68. Following these meetings, Mr Hendrickson and Mr Redhead looked over the scoring again. Mr Hendrickson made the decision to give those previously selected notice of termination of employment.

69. The claimants each gave evidence about their skill/aptitude and scoring. Mrs Stephenson in her witness statement said that she had not been given training or the chance to do jobs which would improve her score. She was good at the stripping work and happy to do it, so was usually asked to work in that area. She now realised that she did not as a result have the chance to do other jobs which would have increased her matrix score. She felt there was unfairness in that she hadn't been given any score for the jobs that she hadn't worked on – unfairness lying in her lack of chance to do so. She been asked if she was willing to consider working in the 3M mask area on a zero hours contract, but did not wish to do this.

70. On questioning, she said that she would be happy to do other work if she had been asked but admitted that she enjoyed what she did. She referred to a need for reassurance about her work and accepted that she would have needed more training and to have increased in her confidence in order to score higher. At the second consultation meeting she referred to her poor scores resulting from lack of training. The evidence was also that the work was becoming more complicated - she accepted that people had got better knowledge than her and she needed more training. Her confidence had gone and she believed that Mr Redhead was not helping her. She accepted that some jobs were beyond her capabilities. She agreed, when put to her that, where more complicated jobs were concerned, she would be one of the weaker people because she was not good at the more difficult jobs.

71. Mrs Gaughan described how she had held previously a quality assurance role until 2015. She found the role stressful and had returned to the role of

assembly operative at her request. Thereafter, she was working on a line with the other claimants which she said was usually given the higher volume and lower skilled work. In her previous role she used to work on high level jobs and said that she had worked on pretty much all types of jobs within the respondent. She had previously checked the quality of work of everyone else within the workshop and had passed the IPC620 qualification. She said that she was confident that she had the required skill and aptitude to do the full range of jobs, but was not given the chance. She was not willing to take alternative employment on a zero hours contract.

72. When put to her in cross examination that the work had become more complicated, she said that she did not know as she never went on those jobs. She agreed that her main issue was that she hadn't got the chance to do more complicated work and that was why her scores were lower. She was not given the opportunity to work on new cables. However, she maintained that she had not lost the skills – she had simply not performed certain skills for 4 or 5 years. She agreed with a proposition that she was not saying that her score on aptitude was wrong, but rather that the respondent was to blame for that low score. She agreed that she made no request for training after reverting to the assembly benches. She said that she did not do so because she believed that she had the higher scores on the skills matrix as she had done the work previously.

73. Mrs Metcalf said that she had not been given the chance to work on the full range of jobs, hence her inability to score full points for certain types of work. She also had not worked for the full range of customers. The suggestion of 3M mask work without any guarantee of work was not acceptable to her. When put to her that it was no surprise that she came where she did in the scoring, because she had not had a chance to develop her skills and show her ability, she agreed. She agreed further that an employee could become de-skilled over a passage of time without carrying out skills. She agreed that she had been kept on lower level work and had decided just to get on with the job. She appreciated that she could have become deskilled in doing so.

74. Mrs Mortimer considered that the lower skilled work she carried out was still required. She did not recognise any decrease. She was particularly upset as she understood her matrix score had previously been much higher and she had passed the IPC620 qualification as long ago as 2006. She had only been invited to do so because at the time she had a high matrix score of 750. She had since renewed the qualification every 2 years. She had trained other workers at times. She felt it was inappropriate at a consultation meeting for Mr Hendrickson to produce an envelope containing connectors which he said was an example of a lack of quality in her work. She felt it unfair that she was not scored on skills that she had not been given a chance to acquire. She believed that she had not been put on the higher skilled jobs which would have improved her score. She was aggrieved that she had only been scored for 1 NVQ qualification when she had a second. The tribunal notes that the respondent did not score anyone for multiple

NVQ qualifications and the only individual who achieved a score for a qualification in addition to Ms Metcalf's had been trained in first-aid and as a fire warden.

75. Mrs Mortimer agreed in questioning that over time the work had become more technically difficult. She also accepted that the reason why she did not get better scores was because she hadn't been trained upon particular work – she said she had not been given the opportunity. Mrs Mortimer accepted that she had not asked for further training since an incident on the line with another employee where she felt she had been accused of refusing to do a job. When put to her that she had not asked for training, she said that that was the position she had held for some years before the redundancy exercise. She said that management was to blame for her situation. If they had known her scores were going down, she should have been given a review and she could have asked to go onto jobs to bring her scores back up. She said that she would have never taken a zero hours contract and accepted a position on the 3M masks line.

76. At the date of their dismissals, Mrs Stephenson was 48 years of age, Mrs Gaughan 50, Mrs Metcalf 58 and Mrs Mortimer 61. The other individual, Kinga, who was made redundant was aged 25 – the youngest assembly operative. In terms of age range within the respondent as a whole, in July 2019, out of a total number of 43 employees, 14 were between the ages of 45 and 70 years. Amongst the 21 assembly operatives, there were 3 employees within the 48 years and over age group, aged 50, 54 and 56 years of age, who survived the redundancy exercise and who had skills matrix scores respectively of 776, 539 and 865 points. Statistically, 4 out of 7 assembly operatives aged 48 years and over were made redundant compared to 1 out of 14 below the age of 48.

77. Mrs Metcalf's evidence was that the individuals aged 50, 54 and 56 who were retained had the "best skills", something she could see for herself from working with those individuals. They couldn't have been let go by the respondent, she said, because others did not have their skills. Kinga couldn't be retained because there were such significant issues with her attendance and disciplinary record. She had no recollection at all of Mrs De Kok ever saying (which Mrs De Kok denied) that she wanted to get rid of older workers - she said this was something she would have remembered. Mrs Stephenson said that she had heard that comment being made in the workshop on one occasion, in Mrs Metcalf's presence and a long time previously. Mrs Stephenson was unable to give any context, was vague in her recollection as to what was said and accepted that she hadn't discussed the matter with anyone else thereafter. She did also recall a staff meeting when she said Mrs De Kok said that she needed younger people with better eyesight as the work was very intricate. She thought that Mrs De Kok didn't really mean to refer to older people and described her language as clumsy.

