EMPLOYMENT TRIBUNALS

Claimant: **Neil John Williams**

Respondent: **Penny & Giles Controls Ltd**

Heard at: **Cardiff (CVP)** **On:** **28-30 July 2021**

Before: **Employment Judge R Brace**
Members: Mrs J Kiely and Mr B Roberts

Representation
Claimant: In person
Respondent: Ms Gyane (Counsel)

JUDGMENT having been sent to the parties on 2 August 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

WRITTEN REASONS

Introduction

1. The hearing was conducted as a wholly remote hearing by video (CVP) which was not objected to by the parties.

2. The claims before the Tribunal are of unfair dismissal by reason of redundancy and direct age discrimination. The issues to be decided were set out by Judge Ryan in his case management order of 5 February 2021 [34] and that there was a genuine redundancy situation is not in dispute.

3. The issues to be determined included the preliminary issue of whether the Claimant undertook early conciliation with the correct Respondent, 'Curtiss Wright', a trading name, as opposed to the Respondent as named being the legal entity that employed the Claimant.

4. On 14 September 2020, the Claimant had commenced early conciliation against 'Curtiss-Wright', 15 Aviation Park Christchurch, BH23 6HH and on 7 October 2020, an Early Conciliation Certificate ("EC Certificate") had been issued by ACAS. On 27 October 2020 the Claimant had issued an ET1 claiming unfair dismissal, again with the name of the Respondent being 'Curtiss-Wright'.

5. The ET1 Claim form was not vetted by an Employment Judge but listed by the tribunal office for case management on 5 February 2021.

6. Within the ET3 Grounds of Resistance at §1, the Respondent indicated that 'Curtiss-Wright' was not a legal entity, merely a trading /group name of the Claimant's employer, Penny & Giles Controls Limited and contended that as there was no EC Certificate naming the Claimant's actual employer, the Tribunal did not have jurisdiction to hear the claim and it should be struck out.

7. On 20 January 2021, Judge Jenkins directed that the name of the Respondent be amended to Penny & Giles Controls Limited and that the Respondent could raise any issues around early conciliation at the Preliminary Hearing on case management if it wished. This had resulted in Judge Ryan listing this as a preliminary issue to be determined as part and parcel of the final merits hearing.

8. At the outset of this full merits hearing, Counsel for the Respondent confirmed that the Respondent was no longer raising an issue with regard to the early conciliation process that had been undertaken by the Claimant. It was confirmed to the parties that it appeared that the difference appeared to be a minor error and it would not be in the interests of justice to reject the claim on this basis in any event (Mist v Derby Community Health Services NHS Trust 2016 ICR 543 EAT and Drake International Systems Ltd v Blue Arrow 2016 ICR 445 EAT).

Evidence

9. The Tribunal heard evidence from the Claimant and from the following witnesses on behalf of the Respondent:

    a. Sean Tedstone, the Claimant's direct line manager;
    b. Tom Evans, Senior Programme manager;
    c. Jenny Reid HR Manager; and
    d. Aoife McAuliff, HR Manager

10. All witnesses relied on witness statements, which were taken as read and the witnesses were subject to cross examination, Tribunal questions and re-examination.

11. In terms of witness evidence, it is not necessary to reject a witnesses' evidence in whole or in part by regarding the witness as unreliable or as not telling the truth. The Tribunal naturally looks for the witness evidence to be internally consistent and consistent with documentary evidence. I found all witnesses to be candid and seeking to assist the Tribunal reach its decision.

12. There was a Tribunal bundle of 299 pages (the "Bundle") and references to the hearing Bundle appear in square brackets [ ] below.

Facts

13. The Respondent is a company engaged in design and manufacture of control devices for industrial vehicles. It employs approximately over 570 employees at various sites including approximately 55 at the Cwmfelinfach site in Newport.

14. The Claimant started his employment on 23 May 2016 and, at the time of his dismissal on 7 August 2020, was employed as a Mechanical Design Engineer. He was one of nine Senior Project Engineers based at Cwmfelinfach site.

15. The Claimant was employed on terms and conditions set out in a Statement of Main Terms of Employment [38] and reported to Sean Tedstone, Head of Industrial Engineering in Wales.

Payrise

16. At the date of termination of his employment the Claimant received a salary of £41,001 per annum, having received a 2.6% pay increase in January 2020 [72].

17. There is an issue of dispute between the parties regarding whether pay rises were given to all employees in February 2020, with the Claimant believing that there was not an 'across the board pay rise, but that pay rises were performance related. He suggests that this is relevant, as if he had been performing badly, then he would not have expected to receive anything[1].

