EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
Mr Shepherd	Lear Corporation (UK) Ltd

AND

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 11 – 13 August 2021

EMPLOYMENT JUDGE Harding

Representation
For the Claimant: In Person
For the Respondent: Ms Gardiner, Counsel

REASONS

1 Following a hearing on 11 - 13 August 2021, at the conclusion of which an oral judgment and reasons were provided to the parties, a written judgment was promulgated on 17 August 2021. By letter dated 19 August 2021 the claimant sought a reconsideration of part of the judgment. In this letter the claimant stated that he had also applied for written reasons, and that he had done this by way of letter dated 19 August 2021. This second letter of this date was not, in fact, received by the tribunal but in any event the tribunal treated the claimant's reconsideration application of 19 August as also containing a request for written reasons. The claimant was informed by the tribunal administration by letter dated 14 September 2021 that the judge would not be available to deal with the reconsideration application or the request for written reasons until mid-October 2021.

Summary

2 In his claim form the claimant pursued claims of unfair dismissal, breach of contract and/or unlawful deduction from wages, and unpaid holiday pay. At the start of this hearing it was conceded by the respondent that there had been an underpayment to the claimant both in respect of notice pay and holiday pay and a judgment in respect of these claims was issued by consent.

3 In relation to the unfair dismissal claim it is the respondent's case, in essence, that the claimant was dismissed for redundancy, along with a number of other employees. The respondent asserts that it followed a fair selection process using selection criteria that had been agreed with Unite. The claimant does not accept that redundancy was the reason for his dismissal and he also asserts that the process followed was unfair. I discussed in detail with the claimant the basis on which he asserted his dismissal was unfair, for which see below.

4 The claimant had provided a schedule of loss in which he set out, amongst other matters, that he was seeking an award for a failure to provide him with an up-to-date contract and terms and conditions of employment, page 232. The respondent did not dispute that this was something I was required to consider and I therefore clarified with the claimant the basis on which the uplift was sought, see below.

The Issues

Unfair dismissal

5 As set out above it is the respondent's case that the claimant was dismissed for redundancy. The claimant disputes this. In the event that I were to find that the claimant was dismissed for a potentially fair reason, namely redundancy, the claimant asserts that his dismissal was unfair in all the circumstances of the case for the following reasons:

(i) The pool for selection was wrongly drawn up. The claimant was a trainer and he was placed in a pool with warehouse Section Leaders.

(ii) There was a lack of objectivity in the way the scoring process was carried out because a manager involved in the scoring process was involved in scoring his brother, who was a warehouse Section Leader.

(iii) During the consultation process the claimant asked for details of agency workers who could be moved out of their roles in the warehouse, and the respondent refused to provide him with this information.

(iv) Having agreed the selection criteria with Unite the respondent then made additions to the criteria in relation to systems skills which were not agreed with Unite and about which the claimant did not know.

Section 38 uplift

6 The claimant accepts that he was issued with a formal statement of terms and conditions when he was promoted in 2002. It is his case that at some point after this he became a member of a collective bargaining unit and the respondent then failed to notify him of collective agreements which directly affected his terms and conditions of employment as required under sections 4 and 1 of the ERA. It is also the claimant's case that his job title and job description changed in 2013 when he became a trainer and the respondent failed to notify the claimant of this change as required under sections 4 and 1.

Evidence and documents

7 For the respondent I was provided with witness statements from Michelle Wing, Senior HR Business Partner, Rob Williams, Warehouse Manager, and Pete Eastwood, Engineering Manager. For the claimant I had a witness statement from the claimant himself as well as statements from Mr Glassey and Mr Short, neither of whom attended to give evidence. I was also provided with a bundle of documents that ran to just over 200 pages. At the start of the hearing the claimant asserted that two documents were missing from this bundle. After discussions a further document was added into the bundle with the agreement of the parties, which became page 235 of the bundle. The claimant also asserted that an email dated 13 December 2018 was missing from the bundle and it was agreed that the claimant could refer to this document during the hearing, if he felt it was necessary to do so. I explained to the parties at the outset of the hearing that only those documents to which I was referred would be considered to be in evidence before me. The claimant subsequently provided me with a brief list of documents to read in addition to those which he had already referred to within his witness statement.

Findings of fact

8 From the evidence that I heard and the documents I was referred to I made the following findings of fact:

8.1 The respondent manufactures and supplies car seats to its customer, Jaguar Land Rover. The respondent is based at a number of different sites both abroad and in the UK, including Coventry, where the claimant was based, and Redditch.

8.2 The Coventry operation is split into warehouse and production functions. The claimant worked on the warehouse side of the business. The warehouse has a number of different operational areas including warehouse, automated warehouse, goods in and line feed (an area of the warehouse which takes stock from the warehouse and feeds it into the production line). Each section of the warehouse has a Section Leader, who will manage supervisors, known as Zone Leaders, and a team of operatives. The Section Leaders, therefore, have both line management

responsibilities, managing their supervisors and operatives day-to-day, and operational responsibility for an element of the warehouse function. The warehouse Section Leaders are also known as Materials Section Leaders.

8.3 The claimant started work for the respondent on 8 November 1993. His effective date of termination was 29 November 2019. He was originally employed as a Materials Handler (i.e. a warehouse operative). In December 2002 he was promoted to the position of warehouse Section Leader. It was not disputed that the claimant was issued with a statement of terms and conditions when he gained this promotion.

8.4 In 2006 the claimant was approached by his then line manager who asked if he would like to become a Materials Handling Equipment (MHE) trainer. This involves training people to use handling equipment such as forklift trucks. The claimant attended a two week training course. He became an accredited MHE trainer and was the only accredited trainer on site. After he was accredited he began to carry out some training responsibilities in addition to his Section Leader responsibilities.

The claimant's role

8.5 In 2013 the respondent moved to its current premises in Waterman Road, Coventry. This was a much larger site enabling the respondent to employ more people. Additional Section Leaders were recruited and they given roles managing teams of operatives working in specific areas of the warehouse. For instance, there was a packaging engineer Section Leader, three Group Leaders (another term for Section Leader) for automation, a Group Leader for goods in and three Group Leaders for the warehouse, page 63. All Section Leaders had operational responsibility for a warehouse function, or an element of a warehouse function, as well as line management responsibilities for the operatives on their team. Whilst the claimant retained the grade and job title of Section Leader his training workload increased as a result of the increase in the number of employees. I find that his day-to-day role became focused mainly on training the now increased workforce. He did not have line management responsibilities and he had no day-to-day operational responsibilities. From this point onwards he primarily did not work in an operational part of the business; his was mainly a support function. However, on occasion the claimant would also work on line feed projects with a colleague. These projects were focused on improving safety on the line. I do not accept the respondent's evidence that this comprised about 20% - 25% of the claimant's role, I prefer the claimant's evidence that this was a relatively small part of his role.

8.6 I find that whilst the claimant retained the grade of Section Leader his training role was very different day to day to the roles carried out by the other Section Leaders. I base this finding not only on my findings of fact set out in paragraph 8.5 above but also on the extent of the difficulty that Mr Williams had in his verbal evidence in identifying *any* similarities between the claimant's role and that of the other Section Leaders day-to-day from 2013 onwards. After a number of attempts at answering the question the *only* similarities that he could identify were that all used the MHE computer system and all would be required on occasion to attend meetings.

