RESERVED JUDGMENT

EMPLOYMENT TRIBUNALS

Claimant:	Mr A Aubin
Respondents:	Delstar International Limited
Heard at:	Leeds Employment Tribunal
Before:	Employment Judge Deeley, Mrs Mather, Mr Ali
On:	27 and 28 September (with parties) and 30 September 2021 (in chambers)
Representation	
Claimant:	In person
Respondent:	Mr Willoughby (Counsel)

JUDGMENT

1. The claimant's claim of direct race discrimination under s13 Equality Act 2010 fails and is dismissed.

INTRODUCTION

Tribunal proceedings

1. This claim was case managed by Employment Judge Wedderspoon at a Preliminary Hearing on 16 January 2021.
2. We considered the following evidence during the hearing:
   2.1 a joint file of documents and the additional documents referred to below;
   2.2 witness statements and oral evidence from:

2.2.1 the claimant; and

2.2.2 the respondents' witnesses:

Name	Role at the relevant time
1) Mr Paul Ainsley	European Operations Director
2) Mr Marcus Keane	European Commercial Director
3) Mrs Catherine Davis	HR Manager

3. The respondent provided additional disclosure documents during the hearing at the Tribunal's request, consisting of its manning records for the 2018-2020 shifts, an excel version of the redundancy scoring matrix and a clearer pdf copy of the claimant's Hardern training record. The claimant did not object and we included the additional documents in the hearing file.
4. We also considered the oral submissions from the claimant and from the respondent's representative.

Adjustments

5. We asked the parties if they wished us to consider any adjustments to these proceedings. No specific adjustments were requested, other than additional breaks if required.

CLAIMS AND ISSUES

6. The claimant brought a claim of direct race discrimination relating to his dismissal only. He previously brought a claim for unfair dismissal, but this was dismissed due to lack of sufficient service. The respondent maintained that the claimant was dismissed due to redundancy.

ISSUES

7. Employment Judge Wedderspoon set out the issues for the Tribunal to decide at the Preliminary Hearing. The list of issues (with minor amendments) that we considered during this hearing is set out below.

Direct race discrimination (Equality Act 2010 section 13)

a. The claimant describes himself as a black British man of African descent.

b. There is no dispute that the respondent dismissed the claimant.

c. Was the claimant's dismissal favourable treatment?

i. The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

ii. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

The claimant relies upon MM, AN, JW and IC as comparators. The claimant states that these four colleagues were less skilled than him, but were retained following the redundancy process. The claimant describes MM, AN, JW and IC as 'white' for the purposes of his race discrimination claim.

d. If so, was it because of race?

Remedy for discrimination

a. Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

b. What financial losses has the discrimination caused the claimant?

c. Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

d. If not, for what period of loss should the claimant be compensated?

e. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

f. Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

g. Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

h. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

i. Did the respondent or the claimant unreasonably fail to comply ?

j. If so is it just and equitable to increase or decrease any award payable to the claimant?

k. By what proportion, up to 25%?

l. Should interest be awarded? How much?

FINDINGS OF FACT

Context

8. This case is heavily dependent on evidence based on people's recollection of events that happened some time ago. In assessing the evidence relating to this claim, we have borne in mind the guidance given in the case of *Gestmin SGPS -v- Credit Suisse (UK) Ltd* [2013] EWHC 3560. In that case, the court noted that a century of psychological research has demonstrated that human memories are fallible. Memories are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. Most of us are not aware of the extent to which our own and other people's memories are unreliable, and believe our memories to be more faithful than they are. External information can intrude into a witness' memory as can their own thoughts and beliefs. This means that people can sometimes recall things as memories which did not actually happen at all.

9. The process of going through Tribunal proceedings itself can create biases in memories. Witnesses may have a stake in a particular version of events, especially parties or those with ties of loyalty to the parties. It was said in the *Gestmin* case:

> *"Above all it is important to avoid the fallacy of supposing that because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."*

10. We wish to make it clear that simply because we do not accept one or other witness' version of events in relation to a particular issue does not mean that we consider that witness to be dishonest or that they lack integrity.

Background

11. The respondent is part of a multi-national group of companies. The respondent manufacturers plastin resin based substrates for customers across a range of industries and markets, including filtration, automotive, healthcare, industrial, food, electronics and textiles. At its Gilberdyke site, the respondent manufactures products including medical foam, surface protection films and netting materials. The

Gilberdyke site also operates a conversion area at which the respondent undertakes the secondary processing of other products and materials. All of the respondent's products are produced to order for business customers. The respondent does not supply consumers directly with any products.

12. The claimant was employed as one of a group of thirty-six Manufacturing Technicians, working at the Gilberdyke site from 17 September 2018 until he was dismissed with notice as part of a redundancy process with effect from 17 August 2020.

13. The claimant was a member of the Unite union, which the respondent recognised for collective bargaining purposes for all Manufacturing Technicians (including those who were not Unite members). GU and MM were the shop stewards at the site. GU and MM were also both Manufacturing Technicians.

14. The claimant was well regarded and throughout his employment he demonstrated his hard work and commitment. GU stated during the claimant's first individual consultation meeting on 13 July 2020 that:

    14.1 *"no one had a bad word to say about [the claimant]*"; and

    14.2 that the claimant's work was *"10/10".*

Respondent's staff

15. The key staff at the Gilberdyke site included:

Name	Role at the relevant time
1) Mr James Fox	Plant Manager (made redundant on 5 June 2020)
2) Mr Paul Ainsley	European Operations Director (who later took absorbed Mr Fox's duties, following Mr Fox's redundancy)
3) Mrs Catherine Davis	HR Manager
4) CW, KL and one other	Shift Team Leaders

16. The respondent also employed two Deputy Shift Team Leaders at the site.

17. The respondent's staff operated on a 24/7 shift pattern, which involved morning and afternoon shifts. The respondent's Shift Team Leaders were responsible for allocating the Manufacturing Technicians to work or be trained on each manufacturing line or piece of equipment, depending on each individual's skills and customer demand for products.

Respondent's manufacturing processes

18. The respondent operated several manufacturing lines and pieces of equipment at its Gilberdyke site. These included:

    18.1 Lines 1 and 4 (both of which were known as "Net Lines");

    18.2 Cutinova;

    18.3 the Conversion area; and

    18.4 Line 9.

19. The respondent also trained some of its staff to operate other equipment such as cranes and forklift trucks.

20. The respondent employed its Manufacturing Technicians subject to contracts which required them to work anywhere within its Gilberdyke site. For example, the claimant's contract of employment did not specify which part of the factory's equipment or machines he would operate. Clause 4 of his contract stated:

    "4. Duties

    4.1 The Employee shall serve the Company as Manufacturing Technician or such other role as the Company considers appropriate. Duties that you are employed to carry out are set out in the Job Description, which is non contractual. In addition to those duties you may from time to time be required to carry out any other duties within the purpose, spirit and scope of the post or within your capability in order to meet the needs of the business. All employees are engaged on the understanding that on reasonable notice they may be transferred to another part of the business or be offered suitable alternative employment elsewhere in the Company."