18. Both Sean Tredstone and Jenny Reid gave evidence that in February 2020 everyone received a payrise. A total budget had been set of 3% for the whole unit, with an element of discretion for managers to adjust that amount, above or below, and that the Claimant had received an award of 2.6% which had been at the lower end of the band of between 2.5% and 3.5%.[2]

19. Whilst we had no documentary evidence before us to support that live evidence, we accepted their testimony and found that all staff received a payrise in February 2020, and that the Claimant received a payrise of 2.6% being under the average 3% pay award for the industrial business side of the Respondent's business. Whilst we accepted that there were others within the Industrial side of the business that would have received below 2.6%, these have not been identified to us.

Furlough

20. As we all are all too aware by March 2020, Covid-19 had well and truly arrived in the UK and on 19 March 2020 the Respondent wrote to all staff who had notified them of a medical condition that placed them at increased risk of severe illness

[1] CWS§27C
[2] JRWS§3 and STWS§6

from Covid-19, which included the Claimant, recommending that they should act in accordance with government guidance, which was to work from home or, if not practicable, to discuss options with their manager. On 24 March 2020, the Claimant was instructed not to attend the office and that he should work from home [74].

21. On 14 April 2020, the Respondent confirmed that it was intending to use the government's Coronavirus Job Retention Scheme ("CJRS") to manage the economic downturn and protect its business and asked the Claimant, together with some 176 other employees, if he would agree to being 'furloughed' at 80% of his basic salary/usual pay [83]. The Claimant agreed and subsequently signed a 'Furlough Leave Agreement' [87] on 16 April 2020.

22. To comply with the CJRS during periods of furlough the Furlough Leave Agreement also:

    a. confirmed that the Respondent had suspended access for furloughed staff to their IT systems,
    b. instructed staff not to communicate with customers, suppliers or anyone else connected to their work other than communications for purposes that were of an entirely social nature; and
    c. that that they were not to attend premises or sites.

23. Contact was arranged through mobile numbers and personal email addresses and staff were informed that if they wished to raise any questions arising from the furlough, they could contact three named individuals, one of whom being Jenny Reid [84].

24. The Claimant was on furlough from 20 April 2020 to 8 May 2020. He returned to work off furlough on 11 May 2020, but again agreed to be placed on furlough from 1 June 2020. The second Furlough Leave Agreement stated that this period of furlough was planned to end on 31 July 2020 [90].

25. At this time, the Claimant was one of three Senior Project Engineers that were off work on furlough.

Redundancy announcement

26. On 1 July 2020, the Respondent announced to staff that due to a reduction in business, as a result of the impact that Covid-19 had on markets, there would be a redundancy process that would reduce staff levels across the Industrial UK Team and it was proposed that there would be a total reduction of 27 staff across the Industrial Division of the Respondent as reflected in the 'Communication to all Industrial UK Staff' of that date [93] and a further 34 roles in the Sensors' division [99]. A 20% reduction in working hours was also proposed.

27. It was confirmed that the proposals would be discussed through individual and collective consultation and that the Respondent would communicate and consult with an elective consultative group.

28. On the same day, a letter was sent to the Claimant by Jenny Reid, confirming that the Respondent would be arranging for election of representatives for the purposes of consultation on ways of avoiding or reducing the need for redundancies and about the criteria on which any selection would be based and inviting volunteers for redundancy by 10 June 2020. Staff were also informed that they would be given an opportunity to be consulted directly.

29. It was proposed that one representative would be elected to represented Industrial Wales indirect employees [96] and the deadline for nominations to be employee representatives was given for 3 July 2020 . Mark Harradine, Sr Project Engineer at the Cwmfelinfach was appointed as employee representative for the Industrial Wales indirect employees which included the pool of Senior Project Engineers [111].

30. The first collective consultation meeting was arranged for 8 July 2020 and, in advance of that meeting, an email was sent by Mark Harradine to all those that he represented, attaching a copy of the selection criteria and agenda together with a letter providing some more detail regarding the proposals [116].

31. Those employees who were on furlough were also informed that HR would provide the elected representatives with the personal email addresses that they had provided, so that they could be contacted and that they should inform HR by 8 July if they did not wish their personal email address to be shared [122].

32. The 'Process of Scoring against Selection Criteria' document [117] set out an explanation that two assessors would separately complete a staff selection sheet for each employee in the relevant at risk-group, which would then be reviewed and verified by a third person; that subsequently all staff would then be ranked, but that employees would only be given a copy of their own score (§4)[117] and that the lowest scoring employees would attend further consultation meetings to discuss these scores.

33. There were 7 criteria of:

    a. Job performance
    b. Skill/Competence
    c. Future Potential
    d. Work Quality
    e. Attendance
    f. Disciplinary Record and
    g. Time-Keeping

34. The criteria of Job Performance, Skill/Competence Future Potential and Work Quality were weighted, insofar as marks were given out of a total of 20 and increased in bands of 5 marks (0, 5, 10 etc.). Attendance was also scored out of 20, but with marks increasing in bands of 4 (i.e. 0, 4, 8 etc.). Disciplinary Record was scored out of a total of 12, with marks increasing in bands of 4 (0, 4, 8 etc.). Time-keeping was not a criterion that was used for the pool of engineering employees that included the Claimant, as such employees worked flexi-time.

