EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105444/2020

Public Final Hearing held in Glasgow by Cloud Based Video Platform (CVP) on 23-25 June 2021

Employment Judge Mr. A. Tinnion

Mr. William MacDonald	**Claimant** **In person**
Northstone (NI) Limited	**Respondent** **Represented by** **Ms Jenkins,** **Solicitor**

RESERVED JUDGMENT

1. For the avoidance of doubt, the correct legal name of the Respondent is Northstone (NI) Limited.

2. The Claimant's complaint of unfair dismissal under s.98 of the Employment Rights Act 1996 against the Respondent is not well-founded and is dismissed.

REASONS

Findings of fact

Evidence

1. The final hearing in this matter was conducted on 23-25 June 2021. Mr. MacDonald attended to give evidence on his own behalf. Mr. MacDonald called no other witnesses. Respondent Northstone (NI) Limited ("**NNI**") called three witnesses: Ms. Kelly Monaghan (HR); Mr. Darren McMillan (who scored the redundancy selection criteria which resulted in Mr. MacDonald's dismissal); and Mr. Chris Rogerson (who heard Mr. MacDonald's appeal against dismissal).

2. Before NNI's first witness was cross-examined, the Tribunal made sure that Mr. MacDonald – a litigant in person with no legal background – was aware of the need to put his case in cross-examination to NNI's witnesses, including his account of the facts (where material facts were in dispute) and his account of the real reasons why things happened (if he did not accept NNI's witnesses account of why they say they or others acted as they did at the time).

3. The facts in this care are largely not in dispute. The Tribunal makes the following findings of fact on the balance of probabilities.

Respondent

4. Respondent Northstone (NI) Limited ("**NNI**") is incorporated in Northern Ireland and trades in the construction and building materials sectors. NNI itself forms a subsidiary part of a much larger group of companies known as the CRH Group.

5. Internally, NNI has three separate business divisions, each of which trades under its own brand name:

    a. Northstone Materials ("**NS Materials**") – supplier of rooftiles, quarry materials, concrete/tarmac

b. Farrans Construction ("**Farrans**") – construction building company

c. Northstone Testing – tests materials coming out of quarries

6. Each of these three divisions maintains its own separate trading and accounting records – they form, in effect, three separate (albeit closely interconnected) businesses under one corporate roof.

7. NS Materials – the division in which Mr. MacDonald was employed - divides its UK sales force into two groups: a larger sales team of around 8 employees based in, and focusing on, the Northern Ireland market; and a second, smaller sales team of 3 employees based in, and focusing on, the UK mainland market (Scotland, Wales, England). In the UK mainland, NS Materials supplies only one product – rooftiles (unlike N Ireland, where NS Materials sells a significantly wider range of products including aggregates, sand and road surfacing).

Claimant

8. By a letter dated 26 August 2016, NNI offered claimant William MacDonald ("**Mr. MacDonald**") employment with NS Materials as an Area Sales Representative with effect from 3 October 2016 – which Mr. MacDonald accepted – requiring him to work and travel throughout Scotland and Northern England. On 30 August 2016, Mr. MacDonald signed a copy of his employment contract.

9. Mr. MacDonald passed his probationary period and spent the next 3 years working diligently and by all accounts highly competently for NM Materials drumming up business in his designated sales area. Major clients he introduced to NS Materials included Burton Roofing, Scofar Roofing and Travis Perkins. When Mr. MacDonald joined NNI, NS Materials was supplying UK housebuilder Persimmon at approximately 7 or 8 sites in Scotland; by the time Mr. MacDonald left NS Materials in 2020, through his efforts, NM Materials supplied every site Persimmon had in Scotland. In cross-examination, Mr. McMillan acknowledge NS Materials' business had grown, and accepted that was at least in part because of Mr. MacDonald.

10. In 2019, NS Materials encountered significant business problems in North East England as a result of manufacturing defects in the rooftiles it sold. Mr. MacDonald had nothing to do with the cause of those problems, but it is clear that he played a significant role in assisting NS Materials in overcoming them. At the time, Mr. MacDonald was very much the "face" of NS Materials when dealing with unhappy customers, and NNI acknowledges he did a very good job in difficult circumstances trying to repair the business and reputational damage. For lack of a better expression, Mr. MacDonald is very much a "*people*" person, and his strong interpersonal skills enabled him to talk to NS Materials' customers, gain their trust and understanding, and get through this difficult trading period.

11. The Tribunal finds that but for the Covid-19 pandemic in 2020, there is no prospect that NNI would have dismissed Mr. MacDonald on redundancy or, for that matter, any other ground. Mr. MacDonald conducted himself appropriately at all times, had an excellent attendance record, and was unquestionably a hard worker. Mr. MacDonald makes no suggestion, and there is no evidence, that his job was in any way at risk in 2019, or that anyone at NM Materials was looking in 2019 for an opportunity to 'exit' him from the business.

Covid-19 pandemic

12. In March 2020, the UK economy (and indeed the world economy) began to experience a sharp, significant downturn as a result of the Covid-19 pandemic and the measures the UK government and governments worldwide took to attempt to tackle the pandemic, including social distancing and lockdowns.

