EMPLOYMENT TRIBUNALS

Claimant: Mr. J. Haycocks
Respondents: ADP ROP UK Ltd

London Central Remote Hearing (CVP) **5-6 July 2021**

Employment Judge Goodman

Representation:
Claimant: Mr. H. Haycocks (claimant's father)
Respondent: Ms. C. Ashiru, counsel

RESERVED JUDGMENT

The unfair dismissal claim does not succeed.

REASONS

1. The claimant was dismissed by the respondent employer by reason of redundancy In July 2020, and on 16 October presented a claim for unfair dismissal.

2. The respondent asserts the claimant was dismissed by reason of redundancy, alternatively some other substantial reason. The claimant denies redundancy was the real reason, instead, that he was dismissed because of earlier conflict with an influential client. If redundancy was the reason, the process of selection was unfair.

3. The issues were defined at a case management hearing in April 2020, and some changes agreed on the first morning of hearing. They are:

   (1) was redundancy the real reason, or was it a pretext, relating to earlier conflict with PB, an influential client?

   (2) if redundancy was the reason, did the respondent follow fair procedure? The claimant says: the pool of employees was kept artificially small by not including the Warsaw team; next, the evaluation criteria were not reasonable,

and not applied reasonably to the claimant; was there adverse and material influence by PB on the claimant's scoring?
(3) Did the respondent act fairly what unfairly and in particular and consult the claimant, make a reasonable selection decision, take reasonable steps to find suitable alternative employment.
(4)If redundancy was not there reason, was this a business reorganisation carried out in the interests of economy and efficiency, and did the respondent act reasonably in all the circumstances in treating that as sufficient reason to dismiss.
(5) if the process made the dismissal unfair, what difference would fair process have made to the outcome?
(5) If unfairly dismissed, remedy. The respondent argued a failure to mitigate the loss.

Evidence

4. To decide the claim the tribunal heard evidence from:

   Eve Hancock, the claimant's line manager
   Lucy O'Donovan - HR Business Partner employed by ADP Inc and assigned to work with Ms. Hancock during the redundancy process
   Annabel Jones- HR Director of ADP UK Ltd.
   Joseph Haycocks, the claimant

5. A written witness statements had been filed for **Henry Melbourn**, but he was in poor health and the respondent did not call him. Little weight has been given to his evidence where it is disputed.

6. The tribunal was provided with 2 volumes of documents, of 71 and 245 pages respectively. Additions from claimant and respondent were permitted at the start of the hearing.

Conduct of the Hearing

7. Navigation of the written material was troublesome because the witness statements were provided as individual pdfs, not in a bundle, and the documents and indexes were supplied as 20 pdfs, identified by tab numbers, and not in a sequential bundle, nor were these numerous pdfs OCR converted, so they could not be searched, bookmarked or highlighted, contrary to court and tribunal guidance on bundle preparation (see for example paragraph 24 of the Employment Tribunal Presidential Guidance on remote hearings of September 2020, and the courts' more extensive prescriptions of May 2020). There was added difficulty as the claimant's father was using a paper bundle, and could only supply tab references with the aid of his son and respondent's counsel. All this slowed progress in the hearing.

8. The hearing was conducted remotely and was open to the public, although no one unconnected with the case attended as observer. There were few technical difficulties, although the claimant's internet connection on the first afternoon was not always adequate.

9. The claimant was represented by his father, Hugh Haycocks. Although he was once in practice as a solicitor, he was not especially experienced in advocacy, nor in employment law. I tried to guide him as I would a litigant in

person.

10. The respondent had prepared a skeleton argument supplied at the start of the case. At the conclusion of the evidence the claimant made an oral submission and the respondent replied on new arguments, and by reference to factual matters from the evidence. Judgment was reserved.

Findings of Fact

11. The employer is a UK subsidiary of ADP Inc, a US company. At the time of dismissal there were 50-60 employees, now reduced to 35 or 40. ROP stands for recruitment outsourcing programme. ADP contracted with businesses to recruit staff for them. ADP's "sourcers" worked closely with the customer's "recruiters" to fill staff vacancies for the customers as they occurred, acting in effect as in-house recruitment agents.