78. Mrs Mortimer raised at her appeal meeting with Mrs De Kok that Mrs De Kok had made a comment previously asking why she shouldn't have younger more agile workers in her workforce. In witness evidence she referred to a comment attributed to Mrs De Kok about wanting younger faster workers with better eyesight. In cross examination it was clear that if this comment had been made it dated back to 2010. Mrs Mortimer accepted that the 3 older people retained were engaged in more complicated work than her, apart from one individual who, nevertheless, she said, was the only person in the workforce who could do a certain job and would be safe until someone else had been trained up. Mrs Gaughan said that the 3 older workers retained did specific jobs which made them have higher scores. She agreed that the respondent wanted to retain people with their skills.

79. Assemblers were able to wear glasses at work and could also utilise light magnifiers located on the desks and microscopes for even more intricate work if needed. Mrs Mortimer said that none of the 3 older employees retained wore glasses. Mrs Gaughan wore glasses for distance, but did not have a problem with reading. She had struggled to see numbers written on particular blocks because they had been covered over. Mrs Metcalf and Mrs Stephenson wore glasses to assist with close work. Mrs Metcalf and Mrs Stephenson also used the "maglights" provided to assist with such work. There is no evidence as to the use of eyesight correction within the workforce as a whole.

80. Nor is there any evidence before the tribunal of levels of manual dexterity across the workforce. Mrs Mortimer said she had problems with her hands but had not been diagnosed as suffering from repetitive strain injury. Mrs Gaughan said that she thought she had rheumatoid arthritis, although she had not seen anyone about it. She had problems with her hands when it was cold. She said that she suffered repetitive strain in her fingers but didn't know if that was something experienced, amongst the workforce as a whole. Mrs Metcalf said that she experienced cramp in her thumb, but if she rubbed it, that would release it. She said that this had come on over the preceding couple of years. Mrs Stephenson said that she had problems with cramp, but not with carrying out a skill or coordination. She sometimes did not have the strength to squeeze particular tools, but said that this was not a regular task.

81. In terms of time is allocated for assembly of any individual items, job timings were assessed and benchmarked against the average time taken for the job to be completed. The respondent then took no issue with any timings provided they were within 70% of that job timing.

82. Mr Hendrickson accepted that he was aware that Mrs Metcalf, Mrs Mortimer and Mrs Stephenson were union members but he had no knowledge that Mrs Gaughan also was. The claimants' primary case, however, is not that he or Mr Redhead were concerned about their union membership, but that a desire to remove trade union members was driven by Mrs De Kok. It was

said, without any evidential basis, that she had pressured/instructed Mr Hendrickson and Mr Redhead to score the claimants so that they were at risk of redundancy because of her antipathy towards the union and them as union members. Mrs De Kok denied any such antipathy in her evidence and said that she had a positive relationship with the union. The tribunal has noted the discussion which took place regarding the training grievance and the jointly agreed statement which was issued with the union after a meeting on 6 February 2015. It notes also that following this meeting, on 23 February, Mrs De Kok sent an email seeking to arrange a further meeting as Mr Hazlewood of the union, who had asked that she liaise with the union to do so. She asked a question about the notes of the meeting being displayed on the staff noticeboard. It appears that the delay in arranging a meeting was in part down to the union. On 15 April 2015, Mr Hazlewood apologised that the dates proposed clashed with his periods of leave. The correspondence with Mr Hazlewood appears convivial and constructive. There is further evidence of Mrs De Kok seeking to involve the union and indeed at times of the union representatives having difficulty in freeing up time to meet. There is evidence of the union being involved in annual pay negotiations and, of course, the tribunal has referred to the involvement of the union at an early stage in the redundancy process.

83. Mr Boyd in his submissions accurately summarised the claimants' evidence in support of their trade union membership being the reason for their dismissals. Mrs Stephenson disagreed with Mrs De Kok's evidence that the respondent had a good relationship with the union, but when asked about any negative situation involving the union said that she couldn't remember any situation which was bad and said that she never went to union meetings. She, in common with the other claimants, was asked about Matt Cooke's and the various previous union representatives' (Colin Griffiths, Steve Stacey, Phil Sullivan, Donna Cibor, Keith Hazlewood, Billy McCreight, Keith Hazlewood (returning for a second spell) and Rob Jubber) relationship with Mrs De Kok. She could not remember many of those names and had nothing to say regarding their relationship with Mrs De Kok. She was unaware of any industrial unrest which might explain some kind of antipathy towards the union. Her position was that she felt that Mrs De Kok never wanted the union in the workplace but was unable to say why. She made reference to Mrs De Kok allegedly saying that she "would get rid of the union if the staff wanted this", but said in cross examination that she did not remember this being said, but it was "ages ago". She could not give any context and said that it could have been said as a joke. She couldn't recollect what else had been said at the time. She said that this was the sole comment upon which she based her allegation that she was selected for redundancy because of trade union membership.

84. Mrs Gaughan also did not know what Mrs De Kok's relationship had been with the string of union representatives. She was unaware of any industrial unrest. It was pointed out that at her appeal she had suggested there were "numerous occasions" which suggested negativity of the respondent towards the union but could not explain why she had referred to only one

occasion in her witness statement. In evidence before the tribunal she could not be clear whether there was in fact just the one occasion. This again related to the alleged comment of Mrs De Kok at a staff meeting which she thought occurred 3-5 years previously. She could not remember any context, admitting that the incident took place long time ago and she couldn't remember. She then said that Mrs De Kok had said similar things on a regular basis (despite that suggestion not having been put to Mrs De Kok in cross examination) but could provide no details.