First Collective Consultation Meeting

35. The first collective consultation meeting took place on 8 July 2020. We were provided with a copy of the minutes taken of that meeting which we accepted was an accurate record of the consultation meeting [123].

36. The notes reflected that at that meeting the pools for selection were discussed and the voluntary redundancy process, which confirmed that three had volunteered in the Industrial Division. Alternatives to redundancy, such as reduction of hours, use of the Government's retention scheme, pension holidays and purchasing additional annual leave were discussed.

37. The proposed selection criteria was also discussed.

38. The minutes reflected that it had been explained at the meeting that the criteria of 'Job Performance' was based on data from appraisals and reviews and how the individuals performed on previous experience of them in the role whereas 'Skills/Competence' was based on technical ability or mix/criticality of skill [126].

39. Discussion of how the other criteria were to be assessed was also discussed including the fact that a 'Length of Service' criterion was not included. Again the minutes reflected that it was confirmed to the employee representatives that the Respondent had not included this as a criterion as it was considered that such criterion could be potentially discriminatory. It was agreed by the Respondent that they would consider this as a criterion and that the criterion of 'Skills/Competence' would show knowledge and loyalty.

40. On the following day, the Claimant's elected representative sent to the Claimant an email, which included the meeting notes from the previous day's meeting and confirmation that the scoring system would be reviewed the following Friday. The Claimant was asked to send any questions he had by email and that for those employees on furlough, the representative would summarize the MS Teams' discussion in an email update.

41. The Claimant was also sent through the updated Selection Criteria and agenda for the Second Consultation Meeting on 10 July 2020 [136], which now included Length of Service criterion indicating a maximum score of 5 with scores increasing by individual marks (i.e. 0, 1 , 2, 3 etc.)[138].

Second Consultation Meeting – 8 July 2020

42. The second consultation meeting took place on 8 July 2020, and again we were provided with a copy of the notes taken of that meeting which we accepted reflected the matters discussed [142]. These notes were again sent out to staff included in the pool for selection by Mark Harradine, and that this included the Claimant [143].

43. Again the minutes reflect that alternatives to redundancy was discussed, as was the £1k retention scheme and pension holidays .

44. The minutes also reflected that with regard to the selection criteria, at the meeting the Respondent had confirmed that 'Length of Service' criterion had been added with a 5 point scale which was accepted by the elected representatives. The weighting of 'Skill and Performance' criteria was also discussed [146].

45. It appears that 'Future Potential' had caused much feedback from the employees, as reflected in the minutes of the meeting notes as staff were concerned about development and training [146].

46. Notes of these meetings were again provided by Mr Harradine to the staff impacted, including the Claimant, and staff were informed that the next collective consultation meeting would take place on 15 July 2020, with those being provisionally being selected for redundancy being informed by letter on 16 and 17 July 2020, and the first of the individual consultation meetings taking place between 21 and 23 July 2020.

47. On 13 July 2020, the draft timetable of process was sent out to the Claimant and others affected by Mr Harradine, together with further FAQs regarding the redundancies [152].

48. At around this time, an issue had been raised as part of the collective consultation issues where scores were close. It was communicated to the employee representatives by email, that in such a case individual consultation would increase but that where there was a substantial difference in scores, and adjustments would not make a difference to the outcome, those employees would be informed that their role was no longer 'at risk' [156].

49. Whilst we were not directed to any specific documentation, Ms Reid was asked what did 'substantial difference' in scores, mean in practice. She confirmed that this was anything over 10 points. We accepted that evidence.

50. This email was also forwarded to the Claimant. He responded and confirmed to Mr Harradine that he had received the communication from him regarding the collective consultation and thanked him for taking on the representative role [155].

51. There is a dispute between the parties as to whether the terms of the Furlough Agreement effectively prevented the Claimant as a furloughed employee, from taking a proper and efficient part in the consultation process.

52. We heard in cross-examination from the Claimant that he had been an elected representative in prior employment, having gone through compulsory redundancy processes twice earlier in his career. He tells us that he could not engage in this collective consultation process as to do so would have meant that he breached the Furlough Agreement terms which prohibited him from contacting the Respondent regarding work-related matters.

53. He relied on the lack of express confirmation from the Respondent, that it would not be in breach of the Furlough Agreement to contact the Respondent, including Mr Harradine as his employee representative, to support his position.