21. Clause 6 of the claimant's contract included wording stating that:

    "…You will be initially trained within our Surface Protection Film Line which is not expected to go onto the 24/7 roster until some time in 2019. A minimum of 1 month's notice will be given for this change…"

22. The claimant did receive some initial training on Line 9 during 2018. However, he did not work on Line 9 after December 2018, after a colleague suffered from a serious accident at work. The claimant completed around 14 shifts during four separate weeks in 2018 on Line 9.

23. The claimant was trained to and spent the majority of his time working in the Conversion area, which involved operating three main machines:

    23.1 Duffy;

    23.2 Lever; and

23.3 Harnden.

24. The claimant had recent experience of operating all three machines, having operated each of them within the last 12 months of his employment. He had also provided refresher training on each machine to colleagues, although he was not one of the respondent's certified trainers.

Redundancy proposals

25. The respondent's business suffered a significant drop in demand for its products due to the impact of the Covid-19 pandemic and subsequent lockdown during 2020. The downturn in the respondent's business affected both its UK and international sites. The respondent's group leadership (based in the US) told Mr Ainsley that he would need to consider ways of reducing costs, including staffing requirements.

26. Mr Ainsley decided to make the role of Plant Manager redundant on 5 June. Mr Ainsley took over the duties of the Plant Manager as part of his own role, because he had previously carried out the role of Plant Manager.

27. The respondent then proposed to make eleven out of its thirty-six Manufacturing Technician roles redundant in an announcement to their workforce on 4 June 2020. We accept Mr Ainsley's evidence that he proposed to reduce the number of Manufacturing Technicians because of a significant drop in the respondent's orders for surface protection work and Cutinova foam manufacturing processes, carried out by the Manufacturing Technicians.

28. Mr Ainsley also decided not to recruit for the role of Process Engineer after the previous role holder resigned from his employment. The pool for redundancy selection consisted initially of all of the respondent's thirty-six Manufacturing Technicians. During consultation, the respondent agreed that the work of the respondent's sole Warehouse Assistant could also be absorbed into the Manufacturing Technician roles.

Consultation with union representatives

29. The respondent consulted on the business case for the proposed redundancies and the selection criteria with the Unite union representatives over the course of several meetings held on 9, 12, 18, 23 and 30 June and on 2 July 2020. Mr Ainsley and Mrs Davis attended the meetings on behalf of the respondent. GU and MM attended the meetings on behalf of Unite and the staff.

30. MM stated at the first meeting on 9 June 2020 that he did not dispute the respondent's business case for making redundancies:

"Ordinarily I would have fought you all the way [Mr Ainsley] *but I know it has all changed these days. We know that 11 people need to go, GU and I have been discussing this over these past couple of days. We need to make sure this is about*

the people who are staying as well, to keep the right skills going forward, it is not just about the people who are leaving."

31. The discussions also included:

    31.1 whether volunteers would be sought for redundancy – the respondent confirmed that they would not;

    31.2 potential ways of reducing the number of proposed redundancies; and

    31.3 the selection criteria to be used during the redundancy process.

32. The union representatives suggested in the meeting on 12 June 2020 that the selection criteria could include skills that the employees had been 'signed off' as part of their training records, competency/performance, disciplinary records, absence, experience and flexibility.

33. The respondent also issued notes of the meetings to staff on 12, 16, 18, 23 and 30 June and 2 July 2020, following a request from employees for updates on the consultation process. The information provided in the notes summarised the discussions between the respondent and the union representatives. They noted that:

    33.1 discussions regarding selection criteria continued throughout this period; and

    33.2 appraisals would not be used as part of the selection criteria because the respondent had not completed its normal annual appraisals in Autumn 2019.

Leadership skills

34. The minutes of the meeting on 30 June 2020 recorded that the selection criteria would consist of (with our underlining):

"Main body of meeting:

Selection

Selection criteria continued. Confirmed to be on (a) signed off & evidenced skills in the training files and (b) additional points for signed off skills that have been used regularly, evidenced by the manning sheets over the past 12 months. <u>Also additional items such as leadership.</u>

Voluntary redundancy was considered as a selection criteria but rejected on the grounds of:

Costs more - people that volunteer to go usually are the ones that are attracted by the money so they cost more

Takes longer - the people going usually have more service so have more notice

Often involves the business losing the more experienced people.

Higher costs, process taking longer & losing more experienced people is not what the business wants going forward.

Numbers

PA ran through a table showing the 'current' and 'proposed' overall factory manning situation.
Proposed 11 to go, bearing in mind that really only 9 of them are currently operational MTs in the business because 1 x to go is the W/house assistant and the other 1 x to go is currently absent LTS and has not attended work for c 12 months.

PA confirmed that the picture he is showing will take us through the remainder of this year which is what he has visibility on. Depending on the situation may need to recruit in the longer term of course but in so far as he can see on a reasonable business basis he only needs 27 MTs.

PA confirmed that he has a meeting tomorrow with 4 so if that meeting shows we are keeping L9 to run at times, would need to retain a further 3 so 11 would likely become 8."

35. The note sent to employees on 30 June 2020 following that meeting stated (with our underlining):

"Main body of meeting:

Selection criteria was finalised as (a) signed off & evidenced skills in the training files against: net line 1, net line 4, cutinova, duffy, lever, harnden and Line 8. PFA & Line 9 are acknowledged as skills however have not been a part of this process other than we will be pleased to have these as additional skills in our remaining workforce once the selection criteria has been applied.

<u>Other supplementary skills that have evidenced sign off have also been identified such as FLT</u>. Certified training skill on nets, conversion and cutinova have also been included. The company acknowledges that not all signed off and evidenced line skills are 'live' ie used regularly and therefore (b) additional weighting has been given for signed off lines/areas that individuals have used regularly, evidenced by the manning sheets over the past 12 months.

Other criteria such as voluntary redundancy was considered as a selection criteria but rejected.
…

Q&A (extracts)

Q: Are the training records up to date?

The training records show where individuals have 'signed off' skills in an area and they show the progression of training with signatures from trainee and trainer. An individual is not fully trained without a sign off sheet completed and on their file.

Q: What skIIs/machines are on the list that we might be measured against?

Net line 1, net line 4, cutinova, duffy, lever, harnden and Line 8. PFA & Line 9 are acknowledged as skills however have not been a part of this process other than we will be pleased to have these as additional skills in our remaining workforce once the selection criteria has been applied. Other supplementary skills that have evidenced sign off have also been identified such as FLT. Certified training skill on nets, conversion and cutinova have also been included.

