EMPLOYMENT TRIBUNALS

Claimant: **Mr M Paul**

Respondent: **URM (UK) Limited**

Heard at: **Leeds (By Cloud Video Platform)** **On:11 and 12 October 2021**

Before: **Employment Judge Bright**

Representation
Claimant: In person
Respondent: Miss K Swan (solicitor)

JUDGMENT having been sent to the parties on 15 October 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Technical matters

1. The hearing was listed to be heard by Cloud Video Platform. After experiencing technical problems, the claimant participated via video from the Tribunal's Leeds premises. Mr Gibson, appearing as a witness for the claimant, also experienced some technical difficulties, although these were eventually resolved and he was able to join the hearing using his mobile phone. While not ideal, I considered that Mr Gibson was able to participate fully in cross examination and his evidence was clear. However, because he was using his mobile phone he did not have access to the bundle of documents, although he had seen them previously. We were also slightly hampered by the respondent's witnesses' lack of access to witness statements other than their own. However this was mitigated by any relevant passages being read out to them.

2. Although the situation was not ideal, I did not consider that the limitations within which we were operating had any impact on the quality of the evidence, the fairness of the hearing, nor the outcome of the claim. Neither side was prejudiced to any real degree by the technical issues. To have delayed the hearing to seek to mitigate the technical issues would not have been proportionate in the circumstances nor in accordance with the Overriding Objective. A fair hearing remained possible.

Issues

3. The claim was for unfair dismissal and the issues for me to decide were agreed by the parties to be:

   3.1. Was there was an actual dismissal under section 95(1)(a) of the Employment Rights Act 1996 ("ERA")?

   3.2. If there was a dismissal, was that dismissal within the band of reasonable responses open to a reasonable employer? (section 98(4) ERA 1996)

   3.3. If not, what was the likelihood that the claimant would have been dismissed in any event?

   3.4. Did the claimant contribute to his dismissal by rejecting reinstatement and, if so, to what extent?

Evidence

4. The respondent called the following witnesses, who gave evidence from written witness statements:
   4.1. Mr John Green, Site Manager;
   4.2. Mr Kevin Needham, Head of Operations;
   4.3. Mr Scott Ridley, Head of Health, Safety, Environmental and Quality.

5. The claimant gave evidence on his own behalf and also called Mr Richard Gibson, Step Up Site Manager and Supervisor. Both gave evidence from written witness statements and the claimant also had an additional written statement.

6. The parties presented an agreed bundle of 166 pages, of which I read only the pages to which I was directed. Numbers in brackets in the findings of fact below are references to the page numbers in the bundle. A further 12 sets of documents arrived by email from the claimant on the first day of the hearing. The claimant confirmed that only the set of documents in email 6/12 were relevant to the issues and those documents were added to the evidence by consent. The respondent produced an email and excel spreadsheet (Doncaster Skills Matrix) on the first day of the hearing, relating to the holiday pay question, and these were added to the evidence by consent.

7. Both parties made submissions which I have considered carefully but do not see the need to repeat here. Where they were particularly pertinent, I have referenced them in the course of my findings and conclusions below.

Findings of fact

8. I made the following findings of fact. Where there was a conflict of evidence I resolved it, on the balance of probabilities, to arrive at the findings of fact set out here.

9. The claimant commenced employment with the respondent on 20 August 2013. By 2016 he had become a supervisor.

10. This case primarily concerns a redundancy exercise by the respondent, which was announced on 15 July 2020 (39 – 40). The claimant does not dispute that there was a redundancy situation nor that there was a requirement to reduce the number of supervisors. The process included pooling the clamant with other supervisors, as the respondent was seeking to reduce the number of supervisors from 5 to 2 (23, 39). The supervisors were Mr Carl Tierney, Mr Darren Cook, Mr Richard Gibson, Mr J Rushby and the claimant. The claimant does not dispute that the correct roles were included in the pool for selection. He does not dispute that there was consultation, nor does he dispute the selection criteria which were used. He alleges that the dismissal was unfair because of the biased way in which the selection criteria were applied to him.

