RESERVED **Case No: 2603886/2020**

EMPLOYMENT TRIBUNALS

Claimant: **Mrs. Donna Powell**

Respondent: **Boots Management Services Ltd**

Heard at: **Nottingham**

On: **10th & 11th May 2021**

Before: **Employment Judge Heap (sitting alone)**

Representation
Claimant: **Mr. I Powell – Lay Representative**
Respondents: **Miss S Bowen - Counsel**

RESERVED JUDGMENT

The claim of unfair dismissal fails and is dismissed.

REASONS

BACKGROUND AND THE ISSUES

1. This is a claim brought by Mrs. Donna Powell (hereinafter referred to as "The Claimant") against her now former employer, Boots Management Services Limited (hereinafter referred to as "The Respondent")

2. The claim was presented by way of a Claim Form received by the Employment Tribunal on 23rd October 2020 following a period of early conciliation which took place between 10th September and 10th October 2020. The claim is one of unfair dismissal contrary to Section 94 Employment Rights Act 1996. The claim is resisted by the Respondent in its entirety.

3. The Claimant's witness statement also made reference to her being owed the sum of £56.70 by the Respondent and she and Mr. Powell appeared to want me to deal with that as part of the claim. I could not do so, however, as it was not pleaded as a claim within the Claim Form and no application to amend the claim was made. Miss. Bowen helpfully confirmed, however, that she would raise the matter with the Respondent to see if the matter could be resolved.

4. It is common ground that the Claimant was dismissed by reason of redundancy, that being the potentially fair reason for dismissal relied upon by the Respondent. It was accepted by the Claimant during cross examination that there was a genuine redundancy situation which saw the need for employees undertaking work of the type that the Claimant was performing diminish such as there was a requirement for only three No. 7 consultants rather than the four within the retail store that the Claimant worked.

5. There is no dispute that the Claimant was pooled with the other three members of staff on the No.7 counter in the store in which she was based. No argument has been raised that there ought to have been different pooling.

6. Other than some other points as to general unreasonableness or procedural issue, the main crux of this case comes down to the Claimant's scoring. On the first day of the hearing, and so that it would not come as any surprise to Mr. Powell at the point of submissions, I drew his attention to the decision of the Employment Appeal Tribunal in **British Aerospace v Green [1995] ICR 1006**. As a result of Covid restrictions I was not able to provide the parties with that authority in hardcopy form, but it is readily accessible from an internet search. Mr. Powell indicated that neither he or the Claimant had had time overnight to look at that authority, but the principles were outlined both by me and also by Miss. Bowen during her submissions.

THE HEARING

7. The claim was listed for two days of hearing time, which took on 10th and 11th May 2021. The hearing commenced on the first day at 12.00 noon to allow for adequate reading in time.

8. The hearing proceeded as an attended hearing rather than one conducted via remote means on the basis that not all parties and witnesses had access to the necessary equipment and stable internet connection to enable them to participate. Social distancing and other measures were put in place by the Tribunal to minimise the risk to the participants from Covid-19.

9. During the course of the hearing I attempted to assist Mr. Powell, insofar as it was permissible for me to do so, in order to ensure that he and the Claimant were placed on as equal a footing as possible with the Respondent, who were both represented by Miss. Bowen of Counsel.

10. Shortly before the hearing was due to commence an application was made by the Respondent to adduce evidence from a further witness as to the Claimant's position that she was seeking reinstatement. That application was not advanced by Miss. Bowen on the basis that having discussed matters with Mr. Powell, the Claimant was no longer seeking re-instatement or re-engagement and only sought compensation if the claim succeeded. Mr. Powell confirmed that to be the position at the hearing.

11. A further issue arose as to disclosure of documentation. The Respondent sought leave to include pay slips showing the Claimant's rates of pay which would be relevant to the question of remedy. The relevant sums were agreed with Mr. Powell and there was no objection to them being included.

12. Of more significance, however, was that at the close of the Claimant's evidence she made reference to some notes that she said that she had made in preparation for her first consultation meeting prior to being made redundant. Those had not been disclosed and were relevant to whether she had, as the Respondent contended, agreed certain scores be attributed to her at that meeting. She referred to not having disclosed them because she did not consider that they were relevant, although as I shall come to below it is difficult to see why, but she indicated that she had them with her at the hearing.

13. Miss. Bowen indicated that if the Claimant sought to make an application to disclose the notes at this stage then she would object to it on the basis, amongst other things, that the Claimant had made a conscious decision not to disclose those notes and that this was only mentioned at the close of all of the evidence and witnesses, including those for the Respondent, would likely need to be recalled. I adjourned the hearing for Mr. Powell to consider the matter with the Claimant. Having done so he confirmed that he was not going to make any application to adduce the notes into evidence.

14. Mr. Powell and the Claimant had also indicated that they intended to make an application for a Preparation Time Order. However, after discussion about the grounds for such an application that was not advanced further. Had it been advanced then I would not have granted it as none of the grounds for making such an Order had been met.

15. I should also observe that I had to remind Mr. Powell more than once during the course of the Claimant's evidence that it was not acceptable for him to gesture to her to seek to influence the answers that she was giving or to prompt her. Inappropriate as that was, I am satisfied that it did not ultimately affect the fairness of the hearing.