Interchangeability of the claimant's role with other Section Leaders

8.7 It would not have been possible, I find, for any of the other Section Leaders to move straight into the claimant's role, and in this sense the claimant's role was not interchangeable with that of the other Section Leaders. As set out above, the claimant was the only accredited trainer. None of the other Section Leaders were accredited and so no one could have carried out his role without training and gaining accreditation (albeit the training requirements were not too onerous, see paragraph 8.4 above). There was a significant dispute between the parties as to whether, at the time that the redundancy exercise took place (late 2019), the claimant could have covered or moved straight into any of the other warehouse Section Leader roles. The respondent's case was that the claimant could have done this in relation to all of the Section Leader roles other than the automated warehouse Section Leader, and the claimant's case was that he did not have the skills to move into any of the other roles. The claimant's evidence, it seemed to me, somewhat underplayed his prior 11 years as a Section Leader, the respondent's evidence somewhat overplayed it. I find that, automated warehouse aside, which was a specialist area which it was agreed the claimant would not have been able to move into, the claimant's experience as a Section Leader meant that he had the majority, but not all, of the skills required to carry out a Section Leader role. He could have moved across into one of these roles but would have required some training and support in order to do so. I find that the position was as set out in the respondent's assessment of the claimant's job skills which was carried out for the redundancy selection exercise, page 43. Automated warehouse aside, the claimant had 100% of the area skills required to work as a Section Leader in the warehouse, goods in and line feed parts of the warehouse operation, or MHE training – i.e. he had all the knowledge/experience required for the operational side of the job in these areas. However, in contrast to when the claimant was carrying out the role, Section Leaders now also have to use up to five different computer systems. Of these, the claimant only had experience in one. It was this area in respect of which the claimant would have required some training and support.

The warehouse computer systems

8.8 By the time that the redundancy exercise with which this case is concerned took place there were a number of different computer systems used in the warehouse. These were known as: BCPS, DCI, Storeware, CMS and Fleet Manager. There was no formal training offered to enable someone to use these systems; people tended to receive ad hoc training from colleagues and were then expected to pick up further knowledge of the systems on the job. In his training role the only system which the claimant was required to use was Fleet Manager. He was proficient on that system. There was a dispute between the parties as to whether the claimant had access to any of the other systems. On balance I prefer the evidence of Mr Williams and find that the claimant had user access to the DCI system, which he had been trained on in 2013. He could have used this system when he was carrying out his project work, but I do not find that there was any requirement or expectation that he would do so. The project work could readily be arranged so that others would pick up this element of the work, and that is what happened in practice. Accordingly, he did not actually use this system. The claimant did not have access to, and therefore did not use, the other systems. He had historically had access to DCPS but this had lapsed because he had not used it. There was one other Section Leader in the warehouse who only used one of the computer systems, two who used two of them, two who used three of them and five who used four of them. No Section Leader used all five systems. I base these findings on page 157.

The claimant's sickness absence record

8.9 In early 2019 the claimant was scheduled to have surgery on his eye to correct a drooping eyelid. The claimant had exhausted his entitlement to sick pay and in any event did not wish to have two weeks sickness absence on his record and accordingly it had been his intention to try to take the two weeks as unpaid leave. His manager at the time, however, authorised the payment of additional sick pay to the claimant and he took the time as sick leave for which he received sick pay. The claimant was grateful for this at the time.

8.10 In January 2019 the respondent underwent a redundancy process. Later on that year Jaguar Land Rover informed the respondent that there were going to be further volume reductions in the plants that the respondent supplied at Solihull and Castle Bromwich. This in turn meant there would be a significant loss of revenue for the respondent and it was decided that there needed to be a further reduction in headcount to offset these losses as much as possible. On 21 October 2019 the respondent informed all employees that there was to be a restructuring exercise which

might result in what it described as a small number of redundancies, page 16.

The Pools

8.11 The respondent decided that out of 87 employees based at Coventry it needed to make 26 redundant. The respondent did, I find, genuinely give some thought to how the pools for selection should be constructed. It decided that there should be 9 pools with each pool drawn up on the basis of two factors, the area of the business within which individuals worked and their grade, with the expectation being this would group together people doing broadly the same job. So, for example, it was decided that Production Supervisors would form one pool, Warehouse Supervisors another pool. Production Section Leaders would form one pool, Warehouse Section Leaders another, and so on. I do not find that the respondent gave a great deal of thought to what effect drawing up a pool of Warehouse Section Leaders would have on the claimant individually. But this, I find, was because the respondent considered that the claimant was in the same position as every other Warehouse Section Leader – i.e. in the respondent's view he worked within the warehouse as a Section Leader with a particular area of responsibility; in his case this was training, but in respect of other Section Leaders it was operationally focused, for instance goods in or line feed.

8.12 I also accept the respondent's evidence and find that the respondent was of the view that there was considerable overlap between the skills that the claimant had and the skills required for the other Section Leader roles (bar the automated warehouse Section Leader roles). Indeed, that there was considered to be a great deal of overlap, was demonstrated by the scoring that the claimant achieved in the redundancy process for area skill. This is dealt with in more detail below but, as already stated, the claimant scored the maximum area skill marks across all areas (bar automated warehouse) namely; warehouse, goods in, line feed and MHE training.

Consultation with Unite

8.13 The respondent recognises the union Unite for collective bargaining purposes (although I cannot make a finding as to which class or classes of employee formed part of the collective bargaining unit because no evidence was led on this). On 24 October 2019 the respondent held the first collective consultation meeting with Unite, pages 22 – 24. During the meeting the union asked about the pools for selection, page 23,**.** Unite were informed that there were to be 9 pools for selection comprising Production Supervisor, Production Section Leader, Materials Section Leader, Production Zone Leader, Maintenance Supervisor, Maintenance

Facility Technician, Van driver, Quality, and Re-worker. Unite agreed to the use of these pools.

8.14 Unite were also provided with a copy of the selection criteria and matrix. It was set out in these documents that the selection criteria were to be disciplinary record, absence record, relevant job skills and, in the event of a tied score, length of service, pages 25 – 26. It was set out that for each criteria a score of one to five could be achieved and there was a definition of what each mark would look like. By way of example, under the criteria of attendance a score of one with a rating of "poor" would be awarded when an individual had a live third and final absence warning. In contrast a score of five with a rating of "excellent" would be awarded when there was no absences in the last 12 months, page 25.

8.15 Under the criteria "relevant job skills" it was said that this criteria would be measured by reviewing job descriptions, training records and other relevant qualifications as well as assessing overall competence in the role. Once again there was a potential range of scores of one through to five. A score of one was defined as being applicable when an individual had 50% of the relevant skills and training completed, no relevant qualifications and needed constant supervision. A score of three was to be awarded when the individual had all the relevant skills and experience to carry out 80% of the tasks required in the role, when there were some training and development needs identified which were not critical to the effective day-to-day performance of the role and when the individual needed regular supervision. The top score of five was to be awarded when the individual had 100% of the relevant skills and experience, had additional transferable skills, needed minimal supervision and could train and coach others, page 26.