11. The first consultation meeting with the claimant took place on 20 July 2020 (41 – 44). The claimant's line manager, Mr Green, and Mr Needham then each conducted their own score assessment before meeting to create a combined score.

Was Mr Green biased because of the history of disagreements and concerns?

12. The claimant said Mr Green was biased against him in the redundancy process. He provided a number of examples of emails showing disagreements with and concerns about Mr Green. While I accepted the claimant's evidence that he genuinely believed that Mr Green favoured Mr Cook in the redundancy selection process, there was insufficient evidence for me to find on the balance of probabilities that any past disagreements or concerns resulted in Mr Green being biased against the claimant.

Did Mr Green give Mr Cook assurances/tell him the outcome before the scoring was completed?

13. The respondent held a second consultation meeting with the claimant on 23 July 2020 (61 – 65). Mr Green and Mr Needham met to combine their scores on 27 July 2020 (72, 67 – 71 and 74). The claimant says Mr Green had already decided the outcome because he told Mr Cook, that he (Mr Cook) would be keeping his job and shared the scores with him before the scores were finalised at the joint meeting on 27 July 2020.

14. As evidence, the claimant presented an email from a Mr Phil Jones (166) which reported a change in Mr Cook's demeanour after a few hours in Mr Green's office in the second week of consultation. The email concludes, "When he returned to the plant he was visibly happier and he stated that he was sure that the supervisors would be Carl Tierney and himself. The massive change in his attitude could only be inferred as him having received solid assurances about his position". Miss Swan submitted that little weight should be attached to this evidence because it was hearsay and Mr Jones was not present in the Tribunal for it to be challenged in cross examination. However, I noted that this was not a witness statement prepared for the purposes of this litigation, but rather prepared for Mr Ridley's appeal process and sent as an email dated 16 August 2020 from Mr Jones to Mr Gibson. It must in my view therefore carry more weight than Miss Swan submitted, owing to it being a relatively contemporaneous document prepared for another purpose. As it was, Mr Ridley made no findings about whether Mr Green had confirmed to Mr Cook that he would keep his job. In cross examination, Mr Ridley explained that he considered there was 'no evidence either way'. Mr Jones' statement was

evidence, of course, and it is not clear to me what further investigation Mr Ridley did into that allegation nor why he did not reach any conclusion.

15. The claimant also relied on an email at document 6/12 of his additional documents which he says shows that Mr Green and Mr Needham began the scoring exercise before they say they did and that they had therefore pre-judged the redundancy selection. However, the respondent produced the original email during the first day of the hearing and I was satisfied that the only parts of the matrices which were filled in ahead of time were the objective scores in the categories of attendance and disciplinary records. They were not the more subjective categories which the supervisors were required to complete (74).

16. Mr Gibson gave oral evidence that he had been told by two other employees that Mr Cook had been told his scores by Mr Green. It seemed to me that such a key piece of evidence against Mr Green would have been included in Mr Gibson's witness statement which, otherwise, contained a catalogue of examples of Mr Greens' alleged favouritism to Mr Cook. It's absence led me to doubt its veracity and I gave that evidence little weight.

17. The evidence that Mr Green told Mr Cook his scores ahead of the scoring exercise is only hearsay (Mr Jones' document). Mr Green himself gave first hand evidence, on oath, that he did not share the scores ahead of time. There is little in the documents to clearly assist me either way. On the balance of probabilities therefore I find that Mr Green did not share the scores with Mr Cook before the scoring exercise was carried out with Mr Needham.