12. Another UK subsidiary of ADP Inc was ADP Ltd, with 900 employees, including the HR staff who advised the claimant's manager in the redundancy process. One division of ADP Ltd was cut back shortly after the redundancy exercise at ADP ROP UK Ltd.

13. The claimant was employed by the respondent on 16 October 2017 as a sourcer, assigned to ADP Inc's contract with Goldman Sachs ("GS"), in particular their office in London. He had a salary of £60,000 per annum, with membership of a defined contribution pension scheme. There was no contractual bonus.

14. As of 2020, his line manager was responsible for a team of 20 sourcers: 16 working for GS London, and 4 in the Warsaw office. The Warsaw team worked out of the Warsaw office, though in frequent telephone contact with their London colleagues. These 4 were employed by a Polish subsidiary, ADP Polska Spółka z o.o.

15. ADP ROP UK had no significant customer other than GS. The three year GS contract was not renewed when it expired towards the end of 2020 and another business was then given the contract; the change began in May 2021, and some TUPE transfers of ADP staff are expected later this year.

16. There were 3 GS departments which might require staff: Revenue, Federation and Technology. Initially the claimant worked with the recruiter in Revenue, sourcing candidates for vacancies in Sales and Trading or Global Investment Research. The GS recruiter he worked with was first RW, then from April 2018 PB (the claimant having in the interim applied unsuccessfully for the role himself). According to the claimant, he and PB had a difficult relationship, and early in 2019 PB was critical and abusive of the claimant, alleging misconduct at a works event, and then inadequate mapping work, which in the particular circumstances the claimant did not consider justified criticism. The claimant met his own managers about this at the end of March 2019. He did not make a formal complaint about PB, but after discussion he was transferred to work with another recruiter, SM, in Federation. The tribunal has seen some sympathetic texts to the claimant from Henry Melbourn from this period. (The parties know the identity of the recruiters; they are anonymised in this judgment as none has given evidence, they are not employed by the respondent, and they did not originate any document in the

bundle; they have a qualified right to privacy, and it is not necessary for public understanding of the judicial process that they are identified by name). In July 2019 he also started to source for executive office for a colleague of SM.

17. For the year ending 30 June 2019 the claimant's performance review, dated September 2019. His ADP line manager, Evie Hancock, commented that he had had a challenging time across this period, but with the shift into Federation "you seem to be in an excellent place for finishing the fiscal year. You have made great relationships with (SM) and she has passed on some great feedback about you, so well done". There were then some suggestions about improving his knowledge across divisions, and forming relationships with ADP colleagues to learn from best practice. The overall rating was 3.7 out of a possible 5.

18. In September 2019 he received a "Win as One" incentive payment of £1,530; all staff in good standing (i.e. not subject to discipline) and without a contractual bonus were eligible for 5% of gross monthly pay.

19. In January 2020 the claimant had a two week spell of sick leave for depression. He attributes this to his failure to be appointed to replace SM as recruiter when she went on maternity leave in October 2019, believing this was because PB did not want him. He was able to return to normal work. He then helped out with APAC (Asia-Pacific) roles as well in February 2020 because that team was hit by Covid-19.

20. Normal caseload is, according to the claimant, 10 to 15 roles, though he says that usually his own caseload was 20- 25. The figures are disputed. The respondent says caseloads varied according to the of work to be sourced.

21. In March 2020 the coronavirus pandemic hit London, and GS in London went into lockdown. Initially, the number of placements the claimant was asked to source went down from 20 to 2, but this had recovered by the end of May to 10 or 12 active vacancies. By June he had 8 vacancies, having just filled two.

22. Separately, the claimant has ceased to cover the executive office work he had taken on in July 2019, because at the end of March 2020 it was assigned to a colleague who had returned to work from maternity leave.

23. A similar decline in demand occurred across the team. The respondent estimates a 50% reduction in demand from GS London.

24. At the end of May 2020, ADP decided they would have to make redundancies within the group of 16 team members in London. The Polish team was excluded because they would be subject to a separate process. So were two London employees considered to be specialists, one in visa, the other in diversity.