13. As one might expect, NNI's business (like nearly all UK businesses) was adversely affected by the Covid-19 pandemic. From trading at approximately £7.5 million per month pre-Covid, by June 2020 NNI turnover had reduced to c. £1 million per month, a clearly very significant reduction.

14. In order to save costs, NM Materials initially put its mainland UK area sales representatives – Mr. MacDonald, Simon James, Peter McCarrick – on furlough. Mr. MacDonald remained on furlough until his dismissal. Mr. James returned to work before that dismissal. It is unclear whether or not Mr. McCarrick returned from furlough before Mr. MacDonald was dismissed.

2020: Redundancy Process

15. In order to reduce its costs base, NNI made a business decision to restructure its business through redundancies. Farrans' redundancy exercise involved approximately 50 redundancies. In the NS Materials' side of the business, NNI decided to make a total of 20 posts redundant, including 1 area sales representative post from each of its two sales teams (N Ireland, UK mainland). As a result of the proposed redundancies, NM Materials intended to reduce its mainland UK sales force from 3 staff members to 2.

16. On 26 June 2020, NNI held its first collective consultation meeting (held by MS Teams due to Covid/social distancing requirements). In attendance were (1) Darren McMillan – Managing Director, lead manager for the UK sales team (2) Ms. Kelly Monaghan (HR) (3) Mr. MacDonald (4) Mr. James (5) Mr. McCarrick. At that meeting, the UK sales team were informed of NNI's provisional intent to make one of their sales posts redundant.

17. By letter dated 29 June 2020, Mr. R. McQuillan (Group HR Manager) formally notified Mr. MacDonald that his role had been placed at risk of redundancy on 26 June 2020. The letter notified Mr. MacDonald that the next meeting would take place during the week beginning 29 June 2020, and the purpose of the meeting was to discuss the proposed redundancy and consider any alternative proposals or suggestions he might have to avoid redundancies. Mr. MacDonald was informed that he had the right to be accompanied at that meeting by a colleague or trade union representative.

18. On 2 July 2020 at approximately 4pm, NNI held its second collective consultation meeting via MS Teams. In attendance were (1) Mr. McMillan (2) Ms. Monaghan (3) Mr. MacDonald (4) Mr. James (5) Mr. McCarrick. Ms. Monaghan talked the sales team through a 'Redundancy FAQ', which identified the elements of the selection matrix (work performance, employability/flexibility, attendance, disciplinary record); stated the scores of the person provisionally selected for redundancy would be shared with them, but not the scores of their colleagues; and stated that "*Management who are familiar with your performance, skills and capability will make the selection recommendations*." No questions were asked at this stage. Ms. Monaghan raised the possibility of voluntary redundancy, which no-one expressed an interest in. At the end of the meeting, Ms. Monaghan asked whether there were any questions; there were not.

19. Later that day, by email on 2 July 2020 at 19:27, Ms. Monaghan forwarded the redundancy scoring matrix and Redundancy FAQ to Mr. MacDonald, Mr. James and Mr. McCarrick. Mr. MacDonald did not object to the selection criteria or their weighting. At the time, Mr. MacDonald was confident his scoring against those criteria would not result in his post being the one selected for redundancy.

20. On or about 3 July 2020, Mr. McMillan scored each of the 3 UK mainland sales agents against the redundancy criteria – see Schedule attached to these Reasons for a summary of the scoring. Mr. MacDonald received the lowest total score of 80; Mr. McMillan achieved the next highest score of 100; and Mr. James achieved the highest score of 100.

21. So far as the Tribunal can tell, Mr. McMillan's scoring appears to have been based largely on Mr. McMillan's 'judgment' (putting it at its highest) and 'subjective opinion' (putting it at its lowest) as to the appropriate score for each pool member. Conspicuous by its absence at the hearing was hard data, documents or information which showed that Mr. McMillan's scoring judgments on each criterion accorded with the information held in NNI's records, although the absence of that evidence may simply have been

because of the narrow scope of Mr. MacDonald's challenge to his scoring. In the event, the only document produced at the hearing which corroborated Mr. McMillan's marking – a '2' for weekly reporting and quality of administration - was an activity sheet which demonstrated that Mr. MacDonald regularly filed late sales reports in the period October 2019 – March 2020 [Respondent's Production, p.109].

22. Mr. McMillan's scoring was reviewed by Mr. Ken Anderson. The Tribunal makes no finding as to precisely what that review entailed and how rigorously it was conducted, both of which remain unclear. The Tribunal does not know whether any scores were changed as a result of Mr. Anderson's review, but certainly no evidence was put before the Tribunal suggesting that any scores had been changed because Mr. Anderson disagreed with Mr. McMillan's scoring. In cross-examination, it became clear Mr. Monaghan was not involved in the scoring. Accordingly, the Tribunal finds that Mr. McMillan was the decisive 'voice' on scoring the pool against the redundancy selection criteria.

