EMPLOYMENT TRIBUNALS

Claimant: Mrs S Trew

Respondent: Middlesex Group Limited

Heard at: Bristol Employment Tribunal (remotely by CVP)
On: 9 and 10 September 2021

Before: Employment Judge Heath

Representation
Claimant: Mr Melvyn Harris (counsel)
Respondent: Mr Colin McDevitt (counsel)

JUDGMENT

The claimant's claim for unfair dismissal is not well-founded and is dismissed.

REASONS

Introduction

1. By an ET1 presented on 5 February 2021 the claimant claims to have been unfairly dismissed by the respondent. The respondent contends that it dismissed the claimant by reason of redundancy.

Issues

2. The parties agreed the issues in the case, subject to one suggested amendment of mine which was accepted. They were as follows:-

LIABILITY

a. What was the reason for the Claimant's dismissal?

b. Has the Respondent demonstrated that that was a potentially fair reason for the Claimant's dismissal under either Section 98(1) or 98(2) ERA 1996?

c. If so, was the dismissal fair under the provisions of Section 98(4) ERA 1996. In particular, was the dismissal procedurally and substantively fair?

If the dismissal was for redundancy:

i. has the Respondent demonstrated that it carried out fair consultation?

ii. Was the selection of the pool of employees into which the Claimant was placed within the band of reasonable responses?

iii. Were the selection criteria reasonably and objectively chosen and fairly applied?

iv. Was the scoring of the Claimant under the selection criteria fair and appropriate?

v. Were reasonable steps taken to find the claimant alternative employment

vi. Did the decision to dismiss the Claimant fall within the band of reasonable responses?

REMEDY

d. If the tribunal finds that the Claimant was unfairly dismissed, what, is the appropriate amount of compensation that should be awarded for financial loss in all the circumstances, taking into account the Claimant's duty to act reasonably to mitigate her loss?

e. If a fair procedure was not followed, would the Claimant have been dismissed in any event had a fair procedure been followed, such that any award of compensation should be reduced (*Polkey v AE Dayton Services Limited [1987] ICR 142*)? If so, by how much should any award of compensation be reduced?

Procedure

3. I was provided with a 116 page bundle, witness statements from the claimant and on behalf of the respondent by Mr Laurence Foulds and Mr Paul Foulds, all of whom gave live evidence. I agreed with counsel at the outset that I would deal with liability (including Polkey issues) first, and then move on to remedy if I found in the claimant's favour. At the close of evidence both counsel made oral submissions and I delivered an oral decision. Mr Harris requested written reasons.

Facts

4. The respondent is a family run aerospace company founded by the father of Laurence and Paul Foulds (respectively the respondent's managing director and CEO). Prior to the redundancy exercise which this case is concerned with the respondent employed around 150 staff. It now employs around 100. The respondent does not have a human resources department, but outsources these services.

5. The claimant was employed on 8 October 2007 as a Detail Fitter in the Jet Cell area of the respondent business. In her witness statement, and in various documents in the bundle, the claimant sets out a number difficulties which she has experienced in the workplace. When she was working in the Jet cell area she says she experienced sex discrimination and was poorly treated in a number of respects, not least to do with an episode where she says her manager misused used her "inspection stamp".

6. I do not seek to minimise the claimant's experiences, however I consider that they are very much in the background and of marginal relevance to the issues I have to determine, and will not set them out in great detail.

7. In 2017 the claimant was transferred out of the Jet Cell area following making a grievance which was not resolved to her satisfaction. She believes that she whistle blew on her manager who was misusing her inspection stamp.

8. In 2018 the claimant was moved into the Calibration area of the business. She says that she was moved here to set her up to fail as this was an area of the business in disarray.

9. In early 2020 the coronavirus pandemic hit. In March 2020 flights were grounded, which had a devastating effect on the airline industry, who were major customers of the respondent's. During this time the respondent's senior management were discussing how the company would weather this storm. Senior management considered making use of the Coronavirus Job Retention Scheme, but also discussed the possibility of making redundancies.

