EMPLOYMENT TRIBUNALS

Claimant:	Mr Brian Marshall
Respondent:	MD Building Services Ltd
Heard at:	Bristol (remotely)
On:	16&17.06.20201 & 14.07.2021
Before:	Employment Judge David Hughes
Representation	
Claimant:	in Person
Respondent:	Sarah Harty (counsel)

JUDGMENT

1. The Claimant's claim for unfair dismissal by reason of redundancy is not well founded and is dismissed.

REASONS

1. The Claimant was employed by the Respondent as a supervisor.

2. The Respondent is a building maintenance company, operating primarily in the public sector.

3. In August 2019, the Respondent had won a contract with Poole Housing Partnership (PHP), to carry out maintenance on the latter's properties. The Claimant had been employed by the previous contractor, and was TUPEd into his employment with the Respondent.

4. The Claimant claims that his dismissal was unfair.

<u>The issues</u>

5. A case management order made on 21.11.2020 directed that, where the parties are both professionally represented, the professional representatives shall prepare a draft statement of issues or questions that are to be decided by the Tribunal at the hearing. The draft statement of issues said shall be subject to the Tribunal's agreement at the commencement of the hearing.

6. The Claimant is not professionally represented, and so no joint statement of issues was prepared. The Respondent is professionally represented, and its counsel, Sarah Harty, prepared a skeleton argument, in which she identified the issues as being the following:

a. What was the reason for the Claimant's dismissal? The Respondent contends that he was dismissed on the grounds of redundancy, or alternatively, for some other substantial reason, namely a business re-organisation;

b. If the reason for the dismissal was redundancy;
   i. Had the requirements of the Respondent's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?
   ii. If so, was the Claimant's dismissal caused solely or mainly by that redundancy situation?
   iii. If so, was the Claimant's dismissal fair in all the circumstances, taking into account in particular (i) consultation, (ii) selection criteria and (iii) any suitable alternative employment?

c. If the dismissal was procedurally unfair, would the Claimant have been dismissed in any event, had a fair procedure been followed?

7. In order to guarantee fairness to the Claimant, I asked Ms Harty to deliver a short oral opening at the outset of the hearing. She did so, in the course of which she paraphrased the issues as being;

   a. Was there a genuine redundancy situation?
   b. Was the dismissal caused by the redundancy? And
   c. Was the dismissal fair in all the circumstances, encompassing the process of selection, scoring, etc.

8. I am satisfied that the issues set out in the Respondent's skeleton argument are the correct ones for me to consider.

The facts

9. I heard evidence from Vincent Bradbury, Samantha Matthews, Richard Perry and Ricky Swift for the Respondent. The Claimant gave evidence on his own behalf.

10. The Claimant was a supervisor. He was one of 3 supervisors.

11. The Respondent took over the contract with PHP on 01.08.2019.

12. After taking over the contract, the Respondent inherited 3 supervisors. Two of those covered reactive works, which is to say, works that arose in occupied homes. The Claimant covered what were termed "voids". This meant works required in untenanted homes.

13. Mr Bradbury told me that he was part of a team that reviewed the contract over the first few months, and that it was not commercially viable because of overhead costs, poor management of people, and there were too many trade personal with the wrong trade skills. He said that there were too many supervisors, bricklayers and painters. He said that it was planned to have one supervisor, and one person in a higher level role as a voids and planned works manager. This was referred to before me as the "new role", and I will refer to it as such.

14. Samantha Matthews was performance director at the Respondent. She told me that 3 supervisors were more than the Respondent had anticipated or priced for. It strikes me as perhaps little surprising that the Respondent was, apparently, unaware of the number of supervisors it was taking on. It is also in some tension with Ms Matthews also saying that she was aware that the Respondent was over-staffed in regard to supervisors, something of which she was aware through being part of the team that had bid for and obtained the contract with PHP.

15. This was not challenged by the Claimant when he cross examined Ms Matthews. I had explained to the Claimant that, if he wanted to challenge something a witness said in evidence, he needed to ask that witness about it in cross-examination. It became apparent when the Claimant gave his own evidence that he had not understood that. I have to be fair to both parties. It seems to me that it would be unfair to him to simply disregard his submissions on points about which he did not cross-examine. I have had regard to all of the points made by the Claimant in his submissions. But I cannot speculate on the answers that may have been given, had, for example, Ms Matthews been cross-examined on the need for 3 supervisors. And I must be cautious about accepting any submissions on which a relevant witness has not been given the chance to comment.

