



THE EMPLOYMENT TRIBUNALS

Claimant

Mr P. Gillis

Respondent

Tesco Stores Ltd ("Tesco")

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at Newcastle (by CVP)
EMPLOYMENT JUDGE GARNON

ON 1 and 2 July 2020

Appearances

For Claimant: Mr W Hoban, Lay Representative

For Respondent: Ms L Gould of Counsel

JUDGMENT

The claim is not well founded and is dismissed

REASONS (bold is my emphasis, italics are quotations and numbers in brackets are pages in the trial bundle)

1 Issues and Relevant Law

1.1. The claim is unfair dismissal only. The issues are

- (a) What was the reason, or if more than one the principal reason, for the claimant's dismissal?
- (b) Was it that he was redundant?
- (c) If so, did Tesco act reasonably in all the circumstances of the case (i) in following a fair procedure, and(ii) in treating the reason as sufficient to dismiss?
- (d) If it acted fairly substantively, but not procedurally, what are the chances it would still have dismissed if a fair procedure had been followed?

1.2. Section 98 of the Employment Rights Act 1996 (the Act) includes:

"(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 dismissal*
 - (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*
- (d) is that the employee was redundant "*

1.3. Redundancy is defined in s 139 which says dismissal shall be taken to be by reason of redundancy if, among other circumstances, it is wholly or mainly attributable to the fact the

requirements of the business for employees to carry out work of a particular kind, either generally or in a particular place, have ceased or diminished or are expected to cease or diminish, permanently or temporarily, and for whatever reason. The “for whatever reason” is from s 139(6) and means an employer need not justify objectively its commercial decisions of how to respond to economic circumstances. Safeway Stores-v-Burrell, affirmed in Murray-v-Foyle Meats, held if there was (a) dismissal and (b) a “redundancy situation” (shorthand for one of the sets of facts in s 139) the only remaining question under s 98(1) is whether (b) was the principal reason for the happening of (a). The test is whether there was a reduction in the requirement for employees to carry out work not a reduction in work. The claimant rightly accepts there was a redundancy situation.

1.4. Abernethy-v-Mott Hay & Anderson held the reason for dismissal is a set of facts known to the employer or may be beliefs held by it, which cause it to dismiss the employee# ASLEF-v-Brady involved dismissal on grounds of misconduct. What Elias P said would read as follows, if I substitute for misconduct the words “redundancy situation”: *“It does not follow therefore wherever there is a redundancy situation which could justify dismissal, a Tribunal is bound to find that was indeed the operative reason, even a potentially fair reason. For example, if the employer makes the redundancy situation an excuse to dismiss an employee in circumstances where he would not have treated others in a similar way, then the reason for the dismissal – the operative cause – will not be the redundancy situation at all since that is not what brought about the dismissal, even if the redundancy situation in fact merited dismissal. Accordingly, once the employee has put in issue with proper evidence for contending the employer dismissed out of pique or antagonism, it is for the employer to rebut this by showing the principal reason is a statutory reason. If the Tribunal is left in doubt it will not have done so ... On the other hand, the fact the employer acted opportunistically in dismissing the employee does not necessarily exclude a finding the dismissal was for a fair reason. There is a difference between a reason for dismissal and the enthusiasm with which the employer adopts that reason. An employer may have a good reason for dismissing whilst welcoming the opportunity to dismiss which that reason affords.”*

1.5. Section 98(4) of the Act says:

“Where an 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 all 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
(b) shall be determined in accordance with equity and the substantial merits of the case.”

1.6. Dismissal by reason of redundancy may be unfair if there was (a) inadequate warning/consultation (b) unfair selection and (c) insufficient effort to find alternatives. The claimant argues all these points. R-v-British Coal Corporation ex parte Price held fair consultation is (a) discussion while proposals are still at a formative stage (b) **adequate** information on which to respond (c) adequate time in which to respond and (d) conscientious consideration of the response. Mugford-v-Midland Bank held there is a difference between collective consultation and individual consultation, the latter being still necessary even if the former was fair and adequate. **“Adequate” does not mean “perfect” or “flawless”.**

1.7. As for fair selection British Aerospace -v- Green held provided an employer sets up a selection method which can reasonably be described as fair and applies it without any overt sign of bias which would mar its fairness, it will have done what the law requires. Taymech-v-Ryan says in choosing pools for selection an employer has a broad measure of discretion and the important point is it must give some thought to the matter. Selection criteria which are objective are preferable to

those which are subjective, but in Samsung Electronics U K Ltd-v-Monte De Cruz EAT/0039/11 Underhill P. said *“Subjectivity” is often used in this and similar contexts as a dirty word. But the fact is # not all aspects of the performance or value of an employee lend themselves to objective measurement, and there is no obligation on an employer always to use criteria which are capable of such measurement, .. Given the nature of the claimant’s job, we see nothing objectionable in principle in his being assessed on “subjective” criteria*

1.8. In considering what, if any, alternative employment to offer, an employer should not assume an employee will not accept a reduction in status or pay (Avonmouth Construction-v-Shipway). Large employers should look across their business.