…

Q: LIFO, has this been discussed as a measured way of choosing redundancies and what was the outcome?

Yes, it has been discussed, however LIFO ('last in first out') has been rejected as primary criteria. The company decided to select on skill.

Q: Is the company accepting voluntary redundancies?

This has been discussed, however the company has decided to use skill as a criteria rather than to ask for volunteers."

36. The claimant stated during his evidence that he believed that the comment regarding leadership skills as part of the selection criteria had been added to the minutes after they had been produced. However, the claimant was not present at the meeting on 30 June 2020 and he did not provide any evidence in support of this allegation.

37. The note issued to staff on 30 June 2020 did not mention leadership skills or tie-breaker points. We note that the respondent's Counsel sought to argue that leadership skills formed part of a non-exhaustive list of 'other supplementary skills'. However, Mrs Davis said that it was a mistake that the note on 30 June 2020 contained no reference to the additional points available for 'leadership' skills. Mrs Davis said that the reason why the minutes did not record much discussion about leadership skills is that whether or not an individual held a leadership role was 'a fact'. She stated that the respondent decided that points would be awarded under leadership skills if an individual held the role of Shift Team Leader, Deputy Shift Team Leader or shop steward.

38. We have concluded that leadership skills did form part of the selection criteria as at 30 June 2020. However, we have concluded that the respondent had not decided how many points to allocate to leadership skills at that meeting on 30 June 2020. The key reasons for our conclusions are that:

38.1 the respondent expressly referred to points being allocated for other supplementary skills, including FLT, certified training on Nets, Conversion and Cutinova; and

38.2 there is no documentary evidence regarding the number of points that the respondent had decided to allocate to leadership skills, other than the scoring matrix. The only other document produced by the respondent which expressly stated the number of leadership points allocated was an email sent by Mrs Davis to the Manufacturing Technicians on 28 July 2020 (i.e. at least three weeks after the scoring had taken place).

39. The respondent subsequently decided that the points available for leadership skills were:

39.1 three points – Shift Team Leaders; and

39.2 two points – Deputy Shift Team Leaders and union representatives.

We consider the timing of the decision regarding the allocation of points for leadership skills in our findings below under the hearing "Scoring".

*Last in, first out ("**LIFO**")*

40. Mr Ainsley mentioned during the meeting on 20 June 2020 that the respondent may need to apply a tie-breaker if two or more employees had the same score. However, the minutes of that meeting do not record any discussions regarding the type of tie-breaker would be used.

41. There was no reference in any of the meeting minutes or the notes to employees regarding the use of LIFO as a tie-breaker if two or more staff were awarded the same scores. We note that the selection criteria referred to in the note circulated to employees on 30 June 2020 instead stated that: *"LIFO…has been rejected as primary criteria. The company decided to select on skill"*.

42. Mrs Davis' evidence was that the union representatives wanted the respondent to use LIFO as a criteria against which points would be awarded. She stated that she pushed back on this, due to the fact that using LIFO may give rise to age discrimination concerns because older employees may be more likely to have a longer period of service than younger employees. Mrs Davis stated that she did agree that LIFO could be used as a tie-breaker, once the Manufacturing Technicians had been scored against the respondent's other criteria.

43. Neither Mrs Davis nor Mr Ainsley could recall when the respondent decided to use LIFO as a tie-breaker if two or more employees had the same score. We have concluded that the respondent decided to use LIFO as a tie-breaker after the scores had been awarded to the individual Manufacturing Technicians. The key reasons for our conclusions are that:

43.1 there is no reference in any of the minutes of the meetings or the notes to employees to LIFO being used as a tie-breaker;

43.2 the note to employees dated 30 June 2020 expressly state that LIFO would not be used as a primary criteria. They do not state that the respondent was considering using LIFO as a tie-breaker, despite the fact that Mr Ainsley raised the possible need for a tie-breaker in the meeting on 20 June 2020; and

43.3 neither Mr Ainsley nor Mrs Davis could recall when they decided to use LIFO as a tie-breaker.

44. Mr Ainsley had a call with his management in the US regarding Line 9 on 1 July 2020. This call brought the good news that the respondent forecasted that there would be growth in demand for Line 9 products from 2021 onwards. Mr Ainsley reported that this meant that the respondent was now proposing to retain four additional Manufacturing Technician roles. The minutes of the meeting on 2 July 2020 record that:

"Selection & Numbers

[Mr Ainsley] *fed back on his call yesterday about L9. For the remainder of 2020 there will be little work on L9 but from next year onwards growth is predicted so PA has added 3 people back in which amounts to one shift worth of surface protection.*

Having reviewed this as a number, [Mr Ainsley] *stated he has also added one further employee back in as*

don't want to dig too deep.

Total 6 + 1 (ie 6 x MTs plus 1 x warehouse assistant)"

45. The respondent's final proposed redundancies at the end of its consultation with the union representatives therefore consisted of:

45.1 the standalone Warehouse Assistant role; and

45.2 six Manufacturing Technician roles.

Scoring

46. The final meeting between the respondent and the union representatives took place on 2 July 2020. The respondent did not consult directly with any individual staff members before carrying out the scoring exercise. Mrs Davis and her assistant went through each Manufacturing Technician's training records in their training files and awarded them points for each of the manufacturing skills set out in the scoring matrix.

47. In summary, the manufacturing and related skills scoring involved:

47.1 assessing whether or not each individual had the skills to work on a particular manufacturing Line or piece of equipment, based on their training records;

47.2 awarding an additional two points for each 'live' skill that an individual possessed. An individual must have worked on that Line or piece of equipment in the last 12 months in order to receive the 'live' points; and

47.3 awarding points to any Manufacturing Technicians who had supplementary FLT and Crane operative skills.

48. The respondent disclosed a copy of its scoring matrix as part of the hearing file. We note that the decision whether or not to award any points for a skill was a 'yes or no' decision, i.e. they received either the maximum available points or zero points for each skill. Mrs Davis and her assistant checked each individual's signed off training records. If Mrs Davis took the view that the training records showed that the individual had the skills to work on a particular Line or piece of equipment, then the individual was awarded the full points available for that Line. If Mrs Davis took the view that the training records showed that the individual did not have the skills to work on a particular Line or piece of equipment, then that individual was awarded none of the points available for that Line.

49. Mrs Davis' evidence was that she (along with her assistant) did not review any individual's files or award any scores until all of the respondent had finalised all categories against which the individuals would be scored, including leadership points and the use of LIFO as a tie-breaker.

50. The claimant disputed Mrs Davis' evidence, stating that he believed that:

50.1 Mrs Davis and her assistant scored all of the Manufacturing Technicians again the skills criteria;

50.2 the respondent noticed that he had scored sixteen points (i.e. two points higher than MM);

50.3 the respondent then introduced the leadership skills criteria to bring MM's scores to the same level as the claimant's; and

50.4 finally, the respondent introduced the LIFO tie-breaker in order to 'save' MM from being at risk of redundancy.