85. Mrs Metcalf had been a member of the union since 2004 and described herself as active in it. Whilst not a representative, she would sit in on meetings when Mrs Mortimer wasn't present. As far as she was aware, she said it was correct to say that Mrs De Kok had a good relationship with Matthew Cooke. She did not provide any evidence of a different position in respect of the other historic representatives. She said that there had been some friction between Mr Sullivan and Mrs De Kok, but she had not witnessed it and that was around 2011 or earlier. As regards Mrs De Kok's alleged comment at the staff meeting, she could not remember when this was said or any context. She accepted that she did not approach anyone in the union to let them know that such a comment had been made. She explained that she thought she had been selected for redundancy because of union membership because she and her fellow claimants were in the union and were made redundant.

86. Mrs Mortimer suggested that Mrs De Kok did have a "frosty" relationship with a number of trade union representatives. She referred to Mrs De Kok constantly asking her questions in a meeting and described her manner of leaning forward quite aggressively when questioning her. She says that she was advised by the full-time officer that she should not have to put up with this and subsequently she stood down as shop steward and became the union's branch secretary. The meeting at which Mrs De Kok was alleged to have made a comment about removing the union was, she thought, around 2011. She accepted that in a previous redundancy exercise no one had been targeted because of trade union membership. She sought to explain Mrs De Kok's reluctance to consult with the union with reference to her not accepting any of the recommendations made by the union in respect of the grievance in 2015 regarding training. She accepted that this was, however, a "two-way street" where both the respondent and the union appeared to be to blame for letting matters drift. She said that she had held a strong view that from around 2008 Mrs De Kok did not want the union involved in the respondent.

87. It is accepted that Mrs Stephenson was disabled person by reason of her having difficulty reading and writing. It is not in dispute that she never specifically stated to anyone that she was disabled and indeed she did not appreciate that she was. Once in cross examination she responded that she was not disabled.

88. Mr Hendrickson's evidence was that he was unaware of any disability which Mrs Stephenson suffered from. He said that allowances would have been made for anyone with a learning disability but they had no knowledge of this. Any impairment she might have had was, he said, "never visible". When asked if she often asked him for help he said that this did not relate to any disability-related difficulties. He agreed that the fact she needed help at times in her work did adversely affect her score on aptitude.

89. Mr Redhead said that no one knew anything about Mrs Stephenson having a learning disability. If anyone had known, it would have been him as they were quite close and used to socialise together out of work. When put to him that Mrs Stephenson used to describe herself as "thick" he said that she did so in a very flippant off-the-cuff manner. He did have to show her how to do things at times but this he said happened all the time in the workshop, not just with Mrs Stephenson. He said that she often filled out job forms and booking out cards without noticing any difficulty she had in doing so. He said that she was very quick on jobs she was confident with. He recalled that he and Mrs De Kok had met with Mrs Stephenson at a time when she was becoming stressed about the quality of her work. A plan was put in place so that if he was not available others would be on hand to check her work if she felt she needed that. He said she did not say that she struggled in learning new tasks. They simply wanted to stop her stressing when she went home on a night. Their evidence is accepted. He agreed that, a lot of the time, she was put on stripping jobs because she was quick and accepted that possibly this denied her opportunities given to others. Mr Redhead's evidence, in particular regarding his knowledge, is accepted. He came across as entirely genuine and hurt by the suggestions by Mrs Stephenson that he would simply walk away when she asked for assistance. The tribunal does not accept that he acted in this way which is at odds with the good personal relationship he had with Mrs Stephenson. Mrs Stephenson's own evidence was contradictory and at times exaggerated. The tribunal does not accept that the claimant told the respondent and in particular Mr Redhead and Mrs De Kok in a meeting of her disability impairment. This was not a feature of her primary witness statement evidence. Nor does she provide evidence of the frequency of the problem she experienced due to her lack of reading ability at work. There is no evidence that difficulties in writing impacted upon her work.

Applicable law

90. Section 98(1) of the Employment Rights Act 1996 ("the ERA") provides:

> "*(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 -*
>
> *the reason (or, if more than one, the principal reason) for the dismissal, and 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."*

91. Redundancy is a potentially fair reason for dismissal pursuant to Section 98(2)(c) of the ERA. Redundancy itself is defined in Section 139(1) of the ERA as follows*:*

> *"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—*
> *a. to carry on the business for the purposes of which the employee was employed by him, or*
> *b. to carry on that business in the place where the employee was so employed, or*
> *(b) the fact that the requirements of that business—*
> *for employees to carry out work of a particular kind, or*
> *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."*

92. In **Murray –v- Foyle Meats Ltd 1999 ICR 827** the House of Lords considered the test of redundancy and Lord Irvine suggested that Tribunals should ask themselves two questions. Firstly, does there exist one or other of the various states of economic affairs mentioned in the section? Secondly, was the dismissal wholly or mainly attributable to that state of affairs?

93. Section 98(4) of the ERA provides:

> *"(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) –*
>
> *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*
>
> *shall be determined in accordance with equity and the substantial merits of the case."*

94. The Tribunal in a redundancy case will be concerned with reasonableness in the advance warning of redundancy, in the quality of individual consultation, the method of selection for redundancy and in the employer's efforts to identify alternative employment. How this test ought to be applied in redundancy situations has been the subject of many judicial decisions over the years, but some generally accepted principles have emerged including those set out in the case of **Williams –v- Compair Maxam Ltd 1982 IRLR 83** where employees were represented by an independent union. In the Williams case it was stated:

> *"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."*

95. Provided an employer's selection criteria are objective, a Tribunal should not subject them or their application to over minute scrutiny – see **British Aerospace plc v Green 1995 ICR 1006**. In **Swinburne and Jackson LLP v Simpson EAT 0551/12**, the EAT stated that: "in an ideal world all criteria adopted by an employer in a redundancy context would be expressed in a way capable of objective assessment and verification. But our law recognises that in the real world employers making tough decisions need sometimes to deploy criteria which call for the application of personal judgement and a degree of subjectivity. It is well settled law that an employment tribunal reviewing such criteria does not go wrong so long as it recognises that fact in its determination of fairness." However, where there is clear evidence of unfair and inconsistent scoring the dismissal is likely to be unfair. An employer still needs to demonstrate that it established a good system of selection which had been administered fairly.