54. Whilst initially we did have some sympathy with the Claimant's stated position on this issue, and we did find that there was no clear or unequivocal statement that the Furlough Agreement did not prevent employees engaging in the redundancy process, our attention was also drawn to repeated emails which encouraged the Claimant to make contact if there were any queries, including those on:

    a. 14 April 2020 [85], when Jenny Reid, HR Manager within the Industrial Division, confirmed that if any employee wished to raise any questions or issues to contact her and/or two other managers named;
    b. 1 July 2020 [92], when Jenny Reid emailed the staff affected and stated '*If you have any questions please do not hesitate to contact Jason Watkins or myself*'

55. Our attention was also drawn to the content of the Redundancy documentation, which exhorted staff affected to participate [95, 96, 97,99]. We were not persuaded that the Claimant's position; that these were just circular emails and there was no clear communication that he was no longer bound by the terms of the Furlough Agreement, was a reasonable or common-sense position to have taken. Had the Claimant concerns that there was a prohibition in making contact about the redundancy, it was reasonable to expect that he would have raised a query through the contacts that had been provided, whether HR or indeed his elected representative. He did not.

56. Further, despite the collective consultation ending with his provisional selection for redundancy, the Claimant did not, even at that stage and in the following individual consultation meetings, raise his concerns on this issue.

57. We concluded that had the Claimant genuinely held this concern at the time, it was more likely than not he would have raised this, particularly as he had been an employee representative previously. He did not.

58. We therefore found on balance of probabilities that the Claimant did not consider that he had been bound by the Furlough Agreement such that it had prevented him from taking part in the consultation process. In the alternative, that it was not a reasonable conclusion for the Claimant to have taken, even if he genuinely held that view.

Initial Selection Process

59. During the course of 14 July 2020, Seam Tedstone and Tom Evans, Senior Programme manager, completed their initial scoring of the individuals within the pools for selection, using the guidance that had been finalized after the Second Consultation Meeting [137]. The Claimant was in a pool of 9 engineers and there is no challenge by the Claimant to the pool for selection.

60. We have not been provided with the individual scores given by Sean Tredstone and Tom Evans separately, but included in the Bundle were the final scores, following review by Phil Weston, Director of Engineering [161] as follows:

a. Final scores ranged from 97, being the highest score, down to 47 being the lowest score, that of the Claimant, out of a maximum possible of 117.

b. No employee scored a maximum of 20 for Future potential and 4 employees, including the Claimant, scored 5/20 for that criterion.

c. The Claimant also scored 5/20 for the criteria of Job Performance, Skill/Competence and Work Quality, 12/20 for Attendance, 12/12 for Disciplinary Record and 3/5 for Length of Service [173].

61. We heard evidence, which we accepted, from both Mr Tedstone and Mr Evans, that they based their assessments on the information that they had obtained from their review of the Reflective Check-ins, a regular employee- engagement process and their own knowledge of the work of the individuals scored.

Third Consultation Meeting 15 July 2020

62. A third consultation meeting took place on 15 July 2020. Again, notes were provided which we accepted reflected the matters that were discussed and determined [157]. It was confirmed that the weighting for 'Future potential' would be retained.

63. Jenny Reid, gave evidence[3] that consideration was given to reducing the weighting of this criterion, however it had been concluded that this criterion should remain weighted for the reasons reflected in §14 of her written evidence, and as reflected in the notes of the meeting at [146] as follows:

> 'Recognising and developing future potential is important as we recover and build a sustainable future for the Company and our employees.
>
> This is based on an assessment of an employee's ability or willingness to learn new skills, undertake new roles, seek to continually improve.
>
> We appreciate that employees may have shown an interest in training or development but not had been presented with an opportunity; this will still be recognised in the scoring
>
> We also understand that many employees are content with their role and work that they do and they may have unique skills. We value this and it will be recognised in other sections of the scoring eg performance, skills and quality) '

64. It was also confirmed that the Respondent would not be making any decisions in relation to the £1k furlough bonus as no further information was available at that time [157]. Other miscellaneous matters were also addressed as reflected in those notes.

First Individual Consultation Meeting

65. On 17 July 2020, the Claimant was informed by Jenny Reid by way of letter emailed to the Claimant's personal email account, that he had been provisionally

[3] JRWS§14

selected for redundancy [175]. He was invited to a individual meeting to discuss the selection for the following Monday 20 July 2020 and it was confirmed that Sean Tedstone and Tom Evans would be in attendance. He was informed he could bring a trade union representative or a colleague as his companion

66. The Claimant was informed that if he were to be made redundant he would received payment in lieu of notice and accrued unused holiday, a statutory redundancy payment and a discretionary award representing £100 for each year of service, a total payment of £6,781.92, with the statutory redundancy payment being paid free of tax deductions.

67. Prior to the meeting the Claimant requested

    a. Access to the Respondent's IT system to review his personnel records; and
    b. copies of all completed performance reviews and his full attendance / sickness record.