16. I accept that the Respondent, made a genuine assessment that the Respondent did not need 3 supervisors. Whether that was a commercially sound decision, or one that is consistent with the Respondent's contract with PHP, are not issues for me to consider. The Claimant cross-examined the Defendant's witnesses on the use of sub-contractors, but it seemed to me that he did so with a view to either establishing that the business case for a reduction in the number of supervisors was not sound, or was in breach of the Respondent's contractual duties towards PHP.

<u>Consultation</u>

17. On 23.01.2020, all 3 supervisors were called into a meeting. That meeting was chaired by Ms Matthews. In that meeting, as the Claimant accepted when cross-examined, the supervisors were shown a series of 12 slides;

    a. Slide 1 was a title slide, with the words "*Poole Optimisation*";
    b. Slide 2 posed the question, "*why are we all here?*" I do not need to set out its contents in full, but says "*Optimisation – Review of processes and resources*". It then goes on to set out a series of bullet points, below which one sees "*Results in us needing to reorganise our team*";
    c. Slide 3 starts with the heading "*What this means for you*". This is followed by bullet points, which read (i) "*There are more people than available roles for your position*"; (ii) "*therefore unfortunately you are put at risk of redundancy*"; (iii) "*you will automatically be considered for a position in the same role via a selection criteria process*"; and (iv) "*You may apply for any available vacancies we have*";

d. Slide 4 list the selection criteria. They are stated to be;
- Ability;
- Engagement;
- Problem solving;
- Productivity;
- Communication;
- Attitude and motivation;
- Attendance.

e. Slide 5 indicates the number of positions available for supervisors, bricklayers, and decorators. One position was available for each. It indicated the individuals in the pool for each post. For the supervisor post, they were the Claimant, Brian Kenchington, and Mark Warland;

f. Slide 6 indicated what the next steps would be. Each would receive a letter confirming the details of the meeting, and a copy of the presentation made. In the week commencing 27.01.2020, each would be contacted regarding the appointment for a first consultation meeting. They were told to take time to consider any questions they may want to ask at that consultation meeting, and whether they wished to be accompanied by a representative. It was emphasised that this was a consultation, with no decisions having yet been made, and recipients were asked to raise any viable suggestion to mitigate against redundancy;

g. Slide 7 set out the time line for individual consultations, selection criteria forms being scored (both in the week commencing 27.01.2020), 2nd and final individual consultation (week commencing 03.02.2020) and individuals being informed of the decision (07.02.2020);

h. Slides 9 to 11 dealt with frequently asked questions. I do not need to set them out in full.

i. Slide 12 simply read, "*Any questions?*"

18. The papers before me contained a letter dated 22.01.2020. It is addressed to "*Dear Brian*", and starts "*Further to today's meeting, I am writing to confirm that the Company has undertaken a review of its staffing requirements and resources which may lead to redundancies for Supervisors in Poole"*. Its terms are consistent with the slides referred to above. I do not think anything turns on whether it was given on 22nd or 23rd.

19. Another email relating to redundancies was sent by Ms Matthews on 24.01.2020. It was circulated to a large number of people, including all 3 supervisors. I do not need to set out its terms.

1st consultation meeting

20. Dean Dawn arranged an individual consultation meeting with the Claimant on 28.01.2020. A record of that meeting, part typewritten, part in manuscript, was in the bundle before me. I accept that that record is likely to reflect what was said at that meeting.

21. Ms Matthews dealt in her statement with the meeting of 28th. She said in her statement that "*Brian Marshall commented that he could see this*

happening and knew that we didn't need 3 supervisors". The Claimant challenged this, and I understood him to dispute that he acknowledged that 3 supervisors were not needed. The only comments recorded in manuscript on the record of the meeting are "*advise redundancy figures*", "*works hard – not interested in other role*" and "*works harder than most*". I do not take the record to be a verbatim note, but I think it probable that, if the Claimant had acknowledged that 3 supervisors were not needed, that would have been recorded. I therefore do not accept Ms Matthews as account that he did say that in the meeting as reliable.