51. The Tribunal panel reached different findings of fact regarding the time at which the decision was made regarding the number of points allocated to the leadership roles of Shift Team Leader, Deputy Shift Team Leader and union representative. The panel's conclusions were as follows:

51.1 The majority of the Tribunal panel (consisting of the Tribunal Members) concluded that the decision to award two points for union representatives (and Deputy Shift Team Leaders) was not reached until after the Manufacturing Technicians had been scored for their skills. They rejected the respondent's witnesses' evidence that the number of points was agreed with the union representatives before Mrs Davis started to fill in the scoring matrix.

The Members noted that the respondent was unable to adduce any documentary evidence of the number of points allocated to the leadership roles that was dated before completion of the scoring matrix. They also noted that Mrs Davis' statement explained the allocation of points for the skills categories in the selection matrix, but did not explain the decisions around the allocation of leadership points. The Members concluded that the allocation of leadership points, together with the decision to use LIFO as a tie-breaker (see below), was made in order to 'save' MM from redundancy. The reason why the Members concluded that the respondent wished to save MM from redundancy were two-fold: (a) the costs of making MM redundant would have been higher than making the claimant redundant (due to MM's length of service, which was around 10 years); and (b) because the respondent valued its relationship with its union representatives, whom it regarded as important to the running of the Gilberdyke site.

51.2 The minority of the Tribunal panel (consisting of the Judge) concluded that the decision regarding the number of points available for leadership skills was reached after the meeting on 30 June 2020 but before the start of the scoring process in early July 2020. The Judge accepted Mrs Davis' evidence that whether or not an individual held a leadership role was an objective fact, which did not require much discussion during the consultation meetings with union representatives. She noted that the minutes of the meetings were a summary of the discussions with the union representatives, rather than a verbatim record and that the scoring criteria were contained in a spreadsheet. GU (one of the union representatives) was present at the claimant's consultation meeting on 13 July 2020 (see findings below) and did not challenge Mrs Davis' statement to the claimant at that meeting that the scoring criteria were agreed with the union.

The Judge also accepted Mrs Davis' evidence that the respondent was aware that MM wished to leave the respondent's employment, but that the respondent had already decided against inviting volunteers for redundancy (as recorded in the minutes of the meeting on 12 and 30 June 2020). The respondent stated in the minutes of those meetings, that the reason for rejecting voluntary redundancy was due to: "*Higher costs, process taking longer & losing more experienced people is not what the business wants going forward".*

The Judge concluded that there was no particular reason for the respondent to seek to 'save' MM in those circumstances. The costs of making the claimant redundant were lower than those of making MM redundant. However, those costs related to statutory redundancy pay and notice pay only. There was no dispute that the respondent viewed MM's length of service as relatively short, given that some of the other Manufacturing Technicians

had around 30 years' continuous employment. In addition, the Judge noted that MM had limited skills (reflected in the points that he scored) and accepted Mrs Davis' evidence that he could have easily been replaced on the work that he performed in the Conversion area. The Judge also noted that if the respondent wished to 'save' MM from redundancy after each of the technicians had been scored, they could have done so by allocating three points for leadership skills to union representatives, rather than allocating two points for such leadership skills and then relying on LIFO as a tie-breaker (see below).

52. The Tribunal unanimously concluded that the respondent introduced the use of LIFO as a tie-breaker after Mrs Davis and her assistant had scored all of the Manufacturing Technicians against the other criteria and realised that the claimant and MM had the same score of sixteen points. The key reasons why we have reached our conclusion include:

    52.1 Mrs Davis told Mr Ainsley and the union representatives at the start of the consultation process in June that they should not use LIFO as a scoring criteria because it could give rise to age discrimination complaints;

    52.2 Mr Ainsley identified the potential need for a tie-breaker on 20 June 2020, as recorded in the minutes of that meeting. However, none of the minutes of the consultation meetings with the union representatives refer to the use of LIFO as a tie-breaker;

    52.3 the respondent stated expressly in the note to employees on 30 June 2020 that LIFO would not be used as a primary criteria, but did not state that they were considering its use as a tie-breaker; and

    52.4 neither Mr Ainsley nor Mrs Davis could recall when the decision was taken to use LIFO as a tie-breaker.

53. The respondent selected the Warehouse Assistant and six of the Manufacturing Technicians to be at risk of redundancy, including the claimant. The scores of the six Manufacturing Technicians selected to be at risk of redundancy ranged from 2 points (IC) to 16 points (the claimant). The remaining Manufacturing Technicians who were not selected to be at risk of redundancy scored between 17 points and 35 points.

Claimant's first individual consultation – 13 July 2020

54. The respondent sent a letter to the claimant stating that he was 'at risk of redundancy' on 7 July 2020. The respondent did not provide the claimant with details of the scoring criteria and did not provide a breakdown of his scores at that stage.

55. Mr Ainsley and Mrs Davis met with the claimant on 13 July 2020 to discuss his selection for redundancy. The claimant was accompanied by GU (a union representative) to the consultation meeting. The key points that they discussed at the meeting on 13 July 2020 included discussions regarding:

55.1 the skills that the claimant had been scored against;

55.2 the weighting given to different skills – in particular the fact the net (Lines 1 and 4) had a maximum of six available points each, compared to a maximum of four or two points for other skills;

55.3 the claimant's challenges regarding the rationale for awarding points to different skills. Mrs Davis said that the scoring criteria were agreed with union (which GU did not dispute) and that:

"…we are not here to have to explain our rationale for the selection criteria. Discussed that with the Union during consultation. What we are here to do is to help [the claimant] *understand what we have taken into account for him and we have checked this* – [the claimant] *has confirmed this is correct."*;

55.4 Mrs Davis confirmed that there were no vacancies in the respondent's UK business.

56. The claimant wrote to Mr Ainsley and Mrs Davis by letter dated 13 July 2020. He also sent an email with identical wording to them on 14 July 2020. He stated:

"…Based on the criteria you said informed your selection process, and from the answers I received during our meeting yesterday, there are still issues I have with my being selected so I would like to bring your attention to them:

1. I know for certain some individuals (MTs) who I'm more skilled and utilized than, but are shockingly not included in your selection.

2. I also know certain individuals who have been off work since I started working for SWM (22 months ago) but are still on SWM payroll, yet they are also not included in your selection.

3. I asked for my score card (which I'm entitled to) among other things to further understand why I have been selected, but you refused and said SWM doesn't need to explain all of its rational to me..."