WITNESSES

16. During the course of the hearing, I heard evidence from the Claimant on her own behalf. I also heard evidence on her behalf from Mr. Ian Powell, the Claimant's husband, although his evidence was relatively limited given that much was to recount what the Claimant had told him and what had already been dealt with in her own evidence. There was therefore limited cross examination and no Tribunal questions for Mr. Powell.

17. In addition to the hearing evidence from the Claimant, I also heard from a number of individuals on behalf of the Respondent. Those individuals were as follows:

    - Donna Smith – a Store Manager for the Respondent who had line managed the Claimant for a period of time;

- David Hollyoake-Smith – a Store Manager with the Respondent who selected the Claimant for redundancy; and

- Gareth Armstrong-Jones – an Area Manager with the Respondent who dealt with the Claimant's appeal against dismissal.

18. In addition to the witness evidence that I have heard, I have also paid careful reference to the documentation to which I have been taken during the course of the proceedings and also to the helpful oral submissions made by Mr. Powell on behalf of the Claimant and by Miss Bowen on behalf of the Respondent.

CREDIBILITY

19. One issue that has invariably informed my findings of fact in respect of the claim before me is the matter of credibility. Therefore, I say a word about that matter now and begin that with my assessment of the Claimant. I had doubts over the credibility of the Claimant as a result of the issue about disclosure of the notes to which I have already referred above. I say more about that below and why I considered her evidence in that regard to lack credibility. In view of that, I also had doubts as to the veracity of other parts of her evidence.

20. I did not have the same concerns over the evidence of the Respondent's witnesses and so, unless I have said otherwise, I prefer their evidence to that of the Claimant.

21. I have already observed in respect of the evidence of Mr. Powell that there was ultimately little of relevance that he was able to add as on the whole he was simply repeating what he had been told by the Claimant.

THE LAW

22. Before turning to my findings of fact as I have found them to be, I set out below the law that I am required to apply to those facts.

23. Section 94 Employment Rights Act 1996 ("ERA 1996") creates the right not to be unfairly dismissed.

24. Section 98 deals with the general provisions with regard to fairness and provides that one of the potentially fair reasons for dismissing an employee are either that the employee was redundant. If it is disputed, the burden rests upon the employer to satisfy the Tribunal on that question.

25. Assuming that the employer is able to do so, the all important test of reasonableness is then set out at section 98(4) ERA 1996 and provides as follows:

> *"Where the employer has fulfilled the requirements of subsection (1),* (that is that that they have shown that the reason for dismissal was redundancy) *the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-*

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

26. Key to the consideration of fairness in the context of a redundancy dismissal (once it has either been established that there was a potentially fair reason to dismiss on that basis) is the process adopted for selecting employees for redundancy. The relevant considerations are whether the employer:

a. Identified the correct pool for selection for redundancy;

b. Applied fairly and reasonably to that pool fair and objective selection criteria;

c. Undertook appropriate consultation with the employee on the method for selection and the process adopted (including consideration and consultation on the question of suitable alternative employment).

27. With regard to the selection criteria, Employment Tribunals must avoid subjecting them to undue scrutiny provided that those selection criteria are objective (see **British Aerospace plc v Green and Ors 1995 ICR 1006, CA**). The question for the Tribunal will be whether the selection criteria were or were not inherently unfair and whether they were applied in the particular case in a reasonable fashion.

28. The burden is no longer upon the Respondent alone to establish that the requirements of Section 98(4) ERA 1996 were fulfilled in respect of the dismissal. This is now a neutral burden.

29. However, I remind myself that an Employment Tribunal hearing a case of this nature is not permitted to substitute its judgment for that of the employer (see **Sainsbury's Supermarkets Limited v Hitt [2002] EWCA Civ 1588** and **Williams v Compare Maxam Ltd 1982 ICR 156, EAT**). It judges both the employer's processes and decision making by the yardstick of the reasonable employer and can only say that the dismissal was unfair if either falls outside the range of responses open to the reasonable employer. Put another way, could it be said that no reasonable employer would have done as this Respondent did?

FINDINGS OF FACT

30. I ask the parties to note that I have only made findings of fact where those are required for the proper determination of the issues in this case. I have invariably therefore not made findings on each and every area where the parties are in dispute with each other or upon which evidence has been given if that is not necessary for the proper determination of the claim.

31. The Respondent is a well known retailer in the health and pharmacy sector. The Claimant has a long history of employment with the Respondent commencing in 1998 and 1999 in temporary roles over the Christmas period. In January 2000 the Claimant was offered a permanent contract as a Sales Adviser working 30 hours per week. She had a short break in her employment between April and 1st November 2003 and after returning she undertook training to become a No.7 consultant. No.7 is a brand of make-up stocked by the Respondent. The Claimant's role involved doing make-overs in store, advising on No.7 products and making sales of those products.

32. The Claimant was based at a store within the Four Seasons shopping centre in Mansfield and she continued in her employment in that regard until her employment terminated by reason of redundancy on 31st August 2020.

33. Between October 2019 and February 2020 the Claimant was absent from work on the grounds of ill health and upon her return she was on a phased return to work for approximately three months. Her normal working hours were 16 hours per week.