22. I do, however, accept that the Claimant indicated in the 1st consultation meeting that he was not interested in applying for the new role.

Subsequent email correspondence

23. The was an exchange about whether supervisors had to have a qualification in Site Management Safety Training Scheme (SMSTS). This was referred to extensively before me, but it what exactly it was, or who might have imposed a requirement that supervisors have it, was not explained to me in any depth.

24. On 16.01.2020, Matthew Vincent, operations manager, had emailed the 3 supervisors, to ask if any of them held a SMSTS or SSSTS certificate. The Claimant replied on 28.01.2020 – the email is timed at 08:45hrs, the same time at which the consultation meeting is recorded as having started – to say that he did not. I have not seen any replies from the other supervisors.

25. At 09:53hrs on 28.01.2020, Mr Vincent emailed Ms Matthews, saying "*if it transpires none of the supervisors have these qualifications, they should not be in the role*".

26. At 21:21hrs on that same date, Ms Matthews forwarded Mr Vincent's email to Mr Bradbury, asking if it was correct, and, if it was, what were the implications.

27. A few minutes later – at 21:29hrs – Mr Bradbury replied. He wrote as follows:

"*Zoe can back me up here – the clue is in the name – it is all about sites and specifically building sites (so always construction and nearly always in planned). But regardless, all managers and supervisors should have experience and knowledge in any construction activity to ensure the safety of the workforce and public.*
*Unfortunately as usual the HSE dont (*sic*) make the latter easy to interpret and therefore people tend to graduate to what is commonly accepted. Most Supervisors and managers in R&M dont (*sic*) have SMSTS or SSSTS but have experience and training to ensure the safety responsibilities they have due to their role."*

28. At 9:41pm – for some reason, the timing of the email has switched from the 24hr clock to the 12hr clock – Ms Matthews acknowledged Mr Bradbury's email.

29. On 28th and 29th January, there was an exchange of emails between the Claimant and Dawn Dean, who attended the consultation meeting on 28th but did not give evidence before me. The Claimant asked if the new role would be on the same TUPE terms and conditions. Ms Dean replied that it would be on a new MD contract, but if ex-sovereign staff were successful, the person's length of service would be honoured. On 29.01.2020, the Claimant asked to be sent the full terms and conditions for the new role.

Scoring

30. The scoring of the 3 supervisors was done by Ms Matthews and Mr Perry. Each scored each of the supervisors.

31. The presentation of the scoring was not without shortcomings. The scoring document in the bundle was not the correct one, and other scoring documents had to be sent in to me. Ms Matthews and Mr Perry were re-called to explain those documents.

32. The criteria were;

- Ability
- Engagement
- Problem solving
- Communication
- Attitude and motivation.

33. There was an additional criterion – attendance – but this was only to be used as a tie-breaker.

34. Each criterion had a general description at the top, and below, descriptors with 5, 3 and 1 point.

35. My understanding from looking at the scoring descriptors is that scores of 1, 3 or 5 were possible for each criterion. Mr Perry appears to have taken the same view, as he scored each applicant with a 1, 3 or 5.

36. Ms Matthews took a different view. She considered that the scores provided for a sliding scale. The difficulty with that view is that, one can look at the descriptors in each criterion, and the scorer can make an assessment of what someone's score should be. What might take a person from, say, a 1 to a 2, or from a 3 to a 4, is not indicated at all.

37. It is not difficult to see that the Claimant might perceive this element of the scoring as unfair. I have some sympathy with that view. But it is important to look at the practical consequences of this.

38. The final score for each supervisor was obtained from an average of Ms Matthews' and Mr Perry's score, multiplied by a weighting. In some

instances, marks were rounded down, rather than rounded up. There was a lack of consistency in this. The final score for each supervisor was as follows:

- Brian Ketchington 114 points
- Mark Warland 90 points
- The Claimant 69 points

39. I have not included the attendance scores in those figures, as no tie-break was necessary.

40. The Claimant was cross-examined on what the consequences would have been, if Ms Matthews had scored on a 1-3-5 basis, omitting 2 and 4 as possible scores. He recognised – I think correctly – that, had Mr Perry used the sliding scale approach, he might have scored a 2 where he scored a 1, or a 4 where he scored a 3, but he would not have scored a 3 or a 5, respectively, because Mr Perry had had those descriptors in mind, and had determined that the Claimant did not meet them. If Ms Matthews had adopted the 1-3-5 approach, the Claimant's scores for problem solving and attitude and motivation – he scored a 2 on each – would have gone down.