10. On 6 May 2020 the claimant was placed on furlough. The claimant's evidence is that when she was put on furlough she suggested to a senior manager, Mr Standing, that this meant she was going to be made redundant. Mr Standing responded that "this was a long way off" [72]. She says that she went to speak to her line manager, Mr Johnson, who said this would be a shame as he would have to train up someone else. While on furlough, the claimant went into the workplace to attend a committee meeting, and a colleague, Mr Butcher, asked if she had come in to collect her things. The claimant believes that all this indicated that her subsequent dismissal was predetermined at an early stage.

11. Mr Laurence Foulds told me that all of these individuals denied making such comments. I find it unlikely that three individuals would be insensitive or indeed stupid enough to say out right to the claimant that she was effectively on her way out of the respondent organisation. Stepping out of the chronology, the issue also was covered in a meeting on 16 September 2020. At that meeting Mr Paul Foulds indicated that a preprepared script was read to employees being placed on furlough which said that if furlough was declined the alternative could be redundancy. This would correspond also with the claimant's furlough agreement at [63-4]. I find that it is most likely that Mr Standing made reference to redundancy being the alternative if furlough were declined, and in discussing furlough may have made a general comment that furlough was the way the company was progressing at present, and that redundancies in general terms (and not specifically the claimant's) may happen, but that was a long way off. I find that the claimant interpreted this general conversation in a negative light and applied it to her own circumstances to conclude that "the writing was on the wall" for her. This was obviously a difficult and worrying time for the claimant, and we often interpret things to confirm our fears. I do not for one moment think the claimant was putting forward a dishonest account, but a negative one shaped by her worries.

12. In the summer of 2020 the respondent's senior management took the decision that it needed to make redundancies. The claimant, under cross-examination, persistently suggested that this was a fundamentally wrong decision and that the respondent had no need to make redundancies whilst the government was making furlough payments. Whether the respondent took the right decision in this regard was not, however, an issue I had to resolve.

13. On 13 July 2020 Mr Laurence Foulds wrote a letter to all staff, headed Redundancy Plan, in which he outlined the difficulties the respondent was facing. He explained that its order book had fallen by about 25 to 30% overall with some

parts of the business being worse affected than others. For example, military sales were stable, helicopter sales had slowed, shorthaul commercial products had taken a "sharp hit" but were expected to recover quickly whilst long haul commercial products were not expected to resume for years, if ever. He set out a plan in numbered points:-

a. He said that during week commencing 13 July 2020 a "*general notice will be sent out to all employees informing them that a general redundancy consultation will be taking place and what the process will be*".

b. From 13 July until 24 July the management team will be dividing the workforce into groups of people with related skills. Some groups would be affected by redundancy and some would not depending on the order book variations.

c. There would be a call for volunteers during week commencing 27 July. If sufficient volunteers were not identified the company would move on to the next phase. Management team would compare members of affected groups and those who scored the least would be highlighted for consultation and written to to inform them that they were at risk of redundancy. There would be a consultation phase in week commencing three August where selected employees would be consulted and asked for suggestions as to how redundancy might be avoided. They would be given an opportunity to challenge their score. If there was no challenge or no alternative ideas they would be served notice of redundancy.

d. The process would be conducted by the senior management team headed by Mr Laurence Foulds, but an appeal to the chief executive Mr Paul Foulds was available at any point in the process.

14. Mr Harris rightly pointed out that no "general notice" appeared to be sent out. Mr Laurence Foulds suggested that the Redundancy Plan itself was that notice. I find that the Redundancy Plan is poorly worded in this regard, no such "general notice" was sent out, but the Redundancy Plan itself seems to serve the function of informing employees that are redundancy consultation would be taking place and what the process would be.

15. On 14 July Mr Laurence Foulds wrote to the claimant reiterating the commercial difficulties faced by the respondent and telling her that redundancy was necessary. He attached the Redundancy Plan referred to above, and pointed out that the workforce would be categorised into groups, some of which would be affected by redundancy and some not.

16. Mr Laurence Foulds's evidence was that the respondent's business broadly fell into definable categories, such as machining, assembly, administration, stores, engineering, accounting, and inspection. In terms of the inspection pool, all of those pooled within it were involved in the checking of components and parts and ensuring their quality. The senior management team (the Foulds brothers, the chief accountant, the sales director and the purchasing/operations director) were involved in setting out these pools. The claimant's case was that an inspection pool was artificially created and she had been put in it in order to ensure her dismissal. I find that this was not the case, a logical grouping of the respondent's work was set up and it is notable that the claimant has not identified a more suitable group for her to have been placed within.