68. These were provided to him on 17 July 2020 [192].

69. Again, we were provided with notes taken by the Respondent of that consultation meeting [187], which we accepted as reflective of the matters discussed. The Claimant confirmed as much in his email of 21 July 2020 to Jenny Reid [191], although there was some dispute as to whether the minutes accurately reflected the totality of the matters discussed as following the meeting the Claimant was provided with a copy of the minutes and emailed Jenny Reid clarifying that he:

    a. Had stated in the meeting that he was legally obliged to be provided with the points he would need to be 'safe' in the process; and
    b. That Sean Tredstone had repeatedly stated that he would not and could not answer any of the Claimant's questions or discuss any of the scoring/reasons for his selection [192].

70. The Claimant asked again for the score that he would need to be 'safe' from risk of redundancy and that he wanted it to be added to the notes of the meeting that he had informed Sean Tredstone that it was a legal requirement that he must be informed of what score he would need to be 'safe' in the process and that Sean Tredstone had stated that he would not enter discussion or answer his questions. He requested a copy of his scores [189].

71. What is agreed between the parties is that at the meeting the Claimant challenged his scores in relation to:

    a. Absence – he had calculated that his score should be 16/20, not 12;

    b. Future Potential – which the Claimant considered was discriminatory on age and should not be used; and

    c. Job Performance, Skill/Competence and Work Qualities, his complaint being that he fundamentally disagreed with the scores that he had been

given on the basis that no negative feedback was given during 'Reflektive Reviews'.

72. He also confirmed that he had not been given details of available roles due to his furlough and lack of access to the Respondent's IT System and it was confirmed that the vacancies list would be shared with him. He asked how many points short of the next person in the pool he was and whether he was the only person in the pool invited to a consultation meeting; if so, was this because these was a big gap in the scoring or whether process had not been followed. He believed that there was underlying motivation that had resulted in his selection and that should his scores not be revised, he confirmed his intention to bring an Employment Tribunal claim.

73. The Claimant was informed that he was the only one in the pool that had been selected for redundancy and was verbally provided with the scores that he had received during the meeting.

74. Following the email exchange on 29 July 2020, Jenny Reid wrote to the Claimant and provided him with written confirmation of the scores that had verbally be given to him at the meeting on 20 July 2020. She also confirmed that his Attendance score had been adjusted to 16/20 [201].

75. Some information regarding his scores was provided which reflected the document at [200]. She also responded to the Claimant's concerns that the criterion of 'Future Potential' was age discriminatory, stating that it was not based on age but used to define employees who were demonstrating potential for future development and progression and that the assessment criteria included a score to show that an employee was content with the current role but open to and capable of taking on other responsibilities.

Second Consultation Meeting

76. The second individual consultation meeting took place on 3 August 2020. Again the minutes are not disputed and we accepted those as a reflection of the matters discussed [204].

77. In response to alternative suggestions to the Respondent's proposal, the Claimant indicated that someone else could be made redundant or make the scoring fair. He confirmed he was aware of the discussions at collective consultation level and asked if it was possible that the Respondent could make him redundant and then furlough him. It was agreed that this would be considered. He was asked if he wished to have a further consultation meeting and he confirmed that he did not. Arrangements were made for the Claimant to collect his personal belongings and that there would be a termination date at the end of the following week.

78. Later that day, Jenny Reid emailed the Claimant confirming that as it was the Respondent's understanding of the CJRS was to support employees where the intention was that they remain an employee, the CJRS should not be used where there was a need to terminate the employment, and that the Respondent would

not be using the CJRS to re-employ an employee who was made redundant [206].

79. On 4 August 2020, the Claimant was provided with written notice of termination confirming his employment would terminate by reason of redundancy on 7 August 2020 [210]. He was provided with details of how he could appeal.

80. On 6 April 2020 the Claimant returned to his workplace to collect his personal belongings in what was understandably a difficult and emotional time for him [216][4].

Appeal

81. By way of letter dated 7 August 2020 the Claimant appealed [219]. The grounds of appeal set out in that letter were as follows:

    a. The correct procedures had not been followed.
        a. The Claimant asserted that had not been allowed to take part in consultation prior to being told that he was selected for redundancy and that he had been unable to take an active part or have any input into the group consultation as to do so would have been in breach of the Furlough Agreement;
        b. That in the First Consultation Meeting Sean Tedstone had refused to inform the Claimant of the next lowest score and refused to discuss any concerns relating to his scores
        c. That his attendance score had been incorrect
        d. He had not been provided with emails advertising available roles and they were never sent to him
        e. That the 'future Potential' criterion was age discriminatory and should not have been allowed.
    b. He considered that his low scores were designed so that he would be selected for redundancy; and
    c. The narrative to support the scores had been false and deliberate to defend the scores which the Claimant considered 'outrageous.

82. He stated that he assumed that because he had no problems with anyone at a professional level, he could only assume that this was due to his being the oldest employee in the pool for selection.