"…*4. Granted, we are where we are now, but regarding how many machines an MT is trained on, what is SWM's policy for multi-skill training? As I stated in the meeting yesterday, my not being trained on certain machines was not for lack of trying, I went through all the correct procedure and showed my eagerness to upgrade myself, but I've realized I wasn't given the opportunity to train on other machines but Other Individuals who joined SWM after me were given the chance to train on new machines and now I'm being held responsible for something that was not within my power."*

57. The claimant did not state the names of any individuals whom he believed should have received a lower score than him in his letter. He also did not state the names of other individuals whom he believed had been given the opportunity to train on other machines.

58. The claimant then stated:

"[GU] *commended me in yesterday's meeting saying no one has had a bad word to say about me and my work is 10/10. Hearing that but seeing what is happening, I currently feel very discriminated against. With all the happenings in the world in recent years, my attention has been drawn to Institutional Racism and I find myself thinking I'm being targeted because I'm Black. I've thought long and hard about it and it's not an easy feeling for me to put out, but sadly it's the only logical reason I can think of as to why I have been selected and some others are safe (especially going by 'the skill set and skill utilisation criteria' SWM claims to have used)."*

59. Mrs Davis then sent a letter inviting the claimant to attend a second consultation with herself and Mr Ainsley. Mrs Davis included the selection criteria and his scores against those criteria to the claimant with her letter. The letter stated:

"We will give you the opportunity to explain further the concerns you expressed in your email about institutional racism".

Claimant's discussions with MM – 19 and 20 July 2020

60. The claimant and MM discussed the redundancy selection process during a shift handover on 19 July 2020. We accept the claimant's evidence regarding this discussion. The claimant stated that:

    60.1 MM said that he had received a lot of queries from other colleagues as to how he was 'saved' from being at risk of redundancy but that the claimant was not;

    60.2 MM said that he had other qualifications which most people were not aware of, which caused MM and the claimant to score the same points; and

    60.3 the claimant was selected to be at risk of redundancy because MM had a longer period of service than the claimant.

61. The claimant exchanged text messages with MM before his meeting on 19 and 20 July 2020. The claimant asked MM how MM knew that they had scored the same points. MM said:

"I didnt what I said is if I was the same points as you then it would have been a tie break like length of service I don't know my points do you they will not show the points to anybody" [sic]

62. MM then sent a message stating: *"You never answered earlier are you going in to the meeting if so do u want me there or are you taking someone else its up to you buddy…Are you trying to trick me into something andy"* [sic]

63. The claimant responded: *"I'm not trying to trick you* [MM], *I asked the question based on what I heard you say…"*. The claimant later confirmed that he did not want MM to attend his second consultation meeting on 20 July 2020 as his representative.

Claimant's second individual consultation – 20 July 2020

64. The claimant's second consultation meeting took place on 20 July 2020 with Mr Ainsley and Mrs Davis. The key points that were discussed included:

    64.1 the claimant stated that he did not want MM to attend the meeting as his representative, but that he was willing to continue with the meeting without a representative. MM therefore left the meeting;

    64.2 the respondent and the claimant discussed the points awarded to the claimant in detail;

    64.3 the claimant disputed the weighting of the skills;

    64.4 the claimant stated that he thought he should be awarded points for other skills (eg his forklift truck licence);

    64.5 the claimant stated: *"I believe you have geared the selection criteria around keeping or getting rid of certain people...[I know] for sure that other people have scored less than [me] but they have not received a letter. [I want] the company to re-check the whole sheet again as [I believe] that the scoring is incorrect"*;

    64.6 the claimant refused to provide any names of the individuals whom he believed had been scored inaccurately;

    64.7 the meeting was adjourned. During the adjournment, Mrs Davis asked MM to check the claimant's scores with her. The claimant was not aware that Mrs Davis had involved MM in checking his scores;

    64.8 the claimant was given chance to check his training records when the meeting reconvened; and

    64.9 at the end of the meeting, the respondent confirmed that the claimant would be made redundant with 4 weeks' notice.

65. The claimant did not dispute the number of points awarded to him under the respondent's scoring criteria for each skill. He continued to dispute the weighting of the different skills, particularly the fact that six points were available for each of the two Net Lines (which was higher than the available points for other Lines or pieces of equipment).

Mrs Davis' email of 28 July 2020

66. Mrs Davis sent an email to all employees with an update note on the consultation process and a copy of the selection criteria. The email also detailed the points allocation for each skill. She stated in her cover email that:

    "Much of it is self explanatory but to assist understanding of a few areas:

• Points were received only if there is signed off evidence in our files

• On the leadership aspect a Shift Team Leader received 3 points, a Deputy 2 points and a Shop Steward 2 points.

• +2 'live' points means that for each of the main areas in the factory ie LI, L4, L8, Cutinova, Harden, Lever & Duffy 2 additional points were given if you have regularly worked at control level in that area in the past 12 months, evidenced by the manning (ie not just 'assisted' but signed off and operated the machine independently)

• 'Last in First out' was used in the event of a tie breaker

We acknowledge that the points are not the same for each area, this was determined associated with business need, forecast sales and revenue."

67. Mrs Davis also stated in the note to employees that:

"Since our last collective consultation meeting with your employee representatives (Shop Stewards) and as indicated in our last newsletter, the selection criteria that the company decided upon has now been applied.

As you know, the criteria is based on signed off skills against certain areas and lines of the business at Gilberdyke. The company has anticipated our business needs going forward and possible points have been allocated to each area/line accordingly.

Additional points have also been allocated for those areas and lines which have been used extremely regularly over the past 12 months (evidenced by the manning for that 12 month period)

In addition to this we have also identified certain/specific signed off/ certificated supplementary skills including FLT and leadership although these are not checked off on the manning and for the purposes of this exercise do not get extra points for being used regularly.

The possible scoring is identified as follows on the attached sheet but it should be noted that we know people have skills or certificates (such as first aid) that we have decided not to include for the purposes of this exercise.

Consultation has continued on an individual basis with the seven individuals who have been provisionally selected for redundancy following application of the selection criteria."

Claimant's appeal

68. The claimant appealed against the decision to make him redundant. Mr Keane heard the claimant's appeal on 4 August 2020. The points that they discussed included:

68.1 the claimant's view that he had been 'targeted' and that the respondent failed to apply the selection criteria to him. The claimant stated in relation to Mrs Davis' email to employees on 28 July 2020:

> *"This criteria is totally different from what they gave us with the Union. I think they gave us one thing then shifted scores around to save people.*
>
> *Also the SLT, SS and DTL, that wasn't part of it. That was put there specifically to save certain people and to disadvantage other people. If not, why was it held back. That was the red flag for me, the fact that they saved certain people."*;

68.2 the claimant's view that he should have scored more points than MM:

> *"Catherine and Paul told me that I scored the same as 6 other people and the same as another person. I know that person is Mick. If the original criteria was followed it should not be me it should be Mick. The criteria was changed after the consultation had ended.*
>
> *They are trying to save Mick Millar."*

69. In relation to discrimination, the claimant stated:

> *"Also the scoring as well, I mentioned Mick's name, when I was trying to work out how he got more than me, I assume he got shop steward points and maybe team leader points as well. He was team leader when I arrived for maybe one month but he resigned because he was busy with the union work and the duffy work as well but he said he was not trained in the team leader work. He shouldn't have been given the team leader points, especially if that was used to make his points above mine.*
>
> *I believe the discrimination came in here and I am really distraught by it…".*

70. Mr Keane discussed the points raised with Mr Ainsley and Mrs Davis, both of whom provided their written feedback by email. Mr Keane rejected the claimant's appeal against his dismissal and confirmed the outcome by letter dated 20 August 2020.