23. At the hearing in cross-examination, Mr. McMillan conducted a vigorous challenge to Mr. McMillan's scoring. Save in respect of the matter noted at para. 77 below, the Tribunal's impression of the outcome of Mr. MacDonald's questions and Mr. McMillan's answers was that it effectively a 'score draw' was reached – Mr. MacDonald asked Mr. McMillan searching questions, in response to which Mr. McMillan 'held his ground' and justified each of the scores he had given. Regardless of whether Mr. McMillan's scoring was right or wrong, the Tribunal was satisfied that Mr. McMillan's scoring had been done in good faith. In his evidence-in-chief, Mr. MacDonald stated: "*I am not doubting Mr. McMillan's integrity [ ] whatsoever*."

24. On 7 July 2020, a meeting was held by MS Teams attended by Mr. McMillan, Mr. MacDonald and Ms. Monaghan at which Mr. McMillan told Mr. MacDonald his scores, why he had been given those scores, that he had scored the lowest in the pool, and that he had been provisionally selected for

redundancy. Mr. MacDonald did not agree with everything Mr. McMillan said, and asked for a copy of his scoring.

25. By email once and by email once again on 7 July 2020 at 15:14, Ms. Monaghan sent Mr. MacDonald a copy of his redundancy scoring on the matrix.

26. By email to Ms. Monaghan on 8 July 2020 at 10:26, Mr. MacDonald stated he had issues with the scoring criteria, requested additional time (until next week) to get the advice he needed, and asked whether there was any possibility of him doing the job on a part-time basis.

27. By email on 8 July 2020 at 14:36, Ms. Monaghan replied to Mr. MacDonald that (i) part-time working had been considered, but at this moment in time it was not something NNI could offer (ii) all employees had been given until close of business Thursday (9 July) to come back with concerns and questions (iii) NNI would proceed on Friday (10 July) if it was unable to identify any suitable alternative employment within the group or find another way to mitigate redundancy (iv) details of how to appeal would be given if the redundancy goes ahead.

28. By letter dated 8 July 2020, Mr. R McQuillan (Group HR Manager) formally notified Mr. MacDonald that he had been provisionally selected for redundancy. The letter invited Mr. MacDonald to attend a "consultation closure" meeting on 9 or 10 July 2020, and informed Mr. MacDonald of his right to be accompanied by a work colleague or union representative. The letter warned Mr. MacDonald that the outcome of that meeting could be the termination of his employment if the Group were unable to identify suitable alternative employment and unable to find ways to mitigate the need for the proposed redundancy.

29. By email on 9 July 2010 at 15:03, Mr. MacDonald asked Ms. Monaghan and Mr. McMillan for clarification of how his scores of 2 and 3 on his redundancy scoring had been reached. He requested the Grievance Policy and Appeals Procedure.

30. By email to Mr. MacDonald on 9 July 2020 at 19:32, Ms. Monaghan replied that Mr. McMillan had considered each point within the redundancy selection criteria document and provided a score that he felt was an accurate reflection of Mr. MacDonald within the role that he was performing. She attached copies of the Grievance Policy and Appeal Procedure.

Dismissal

31. On 10 July 2020, Mr. MacDonald attended a final meeting by MS Teams. Also in attendance were Mr. McMillan and Ms. Monaghan, At the meeting, there was further discussions of Mr. MacDonald's scores. At the end of the meeting, Ms. Monaghan told Mr. MacDonald that he was dismissed on grounds of redundancy.

32. By letter dated 10 July 2020, Ms. Monaghan formally notified Mr. MacDonald that his role was redundant, that he was entitled to 1 month's notice, that he was required to work his notice period by way of garden leave, and that his last day of employment would be 7 August 2020. Her letter reminded Mr. MacDonald of his right of appeal against this decision and set out how to appeal. Mr. MacDonald was subsequently paid for his notice period. Ms. Monaghan's involvement ended at this point.

Appeal

33. By email on 13 July 2020, Mr. MacDonald notified Mr. Chris Rogerson (HR Director) of his intent to appeal the decision to make him redundant, details of which would be forwarded on 15 July. Mr. Rogerson acknowledged receipt of the appeal by email on 13 July 2020 at 14:32.

34. By email on 17 July 2020 at 13:01, Mr. MacDonald notified Mr. Rogerson of his grounds of appeal:

"*New business and new customers recording has never been raised as an issue. All new business and new customers recorded by email and recorded to up line. They were also recorded in my weekly report and the GB*

Opportunities Database. I was not aware, as nobody brought it to my attention on the above as an issue. Re Complaint, they were also always dealt with as a matter of urgency, Called, visited and recorded when necessary, also recorded on the F12 Complaint form although that was only for serious complaints or complaints of major significance … A question also, will Northstone still operate in Scotland? If yes, in what manner?"