25. According to the claimant, at around this time PB became head of GS Expert and Recruitment for GS EMEA (Europe and Middle East). This was not put to the respondent's witnesses for confirmation.

<u>Redundancy Selection and Consultation</u>

26. At the beginning of June, the HR team of ADP Inc supplied the London team

manager, Evie Hancock, through her ADP UK HR colleagues, with a matrix of criteria for selection, and asked her to assess her team members. She did so, entering results on an Excel spreadsheet of all employees. She says she used documentary evidence when available as a check, but otherwise relied on her own knowledge. In effect the documentary evidence is limited, because she had only started in post in April 2019, and did not have access to previous reviews. She did carry out regular one-to-one meetings with her team members, but did not keep notes of them. In particular, Miss Hancock denies knowing the detail of the claimant's transfer to Federation in March 2019, which was before she joined, and said she had never heard of difficulty with PB.

27. She discussed her preliminary results with her own line manager, Janice Hirst, who was in New Zealand. No changes resulted. Some confusion arose over this because Lucy O'Donovan advised Annabel Jones at the appeal stage that Henry Melbourn did this. Henry Melbourn denies this, and so does Evie Hancock. Lucy O'Donovan says she had misunderstood something Ms Hancock said and heard it from another HR staff member which dealt with Ms Hancock directly. Having heard Ms Hancock, the tribunal accepts her evidence.

28. Members of the 16 person team were scored 1 to 4 on each of17 criteria. Scores were then totalled and ranked. The claimant was lowest with 2.35. The next highest was DW with 2.47, and then AA.

29. On 18 June HR determined that three roles would have to go: one from ADP itself and two from the GS contract. So it was anticipated that from the GS team, 16 staff would be reduced to 14. In fact, after selections were made, two London staff resigned, and one member of staff in Warsaw, and none were replaced. This reduced the London team to 12. Overall, two left the GS team on redundancy, the claimant as a compulsory redundancy, and another (NW) as a volunteer. Two non-GS employees were redundant.

30. On 19 June a timetable was set: there was to be an initial consultation meeting with affected staff on 30 June, the consultation period was to last 14 days, and those leaving were to be told on 14 July, and work to be given one month's notice, which they were not required to work.

31. The claimant was called to a meeting on 30 June; he heard that morning from a colleague who had already had his meeting what it was to be about He was told there was a reduction in client needs requiring some redundancies, and that the purpose of meeting was to inform him of this, enable him to ask questions, and for him to suggest alternative approaches to the reduction in demand. He was also invited to review the intranet or contact the recruitment team about alternative vacancies within ADP.

32. On 3 July he got details of vacancies. At the time there was one in Scotland and one in education. There were two upcoming vacancies as recruitment coordinator and another post in Scotland. The claimant did not apply, they were less well paid and outside his skills range. The claimant was invited to the second consultation meeting with Evie Hancock on 8 July, and he asked when, if he was redundant, he would be paid.

33. On 14 July there was a final meeting with Evie Hancock at which Lucy O'Donovan kept a note. He was told he was to be made redundant and

handed the letter of dismissal. The claimant asked why they are not taken account of the number of placements or his length of service. He was told that the latter was not used because it might be age discriminatory. He was told he would not have to work after today, and he asked when he would be paid. The claimant says he asked why he could not be furloughed (this is disputed). The respondent says now that they had not initially applied for the furlough scheme in March 2020, and by the time of making redundancies, had missed 10 June cut-off date for registering for furlough.

34. The claimant asked for information about the dismissal decision so that he could decide whether to appeal. He was sent his scores on 15 July. He also approached ACAS for early conciliation.

Appeal Against Dismissal

35. On 24 July he sent a letter his father had helped him draft, appealing against the decision to dismiss. He recited how his workload had altered from time to time in 2019 and 2020, and said he was not redundant. Next, he said that the score 2.35 was too low, and he should be in the top 30% of his team. There must have been a mistake, or the score must have been manipulated. Then he asserted that there was lack of procedural fairness. The criteria were "nebulous and subjective"; there were few neutral performance criteria such as experience, length of service and attendance record. The number of billable hires he had made by the date of redundancy was 10, not 9. He had not been given information about the criteria, to give him an opportunity to challenge the pool or scoring result. Finally, there were no suitable alternative vacancies – he was not qualified, and they were too low paid.