<u>Was the scoring biased?</u>

18. The fact that Mr Ridley overturned the scores for the four supervisors, such that Mr Cook moved to the bottom of the matrix, is strong evidence, in my view, that Mr Green and Mr Needham's scoring of the supervisors was unsafe. Mr Ridley gave evidence that he had been trained in redundancy scoring and was experienced in that area and his method of scoring relied on more objective observation than the subjective views Mr Green recounted relying on in his evidence. He explained that Mr Green had based his scores on what he saw of the supervisors 'everyday' and who he thought would be 'best', rather than the objective evidence, such as the 2019 appraisal documents. I find that Mr Green's and Mr Needham's scoring was subjective.

19. Following Mr Green and Mr Needham's scoring the Claimant scored 81 points and was placed third, meaning he was put at risk of redundancy (74).

20. The claimant's third consultation meeting took place on 28 July 2020 (75 – 77 and he was issued a notice of termination giving an effective date of termination of 7th September 2020 (78-79).

21. The claimant emailed the respondent to query his holiday pay on 29 and 30 July 2020 (89 – 91)

Appeal

22. On 3rd August 2020, the claimant appealed his dismissal (102-103). An invitation was issued on 6 August 2020 to an appeal hearing (108 – 109) which took place on 13 August 2020. The appeal was conducted by Mr Ridley (110 – 112). Mr Gibson had also lodged an appeal.

23. Following the appeal Mr Ridley wrote to the claimant on 25 August 2020 to update him on progress (115) but was unable to provide an outcome. The claimant's redundancy therefore took effect on 7 September 2020.

24. Mr Ridley sent the claimant a further update on the appeal on 9 September 2020 (120) and on 15 and 16 September 2020 held a redundancy appeal outcome meeting (121 – 124).

25. In the course of the appeal, Mr Ridley conducted his own score assessment, resulting in a change to the claimant's score from 81 to 83. The claimant remained in third place (116) but the ranking of the other supervisors changed, meaning Mr Gibson's score of 79 increased to 83 (117). Although Mr Gibson and the claimant's scores of 83 tied, Mr Gibson also held the role of Stand-In Site Manager which placed him higher and in second place compared to the claimant. The claimant therefore remained selected for redundancy. However Mr Gibson's employment terminated so, on 16 September 2020, the claimant was notified that he was no longer redundant (121-123).

26. In cross examination the claimant accepted that the decision following the appeal to offer him his role back had the effect of overturning his dismissal. He also accepted that he could have returned to work and raised a grievance about Mr Green's treatment of him. He accepted that, although at the time he had concerns about the respondent's ability to consider a grievance fairly, the fact that Mr Ridley had conducted an impartial appeal demonstrated that the respondent could put someone impartial in place to hear his grievance. He agreed that Mr Ridley had assured him that there was different senior management in place going forward and things would change (122). He also accepted that, if the initial redundancy process had put him in second place then he would have gone back to work.

Rejection of role

27. The claimant requested a few hours to consider the outcome. Later that day, the claimant emailed Mr Scott and rejected the role (124). I accepted that, in the circumstances, it would have been difficult for him to go back into the working environment, having placed bottom in the pool for selection and being required to work with people with whom there had been disputes. However, given the claimant's acceptance that he could have raised a grievance and could have had the impartial Mr Ridley as the grievance officer, and given Mr Ridley's account of the changes in senior management and his reassurances to the claimant about his role going forward, I find the claimant's contention that he could see no future in returning to his position somewhat contradictory and illogical.

28. The claimant accepted in cross examination that he did not give the company an opportunity to investigate his concerns about Mr Green. He also accepted

that he knew that the respondent used an independent human resources company. I find that it was the claimant's choice not to return to his role.

29. Discussions then ensued over his final payments, including queries over holiday pay.

30. On 8 October 2020, the respondent formally wrote to confirm the outcome of the appeal, confirming the claimant's choice not to return (127 – 130). The claimant's termination date remained as 7 September 2020 and the Respondent paid him a sum identified as a 'statutory redundancy payment' in his September 2020 salary (127-130).

