# EMPLOYMENT TRIBUNALS

**Claimant:** **Stephen Slater**

**Respondent:** **Precision Printing Ltd**

**Heard at:** **London East Hearing Centre** **On: 16 July 2021**

**Before:** **Employment Judge S Knight**

**Representation**

Claimant: Unrepresented, in attendance

Respondent: Unrepresented, in attendance

**JUDGMENT** having been sent to the parties on 20 July 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

# REASONS

## Introduction

### *The parties*

1. The Claimant was employed by the Respondent between 16 March 2015 and 21 August 2020 as a Guillotine Operator in the Respondent's Case Binding Department. The Respondent is a manufacturer of printed products.

### *The claims*

2. The Claimant claims for unfair dismissal. The Respondent says the dismissal was fair and that it was for reasons of redundancy.

3. On 9 November 2020 ACAS was notified under the early conciliation procedure. On 17 December 2020 ACAS issued the early conciliation certificate. On 13 January 2021 the ET1 Claim Form was presented. On 25 February 2021 the ET3 Response Form was sent to the Tribunal.

### *The issues*

4. At the start of the hearing the parties agreed a list of issues, which is set out at Annex 1 to this Judgment.

## Procedure, documents, and evidence heard

### *Procedure*

5. This has been a remote hearing which has been consented to by the parties. The form of remote hearing was "***V****: video whether partly (someone physically in a hearing centre) or fully (all remote)*". A face-to-face hearing was not held because it was not practicable due to the COVID-19 pandemic and no-one requested the same.

6. All participants attended the hearing through Cloud Video Platform.

7. At the start of the hearing I checked whether any reasonable adjustments were required. Those in attendance confirmed that none were required.

### *Documents*

8. I was provided with an agreed Hearing Bundle in 2 parts, one headed "Index" and one headed "Tribunal Forms".

9. In a separate bundle witness statements were provided from the Claimant, Christopher Pinborough (Production Director of the Respondent), Kerry Watkins (HR Manager of the Respondent), Paul Bailey (an HR consultant for the Respondent), and Louise Stephenson (a Managing Director).

### *Evidence*

10. At the hearing I heard evidence under affirmation from Ms Watkins and Mr Pinborough and under oath from the Claimant. The Respondent chose not to call their other witnesses. Each of the witnesses who gave oral evidence adopted their witness statements. Each witness was cross-examined in turn, and expanded upon their witness statements.

### *Closing submissions*

11. Both parties made succinct oral closing submissions.

**Relevant law**

***Unfair and potentially fair reasons for dismissal***

12. Section 94 of the Employment Rights Act 1996 ("**ERA 1996**") provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by their employer.

13. Section 98 of the ERA 1996 provides potentially fair reasons for dismissal, of which redundancy is one. It provides insofar as is relevant:

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it— […]
>
> (c) is that the employee was redundant[…]
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case. […]"

14. In *Beatt v Croydon Health Services NHS Trust* [2017] EWCA Civ 401; [2017] IRLR 748; 23 May 2017 Lord Justice Underhill stated that the "reason" for a dismissal is the factor or factors operating on the mind of the decision-maker which causes them to take the decision to dismiss or, as it is sometimes put, what "motivates" them to dismiss.

15. Circumstances in which there is a dismissal by reason of redundancy are set out in section 139 of the ERA 1996 as follows insofar as is relevant:

> "(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to— […]
>
> (b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind […] have ceased or diminished or are expected to cease or diminish. […]

(6) In subsection (1) *"cease"* and *"diminish"* mean cease and diminish either permanently or temporarily and for whatever reason."

***Assessing the fairness of a dismissal for reasons of redundancy***

16. The Court of Appeal in *British Aerospace plc v Green* [1995] ICR 1006 (23 March 1995) set out a restricted set of matters to which the Tribunal should have regard where redundancy takes place following a graded assessment exercise involving objective criteria applied to all employees in a redundancy pool. In that case, the Court of Appeal refused an appeal against an order of the EAT quashing an order of the Industrial Tribunal for discovery of the assessment forms of the employees who had not been dismissed. The Court of Appeal held that, in the absence of any specific attack either on the fairness of the assessment process itself or of the manner of its application, the assessment forms of employees who had not been dismissed were irrelevant and their discovery was not necessary for the fair disposition of the case.