41. The Claimant was taken through the mathematical consequences of the inconsistencies in the scoring in some detail. He accepted that they would have made little difference to his score, and no difference to the relative scores. He would still have scored lower than the other two supervisors.

42. The Claimant's response to that was to contend that he had been scored deliberately low. This was not put to either Ms Matthews or to Mr Perry.

43. In her written closing submissions, counsel for the Respondent contended that the Claimant then changed his case to allege that the whole scoring process had been unfair and that he had lost confidence in it.

44. I think that characterisation of the Claimant's argument is a little unfair. In his statement, he voices an unhappiness with the scoring, saying "*I do not believe that the scores reflect actual position and have been manipulated to suit.*" The reasons he gives in his statement are that one supervisor's score for attendance did not reflect time off work that the person in question had had, and the impact of having had 5 managers in the previous 6 months. The Claimant is a litigant in person, and it would be unfair to expect him to express himself with the precision of counsel.

45. That said, I do not find that the Claimant was unfairly scored, out of any desire to keep his score artificially low, or for any other reason. He was scored as Ms Matthews and Mr Perry honestly and fairly assessed him, as were the other supervisors.

2nd consultation meeting

46. The second consultation meeting was held on 05.02.2020. The Claimant says that he was not given feedback on his scores at that meeting, as no-one was available to discuss the scores.

47. Mr Swift was at the meeting, and discussed it in his statement.

48. There is a record of the 2nd consultation meeting, again part typewritten, part in manuscript. The manuscript reads;

    "*Not accompanied*
    Doesn't agree with scores. May appeal
    Obviously not good enough.
    Won't be bullied not happy with Vince's email
    re holidays
    Management co not maintenance co
    No training & investment
    Didn't feel fair Sam/Richard not here to provide responses
    Not going to make a fuss just move on"

49. I consider that the record of the meeting is more likely to be reliable than the recollection of either the Claimant or Mr Swift, although in truth there is little real dispute regarding this meeting. The record indicates that the Claimant did not agree with the scores, and made that clear at the meeting, and that he was aggrieved that neither Ms Matthews nor Mr Perry was at the meeting to discuss the scores.

Appeal

50. The Claimant did appeal the decision.

51. A handwritten note of the appeal meeting, which was held on 12.02.2020, was in the bundle before me. The meeting was taken by Ms Matthews, and it appears that Ms Dean may have been present too. The record may be the best evidence of what happened at the meeting, but there are things recorded in it of which I am doubtful.

52. The Claimant didn't agree with the scores, and wanted to know how they were reached. Ms Matthews explained to him how the scores were reached. The Claimant was not happy, he believed that the Respondent didn't want him, and that Mr Perry had never liked him.

53. The note records a review of the scores as having been taken place. Given that Ms Matthews' approach to scoring, as I have found, allowed an element of subjectivity into the process, with her allocating marks that did not correspond to a descriptor, I am not satisfied that the review of the scores was as clear as that conducted by Ms Harty when she cross-examined the Claimant.

54. The record has the following:

    "*BM doesn't agree thinks does a good job.*
    -obvious we don't need 3 supervisors
    -knows financially doesn't make sense. Disagrees with the scores."

55. I am doubtful that the Claimant agreed that 3 supervisors were not needed.

56. Discussion then went on to the new role. The Claimant was given a job description, and Ms Matthews went through the detail of it with him. There was a discussion of Health and Safety qualifications, although what the nature of that discussion was is not recorded. There was a discussion of whether the new role would be on TUPEd terms and conditions. The discussion is noted as follows:

    "*DD – TUPE + Ts+ C's are protected this isn't in question in current role.*
    DD – new job new MD contract confirmed.
    We followed process.

    DD – Was he going to apply for the new role?

    BM- No.

    We said have a look + take away.
    …"

57. The Claimant's appeal was unsuccessful. There was a delay in sending the Claimant written confirmation of this, it was not sent until 04.05.2020.

Alternative role

58. The Claimant was encouraged to apply for the new role. There was much discussion in the course of the hearing as to whether SMSTS qualification was required. No satisfactory answer emerged as to whether or not it was, and I am not satisfied that the Respondent had a clear internal understanding as to whether or not it was. The lack of clarity as to that is unfortunate.