71. The claimant disagreed with the outcome of the appeal. However, we have not made detailed findings of fact regarding the claimant's appeal because the claimant did not complain that the appeal process itself was an act of race discrimination.

Claimant's comparators

72. The claimant compares himself to the following four colleagues who were retained following the redundancy process. The claimant described all of those four colleagues' race as 'white'.

73. The claimant's witness statement set out in detail why he believed the decision to dismiss him due to redundancy was unfair. The claimant concluded in his witness statement: *"I strongly felt their actions were not an oversight but a deliberate attempt to get rid of me because my "face" didn't fit."* The claimant also stated during his witness evidence: *"There were people who should have been at risk at least – there had been some form of discrimination for certain people to have been saved".* The claimant later clarified that he was referring to the comparators that he has named as part of this claim. We have made findings of fact relating to all four of the claimant's named comparators as set out below.

Name	**Total score**	**respondent's stated reason for retention**	**claimant's comments**
claimant	16 points consisting of: - **Manufacturing skills** – 9 points (four points each for Duffy and Harnden, one point for Lever); - **Live skills** – six points (for each of Duffy, Lever and Harnden) - **Supplementary skills** - one point	N/A	N/A
MM	16 points consisting of: - **Manufacturing skills** – same points as the claimant - **Live skills** – four points (Duffy and Lever only) - **Supplementary sills** – one point - **Leadership points** – two points for the role of shop steward	retained due to LIFO being used as a tie breaker	claimant alleges that: a) MM's Harnden record was not signed off and he had no expertise on Harnden b) respondent introduced leadership criteria and LIFO tie-breaker to 'save' MM
AN	11 points consisting of: - **Manufacturing skills** – six points (two points for	retained due to Cutinova expertise	claimant disputes timing and

	Cutinova and four points for Duffy) - **Live skills** – two points (Cutinova only) - **Supplementary sills** – one point		circumstances around AN's retention
JW	8 points consisting of: - **Manufacturing skills** – five points (four points for Duffy and one point for Counter Balance) - **Live skills** – two points (Duffy only) - **Supplementary sills** – one point	retained due to Line 9 expertise	claimant alleges that he could have worked on Line 9
IC	2 points consisting of: - **Manufacturing skills** – one point (for Counter Balance) - **Live skills** – zero points - **Supplementary sills** – one point	retained due to Line 9 expertise	claimant alleges that he could have worked on Line 9

74. Our findings relating to each of the claimant's colleagues are set out below.

Findings re JW and IC

75. JW and IC scored lower than the claimant on the respondent's scoring matrix. The respondent place them at risk of redundancy at the same time as the claimant and subsequently gave them notice that their employment would terminate due to redundancy.

76. However, CW (a Shift Team Leader) emailed Mr Ainsley and Mrs Davis on 2 August 2020 stating:

> *"Due to the added orders we have recently added to the current line 9 plan I have updated the manning sheets to show what the proposed shift plan would look like from weeks 33 to 38.*

> *As predicted it leaves gaps in net line production and also thin experience on both shifts due to holiday cover and* [CWN's] *move to engineering.*
>
> *With this in mind I was wondering if as a business we could extend the notice period of* [IC] *and* [JW] *for a further two months."*

77. Mr Ainsley discussed the matter by email. KL (another Shift Team Leader) emailed Mr Ainsley on 3 August 2020 and stated:

> *"Hi Paul, if orders are flat from quarter 4 onwards could we not keep* [JW] *and* IC] *on, working under a new temporary contract?*
>
> *We are also losing* CWN] *to engineering at the end of this month, so on red shift there will be myself, with a couple of weeks training and* [D] and [A]*.*
>
> *Wouldn't it be beneficial to keep these two guys on even if it's for the short term?*

78. Mr Ainsley discussed the matter with his US managers and they agreed that he could retain two employees on a short term basis. The respondent offered to extend JW and IC's notice periods for an initial two months. Their contracts were subsequently extended again on a number of occasions because of the respondent's business levels on Line 9.

79. We have considered the evidence provided by both parties in relation to the respondent's decision to retain JW and IC to work on Line 9 over the claimant and other Manufacturing Technicians who were made redundant. We have concluded that the respondent retained JW and IC for the following key reasons:

    79.1 we reviewed the manning records in detail during this hearing. JW and IC had far greater experience on Line 9 than the claimant. We noted that during 2018, the claimant had worked around 14 shifts over four weeks on Line 9. By way of contrast, JW and IC had over six months' experience of working on Line 9 from the part of the manning records that we were referred to during the hearing. We accept Mr Ainsley's evidence that it would take around 6 months to train to work on Line 9 independently;

    79.2 JW and IC's experience on Line 9 was also more up to date than that of the claimant. The claimant stated that he had last worked on Line 9 in December 2018. JW and IC worked on Line 9 during 2019 and 2020;

    79.3 we accept the respondent's evidence that Line 9 was a relatively new line for the respondent and that JW and IC were in charge of developing standard operating procedures for that line. Although no employees had 'signed off'

training records for Line 9, this was because the training requirements had not yet been finalised.

80. In summary, we accept the respondent's evidence that it was appropriate to retain JW and IC to work on Line 9 due to the increase in the respondent's business for Line 9. The claimant would not have been able to undertake that work without a significant period of training.

Findings re AN

81. AN also scored fewer points than the claimant. He was placed at risk of redundancy at the same time as the claimant and the respondent started redundancy consultation with him. The respondent said that AN was later retained after discussions in early August 2020, due to AN's Cutinova expertise. The claimant accepted that he had never been trained or work in Cutinova.

82. The respondent stated that Cutinova did not require a length training period (and was hence allocated only 2 points for a skill in their scoring matrix). However, the respondent gave evidence (which was not challenged by the claimant) that Cutinova was difficult to operate safely. The reason for this was that Cutinova involved mixing chemicals and the potential danger to health and safety was high if things went wrong.

83. The respondent said that they thought originally that AE (another manufacturing technician) would be able to continue to operate Cutinova. AE scored 17 points in the respondent's selection matrix. AE had experienced medical difficulties since April 2020 and had been taken off Cutinova work whilst investigations were ongoing. In early August 2020, the respondent received further medical evidence stating that AE would not be able to work on Cutinova for the next 12 months.