1.9. In all aspects substantive and procedural Iceland Frozen Foods-v-Jones (approved in HSBC-v-Madden and Sainsburys-v-Hitt) held I must not substitute my view for that of the employer unless its view falls outside the band of reasonableness.

1.10. Section 138 includes

(1) *Where—*

(a) *an employee’s contract of employment is renewed, or he is re-engaged under a new contract of employment in pursuance of an offer (whether in writing or not) made before the end of his employment under the previous contract, and*

(b) *the renewal or re-engagement takes effect either immediately on, or after an interval of not more than four weeks after, the end of that employment,*

the employee shall not be regarded for the purposes of this Part as dismissed by his employer by reason of the ending of his employment under the previous contract.

(2) *Subsection (1) does not apply if—*

(a) *the provisions of the contract as renewed, or of the new contract, as to—*

(i) *the capacity and place in which the employee is employed, and*

(ii) *the other terms and conditions of his employment,*

differ (wholly or in part) from the corresponding provisions of the previous contract, and

(b) *during the period specified in subsection (3)—*

(i) *the employee (for whatever reason) terminates the renewed or new contract, or gives notice to terminate it and it is in consequence terminated, or*

(ii) *the employer, for a reason connected with or arising out of any difference between the renewed or new contract and the previous contract, terminates the renewed or new contract, or gives notice to terminate it and it is in consequence terminated.*

(3) *The period referred to in subsection (2)(b) is the period—*

(a) *beginning at the end of the employee’s employment under the previous contract, and*

(b) *ending with—*

(i) *the period of four weeks beginning with the date on which the employee starts work under the renewed or new contract, or*

...

and is in this Part referred to as the “trial period”.

(4) *Where subsection (2) applies, for the purposes of this Part—*

(a) *the employee shall be regarded as dismissed on the date on which his employment under the previous contract(or, if there has been more than one trial period, the original contract) ended, and*

(b) the reason for the dismissal shall be taken to be the reason for which the employee was then dismissed, or would have been dismissed had the offer (or original offer) of renewed or new employment not been made, or the reason which resulted in that offer being made.

(5) Subsection (2) does not apply if the employee's contract of employment is again renewed, or he is again re-engaged under a new contract of employment, in circumstances such that subsection (1) again applies.

2. Findings of Fact

2.1. For Tesco I heard Juliette Kitching, a Lead People Change Partner, Susan McTaggart, now a Manager in the Dotcom function, part of its online shopping arm, and Emma Collinge, General Merchandise Manager for the North Shields Tesco Extra store (the store) where the claimant, Paul Gillis, who also gave evidence, was employed. I had an agreed document bundle.

2.2. The claimant started work with Tesco on 23 August 2002 on a temporary contract as a Café Assistant and secured a full time contract as a Baker in 2003. In July 2010 he was made Bakery Team Leader at the store. His reviews were consistently positive about his performance (45-50). The Team Leader role was removed in 2015 as part of a restructure. It was never customer facing (82-85). The only reference in his training records to customer service standards relates to giving information about "allergens". He never was told his customer service skills were sub-standard or required improvement. I accept this but an agreed action plan (41-46), which he suggests would have been in place if **any** criticism was genuine, is inappropriate to address minor differences between bakers who all do **well enough** , **but some slightly better than others**.

2.3. On 21 January 2019 his line manager, Adela Langerova, told him to attend the training room at 9.30am for a meeting with store manager Phil Crawford with no information on what the meeting was about. He was joined by fellow baker Mark Barrass. It soon became apparent the meeting was to discuss the fact no one had been allocated to work in the bakery the previous day to cover Sunday overtime. The claimant did not work Sundays or any overtime but knew there was no Sunday rota up in the bakery and management were aware of this. Mr Barrass had informed Ms Langerova there would be no staff in the bakery on this particular Sunday.

2.4. Mr Crawford started saying they had let customers down and '*thrown our manager under a bus.*' He badgered the claimant into making a response, who said he was not a Team Leader anymore so should not be expected to sort Sunday overtime out. Mr Crawford said he was "*giving lip*" and sat there looking like he "*couldn't give a Shit!!*" He then threatened to give the claimant 30 days notice if Sundays were not covered and he would make him come to work next Sunday, stand outside the bakery and apologise to customers.

2.5. The claimant submitted a formal grievance against Mr Crawford on 23 January 2019 (51-52), John Laing, Lead Fresh Manager, invited him to meeting on 28 January to discuss it. Rachel Simpson, Tesco People Partner, invited him to attend a grievance hearing on 6 February (53-61) and a further meeting on 20 February to present her investigation findings and recommendations (65-77). Her report (63-64) **fully** upheld the grievance, as confirmed in a letter of 21 February 2019 (78). Following the grievance hearing, the relationship between the claimant and Mr Crawford was not good, because the claimant asked for a written apology rather than a verbal apology offered.

2.6. During the 20 February meeting he was surprised Ms Simpson had raised issues concerning his health at work (67-69) which only added to his stress and anxiety. Notes of a meeting with his manager Paul Reed and a Nuffield Health letter dated 15 June 2019 (79-81) confirm he was receiving treatment for a health condition which prevented him working in the bakery until further notice, and resulted in him being transferred to another department. A further letter from Nuffield

Health dated 17 October 2019 (86) confirmed he was fit, subject to work adjustments when working with flour, to return to working in the bakery, which he did.