36. Annabel Jones was asked to hear the appeal. She spoke to Evie Hancock by telephone on 31 July. She was told volumes were down. As to the claimant, his performance was acceptable, but others were better. "He has a laid back approach to most things, he does not go the extra mile. He will do what he is asked to do, but doesn't offer to do more".

37. There was an appeal meeting on 10 August 2020, which was recorded at the claimant's request. The appeal was heard by Alan Hoke from the GS team in Ohio, assisted by Annabel Jones, ADP UK Ltd's HR director. The claimant discussed a number of topics with them, but in particular said his line manager would not have day-to-day oversight of his work, and it would be better to get GS input on his ability. He also mentioned PB, that he had not liked the claimant, and had more influence now. There was discussion of why particular criteria were applied.

38. After the meeting, Annabel Jones asked Evie Hancock to assess the claimant against the criteria, and whether someone called PB could have influenced the selection process as there was some difficulty in the past with PB. Evie Hancock replied that she had almost daily interaction with the claimant and met him weekly, so knew best how to assess his ability, and she had not had input from GS.

39. Annabel Jones then drafted a reply to the claimant. In summary, it was asserted there was a genuine redundancy situation involving a 50% drop in sourcing work across the whole team, though actual numbers might vary from team member to team member. Duties could be redistributed between the

team. They were using the same criteria for another redundancy exercise in the ADP implementation team in August 2020. Of the 17 criteria, they did not use number of vacancies filled because this would be unfair to some team members, given the changes in distribution of work, the different lead times for particular sectors, some niche subject matter, and that some staff worked on placements multifunctionally. They did not use the same criteria when selecting as for performance review, because they wanted to look to the future, not past performance. Where the claimant "sometimes met" criteria, he was scored a 2. There were no other roles to which he could be directed.

40. The claimant received notice pay, the statutory redundancy payment, and an ex gratia payment on top.

41. Since dismissal the claimant has applied for 60 jobs, all in recruitment. In recent weeks he has been able to make more applications and has had some success reaching interview stage. This probably reflects decline in hiring during the pandemic, and he has shown courage and commitment in persisting despite so many setbacks over nearly a year. He decided to pursue his career in recruitment, rather than look for other kinds of work. His mother has made debt repayments for him as guarantor, his father paid him "pocket money", and he has Universal Credit payments.

Relevant Law

42. Unfair dismissal is a statutory right. The employer must prove that the reason for dismissal was one of the potentially fair reasons set out in section 98 (1) of the Employment Rights Act 1996, or if not, that it was 'for some other substantial reason justifying dismissal'. Redundancy is a potentially fair reasons – section 98(2)(c).

43. If an employee seeks to say that the ostensible reason for dismissal was not the real one, he must produce some evidence that casts doubt on that – **Maund v Penwith District Council (1984) IRLR 24.**

44. If dismissal for a potentially fair reason is established, the tribunal goes on to determine whether the dismissal for that reason was fair or unfair, which, by section 98(4):

> "depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b)shall be determined in accordance with equity and the substantial merits of the case".

45. Employment tribunals must be careful not to substitute their own view of a what would have been fair for that of a reasonable employer, and should recognise that reasonable employers can have a range of responses to a particular circumstances - **Iceland Frozen Foods Ltd v Jones (1982) IRLR 43**. While **Williams v Compair Maxam Ltd (1982) IRLR 83** approved objective procedures for making redundancy dismissals, these are not prescriptive, provided the process was reasonable. Industry practice can change, it is as reasonable for an employer to identify and retain the skills he requires in future as it is to identify those who have performed well in the past, provided the process is fair, which in general terms means setting out some criteria for selecting who to retain, and then applying them across the pool of employees whose numbers are to be reduced, without special cases. Length of service was once a common criterion, now complicated by the introduction of age discrimination protection. It can still be a valid criterion, but like all age