83. The appeal took place by telephone on 19 August 2020 [224] and was conducted by Aoife McAuliffe , Huma Resources manager. The minutes are detailed but essentially the Claimant

    a. Indicated that he could not get actively involved in the collective consultation as he felt he would be breaking furlough. He accepted he had received all the minutes of the collective consultation;
    b. Was asked to provide evidence to support his contention that the justification for his scores were fabricated to justify the low scoring. He

[4] CWS§23 / STWS§21

indicated that he was holding on to such evidence for his tribunal claim but that it was documented in the Project Minutes and Reviews;

c. He confirmed he had received the emails advertising available roles but there had been no attempt to find the Claimant an alternative role. He confirmed he had considered the list of vacancies on 3 August and that there was nothing suitable;
d. The Claimant considered his score for Future Potential was discriminatory and that he deserved, as he put it, 'a sold 10'. He also considered he should have received 10 as a minimum, if not 15, for Skills and Competence;
e. He repeated that the fact that he was nearly 59 was the only reason he was singled out; and
f. He repeated that he believed that he was deliberately down-scored and that she should have been scored higher.

84. A copy of the notes of the meeting was provided to the Claimant and he accepted that they were a fair representation of the matter discussed. He also provided by return, further information including his comments on Jenny Reid's letter of 22 July in relation to his scoring [235].

85. On 9 September 2020, Aoife McAuliffe sent to the Claimant her letter confirming the outcome [276] following her further investigation. The letter is detailed and really needs to be reproduced to do it justice. The Tribunal incorporates it by way of reference.

86. On 14 September 2020 the Claimant contacted ACAS and the early conciliation ended on 7 September 2020 [1], with the Claimant filing his ET1 on 27 October 2020 [2].

Issues and Law

87. In the Equality Act 2010 ("EqA 2010), direct discrimination is defined in section 13(1) as:

(1) A person (A) discriminates against another person (B) if, because of a protected characteristic A treats B less favourably than A treats or would treat others.

88. Age is a protected characteristic(s.5 EqA 2010).

89. The concept of treating someone "less favourably" inherently requires some form of comparison. Section 23 provides that when comparing cases for the purpose of Section 13, "*there must be no material difference between the circumstances related to each case*."

90. Section 136 provides as follows:

(2) If there are facts from which the court (which includes a Tribunal) could decide, in the absence of any other explanation, that a person (A) contravenes the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provisions.

91. Guidance as to the application of the burden of proof was given by the Court of Appeal in Igen v Wong 2005 IRLR 258 as refined in Madarassy v Nomura International Plc [2007] ICR 867. The Court of Appeal emphasised that there must be something more than simply a difference in protected characteristic and a difference in treatment for the burden of proof to shift to the respondent. They are not, without more, sufficient material from which a Tribunal could properly conclude that, on the balance of probabilities, the respondent had committed an act of discrimination.

92. With unfair dismissal, we first have to consider the reason for the dismissal and whether it was a potentially fair reason for the dismissal.

93. In this regard, the Respondent bears the burden of proving on balance of probabilities, that the Claimant was dismissed for one of the potentially fair reason set out in section 98(2) Employment Rights Act 1996 (ERA 1996). The respondent states that the claimant was dismissed by reason of his redundancy which was a potentially fair reason for dismissal pursuant to section 98(2)(b) Employment Rights Act 1996 (the "Act"). In the alternative, some other substantial reason.

94. After considering the reason for dismissal, on the presumption that we identified a potentially fair reason for dismissal, we then have to consider whether the application of that reason in the dismissal for the Claimant in the circumstances was fair and reasonable in the circumstances (including the respondent's size and administrative resources). This should be determined in accordance with equity and the substantial merits of the case and the burden of proof in this regard is neutral.

95. Taking into account this is a redundancy case, the factors suggested by the EAT in Williams and ors **v** Compair Maxam Ltd 1982 ICR 156, EAT that a reasonable employer might be expected to follow in making redundancy dismissals, are to be considered, being mindful that it was not for the employment tribunal to impose its standards and decide whether the employer should have behaved differently. Instead we have to ask whether 'the dismissal lay within the range of conduct which a reasonable employer could have adopted'.

96. In Polkey v AE Dayton Services Ltd [1987] IRLR 503 the House of Lords held that in the case of redundancy, an employer will not normally be acting reasonably unless employees were warned and consulted about the redundancy there was a fair basis on which to select for redundancy which will include whether the selection criteria were objectively chosen and fairly applied (Compair Maxam) and whether any alternative work was available.

Submissions

97. Counsel for the Respondent had provided closing submissions which the Tribunal incorporate by way of reference and had, in addition also relied on the further authorities set out in that document as follows:

    a. Mugford v Midland Bank [1997] IRLR 2018 (§41);
    b. Eaton Ltd v King and others [1995] IRLR 75 (§11);
    c. British Aerospace PLC v Green and others [1995] IRLR 433 (§3, 5, 13 and 25);
    d. Iceland Frozen Foods v Jones [1982] IRLR 439; and
    e. Nagarajan v London Regional Transport [1999] IRLR 572.