96. Whilst the question of what constitutes fair and proper consultation will vary in each individual case, consultation involves giving the employee a fair and proper opportunity to understand fully the matters about which he/she is being consulted on, to express his views on those subjects with the consultor thereafter considering those views properly and genuinely. It was suggested in **John Brown Engineering Ltd v Brown 1997 IRLR 90 EAT** that a fair process would give an individual employee the opportunity to contest his/her selection which would involve allowing him/her to see the details of his/her individual redundancy selection assessment.

97. If there is a defect sufficient to render dismissal unfair, the Tribunal must then, pursuant to the case of **Polkey v A E Dayton Services Ltd [1998] ICR 142** determine whether and, if so, to what degree of likelihood the employee would still have been fairly dismissed in any event had a proper procedure been followed. If there was a 100% chance that the employee would have been dismissed fairly in any event had a fair procedure been followed, then such reduction may be made to any compensatory award. The principle established in the case of **Polkey** applies widely and beyond purely procedural defects.

98. Section 152 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that dismissal is automatically unfair if the reason or principal reason for it is that the employee was a member of an independent trade union. Section 153 extends the protection to where an employee has been selected for redundancy on union grounds. The employee has an evidential burden to show, without having to prove, that there is an issue which warrants investigation and which is capable of establishing the automatically unfair reason. However, once the tribunal is so satisfied, the burden reverts to the employer, who must prove on the balance of probabilities which of the competing reasons was the reason or principal reason for dismissal. If the employment tribunal rejects the employer's purported reason, it may conclude that this gives credence to the reason advanced by the employee but it is open to it to instead conclude that the real reason for dismissal is one not advanced by either side.

99. The claimants complain of direct disability discrimination based on age – with reference to them being in an age group of employees aged 48 years and over. In the Equality Act 2010 direct discrimination is defined in Section 13(1) which provides: *"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."* In terms of a relevant comparator for the purpose of Section 13, *"there must be no material difference between the circumstances relating to each case".*

100. The Act deals with the burden of proof at Section 136(2) as follows:-

> *"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes the provision concerned, the court must hold that the contravention occurred.*
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provisions".*

101. In **Igen v Wong [2005] ICR 935** guidance was given on the operation of the burden of proof provisions in the preceding discrimination legislation albeit with the caveat that this is not a substitute for the statutory language. The Tribunal also takes notice of the case of **Madarassy v Nomura International Plc [2007] ICR 867**.

102. It is permissible for the Tribunal to consider the explanations of the Respondent at the stage of deciding whether a prima facie case is made out (see also **Laing v Manchester CC IRLR 748**). Langstaff J in **Birmingham CC v Millwood 2012 EqLR 910** commented that unaccepted explanations may be sufficient to cause the shifting of the burden of proof. At the second stage the employer must show on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of the protected characteristic. At this stage the Tribunal is simply concerned with the reason the employer acted as it did. The burden imposed on the employer will depend on the strength of the prima facie case – see **Network Rail Infrastructure Limited v Griffiths-Henry 2006 IRLR 865**.

103. The Tribunal refers to the case of **Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** for guidance as to how the Tribunal should apply what is effectively a two stage test. The Supreme Court in **Hewage v Grampian Health Board [2012] UKSC 37** made clear that it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

104. Indirect discrimination, as defined in Section 19 of the Equality Act 2010, occurs where:

> *"A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*

For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

A applies, or would apply, it to persons with whom B does not share the characteristic,

it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

it puts, or would put, B at that disadvantage, and

A cannot show it to be a proportionate means of achieving a legitimate aim."

105. In the Equality Act 2010 discrimination arising from disability is defined in Section 15 which provides:-

> *"(1) A person (A) discriminates against a disabled person (B) if – A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *A cannot show that treatment is a proportionate means of achieving a legitimate aim."*

106. The duty to make reasonable adjustments arises under Section 20 of the 2010 Act which provides as follows (with a "relevant matter" including a disabled person's employment and A being the party subject to the duty):-

> *"(3) The first requirement is a requirement where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

107. The tribunal must identify the provision, criterion or practice applied, the non-disabled comparators and the nature and extent of the substantial disadvantage suffered by the claimant. 'Substantial' in this context means more than minor or trivial.

108. The case of **Wilcox –v- Birmingham Cab Services Ltd EAT/0293/10/DM** clarifies that for an employer to be under a duty to make reasonable adjustments he must know (actually or constructively) both firstly that the employee is disabled and secondly that he or she is disadvantaged by the disability in the way anticipated by the statutory provisions.

109. Otherwise in terms of reasonable adjustments there are a significant number of factors to which regard must be had which as well as the employer's size and resources will include the extent to which the taking the step would prevent the effect in relation to which the duty is imposed. It is unlikely to be reasonable for an employer to have to make an adjustment involving little benefit to a disabled person.

110. If the duty arises it is to take such steps as is reasonable in all the circumstances of the case for the respondent to have to take in order to prevent the PCP creating the substantial disadvantage for the claimant. This is an objective test where the tribunal can indeed substitute its own view of reasonableness for that of the employer.

111. Applying the legal principles to the facts as found, the Tribunal reaches the following conclusions.

Conclusions

112. The claimants contend that their dismissals and, more particularly, their selection for redundancy was because of their trade union membership. The tribunal has noted the evidence advanced by the claimants in support of the contention that Mrs De Kok had an antipathy towards the recognised trade union which translated into an antipathy towards the claimants as trade union members. The claim is not based on their trade union activities or on them or the union somehow being a thorn in the respondent's side or a source of industrial unrest. There is no evidence that the union was in fact particularly active within the respondent. The correspondence the tribunal has seen is indicative of a quite normal relationship between an employer and trade union. There is evidence of Mrs De Kok engaging appropriately with the union in a number of matters and trying to follow-up matters to allow their continued involvement. In the redundancy exercise itself she recognised the need to consult collectively and was willing to allow Mr Cooke to make suggestions and indeed accepted suggestions from him regarding the criteria used. Mrs Mortimer might have felt upset by Mrs De Kok's behaviour at some meetings, but she remained as branch secretary and still attended meetings and was able to represent people.