35. On 12 August 2020, the appeal hearing was conducted. In attendance: Mr. MacDonald, Mr. McMillan, and Mr. Rogerson (appeal officer). The Tribunal is satisfied that the note of that appeal hearing (who spoke, what was said, in what order) is a broadly accurate, non-verbatim note so far as it goes, although the Tribunal questions whether it omits at least part of the discussions (e.g., regarding updating and maintenance of the sales database). Of note:

    a. Mr. MacDonald raised concerns about his scoring on four particular 'work performance' selection criteria (i) dealing effectively and timely with customer enquiries/complaints (score 3) (ii) IT skills (score 2) (iii) regularly updating and maintaining the sales database (score 2) (iv) consider their weekly reporting and quality of administration (score 2);

    b. *Dealing effectively and timely with customer enquiries/complaints* – Mr. MacDonald challenged his score of 3 on the basis that Mr. MacDonald had a good record on complaints – all major F12 reports were filed, he had a reasonable ability to close complaints, and there had been only 2 technical questions in his 4 years with the business which he had not been able to answer;

    c. *IT skills* – Mr. MacDonald challenged his score of 2 on the basis that (i) he preferred to use his mobile phone over his laptop as this was better for customer relationships (ii) Mr. McMillan agreed that because of his past professional background he did not need to use Facebook for social media purposes (iii) he had not been able to log onto BARBOUR (a sales database of architects, builders and

merchants) to prospect for new clients as the subscription licence had been suspended for 3 months. Mr. MacDonald accepted he did not post at least one article/visual piece a month of LinkedIn;

d. *Regularly updating and maintaining sales database* – Mr. MacDonald challenged his score of 2 on the basis that the sales database was up to date;

e. *Consider weekly reporting and quality of administration* - Mr. MacDonald challenged his score of 2 on the basis that (i) the majority of his weekly reports were in on time (ii) when reports were late there was a good reason – for example, if Mr. MacDonald had to visit a client in Newcastle an early 5am start was required, causing the report to be a day or so late (iii) his reports were of good quality (to which Mr. McMillan replied that Mr. MacDonald had not been marked down for the content of his reports but their regularity). In response, Mr. McMillan said that Mr. MacDonald's reports were meant to be sent to him and he was aware that on a number of occasions Mr. MacDonald's reports had not been received;

f. Mr. Rogerson was persuaded Mr. MacDonald's score of 2 for regularly and maintaining the sales database was too low, and increased it to 3;

g. Mr. Rogerson was not persuaded that Mr. MacDonald's scores for 'Dealing effectively and timely with customer enquiries/complaints' (3) 'IT Skills' (2) 'Consider weekly reporting and quality of administration' (2) were too low and should be increased;

h. the following exchange took place: "*After the conversation around these topics CR asked WM if there were any other areas in his selection matrix where he though that he had been marked down. WM replied that he did not think so. CR then asked if he thought he had been marked fairly in these areas. WM replied he thought so as*

he had not been marked down." In cross-examination, Mr. MacDonald stated: *"I think there was an exchange of this type*";

i. at the end of the appeal meeting, Mr. Rogerson said that even if he decided to accept Mr. MacDonald's comments (which were disputed) the scoring on the other elements of the selection matrix meant that Mr. MacDonald would still be at the bottom of the pool, therefore the selection for redundancy was a fair selection.

36. By letter dated 14 August 2020, Mr. Rogerson notified Mr. MacDonald that his appeal had not been successful. Mr. Rogerson explained his decision as follows:

"*As well as considering the specific elements of the scoring that you objected to, I also asked you if there were any other parts of the scoring where you thought you were underscored or 'marked down'. As your response to this was that there was not, I considered your scoring in relation to the other people in the pool and taking into account the points that you raised during the appeal, concluded that this would not have altered the ranking in the pool and therefore that you were fairly selected for redundancy*."

Claim

37. By an ET1 presented twice – first on 1 October 2020 (before Mr. MacDonald contacted ACAS), again on 3 December 2020 (after Mr. MacDonald received his ACAS Certificate) – Mr. MacDonald presented a complaint of unfair dismissal against NNI. He presented no other complaints. In para. 8.1 of his ET1, Mr. MacDonald stated why his dismissal on redundancy grounds had been unfair in the following terms:

"*I was very unfairly treated in the scoring system used to make me redundant. I was scored low on IT skills and reporting!! My records can and will prove that my IT skills were more than sufficient for the job that I was doing. My IT skills required to do certain weekly tasks, all of which were up to date and comprehensively completed. I was even completed on both reports. My*

weekly reports were also up to date again this can be proven, again [I] was complemented on the reports. The parent company The CHR Group also provides online IT training again this was FULLY up to date as there were consequences if they were not! At no time was I offered verbally, written or communicated with in any way, nor did I ask for any training as it was never identified as an issue until the scoring matrix which ultimately cost me my job."

38. In order to better understand and 'flesh out' Mr. MacDonald's case, NNI's solicitors asked Mr. MacDonald a series of questions in email correspondence, to which he replied (in terms) as follows:

    a. Mr. MacDonald did not accept that the reason for his dismissal was redundancy, on the basis that his post was not redundant as NS Materials was still actively selling and trying to grow its business in all the areas he had worked in;

    b. Mr. MacDonald accepted that the process which had resulted in his dismissal had been fair ("*I do believe that the process is a fair one*") save that what Mr. MacDonald did not accept had been fair was "*the lack of information/detail to support the eventual outcome other than scoring a number*");

    c. when asked why his scoring on IT Skills, updating the sales database, weekly reporting and administration (the matters raised in his ET1) led to an unfair dismissal, Mr. MacDonald replied: "*I was unaware there were issues*."