98. These were supplemented by additional oral submissions that fleshed out the written submissions.

99. In his oral submissions, the Claimant reiterated that he felt unable to comment or take part in the collective consultation as he had signed the Furlough Agreement and that he considered the individual consultation to be unfair as the Respondent had refused to answer his questions and that he was not provided with his score and the 'safe' score. He also submitted that the employer must make decisions based on records and that he did not believe his scores were reflected in the Reflective Check Ins. He complained that the CJRS should have been used to prevent his redundancy. He did not consider that his appeal had been conducted fairly or properly and that the appeal manager had not been truly independent. With regard to his age discrimination claim, he believes he was selected because of his age as he knew of no legitimate reason for selecting him otherwise.

Conclusions

Unfair Dismissal

Reason for dismissal

100. In applying our findings to the issues identified at the outset, that the Claimant was dismissed by reason of redundancy was not in dispute. This was a potentially a fair reason for dismissal.

101. Moving on to assessment of overall fairness, in considering the section 98(4) test, the Tribunal was satisfied, and the Claimant has not challenged, that he was warned about redundancy.

102. For the reasons provided in our findings of fact, we did not find that the Furlough Agreement excluded, or could reasonably be construed as excluding, contact regarding the redundancy process, whether as part of the collective consultation or otherwise.

103. Whilst the Respondent had not expressly and explicitly stated that the terms of the Furlough Agreement did not mean that the furloughed employees could not participate in discussions or consultation regarding the redundancy proposals, we concluded that the Claimant had not been prevented from taking a proper

and effective part in the consultation. That the Claimant did not engage with the collective consultation was clear, but we did not conclude that this led to any failure in the process or unfairness on the part of the Respondent.

104. Turning to individual consultation, we considered that it was unfortunate that Mr Tedstone had attended the first consultation meeting without HR support or being in a position to provide the Claimant with the information that he sought and needed to properly consult about his selection. The error, as the Respondent has conceded, in not being in a position to provide the Claimant with the information he required to properly consult at that point, effectively meant that that particular meeting was of little benefit and, if anything, was likely to have exacerbated and inflamed an already charged and emotional situation for the Claimant.

105. However, when considering the consultation as a whole, we did not conclude that this was a case where no consultation about redundancy had taken place. Rather, there had been collective consultation and, at the individual consultation stage, the Claimant had the information he had requested in writing subsequently provided to him, albeit some days after the first consultation meeting.

106. For the avoidance of doubt, whilst we did not find that this led to any interference or alteration of the scores that had been given on 14 July 2021 by Mr Tedstone and Mr Evans, as had been suggested by the Claimant, this again was likely to have increased the Claimant's discontent with the redundancy process.

107. The Claimant did have the benefit of a further meeting to discuss scores, before the decision to terminate the Claimant's employment, and after the Claimant had received not only his scores but also the scores of the engineer next placed in the scoring chart and the rationale for his scores. The Claimant had the opportunity to discuss those scores at a further meeting, which he declined, and again at the second consultation meeting, where the Claimant instead chose to focus on the possibility of the Respondent furloughing him again. He declined a further meeting.

108. In those circumstances, we were satisfied that the Respondent did engage in meaningful consultation at both the collective and individual consultation stages.

Selection

109. There has been no issue regarding the pool for selection that impacted the Claimant, namely the 9 Senior Project Engineers employed by the Respondent in Wales region.

110. There was no issue from the Claimant of whether the selection criteria was not clear or transparent or in any way vague or ambiguous, the Claimant only taking objection to the title of the criterion of 'Future Potential'. He took no issue with the substance of the criterion. We also concluded that the selection criteria was verifiable by reference to data such as the Reflective Check-Ins, not just the managers' assessment of individuals having direct knowledge of the work of the employees in the pool for selection.

111. Whilst the Claimant was of the belief that the formulation criterion of 'Future Potential' was an attempt to remove the Claimant because of his age, we did not form this conclusion as the criterion and marking boundaries did not refer to age nor could did we conclude that they could be said to be influenced by the age of the individual.

112. Turning to the manner of selection more generally, the Claimant believed that his scoring in the Selection Criteria of Job Performance, Skill/Competence, Future Potential and Work Quality should have been higher

113. Whilst we accepted that the Claimant was unhappy with the scores of 5 in each of these criteria, we did not consider that such an approach to be inherently unreasonable or that there had been any underlying error in the assessment or any evidence of bias.

114. We accepted the evidence from Mr Tedstone that in scoring the Claimant he had not simply placed each candidate according to his own experience of working with them, but had scored on the basis of information contained in the Reflektive Check Ins, as had Tom Evans.

115. The Claimant sought to argue that not just the formulation of the third criterion, but also the scoring against that criterion was biased, but we did not reach that conclusion or infer from that exercise any bad faith on the part of the Respondent in the scoring exercise that had been undertaken by Sean Tedstone or indeed Tom Evans.