Holiday pay

31. The respondent said all holiday owed was paid in the claimant's August and September 2020 wages. The claimant accepted that, from 13 May 2020, he was required to use 1 day's annual leave during every 3 weeks in which he was on furlough. The respondent said the claimant was furloughed for a total of 23 weeks, including during his notice period, equating to 7.66 days' annual leave which was paid during furlough. The respondent said this therefore left 6 days' holiday outstanding on termination, for which the claimant was paid (paragraph 27 of Mr Needham's witness statement). The respondent relied on pages 86 and 87 as evidence that, later in September 2020, it had always been the position that holiday would be taken during furlough including while on notice.

32. The claimant said he was still owed 1.75 day's holiday on termination of his employment (125). The claimant said Ms Lisa Brannan agreed that he would be paid for all of his remaining holidays in his final pay packet (83). He interpreted that to mean that it would be paid on termination, rather than that he would be expected to take a day's holiday during his notice in accordance with the previous agreement. He therefore believed that the furlough holiday arrangement did not apply during his notice period.

33. The claimant's payslips for August and September 2020 include payments shown as 'basic' in the sum of £496.87 (164), and £171.99 (165) respectively. The respondent says these payments included the claimant's pay for the days of holiday taken during furlough. The September 2020 payslip also itemises a payment for 'holiday' in the sum of £982.80, which the respondent says was the payment in lieu of holiday accrued but untaken on termination. On the basis of the payslips and the amounts shown, I accepted the respondent's account of the payments. The fact that the claimant was receiving full pay during his notice period while furloughed meant that his full pay for the days' holiday during that period did not stand out and was not itemised. Ms Brannan's comments were ambiguous and did not accord with the established arrangement. It seems to me they were unlikely to have been intended to vary the agreement to take a day's holiday for every 3 weeks of furlough including during the notice period.

34. The respondent paid the claimant for 6 weeks' notice. However, the claimant had seven years' service by his termination date, as his seventh-year anniversary fell during the notice period. Accordingly, the respondent now accepts that a further one week's salary is payable and concedes the notice pay claim for this amount.

The law

Dismissal

35. To succeed in a claim of unfair dismissal, an employee must first establish that they were dismissed (section 95 Employment Rights Act 1996 ("ERA")).

36. In **Roberts v West Coast Trains** [2004] IRLR 788, the Court of Appeal held that the effect of the decision to overturn the claimant's dismissal at the internal appeal was to resurrect his contract of employment. The fact he had made a complaint to an employment tribunal before the appeal decision was reached did not affect the decision and was legally irrelevant. Thus, if the appeal succeeds, the employee is reinstated with retrospective effect, but if the appeal fails, the dismissal takes effect from the original date.

37. In **Patel v Folkestone Nursing Home Ltd** [2018] IRLR 924, the Court of Appeal upheld the EAT's judgment that it is implicit in any internal appeal system, that if an appeal is lodged, pursued to its conclusion, and is successful, the effect is to negate the dismissal and mean that the employee will remain in employment with retrospective effect. Miss Swan directed me to the findings of Lord Justice Sales at paragraph 43, regarding the decision in **Roberts**:

> "*Mummery LJ's analysis in his judgment is contrary to the submission of Mr Jackson in this case. In our case, the appellant lodged an appeal and did not withdraw it before it was found to be successful, even though that happened after he had lodged his claim with the tribunal. According to the analysis of Mummery LJ, in line with the view of Elias J, the success of the appeal means that the appellant's employment contract was treated as continuing down to that point, with no dismissal. In line with Mummery LJ's indication in Roberts at [25], the success of the appeal in the present case did not constitute an offer which the appellant could accept or reject. Similarly, in my view, the appellant's success on his appeal did not give rise to an option for him to continue with the employment or not. When his appeal was successful, the appellant was bound by the result to the same extent as the respondent***.**

38. Where an employee appeals against the employer's original decision to dismiss, and that appeal is successful, this therefore has the effect of negating the decision to dismiss, reviving the contract of employment, which continues uninterrupted. There is no 'dismissal' for the purposes of section 95 ERA and the employee cannot pursue an unfair dismissal claim on that basis. This is sometimes known as a 'vanishing dismissal'.