34. As a result of the impact of the Covid-19 pandemic the Respondent determined that there had to be a re-organisation of the way in which they operated. Although many of their stores, including that at which the Claimant worked, remained open during the pandemic it is common ground that the Respondent was nevertheless significantly impacted by the pandemic. There were less sales of non-essential items and less footfall through the stores. It should be noted that the Claimant elected to continue to work during the pandemic, albeit in a different capacity so as to assist in ensuring that operations could continue. The Claimant had worked in this regard in a picking and packing role.

35. It was determined by the Respondent that the needs of the Four Seasons store had a diminished need for No.7 consultants and that they proposed to reduce the team from four to three consultants. It is not disputed by the Claimant that there was therefore a genuine redundancy situation.

36. The Store Managers were notified of the situation by way of a briefing with area management and were then tasked with notifying those who may be affected by the situation within their own stores. At that time, the Store Manager of the Four Seasons branch was David Hollyoake-Smith who had taken over management of that branch with effect from January 2020. Prior to that, the store manager on a temporary basis was Donna Smith who had moved there with effect from June 2019. However, Ms. Smith was also covering the Four Seasons branch whilst Mr. Hollyoake-Smith was on leave. She therefore dealt with the managers briefing in his absence. After the briefing she spoke with all of the No.7 consultants, the Claimant included, to advise them about the situation.

37. Ms. Smith also wrote to the Claimant on 10th July 2020 notifying her that there was a possibility of future redundancies and that as her role was one of those which were to reduce, she was at risk of redundancy. The Claimant was informed that the Respondent would look to avoid compulsory

redundancies, including offering suitable alternative employment, and the Claimant was invited to put forward any suggestions that she had to avoid redundancies.

38. The Claimant was told that the proposal was to reduce the No.7 consultant roles by one and that the team would be pooled to decide who would be made redundant. I accept that the Claimant was provided with a copy of the desktop selection exercise that would be used to select for redundancy and she was asked to be prepared to discuss that at a consultation meeting which was scheduled for 17th July 2020. The Claimant was informed of her right of accompaniment at the consultation meeting and was given details of the Employee Assistance Programme ("EAP") in the event that she needed that support.

39. The scoring criteria adopted by the Respondent scored those in the pool in the following areas:

    a. Commercial focus;
    b. Customer focus;
    c. Practical skills;
    d. Brand standards;
    e. Communication skills.

40. Each of those areas was allocated a score from zero to four. Zero was if the employee was not performing, a score of one was allocated for "approaching performing", a score of two for "performing", three for "above performing" and a four for "exceptionally performing". For each of the areas there was a clear and detailed description of what would be required to meet each of the zero to four scores.

41. There was a final area relating to the individual's disciplinary record which had a different scoring system. No live disciplinary action resulted in there being no reduction in the total score, a live first written warning would see scores reduced by ten points and by 15 points in the event of a live final written warning.

42. Each of the areas which were to be scored, including disciplinary record, were given a weighting which added up to a total maximum possible score of 88 points.

43. If scores were tied, requests for voluntary redundancy would be prioritised or in the absence of any such requests then length of service would be the determining factor.

44. The scoring was to be undertaken by the Store Manager and the guidance provided to those managers set out that if the line manager had been in post at that branch for less than six months then the previous line manager must also be consulted. The period over which the scoring review was to take place was in the last 12 months of employment (see page 76 of the hearing bundle).

45. The scoring was applied to all four members of the No.7 team. Those were the Claimant, Melanie Eyley, Sue Walker and Michaela Hearne. No issue is taken by the Claimant that that was not the appropriate pool. The Claimant and Ms. Eyley had continued to work during the pandemic in the aforementioned Customer Adviser roles whilst Ms. Walker and Ms. Hearne had agreed to be furloughed.

46. The Claimant attended the consultation meeting on 17th July 2020. By that David Hollyoake-Smith had returned from his annual leave and he conducted the meeting with the Claimant.

47. The evidence of Mr. Hollyoake-Smith, which I accept, was that all of the other No.7 consultants had scored themselves on the desktop selection document before their first consultation meeting except for the Claimant.

48. The Respondent contends that in the Claimant's case she had therefore been asked to do that at the consultation meeting; that she had then undertaken her own scoring and that those scores appear in the hearing bundle at pages 76 to 83. The Claimant contends that those were not her scorings and that she had a different document on which she had scored herself. As I have observed above, she did not disclose that document at any stage of these proceedings.

49. I did not accept her evidence and I prefer the evidence of Mr. Hollyoake-Smith that those scores at pages 76 to 83 were the ones which the Claimant gave herself in discussion with him at the consultation meeting. I say that on the basis that:

    a. The Claimant had not disclosed the score document which she says that she produced prior to the consultation meeting at which she says that she gave herself different scores. She contended that she had not disclosed that because she did not consider that it was relevant. I did not accept that evidence at all. I found it incredible that the Claimant could not consider that scoring document to be relevant when this whole case is essentially about the scores that she had been given;

    b. Even when given the opportunity to make an application to have the document, which the Claimant said that she had with her, admitted into evidence she decided not to make that application;

    c. The Claimant's witness statement made plain that she had given her assessment sheets to Mr. Hollyoake-Smith which would explain the documents in the bundle and it is not otherwise clear where they are said to have come from;

    d. The Claimant's extremely otherwise very detailed witness statement did not make any reference to pages 76 to 83 not being the sheets which she had scored herself on. The bundle index is very clear that those are said to have been her scores and her witness statement would have been the ideal opportunity to correct that and to disclose the document which she says had her own

scoring notes; and

e. Mr. Hollyoake-Smith's evidence that pages 76 to 83 were the scores that the Claimant allocated herself at the first meeting was not challenged by Mr. Powell in cross examination.