113. The claimants' evidence is that roughly 7 of the assembly operatives were trade union members. Obvious in the redundancy exercise they, i.e. 4 trade union members, were selected. However, the tribunal accepts that the selection made was genuinely based upon the criteria applied and, in particular, with reference to skills matrix scores. There is no evidence that those scores were manipulated because of trade union membership and no suggestion put to Mr Redhead or Mr Hendrickson that they held a particular antipathy towards union membership. There is no evidence that Mrs De Kok pressurised them, let alone instructed them, to ensure that the claimants were selected for redundancy on the ground of their trade union membership.

114. The main piece of evidence advanced by the claimants to persuade the tribunal to infer an improper motivation on Mrs De Kok's part, relates to a staff meeting at which she is accused of saying that, if the staff wanted to be rid of the union, she would arrange that. The comment is not accepted by Mrs De Kok. On balance, the tribunal considers that something was said of that nature given the, albeit limited, recollections of the claimants, but it is impossible to conclude more regarding the specificity, nature and intent of such, given the lack of contextual evidence which the claimants could provide. It does not appear to the tribunal that the comment was likely to have been taken seriously or have created genuine concern in circumstances where none of the claimants raised the matter with the union officers. Furthermore, whilst it is difficult to ascertain from the claimants' evidence when a comment, taken in the way it was, was likely to have been made, it was clearly, to quote Mrs Stephenson, "ages ago" and the best evidence perhaps is from Mrs Mortimer who had the greatest involvement with the union and who placed the comment at around 2011. There had been a redundancy exercise since then, she accepted, where trade union members had certainly not been targeted.

115. Taking the claimants' case at its absolute highest, the tribunal cannot and does not conclude that a momentary comment made some years previously founds any basis for concluding that Mrs De Kok in a redundancy exercise in 2019 chose to target any individuals for redundancy on the basis of trade union membership. Again, the particular trade union membership of any of these claimants was of no obvious concern or issue for the respondent in circumstances where clearly the level of skills of those individuals was.

116. The tribunal next turns to the complaint of direct age discrimination. Again, fundamentally, the tribunal accepts the explanation advanced on behalf of the respondent that the reason for the selection of the claimants was primarily skills based and that their age formed no part whatsoever of the consideration of the claimants for redundancy. There is no basis for concluding that age had any influence on training opportunities. Workers older than the claimants had put themselves in a position of being amongst the most skilled in the workforce. Younger employees with less service had

attained a greater range of skills than the claimants, but where the tribunal is satisfied that this occurred arising out of the aptitude they showed and a willingness to challenge themselves. That is what was missing in a comparison with the claimants. Training was not structured, planned or monitored, but did require the showing of an interest and a base aptitude. The claimants had all become settled and content in the work which they did for a significant period of time, which put them in danger in the context of a change in emphasis in the respondent's work and a greater complexity in the work it could economically carry out. The claimants were all long serving and the tribunal does not accept that they were excluded from training opportunities because of age or that, had they sought it, the claimants could not have been amongst the more highly experienced members of the workforce.

117. The selection of an age group of those aged 48 and above as the source of less favourable treatment clearly derived from that being the age of Mrs Stephenson, the youngest of the claimants at the time of their dismissal. However, within that age group the tribunal has noted 3 employees older than Mrs Stephenson and Mrs Gaughan, who were not made redundant and that the only person other than the claimants who was made redundant was the youngest of the assembly operatives. The evidence of the claimants is in fact that the employees aged 50, 54 and 56 were retained because they were the most skilled workers and/or possessed a skill unique within the respondent's workforce. It surely follows that had any of the claimants been so skilled, they too would have survived the exercise. The selection for redundancy was to no extent whatsoever because of their age.

118. The claimants also pursued a complaint of indirect age discrimination. The third PCP relied upon relating to not giving the claimants the opportunity to develop their skills because of their age has being withdrawn on the claimants' behalf. Mr Williams was sensible to do so in circumstances where there was no evidence of a practice in place depriving the claimants' age group of an opportunity to train. The tribunal is left with the first PCP of the use of skill and aptitude in the redundancy selection exercise and the second of the use of criteria which considered an employee's job timings and speed of completing work. The respondent accepts that it did apply these PCPs.

119. The claimants were required to produce further and better particulars of the basis upon which they pursued their indirect age discrimination complaints. They clarified that the claims were based upon effectively a deterioration in capability with age. They raised that those in the claimants' age group were more likely to suffer from age-related visual changes such as presbyopia as well as a deterioration in manual dexterity and the prevalence of repetitive strain injury. However, evidence to support this and the disadvantage caused is absent. Where the claimants had issues with presbyopia, they accepted that these were corrected by wearing glasses.

There was no evidence of the claimants or others within the over 48 age group more generally suffering a deterioration in manual dexterity or repetitive strain injury.

120. There is statistical evidence which might point to an age-related disadvantage in the sense that for those aged over 48 there was a 4 in 7 chance of selection for redundancy against a 1 in 14 chance for those under the age of 48. Evidentially, however, there is no basis for drawing a causal link between age and age-related deterioration in capability which in turn has disadvantaged the older age group in the scoring. Clearly, 3 out of 7 in the older age group were able to and did score very highly in the skills matrix and were described by the claimants as the most skilled employees in the entire workforce.

121. Even if a group disadvantage had been shown, the claimants have failed to show that they suffered any individual disadvantage arising out of any identified health issues they suffered, whether as part of natural ageing or otherwise. In fact, the claimants suffered no such disadvantage on the evidence of their health advanced. The tribunal has no evidence that the claimants were penalised for being slow or that they were indeed any slower than anyone else. The respondent has effectively shown that the disadvantage suffered by the claimants was related to their skills which in turn arose out of primarily a concentration of the claimants on lower skilled work and work of a limited variety. This arose largely, on the claimants' own evidence, out of their choices and certainly not out of any health-based impediment which arose out of their being in the older age group.