2.7. Ms Kitching has worked for Tesco for around 10 years. She heads a team that manages changes impacting colleagues across the business, such as redundancies, aiming to minimise the impact on them and the risk around proposed approaches. It leads collective consultation processes for redundancy situations. She was in this role for the majority of the restructure process. She was involved in the project relating to the proposed changes to Tesco's instore bakeries in large stores, implemented from the end of February 2020, although discussions about the profitability of Tesco's bakeries had commenced in February 2019. She was not involved in the initial planning stages but coordinated the collective consultation process with USDAW. The changes came about as part of Tesco's ongoing service delivery model which focuses on driving efficiencies. Twice a year the business looks at service delivery and at roles, tasks and routines and considers how it can operate more efficiently. Tesco stores are split into convenience stores and large stores and these bakery changes only affected the large stores.

2.8. Tesco had conducted a review of how the bakeries were performing and found in 2018 - 2019, its bakeries had a £55 million operating loss and the forecast for 2019 - 2020 was a £42 million operating loss (95). Tesco had also noticed a changing trend in customer shopping with a decreased demand for traditional loaves but an increase in demand for bagels, flatbreads and wraps (95). It needed to make cost savings. It looked at three areas to see how savings could be made: the **range** of bakery products, the **space** available in stores and the **payroll costs**. It conducted trials of new ways of working in 17 stores which involved trialling four different operating models operating with a reduced range of products, reduced space and fewer staff hours worked (96). The trials ran from mid 2019 until the date of the announcement of the redundancy proposals in February 2020. The trials delivered a 5.8% improvement to the operating profit and the business chose to roll out three of the four proposals trialled across its bakeries nationwide.

2.9. Prior to the changes, the bakeries in Tesco's large stores were either (i) "scratch" bakeries, where many products were made from scratch in store, or (ii) "bake off" bakeries, where products came to the store frozen or part baked and the baking was completed in store. Following the changes, Tesco's bakeries were converted to one of three models (i) "simplified scratch" (a reduced range of products made from scratch and some bake off products instead) (ii) "white dough scratch" (only white doughs made from scratch and all other products bake off) or (iii) "simplified bake off" (no products made from scratch; rather all are bake off). The business looked at all of the bakeries nationwide to determine which model each bakery would move to. There was a reduction in space and range in all of the bakeries (100) and reduced manning requirements (no longer a requirement for the bakeries to be manned after 6pm so reduced hours available). Further, there was a reduced need for skill. Before the changes there were three levels of baker: C grade unskilled, D grade semi-skilled and E grade skilled. In the new operating models, there may be skilled and semi-skilled bakers doing unskilled work, but a significant payroll cost saving overall. Tesco proposed to only have two levels: C grade unskilled and E grade skilled. This did not mean all semiskilled bakers were redundant, but the role was removed (101).

2.10. In total 738 stores and 1,883 staff were impacted by the changes both in relation to bakeries and to Tesco's Click and Collect service, happening around the same time. Most of the 1,883 impacted were in bakery. Tesco has a very good relationship with USDAW and it was briefed on the proposed changes. The general announcement was made to colleagues on 25 February 2020 and store managers were provided with a communication pack to guide them on making the announcement(107-124).USDAW representatives were selected and the first collective consultation meetings took place on 2 and 3 March 2020 (129- 134). Ms Kitching's team had a proposal for

pooling and selection criteria which were put forward at that meeting. They proposed having one pool for the D grade semi-skilled and E grade skilled bakers and a separate pool for the C Grade unskilled. USDAW agreed to the use of these pools.

2.11. As for selection criteria, Ms Kitching's team proposed using a selection form which had been agreed between Tesco and the union for previous business changes, although they review this form for each new redundancy process to ensure it is fit for purpose. It included scoring based on warnings for performance, absence and disciplinary, four key competencies and a tie break based on additional responsibilities. USDAW agreed this previously agreed selection form should be used for the unskilled bakers but for the skilled and semi-skilled bakers pool, the union requested the key accountabilities and tie break criteria be amended to be more specific to their role. The USDAW representatives took the criteria away and came back with new proposals at the second consultation meeting on 12 March 2020 (135 -137). The four key competencies were

- (i) Do you produce a consistent level of high-quality products and understand what elements contribute towards poor quality?;*
- (ii) Are you adept at hand moulding in the event of a breakdown relating to the bread plant?*
- (iii) Do you fully understand all legal implications and adhere to all measures within the safe and legal audit?*
- (iv) Do you display excellent interpersonal skills in order to train colleagues to the required standard?*

2.12. The USDAW representatives also proposed the following tie break criteria:

- (i) Can you recognise when a piece of equipment is not functioning correctly, and can you support in raising a work order for that equipment?*
- (ii) Can you fully explain and adhere to the production planner and be proactive in recognising stock issues and can provide solutions/recommendations to resolve?*
- (iii) Are you fully competent in all areas of Bakery and regularly alternate between oven work/production and replenishment?*
- (iv) Do you display first class customer service skills and interact with customers offering alternative products and accurate ingredient information?*
- (v) Do you always conform to the company standard of dress and hygiene standards set out?*

2.13. Three of the USDAW representatives who had proposed these criteria were skilled bakers and familiar with the tasks skilled bakers carried out. The selection and tie break criteria were agreed between the union and Tesco because they were considered appropriate and relevant to the role of a skilled or semi-skilled baker.