8.16 It was further set out that each score would be given a weighting, page 27. Both attendance and disciplinary records were to be given a weighting of three, job skills a weighting of two and length of service a weighting of one. This had the effect of giving two of the most objectively measured criteria - attendance record and disciplinary record - the greatest weight in the selection process,

8.17 Unite specifically queried how the matrix would work in relation to those who were in supervisory/management roles who had not been given the opportunity to train or cover other areas. The respondent informed the union that in the case of Section Leaders the roles had been rotated several times so that there was exposure to different lines and that the same roles and responsibilities applied across all lines, page 23. In fact that was not right, certainly so far as the claimant was concerned in more recent years. He had not been rotated. The respondent told the union that the process being adopted was the process that had been used earlier in

the year in January and the union confirmed that they felt it was a fair process which had not caused any issues when implemented on the last occasion.

8.18 A second consultation meeting was held with Unite on 29 October 2019. There was discussion around voluntary redundancy and a potential enhancement to statutory redundancy payments and Unite asked for clarification as to how the at risk roles had been identified. The respondent asked the union if they had any further questions or points they would like to make around the process and criteria to be adopted and the union confirmed they had nothing further to add, page 30. Accordingly, by the end of this meeting the selection criteria and matrix had been agreed by Unite.

8.19 There were, in total, 87 employees in the 9 pools for selection and, as set out above, the respondent proposed to make 26 of these 87 employees redundant, page 20. The respondent lodged form HR 1 with the Insolvency Service to this effect. There were a total of 11 people in the Materials (or warehouse) Section Leader pool, of whom the respondent proposed to make 5 people redundant. The 11 people in this pool were all of the people whose job title was Materials (or warehouse) Section Leader at the Coventry site.

Agency workers

8.20 Historically the respondent has relied quite significantly on agency workers, having had over 400 on the books in January 2018. However, significant reductions had been made in agency numbers since then and as at the date of the first collective consultation meeting with Unite there were approximately 30 agency workers being utilised on the site, page 23. Most of these were covering for long term absence such as sickness absence and maternity cover and some were utilised as a resource to be moved around the site into different roles at short notice depending on where there was a business need.

8.21 The claimant asserted, for the first time in cross examination, that there were a small number of agency workers who were each covering a single role in the warehouse on a long-term basis. The claimant had not led evidence to this effect in his witness statement. Neither had he put this assertion to any of the respondent's witnesses. Accordingly, the evidence before me on this issue was limited.

8.22 Doing the best I can, I find, based on the information contained at page 66 of the bundle, that there were a very small number of agency workers at Coventry at the time of the redundancy exercise who were long term and who were working as Operatives in a specific role (i.e. they were

not being used as temporary cover and constantly moved around to meet business need). I cannot be more specific than this because the evidence before me was too vague.

The scoring process

8.23 HR were responsible for carrying out the scoring in respect of attendance and disciplinary records and line managers were responsible for scoring the relevant job skills criteria. In the warehouse the job skills assessment was to be done by Mr Rob Williams, Warehouse Manager, and his line manager, Mr Gurdip Singh, Planning and Logistics Manager. Mr Singh has a brother, Mr S Singh, who was a Section Leader in the warehouse at the time. Accordingly, Mr Singh was to be involved in scoring his own brother in the selection exercise.

8.24 Mr Williams devised a method for assessing and scoring the relevant job skills criteria which was then applied by both Mr Williams and Mr Singh. He split this criteria into three separate areas; (i) training matrix and versatility, (ii) area skill and (iii) system skill, page 43. He further split area skill into five areas: automated warehouse, warehouse, goods in, line feed and MHE training. System skill was also split into five areas representing each of the five separate computer systems in use in the warehouse; BCPS, DCI, Storeware, CMS and Fleet Manager, page 43. Mr Williams considered this to be a satisfactory way of assessing both system skills and operational skills firstly because whether someone was using a particular computer system was something that could be measured objectively and secondly because it was important to Mr Williams going forward that those who were retained were those with the broadest skill base.

8.25 For each of the three areas a person could receive either a mark of 0 or 10 (i.e. there were no marks in between). For training matrix and versatility this meant the maximum score was 10 but for those two areas which were sub-divided into five different areas the maximum score was 50. This mark was then converted into a percentage score. So 50 out of 50 would equal 100%, 40 out of 50 80%, and so on. The three areas of training matrix and versatility, area skill and system skill were all to be given a percentage marking and the average of these three percentage markings was then to be calculated to give an overall skill level score, page 43. Once Mr Williams had devised this system he submitted it to HR, who approved it.

Individual Consultation

8.26 On 1 November 2019 the respondent wrote to the claimant informing him that his role was at risk of redundancy, pages 32 – 33. Each

of the pools for selection was set out in the claimant's letter together with confirmation of the proposed number of redundancies from each pool. Enclosed with the letter was a copy of the minutes of the collective consultation meetings and a copy of the selection criteria. The claimant was invited to attend a formal consultation meeting to take place on 5 November 2019 and was informed of his right to be represented at the meeting. He was told that all internal vacancies would be made available to him as part of the consultation process and he was also provided in the letter with a link to the vacancies page on the company website. The claimant was informed that if at the end of the consultation period no alternatives had been found and no way to avoid a redundancy situation had been found his employment might be terminated by way of redundancy.

The redundancy pro forma document

8.27 All of the consultation meetings were carried out by managers who used a pro forma document to ensure consistency across the meetings. The managers were mandated, via this pro forma, to give individuals certain information and to go through a set series of questions. For example, the managers had to explain to each employee the selection criteria which were to be used, the pools for selection and the number of people in these pools and they were then directed to ask the employee whether there were any other points the individual wished the respondent to consider that they might not be aware of in relation to the scoring criteria, page 34.

8.28 In the section headed "alternative employment options and outplacement" the manager was to inform the employee that there had been a vacancy search and the pro forma then went on to say:
"here is a list of the current vacancies that we have within the business: *hand a list of company vacancies dated*_____.

Do you want to be considered for one of these roles?

Please take the list away and consider the vacancies that have been put forward and advise throughout the consultation period if you are interested

Are you interested in alternative employment if it is available"

The claimant's first consultation meeting

8.29 The claimant's first consultation meeting took place on 5 November 2019, pages 34-36. The meeting was chaired by Mr Gary Evans,

Operations Manager, who was supported by Ms Laura Thomas from HR. The claimant was informed that he had been placed in a pool of 11 Materials Section Leaders and that the respondent was looking to make 5 people redundant out of this pool. He was informed that selection would be made using the criteria of disciplinary record, absence record and skills and versatility, with length of service being used in the event of a tie. He was not informed how the skills and versatility criteria would be marked, and in particular he was not told that system skills were to form part of the scoring process. As set out above, the skills and versatility marking system had been devised by Mr Williams, and the pro forma did not deal with this.

8.30 On balance I find that the claimant was handed a list of the current vacancies within the business during the meeting. Whilst the claimant asserted that he was shown a list of vacancies but not given a copy to take away with him I considered that significant weight could be placed on the contemporaneous meeting notes. As set out above, after the entry on the pro forma:
"here is a list of the current vacancies that we have within the business" there followed the instruction to the manager in italics to "*hand a list of company vacancies dated*" and there was then a blank on the form for a date to be filled in. On the claimant's meeting notes this blank had been filled in with the entry 4 November 2019. Given that (i) this date had been filled in and (ii) there would have been no reason for Mr Evans to have deviated from the instruction contained in the pro forma, I concluded that it was more likely than not that the list had been handed over. Moreover, the claimant also signed the meeting notes to confirm they were accurate. There were 13 different vacancies on the list none of which were within the warehouse, page 37. The respondent did not include any roles currently being filled by agency workers on that list.