Response

39. In their ET3 and Paper Apart, NNI denied Mr. MacDonald had been unfairly dismissed on grounds of redundancy, contended NNI had used a fair redundancy selection procedure – a reasonable redundancy pool, reasonable redundancy selection criteria, fairly applied to Mr. MacDonald and his mainland sales co-workers - to select Mr. MacDonald as the sales team member to dismiss on redundancy grounds.

Law

Fairness/reasonableness of dismissal to be judged as a whole, band of reasonable responses test applies

40. In determining whether a dismissal was fair or not, the Tribunal is obliged to (a) determine that issued based on the facts known and beliefs held by the employer at the time of the dismissal (i.e., not judge the dismissal with the benefit of hindsight, although the Tribunal can take into account matters which the employer ought reasonably to have known at the time) (b) assess the fairness of the dismissal as a whole, not just focus on only the substantial fairness or only the procedural fairness of the dismissal.

41. A dismissal is unfair under s.98(4) of the Employment Rights Act 1996 if, and only if, the dismissal judged as a whole was outwith the band of reasonable responses open to the employer at the time. The Tribunal must not substitute its own judgment for that of the employer, and must not ask itself what it would have done in the same circumstances – the Tribunal is obliged to focus on what the employer did, based on what the employer knew and believed at the time, in determining whether the employer acted reasonably at the time in dismissing the employee for its reason (if more than one principal reason) for dismissal.

Redundancy

42. Sec 139(1) of the Employment Rights Act 1996 states (in relevant part) that for the purpose of that 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.

Reason for dismissal

43. A reason for dismissal is a set of facts known to and/or beliefs held by the employer which cause it to dismiss an employee. *Abernethy v Mott, Hay & Anderson [1974*] ICR 323.

Extent of Tribunal's jurisdiction in redundancy dismissals

44. Provided a genuine redundancy situation exists (ie, it is not a mere sham to provide pretextual cover for a dismissal), the Tribunal does not have jurisdiction to determine whether an employer's decision to have redundancies either at all or in the numbers decided upon rather than take an alternative course of action was unfair or unreasonable, or decide an unfair dismissal claim on the basis that the decisions the employer made on those matters were unfair or unreasonable. In a genuine redundancy situation, the decision whether or not to make posts redundant is a business decision for the employer*. Moon v Homeworthy Furniture (Northern) Ltd* [1976] IRLR 298.

Fairness of dismissal on redundancy grounds

45. *Williams v Compare Maxam* [1982] UKEAT/372/81. Where employees are represented by an independent union recognised by their employer, reasonable employers will generally seek to act in accordance with the following principles:

46. *First*, 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.

47. *Second,* the employer will consult the union as to the best means by which the desire management result can be achieved fairly and with as little hardship to the employee as possible. 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.

48. *Third,* 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, experience or length of service.

49. *Fourth*, 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 selection.

50. *Fifth*, the employer will seek to see whether instead of dismissing the employee the employer could offer the employee alternative employment.

51. The factors above are not present in every case, and can be departed from for good reason.

Selection of redundancy pool

52. The question of how the redundancy pool should be defined is primarily a matter for the employer to determine. It will generally be difficult for the employee to challenge it where the employer has genuinely applied their mind to the problem*. Taymech Ltd v Ryan* [1994] UKEAT/663/94/1511.

Application of redundancy selection criteria to pool

53. In general, an employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt sign of conduct which mars its fairness will have done all the law requires of it. *British Aerospace v Green*, 1995 ICR 1006, 1010A-B.

Pleadings

54. The parties to a Tribunal claim must set out the essence of their case on paper in the ET1 and the answer to it. The Tribunal must take care not to be diverted into thinking the essential case is to be found other than in the pleadings. *Chandhok v Tirkey* [2014] UKEAT/0190/14 (paras.17-18).

55. If not specifically pleaded or raised in an agreed list of issues, the Tribunal is generally not required in every redundancy unfair dismissal claim to investigate and determine whether there was unfairness in the selection process, lack of consultation and/or failure to seek alternative employment on the part of the employer. *Remploy Ltd. v. Abbott* [2015] UKEAT/0405/14/DM.

Conclusions

Preliminary observations

56. Before considering the merits of Mr. MacDonald's unfair dismissal claim, the Tribunal pauses to note the relatively narrow basis upon which Mr. MacDonald complained to the Tribunal that his dismissal was unfair in his ET1.

57. *First*, Mr. MacDonald made no complaint about the use of a redundancy selection pool and application of redundancy selection criteria as the method to determine which employee's post should be made redundant.

58. *Second*, Mr. MacDonald made no complaint about his employer's choice of redundancy pool - the three UK mainland sales agents. There is no suggestion that this choice of pool was unreasonable and should have been wider.

59. *Third*, Mr. MacDonald made no complaint about the selection criteria his employer chose to use/apply to determine the scoring of those in the redundancy pool - work performance, employability/flexibility, attendance, disciplinary record, or the way his employer chose to break down work

performance and employability/flexibility into their more granular constituent parts.

60. *Fourth*, Mr. MacDonald made no complaint about the weight his employer chose to give each of those criteria, with work performance given by a considerable margin the most weight, then employability/flexibility, and attendance and disciplinary record given much less weight.