2.14. Employees' availability was also a driving factor. It was agreed with USDAW staff would be asked to fill in a form to set out their availability for work at the outset of the process given it was important Tesco had bakery staff with **the right level of skill meeting the customer demand at the right time**. Once the selection criteria had been applied those impacted, the relevant manager would take into account availability in matching people to available hours in the proposed new operating model for each store. This involved starting with the highest scoring colleague and seeking to match them first with roles set out on the "heat map" provided to the store. The heat maps have a traffic light system: Red where it has more hours than required, amber is where it does not have enough hours to deliver workload and green is where hours and demand match. It was therefore a matter of checking if the colleague's availability on their form matched the demand of hours on the heat map. If a higher scoring colleague's availability did not match the hours on the heat map, a lower scoring colleague could be matched with a job first if their availability did. There was some flexibility to deviate from the hours on the heat map but generally stores were required to

stick to them as much as possible, because they are modelled on factors such as the time it takes to complete each task (this includes fixed times such as turning on ovens and variable times such as packing), sales, travel distances, product range and equipment to give a store level view of demand. Following the collective consultation process, Ms Kitching provided the materials to stores for the individual consultation process but was not directly involved in it.

2.15. Various documents were sent to stores to guide managers through the scoring process and the individual consultation process. An operational guide and a toolkit were given to managers which set out what had been agreed through the collective consultation process (138-153). Updates were also sent through to stores, which included one to explain impacted staff would also be given the option to defer their redundancy until 22 August 2020 by working in a temporary role, **whilst still preserving their redundancy package**. This was because the restructure was taking place at a time when Tesco was recruiting a large number of temporary workers due to increased retail demand in light of Covid-19. Tesco was keen to support impacted colleagues by giving them the option to take on one of these temporary roles. Additionally, slides and notes from the collective consultation meetings were provided to USDAW and a summary document of each collective consultation meeting to be sent to stores was agreed with USDAW. The stores were instructed to print the summary document out and put it in colleague-facing areas. USDAW also shared the summary documents with the consultation representatives.

2.16. My only criticism of this collective plan is a “blurring” of the distinction between what employees are **entitled** to by way of a statutory trial period under s 138 without risking loss of their redundancy payment and the additional **concessions** Tesco were prepared to give while guaranteeing redundancy payments (possibly greater by increased length of service and age of employee) would still be paid if they took a temporary role and left on or before 22 August 2020. It was important staff understood this and , to achieve that, those handling the implementation of the process in store needed to too. USDAW clearly did understand, so employees themselves and its representatives in store could have asked specific questions if in doubt.

2.17. Ms McTaggart, at the time, was the Bakery Manager in the store. She managed the daily running of the bakery, such as rotas for bakers and packers, holiday requests etc. She has worked for Tesco for around 13 years. She knew, **and got on well with** the claimant but says *“he kept himself to himself so I did not have lengthy social conversations with him and our relationship was purely professional”*.

2.18. She echoes Ms Kitching’s evidence of the reasons for the restructure of Tesco’s bakeries being driven by changing customer requirements. Customers were no longer looking to buy freshly baked products because they could buy many such products, off the shelves rather than made from scratch in store. Tesco decided more products should come to the store ready prepared which only needed to be finished off and baked in store. As a result, fewer hours needed to be worked by skilled workers in Tesco’s bakeries across the country. But those workers can do unskilled tasks and it is vital to take an overview of each bakery as to how this can best work. In February 2020 her store manager Mr Crawford , told her of the proposed changes and she received a "Store Manager Communication Pack" a few weeks later about how the redundancy process was to be carried out (107-124 and 155-168). She used this for guidance during her involvement in the process. Ms McTaggart spoke to all of the bakery staff individually about the changes proposed and explained only some products would be made from scratch in store and more would come pre-prepared so there would not be as many hours available for work in the bakery. At this point, she was not aware of how many hours would be available under the new proposals.

2.19. After she had informed all six about the upcoming changes she had a couple of discussions with each to explain they would be required to complete availability forms to detail the maximum and minimum hours they would be available to work, the days and their flexibility in terms of days and hours (154). They would then be considered alongside the hours available in the bakery under the new proposals, as Tesco had worked out the number of hours that needed to be filled and when to meet customer demand. The Availability Forms of the skilled bakers are pages 126 – 128.

2.20. In addition, all were also scored using a scoring matrix, carried out before knowing how many hours would be available. Ms McTaggart attended a training session at Tesco's Gateshead store and completed eLearning training about how to carry out redundancy scoring. The unskilled bakery staff (sometimes called "packers") were in a separate pool and had a different scoring matrix.