17. In *Green* the Court of Appeal warned against a substitution mindset when considering the system used for determining who would be made redundant:

"The industrial tribunal must, in short, be satisfied that redundancy selection has been achieved by adopting a fair and reasonable system and applying it fairly and reasonably as between one employee and another; and must judge that question objectively by asking whether the system and its application fall within the range of fairness and reason (regardless of whether they would have chosen to adopt such a system or apply it in that way themselves)."

18. Waite LJ in *Green* also explained that:

"Employment law recognises, pragmatically, that an over-minute investigation of the selection process by the tribunal members may run the risk of defeating the purpose which the tribunals were called into being to discharge — namely a swift, informal disposal of disputes arising from redundancy in the workplace. So in general the 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 that the law requires of him."

***The 'pool for selection' in dismissals for reasons of redundancy***

19. In carrying out a redundancy exercise, an employer should begin by identifying the group of employees from which those who are to be made redundant will be drawn. This is the 'pool for selection'. It is to these employees that an employer will apply the chosen selection criteria to determine who will be made redundant. The application of otherwise fair selection criteria to the wrong pool of employees may result in an unfair dismissal. As the EAT noted in *Taymech Ltd v Ryan* EAT 663/94 (15 November 1994), if an employer simply dismisses an

employee without first considering the question of a pool, the dismissal is likely to be unfair.

20. In *Capita Hartshead Ltd v Byard* 2012 ICR 1256 (20 February 2012) the EAT rejected an argument that a statement in *Taymech Ltd v Ryan* that "*how the pool should be defined is primarily a matter for the employer to determine*" necessarily meant that tribunals are precluded from holding that the choice of pool for selection by the employer is so flawed that the employee selected has been unfairly dismissed. That statement only applies where the employer has "*genuinely applied his mind to the problem*" of selecting the pool. Even then, the EAT thought that an employer's decision will not be impossible to challenge.

21. Nonetheless, as the Court of Appeal held in *Thomas and Betts Manufacturing Co v Harding* 1980 IRLR 255 (1 January 1980), employers have a good deal of flexibility in defining the pool from which they will select employees for dismissal.

22. A tribunal will judge the employer's choice of pool by asking itself whether it fell within the range of reasonable responses available to an employer in the circumstances. As the EAT put it in *Kvaerner Oil and Gas Ltd v Parker and ors* EAT 0444/02 (29 January 2003), "*different people can quite legitimately have different views about what is or is not a fair response to a particular situation* […] *In most situations there will be a band of potential responses to the particular problem and it may be that both of solutions X and Y will be well within that band.*" It is not for the Tribunal to substitute its view for that of the Respondent.

23. It may be unreasonable to exclude a group of employees doing similar work from the pool for selection even where the employees in the pool would have to undertake some training before carrying out the work done by the excluded employees. An example of this is the first-instance case of *Thornley v JCT600 Ltd* ET Case No.1800944/10. The claimant was one of seven technicians employed by JCT600 Ltd in its specialist workshop. Five of the technicians, including the claimant, worked on Ferrari and Maserati vehicles and two worked on Lotus vehicles. JCT600 Ltd decided to reduce the number of technicians by one and the claimant was selected from among the five technicians working on Ferrari and Maserati cars. An employment tribunal held that he had been unfairly dismissed. JCT600 Ltd had acted unreasonably in excluding from the pool the two technicians working on Lotus cars. There was no consideration at any stage of transferring one of the technicians working on Maserati and Ferrari cars to Lotus in the event that a Lotus technician was selected for redundancy, yet this would have required only ten days' training. In fact, all technicians worked on all of the cars from time to time.