8.31 The claimant was asked whether he wanted to be considered for one of the roles on the list and he said that he did not, page 35. He was asked if he was interested in alternative employment if it was available and he said that he might be dependent on the terms and conditions, page 35. He confirmed that he was not interested in roles in other geographic areas. The claimant was told that there would be a second consultation meeting in the week commencing 11 November 2019 and that the proposed end of the consultation period was 29 November 2019. The claimant was given the opportunity to ask further questions. He queried the fact that he was in the same pool as the other Section Leaders pointing out that most of his time was spent as an MHE trainer. Mr Evans stated that he would take that point away. The claimant asked if he could come back after his notice period as a contractor working as an MHE trainer. He also raised that one of the Section Leaders was the brother of Mr Gurdip Singh, page 36.

The Claimant's scoring

8.32 The scoring exercise for the claimant took place after the first consultation meeting. As set out above, Mr Williams and Mr Singh marked independently first of all before meeting to sign off on a final score. For training matrix and versatility the claimant received the maximum score of 100%, which was in fact the mark given to everyone who was undergoing the selection process in the claimant's pool.

8.33 Area skill, as set out above, was subdivided into five separate areas; automated warehouse, warehouse, goods in, line feed and MHE training. The claimant scored zero in respect of the automated warehouse (as he had never worked in this area) and the maximum score of 40 in respect of the other four areas (i.e. the maximum 10 points for each of the 4 areas). Overall, therefore, this equated to a score of 80% for area skill, page 43. System skill was also subdivided into the five separate computer systems in use in the warehouse. The claimant achieved the maximum score of 10 in respect of the fleet manager system and he was marked zero in respect of the other four systems. That gave him a score of 20% in respect of system skill. The three percentages: 100%, 80% and 20% were then averaged to give an overall skill level mark of 67%, page 43.

8.34 Using the agreed definitions, page 26, Mr Williams then converted this percentage score into a numeric score of three. Under the definitions this equated to; "has the skills and experience to carry out over 80% of the tasks required but needs some training and supervision". In fact, Mr Williams mis-read the definitions, this percentage score should have translated into a numeric score of 2; "has all the relevant skills and experience to carry out 60% of the tasks required in the role, some critical training needs identified and needs close supervision". But, before me, it was not disputed that this made no difference to the outcome because Mr Williams made the same mistake for everyone aside from one individual who was made redundant in any event.

8.35 The weighting of two was then applied to the numeric score of 3 to give an overall skills and versatility score of six for the claimant, page 46.

8.37 HR were responsible for marking the claimant's attendance and disciplinary record. He had no disciplinary record and therefore scored the maximum mark of five. With a weighting of three this gave a final score in respect of disciplinary record of 15, page 46. In relation to the claimant's attendance record the two week period of sickness absence which the claimant had taken for eye surgery, paragraph 8.9 above, was taken into account, meaning that the claimant received a score of 4 out of 5. The

weighting of three was then applied to give a total score for this criteria of 12.

The other materials Section Leaders

8.38 The scores for all 11 Section Leaders were close, see the spreadsheet handed in during the hearing now marked as page 235 of the bundle. Prior to the length of service tiebreaker criteria being applied two Section Leaders scored 32 points, two (one of whom was the claimant) scored 33 points, one scored 34 points, two scored 35 points one scored 36 points and three scored 38 points. Once the length of service tiebreaker criteria was applied of those who were made redundant two scored 34 points, one scored 36 points, one scored 37 points and the claimant scored 38 points. The claimant, therefore, was the highest scoring individual to be made redundant. He was only one point off the next highest scoring individual who retained a Section Leader job.

8.39 Looking at the breakdowns of the scores in more detail, pages 157 - 158, in respect of area skill the top mark achieved by anyone was 40 (or 80%). The claimant and three others achieved this top mark. There were three Section Leaders who only had experience in one operational area and they achieved the lowest mark of 10, or 20%. The claimant was the only Section Leader to receive a mark of 10 for MHE training, everyone else scored zero for this.

8.40 In relation to system skill the claimant and one other Section Leader were awarded the lowest mark for those in the pool, which was 10 (or 20%). Two Section Leaders achieved a mark of 20 (i.e. they had experience in two of the systems), two achieved a mark of 30 and five achieved a mark of 40. No one achieved the maximum mark of 50.

8.41 Mr Sarban Singh, Mr Gurdip Singh's brother, achieved a sufficiently high mark to be retained, I was not told exactly what mark he achieved but before me it was not disputed that Mr Singh's skills were such that he would have done well in the selection exercise and been retained even had he not been marked, in part, by his brother.

Process for challenging the scores

8.42 The respondent had in place a process by which employees could challenge their scores. The process was that if a person indicated at their second consultation meeting that they wished to dispute their scores than a third consultation meeting would be set up at which the individuals would be presented with the detail of the scores matrix and would be given an explanation of how that had been applied to them. If the individual continued to challenge their score then the meeting would be adjourned

and both the individual, the managers and HR would be asked to produce evidence to support the markings.

The claimant's second consultation meeting

8.43 The second consultation meeting with the claimant took place on 14 November 2019. He was told of the overall mark that he had achieved in respect of each of the criteria and he was then told what his total score was and what the maximum total score was. There was no explanation provided as to how the scores had been arrived at. The claimant was asked if he wished to dispute his score and he said that he did not, page 47. He was asked if he had seen any vacancies or made any applications since the last meeting and he said that he had not. He was provided with a list of the current vacancies, page 55. Before me, the claimant disputed this was the case but I preferred the respondent's evidence because the claimant subsequently accepted, during a meeting with Ms Wing on 29 November, page 86, and during his appeal hearing, page 132, that he was given the vacancies list.

8.44 This list did include vacancies which were currently being filled by agency workers, which were those designated by the letters N/A on the list. The claimant was told that the list included vacancies which were currently being covered by agency workers, page 47, although he was not told which ones, and he was asked if he wanted to be considered for one of the roles. He said that he did not. The claimant was told that there would be a third consultation meeting to be held in the week commencing 18 November to review scoring assessments where those had been disputed and to discuss alternative employment options, page 49. The claimant signed the notes of the meeting to confirm they were accurate.

8.45 On 18 November 2019 the claimant emailed HR with 10 questions, page 67. Amongst other matters he asked for a list of job vacancies together with job specifications, he requested a list of the scores for the other Section Leaders, he asked for a copy of his scoring matrix and attendance record, he stated that he believed there was still agency people working in the materials department who were not covering absence or maternity leave, he raised again what he considered to be the conflict of interest brought about by Mr Singh scoring his brother and he asked for a full and complete written response to the questions he had raised in his first consultation. This included the query he had raised about the fact that he was in the same pool as the other Section Leaders, which Mr Evans had not responded to.

8.46 Ms Large from HR responded to most, but not all, of the claimant's queries on 19 November. In relation to vacancies he was told to let the team know which job descriptions he would like and he was told that the

job descriptions would then be provided to him, page 65. The claimant was also told that he would get an answer to the questions raised in his first consultation meeting by close of play the next day. The respondent refused to provide the claimant with details of the scores achieved by the other Section Leaders.

8.47 The respondent confirmed it would provide the claimant with a copy of his scoring matrix and attendance record. The claimant was told that there were a very small number of agency workers left in the building who were not covering long-term sick or maternity and that if any Section Leader wished to request to step down to the level of operator the respondent would consider displacing any remaining agency worker who was not covering long-term sick or maternity. The claimant was told to highlight this at the next consultation meeting, page 66.