17. On 22 July 2020 Mr Laurence Foulds wrote to the claimant to inform her that she was in a group where the staffing level did not need to be maintained, and that two positions are redundant. In his evidence under re-examination Mr Laurence Foulds gave evidence that one member of the claimant's group had made a

verbal expression of interest in voluntary redundancy more or less straight away after the Redundancy Plan was sent out, notwithstanding the fact that the plan stated the call for volunteers would be during week commencing 27 July. I accept this evidence as it conforms with the tribunal's experience that it is not uncommon for staff members to make early expressions of interest in voluntary redundancy. The claimant's case is that the respondent was actually looking to make two redundancies in her grouping, that it received an application for voluntary redundancy and thereafter increased the number of redundancies in this grouping to three in order specifically to make her redundant. I find it more likely that Mr Laurence had in mind that there was a volunteer and that two further people would need to be made redundant.

18. On 29 July 2020 Mr Laurence Foulds wrote to the claimant to inform her she was at risk of redundancy and asked for proposals to be discussed at a meeting on 4 August 2020. Attached to the letter was an estimated redundancy payment.

19. On 4 August 2020 and at risk of redundancy meeting took place in a local hotel. Present were the claimant, Mr Laurence Foulds, Mr Monk, a notetaker and a Mr Sandle who accompanied the claimant as an observer.

20. In the meeting the claimant said that Mr Standing had mentioned that redundancy was a long way off in her furlough meeting, which she interpreted to mean that she would not be coming back. Mr Laurence Foulds said that there was not a matrix for furlough as there was for redundancy. He said the claimant was in the "inspection group", and that her job could be absorbed within other tasks. The claimant said that she had been to see a solicitor and wanted to see the matrix of everybody in her pool. She pointed out that she had varied skills which she had deployed across various departments. She felt the whole process was a farce. Mr Laurence Foulds said that redundancies were an unfortunate necessity in that it was felt that calibration could be absorbed into other business activities. The claimant again emphasised her interchangeable skills. In the minutes of the meeting there is highlighted in bold **Sue to be provided with hers/others scores matrix**. Mr Sandle asked whether the company could suggest how the claimant could continue her work with the company, and Mr Laurence Foulds replied that she should provide her suggestions. The claimant said that she had no problem with Paul or Laurence Foulds but was not happy with other managers.

21. A skills matrix for "Inspection" group was prepared. This was the group the claimant was assigned to. Assessments were made across 33 different activities. These activities were operating a machine or work centre or deploying a skill. Scores were assigned in each of these domains going from zero, reflecting No Experience, through 1 – Limited Experience, 2 - Fully Trained to 3 - Able to Train.

22. Mr Harris points out that only five activities mention the word "inspection" which undermines the integrity of the grouping. Mr Laurence Foulds gave evidence that you do not need to use the word "inspection" for the activity to be inspection related. All of the 33 domains cover inspection and calibration and are all inspection functions that would be well known to anybody in the industry. He gave the example of "DEA programming" which was clearly inspection related yet did not have the word "inspection" in it. I accept Mr Laurence Foulds' evidence. Whilst Mr Harris formally challenged it in cross examination, no challenge was made contemporaneously by the claimant or during these proceedings (apart from the suggestion that the absence of the word "inspection") and no evidence put forward by the claimant to suggest that any of the 33 activities were not inspection related.

23. There were nine employees within this grouping. Employee 2, who scored 39 points, volunteered for redundancy. Employee 8 scored 29 points and was made redundant. The claimant scored 33 points. The next lowest score was employee 3

who scored 52 points.

24. Of the 33 activities, seven related to health and safety where the vast majority of the employees scored two points. The claimant only scored points in seven of the remaining 26 activities.

25. On 6 August 2020 Mr Laurence Foulds wrote to the claimant inviting her to a further meeting at a local hotel on 11 August 2020. Notes of the previous meeting were attached. The letter also said "We appreciate your proposals".