50. I am therefore satisfied that pages 76 to 83 were the scores that the Claimant gave herself at the first consultation meeting. Those scores after weighting were 50 out of 88.

51. On 14th July 2020, prior to the meeting, Mr. Hollyoake-Smith had also undertaken a provisional scoring of the Claimant and that scoring appears in the bundle at pages 84 to 95. He in fact gave the Claimant a more generous assessment and his scoring after weighting was 55 out of 88. I raised with Mr. Hollyoake-Smith whether he had used any documentation in his assessment such as appraisal documentation or the like. He confirmed that he had not done so because those appraisals could not be located for everyone in the pool and so he disregarded them because he felt that it would be unfair to use those for some and not for others. I do not consider that to be an unreasonable approach.

52. I do not accept that Mr. Hollyoake-Smith did not discuss the scorings that the Claimant had done and his own scorings with her at the first consultation meeting and that she had not seen those. I preferred the evidence of Mr. Hollyoake-Smith to the Claimant on that point.

53. There was no area within the overall assessment where Mr. Hollyoake-Smith gave the Claimant a lesser score than she had allocated herself.

54. Prior to the consultation meeting with the Claimant Mr. Hollyoake-Smith had also discussed his provisional scorings for all of those in the pool with Donna Smith. That was of course in accordance with the requirements of the Respondent's procedure because Mr. Hollyoake-Smith had been in post as the Store Manager at the Four Seasons branch for just short of six months. Ms. Smith agreed with Mr. Hollyoake-Smith's assessment and gave her input as to what she had observed. Likewise, Mr. Hollyoake-Smith also had input into the scores of those in Ms. Smith's branch because he had previously been the Store Manager there.

55. I did not accept the Claimant's position that neither Ms. Smith nor Mr. Hollyoake-Smith had had sufficient time to properly observe her work so that they could not accurately score her. Whilst the Claimant had been off sick between November 2019 and February 2020, Mr. Hollyoake-Smith had nevertheless been able to regularly observe her work since her return as he was in store on most days even if some of that time had been on a phased return. Moreover, others in the pool who had been on furlough had also had time away from the business where they had not been observed by either Mr. Hollyoake-Smith or Ms. Smith.

56. I also do not accept that Lettice Dabell needed to be consulted about the Claimant's scores because she had overseen her return to work. That did not, as Mr. Powell suggested, make Ms. Dabell her line manager nor was there any other reason to deviate from the Respondent's redundancy

procedure so as to involve her.

57. Mr. Hollyoake-Smith also spoke to Lee Dowle-Evans who was the Regional Business Manager about the provisional scorings of all those within the pool. The Claimant is critical about that because she says that Mr. Dowle-Evans did not know her and so could not score her. However, I am satisfied that the involvement of Mr. Dowle-Evans was limited in respect of her position to brand standards in the store itself – a matter confirmed by the note at page 105 of the hearing bundle - and that affected all of those within the pool in the same way and not just the Claimant. Whilst he was able to make more general comments on the others in the pool who he had seen work, that was also not a matter that negatively affected the Claimant's position.

58. Having visited the store, I accept that Mr. Dowle-Evans was qualified to make his assessment in that regard.

59. As well as discussing the scoring at the meeting, Mr. Hollyoake-Smith also discussed with the Claimant whether, if she was selected for redundancy, whether there was any alternative employment that she would be interested in. She completed an availability review form setting out the details of where, when and how many hours per week she would be prepared to work. That form appears at pages 115 and 116 of the hearing bundle. The Claimant set out that she was prepared to work for 16 hours per week. She would accept a role as a customer adviser and the other store that she would be prepared to work in would be at St. Peter's Retail Park in Mansfield. I accept that there were no vacancies at that branch which the Claimant could have been offered.

60. The Claimant indicated that she did not need any other assistance in obtaining an alternative role. She was advised about a Boots Jobs intranet site although she did not use that tool to look for alternative roles herself.

61. Vacancy lists were sent around to all store managers from the Area Manager, Louise Foster, to review against the availability review forms that had been completed by those who were in the pool for selection (see page 120 of the hearing bundle). Those vacancies were discussed with the Claimant but she did not view any of them as being suitable.

62. At the consultation meeting Mr. Hollyoake-Smith read over a pre-prepared script which covered off on all key points, including that consultation was a two way process and the Claimant's views were important. A further meeting was arranged for 25th July 2020 to discuss matters further.

63. I am satisfied that Mr. Hollyoake-Smith made reference in the meeting to the Employee Information Pack (see page 113 of the hearing bundle) but the Claimant made no mention that she had not received that as she now says. Whilst I accept that it is possible that she may not have received that pack, Mr. Hollyoake-Smith was not aware of that and I am satisfied that the Claimant was aware of the existence of such a pack and could have asked for one at any time. It did not cause her any difficulties that she was not in receipt of it as when asked about that in cross examination all that she was able to say was that it "would have been nice" to have had a copy.