61. *Fifth*, so far as the redundancy selection scoring is concerned, Mr. MacDonald made no complaint about most of the scores Mr. McMillan gave him on the selection criteria or the way in which Mr. McMillan marked those scores.

62. *Sixth*, Mr. MacDonald made no complaint about the scores the other two sales agents in the pool were given on the selection criteria (although in fairness to Mr. MacDonald, it must be noted that when he commenced his Employment Tribunal claim he did not have that information), even though their scoring in such a small pool of three played a critical role in determining who would get the lowest score and therefore be selected for dismissal on redundancy grounds.

63. *Seventh,* Mr. MacDonald made no complaint that he did not get sufficient advice notice of the need for potential redundancies.

64. *Eighth.* Mr. MacDonald made no complaint that the redundancy consultations were not adequate, or were a mere sham (although it has to be said that in his oral evidence Mr. MacDonald did sometimes waiver on this point, sometimes suggesting that he had no procedural complaints, at other times suggesting that the outcome was predetermined – clearly both positions cannot be correct).

65. *Ninth,* Mr. MacDonald made no complaint that NNI failed to make reasonable efforts to find alternative employment for him within one of NNI's other businesses or the wider corporate group of which NNI formed part.

66. The Tribunal, of course, makes no criticism of the above – it was entirely up to Mr. MacDonald how he chose to present and advance his complaint of

unfair dismissal in his ET1. However, the Tribunal is bound to note that had Mr. MacDonald pleaded and put NNI on fair notice of certain other matters, e.g., his scoring on certain redundancy criteria in comparison to the scoring of his redundancy pool colleagues, the Tribunal would have been considering a very different unfair dismissal claim to the one he actually brought, and would have had to consider issues which did not arise for consideration in the context of the claim actually brought. For example, the Tribunal found it very difficult to understand how Mr. McMillan could reasonably have scored Mr. MacDonald 3 for business development and Mr. Smith and Mr. McCarrick both 4 when (i) it was not in dispute that Mr. MacDonald had introduced numerous major clients to NM Materials during his time there (see para. 9 above), whereas (ii) Mr. Smith had only been in NM Materials' employment since approximately January 2020, and had been working there for only 2-3 months before he was put on furlough. In the event, however, Mr. MacDonald never made a complaint about his absolute or relative scoring for business development.

Merits

67. So far as the merits of the unfair dismissal complaint that Mr. MacDonald presented in his ET1 are concerned, the Tribunal's conclusions are as follows:

68. *First*, NNI has discharged its burden of establishing that Mr. MacDonald's dismissal was wholly or mainly attributable to the fact that NS Materials had or expected to have a diminished requirement for area sales representatives in the UK mainland seeking to sell NS Materials' rooftile products in the UK mainland market in 2020 following the Covid-19 pandemic and the serious adverse effect the pandemic had on NNI's business. NNI's genuine intention in 2020 was to reduce the size of its workforce to cut costs, as part of which NNI's genuine intention was to reduce the size of NM Materials' UK mainland sales force from 3 posts to 2 posts (as well as the size of their sales peers focusing on the Northern Ireland market). As a consequence of its redundancy exercise in 2020, NNI did reduce its UK mainland sales force from 3 posts to

2 posts. This intended and actual reduction in the size of this particular UK mainland workforce from 3 posts to 2 posts falls squarely within the terms of s.139(1)(b) of the Employment Rights Act 1996.

69. The mere fact that a genuine redundancy situation existed in 2020 does not necessarily mean that Mr. MacDonald's dismissal was wholly or mainly attributable to that fact. However, the Tribunal is satisfied that Mr. MacDonald's loss of employment was wholly or mainly attributable to this redundancy situation. The redundancy situation at NM Materials, which itself formed part of a wider round of redundancies both at NM Materials and at Farrans, was not a sham nor was it used by NNI or NM Materials as a convenient pretext to end Mr. MacDonald's employment. There is no evidence of a threat to Mr. MacDonald's employment before the Covid-19 pandemic. The Tribunal is satisfied, on the balance of probabilities, that had the Covid-19 pandemic not occurred and not had such a severe adverse effect on NNI and NM Materials' businesses, that Mr. MacDonald would likely still be in NNI's employment now. Mr. MacDonald did not put to Mr. McMillian that he had used the redundancy scoring exercise to keep his preferred younger UK mainland sales team members by deliberately scoring him lower than them.

70. Mr. MacDonald questions the existence of a genuine redundancy situation on the basis that while the UK mainland area sales team may have reduced from 3 to 2, there was still a continued demand for NS Materials' rooftile products in the UK mainland market which needed to be serviced. Mr. MacDonald's reaction is an understandable one, and Mr. MacDonald is probably right that in 2020 there still remained (to a greater or lesser extent) a demand for NM Materials' rooftile products in the UK. The problem Mr. MacDonald has is that a continued demand for goods or service is not the test to determine whether a genuine redundancy situation exists, the test being that set out in s.139(1) of the Employment Rights Act 1996. It is that test (and that test alone) which the Tribunal must apply to determine whether a genuine redundancy situation existed at the time. Applying that test, the Tribunal is satisfied that there was a genuine redundancy situation at the time of the redundancy exercise in 2020.