26. On 11 August 2020 p at risk of redundancy meeting reconvened with the same personnel as on 4 August 2020. The minutes start that Mr Laurence Foulds read from his script "*and advised Sue that the company had evaluated her proposals from the previous meeting on 4th August and found that these proposals were unworkable. The only alternative was compulsory redundancy*". It is right to say that the only "proposals" put forward by the claimant were that she had a broad set of skills that were transferable across the organisation. In his oral evidence Mr Laurence Foulds said that the proposals he was referring to were to go into other areas of the organisation. The claimant's evidence was that she was cut off "as soon as" she tried to read from her notes and that Mr Laurence Foulds told her that she was redundant and that was the end of it, and that he did not allow her to speak and just ended the meeting. The minutes, however, indicate that the claimant did in fact read from her prepared notes and mentioned the fact that she had been told on 4 August that she would receive both the minutes and the matrix used by the company to make its decision and that she had not been sent the matrix which has solicitor said should have been sent to her. She then went on to talk about having been forced out of Jet Cell, moved into different parts of the business without being given a job description, having her inspection stamp used fraudulently and being the victim of age and disability discrimination. She asked about appealing the decision and was told that this needed to be done fairly swiftly. Mr Laurence Foulds advised the claimant that she would be made redundant as of 17 August 2020.

27. Later on 11 August 2020 the claimant sent in a letter indicating her appeal. On 12 August 2020 she was given notice of redundancy which explained to her that her selection was discussed with her and there was no way of avoiding redundancy and that there was no alternative employment that could be offered to her. The claimant was required to work her contractual notice period of 12 weeks and her termination date was 6 November 2020; however she would be on furlough throughout this period and was not required to attend work. She was given the opportunity to appeal and thanked for her service.

28. On 18 August 2020 the claimant's solicitors wrote to Mr Paul Foulds setting out an appeal against dismissal. The letter is reasonably lengthy and detailed and highlights a lack of transparency leading to procedural unfairness. It was said that no information had been given about pooling, no matrix provided, no information given about numbers or redeployment, the claimant had not been able to put points across in meetings and had been ignored, that she was the victim of disability discrimination, that her role had not diminished, that she had a broad range of skills and was suitable for alternative roles, that her dismissal was predetermined based on remarks made, that the company could win business and did not need to make redundancies, and that she was a whistleblower.

29. The claimant was invited to an appeal meeting on 27 August 2020 heard by Mr Paul Foulds. Mr Paul Foulds started the meeting by saying that he wanted to hear what the claimant had to say and thought it would be best to work through the solicitor's letter. The claimant responded that going through the letter was not necessary as it set things out clearly. What the claimant focused on in that meeting were in fact several points raised in the solicitor's letter, and I find that

she focused on the issues that she felt were the most pressing. The claimant focused on the fact that remarks were made when she was furloughed that indicated a predetermined decision to dismiss her, that she was forced out of Jet Cell when her stamp was misused and not allowed back into this area of the business, historic mistreatment by former managers, victimisation, questioning the need to make redundancies when the furlough scheme was continuing and also saying that she was not in a group and wished to know which group she was in.

30. Mr Paul Foulds addressed the issue of the need for redundancies and spoke about the fact that volunteers had come forward as well as some retirements and that for employees with less than two years service had been dismissed. He indicated that he was impartial and said that he had been involved in the creation of different pools but not in the selection of those within the pools. He asked if the claimant had received the skills matrix. The claimant said that she had not and indicated that she would not trust any sent to her as the company could now make things up. He asked her for her suggestions and she said that she was multiskilled and willing to train and could became a flexi-worker. A follow-up meeting was arranged. The claimant was sent the matrix the following day, and she received it very shortly after.

31. A second appeal meeting was held on 16 September 2020. By this stage the claimant had had the matrix for just short of three weeks. Mr Paul Foulds asked the claimant if she had further points to raise. She spoke about the misuse of her stamp. Mr Paul Foulds enquired if she had the matrix and she replied that she should have had it from the beginning and mentioned that she had been taken out of another part department and told to concentrate on calibration and area in something of a mess. She questioned whether other people were qualified to do calibration. The claimant made no specific challenge relating to the contents of the matrix or her scoring.