122. In any event, the tribunal is satisfied that the respondent pursued a legitimate aim in seeking to retain a workforce with the skills most needed for the type of work the respondent was likely to obtain in the future. Even had a reduction in skill matrix scores being related to age-related health issues, the respondent acted proportionately in making the assessment it did. In so far as speed of work was ever considered, the tribunal notes that an expected speed had been ascertained for each task, but that no one was penalised unless they fell below a 70% attainment of that work rate.

123. The tribunal now deals with the particular complaints of disability discrimination brought by Mrs Stephenson. The tribunal firstly concludes that this was not a situation where the respondent had actual knowledge of her (now accepted) difficulty in reading and writing or where they ought reasonably to have known about such impairment. The evidence is not of her requiring regular assistance in reading and writing, for instance. Mrs Stephenson never stated to anyone from the respondent that she believed she had a disability. Mrs Stephenson clearly had confidence issues and appreciated reassurance and assistance from, in particular Mr Redhead, but this did not arise out of difficulties in reading or writing and he certainly had (reasonably) no inclination that this was a source of her problems. Referring to herself quite casually as being "thick" is insufficient to have put

the respondent on notice either of her impairment or of how it disadvantaged her in day to day or work related activities. The way Mrs Stephenson referred to herself was unnoteworthy, where in any workforce such as the respondent's there will be some people who will better than others at reading and writing and there is no evidence of any indication which the respondent reasonably ought to have picked up upon that Mrs Stephenson had a disability impairment affecting her ability to carry out normal day-to-day activities.

124. Such conclusion is fatal to Mrs Stephenson's complaint that the respondent failed to make reasonable adjustments. The tribunal has, nevertheless, proceeded to analyse such complaints on the basis that there was sufficient knowledge to render the respondent potentially liable.

125. The first PCP relied on is particularised as "the requirement that she be sufficiently well to carry out the whole of her job description." The requirement that Mrs Stephenson be able to carry out the whole of her job description did not place her at a substantial disadvantage however, because she was capable of carrying out her role. There is no suggestion that she was taken to task for being unable to carry out her role and in particular no evidence that her difficulty in reading disadvantaged her in her work (or indeed in expanding the type of work she undertook). If she had any difficulty in reading a process diagram, she was able to seek assistance from a colleague or Mr Redhead and there is no evidence that assistance was never provided. The evidence again is not of reading and writing being a material requirement of the role.

126. The second PCP relied on is a requirement that Mrs Stephenson be able to read written instructions. Reading instructions was part of her role albeit not a significant part. However, again there is no evidence of this having placed her at a substantial disadvantage in the sense that others could have read instructions to her if she was having difficulty. Again, we are talking about very brief instructions which would not need to be regularly viewed or on a continuing basis.

127. The third PCP relied on is the application of the unmodified selection criteria. There is, however, no evidence that Mrs Stephenson was placed at a substantial disadvantage by the criteria under which she was scored or how those criteria were scored because of any issue she had in reading and writing. The tribunal has not been pointed to any score where a mark was low or lower due to any such difficulties. In fact, she was scored quite highly for her aptitude and to an extent at odds with the view the respondent took of her lacking in confidence and seeking reassurance about the quality of her work.

128. Mrs Stephenson next brings a complaint that her selection for redundancy was unfavourable treatment because of something arising in

consequence of her disability. To succeed in such a claim would require her to show facts from which it could be concluded that her scores were lower because of her difficulties in reading and writing. Whilst the respondent's evidence was that an employee would be downmarked if they required repeated and significant assistance and input of others, the reality of Mrs Stephenson's scoring is again that she was not so downmarked. Her aptitude scores were not low scores. Mrs Stephenson has certainly not pointed to any evidence which would support the cause of any unfavourable treatment in the sense of lower marks being related to her difficulties with reading and writing. Had the tribunal come to the point of accepting such causal link, it would still have been opened the respondent to defend the claim on the basis that, in using the skills matrix selection criteria, it was acting proportionately in pursuance of the legitimate aim of retaining the most skilled workforce. Whilst such justification would have been difficult for the respondent had it failed to comply with a duty to make reasonable adjustments, no such failure has been identified in this case.

129. Finally Mrs Stephenson brings a complaint of indirect disability discrimination. Mr Boyd's position was that this had been inadequately explained for the respondent to be able to answer and, it follows, for the tribunal to determine. Mr Williams was given an opportunity in submissions to elaborate, if he was able. The tribunal's understanding is that it is said that the selection criteria would put employees with difficulties in reading and writing at a disadvantage when compared to those who did not have that impairment. The claimant then it is said suffered such disadvantage herself. The claim was presumably pleaded in the alternative to the reasonable adjustment complaints on the basis that, in a complaint of indirect discrimination, there is no requirement of knowledge for the respondent to be liable. Nevertheless, there is a requirement to show a group disadvantage. No evidence or submissions in this regard have been advanced and, in any event, it is the tribunal's findings that the Mrs Stephenson herself did not suffer any individual disadvantage of being scored lower because of any literacy impairment.

130. All of the claimants' complaints of unlawful discrimination, including selection for redundancy on the basis of trade union membership, must therefore fail and are dismissed.

131. The tribunal turns now to effectively the primary complaint in any event of all the claimants, that of unfair dismissal. Obviously, on the tribunal's findings, such dismissals are untainted by any act of unlawful discrimination.

132. The tribunal accepts that the reason for the claimants' dismissal was redundancy. There was a reduced need for assembly workers to carry out the cabling work available in circumstances where high-volume and lower skilled work was in the decline due to cost pressures. Whilst the claimants may maintain that they had not noted a decline in their own work, the

genuineness of the redundancy situation was not seriously challenged, including at the time by Mr Matt Cooke.