2.21. Ms McTaggart echoes Ms Kitching evidence of the four key competencies. She scored each against the selection criteria and they all scored full marks (169-190). She therefore had to apply the five tie break criteria pre-agreed with USDAW as set out above, each out of a maximum of 3 points. The claimant scored 14 out of 15 points for the tie break criteria and the other two full marks. He dropped a mark in relation to "*Do you display first class customer service skills and interact with customers offering alternative products and accurate ingredient information?*". His Baker Redundancy Selection Form (169-172) shows his overall scores.

2.22. Customers sometimes raise questions about ingredients or allergens in bakery products. The reason she scored him 2 out of a 3 was , compared to the other two, she had never seen him make an effort to engage with customers. He tended to stay at the back of the bakery and keep himself to himself. He did not have such an open manner and was less approachable to customers in comparison to the other two and he did not really go onto the shop floor. She had seen both of the other two come out of the bakery onto the shop floor to interact with the customers on a number of occasions. She had not raised this with him as she had only joined as the Bakery Manager in September 2019 and had not yet carried out an annual performance review with any bakers. I accept her evidence because while the claimant accepts the only mark down for customer service was said to be because he tends to be in the back of the bakery rather than out front, his statement says he felt this was unfair as he is making things and that is where he has to be not, as he now says, that he went out but Ms McTaggart hardly saw him. I believe she saw enough to form a view.

2.23. She had a call with John Laing, the Lead Fresh Manager who has longer knowledge of the claimant, to explain how she had scored each of the bakers and why she had given the scores she had. **He validated her scoring.** Whilst she was not involved in choosing the selection criteria, she does think an assessment of customer service skills was appropriate. The bakery is on show to customers and bakers regularly have to come out of the bakery and onto the shop floor, for example to put bakery products on the shelves. They often get asked questions about what ingredients are in the products and have the knowledge about the products and contents so need give customers a response to their questions.

2.24. Ms McTaggart was not aware the claimant had raised a grievance in January 2019 as she had only become the Bakery Manager in September 2019. Before then she was based between North Shields and another store as a Dual Site Security Manager. The fact he had brought a grievance had no impact whatsoever on her scoring of him. She was aware he thought he had developed asthma from working in the bakery but it was not something he had discussed with her in detail. This also had no influence on her scoring. The only area where she can see his asthma could possibly have had any influence would be in relation to the absence warning criteria if it had resulted in him having time off due to sickness. However, he did not have any live absence warnings so it was not a relevant factor at all.

2.25. As Ms McTaggart was self-isolating for 12 weeks due to the Covid 19 pandemic ,she was not involved in the consultation process which followed. I accept this was not ideal. Ms McTaggart had no further involvement except to conduct interviews for the two new part time baker vacancies in or around June 2020. It was then she was made aware the claimant had been made redundant.

2.26. Emma Collinge has worked for Tesco for around 18 years. She managed two departments, hardware and health and beauty. She echoes the evidence of her two colleagues about the need and plan for changes. Her role was to carry out consultation meetings with "at risk" bakers as Ms McTaggart, who would ordinarily have done so, was self-isolating. She was asked by her line manager, Mr Millmore, to do it because her department was the quietest at the time.

2.27. Ms Collinge was provided with various packs of information, the scoring Ms McTaggart had completed and details of how to carry out the job matching and consultation process. The packs contained checklists of the information she needed to go through with each at risk colleague which she followed. She also had online training on Tesco's "Click and Learn" training system.

2.28. Prior to this she did know the claimant as they worked in the same store for 17 years but she had never worked alongside him. She would always speak to him if passing or have a general "*how are you doing*" conversation. If she was Duty Manager she would sometimes "*pop her head into*" the bakery to see how the bakers were getting on. Ms Collinge was aware the claimant had raised a grievance previously but did not know to what it related. She was also aware he had some time off work which she believed was related to asthma but did not know any of the details. She was the Duty Manager on the day he returned to work after his absence and checked with him he was okay to be in the bakery. She says his grievance and medical condition had no bearing on her decisions.

2.29. Ms Collinge echoes Ms Kitching and Ms McTaggart's evidence about the bakery staff in the store skilled and non-skilled. Prior to the changes, all were asked to fill out availability forms detailing the current hours they worked and the hours they were available to work if required (126-127), **not simply the hours they wanted to work** . These forms were important as the information the bakers provided would be used to match them to a job **if there were hours available**. The other two skilled bakers confirmed to her when she became involved in the process , in relation to working on a Sunday, they would not be available to work a contracted shift, but would be willing to do overtime on Sundays if needed.

2.30. The claimant had scored lowest of the three skilled bakers after the application of tie break criteria but neither of the vacancies matched his availability, as on his availability form he had stated he was available for a minimum of 30 hours per week but not on Sundays. In the packs provided (146 -147) she was to start with the highest scoring and work down to the lowest, matching them to shifts but staff with a lower ranking may be placed into roles because they had more availability or were able to work unpopular shifts. The other two had both scored full marks so she matched each to a full time skilled baker role as their availability also matched the hours needed.