32. Mr Paul Foulds indicated that the significant reduction in the company's workload had resulted initially on 16 redundancies, but that a client had withdrawn work since then and a further round of redundancies was needed which had the potential to make 30 further employees redundant. Mr Paul Foulds addressed issues relating to the decision-making on furlough. He indicated that when the claimant was furloughed the details were read from a prepared script which indicated that if furlough was declined then this could lead to jobs being put at risk and potential redundancies. The claimant said that when she mentioned this to the manager Mr Standing his reply that was that was a long way off. The claimant again spoke about being forced out of jet cell and said that she had not been allowed to speak at the previous meeting. Mr Paul Foulds concluded that correct procedures had been followed, the company had evaluated the claimant skills and whether there were other opportunities and reluctantly came to the view that the claimant's position was redundant and that there were no other suitable positions available.

33. The claimant was sent an appeal outcome letter on 28 September 2020. This mentioned the significant loss of custom arising from the pandemic and leading to 16 redundancies including volunteers. It pointed out that further loss of custom has led to a risk of 30 further jobs being at risk of redundancy. The claimant's job could be absorbed within other roles and was therefore redundant. He suggested that the company's approach had been balanced and the claimant has been able to raise concerns and offer suggestions as to other potential employment opportunities. Notwithstanding the claimant's interchangeable skills Mr Foulds had asked others whether any vacancies were available and there were none.

34. The claimant wrote to "Mr Foulds" (presumably Paul Foulds) on 30 September 2020 to ask for a copy of the HR1 form and to lodge a grievance. She said that the way she was grouped and marked was disability discrimination, she said she

was a whistleblower regarding complaints about her stamp and mentioned remarks leading her to believe that she was being lined up for dismissal. On 14 October 2020 Mr Paul Foulds responded, declining to investigate the grievance as this appeared to be a further appeal to her decision. He said that he again had reviewed the redundancy process but believe it to have been fair. He believed it was not right to open up the historic issue of the stamp.

The Law

General

35. Under section 98(1) Employment Rights Act 1996 ("ERA") it is for the employer to show the reason for dismissal and that such reason was potentially fair one under section 98(2). Redundancy is one such potentially fair reason.

36. Fairness is determined under section 98(4) ERA and depends on whether, in all the circumstances (including the size and administrative resources of the employer), the employer acted reasonably or unreasonably in treating the reason as sufficient reason to dismiss, and should be determined in accordance with equity and the substantial merits of the case.

37. General principles relating to fairness in redundancy process emerge from ***Polkey v A E Dayton Services Ltd*** **[1988] ICR 142** where it was held that an employer will not be acting reasonably unless it:

    a. Warns and consults affected employees or their representatives;

    b. Adopts a fair basis on which to make selections for redundancy; and;

    c. Takes reasonable steps to avoid redundances.

38. In ***Williams v Compair Maxam Ltd*** **[1982] ICR 156** guidance was given on the factors which the tribunal should consider when assessing fairness within a redundancy process: -

    a. The employer should seek to give as much warning as possible of impending redundancies to employees;

    b. It should consult them or their unions about the best means of achieving redundancies, including the applicable criteria in selecting for redundancies;

    c. That criteria for selection should, so far as possible, not depend solely on the subjective opinions of decision-makers;

    d. Selection is made fairly according to the criteria; and

    e. The employer will take reasonable steps to offer alternative employment instead of dismissing.

39. In looking at all these elements it is not for me to substitute my own view, but to assess whether the employer's actions fell within a range of reasonable responses open to a reasonable employer.

The pool

40. In terms of establishing a pool, the employer is to be given considerable latitude. Identifying the pool is primarily a matter of the employer and the pool does not have to be confined to employees doing the same or similar work. It is difficult to

challenge the establishment of the pool if the employer had genuinely applied its mind to the consideration (***Taymech v Ryan*** **UKEAT/663/94,** ***Capita Hartshead Ltd V Byard*** **[2012] IRLR 814**).