8.48 In relation to Mr Sarban Singh Ms Large stated that his scores would need to be re-evaluated if Mr Gurdip Singh had been involved in the process. She stated that she would verify who had completed the scoring.

8.49 The claimant sent a further email to HR on 26 November complaining that he had received next to nothing and he said that with a prospective leaving date looming he was becoming increasingly frustrated. He asked for confirmation as to when his final consultation meeting would take place, page 78.

8.50 HR arranged for the claimant to meet with Ms Wing from HR and this meeting took place on 27 November. The claimant complained again that he had still not received a copy of his scoring matrix or attendance record, page 80, and he asked again how he could be grouped with the materials Section Leaders for the purposes of the pool when he was an MHE trainer. He also asked where the agency workers were who were not covering long-term sickness or maternity.

8.51 Ms Wing told the claimant that she would meet with him the following day to answer his questions. However, on 28 November she emailed the claimant saying that she was waiting for Mr Williams to return to work in order to address some of the points the claimant had raised and she suggested a further conversation with the claimant later on that day. The claimant's response to that was that he finished work at 2:30 PM and was unable to stay because he had an appointment with his solicitor, page 82. No meeting took place, therefore, and the claimant's outstanding queries remained unanswered. In particular, he still had not received a copy of his scoring matrix and attendance record.

<u>The meetings of 29 November</u>

8.52 As there had been no meeting with the claimant on 28 November the respondent arranged to meet with the claimant on 29 November, immediately before his third consultation meeting was due to take place. Present at that meeting were the claimant, Mr Williams and Ms Wing. At this meeting the claimant was handed an anonymized spreadsheet setting out each of the marks achieved in each area for each of the Materials Section Leaders including the claimant himself, pages 157- 158. He was also handed a spreadsheet which set out for each Section Leader the total numeric score for each area and the total final score once the weighting had been applied, page 235.

8.53 There was a discussion during this meeting about agency workers, with the claimant insisting on knowing precisely which roles the agency workers were covering. It was pointed out to the claimant that he had been told to express an interest in stepping down into one of the operative roles currently being covered by an agency worker and that he had not done so, pages 85 - 86. It is fair to say that, on an objective reading of the notes of the meeting, as the discussion continued both Ms Wing and the claimant became unnecessarily entrenched in their respective positions. Ms Wing continued to refuse to tell the claimant precisely where the roles were on the site. She told the claimant he needed to express an interest in stepping down to be an operative, and that if somebody wanted to step down they did not get to choose where they went, page 85. The claimant, on the other hand, refused to express an interest unless he knew precisely which vacancies were currently being covered by agency workers. He also raised again the issue of Mr Gurdip Singh scoring his brother. He was told that someone else had raised a grievance about that and that as a result a Band 5 manager had reviewed Mr Sarban Singh's scores, page 89. Ms Wing told the claimant that the manager had ratified all of the scores but she did not explain to the claimant what she meant by this, page 90.

8.54 Ms Wing did explain to the claimant what the process was if any individual wished to dispute their score, page 94. There was also discussion about the pool for selection and how this had been drawn up. The claimant was told that the respondent had looked to put together people in the same area of the business, with the same job title who did broadly the same job, albeit each person might have their own individual area of specialism, page 96.

8.55 The final meeting with the claimant, which the respondent described as a consultation meeting, took place straight after this meeting and was conducted by Mr Williams and Ms Wing. The claimant did not choose to be accompanied. Mr Williams read through a pre-prepared letter confirming to the claimant that he was being dismissed for redundancy and setting out what payments he would receive, pages 112 – 113. The claimant was informed of his right to appeal the decision.

The appeal

8.56 The claimant duly appealed the decision by email dated 3 December, pages 124 – 126. He raised 10 points in his email. These included: he was denied copies of his scoring and his absence record until his final consultation meeting, the whole selection process was flawed, the scoring was balanced in such a way as to negate his MHE training, he had been told by his manager he was "one of one", he had at no stage been offered any further training in the areas that he was apparently lacking, and he again raised the issue of Gurdip Singh, page 125. An appeal hearing then took place with Mr Eastwood, who was supported by Ms Large from HR. Mr Eastwood went through each of the 10 points raised by the claimant, pages 129 – 142. The claimant asserted that he did not see how he could be marked on his abilities in comparison to the rest of the Section Leaders, he said he should not have been in the pool of Section Leaders, page 132, and he complained that he had not been given a copy of his scores until the third and final meeting, page 133. The claimant raised that the respondent had not been willing to tell him which vacancies were being covered by agency workers. He was directly asked whether he would consider dropping down to a picker operator role, page 134, and the claimant's response was that was irrelevant at this moment. He stated that the issue was that he was denied the information. Discussions about this continued. At a later point in the meeting the claimant asked if it was an option for him to drop down to operator. Ms Large told him that this was a "very likely option" if he wanted to do that, page 135. The claimant complained again that he had not been told which roles were being covered by agency workers and Ms Large responded "but did you indicate to them that you wanted to consider that". The claimant's response was that he was not going to indicate anything, page 135. There was also a discussion about Gurdip Singh's involvement in the process.

8.57 Mr Eastwood wrote to the claimant with his decision on 9 January 2020, which was that his appeal was rejected, pages 143 – 146.

8.58 Based on the claimant's evidence I do not find that he was in a role which formed part of the group (or class) of employee represented by the union for collective bargaining purposes.

The Law

The reason for dismissal

9 Sections 98(1) and (2) of the Employment Rights Act 1996 set out the potentially fair reasons for dismissal, which include redundancy. The burden of proof is on the respondent to prove the principal reason for dismissal. In

determining the reason for dismissal it is appropriate to go through the three-stage process that is set out in **Safeway Store Plc -v- Burrell [1997] IRLR 200**, as approved by the House of Lords in **Murray -v- Foyle Meats [1999] IRLR 562**, which requires me to consider; (1) was the claimant dismissed, (2) had the requirements of the business for employees (not the claimant) to carry out work of a particular kind ceased or diminished or were expected to cease or diminish and (3) if so, was the claimant's dismissal wholly or mainly attributable to that state of affairs.

10 As was emphasised in the case of **Fish v Glen Golf Club UKEAT/0057/11** it is important to remember that the fact that a dismissal occurs during a redundancy situation does not necessarily show that the dismissal was because of the redundancy situation. There is a difference between redundancy being the occasion for the dismissal and it being shown by the employer to be the reason for dismissal. The two issues (whether there is a redundancy situation and if so whether the principal reason for dismissal was redundancy) should therefore be considered separately.

Section 98(4)

11 Section 98(4) sets out what needs to be considered in order to determine whether or not a dismissal is fair. It states:

> "the determination of the question whether the dismissal is fair or unfair…
>
> > (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and
> >
> > (b) shall be determined in accordance with equity and the substantial merits of the case."

12 Here the burden of proof is neutral. In applying section 98(4) I have reminded myself that it is not for me to stand in the shoes of the employer and decide what I would have done were I the employer. Rather I have to ask myself whether the decision to dismiss fell within the reasonable range of responses open to the employer, judged against the objective standards of a hypothetical and reasonable employer. Accordingly where I have expressed myself in terms such as "I consider or conclude that", this is not to be taken as an indication of the application of a subjective standard. In the case of **Polkey -v- AE Dayton Services [1987] IRLR 503 HL** Lord Bridge laid down guidelines which a reasonable employer might be expected to follow in making a redundancy dismissal. He said that: '… in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes

such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation."