64. Mr. Hollyoake-Smith met with the Claimant again on 25th July 2020 for the second consultation meeting. By that stage the scores of all those who were at risk of redundancy at all stores where that was an issue had been moderated. That had taken place by way of a conference call with the Area Manager and then consideration of the scores at regional level. I accept that that was to ensure a consistency of scoring. The senior managers were able to do undertake that moderation exercise because on each of the areas where Store Managers had scored those in the pool, they were required to record all relevant evidence that they had considered when allocating the score. Those would be reviewed by the Area Manager against the relevant description of what amounted to "Excellent", "Effective", "Partially Effective" or "Not Effective" in each category to see if they had been marked consistently.

65. After the moderation exercise the Claimant's score was reduced to 47. The final score of Melanie Eyley was 52, that of Sue Walker was 63 and Michaela Hearne scored 68. I accept the evidence of Mr. Hollyoake-Smith that the only changes to his scores resulted from the input of the area level discussions and that there was no change to the scores of anyone after regional level review. Whilst the Claimant raises that Ms. Hearne was still only in training whilst she had a considerable number of years of experience, I accept the evidence of Mr. Hollyoake-Smith that length of service does not necessarily determine what scores should be allocated and I can see nothing unreasonable in the scoring that was given to Ms. Hearne.

66. The Claimant's score was the lowest of those in the pool for selection. I accept the evidence of Mr. Hollyoake-Smith that even before any calibration had taken place the Claimant's score was still the lowest. Therefore, even if the Claimant's score had remained at 55 she would still have scored the lowest and still have been the one in the pool selected for redundancy.

67. The main difference between the Claimant and the next lowest scorer, Melanie Eyley, was that the latter was given three points for commercial focus whilst the Claimant was given a two. Given the weighting attached to that criterion, it gave Ms. Eyley the higher score of the two. The Claimant had initially scored herself a two on that criterion as had Mr. Hollyoake-Smith. That score reflected the comments that he had made under that criterion and the score of three allocated to Ms. Eyley was fair and reasonable as she had a much more glowing account given to her by Mr. Hollyoake-Smith which took her into the category of a three.

68. The changes to the Claimant's scores which had resulted from the moderation exercise was to see her customer focus and brand standards scores reduced from a score of three to two in each case. Given the weighting for each of those scores this reduced the Claimant's overall scoring by eight points. It is not my role to re-score the Claimant but having regard to the comments of Mr. Hollyoake-Smith in respect of those areas I cannot say that the scores allocated were unreasonable ones and they certainly did not fall outside the band of reasonable responses.

69. Mr. Hollyoake-Smith met with the Claimant again on 25th July 2020. Again, Mr. Hollyoake-Smith read from the script provided by the Respondent to ensure consistency. Notes of the meeting were also taken and those appear at pages 133 to 136 of the hearing bundle. I am satisfied that they are an accurate reflection of what was said at the meeting.

70. Mr. Hollyoake-Smith explained that there was no available Customer Adviser role that she had expressed an interest in although he indicated that that position might change. He explained to the Claimant that she had scored the lowest within the pool and I am satisfied that he explained her new moderated score and why that had changed.

71. He advised the Claimant to continue to look for jobs on the Respondent's intranet site and set out the existing vacancies which were for The Moor in Sheffield, Healey in Sheffield and in Chesterfield. The Claimant was not interested in those roles and I am satisfied that that was because they involved too much travel. Although the Claimant has a car, I accept that it would not have been financially viable to travel from Mansfield to any of those locations to work for just 16 hours per week.

72. Mr. Hollyoake-Smith also set out that if alternative employment could not be found then her employment would terminate by reason of redundancy and he set out the Claimant's entitlement to redundancy pay. He explained that if the Claimant was made redundant then there would be a further meeting.

73. The Claimant, understandably, became upset at the meeting and chose to leave and so it terminated rather more abruptly than would have otherwise been the case.

74. On 31st July 2020 Mr. Hollyoake-Smith wrote to the Claimant confirming that she had been provisionally selected for redundancy. The letter enclosed a copy of the Claimant's scores and a breakdown of how they had been arrived at. That was a copy of the scoring sheets after moderation.

75. The letter set out that the selection was only a provisional decision and that there would be further consultation as to the way in which redundancy could be avoided. It was indicated in that regard that the Respondent would continue to explore alternative employment and invited the Claimant to make any representations as to how her redundancy could be avoided.

76. The letter invited the Claimant to a third consultation meeting on 5th August 2020 to give the Claimant an opportunity to discuss her proposed redundancy in more detail and how that would affect her. It was indicated that the following topics could be discussed:

- Why the Respondent had decided that it was necessary to make redundancies;
- How the pools for selection were identified;
- The selection criteria applied;
- How the selection criteria was applied;
- Why the Claimant's position had been provisionally selected;
- The terms on which any redundancy would take place;

- Possibilities for alternative employment elsewhere; and
- Any ideas that the Claimant may have for avoiding redundancy or reasons why she thought that she should not be selected.