24. Another illustrative example is the first-instance case of *Fairbanks v David Ross Education Trust* ET Case No.2600410/17. The claimant was a teacher in a DT department which offered a number of subjects, including food technology, art, textiles, graphics and resistant materials. She spent approximately 80 per cent of her time teaching food technology, with the remainder spent teaching other DT subjects. All staff in the DT department had a particular speciality subject, but they were all able to teach, and on occasion taught, other DT subjects according to department needs. Following the decision to stop teaching food technology at GCSE level, the claimant was made redundant. The employment

tribunal found that it was outside the range of reasonable responses for the employer to treat the claimant as being in a pool of one and to take the view that there was no need for objective selection criteria. The tribunal considered that it was unreasonable not to include all DT teachers within a pool and to fail to carry out a skills audit of the department as had occurred in previous selection exercises.

25. A final first-instance illustrative example is *Despard v Transalis Ltd* ET Case No.1411583/15. The claimant was selected for redundancy when the employer determined that it had a reduced need for employees to provide technical support to Argos, one of the company's major clients. Although the claimant worked as part of a technical support team, he worked almost exclusively on support tickets for Argos. The respondent regarded his role as being unique and placed him in a pool of one in the course of a redundancy process. The employment tribunal held that the decision not to include other employees in a redundancy selection pool was flawed and unreasonable. It noted that the respondent had been asked to gain experience and training to enable him to provide support to all of the respondent's clients and gain knowledge about how to use other clients' set-ups. When the claimant was on leave, other members of the respondent's support team did the Argos work. From 2014, the claimant occasionally did work for customers other than Argos. As such, the technical support work done by the claimant and other technical support employees in the technical support teams was similar and interchangeable, notwithstanding any different set-ups. There was no evidence that the respondent had applied its mind to scoping an 'at risk' pool for selection and determining who should be made redundant from among the employees in such a pool.

**Findings of fact**

***The Claimant's work for the Respondent***

26. When the Respondent hired staff, for example a guillotine operator, it would hire someone with the appropriate general skills, and then fit them into a specific role.

27. The Claimant worked for the Respondent as a guillotine operator. He had a primary skillset relevant to his day-to-day work. He also had a secondary skillset as a binder, and a tertiary skillset in lay flat, which were also put to use in his employment by the Respondent. He had trained other people at his primary skillset. The evidence of Mr Pinborough was that "the next day" the Claimant could have done the cutting, binding layflats, and reconciliation contained within his secondary and tertiary skillsets.

28. The Claimant used various pieces of equipment within his department. Other employees of the Respondent in different departments used the same equipment, but to produce different products.

29. The Claimant received extremely positive appraisals; on his last appraisal he received 145/150. At the hearing and in their witness statements the Respondent's witnesses were at pains to point out the Claimant's skill and dedication to his job.

***The impact of the COVID-19 pandemic on the Respondent's business***

30. Due to the COVID-19 pandemic, the Respondent expected there to be a reduction in the amount of work to be done. In particular, it was concerned about the possibility of a recession. The Respondent determined that there was a redundancy situation.

31. The Respondent placed a large proportion of its workforce on furlough and sought methods by which jobs could be saved. On 30 March 2020 the Claimant was placed on furlough.

32. It is apparent that this situation was not easy for anyone involved. The Respondent had genuine concerns that its business may be forced to close permanently and that all of its employees would lose their jobs. The employees were worried that they would lose their jobs. The HR staff of the Respondent were stretched to the limit in responding to the unprecedented circumstances in which they found themselves. The Respondent accepted that it may have made some minor failings in how it dealt with its employees, but it stressed that it, and particularly its HR staff, did their best.

***The redundancy process***

33. While the Claimant was on furlough, another guillotine operator, who the Claimant had trained to work in the Case Binding Department in which the Claimant worked, was brought in to carry out the Claimant's usual role.

34. On 15 June 2020 the Respondent's CEO sent to all staff information on the redundancy exercise. This included an explanation of the criteria on which those in pools would be assessed. The criteria were Flexibility, Overall Ability, Disciplinary Record, and Attendance.

35. The Claimant was placed in a pool of one for redundancy. Other employees were placed in pools along with other people.