The selection process

13 In considering the reasonableness of a redundancy dismissal where a selection has to be made between those who are retained and those who are dismissed the tribunal has to be satisfied that the employer acted reasonably in respect of the selection of the particular employee. This ordinarily requires consideration of two issues; a tribunal must be satisfied both that the system of selection that was adopted by the employer was fair *and* that the system adopted was applied in practice in a fair manner as between one employee and another. These are questions that must be judged objectively by asking whether the system adopted and its application fall within the range of fairness and reasonableness, paragraph 2 **British Aerospace Plc v Green and Ors [1995] IRLR 433**. Every system has to be examined for its own inherent fairness by judging the criteria employed and the methods of marking in conjunction with any other factors relevant to its fair application such as the degree of consultation, paragraph 13 **Green**. The case of **Green** suggests that where an employer sets up a system of selection that can reasonably be described as fair and then applies it without any overt signs of conduct that mars its fairness then the employer will have done all that the law requires. Tribunals should not subject markings to an over minute analysis; the question after all for the tribunal is not whether some other employee could have been fairly dismissed but whether the claimant was unfairly dismissed. A Tribunal is not entitled to embark on a re-assessment exercise, paragraph 25 **Green**

The Pool

14 The usual position, as set out in Harvey on Industrial Relations and Employment Law, Division D1 paragraph 1685, is that the pool should include all those employees carrying out work of the particular kind, but it may be widened to include other employees such as those whose jobs are similar to, or interchangeable with, those employees. A useful summary of the applicable principles was provided by Mr Justice Silber in the case of **Capita Hartshead Ltd v Byard [2012] IRLR 814**. He stated as follows;

(a) The reasonable response test is applicable to the selection of the pool from which the redundancies are to be drawn - it is not the function of the tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted.

(b) There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine.

(c) The employment tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he *has* genuinely applied his mind to the issue of who should be in the pool.

(d) If the employer has genuinely applied his mind to the issue of who should be in the pool, then it will be difficult, but not impossible, for an employee to challenge it (see also **Taymech Ltd v Ryan EAT/663/94**).

15 Consultation is one of the basic tenets of good industrial relations practice. Where unions are recognised, consultation will generally be with the trade unions, although this does not normally eliminate the obligation to consult in addition with individual employees. Usually the former will be over ways of avoiding redundancy and (if the union is willing to discuss the issue) over redundancy selection criteria. Consultation with individuals will generally arise once they have been at least provisionally selected for redundancy, and will be for the purpose of explaining their own personal situations, or to give them an opportunity to comment on their assessments. As the EAT commented in **Mugford v Midland Bank plc [1997] IRLR 208,** unions will generally want to consult over selection criteria, but rarely if ever wish to be involved in the invidious process of selecting individuals by the application of those criteria. It is in that context that individual consultation takes on a special importance.

16 With regards to alternative employment: in order to act fairly in a redundancy situation an employer acting reasonably will seek to see whether instead of dismissing an employee it could offer him alternative employment, **Williams v Compair Maxim Ltd [1982] IRLR 83** (with the same employer or elsewhere in a group of associated employers, if appropriate). It has been emphasised that the duty on the employer is only to take reasonable steps, not to take every conceivable step possible to find the employee alternative employment, see for example **Quinton Hazell Ltd v Earl 1976 IRLR 296**.

Section 38 Employment Act 2002

17 Section 1 of the Employment Rights Act 1996 requires an employer to provide an employee with a written statement of particulars of employment. Section 1(4) provides that the statutory statement must contain details of certain terms and conditions of employment, which includes, subsection 1(4)(f) the title of the job which the worker is employed to do (or a brief description of the work), and subsection 1(4)(j) any collective agreements which directly affect the terms and conditions of the employment.

18 Section 4 of the Employment Rights Act 1996 states that if, after the material date, there is a change in any of the matters particulars of which are required by sections 1 to 3 to be included or referred to in a statement under section 1, the employer shall give to the worker a written statement containing particulars of the change.

19 Section 38 provides that, in respect of certain proceedings, if the tribunal finds in favour of a worker but makes no award, or an award is made, in circumstances where the employer was in breach of its duty under either section 1 or section 4 of the Employment Rights Act, the tribunal must (unless there are exceptional circumstances) increase the award by an amount equal to 2 weeks pay and may increase the award by an amount equal to 4 weeks pay. The right to compensation is dependent upon a successful claim bring brought by the claimant under one of the jurisdictions listed in schedule 5 (whether or not the tribunal would otherwise have awarded compensation). Claims for unpaid wages and holiday pay are amongst those listed in Schedule 5.

Submissions

20 Ms Gardiner, for the respondent, reminded me this it was not permissible for the tribunal to substitute its own view and that the decisions of the respondent were to be tested against the reasonable range of responses. She submitted that was important, particularly in a redundancy exercise. She submitted that the respondent had discharged the burden of proving that redundancy was the reason for dismissal. There was a redundancy situation at the plant because of a downturn in orders which led to a reduction in the respondent's requirements for operatives which in turn caused a reduction in the respondent's requirements for Section Leaders. She referred to the case of **Williams v Compair Maxim Ltd** and what was said in that case about the standards to be applied in judging if a dismissal for redundancy is fair. As to the pool, she submitted that it was clear from the evidence that the respondent had genuinely applied its mind to the pool. To the extent that there was a difference between the work that the claimant did and the work of the other Section Leaders there was, she submitted, no legal requirement that everyone in the pool should be carrying out the same type of work. In any event the claimant was a Section Leader and had 11 years experience of this type of work. The respondent was of the view that he could have moved into a Section Leader role; he had transferable skills in the respondent's view.

21 Ms Gardiner reminded me that the overarching selection criteria had been agreed with the union as had the pool for selection. In relation to the scoring process the claimant's specific complaint was that he had not been made aware that he was being marked on system skills. He was, however, given the breakdown of his scores at the final consultation meeting and he was also informed of the process for challenging his marks. He did not do so. The claimant had asserted that the respondent should have scored the Section Leaders against competency in using the systems, not simply usage of the systems. But that would introduce an element of subjectivity into the marking, and in any event it was not for the tribunal to conduct a scoring exercise itself. Ms Gardiner submitted that the weighting system adopted by the respondent gave the greatest weight in the scoring exercise to those factors which were completely objective; attendance and disciplinary record.

22 It was within the reasonable range, she submitted, to take into account the claimant's two week sickness absence when marking him on his attendance record. It was not, after all, disputed that the claimant had been off sick during that two week period. The fact that it was a planned period of sickness absence, and that initially the claimant had intended to take unpaid leave, did not alter this position. It would have been artificial and unfair to others to ignore the claimant's sickness absence record. As to the involvement of Mr Gurdip Singh, Ms Gardiner submitted that the claimant himself had accepted in evidence that Mr Singh's involvement had no influence whatsoever on the outcome of who was selected for redundancy because the claimant had accepted that Mr Sarban Singh was safe from redundancy because of his skill set. There was, therefore, no unfairness which tainted the process. In relation to the agency worker vacancies Ms Gardiner pointed out that the claimant was provided with a list of vacancies, which included roles being covered by agency workers, and she reminded me that in the appeal hearing the claimant was asked directly if he would drop down to picker operator and the claimant's response was that this was irrelevant.