77. The Claimant was advised of her right of accompaniment at the next meeting and advised that if she required copies of any documents to inform the Respondent. The Claimant did not request a copy of the Employee Information Pack that Mr. Hollyoake-Smith had referred to at the first meeting and which she says that she had never received. I am satisfied again that she had a further opportunity to request that pack if she did not have it.

78. It was indicated that after the meeting Mr. Hollyoake-Smith would consider her responses and write to her to confirm the outcome. Again, the Claimant was given the details for the EAP programme.

79. Between the last two consultation meetings the Claimant wanted to discuss the situation further with Mr. Hollyoake-Smith. It is common ground that he did not go into the detail that she wanted. I do not accept the Claimant's inference that that was because he was not able to explain her scores but instead the reason was due to the fact that he wanted to keep matters on a formal footing and felt that any discussions should properly take place during the scheduled consultation meetings. That was not an unreasonable position but it did give the Claimant the impression that she was getting the brush off and it would have been more sensible to have scheduled another meeting before the final consultation meeting to discuss her concerns.

80. The final consultation meeting was held on 5th August 2020 and the notes of that meeting appear in the bundle at pages 160 to 163. I accept that they are an accurate record of what was discussed. Again, Mr. Hollyoake-Smith used a generic script provided by the Respondent to form the basis of the discussion. The notes of the meeting were taken by Lettice Dabell.

81. The Claimant raised at the meeting that the scores had not been discussed. Mr. Hollyoake-Smith indicated that he had explained to the Claimant what scores had changed and why. The Claimant replied "okay". She did not say that she disagreed with the scores or push that matter any further. As she had not secured alternative employment and had indicated that she did not want to apply for any of the available vacancies, Mr. Hollyoake-Smith confirmed the Claimant's redundancy. Her right of appeal was discussed as was the support available to the Claimant via Lifeworks and a placement scheme.

82. One of the issues that the Claimant contends caused unfairness in her dismissal was that she wanted to be considered for a role undertaking the pick and pack work that she had been doing during the pandemic. Mr. Hollyoake-Smith had discussed that with the Claimant and had been hopeful that a vacancy would be able to arise. However, when raising that with his Area Manager he was told that that was dependant on the Respondent announcing a budget for such roles. I am satisfied that that did not occur before the Claimant's employment terminated.

83. The Claimant and Ms. Eyley worked hard during the lockdown period and it is common ground that after the redundancy consultation process had commenced Mr. Hollyoake-Smith told them that he would "look after" them or words to that effect. I do not accept that that was a reference to the fact that they would definitely be given a role in pick and pack as the Claimant contends. I accept that they would have been offered that only if and when there was a budget for those roles and that it was not open to Mr. Hollyoake-Smith to create a role for the Claimant to avoid her redundancy when one did not exist. The budget for the roles did not come in until approximately mid September 2020 some weeks after the Claimant's employment had terminated.

84. The Claimant also contends that one of the members of the staff from the Care Homes department, Alison Gannon, was allocated a pick and pack role which could have been given to her instead. However, I prefer the evidence of the Respondent on this point that this was a temporary move whilst the Care Homes team was overstaffed and resources needed to be pulled into pick and pack. When Mr. Hollyoake-Smith asked that department for assistance Ms. Gannon indicated that she was interested and therefore was temporarily assigned into pick and pack. Again, that was before there was any budget to create permanent roles in that regard.

85. Whilst Ms. Gannon also expressed an interest in moving into a pick and pack role on a permanent basis, I accept that that was also dependant on the announcement of the budget and that she was in no different position to the Claimant in that regard. There was therefore no pick and pack role that the Claimant could be offered as suitable alternative employment prior to her redundancy.

86. It is common ground that in the consultation meeting the calculation of the Claimant's redundancy entitlement was incorrect as it had been based on 8 years rather than 16 years continuous service. Whilst that was sloppy, it did not cause any unfairness to the redundancy process.

87. On the same day as the final consultation meeting had taken place Mr. Hollyoake-Smith wrote to the Claimant to give her notice of redundancy (see pages 164 and 165 of the hearing bundle). The letter confirmed that the Claimant's employment would terminate by reason of redundancy on 31st August 2020 and that she would be paid the balance of her notice period in lieu. The Claimant was advised of her right of appeal and how that should be exercised.

88. At times after she had been made redundant the Claimant asked what, if anything, she would have to repay of her more generous contractual redundancy payment if she obtained another job with the Respondent after being made redundant. It is common ground that she was not given the correct information about that, but that has no relevance to the fairness of her dismissal because it did not cause her in any way to alter her position on anything.

89. The Claimant exercised her right of appeal against dismissal on 12th August 2020. Her letter of appeal appears in the bundle at pages 170 to 171. The points that the Claimant raised on appeal were as follows:

    a. That she had wanted to discuss the justification for the scores but her requests had been refused;

    b. That the assessment comments did not correspond to the overall scores;

    c. That the people involved in the scoring had not witnessed her performance;

    d. That she had been told that even if her score was to change then she would still have scored the lowest; and

    e. That a role in picking and packing had been discussed but that that could not be dealt with until the release of the budget.