116. Indeed on cross examination, the Claimant was clear that he did not consider that Sean Tedstone had an agenda, confirming in response to cross examination that he had no evidence that anyone wanted him out of the Respondent's employment.

117. Whilst the Claimant sought to introduce argument that Sean Tedstone had some form of agenda in the Claimant leaving, asserting that Sean Tedstone had 'lost face' on whether the Claimant should shield at the outset of the pandemic, it was not suggested that this related to the Claimant's age, and the Claimant had adduced no evidence in relation to that matter (whether in his witness statement or in answers to cross examination) and the Respondent had not had the opportunity to challenge the Claimant on that argument on cross-examination of him.

118. We found no bias or obvious error in the scoring. On that basis we concluded that the Respondent had set up a system of selection that could reasonably be described as fair.

119. Bearing in mind the EAT decision in British Aerospace v Green, we have abstained from close scrutiny of the actual marking given to the Claimant, as even if we concluded that some of the scores could have been higher, we are reminded that it is not for this tribunal to substitute its view as to what the scores should have been and we decline to do so.

Suitable alternative employment

120. Finally, with regard to suitable alternative employment, we were satisfied that at the point that the Claimant was informed that his employment was being terminated, no suitable alternative employment was available.

121. Whilst the delay in sending out the Claimant the list of vacancies to 3 August 2020 was poor practice, and there had been a failing to ensure that the Claimant whilst on furlough, should have been sent emails relating to vacancies, to his personal not work email address, he had received that information albeit indirectly though the notes provided in the consultation by Mr Harradine.

122. Further, the unfortunate reality of the situation was that there was no suitable alternative work available for the Claimant. The roles that were available were either outside the Claimant's skill set or based in Christchurch, and in turn being not suitable for the Claimant. He conceded as much on cross-examination.

123. We therefore did not consider that there had been any failure to seek alternative employment. For the avoidance of doubt, whilst it hasn't been a particular argument of the Claimant, we were satisfied that the Respondent had, as part of its collective consultation, considered a range of alternatives to redundancy including reduction in hours, pension holidays and holiday purchase.

124. In those circumstances, dismissal was the only potential outcome.

Appeal

125. With regard to the Appeal, we were satisfied that there had been consideration of the concerns raised with the Claimant regarding the initial stages of the consultation process at the appeal stage. The appeal letter was detailed and dealt with the issues raised by the Claimant.

126. Whilst we accepted that the appeal outcome letter did lack some detail as to the steps that Aoife McAuliffe had taken to investigate the scores that had been applied to the Claimant, we did conclude that whilst the Claimant had challenged his scores at the appeal stage, he had not provided specific reasons why he considered the scores were too low and had not challenged the justification that had been given for the scores during the appeal hearing. He had not articulated in any detail why he considered the scores to be 'too low', as he termed it.

127. Whilst the appeal manager could have explored this in more detail with the Claimant, equally the Claimant had an opportunity, not just at the second consultation meeting but also at the appeal hearing, to challenge the rationale for the scores that had been given and provide supporting evidence. He did not do so. Where he had questioned the 'Attendance Score', this had been reviewed and amended, which reflected in this tribunal's view, that not only was the Respondent willing to review and uplift scores where there had been genuine error, but also that the Claimant was willing and able to challenge specific scores.

128. Again in those circumstances, we concluded that the appeal process was an opportunity to rectify deficiencies in the procedure and decision-making and that there were nothing in the process that had been adopted by the Respondent that rendered the dismissal process to be unfair or unreasonable.

129. In all the circumstances of the case we concluded that dismissal was a reasonable outcome and that the Claimant's dismissal fell within the band of reasonable responses.

130. In conclusion the Claimant was therefore fairly dismissed and the claim is not well founded.

Age Discrimination

131. We concluded that the Claimant had failed to discharge the burden of showing a prima face case of age discrimination.

132. Whilst we had accepted that the Claimant was the oldest employee in his pool for selection, and held a belief that this was the reason for his selection, this is in itself insufficient to establish a prima face case. As per Madarassy, a Claimant must establish more than a protected characteristic of age and difference in treatment.

133. We were not persuaded that a vague conversation regarding retirement age some time prior to the redundancy process was sufficient to infer that age may have been an effective cause of the Claimant's selection for redundancy.

134. We were not persuaded that the criterion of 'Future Prospects' as potentially age discriminatory, was supported by the evidence and concluded that the description of this criterion, and the marks awarded to it had no connected to the age of the individuals within the pool for selection.

135. The Claimant had not proven primary facts upon which we could conclude or infer that the Claimant was selected because of his age. On that basis, we also concluded that the claim of direct age discrimination was also not well founded and is also dismissed.

Employment Judge R Brace
Date: 11 August 2021

REASONS SENT TO THE PARTIES ON
18 August 2021

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FOR EMPLOYMENT TRIBUNALS Mr N Roche