133. Nor is there any challenge to the pool of selection, which the tribunal finds was reasonably determined by the respondent. This consisted of the 21 assembly operatives in circumstances where it was the work of assembly operatives which had declined.

134. Mr Williams has not sought to challenge the reasonableness of the level of warning and consultation in this case. There was indeed consultation which involved the claimants' union and which included discussion regarding the method of selection, before a recognition on behalf of the union that this would be primarily skills based. The selection criteria were further discussed and whilst not absolutely agreed, the respondent showed that it was open and willing to listen to Mr Cooke and to adjust the criteria to a significant extent to ensure that there was a consideration of wider factors than the skills matrix scores. There was then reasonable individual consultation with the claimants in 2 consultation meetings at which they were represented by their union. The right of appeal was afforded to them with a further set of meetings before the final decision on appeal was confirmed. Mrs De Kok was not involved in the initial scoring and was in a position to consider the appeals without bias.

135. The respondent acted reasonably in looking for alternative employment. The claimants have not pointed to any alternatives which could have been considered. The only alternative which the respondent could reasonably identify was working on the3M mask line. The respondent did not act unreasonably in offering this work despite it being on a zero hours contract basis. This was in circumstances where the work fluctuated significantly and where there could be spells indeed were there was nothing for the operatives to do. The claimants were all clear that they would never have accepted these positions given the lack of guaranteed hours.

136. The key issue in this case is how the claimants were selected for redundancy. The respondent firstly sought to conduct that selection by reference purely to skills matrix scores, but subsequently, having considered union representations, agreed to widen the criteria to include disciplinary record, attendance levels and work-related qualifications. The focus of the claimants' objections has been on the use of the skills matrix.

137. It was reasonable for the respondent to put the greatest emphasis on skills and work performance. In the context of a reduced workforce, where more of the remaining work and the future work anticipated involved the more intricate and complex types of cabling, it was essential for the respondent to retain employees who had the skills to complete such tasks and were able to make a quality product as efficiently as possible. Again,

no unfairness arises out of any argument that the claimants had not had an opportunity for training or to develop their skills.

138. It would have been reasonable for the respondent to have assessed individuals based on their existing skills matrix score, provided such scoring could have been shown to have been reasonably carried out. The tribunal has received no convincing explanation as to the reason why the existing skills matrix was not used. The notion that it would have been 3 months out of date seems curious in circumstances where the tribunal has no evidence that there would have been any material change in the assessment of employees with a gap of, at most, 3 months. This causes the tribunal to wonder whether this was a robust assessment of employees which represented a true differentiation of people in terms of their skills and aptitude, as using it was such an obvious solution and in circumstances where the respondent would not have faced a challenge that they had manufactured the scoring to suit a redundancy exercise.

139. Nevertheless, the respondent chose to perform this exercise afresh and the tribunal ultimately does not consider that to have been an approach outside a band of reasonable responses. It did, however, require the respondent to show that this exercise again was reasonably conducted.

140. The skills matrix itself certainly was capable of amounting to a very thorough and evidence-based evaluation of employee skills and aptitude. However, it represents perhaps the most complex scoring grid this tribunal has ever seen used in a redundancy exercise and, if it was to be completed, as anticipated, with consideration given to each individual score, it amounted to a hugely time-consuming method of selection. The tribunal refers to the number of individual assessments which fell to be made. The tribunal would note that if 10 hours were purely dedicated to this task it would leave the assessor only around 30 seconds to evaluate each skill and aptitude score for all of those in the pool.

141. Ultimately, the tribunal is left with the conclusion that for Mr Hendrickson and Mr Redhead the assessment system in place was too complex and impractical if it was to be conducted reasonably within inevitable time constraints.

142. Fundamentally, the tribunal is left with the conclusion that they did not know indeed how they were scoring the individual skills and aptitude. As regards skills there were defined benchmarks to assist in what score to award, but the tribunal has not heard from the witnesses an explanation of them using that benchmark in arriving at the scores. Mr Hendrickson and Mr Redhead did not know whether they were scoring the individuals against any form of benchmark or system as opposed to simply choosing what they felt to be an appropriate score based upon their opinion of the individuals. As regards the aptitude score, the explanations the tribunal has heard as to

what the respondent was looking at have been imprecise, with the witnesses having at times an inability to distinguish between what they were looking at when assessing skills and whether they were looking at anything different when assessing aptitude. Certainly, no one has been able to tell the tribunal why an employee would achieve a particular score rather than a different point score in any given circumstance. A number of factors came into the assessment, but not in any coherent or logical manner which enabled a specific point score to be ascertained. As regards aptitude, the explanation of point scores in the 2008 redundancy exercise might have provided for an objective and justified basis of scoring, but it was not in fact used.

143. Indeed, the tribunal heard evidence instead of a benchmarking as between employees rather than against objectively defined point scores where a top operative under each category would be identified as meriting the most points with Mr Redhead and Mr Hendrickson then cascading down the workforce differentiating from one employee or group of employees to the next. The tribunal has been told that in theory if they all deserved it, all of the employees in the workforce could have achieved, for instance, a top score of 5 points for their aptitude in a particular skill. The tribunal does not agree. The cascading down inevitably involved Mr Redhead and Mr Hendrickson looking at a rank ordering of employees rather than an objective assessment of their aptitude.

144. Data regarding non-conformities and job timings was produced during the consultation process and, whilst the tribunal can accept that such documentation was available to Mr Hendrickson and Mr Redhead at the time they performed their assessment, they did not provide an objective means of arriving at a particular point score. If anything, they were confirmatory of a feeling that the assessors had regarding an individual's aptitude.

145. In essence, the points were scored based on Mr Hendrickson and Mr Redhead's feel or opinion of the skills and abilities of the operatives. They had their own opinions of the employees and translated those to what they felt to be appropriate scores in circumstances where a much broader brush approach was taken than would have been the case had the employees been considered individually against each defined skill. The similarity in points given to certainly 3 of the claimants across all of the skills assessed is illustrative of such an approach.