Unfairness

39. Provided there has been a dismissal, then the employer must show the reason for the dismissal, and that the reason is a potentially fair one within section 98(2) ERA or for 'some other substantial reason'. Section 98(2)(c) ERA provides that redundancy is a fair reason for dismissal.

40. In determining whether the employer acted reasonably or unreasonably in dismissing for the reason given, the burden of proof is neutral and it is for the Tribunal to decide. Section 98(4) ERA states:

> *The determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case*.

41. The test of whether or not the employer acted reasonably is an objective one; that is Tribunals must determine the way in which a reasonable employer in those circumstances in that line of business would have behaved. The Tribunal must determine whether the employer's actions fell within the range of reasonable responses open to a reasonable employer in the circumstances (**Iceland Frozen Foods Limited v Jones** [1983] ICR 17 (approved by the Court of Appeal in **Post Office v Foley, HSBC Bank plc (formerly Midland Bank plc) v Madden** [2000] IRLR 827)). The Tribunal must not substitute its decision for that of the employer. The range of reasonable responses test (the need for the Tribunal to apply the objective standards of the reasonable employer) must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed (**Sainsbury's Supermarkets Ltd v Hitt** [2003] IRLR 23). I bear that in mind and apply that test in considering all questions concerning the fairness of the dismissal.

42. The Employment Appeal Tribunal ("EAT") set out in **Williams and ors v Compair Maxam Ltd** [1982] IRLR 81 factors that a reasonable employer might be expected to consider in a redundancy situation, including choosing objective selection criteria and applying them fairly, warning and consulting with the employee and considering whether any alternative work was available.

Remedy

43. The case of **Polkey v AE Dayton Services Ltd** [1988] ICR 142 concerned redundancy and establishes that the question of whether the Claimant would still have been dismissed had a fair process been followed is not relevant to liability, but is relevant to remedy. In **Software 2000 Ltd v Andrews and ors** [2007] ICR 825 the Employment Appeal Tribunal summarised the principles to drawn from the previous case law when assessing compensation for unfair dismissal following **Polkey**.

Unpaid annual leave

44. A claim for holiday pay can be brought in three ways: as a breach of contract claim, a complaint of unauthorised deductions from wages under the ERA, or a complaint under the Working Time Regulations 1998 ("WTR"). Whichever cause of action is relied on, it is for the claimant to show that he had an entitlement (whether by contract, statute or otherwise) to the payment in question.

Determination of the issues

45. Was there a dismissal? Section 95 ERA sets out the circumstances in which an employee is dismissed. Section 95(1)(a) ERA provides that an employee is dismissed by his employer if the contract under which he is employed is terminated by the employer (whether with or without notice). The reason for the termination of the contract is not relevant to section 95 ERA. In the claimant's case, his contract initially appeared to terminate on 7 September 2020 following a period of notice.

46. However, as he accepted, that was subject to the ongoing appeal process. The minutes of the appeal outcome meeting on 16 September 2020 confirmed that he was successful in his appeal (page 122) and offered the opportunity to return to his role. That was repeated in the appeal outcome letter on 8 October 2020. The claimant was therefore reinstated to his original supervisor role at Doncaster as a result of the appeal rescoring and Mr Gibson's departure from the pool. As a result of that combination of factors, the claimant was no longer subject to compulsory redundancy. The claimant himself accepted in cross examination that the appeal overturned the original decision to dismiss.

47. I agreed with Miss Swan's submissions that, although the cases of **Patel** and **Roberts** related to conduct dismissals, there was nothing in those cases or elsewhere that I am aware of to suggest that the same principle does not apply to an appeal in other types of termination under section 95 ERA.