2.31. She had been provided by Tesco with a "heat map" which detailed how many hours would be required to be filled in the bakery each day and the times those hours were needed. This heat map had been produced on the basis of analysis of customer demand and service levels. There was a small degree of flexibility that could be exercised to work around the availability of the bakers if their availability did not quite match the hours required on the heat map but overall it was important she stuck to the the hours in the heat map to avoid the department being staffed inadequately. The only shifts Tesco needed to fill after the two skilled bakers were job matched were their days off. As both had a Sunday off, the part time bakers both needed to work a Sunday and the heat map stated two bakers were needed on a Sunday. Now there are two full time skilled bakers ,one part time skilled

baker who works 15 hours per week Wednesday from 6am – 3pm and Sunday 3am – 12 noon and another part time skilled baker who works Friday from 6am – 3pm and Sunday 6am -3pm.

2.32. The claimant asked during consultation whether those two roles could be combined to create one role for 30 hours per week, but this was not possible as both roles required working on Sunday, with some overlap, which would be too many hours for one worker.

2.33. Following the hours matching exercise, three remained at risk of redundancy, one skilled, the claimant, and two non-skilled, unless alternative employment could be found . Ms Collinge wrote to the claimant on 31 March to confirm his role was at risk and invite him to his first formal consultation meeting (183). He was self isolating at the time so she had a phone call with him on 2 April 2020 to confirm his role was at risk (184). After this, he contacted Ms McTaggart to say he did not understand what being at risk of redundancy meant. Ms Collinge rang him to explain about job matching and, as he had not been job matched, he may be made redundant. She explained they would discuss any available vacancies to try and avoid this, read out the redundancy letter over the phone and subsequently sent him the letter in the post.

2.34. On 6 April 2020 Ms Collinge phoned to tell him of a vacancy for a skilled baker Tesco's store in Newcastle for 32 hours per week .It matched his hours of availability as stated on his availability form, was a permanent role, but did require work on a Sunday. He said he would discuss it with his partner. Ms Collinge sent him a text to confirm the days of work were Monday, Tuesday, Wednesday and Sunday (186- 187) and he would need him to let her know by 9 April 2020 if he was interested as this was the cut off date for colleagues to confirm which vacancies they wished to apply for. It was important to have a cut off date as Tesco still needed to continue operating by filling vacancies and it takes time to recruit by interviews. The claimant never raised an issue with this time frame. By 18 April 2020 the Newcastle store did offer to accommodate his availability by changing the Sunday hours to a Thursday or Saturday. The claimant still chose not to take it mainly because of the commute from his home in Whitburn, on the coast just north of Sunderland, to Kingston Park on the north west fringe on Newcastle. I accept this is a very busy route.

2.35. North Shields store is smaller than Newcastle store so did not have as many hours available in its bakery or the same level of flexibility to match hours the store needed on the basis of the heat map for roles in the bakery to the availability of colleagues.

2.36. The first formal consultation meeting took place on 11 April 2020 (188). The claimant attended with his union representative Joanne Matthews, who attended all his formal consultation meetings. He asked how the scoring had been carried out, how the points system worked and for a copy of his scoring sheet. After checking with Ms Simpson, People Partner, it was okay to do so, Ms Collinge gave him a copy of his scoring sheets. He did not raise any concerns about the process or criteria or make any suggestion the scoring was unfair. He did not raise any concerns throughout the consultation process in relation to customer service being used as one of the tie break criteria.

2.37. The notes of all meetings are not good, mainly bullet points in manuscript At this meeting what Ms Collinge said may have conveyed to the claimant an impression his redundancy payment may be lost if he tried alternative work and did not like it. However ,she sent him a letter to invite him to a second formal consultation meeting (189), which read properly dispelled that fear. Had he been in doubt he could have asked. Neither he, nor his representative (of whom he was critical saying she seemed tired and not proactive) did ask . If he had no faith in Ms Collinge knowing the answers, he could have contacted Ms Simpson, but he did not.

2.38 On 18 April, they discussed a number of vacancies (190). One was for a permanent skilled baker at Tesco's Durham store, which, at the time, Ms Collinge believed would be for either 32 or 36.5 hours per week but after the meeting Ms Simpson confirmed was for 30 hours per week Monday, Tuesday, Friday and Saturday which Ms Collinge subsequently confirmed to the claimant. The hours and days matched his availability as stated on his availability form. **He said Durham would be too far for him to travel. I find this remarkable as I know where he lives and where the Durham store is. He had searched against the postcode and found the trip was further than to North Shields, which it is. However, he would avoid daily tolls at the Tyne Tunnel and have several options for routes to avoid traffic. The commute would be easier and no more expensive overall. He had never tried driving it.**

2.39. They also discussed the skilled baker vacancy in Newcastle. She told him the "at risk" baker in Newcastle would need to be offered this role first if he was interested as it was at the store in which he worked. She explained the role could be available as temporary if he wished to allow him to defer his redundancy until 22 August 2020. This was an extra option Tesco had made available to colleagues at risk whereby they could choose to delay redundancy by working in a temporary role. The idea was to provide extra support by enabling them to remain in a role for an extra few months at a time many businesses were not recruiting due to the pandemic. She explained Tesco would pay expenses for travelling to and from Newcastle if he decided to take this temporary role.