59. Also unfortunate is that Mr Bradbury, who was responsible for making sure that those who needed training got it, was unaware that the Claimant had had some safety training regarding working at heights.

60. The Claimant's position on this was also not entirely clear. In his statement, he queries whether the areas and responsibilities of the new role are realistic, and whether they correspond to the role carried out by the person who was employed in the new role.

61. I find as follows: The Claimant was told that he could apply for the new role, and encouraged to do so. There was a lack of clarity as to whether SMSTS certification was a requirement in order to apply for the role, or whether training in it would be provided to a successful candidate who lacked it. That may have caused some concern to the Claimant, but the reason why he did not apply for the new role is that stated in that he was concerned about the change from his TUPE terms and conditions to new terms and conditions in the new role. In his ET1, the Claimant lists 3 reasons for not applying for the new role:

    a. MD Group scored me the lowest so I formed the opinion I was not wanted. Most likely because my

TUPE T&Cs are far better that (sic) MD Groups (sic). (I asked for these & job description).
b. Within the new Job Description they had inserted a qualification which another manager had previously asked me if I had just before the job desc was produced (I did not).
c. I considered that if I applied & if I had got it I would have given up my protected TUPE rights.

62. I do not accept that the second of those reasons was why the Claimant did not apply for the new role. If – as I have found that there was – confusion as to the exact requirements of the new role re SMSTS training, the Claimant could, and I find would, have applied for it, and awaited the outcome. The reason he did not was because of concern about what he considered inferior terms and conditions.

Law

63. The Employment Rights Act 1996, s98, provides as follows (insofar as is relevant):

98.— General.
(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it—
(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
…
(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.
…

64. S139 of the ERA1996 deals with redundancy, and provides as follows:

139.— Redundancy .

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
(a) the fact that his employer has ceased or intends to cease—
(i) to carry on the business for the purposes of which the employee was employed by him, or
(ii) to carry on that business in the place where the employee was so employed, or
(b) the fact that the requirements of that business—
(i) for employees to carry out work of a particular kind, or
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
have ceased or diminished or are expected to cease or diminish.
(2) For the purposes of subsection (1) the business of the employer together with the business or businesses of his associated employers shall be treated as one (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).
(3) For the purposes of subsection (1) the activities carried on by a local authority with respect to the schools maintained by it, and the activities carried on by the governing bodies of those schools, shall be treated as one business (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).
(4) Where—
(a) the contract under which a person is employed is treated by section 136(5) as terminated by his employer by reason of an act or event, and
(b) the employee's contract is not renewed and he is not re-engaged under a new contract of employment,
he shall be taken for the purposes of this Act to be dismissed by reason of redundancy if the circumstances in which his contract is not renewed, and he is not re-engaged, are wholly or mainly attributable to either of the facts stated in paragraphs (a) and (b) of subsection (1).
(5) In its application to a case within subsection (4), paragraph (a)(i) of subsection (1) has effect as if the reference in that subsection to the employer included a reference to any person to whom, in consequence of the act or event, power to dispose of the business has passed.
(6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.
…

65. The Respondent refers me to Williams -v- Compare Maxam [1982] ICR 156, inviting my attention in particular to the following:

"*…there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:*
1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.
2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little

hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.
3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.
4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.
5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

The lay members stress that not all these factors are present in every case since circumstances may prevent one or more of them being given effect to. But the lay members would expect these principles to be departed from only where some good reason is shown to justify such departure…."

66. Although Williams concerned a case in which there was a trade union in the workplace, the same principles apply where there is none: see Freud -v- Bentalls [1983] ICR 77.

67. It is not open to me to investigate the commercial and economic reasons behind a decision that an employer's need for employees to carry out work of a particular kind has ceased or diminished: see James W. Cook & Co (Wivenhoe) Ltd -v- Tipper & ors [1990] ICR 716. It is a question of whether this is a genuine decision or not.

68. If the decision is genuine, the Respondent's contention is that the criteria chosen for making the selection shouldn't depend solely on the subjective assessment of a particular manager, but should be capable of at least some objective assessment (see Williams). If some items are not capable of objective verification, that is not necessarily fatal to the scheme; see Nicholls -v- Rockwell Automation Ltd UKEAT/0540/11.