36. In a consultation meeting, the Claimant said to Mr Pinborough that other employees should be placed in the same pool. The Respondent refused to do this because it considered that roles were redundant, not people.

37. The Claimant was offered the opportunity to apply for alternative vacancies with the Respondent. However, he did not make any applications. He said that he did not make any applications because the vacancies were for unsuitable roles. For example, 2 out of the 3 vacancies were for night roles, and the Respondent accepted that this was unsuitable for the Claimant because he is a diabetic and needed to regulate his blood sugar, which would be more difficult with night shift work. The other vacancy was for a time of day at which the Claimant was required to provide care to his family, and so he also did not apply for it. Before the redundancy situation arose, the Claimant had previously turned down an alternative job at the Respondent for a similar reason.

38. Having been guaranteed selection for redundancy, having been in a pool of one, and no alternative employment having been found for the Claimant, the

Claimant was dismissed.

39. After the Claimant's dismissal an agency worker was brought in to cover the Claimant's old job. The agency worker worked in multiple parts of the Respondent's business.

***After the dismissal***

40. After the Claimant's dismissal the Respondent's business continued to operate. Demand for its services did not decline to the extent it had anticipated. The Respondent had a surge in demand in some areas. As such, the Respondent took on new employees, and offered temporary work.

41. The Claimant did not apply for temporary work with the Respondent. Instead, he made a successful application to join the Civil Service. He now has a new job.

**Conclusion**

***Liability***

42. The Claimant accepts that there was a redundancy situation. Although questions arose about this at the hearing, the Claimant did not withdraw this concession and I therefore conclude that there was a redundancy situation.

43. The reason for the Claimant's dismissal was redundancy. This is a potentially fair reason for dismissal.

44. Therefore, I have considered whether the choice of pool for selection was fair. I have borne in mind that the range of pools open to the Respondent is wide, and that it is not my role to substitute my judgment for that of the Respondent. I have been assisted by having regard to the precedent cases to which I referred above.

45. In concluding that roles were redundant and not people, the Respondent approached the question of whether there was a redundancy situation correctly. The Respondent identified the redundant positions in a way which was within the band of reasonable responses open to it. However, it then conflated the question of which positions were redundant with the question of who fell into the pool for selection. The Respondent did not turn its mind to whether the pool should be wider than the roles to be made redundant. The Respondent concluded that because a job role was redundant, whoever occupied that job role constituted the pool for selection. That was the case whether a job role to be made redundant was a single job role, or a job role within a group of similar or identical job roles, where not all of the job roles in the group were redundant. This artificially and unfairly narrowed the pool.

46. The Respondent employed people who had broad skillsets. It had audited their primary, secondary, and tertiary skillsets even before the prospect of redundancies had appeared. Those skillsets were relevant to their primary roles, and roles which they covered when other employees were unavailable. Nonetheless, the Respondent did not have regard to the skillsets of its

employees when determining redundancy pools. Nor did it have regard to whether employees did similar work to each other that would require no or minimal retraining. Nor did it have regard to whether employees already covered for each other in different departments. It took a rigid approach to its designation of the pool for selection, which arose from the error of treating the redundant roles as being the only way of determining the pool for selection. In doing this, the Respondent guaranteed that the Claimant would be selected for redundancy.

47. In order for the selection pool to be potentially fairly chosen, the Respondent would have had to have turned its mind to the question of whether more people should appropriately have been placed in the pool. In this case, it was plain that given the people employed by the Respondent had multiple skillsets which were required for them to work across multiple roles, covering for each other, it would be unreasonable for the pool for selection not to be larger than 1.

48. In light of these matters, I have come to the conclusion that the pool for selection was outside the range of reasonable responses open to the Respondent, and so was not fair.

49. Having determined that the pool for selection was unfair and outside the range of reasonable pools open to the Respondent, **I conclude that the dismissal was unfair**.