84. The respondent was told that AM (another manufacturing technician who also operated Cutinova) did not wish to act as the lead on Cutinova in AE's absence. The respondent therefore decided to retain AN because he had the most experience in Cutinova and was the certified trainer for Cutinova.

85. The claimant accepted that he had never been trained or work in Cutinova. The claimant said that he had previously wanted to learn new skills. However, we accept that it would not have been practicable for AN to have trained the claimant to a level where the claimant could have taken the lead on Cutinova in a reasonable period of time.

Findings re MM

86. The claimant raised two key issues regarding the respondent's decision to retain MM:

86.1 the claimant believed that MM's Harnden record was not fully signed off;

86.2 the claimant stated that the employees had not been told about either:

86.2.1 the allocation of Leadership points; or

86.2.2 the use of LIFO as a tie-breaker.

Harnden record

87. We compared the claimant's and MM's Harnden records, both of which we accept were present on their training files. We note that:

87.1 MM's Harnden training record was a different (and earlier) version to that completed on behalf of the claimant;

87.2 the claimant's record was not signed off for a two week period leading the running operation. The claimant was signed off for AU25 product (which made up 80% of the Harnden work). The claimant was not signed off for any other products; and

87.3 MM's record was not signed off for the 2 weeks leading for a two week period leading the running operation and he was not signed off for any specific products.

88. Mrs Davis treated both the claimant's and MM's records as signed off training records, which meant that both were awarded the maximum 4 points for Harnden. We accept Mrs Davis' evidence that the administration of training records was not as thorough as it could have been, but that she treated the presence of any document in an employee's training file as signed off for the purposes of the scoring process even if not all of the parts were completed or signed. For example, Mrs Davis said that another Manufacturing Technician was due to be signed off for Cutinova that week, but that she did not award him any points for Cutinova because his training record was not on his file.

Allocation of Leadership points and use of LIFO as a tie-breaker

89. Please refer to our findings of fact set out above regarding the allocation of Leadership points and the use of LIFO as a tie-breaker.

RELEVANT LAW

90. The Tribunal has considered the legislation and caselaw referred to below, together with any additional legal principles referred to in the parties' submissions.

Direct race discrimination

91. Section 13 of the Equality Act 2010 provides that:

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

92. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination

can occur in the employment context, which includes the employer dismissing the employee or subjecting the employee to any other detriment.

Comparators

93. To be treated less favourably implies some element of comparison. The claimant must have been treated differently to a comparator or comparators, be they actual or hypothetical, who do not share the relevant protected characteristic. The cases of the complainant and comparator must be such that there must be no material difference between the circumstances relating to each case (section 23 Equality Act 2010 and see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285).

94. It is for the claimant to show that any real or hypothetical comparator would have been treated more favourably. In so doing the claimant may invite the tribunal to draw inferences from all relevant circumstances and primary facts. However, it is still a matter for the claimant to ensure that the tribunal is given the primary evidence from which the necessary inferences may be drawn. The Tribunal must, however, recognise that it is very unusual to find direct evidence of discrimination. Normally, a case will depend on what inferences it is proper to draw from all the surrounding circumstances.

95. When considering the primary facts from which inferences may be drawn, the Tribunal must consider the totality of the facts and not adopt a fragmented approach which has the effect of 'diminishing any eloquence the cumulative effects of the primary facts' might have on the issue of the prohibited ground (*Anya v University of Oxford* [2001] IRLR 377).

Burden of proof

96. The burden of proof is set out at s136 EQA for all provisions of the EQA, as follows:

> **136 Burden of proof**
> …
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened 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 provision.
> …
> (6) A reference to the court includes a reference to -
> (a) an employment tribunal;
> …

97. The Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 approved guidance given by the Court of Appeal in *Igen Limited v Wong* [2005] ICR 931, as refined in *Madarassy v Nomura International plc* [2007] ICR 867. In order for the

burden of proof to shift in a case of direct race discrimination it is not enough for a claimant to show that there is a difference in race and a difference in treatment. In general terms "something more" than that would be required before the respondent is required to provide a non-discriminatory explanation.

98. Mummery LJ stated in *Madarassy*: *"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination"*

99. In addition, unreasonable or unfair behaviour or treatment would not, by itself, be enough to shift the burden of proof (see *Bahl v The Law Society* [2004] IRLR 799). The House of Lords held in *Zafar v Glasgow City Council* [1998] IRLR 36) that mere unreasonable treatment by the employer "casts no light whatsoever" to the question of whether he has treated the employee "unfavourably".

100. The guidance from caselaw authorities is that the Tribunal should take a two stage approach to any issues relating to the burden of proof. The two stages are:

100.1 the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This can be described as the prima facie case. However, it is not enough for the claimant to show merely that he has been treated less favourably than those identified or than he hypothetically could have been (but for his race); there must be "something more".

100.2 if the claimant satisfies the first stage, out a prima facie case, the burden of proof then shifts to the respondent. Section 123(2) of the Equality Act 2010 provides that the Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. The standard of proof is again the balance of probabilities. However, to discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever because of the protected characteristic.

101. However, we note that the Supreme Court in also stated that it is important not to make too much of the role of the burden of proof provisions. Those provisions will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they are not required where the Tribunal is able to make positive findings on the evidence one way or the other.

APPLICATION OF THE LAW TO THE FACTS

102. We will now apply the law to our findings of fact. The claimant's only claim is that his dismissal amounted to direct race discrimination under s13 of the Equality Act 2010. There is no dispute that the respondent dismissed the claimant.

103. The next question that we have to consider is whether the claimant was treated less favourably than someone who was not a black British man of African descent. The claimant compares himself to four white colleagues, whom he states were less skilled than him and who were retained following the redundancy process.

104. On the face of it, the claimant was treated less favourably than his comparators because their employment continued and he was dismissed due to redundancy. However, we need to consider:

104.1 whether MM, AN, JW and IC were appropriate comparators for the claimant – i.e. were they in the same material circumstances as the claimant; and

104.2 if so, whether the reason for the claimant's treatment was due to his race.

Were the claimant's comparators in the same material circumstances as the claimant?

105. The first question for us to consider is whether the claimant's comparators were in the same material circumstances as the claimant.

106. The claimant compares himself to MM, AN, JW and IC. We have considered whether each of these individuals was in the same material circumstances as the claimant.

JW and IC – Line 9

107. Both JW and IC had significant recent experience of operating Line 9. JW's and IC's contract was renewed for 2 months (initially) due to an unexpected increase in customer demand. By way of contrast, the claimant had only spent around 4 weeks in total being trained or working on Line 9 prior to December 2019.

108. The claimant would not have been able to work on Line 9 without further training. He was therefore not in the same material circumstances as JW and IC.