Criteria for selection

41. The ***Williams*** case observes that criteria should not depend solely upon the subjective judgement and individual. However, subjectivity does have a role. In ***Graham v ABF Ltd*** **[1986] IRLR 90** criteria based on "*quality of work, efficiency and carrying it out and the attitude of the person evaluated to their work"* were not considered too subjective to provide proper criteria for selection. As the editors of *Harvey on Industrial Relations and Employment Law* observe DI [1701.04] "*a challenge by a selected employee purely on the grounds that one or more criteria were too subjective may now be dubious; he or she may also have to show that the subjective element was applied unfairly. On the other hand, from employer point of view, it is still good advice to make the criteria as objective and measurable as possible in order to minimise challenges in the first place*".

Application of the criteria

42. Employment tribunals will not put the selection exercise under the microscope. It is sufficient that the employer set up a good system and administered fairly. It is generally not necessary for those carrying out the actual assessments to be called to the tribunal to justify them, and generally an employee must show good reason to doubt the reliability of the scores (***Eaton Ltd v King*** **[1995] IRLR 75**).

Consultation

43. The consultation involves discussion when proposals are formative, adequate information is given on which to respond, adequate time to respond and conscientious consideration of the response (***R v British Coal (ex p. Price)*** **[1194] IRLR 72**).

44. The obligation to consult individuals generally arises once they have been at least provisionally selected and will be for the purpose of explaining their personal situations or giving them the opportunity to comment on their assessments. It will be a question of fact and degree for the employment tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy (***Mugford v Midland Bank*** **[1997] IRLR 208**).

Conclusions

The reason for dismissal

45. Mr Harris conceded the reason for dismissal was redundancy, a potentially fair reason under section 98(2) ERA. He sensibly focused his attention on the question of fairness.

Consultation

46. There were significant shortcomings in consultation here. I remind myself that my function is not to substitute my own opinion for what the employer should have done but to assess whether the employer's actions fell within the range of reasonable responses open to a reasonable employer.

47. It was a serious shortcoming for the respondent not to supply the matrix to the claimant when they said they would prior to deciding to dismiss her. However, she was told at the consultation meeting of 4 August 2020 that she had been put in the inspection grouping. She did not challenge that at any stage. This was the occasion where she was told she would get the matrix. However, this was never supplied to her before her dismissal. I note in the Redundancy Plan, sent to the claimant on 14 July 2020 it was observed that employees would "be given the opportunity to challenge their score". Obviously the claimant was not able to do this prior to Mr Laurence Foulds deciding to dismiss her.

48. However, ***Mugford*** obliges me to look at "the overall picture" at the date of termination. The claimant was sent the matrix one day after Mr Paul Foulds' first appeal hearing. She had just under three weeks to look at this matrix. It is not a difficult document to understand, and is no doubt even easier to understand by someone working in the industry. At the second appeal hearing the claimant made no challenge whatsoever to any element of the matrix. Under cross examination she repeatedly said that she had only just received it, but this was not the case. Moreover, beyond Mr Harris' suggestion in cross-examining Mr Laurence Foulds that activities were not inspection-related because they did not use the word "inspection", there was no challenge before me to the scoring of the claimant. The unfairness inherent in not providing an employee with a scoring matrix is that it denies them the opportunity to challenge their scoring.

49. I have to ask myself whether the defect in consultation, the failure to provide the matrix in timely fashion, rendered this aspect of the process unfair. In a situation where the matrix was provided before dismissal took effect, albeit late, and where there has been no meaningful challenge to the scoring within it, either within employment or before the tribunal, I conclude that this does not place the respondent outside the range of reasonable responses.

Creation of the pool

50. The law is clear that this is largely a matter for the employer. I find that the respondent's senior management team genuinely applied their minds to the creation of pools, and these pools fell broadly into areas of the business. The creation of these pools was logical and rational, and the claimant has not been able to suggest any more suitable pool for her to have been placed into. I accept the evidence of both Laurence and Paul Foulds that there were clusters of areas of work within the respondent company and the inspection one was the suitable one for the claimant. I do not accept Mr Harris' contention that because the claimant scored no points in so many of the 33 activities means, self-evidently, that she was placed in the wrong group. Case law is clear that it does not matter if all workers within a pool do not do precisely the same job. The nature of the claimant's role within this area of work simply meant she was carrying out fewer functions than many of her colleagues.