69. My attention was also invited to the words of Millet LJ in British Aerospace Plc -v- Green [1995] ICR 1006;

"The tribunal is not entitled to embark upon a reassessment exercise. I would endorse the observations of the appeal tribunal in Eaton Ltd. v. King [1995] I.R.L.R. 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, and that ordinarily there is no need for the employer to justify all the assessments on which the selection for redundancy was based."

Conclusions

70. The Respondent had reached a genuine decision that it did not need 3 supervisors. To use the words of s139 of the ERA, it had determined that the requirements of its business for employees to carry out work of a particular kind had diminished.

71. The Respondent having reached that genuine decision, the wisdom or otherwise of it is not for me to consider.

72. The Claimant was dismissed because of that decision. His dismissal was by reason of redundancy. That is a potentially fair reason for dismissal under ERA s98(2)(c).

73. Was the Claimant's dismissal fair? Looking at the Compare Maxam guidance, I find as follows:

a. The Respondent did give as much warning as possible of impending redundancies. It was entitled to carry out a review of its business needs. Once it had done so, it communicated to those concerned the risk of redundancy;

b. There appears to have been no trade union in place with whom the Respondent could consult. There was some consultation with the workforce as to the criteria to be used in selection for redundancy. Although I have some concern that the consultation may have had more form than substance, this was not explored in evidence before me and I find, on a balance of probabilities, that there was consultation;

c. Did the criteria for selection depend solely on the opinions of the person making the selection, or could they be objectively checked? A consideration of the single-word criteria has the potential to mislead. I pay more attention to the descriptors, both generally and in each individual criterion;

- The "Ability" criterion does have some subjective element. But the reference to having experience in managing teams of operatives, to suggesting possible solutions to problems, and to reviewing processes, seem to me to have a significant objective element;
- The "Engagement" criterion refers to demonstrating compliance with daily routines and tasks assigned. That seems to me to be objective. Other elements of this criterion, such as having a positive attitude, may be more in the eye of the beholder;
- "Productivity" includes having a "good work ethic". That seems to me to allow for a fair element of subjectivity. Maximizing contract performance and having an excellent grasp of information and measurement reporting are more objectively measurable, as is working towards deadlines.
- "Communication" is framed in rather generic terms – "shows ability to communicate at all levels including tenant/client liaison". But the descriptors are more tightly drawn – referring to consistently or frequently communicating verbally and via PDA any issues in a manner as appropriate to the audience. This strikes me as having a significant element of objectivity.

- "Attitude and motivation". The descriptors here strike me as having a mix of subjectivity and objectivity. A "positive attitude" may be in the eye of the beholder. But being "proactive in offering assistance" may be something allowing of more objective assessment.

74. In considering the objectivity and subjectivity of the criteria, I am mindful that too narrow an interpretation of objectivity would reduce the assessment of criteria merely to things susceptible of measurement – eg hours worked, time off taken. It would not allow for proper assessment of an employee's performance. On the other hand, the whim or caprice of the selector is not a fair selection criterion.

75. I consider that the selection criteria were, taken as a whole, fair. Where they allowed for some subjectivity to come in, they did so largely in the form of assessment of the supervisors' workplace performance.

76. Returning to the Williams -v- Compare Maxam guidance, the Respondent did ensure that the selection was made fairly in accordance with the criteria. It allowed the Claimant to make representations about the scoring, and I am satisfied that such representations were considered.

77. Regarding alternative employment, I have found that the Claimant was invited to apply for the new role. He did not do so, because of his concern about what he viewed as inferior terms and conditions. I consider that the Respondent acted reasonably in inviting him to apply for the new role.

78. I find that the Claimant's dismissal was fair in all the circumstances.

Costs

79. The Respondent asks me to make a costs order in its favour.

80. The Employment Tribunals (Constitution and Rules of Procedure) Regs 2013, Rule 76 (1)(b) is relied upon by the Respondent. It provides as follows:

76.— When a costs order or a preparation time order may or shall be made
(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(b) any claim or response had no reasonable prospect of success

81. If I decide that the Claimant's claim had no reasonable prospect of success, I have a discretion to make a costs order.