48. It seems to me that the same principles should apply. The claimant, in entering into the appeal process, was signing up to the possibility of being reinstated. The fact that he might have had other motives for seeking to appeal (for example to protect his right to full compensation for unfair dismissal) does not change that interpretation. A successful appeal did not, as per Lord Justice Sales in **Patel**, give the claimant the option to continue with the employment or not. He was bound by the result to the same extent as the respondent. He was reinistated with retrospective effect. The successful appeal caused the dismissal to 'vanish'. In the cases of **Roberts** and **Patel,** the claimants were no longer able to pursue claims for unfair dismissal on the basis of express dismissal by their employers because there was no longer any express dismissal following their successful appeals. A successful appeal does not, of course, rule out a resignation and claim of constructive unfair dismissal, but there has been no suggestion of that complaint in this case.

<u>Reasonableness</u>

49. Having found that there was no dismissal, I am not required to consider whether any dismissal was unfair, but having heard all of the evidence I consider that, for completeness, it is appropriate to provide my conclusions in the alternative.

50. If I am wrong, therefore, and there was a dismissal, did the respondent act within the band of reasonable responses in dismissing the claimant? I.e. was his dismissal reasonable for the purposes of section 98(4) ERA.?

51. The claimant says the way the scores were applied to him was outside the range of reasonable responses. Mr Ridley's evidence was that Mr Green's scoring was based on what he saw of the supervisors 'everyday' and who he

52. thought would be 'best' rather than objective evidence. Mr Ridley re-scored the employees in the pool, such that the selection for redundancy changed. I find from Mr Ridley's evidence and actions that the scoring by Mr Green and Mr Needham was unsafe, subjective and outside the range of reasonable responses of a reasonable employer.

53. I find that Mr Ridley's application of the selection criteria to the claimant was within the range of reasonable responses of a reasonable employer. Mr Ridley applied a more objective approach to the criteria. Although the claimant disagreed with the score Mr Ridley gave him for versatility, the claimant accepted in cross examination that Mr Ridley was impartial and had carried out a thorough appeal process.

54. I therefore find that any unfairness at the selection stage was remedied on appeal by Mr Ridley's scoring exercise and replacement decision. The claimant was still ranked third and would have been dismissed on redundancy had it not been for Mr Gibson's decision to remove himself from the pool for selection. Had the claimant been dismissed, I find that that dismissal would have been reasonable for the purposes of section 98(4)ERA.

Conclusion

55. I therefore find that there was no dismissal and, even if there was, it was a fair dismissal. There is therefore no need to go on to consider Polkey or contribution.

56. The complaint of unfair dismissal is not well founded and is dismissed.

Holiday pay

57. There is a distinction between paid holiday and pay in lieu of holiday which is often lost, even on legal and human resources professionals. It appears to me that this may be the case here. Regulation 15(2) WTR permits an employer to require a worker to take leave on particular days. While no particular date was agreed for the day's holiday to be taken during furlough in August, given that the claimant was anyway on furlough leave, there was an agreement in place that the claimant would take a day's leave during each three week block of furlough. I do not consider that the email of Lisa Brannan (83) varied that arrangement. The claimant was therefore required to take a day's leave during each period of three weeks of furlough leave, even during his notice period, for which he would receive full pay. Since he was receiving full pay during his notice period, the day's holiday was not itemised on his payslip. I find that he was paid for the day's holiday taken during his notice period and therefore received payment in lieu of the correct number of remaining days' holiday accrued but untaken on termination of employment. His claim for holiday pay therefore fails.

58. The complaint of a breach of the WTR and/or unauthorised deductions from wages and/or breach of contract in respect of holiday pay is not well founded and is dismissed.

Breach of contract

59. The respondent accepts that it breached the claimant's contract of employment in respect of notice. The respondent is ordered to pay to the claimant the sum of £573 gross as damages for breach of contract.

Employment Judge Bright

Date: 9th November 2021