Fair criteria

51. The principal challenge to the criteria here related to Mr Laurence Foulds' oral evidence about the criteria. He described the criteria as being broad assessments of the skills for the whole department. He went on to say "*it's true many of these assessments were highly subjective, for example can you use a machine? A supervisor may feel there is a range of skills*".

52. Looking at the skills matrix it appears that workers were marked from 0 to 3 based on no experience to an ability to train others. The scores were applied across 33 activities, or domains relating to working on a machine or at a work centre or deploying a skill. It seems the scope for subjectivity in the assessment relates to the assessor's view of what score the worker achieves in each activity.

As I have pointed out, where the claimant scored low is that she scored zero points in numerous activities. Indeed, her case, as put by Mr Harris, was that she was put in the wrong pool as she had not done any of this work. As the claimant herself said in cross-examination relating to the matrix "What am I supposed to do? I haven't done any of these jobs".

53. The assessment by the assessor is whether the worker has no or little experience, is fully trained or able to train in relation to use of a machine or workstation or deployment of the skill. It seems the claimant accepts that she had no experience in numerous activities. It is therefore hard to see how any application of subjectivity disadvantaged her. Additionally, the assessor was not assessing something such as an attitude towards work, but whether the worker uses a machine or deploys skill in the course of his or her work. Notwithstanding Mr Laurence Foulds' concession that the assessor made a subjective judgement, it is hard to see that it was problematically so.

54. I note also Mr Laurence Foulds' evidence in his witness statement at paragraph 9 that the selection matrices were made following consultation with staff volunteers.

55. Finally, it is of significance that the claimant at her second appeal hearing made no comment or attack on the criteria themselves. Furthermore, she did not challenge the criteria during tribunal proceedings.

56. In the circumstances I find that the choice of criteria for selection did not fall outside the band of reasonable responses open to a reasonable employer.

Applying the criteria

57. The authorities make clear that the tribunal will not put scoring under the microscope, and it would be rare to require an assessor to attend the tribunal to justify his or her scoring.

58. The claimant's case was that the pool was inappropriate as she had not done many of the tasks assessed. As set out earlier, no challenge was made as to the criteria themselves and none was advanced on how they were applied. In the circumstances the claimant has not given me any basis to doubt the reliability of the scoring. I therefore find that the way the respondent applied the criteria fell within the range of reasonable responses open to a reasonable employer.

Alternative employment

59. The respondent's case, which I accept, was that the pandemic hit hard. It's orderbook dropped by some 25 to 30% and the outlook in some of its activities looked particularly bleak. It needed to shed headcount and reduce the wage bill. It carried out two waves of redundancy dismissals, the first of which led to the dismissal of the claimant. It shed a significant number of its workforce.

60. Mr Paul Foulds in his letter of 28 September 2020 sets out that he discussed with others whether any other vacancies existed and whether any other suitable positions were available, and there were none. This evidence was not meaningfully challenged, and the claimant could not point to a particular post particular area of work for her to go to. She put forward her flexibility as a worker, her ability to undertake further training and her having worked in more than one area of the business. None of these positive factors about her skills, experience or adaptability have been doubted; but I accept the respondent's evidence that there was simply nowhere for her to go.

61. Mr Harris suggested that it was unfair that the respondent had not even considered bumping. It seemed quite clear that neither of the Foulds brothers was

aware of this term. However, Mr Laurence Foulds pointed out that it had made for dismissals of staff with under two years service. It also appeared that Mr Harris's suggestion of bumping, that is to say dismissing a worker with less service than the claimant, would elevate length of service to a trump card that cut across the criteria for selection that it had adopted. In all the circumstances, I find that the decision not to bump other employees (when it appears that senior management did not even know of this concept) did not fall outside the range of reasonable responses open to a reasonable employer.

Conclusion on fairness

62. I have found that in all the areas which ***Williams*** and ***Polkey*** require me to focus on the respondent has not strayed outside the range of reasonable responses open to a reasonable employer. It follows that the claimant was not unfairly dismissed.

Employment Judge Heath
Date: 17 September 2021

Judgment & reasons sent to parties: 12 October 2021

FOR THE TRIBUNAL OFFICE