50. As such, there is no need for me to consider the further questions in relation to liability.

***Remedy***

51. In relation to remedy the parties are agreed on the calculations.

52. The Claimant was awarded a redundancy payment equal to his Basic Award. As such, there is **no Basic Award**.

53. The compensatory award compensates the Claimant for the loss he has suffered as a result of his unfair dismissal. The Claimant's loss of earnings are £10,408.86.

54. In addition, the Claimant is entitled to £993.51 for holiday pay.

55. In addition, the Claimant is entitled to £948.42 for pension contributions.

56. Finally, the Claimant is entitled to £500 for loss of statutory rights.

57. That is a total **Compensatory Award of £12,850.79**.

58. The Respondent says that there was a 1/15 chance that the Claimant would have been dismissed had a fair pool been adopted. Therefore, the Respondent says that the Claimant's award should be reduced by 1/15. However, the Respondent also accepts that the Claimant's performance was exemplary. In my judgment, if a fair pool had been used, the Claimant would not have been selected for dismissal. His scores in any graded assessment exercise would have led him

to be retained. As such, the Claimant's award will not be reduced on this basis.

59. The Respondent says that the Claimant failed to mitigate his loss because he did not take temporary work with the Respondent after his dismissal. However, the relationship between the Claimant and the Respondent had clearly been destroyed by this point. The arguments and recriminations between them are set out in their witness statements. Further, the Claimant was already in the selection process for the Civil Service. Finally, the Claimant taking on further temporary work with the Respondent would inevitably have obstructed him finding permanent work, which he did, in the Civil Service. The Claimant did not fail to mitigate his loss, but rather took steps to mitigate his loss in the long term through seeking out and obtaining permanent, rather than temporary, employment. As such, the Claimant's compensation will not be reduced on this basis.

60. **The Claimant is awarded £12,850.79**.

**Employment Judge S Knight**
**Date: 26 July 2021**

# ANNEX 1: LIST OF ISSUES

**Liability**

1. What was the sole or principal reason for the dismissal and was it a potentially fair reason pursuant to section 98 of the Employment Rights Act 1996?
   The parties agree that the reason was redundancy.

2. If the reason for dismissal was a potentially fair reason (i.e. redundancy), then in the circumstances (including the Respondent's size and administrative resources) and having regard to the equity and the substantial merits of the case, did the Respondent act reasonably or unreasonably in treating redundancy as a sufficient reason for dismissing the employee? In particular

   (1) Was the pool for redundancy fair?
   The Claimant says "no" because his was the only role in it.
   The Respondent says "yes" because only his role fit in it.

   (2) Were the selection criteria fair?
   No issue is taken on this as there was a pool of 1.

   (3) Were the selection criteria fairly applied to the Claimant?
   No issue is taken on this as there was a pool of 1.

   (4) Did the Respondent take appropriate steps to find alternative employment for the Claimant?
   The Claimant says "no".
   The Respondent says "yes because permanent vacancies were made available in the process and made visible to everyone in the business, and the Respondent was open to suggestions to retain workers".

3. Was a fair procedure adopted?
   The Respondent says "yes".
   The Claimant says "no, because no scoring matrix would be used and the outcome was predetermined".

**Remedy**

4. To what Basic Award is the Claimant entitled?
   The parties agree £0.

5. Is it just and equitable to reduce the Basic Award because of the Claimant's conduct before the dismissal?
   The parties agree "no".

6. To what Compensatory Award is the Claimant entitled?
   The parties agree as set out in the Claimant's Schedule of Loss.

7. Is it just and equitable to reduce the Compensatory Award because the Claimant caused or contributed to his own dismissal?
   The parties agree "no".

8. Should the Claimant's compensation be reduced because of a failure to mitigate his loss (e.g. by looking for a new job).
   The Claimant says "no".
   The Respondent says "yes where the Claimant failed to take temporary work with the Respondent".

9. What chance was there that the Claimant would have been dismissed if a fair procedure had been adopted, and on what date would the Claimant have been dismissed? (*Polkey*)
   The Claimant says 0%.
   The Respondent says the chance was $^{1}/_{15}$.

10. Should any award be increased or reduced due a failure to comply with an ACAS Code of Practice?
    The parties agree "no".