82. There are therefore potentially two questions for me to consider;

a. Did the claim have no reasonable prospect of success, and, if so
b. Should I exercise my discretion to award the Respondant costs?

83. Ms Harty for the Respondent contends that it should have been abundantly clear to the Claimant why he was dismissed. That there was a redundancy situation, that, even if he disagreed with the scoring, the process was fair and objective. There was no apparent unfairness on the face of the criteria, such as might have entitled him to some expectation of being able to achieve success before the Tribunal. There was no prospect of him being able to persuade the Tribunal to conclude that the Respondent didn't have a business need to make redundancies, nor that the consultation was inadequate. Concerns about shortcomings in disclosure not within the Claimant's contemplation when he put forward his claim.

84. Ms Harty sought to rely on a costs warning letter, dated 11.06.2021.

85. I was very unimpressed with the costs warning letter. It consisted of 2 and a half pages of what might politely be called legalese. Ms Harty submitted to me that its terms were clear. They were to a trained lawyer. I will quote part of it as an example:

> ***PROSPECT OF SUCCESS – UNFAIR DISMISSAL***
>
> *The reason we are writing to you in these terms is because we consider that your claim does not have reasonable prospects of success. We have summarised the principal reasons for our view below:*
>
> 1. *The Respondent documented the business need for the re-organisation (principally in the consultation letter of 22 January 2020, the consultation slides and witness evidence) which did not solely impact you, but other supervisors, bricklayers and decorators.*
> 2. *The Respondent followed a thorough and robust process in relation to the business re-organisation and acted fairly and reasonably at all times during the redundancy process.*
>
> *The Respondent conducted two rounds of consultation meetings where supervisors were scored against objective criteria and, in compiling the scores, the Respondent sought input from another member of staff who has worked with you for longer.*
>
> 3. *You were also offered the opportunity to apply for the new Planned and Voice Works Manager role, but you chose not to apply.*
> 4. *As a result of the Respondent's business re-organisation, you were dismissed by reason of redundancy.*
> 5. *Even in the event that the Employment Tribunal was persuaded that your dismissal was procedurally unfair (which the Respondent considers unlikely), it is likely that the Tribunal would find that you would have been dismissed in any event as a result of the business need for re-organisation and your low scoring. As a result, any damages that you may be awarded would be reduced. Accordingly, the Respondent believes the settlement offer of £3,000 (subject to COT3 terms) to be fair and reasonable.*

86. Solicitors frequently write to opposing parties, expressing confidence in their own client's prospects of success. I consider that the most probable reaction to a letter such as this from a lay person would be complete bafflement. Let us take the first sub-paragraph above. It could easily have been framed in terms such as "*The Respondent has shown that it needed to make redundancies. You saw the letter dated 22.01.2020.*"

87. The letter also assumes a level of legal knowledge that strikes me as unfair. A lay person receiving it might well think, ok, you say your client is going to win, but why does what you say mean that? If the letter had said something like, in order to succeed, the Tribunal will need to find X, Y or Z, and we say that it won't find that, for reasons A, B or C, I might have given it more weight. But, framed as it is I do not think it would be fair to give it much weight at all.

88. I accept that the Claimant had little reasonable prospect of persuading the Tribunal that there was not a genuine redundancy situation. I have found that there was adequate consultation, but I would be cautious about concluding that there was little prospect of the Claimant succeeding on that point. To do so would risk presuming that a conclusion I have reached on considering the evidence was apparent from the outset.

89. I am still less ready to accept that my finding that the selection criteria were fair, and were fairly scored, was one which the Claimant should have realised was inevitable. It wasn't. When I read the scores in the Respondent's bundle before the hearing, I had concerns about the scoring system. It may be that Ms Harty sells herself short, in that her analysis of the impact of inconsistencies persuaded me that the inconsistencies that I found were there, had no impact on the overall fairness.

90. I would therefore not find that this was a case in which the Claimant had no reasonable prospect of success.

91. If I were wrong on that, I would not exercise my discretion to award costs against him in any event. He's brought a claim, which has not succeeded. In this Tribunal, costs do not automatically follow the event. I am not persuaded that there is anything really to distinguish this case from any other unsuccessful case.

Employment Judge Hughes
Date: 14 July 2021

Judgment and Reasons sent to the Parties: 21 July 2021

FOR THE TRIBUNAL OFFICE