23 In relation to the section 38 uplift Ms Gardiner submitted that the claimant's claim was not sustainable on the claimant's own evidence. He had said clearly in evidence that he was not part of the collective bargaining unit. This was clarified with him on a number of occasions. On his own evidence, therefore, his terms and conditions cannot have been affected by any collective agreement and there was, therefore, no breach of section 4. As to the claimant's job description and job title, there was no obligation under section 1 to provide a job description; the obligation is to provide either a job description or job title. The claimant's job title was Section Leader. He had been given a statement confirming this, it was accepted, when he first became a Section Leader. His job title did not change when he became a trainer, and the claimant had accepted this in evidence. Accordingly, the respondent was not in breach of its obligations under Section 4.

24 The claimant reminded me that he did not have a team or a specific area of responsibility in the warehouse and that he had a clean disciplinary record. The absence that had been taken into account as part of the redundancy exercise had been approved and it was the respondent who had chosen to pay the claimant sick pay. The scoring for the redundancy exercise was done by a manager and his direct subordinate for a pool that included his brother. For the sake of transparency that should not have happened. The claimant submitted that he knew the computer system that he was required to use for his role but he did not have any other system skills. He submitted that it was unfair for the respondent to score system skills on the basis of who accessed which systems because that did not measure a person's competency in using a particular system. In relation to the roles being covered by agency workers the claimant submitted that there were agency workers covering roles in Mr Williams' area of the warehouse. He should have been told which specific roles the agency workers were covering and those roles should then have been made available to

him. In relation to the asserted failure to provide him with updated terms and conditions the claimant submitted that he was not in a collective bargaining unit and he queried how the respondent could have applied collective bargaining to him if he was not in the unit.

Conclusions

Reason for dismissal

25 It was not, of course, disputed that the claimant was dismissed. As to the second question set out in **Burrell** and approved in **Murray** - had the requirements of the business for employees to carry out work of a particular kind ceased or diminished or were they expected to cease or diminish - there can be no doubt, I conclude, that a redundancy situation existed. Overall the respondent had a diminishing requirement for employees working in the warehouse and was seeking to achieve a headcount reduction of 26. The claimant was a Section Leader and there was, specifically, a diminishing requirement for Section Leaders brought about by the respondent's diminishing requirement for warehouse operatives. Within the warehouse the respondent needed to reduce from 11 Section Leaders to 5 Section Leaders. There was, therefore, a diminishing requirement for employees to carry out the work of Section Leader.

26 That, of course, is not a complete answer to the issue of what was the reason for dismissal because, even if there is a redundancy situation, it is still for the respondent to prove that redundancy was the reason for the claimant's dismissal. I conclude that the respondent has proved that redundancy was the reason for the claimant's dismissal. The claimant's argument that he was not dismissed for redundancy was based on the fact that there was still some training work that needed to be done at the Coventry site, albeit it was not contested that the amount of training work required had reduced as a result of the reduction in headcount. Even if one ignores the impact of the accepted reduction in training work, the claimant's argument misunderstands the statutory question that is to be asked; which is simply whether the diminishing requirement for employees to carry out work of a particular kind was the reason for the claimant's dismissal. There does not, in fact, have to be a diminishing requirement for employees to do work of the kind for which the claimant was employed – hence why so-called "bumping" redundancies - where one person who is at risk of redundancy is moved into the role of another person and that other person is dismissed – are potentially fair.

27 Here it was not disputed that the respondent had a diminishing requirement for employees to carry out Section Leader work. All of the evidence indicated that this is what caused the respondent to dismiss the claimant. The need for a reduction in headcount, and in particular a reduction in headcount amongst the Section Leaders, featured prominently in the contemporaneous paperwork produced as part of the redundancy exercise as an explanation for

why the selection exercise needed to take place. Moreover, the claimant, along with his colleagues, then went through a structured redundancy process and a number of Section Leaders, along with the claimant, were made redundant. There was no alternative reason for dismissal put forward by the claimant.

General fairness

28 I considered the issue of general fairness under section 98 (4) of the ERA using the list of issues that was drawn up at the beginning of this hearing. The first of these issues was the pool.

The pool

29 The respondent, on my findings, put the claimant into a pool of people who, day to day, were carrying out different roles to him. Of course, as the respondent correctly submitted, there is no *legal obligation* to limit the pool to people carrying out the same or very similar jobs.

30 That said, had it been the case that I was permitted to consider whether I would have done things differently in respect of the pooling were I the employer I may well have concluded that the answer to that would have been yes. But I am not, in law, permitted to take that approach. Instead, I have to review the respondent's decisions in drawing up the pool as it did and consider whether those decisions fell outside the reasonable range. Put another way the question for me is; in constructing the pool as it did did the respondent act as no reasonable employer would have done. It needs to be understood that this is a test that gives a wide margin of appreciation to an employer.

31 Approached in this way I concluded that the respondent's decision to pool together all warehouse Section Leaders was within the reasonable range. I did so for the following reasons. Firstly the respondent, I have found, genuinely gave some thought to how the pool should be constructed. It drew up the pools on the basis of two factors, the area of the business within which individuals worked and their grade, which the respondent considered would pool together people doing broadly the same jobs, paragraph 8.11. As I have already set out I do not find that the respondent gave a great deal of thought, if any, to what effect drawing up a pool of warehouse Section Leaders would have on the claimant individually. But this, I have found, was because the respondent considered that the claimant was in the same position as every other warehouse Section Leader – i.e. he worked within the warehouse as a Section Leader with a particular area of responsibility, which in his case was training but in other cases was, for instance, goods in or line feed, see paragraph 8.11 above.

32 Secondly, the respondent considered, in broad terms at least, that the claimant had a transferable skill set which would have enabled him to be moved into any of the Section Leader roles, bar the role of Section Leader for the

automated warehouse, paragraph 8.12. That view, of course, reflected the claimant's 11 year experience as an operational Section Leader. Indeed, that he was considered to have a transferable skill set was demonstrated by the scoring that he achieved for area skill. Automated warehouse aside, which was an area of skill that only a few of the Section Leaders had, the claimant scored the maximum marks across all other areas namely; warehouse, goods in, line feed and MHE training, paragraph 8.33.

33 Thirdly, and importantly, the use of this pool was agreed by the respondent with Unite, paragraph 8.13. It is difficult, in my view, to conclude that an employer has acted as no reasonable employer would have done when the pool that it uses has been agreed with the recognised union.

34 A consequence of the pooling decision, however, was that the claimant was also marked against system skills. As set out above, paragraph 8.8, there were five systems in total in use in the warehouse only one of which, Fleet Manager, the claimant was required to use in his training role. There was one further system, DCI, which he had the option to use, but I have not found that there was a requirement, or even an expectation, that the claimant would use this system as part of his role.

35 However, it is evident from the marks that were given to the other Section Leaders that use of the systems amongst the other operational Section Leaders was variable. As set out above, out of the other 10 Section Leaders five scored 40 out of 50 (i.e. they used 4 out of 5 of the systems), two scored 3 out of 5, two scored 2 out of 5 and the claimant and one other scored 1 out of 5 (ie 10 out of 50), paragraph 8.40. In such circumstances I do not conclude that the respondent's decision to draw up the pool as it did and place the claimant in a pool in which this would be assessed fell outside the reasonable range. He was, after all, in similar circumstances to some of the other Section Leaders.