discrimination, its use must be justified by reference to a legitimate aim - **Unite the Union v Rolls Royce plc (2009) EWCA Civ 387**. It is better to choose criteria which can be objectively measured, to avoid bias and subjectivity on the part of the selecting manager, but there is room for a degree of judgement – **Mitchells of Lancaster (Brewers) Ltd v Tattersall EAT 0605/11**, indeed in **Biluan v Mental Health Care UK Ltd UKEAT/0248/12,** contrasting a pure process driven approach to managerial judgement, it was suggested that the latter should be preferred. In **Canning v NIHCE UKEAT/0241/18,** it was suggested that subjectivity and selection was unobjectionable provided that there were "checks and balances" in the procedure overall. Tribunals are discouraged from entering into detailed remarking of an employer's scores. In **British Aerospace v Green (199) IRLR 433,** the Court of Appeal said:

> "If the applicant can show that he was unfairly dismissed, he will succeed; if he cannot, he will fail. It will not help him to show that by the same criteria some other employee might not have been retained. The tribunal is not entitled embark upon a re-assessment exercise. I would endorse the observations of the Employment Appeal Tribunal in **Eaton Ltd v King and others [1995] IRLR 75** that it is sufficient for the employer to show that he set up a good system of selection and that it was fairly administered…".

There should be something pointing to the employer rigging the scoring system to achieve a particular result than mere suspicion on the part of the employee **– Semple Fraser LLP v Daly UKEAT/0045/09**.

46. There has in the past been a great deal of case law on choosing a pool, but provided it is genuine and there are reasons for choosing a particular pool, a tribunal should not interfere: **Taymech Ltd v Ryan EAT/663/94**. Fairness also requires consulting employees about the process and giving them a chance to suggest alternatives (**Compair Maxam**), as well as an opportunity to identify where they think the selection decision may have been mistaken or unfair.

47. At the conclusion of the evidence the tribunal will stand back and ask whether there has been a fair redundancy process overall.

Discussion and Conclusion

48. In closing the claimant indicated it was not disputed that there was a redundancy situation, meaning the need for employees of a particular kind had ceased or diminished.

49. The claimant has suggested that the employer should have furloughed staff rather than making them redundant. However, the Corona Virus Job Replacement Scheme of 2020 enabled employers to retain staff they might otherwise make redundant, as a matter of social policy, but does not oblige them to do so, and an employer may decide there are business reasons for not retaining staff, even at reduced cost.

50. There was a dispute about the pool chosen: it was argued the Warsaw four in Ms Hancock's team should have been included, and that they were deliberately excluded to bring the number below 20. The Warsaw four included a man had only been hired a few weeks earlier. This argument fails because more stringent collective consultation about redundancy starts to apply when the employer proposes to dismiss 20 or more employees. In this

exercise, employer proposed to dismiss only 3 employees; the size of the pool from which to make the selection has no significance. Further, the tribunal accepts the respondent's reason that the Warsaw four were employed on Polish employment contracts. It is entirely possible that Polish law on redundancy bears little resemblance to English law. It is a legitimate business reason for deciding that cuts should fall on London staff. In view of the dispute about the influence of PB on the selection decision, it should be added that the reason given by the employer is adequate and leaves little room for finding that the Warsaw four were excluded to increase the chances that the claimant went. It was also legitimate for the employer to exclude to employees with particular skills they wished to retain. It is not suggested that the claimant, or other sourcer colleagues, could have taken on their roles had they been retained.

51. Th choice of criteria looks from the emails to have been a standard package from the US parent. They were not tailored to exclude matters where the claimant might have scored well.

52. It is right that the criteria for selection relied heavily on the judgement of the team manager, something it would be difficult to check by reference to objective criteria, other than the most recent performance review, which in case could not have assessed work done in the last 12 months, as the financial year was only just ending. Where decisions are being made on the basis of managerial judgement, there is scope for bias, or for decisions to be made on other grounds. The claimant did not however in this hearing challenge Ms Hancock's good faith: his case was that others had interfered with her selection. At early stages in the proceedings some HR staff had said that Ms Hancock's selections had been reviewed by Henry Melbourn. This was important to the claimant, because Henry Melbourn knew all about the run-in with PB. However, Ms Hancock herself firmly denied that Henry Melbourn checked her selection, it was Janice Hirst. Ms O'Donovan said she had misunderstood what she had been told. Such misunderstandings do occur, that is why hearsay is not best evidence. For what it is worth, as it cannot be tested, Henry Melbourn has said he did not participate in selection decisions. He confirmed the claimant was a satisfactory employee and there was a "personality clash" with PB. The claimant has produced, not in disclosure but at the start of this hearing, texts he exchanged with Henry Melbourn at the time of the dispute where, in the context of when to move the claimant in 2019, he said the PB wanted him off the account, but these were not put to Ms Hancock.