AN - Cutinova

109. AN had significant experience of operating Cutinova and was the certified trainer for Cutinova. The claimant accepted that he had no training or experience in Cutinova.

110. The claimant would not have been able to operate Cutinova without being fully trained. We concluded that it was not practicable for the claimant to be trained to operate Cutinova within a reasonable timeframe. We therefore concluded that the claimant was not in the same material circumstances as AN.

MM – Harnden, leadership points and LIFO tie-breaker:

111. We concluded that both the claimant and MM were awarded the correct points for their Harnden training records (i.e. 4 points each for the skill itself). We note that:

111.1 the claimant accepted that the other points awarded in relation to 'skills' and 'live skills' to both him and to MM were the correct number of points based on their training records. This provided the claimant with a total of sixteen points and MM with a total of 14 points;

111.2 however, the claimant believed that the respondent had then introduced two additional criteria to 'save' MM from redundancy once the respondent realised that MM had scored less points than the claimant. The claimant contended that the additional criteria consisted of:

111.2.1 additional leadership points (three points for Shift Team Leaders and two points for Deputy Shift Team Leaders or union representatives); and

111.2.2 LIFO as a tie-breaker.

112. On the basis of the findings of fact of the majority of the Tribunal panel, MM was an appropriate comparator for the purposes of the claimant's race discrimination claim.

Was such treatment because of the claimant's race?

113. The Tribunal panel concluded unanimously that on the basis of the majority's findings of fact, the claimant's selection for redundancy was not due to his race. The remaining treatment for which the claimant compares himself to MM is the introduction of two leadership points for the role of union representative and the use of LIFO as a tie-breaker.

114. The key reasons for our unanimous conclusions are:

114.1 the majority of the Tribunal (consisting of the Members) rejected the respondent's witnesses' evidence and found that the respondent decided to allocate two leadership points to the union representative role after it had scored all Manufacturing Technicians in order to 'save' MM from redundancy. (The minority of the Tribunal (consisting of the Judge) concluded that the number of leadership points available was agreed with the union representatives before the scoring process commenced). The Tribunal panel was unanimous in its findings that the LIFO tie-breaker was not introduced until the scoring process was completed;

114.2 the claimant's witness statement set out in detail why he believed the decision to dismiss him due to redundancy was unfair. The claimant concluded in his witness statement: *"I strongly felt their actions were not an oversight but a deliberate attempt to get rid of me because my "face" didn't fit."* However, the claimant was unable to provide any supporting evidence as to why he believed the respondent's decisions regarding leadership points and the LIFO tie-breaker were taken because of was his race. He stated during his witness evidence: *"there had been some form of discrimination for certain people to have been saved"*;

114.3 the respondent was not aware that the claimant believed that the scoring process was affected by the claimant's race until after the scoring had been completed. The claimant first raised complaints of race discrimination in his email and letter on 13 and 14 July 2020. He stated:

"[GU] *commended me in yesterday's meeting saying no one has had a bad word to say about me and my work is 10/10. Hearing that but seeing what is happening, I currently feel very discriminated against. With all the happenings in the world in recent years, my attention has been drawn to Institutional Racism and I find myself thinking I'm being targeted because I'm Black. I've thought long and hard about it and it's not an easy feeling for me to put out, but sadly it's the only logical reason I can think of as to why I have been selected and some others are safe (especially going by 'the skill set and skill utilisation criteria' SWM claims to have used)."*

114.4 the claimant refused to provide the names of any individuals whom he believed had been scored inaccurately to the respondent until his appeal hearing, which took place after he had been made redundant. This hampered the respondent's efforts to investigate matters during the redundancy consultation meetings;

114.5 we note that the burden of proof under the Equality Act is on the claimant to provide evidence of direct race discrimination. This means that the claimant must show that any comparator would have been treated more favourably than he had been treated. The fact that MM was a union representative (and therefore qualified for two leadership points) and had been employed for longer than the claimant was not in dispute. What is in dispute here is the respondent's motivation and timing regarding its decisions around the number of leadership points allocated and the use of LIFO as a tie-breaker;

114.6 we are bound by the caselaw that we have set out in our judgment under the heading 'Relevant Law'. This caselaw states that in order for the burden of proof to shift in a case of direct race discrimination, it is not enough for a claimant to show that it is not enough for a claimant to show that there is a difference in race and a difference in treatment. In general terms "something more" than that would be required before the respondent is required to provide a non-discriminatory explanation. Mummery LJ stated in *Madarassy*:

"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination";

114.7 In addition, unreasonable or unfair behaviour or treatment would not, by itself, be enough to shift the burden of proof (see *Bahl v The Law Society* [2004] IRLR 799). The House of Lords held in *Zafar v Glasgow City Council* [1998] IRLR 36) that mere unreasonable treatment by the employer "casts no light whatsoever" to the question of whether he has treated the employee "unfavourably";

114.8 the majority of the Tribunal found that the respondent had acted in the manner that they did because the respondent wished to 'save' MM. However, the majority of the Tribunal concluded that the reasons why the respondent wished to 'save' MM were two-fold: (a) it would have been more expensive to make MM redundant, rather than the claimant; and (b) the respondent valued the relationship it had with its union representatives (including MM). The minority of the Tribunal disagreed with these findings, concluding that LIFO was only introduced as a tie-breaker after the respondent realised that the claimant and MM had scored the same number of points (including in MM's case, two leadership points). However, the unanimous view of the Tribunal was that the respondent did not allocate two leadership points to MM and use LIFO as a tie-breaker due to the claimant's race and therefore his dismissal was not an act of direct race discrimination.

CONCLUSIONS

115. We have concluded that the claimant's dismissal did not amount to an act of direct race discrimination. The claimant's claim therefore fails and is dismissed.

116. We would also like to add that the respondent's decisions (and the timing of the decisions) to allocate leadership points and to use LIFO as a tie-breaker were not communicated to the claimant or any other Manufacturing Technicians directly before scoring took place. As a matter of good practice, the respondent should have consulted directly with the Manufacturing Technicians regarding the scoring criteria to be applied to them prior to undertaking the scoring exercise. This was not a collective redundancy consultation process due to the number of potential dismissals. The respondent provided some information to the Manufacturing Technicians in its employee notes but this information was not complete. We understand that this lack of direct consultation made it more difficult for the claimant to evaluate his redundancy scores against those of other Manufacturing Technicians and to participate fully in his individual redundancy consultation meetings. However,

we also note that the claimant could have sought clarity from the union representatives regarding the selection criteria applied. The claimant could also have informed the respondent that he believed that MM should have scored lower than him at the meeting on 20 July 2020.

117. If the claimant had sufficient service to bring a complaint of unfair dismissal, then we would have considered questions of substantive and procedural fairness as part of any such complaint. However, the claimant did not have sufficient qualifying service to bring a complaint of unfair dismissal.

Employment Judge Deeley
26 October 2021

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