<u>System skills</u>

36 It was the claimant's case that it was unfair to introduce the use of system skills as a subcategory of the job skills criteria when this had not been agreed with Unite and was not known to him until he was handed the scoring spreadsheet on the day he was dismissed.

37 I do not find that the failure to agree the system skill subcategory with Unite rendered the claimant's dismissal unfair. Whilst it is best practice to agree selection criteria with a recognised union there is no absolute obligation on the employer to do so and in this case, of course, the main selection criteria had all been agreed with Unite.

38 However, there was also the issue that the claimant (and presumably his colleagues) was wholly unaware until moments prior to his dismissal that these five system skills were being assessed and used as part of the selection criteria.

39 This, I concluded, was a significant error on the respondent's part. After all, part of a fair selection process, particularly when specific criteria have not been agreed with a union, is that an individual is given sufficient information to enable them to understand the basis on which they have been selected for redundancy so that they can challenge it if they wish to do so. This includes information concerning how the marking process has been carried out.

40 Had it been the case that the respondent had failed to provide the claimant with this information at all then I would have considered this likely would have rendered the claimant's dismissal unfair. As it is the respondent finally provided this information to the claimant on the day of his dismissal, albeit it was undoubtedly provided too late for the claimant to be able to absorb and understand it prior to his dismissal being confirmed.

41 But it is settled law that when considering the fairness of a dismissal a tribunal must consider both the original dismissal decision and the appeal decision. Both are necessary elements in the overall process of terminating the contract of employment. By the time of the appeal hearing the claimant had been in possession of this information for nearly 2 weeks. He knew, therefore, at the time of his appeal hearing the basis on which the marking had been done and the scores that he had achieved in each area. The respondent had put him in a position whereby he was sufficiently well informed to challenge the marking should he wish to do so, which he evidently did not as there was no challenge made by him to the marking during the appeal hearing. The respondent corrected this defect, therefore, and consequently I conclude that the overall process in this regard was not outside the reasonable range.

Attendance record

42 A further issue raised by the claimant was that the respondent took into account the two week period of pre-booked sickness absence which the claimant had originally intended to try to take as unpaid leave. Whilst I have sympathy with the position that the claimant found himself in, as it is unfortunate that matters turned out as they did, I do not conclude that the respondent's actions can be said to fall outside the reasonable range in this regard for the following reasons. Firstly, it was not disputed that the claimant was in fact on sick leave during those two weeks. Accordingly, in accordance with the agreed selection criteria, this period of absence needed to be taken into account. Secondly, in any redundancy process where a number of people are made redundant, an employer acting reasonably will want to achieve consistency. To treat the claimant differently to others in the selection process would have been to lose the required consistency of approach.

The involvement of Mr Gurdip Singh

43 The last issue raised by the claimant in respect of the scoring system adopted by the respondent was the involvement of Mr Gurdip Singh who, in conjunction with Mr Williams, marked all of the Section Leaders including his brother Mr Sarban Singh. In the list of issues drawn up at the start of the hearing the claimant had asserted that this indicated a lack of objectivity in the way the scoring was operated, but in fact during the hearing itself the claimant's position on this changed. The claimant, in evidence, did not seek to assert that Mr Gurdip Singh's involvement had, in fact, affected the outcome of the marking process. The claimant accepted that Mr Sarban Singh, given his particular skill set, would have achieved the scores that he did and been retained by the respondent even with demonstrably objective and independent marking. His complaint became that it was indicative of what he termed a lack of transparency.

44 I have no hesitation in concluding that the involvement of Mr Gurdip Singh was a procedural error on the respondent's part. It is, I might add, a surprising error given that this respondent is well enough resourced to have an in-house HR Department who should have been aware of which managers were carrying out the marking and well enough trained to know that allowing a close relative to be involved in making selection decisions when people's jobs are at stake risks calling into question the integrity of the process.

45 But it is important to understand what the claimant was *not* asserting. He was not saying that the system adopted was not applied in practice in a fair manner as between one employee and another. Nor was he asserting that there had been actual bias in the way the system was applied nor that there were demonstrable inaccuracies in the marking measured against objective data.

46 Not all defects in procedure render a dismissal unfair. In this scenario the question to be asked is whether, taking into account equity and the substantial merits of the case, and notwithstanding this procedural irregularity, the respondent acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissal.

47 I conclude that, notwithstanding this irregularity, the respondent acted reasonably in treating the reason as sufficient to dismiss because:
(i) there was no suggestion on the evidence that the irregularity had actually influenced the scoring in any material way, and
(ii) there was another independent manager involved in this part of the scoring process, paragraph 8.23, and
(iii) The marking system was set up so that it gave the greatest weight to completely objective factors, paragraph 8.16, and the scoring for the objective factors was carried out wholly outside the line management chain, and

(iv) There was a structured and agreed process by which employees could challenge any particular score, paragraph 8.42.

Refusal to provide details of agency workers

48 On my findings details of vacancies were provided to the claimant, which included details of vacancies which were currently being covered by agency workers, paragraphs 8.43 and 8.44 above. The claimant was, moreover, told that the vacancy list included those vacancies currently being covered by agency workers. Importantly, when the claimant raised a specific query on 18 November, to the effect that he thought there were still agency people working in the materials department who were not covering for absence or maternity leave, the respondent responded to this quickly, paragraph 8.47 above.

49 As already set out, on my findings of fact the claimant was sent an email from HR the following day, 19 November, stating that there were a very small number of agency workers left in the building (albeit the email did not make clear whether the agency workers were in the materials department or not) and the claimant was told that the respondent would consider displacing any of the remaining agency workers if any Section Leader wished to step down to the level of operative. The claimant was told to highlight his interest in one of the roles in his consultation meeting. Of course, in the meetings that followed the claimant refused to confirm whether he was interested in such a role, saying that he wanted to know where the agency workers were before he expressed an interest. Both the respondent and the claimant then became somewhat intransigent over this issue, paragraph 8.57, with the respondent requiring the claimant to express an interest in an operative role before telling him exactly where the role was and the claimant refusing to express an interest unless or until he was told where the role was. The respondent could undoubtedly have handled this issue better. However, the question for me is whether the respondent's actions fell outside the reasonable range. In circumstances where the list of vacancies provided to the claimant included the agency worker roles, and where the claimant had been specifically invited to express an interest in one of these roles, which he knew were at operative level at the Coventry site, and the claimant then repeatedly declined to do so, it cannot be said in my view that the respondent acted as no reasonable employer would have done in refusing to provide the claimant with further information about those positions.

Section 38

50 Collective bargaining agreements are negotiated by the union on behalf of a collective bargaining unit. The collective bargaining unit is the group (or class) of employee represented by the union. On the claimant's own evidence, which was clarified with him on a number of occasions during the hearing, his role was not within the collective bargaining unit to whom a collective agreement might apply. It follows from this that that there cannot have been any failure on the

respondent's part to notify the claimant of collective agreements which directly affected his terms and conditions.

51 There is an obligation under section 1 of the ERA to notify an employee of their job title or give a brief description of the work. The claimant's claim in this regard was that when his role changed to that of MHE trainer he was not issued with revised terms and conditions that reflected this, as required by Section 4 of the ERA. However, on my findings, there was no change to the claimant's job title at this point. He remained a Section Leader, which was his contractual job title, paragraph 8.5, and there was, therefore, no requirement to notify him of a change. Accordingly, no uplift falls to be be made.

Case No:1304759.20
Employment Judge Harding
Dated: 9 November 2021