90. An Area Manager, Gareth Armstrong-Jones, was allocated to deal with the Claimant's appeal. Initially the appeal was to be dealt with by another Area Manager but there was a delay in his receipt of the Claimant's appeal letter which coincided with a pre-booked period of annual leave. Mr. Armstrong-Jones therefore took over the matter so that the appeal was not further delayed. I am satisfied that it was dealt with within a reasonable period of time.

91. Mr. Armstrong-Jones met with the Claimant on 28th August 2020. He had telephoned her previously to arrange the appeal hearing and she had agreed to forgo the usual 48 hours notice so that the appeal could progress as swiftly as possible. The Claimant's employment was of course due to end on 31st August 2020.

92. The Claimant takes issue with the fact that the note taker at the appeal meeting was a Vicky Stokes who was also due to be made redundant. Ms. Stokes was only taking notes, however, and was not part of either the decision making process or in the Claimant's pool for selection. It is therefore difficult to see what unfairness that is said to have caused.

93. I am satisfied that the notes of the meeting, which are in the hearing bundle at pages 184 to 194, are accurate. I am also satisfied that the Claimant was given the opportunity to raise all points that she wanted to during the hearing.

94. Mr. Armstrong-Jones also had a discussion with Mr. Hollyoake-Smith on 26th August 2020. There was no note taker for that meeting and the record was taken by Mr. Armstrong-Jones. Mr. Powell suggests that that was unfair to the Claimant, but it is very difficult to see what difference that made to her. I do not find there to have been any unfairness in that regard.

95. Mr. Armstrong-Jones discussed with Mr. Hollyoake-Smith the appeal points that the Claimant had made. Mr. Hollyoake-Smith told Mr. Armstrong-Jones that the input of Lee Dowle-Evans had been minimal, that the Claimant had been given a copy of the post calibration scores and that they had discussed the changes that had been made after the initial assessment. He set out that the main issue for the Claimant had been technology related although that was not actually an entirely accurate statement.

96. Mr. Armstrong-Jones asked Mr. Hollyoake-Smith if the scores had been close enough to affect the outcome. Mr. Hollyoake-Smith erroneously told him that Ms. Eyley had scored 63 when she had of course scored 52. I am satisfied that that was simply an error because Mr. Hollyoake-Smith had been referring to her original score rather than the one after calibration.

97. I am satisfied that before he made his decision on the outcome of the appeal Mr. Armstrong-Jones had in fact seen the relevant paperwork and understood the accurate position on the scoring. He therefore knew that Ms. Eyley's final score was 52 and not 63 and I am satisfied that he considered the scoring sheets of all of those in the pool.

98. Mr. Armstrong-Jones did not go back and rescore all of those in the pool and Mr. Powell is critical of that, but I accept that that was not his role. He was only required to consider matters from a review perspective to see if there was fairness and consistency as to the scoring process. He could not in all events score accurately or fairly those who were in the pool because he had no recent experience of their work. Indeed, he had not worked with the Claimant for approximately 15 years.

99. After he had completed his review, Mr. Armstrong-Jones telephoned the Claimant and advised her that her appeal had been unsuccessful and explained the reasons why. He also explained to her during the appeal process that Alison Gannon had only been temporarily assigned to pick and pack and had not been given a permanent role there.

100. Mr. Armstrong-Jones also wrote to the Claimant on 7th September 2020 dismissing her appeal. He summarised the Claimant's grounds of appeal as being that the desktop scoring was not an accurate reflection and the people involved in the scoring did not know her well enough.

101. As to those grounds Mr. Armstrong-Jones said this:

> *"We discussed in detail the desktop exercise and that you understood the process which you confirmed you did. You confirmed that you understood the calibration element as part of this process and that the scores that had changed as part of calibration were shared with you. When we reviewed your self scoring,* (sic) *confirmed that you had scored yourself and supported this with evidence; some scores had changed as part of your consultation with your Store Manager, highlighted with his pen, which confirmed the scoring on both sides had been discussed.*

The previous Store Manager, Donna Smith and the current Store Manager, David Hollyoake-Smith were the main contributors to your score. Whilst I appreciate there was a 6 month period of absence in between both Store Managers the relevant people applicable to complete this desktop, were involved, the same consistent approach was adhered to across the company as per guidance. You also shared that Lee Dowle-Evans, Regional Business Manager, had inputted and you had never met him. I am satisfied that Lee's involvement was very minimal and was the same input given to all No7 colleagues in store 12, which did not rely on him having met you."

102. He concluded that the correct process had been followed and was consistent and that options for alternative employment had been explored. He also set out his opinion that those who had had input into the scores was consistent across all stores.

103. The Claimant subsequently issued the proceedings which are now before me for determination.

CONCLUSIONS

104. Insofar as I have not already done so in my findings of fact above, I deal here with my conclusions in respect of the claim.

105. It is common ground that the Claimant was dismissed by reason of redundancy and no issue is taken that there was not a potentially fair reason to dismiss in that regard.

106. The question, therefore, is whether it was fair and reasonable to dismiss for that reason. The main challenge to the fairness of the dismissal is the scoring with the Claimant saying that the scores do not match the comments made and/or that she should have in all events scored in the higher range of three's or four's rather than two's.