53. The difficulty for the claimant in showing that he was unfairly marked down on the various criteria is that he has not been able to demonstrate that he should have scored higher than other individuals on particular criteria, even after he was supplied, in the course of proceedings, with the names and detailed scores of all 16. We do not have the performance review ratings of others. The claimant's score was good, but not outstanding, and in the review 9 months before selection Ms Hancock had been making clear suggestions for how to improve performance. This is not out of line with her score decisions against criteria. The claimant has challenged that he had achieved 10 placements by the date of dismissal, not 9, but as he stated that there were billings in July, it could well be that he had 9 when the selection was made in June, and 10 by the date of dismissal in July. Placements formed a part of one of the criteria. Even if this was out by one, there is no chance it would

have moved the overall score by enough to move the claimant up the ranks to stay. As for using length of service, by the claimant was at the higher end the group, the overall range was small, and the respondent was entitled to hold that these differences have little significance in assessing the strength of the team going forward. It happens that not using it disadvantaged the claimant, but that does not mean excluding length of service was done to make sure he had to go, or that it made the process unfair. It is also true that using length of service complicated the respondent's decision making, because if the disappointed employee chose to bring an age discrimination claim arising out of redundancy selection, they would have had to justify it.

54. In closing, it was argued for the claimant that when the respondent's solicitors wrote to the claimant's father earlier this year setting out grounds why they were seeking a deposit order, they have summarised the claimant's case as being the decision-makers were Evie Hancock, Henry Melbourn and Annabel Jones. Therefore, it was argued, these three have been involved in the selection decision, and seeking to say that in fact only Ms Hancock made the initial decision demonstrated there was a cover-up of the decision to get rid of the claimant because of the history with PB, who was now more influential in the GS contract. The tribunal does not accept that this argument has much or any evidential force. First of all, the respondent's solicitors were summarising what they understood to be the claimant's case, not their own. Secondly, they have explained that if their witnesses initially said Henry Melbourn had checked the schools, this was a misunderstanding based on hearsay. They were checked by Janice Hirst. Thirdly, Annabel Jones was a decision-maker, but only at the appeal stage.

55. The claimant does not rely on the absence of alternative vacancies as showing the dismissals unfair. He accepts there were none suitable.

56. It is right that the claimant knew nothing about his scores, until the appeal stage, but the appeal process was a conscientious investigation of what he said about Ms Hancock's knowledge and ability to assess his performance (the claimant having suggested GS were better people to ask), and there was also enquiry into his mention of PB. In any case, now that he has the scores, and knows the identity of the others on the list, he has not demonstrated that his own score should be higher up the list, and others should have been lower.

57. To conclude, the claimant has not shown anything more than a *possibility* that knowledge of the previous run-in with PB 15 months earlier influenced his managers to reduce his score to make sure he went. In particular, he has not shown that he ought to have scored higher than needed. It remains speculation. Ms Hancock did not know about it. As far as she was concerned, GS, in the person of SM, were very happy with the claimant. It is not shown Henry Melbourn was involved. It often happens in redundancy situations that those dismissed by reason of redundancy experience it as rejection, and as criticism of their capability or conduct. This is understandable, but redundancy, when there is not enough work to go around, often involves difficult choices about people who do their jobs well, and are satisfactory employees.

58. In the judgement of the tribunal, this was a fair redundancy process. There is

no reason to hold that any apprehension about the views of GS on particular individuals skewed the selection decisions of the respondent's managers. The unfair dismissal claim does not succeed.

Employment Judge Goodman

Dated: 7th July 2021

JUDGMENT and REASONS SENT to the PARTIES ON

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. 07/07/2021.

FOR THE TRIBUNAL OFFICE