146. The tribunal is not satisfied that there was a reasonable and sufficiently transparent and objective process of assessment in this case, such that it must conclude that the claimants were not fairly assessed and, on this substantive ground, they were unfairly dismissed.

147. Mr Redhead and Mr Hendrickson did however know the assembly operatives and their respective skills and abilities very well, having worked with them closely and, certainly in the case of the claimants, over a period of many years. They genuinely wished to retain those with the greatest skills and aptitude. They genuinely believed that those selected for redundancy were those who ranked lowest amongst the respondent's assembly operatives looking at relevant skills and their aptitude within them.

148. There was no element of bias or favouritism within that assessment but a cold evaluation of employees where they wished to retain those who could be efficiently utilised on the wider range of skills and in particular on the most complex types of work. Mr Redhead was particularly close to the workforce and the tribunal does not consider it to be realistic that he would not have been able to identify, indeed without any formal assessment, the most limited members of the assembly operative pool. It is inevitable that at the start of the exercise, he would already have had a clear idea of individuals who were most likely to be at risk of redundancy and if he did not have that knowledge he would have been a poor supervisor, a charge which the tribunal certainly does not level at him.

149. Furthermore, the concentration of the claimants' case internally and in these proceedings has not been in criticising the respondent for awarding them low scores but in fact in being responsible for a situation where they inevitably scored poorly because of the more limited range of work they had been allocated and its lower skill nature. The claimant's case has been that they were effectively de-skilled. However, the respondent was reasonably entitled to assess the claimants on the skill and aptitudes that they actually had at the point of time of the redundancy exercise and not on what they might have been trained in. Again, the tribunal has found that any deficit in training was not tainted by unlawful discrimination.

150. Such considerations render it not an exercise of pure speculation for the tribunal to consider what chance the claimants would have had of surviving the redundancy exercise had they been fairly and objectively assessed.

151. In terms of skills matrix scores Mrs Metcalf was adrift at 410 points when compared to the lowest score of a surviving employee of 539 points. Mrs Gaughan, Mrs Stephenson and Mrs Mortimer were closer to that cut-off point but still adrift, scoring 482, 488 and 478 points respectively. Whilst clearly on the tribunal's conclusions the scores cannot be relied upon as any form of scientific measure, clearly all of the claimants were at risk without a material reassessment of them in terms of their skills and aptitude.

152. As explained, in the final assessment the matrix scores were converted into point score values and added to the other point scores awarded under the other criteria relating to disciplinary record, attendance

and work qualifications. The tribunal does not consider that there was any unreasonableness in the assessment of these criteria. The lowest scoring employee who was safe in the exercise was the individual with the matrix score of 539 point which translated to a total points score, when the other criteria were brought in, of 70 points. That was the same number of points awarded to Mrs Gaughan with her fate decided by the tie-breaker of skills matrix score. The other three claimants had scores of only 60 points which would necessitate Mrs Stephenson and Mrs Mortimer achieving a skills matrix score of at least 550 to draw level on points with the lowest scoring individual and attain a position of safety. Mrs Metcalf benefited from a more favourable Bradford factor score than Mrs Stephenson and Mrs Mortimer but achieving a score of 450 points (and an additional 10 points in the assessment exercise) would not have saved her given the need to beat the score of 539 as a tie-breaker. It is considered more likely than not that none of the individuals would have been able to bridge that gap. It is certainly unrealistic to consider the claimants having something around a one in four chance of survival on a particular statistical analysis of there being 5 out of 21 at risk. The chances of survival statistically would have been much reduced given that they were always going to be effectively scrapping with each other at the bottom in terms of who would be made redundant.

153. Looking at the claimants then individually, the tribunal considers that if there was any element of clear lack of objectivity in scoring it was in the way Mrs Stephenson's aptitude was assessed. Mrs Stephenson, on own evidence, was an individual lacking in confidence and requiring reassurance which is what Mr Redhead told the tribunal. Yet her aptitude scores are significantly higher than the other claimants in circumstances where Mr Redhead's evidence is that she would have been penalised for such factor. The tribunal considers that it can safely conclude that Mrs Stephenson's scores were at the top end of what she could have attained on any objective assessment. Her aptitude scores were indeed good, yet her limited range of skills were such as to put her risk of redundancy. The point scoring assessment of her was in the tribunal's view at the top and of where she could reach and the tribunal concludes that had a fair assessment been conducted there is a 100% chance that she would have been fairly selected for redundancy in any event.

154. Mrs Gaughan stands out from her colleagues in that up to 2015 she had been a quality assessor who by definition was more highly skilled than many and who was utilised to assess the work of others. In more recent times she had allowed herself to become much more limited in the work she performed which negatively impacted upon her in the redundancy exercise. However, there is no suggestion that she stepped down from her quality assurance role because she couldn't do the job of a quality assessor. The tribunal then has heard evidence from the respondent that if people had a skill then they did not simply lose it. Again, the period of time where Mrs Gaughan may not have been demonstrating the full range of skills after she relinquished the quality role was not great. In such circumstances the tribunal considers it appropriate to conclude that she would have had a

greater chance of being retained than her colleague claimants, albeit she would still struggle due to the changing nature of the respondent's work and her more recent self-limitation. The tribunal considers that had a fair process being followed there is still a 75% chance that she would have been fairly selected for redundancy.

155. Mrs Metcalf and Mrs Mortimer were viewed similarly as again individuals who had become, on their own evidence, de-skilled and had decided not to keep up-to-date with new types of work or to develop their skills. Mrs Metcalf had done more highly skilled work in the past but in her case that can be viewed certainly as more historic that Mrs Gaughan. The tribunal does not consider there to have been any realistic prospect that had a fair redundancy excess been conducted they would have survived the exercise, such that their compensatory awards must also be reduced by a factor of 100%.

Employment Judge Maidment

Date 12 July 2021