71. *Second*, the Tribunal is satisfied that NNI gave Mr. MacDonald sufficient advance notice of a redundancy situation falling within the range of reasonable responses open to NNI at the time. Since Mr. MacDonald does not contend that his dismissal was unfair on the grounds that he was not given sufficient advice notice of his potential redundancy, the Tribunal will not address this issue further.

72. *Third,* subject to the matters noted below, the Tribunal is satisfied that NNI conducted a fair redundancy selection procedure. The Tribunal reaches this conclusion first and foremost because Mr. MacDonald himself accepts that NNI followed a fair process, and said so, several times ("*Regarding procedures, I've got no questions on that, you were very good at that, no questions at all on that*.") ("*My questions are all about the scoring matrix – I have absolutely no questions regarding the protocols and I'm sure process was followed absolutely to the letter of the law*.") ("*Regarding the redundancy selection matrix, I have no issues regarding the structure or the processes, I'm sure they have been done correctly*.")

73. *Fourth*, the Tribunal is satisfied that Mr. MacDonald's score of 2 for IT skills score was within the range of reasonable scoring responses open to Mr. McMillan. In cross-examination, Mr. MacDonald stated "*Yes, I'm not a 10/10 in IT*", and accepted he preferred to use his mobile phone rather than his laptop computer because in his sales job, he often had to do very extensive travelling, with 5am starts on a not infrequent basis, and his phone was much more convenient for him (and his clients) to use than his laptop. So far as his use of social media was concerned, Mr. MacDonald (because of his former occupation in a very different field of work) was not required to use Facebook to promote NM Materials, but he had no equivalent dispensation relating to use of the LinkedIn website, and accepted that he did not manage to post (either directly or with the assistance of others) a photo and text on LinkedIn at least once a month, the minimum expectation of sales team members.

74. *Fifth*, the Tribunal is satisfied that Mr. MacDonald's score of 2 for weekly reporting and quality of administration was within the range of reasonable

scoring responses open to Mr. McMillan. This was the one selection criterion for which hard data was available, namely a document which summarised over the 6 month period October 2019 – March 2020 the timing of Mr. MacDonald's submission of his reports. The information on that document, which Mr. MacDonald did not dispute, showed that over this period (i) a total of 22 sales reports had been due from him (ii) of those 22, 7 sales reports had not been submitted at all (iii) of the 15 sales reports which Mr. MacDonald had submitted, 5 had been submitted on time, 3 had been submitted 1 day late, 2 reports had been submitted 2 days late, 2 reports had been submitted 3 days late, and 3 reports had been submitted between 6 and 9 days late. These figures suggest that Mr. McMillan's conclusion that Mr. MacDonald's sale reporting was less than satisfactory was a reasonable one, and within the range of reasonable responses open to Mr. McMillan at the time. The Tribunal notes the scores of the other two pool members on this criterion – both a 3 – were not much better.

75. *Sixth*, the Tribunal is satisfied that Mr. MacDonald's final score of 3 (Mr. Rogerson having increased Mr. McMillan's initial score of 2 on this criterion at the appeal hearing) for regularly updating and maintaining the sales database was within the band of reasonable responses at the time. According to Mr. McMillan, 3 denoted a 'satisfactory' performance. At the final hearing, Mr. MacDonald did not put to Mr. Rogerson that he ought to have scored a 4 or a 5. The Tribunal notes that with a 3 Mr. MacDonald scored only 1 point lower than Mr. Smith and Mr. McCarrick, and it would effectively constitute an impermissible remarking exercise (not an appraisal of the reasonableness of the employer's scoring) if the Tribunal were to suggest that the only reasonable score on this criterion was a score at least as high as the other two members of the pool. Perhaps most importantly, under cross-examination, Mr. MacDonald accepted a score of 3 was the correct score.

76. *Seventh*, in contrast to the three selection criteria discussed above, the Tribunal was satisfied that Mr. MacDonald's score of 3 for 'dealing effectively and timely with customer enquiries and complaints' was <u>not</u> within the range of reasonable scoring responses open to Mr. McMillan. The evidence

adduced at the hearing suggested that Mr. MacMillan's history of dealing with complaints, in particular the serious problems that had arisen in 2019, had been exemplary. A score of 3 suggested that Mr. MacDonald's performance on this criterion had been no more than merely satisfactory – Mr. MacDonald's score of 3 on this criterion simply did not match the objective facts.

77. *Eighth*, notwithstanding the above, the Tribunal was satisfied that Mr. MacDonald's selection for redundancy, looked at in the round as the Tribunal must do, was within the band of reasonable responses. Even if the Tribunal is wrong to have found that Mr. MacDonald's scores on the four redundancy selection criteria whose scoring he challenged were within the band of reasonable responses, and even if each of those scores should have been higher, as a matter of simple mathematics (i) if Mr. MacDonald's scores on those 4 criteria were each increased by 1 point (gaining an extra 4 points in total over his original score), Mr. MacDonald would still have scored the lowest in the pool, hence would still have been fairly selected for redundancy (ii) if Mr. MacDonald's scores on those 4 criteria were each increased not by 1 point but by 2 points (gaining an extra 8 points in total over his original score), Mr. MacDonald would still have scored the lowest in the pool, hence would still have been fairly selected for redundancy. In this context, the unreasonableness of Mr. MacDonald's score of 3 for 'dealing effectively and timely with customer enquiries and complaints' does not make a material difference to the fairness of the outcome of the redundancy selection process when considered as a whole.