107. Mr. Powell spent a considerable amount of time in cross examination seeking to establish that the Claimant should have been given a higher score. I find it all the more surprising in that regard that the Claimant had not disclosed what she says was her own original scoring if she now says that she should have been allocated a greater score than 50 points and her witness statement was also silent on the areas where she contends that she should have been given a higher score.

108. However, in all events I accept the submissions or Miss Jennings that in order to be placed into the higher categories the Claimant would have had to meet all of the standards in that area and not just one or two. Mr. Powell's cherry picking of some comments set out in the assessment by Mr. Hollyoake-Smith that may have resonated with some parts of the higher scores did not therefore mean that the Claimant should have been allocated that higher score when she did not meet all of that criteria.

109. I am satisfied that the scores that were allocated to the Claimant were fair and reasonable having regard to the comments made by Mr. Hollyoake-Smith, which I am also satisfied were his honest assessment of her.

110. Moreover, what the Claimant and Mr. Powell are effectively asking me to do is to re-score her and allocate her the higher scores that Mr. Powell now says that she should have been given (although it is again notable that the Claimant's statement was silent on those matters) which given the decision in **Green** to which I have referred to above it is not permissible for me to do.

111. There is also a challenge to the scoring in that the Claimant says that those who scored her were not able to fairly and accurately do so. I do not accept that, or that there should have been input from Lettice Dabell, for the reasons that I have already given above.

112. I therefore do not find any unfairness in the way that the Claimant was scored or the people who were scoring her.

113. The Claimant also contends that Mr. Armstrong-Jones did not discuss her scores or the comments which underpinned them. I am satisfied that that is not the case and that the Claimant was aware of the initial scoring that Mr. Armstrong-Jones had given her as they had discussed and worked through that at the initial consultation meeting. I am also satisfied that the Claimant was aware of the revisions to her scoring after moderation and that that was also discussed with her and the areas which had changed were identified. There was therefore no unfairness in the process in that regard. I am satisfied that had she wanted to challenge those then she had the opportunity to do so during the consultation process.

114. The third ground on which the dismissal is said to be unfair is that the Claimant contends that she should have been allocated suitable alternative employment. It is not suggested that there was any other role which should have been offered to the Claimant other than a pick and pack role. I am satisfied that that role did not exist at the time of the Claimant's redundancy because the budget for it had not been announced and, indeed, was not announced for some weeks after her employment had terminated. To offer the Claimant a position in pick and pack would therefore have required the Respondent to create a role that did not currently exist. That included the role which Ms. Gannon temporarily occupied. It was well within the band of reasonable responses for the Respondent not to have offered the Claimant a role in pick and pack which did not exist at the time.

115. The Claimant also contends that it was unfair that she was not provided with a copy of the Employee information pack. I am satisfied that the Claimant would have been aware, for the reasons that I have already set out above, of the existence of the pack and so could have requested a copy if she required one. Moreover, other than the fact that it would have been "nice to have had it", the Claimant was not able to point to anything in cross examination that affected the fairness of the process by her not having had a copy.

116. The Claimant also contends that it was unfair that Vicky Stokes was the note taker at the appeal hearing because she was also being made redundant. I do not accept that there was any unfairness in that regard. Ms. Stokes was not making any decision in respect of the Claimant's appeal and it is difficult to see how her own redundancy would have had any impact on the hearing, the outcome or the fairness of either. Similarly, despite Mr. Powell's position in cross examination there was no unfairness to her either that she had a note taker but there was none for the interview of Mr. Hollyoake-Smith.

117. The Claimant also contends that she was given incorrect information about the length of time that she would have to have left the Respondent before she did not have to pay back any part of her contractual redundancy payment and her length of service was initially incorrect with regard to her redundancy entitlement. Neither of those things affected the fairness of the process nor was it information that the Claimant relied upon to her detriment.

118. The Claimant also raises that Mr. Hollyoake-Smith gave incorrect information to Mr. Armstrong-Jones about the scores of Ms. Eyley but I am satisfied that that did not cause any unfairness to the process because that was picked up by Mr. Armstrong-Jones before he made his decision on the appeal when he reviewed the scoring documentation.

119. Finally, the Claimant is critical of the fact that Mr. Armstrong-Jones did not rescore her during the appeal process. For the reasons that I have already given above I do not find that that was at all unfair and that in reality Mr. Armstrong-Jones was not in a position to fairly rescore those who he did not line manage. He could do no more than look at the comments supplied by Mr. Hollyoake-Smith and whether those had been fairly and consistently applied during the scoring process. I am satisfied that that is what he did.

120. I am therefore satisfied that the Claimant's dismissal was neither substantively nor procedurally unfair. However, even if I had found that there was some procedural defect in the redundancy process I would nevertheless have concluded that that would not have made any difference to the overall process because the Claimant would still have been dismissed in all events. That is because she had been fairly scored and had received the lowest score of the pool of four. Her dismissal was therefore inevitable.

121. On a final note, nothing that I have said here detracts from the fact that I am well aware of the fact that the Claimant found her dismissal to be a very distressing experience and I sincerely hope that she can take comfort from the words of Miss. Bowen in her closing submissions that at no time was the process designed to criticise her or her performance.

122. However, for all of the reasons that I have given the claim fails and is dismissed.

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Employment Judge Heap
Date: 15th July 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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