2.40. The claimant asked whether there were any vacancies for night shifts in the Sunderland store as he lives near it. Ms Collinge was not sure so spoke to Ms Simpson immediately after to ask. She confirmed the Sunderland store does not have a night operation so there were none. As the process was happening during the pandemic, which had increased the demand for online food shopping, Ms Collinge also told the claimant she would check if there were any vacancies within Tesco's "Dotcom" operation, as she was keen to ensure they explored all options. Ms Simpson said there may be one for 7.5 hours per week but the claimant said this would be no good for him. At no point did he make a workable suggestion for combining any available job with one of the part time skilled baker jobs at North Shields. He **now** says this would have been an option, but accepts neither he nor his representative made a viable "counter proposal" during consultation.

2.41. Ms Collinge had an informal meeting with the claimant and his representative on 24 April 2020 (193) at which she offered him a General Assistant role on the shop floor in the store for 15 hours on Thursday and Friday nights. She said he could do this role on a temporary basis until 22 August 2020, defer his redundancy, and there may be more hours available by way of overtime but this was not guaranteed. He decided to go away and discuss it with his partner.

2.42. Ms Collinge had an informal phone call with him on 28 April 2020 (195) to move the final consultation meeting scheduled for 1 May 2020 forward to 29 April 2020 as all the consultations needed to have been completed by 1 May. She reminded him he had the option to defer redundancy until 22 August 2020 and confirmed if he chose to take a temporary role until August but then found a permanent role outside Tesco before 22 August 2020 he could leave on one week's notice and still have his redundancy pay. They had a further phone call on 28 April 2020 (196), the main purpose of which was to let him know in relation to the night time General Assistant role in North Shields discussed on 24 April 2020, the store was able to offer flexibility in terms of hours so he could choose 11pm until 8am or from 2am until 11am, whichever suited him best.

2.43. The final formal consultation meeting took place on 29 April 2020 (197). The claimant was not interested in the 15 hours per week as a night time General Assistant in the store or in either of the skilled baker roles at Durham or Newcastle as he considered these stores to be too far for him to travel. He was not interested in taking the skilled baker role at Newcastle on a temporary basis even

with his travel expenses being paid. He did not wish to defer his redundancy. He said he "*felt done out of a job*" as he had only dropped one point during the scoring, but he did not raise an issue with the selection criteria or make any suggestion he felt the scoring had been carried out unfairly. He **now** goes further and alleges Mr Crawford, Mr Laing and/or Ms Simpson engineered his selection by instructing Ms McTaggart and or Ms Collinge to ensure his selection

2.44. Ms Collinge believes she and Tesco did everything they possibly could to find an alternative role they could offer at any other stores or in the Dotcom operation. She discussed everything available with him and gave him a list of vacancies for him to review and well as making efforts to find out about vacancies herself, but he did not wish to apply for any of them. The claimant has a different view saying other stores were willing to be flexible but his own store management seemed to do everything they could to stop him from taking up alternative jobs .

2.45. The claimant also says during consultation he offered to reduce his hours from 36.5 to 30 hours per week (188) and "ticked better working availability" as well meaning he might consider Sunday work. He asked if he could apply for the two baker posts to be advertised at 15 hours per week (194) but was told he did not meet the criteria as he could only apply for jobs that had a minimum of 30 hours/week. He asked if he could have 30 hours if he was willing to be contracted on a Sunday and was told no. He asked if he could apply for a job in another department as he thought (but Tesco do not accept) there was a "bread and cakes job" on a Monday, a more customer facing, basically shelf stacking role. He says he was told he could not work in two departments at one meeting but at the next meeting he was told he could, but not if they included a Sunday. He pointed out only one baker had ticked to work a Sunday (126-127) and was told it had been raised and dealt with, and that was all Ms Collinge could say on it. He was contracted to a 9am to 6pm Saturday shift when he was very rarely baked. He now says he could have had a skilled baker role on two weekdays and an unskilled job on a Saturday, he just would not have been given a skills payment, which he was been willing to accept. Handwritten notes by Ms Collinge, on Usdaw News headed paper and on another document in the bundle show alternative jobs he was offered (191, 224).

2.46. **I do not disbelieve the claimant as such**, but I noticed, very clearly, his tendency to refer to what Ms Collinge said at earlier meetings without acknowledging she corrected points at later meetings. Consultation is a two way process. I find Ms Collinge was "feeling her way" through a process she did not fully understand on certain points For example I accept she may originally have said if he delayed his redundancy to August he could not leave for another job otherwise he would lose his redundancy pay. He was then told at the last meeting this had changed and he could leave for another job. He was then only offered a 15 hour contract, which he declined because the pay was not enough for his family to live on. He now says had he have been offered a 4-week trial without losing his redundancy pay if it did not work out, he would have been willing to accept jobs offered at other Tesco stores. He adds the managers' consultation meeting pack shows the 4 week trial option was marked N/A (209-210) but that was only after he had refused re-deployment. I asked him why, if he was confused, he did not challenge what he was being told and ask, himself or through his union representative for more clarity **at the time**. He really had no answer save to say he assumed everyone in management and the union knew what they were doing.