78. *Ninth*, if Mr. MacDonald was unfairly dismissed (ie, the Tribunal is wrong to find that his dismissal on redundancy grounds was within the band of reasonable responses open to NNI at the time), the Tribunal is satisfied for the reasons stated in the paragraph above that there is a 100 percentage chance that Mr. MacDonald would have been fairly selected for dismissal had a fair redundancy selection procedure been applied.

79. For the reasons stated above, the Tribunal finds that Mr. MacDonald's complaint of unfair dismissal under s.98 of the Employment Rights Act 1996 is not well-founded and is dismissed.

80. Finally, the Tribunal notes that at the commencement of the hearing on 23 June 2021 it heard and then dismissed Mr. MacDonald's oral application to rely on approximately 30 pages of documents. Mr. MacDonald had not served those documents on the Respondent either at the time he was ordered to do so under the existing Case Management Order or, indeed, at all. The Respondent's solicitor stated they had only seen those documents for the first time that morning, and this appears to have been the result only of Mr. MacDonald emailing those documents to the Tribunal that morning (or the evening before) and the Tribunal clerks having then forwarded that email to the Respondent's solicitors. The Respondent objected to their admission and use at the hearing on the basis that they were prejudiced in not having had any time to review them prior to the start of the hearing. Mr. MacDonald sought to excuse his late production of these documents on the basis that he was not a lawyer and had been "certain" that his application for a postponement of the final hearing would be granted. The Tribunal dismissed Mr. MacDonald's application on the basis that (i) the documents had not been timely served on the Respondent (ii) the Respondent was plainly prejudiced by their extremely late production (iii) if the hearing was stood down to give the Respondent's representatives adequate time to review those documents with their witnesses, the final hearing would likely go part-heard (iv) Mr. MacDonald would still be able to put his case to the Respondent's witnesses in cross-examination, just not with the benefit of those documents. In the event, the final hearing took all of its 3 allocated days, with closing submissions ending at or around 4pm on the third day (to the best of the Tribunal's recollection) with judgment and reasons required to be reserved. Accordingly, the Tribunal's judgment on the morning of the first day that the final hearing would likely go part-heard had those documents been admitted into evidence was vindicated by how long the finally hearing actually took.

Employment Judge: Antoine Tinnion
Date of Judgment: 22 July 2021
Entered in register: 27 July 2021
and copied to parties

SCHEDULE

Redundancy Selection Criterion	MacDonald	Smith	McCarrick
#1: Work Performance - Performance & Productivity			
Take ownership and responsibility for quality of work (5)	3	4	4
How does their productivity rate compare with teammates – on par/higher/lower (5)	3	4	4
Is person well organised, use their time effectively (5)	3	3	3
Do they deal effectively and timely with customer enquiries / complaints (5)	3	4	3
IT skills – are they competent in the use sales databases, social medial skills and online prospecting opportunities (5)	2	5	4
Business development – competent/active in prospecting/developing new contacts (5)	3	4	4
Do they take an active role in development of product range (5)	3	4	3
Do they regularly update and maintain the sales database (5)	2	4	4
Are they capable of multi-product selling (NI only)	n/a	n/a	n/a
Work Performance - Teamwork – Working With Others			
Is this person approachable? (5)	4	5	5
Is this person adaptable? (5)	4	5	5
Is this person amenable? (5)	4	5	5
Is this person positive towards others, including customers? (5)	5	5	5
Is this a person who develops positive relationships with team mates? (5)	5	4	4
Work Performance – Communication Skills			
How does this person advise on production requirements? (5)	3	3	3
Does this person communicate well with other departments within the company? (5)	3	4	4
Consider their weekly reporting and quality of administration (5)	2	3	3
How would you rate their competitor awareness? (5)	3	5	3
#2: Employability and Flexibility			

Redundancy Selection Criterion	**MacDonald**	**Smith**	**McCarrick**
Is the person a sounding board for les experienced colleagues (a 'go to' person) (5)	3	4	3
Is the person competent to undertake a range of duties within the team? (5)	3	4	4
Is the person competent to transfer knowledge across roles? (5)	3	4	3
Does the person use depth of experience to inform and make sound judgments? (5)	3	4	3
Demonstrate willingness to go beyond existing duties to meet business needs? (5)	4	4	4
#3: Attendance			
Last 12 months – 8+ days absence – score 1 Last 12 months – 6-7 days absence– score 2 Last 12 months – 4-5 days absence– score 3 Last 12 months – 2-3 days absence – score 4 Last 12 months – 0-1 days absence– score 5	5	5	5
#4: Disciplinary record			
Final written warning – score 1 First written warning – score 2 Verbal warning – score 3 No disciplinary record – score 4	4	4	4
TOTAL	80	100	92

Note

1. Rows highlighted in yellow identify redundancy selection criteria whose personal score Claimant challenged in his ET1.