2.47. Before or at the final meeting he had turned down a temporary Newcastle job (190) because he was told he would need to apply and be interviewed, it too far away and says the respondent never got back to him on whether it was willing to pay travel expenses, which I find they did. He was offered vacancies at Durham but did not accept because the travel was too far. He was offered 15 hours on night shift (196) even though his availability form did not have those hours ticked (124). He asked Ms Collinge if he could let her know by the end of the day but she said she needed to know then as she may have to go home as her son was sick, so he rang his wife to ask what she thought. She said "*they obviously don't want you in that shop, just leave*" (197). He told Ms Collinge who, reasonably believing she had exhausted all possibilities. said his redundancy dismissal would

be confirmed He received a letter from the store manager (198-199) saying his employment would end on 2 May 2020, although he could appeal. He did not appeal because he was depressed about the whole process, felt appealing would only make him feel worse and he had had enough.

2.48. He looked for another job and managed to find a temporary job with Amazon UK starting on 16 May 2020 (249-251). Whilst there he managed to find a permanent skilled baker job with Morrisons Stores starting on 30 May 2020 (252-253) with contracted hours reduced to 25 (252-253).

3 Conclusions

3.1. It is **possible** senior managers did instruct Ms McTaggart and Ms Collinge to ensure the claimant was dismissed. However, there is no evidential basis for finding they did, and it flies in the face of what happened. Ms Simpson was the one who upheld his grievance and did a great deal to find him alternative employment. On balance, I conclude neither his grievance in 2019 nor his health had any influence on the decision to dismiss.

3.2. The reason for dismissal was redundancy. Prior to the changes there were six staff employed in the North Shields bakery; three skilled bakers who all worked 36.5 hours per week and three packers, one working 16.5 hours per week, another 22 hours and the third 30. Three of the six were made redundant, the claimant and two packers. Following the restructure there are four skilled bakers at the store; two who worked in the bakery before, Mark Barrass and Kevin Taylor who both still work 36.5 hours per week, and two new skilled bakers who each work 15 hours per week, one on Wednesdays and Sundays and the other on Fridays and Sundays. Both the two new skilled bakers work on Sundays as this is a day baker hours are required in the store. There are also two packers, one who worked at the bakery prior to the restructure and a new packer. One works 13.5 hours and the other 22.75 hours per week.

3.3. The claimant's case is before the process started, the total contracted hours of the three skilled bakers was 109.5 hours. The total contracted hours of the two remaining skilled bakers was 73 hours. After two new 15 hour/week baker posts had been appointed (194), the skilled bakers contracted working hours increased to 103 hours, only 6.5 hours less than before the redundancy process. During the consultation process the claimant had offered to reduce his hours from 36.5 to 30 hours (188) which would have produced the same reduction in skilled baker working hours without making him redundant.

3.4. This is a flawed argument as explained in Safeway Stores -v-Burrell and many other cases which make clear the type of work needed and skills of workers must be viewed overall. If one adds the 109.5 skilled hours and the 68.5 packer hours one has 178 hours worked before the change compared to 139.25 hours after it. 38.75 hours less are worked albeit skilled men are doing less skilled work for some of the time. The reason for making the saving was the requirements for employees to carry out work of a particular kind had diminished. That is a redundancy situation. It caused the dismissal so the respondent has discharged the burden of showing a potentially fair reason under s98(2). I now move to fairness under s 98(4)

3.5. The selection criteria agreed with USDAW were impeccable. Ms McTaggart made a partly subjective decision to mark him down on one tie break criterion. There is a world of difference between that and deciding his slight failing in comparison to two other bakers needed performance management. Her decision was well within the band of reasonableness and noting the points made in Samsung Electronics-v-Monte D'Cruz there is no overt sign of bias in the selection.

3.6. When he asked Ms Collinge why he was being made redundant, she gave him the paper with the redundancy questions on and he saw he was one mark down on giving information to

customers about ingredients and allergens. He asked if this was why he was being made redundant. He says Ms Collinge gave a nod and shrug of the shoulders. She does not recall this but the scoring was explained to the claimant . The claimant just does not agree with it. Again it was well within the band of reasonableness.

3.7. The consultation could have been better but, in all the circumstances, including the pandemic and people self isolating it was adequate . The same can be said of the search for alternatives to dismissal. This is especially so because the claimant did not take the chances to question what he was being told on such points as trial periods and their effects. The overall impression I formed was that he was so disappointed and disheartened to be in the position he was after the scoring, that he gave up on any real wish to stay with Tesco. He is not reluctant to work , just not for Tesco, especially anywhere but North Shields or even closer to his home.

3.8. My task is to decide whether the employer acted reasonably and I conclude it did. The claimant and Mr Hoban put his case clearly concisely and well, but it does not amount to an unfair dismissal, so must fail.

Employment Judge T.M.Garnon

Judgment authorised by the Employment Judge on 2 July 2021