EMPLOYMENT TRIBUNALS

Claimant: Mr S Seyfollahi

Respondent: DNT Company Ltd

Heard at: Birmingham (by CVP) **On:** 6 & 7 September 2021

Before: Employment Judge Miller

Representation
Claimant: Mr D Patel – Counsel
Respondent: Ms K Anderson - Counsel

RESERVED JUDGMENT

1. The claimant's claim this he was unfairly dismissed is well founded and succeeds.

2. The claimant's claim for breach of contract in that he was not given sufficient notice to terminate his employment is unsuccessful and is dismissed.

REASONS

Introduction and background

1. The claimant was employed by the respondent as a Sales Director, although he was not a Director of the respondent company in the formal sense of the word.

2. He had worked for the respondent since 2010 (the exact start date is disputed) and his employment ended on 30 October 2020. The claimant started a period of early conciliation on 16 November 2020 which finished on 7 December 2020. The claimant made his claim to the Employment Tribunal on 31 December 2020 and he brought claims of unfair dismissal,

unpaid holiday pay and notice pay. He also said that he was making a claim for “other payments” but no other claims were identified in the claim form.

3. The respondent is a company that deals in steel coils. They submitted their response to the claimant’s claim on 26 February 2021. The respondent’s defence was that the claimant had been dismissed for redundancy following a fair process and that he had received the correct amount of notice and notice pay, being the statutory minimum. They said that the claimant had taken all but 3 days of his outstanding holiday in his notice period and he had been paid in lieu of the remaining untaken holiday.

The issues

4. In the course of the hearing, the claimant withdrew his claim for holiday pay. The issues for me to determine are therefore as follows:

Unfair dismissal

5. Was the claimant dismissed? It is agreed that he was

6. What was the reason or principal reason for dismissal? The respondent says the reason was redundancy. The claimant disputes this and says the redundancy was not genuine, but a sham to effect his removal from the company.

7. If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will decide, in particular, whether:

    a. The respondent adequately warned and consulted the claimant;
    b. The respondent adopted a reasonable selection decision, including its approach to a selection pool, the identification of the selection criteria, the application of those criteria and whether the decision to select the claimant was predetermined;
    c. The respondent took reasonable steps to find the claimant suitable alternative employment;
    d. The claimant was given a fair opportunity to appeal the decision to select him for redundancy;
    e. Dismissal was within the range of reasonable responses.

Wrongful dismissal / Notice pay

8. What was the claimant’s notice period? The claimant says that he had a contractual entitlement to three months’ notice, the respondent says he was entitled under his contract to notice of 9 weeks, but he was in fact given/paid for 10 weeks as a concession.

9. Was the claimant paid for that notice period?

The hearing

10. The hearing was conducted by CVP. I was presented with an agreed file of documents (the bundle) and additional documents were disclosed during the hearing which were admitted as necessary. Where relevant, they will be referred to in the judgment. The claimant produced a witness statement and attended and gave evidence. He also produced a witness statement from his trade union representative, Ms Harding. Ms Harding did not attend and the majority of her witness statement was redacted by agreement as referring to without prejudice matters. The remainder of Ms Harding's statement comprised only of one substantive paragraph referring to her attendance at various meetings which was not in any event, contentious. Part of the claimant's witness statement (in paragraph 28) was also redacted as it was agreed that this included privileged information. I have disregarded all of the redacted material.

11. The respondent produced witness statements from three people: Mr Anthony Feek, a Director and joint owner of the respondent, Ms Karen Burbeck, an external consultant and Mr Stephen Jones, another external consultant. All of the respondent's witnesses attended and gave evidence.

12. Both parties were represented, as set out above. I am grateful to both advocates for their assistance in presenting the case.

13. Regrettably, because of some technical and procedural issues it was not possible to give judgment at the hearing hence this reserved judgment. I apologise to the parties for the delay in producing this judgment which has been as a result of workload issues.

Findings of fact

14. I set out my findings of fact, Where matters are disputed I have decided on the balance of probabilities. I only record such findings as I consider necessary to determine the issues before me as set out above.

Start date and contract

15. Mr Feek says, and the claimant agreed, that the claimant's role was created for the claimant when he was made redundant from his previous role. The claimant had no experience in the steel trading industry but Mr Feek said that after intense training over several years, he became a valued member of the team. The claimant started working for the respondent in August 2010 - the claimant says 2 August 2010 and that was not disputed. I find, therefore, that the claimant's employment with the respondent started on 2 August 2010. Although in his witness statement Mr Feek says that the claimant did not start receiving pay – at his own request – until January 2011, it was not disputed that the claimant started actual work in August 2010. More particularly, in their ET3, the respondent agrees that the claimant's employment commend in August 2010.

16. When the claimant started his employment, there was no written contract or statement of main terms of employment provided. The claimant said, and I accept, that there was no specific discussion at the start of his employment about any terms of his contract relating to notice. This is consistent with the

respondent trying to introduce written terms in 2016. Mr Feek said that the draft contract, (see below) of 2016 attempted to reflect the terms under which employees had been working. This was produced on advice and the notice provisions in that draft reflect the statutory notice provisions in the Employment Rights Act 1996.This is consistent with there being no separately and previously agreed contractual notice provisions. It is also consistent with the claimant's oral evidence that in 2016 he *requested* a three month notice period, implying that he did not believe he was entitled to three months before that request. I find that no notice period for termination of employment was agreed at the outset of the claimant's employment – either in writing or orally.

2016 – written contract

17. In 2016 the respondent attempted to introduce written contracts of employment for its employees. The claimant was not happy with the written contract and did not sign it. He said in his witness statement that he did not agree it. It is the claimant's case that he was contractually entitled to three months' notice of termination of his employment. Mr Feek said that as part of the discussion about the 2016 contract, the claimant had asked for three months' notice but the respondent had not agreed to that. It was put to Mr Feek that three months had been agreed in a conversation in 2016, but it had never been committed to writing. Mr Feek said that was not the case as they wanted everyone to be on the same terms.

18. The claimant's oral evidence – which was not in his witness statement – was that "Once I received the draft contract, I went through it, had a meeting, highlighted a number of points and discussed I said notice period as they requested 3 months - should be the same for me. My understanding they agreed to that". A varied contract was never provided and the claimant never chased for one. He continued working for the respondent and I did not hear that he raised the issue again until his dismissal.

19. The claimant sought to rely on two other issues that were in dispute in the wording of the new contract: that the draft referred to him as Commercial Manager when his actual title was Commercial Director; and that the contract required him to seek approval for expenses which he did not want and in fact did not do. He said the fact that they were agreed suggests that the other issue was also agreed.

20. The respondent's evidence was that although the claimant is permitted to refer to himself as a Commercial Director to external parties, this was to add to his credibility – the claimant agreed he was not in fact a company Director. In respect of the expenses, Mr Feek said that the claimant did in most cases seek approval for expenses – he described the claimant as very courteous. The claimant said that in reality there was never a need for him to get approval for expenses.

21. I find that the respondent did not agree to the claimant having three months' notice. Firstly, the fact that one term is agreed, or not enforced, has no bearing on whether another is. Any issues relating to expenses or job title

are not therefore relevant. However, I prefer Mr Feek's evidence about those in any event.

22. Secondly, I prefer Mr Feek's evidence about the conversation in 2016. The claimant did not give any explicit evidence until the hearing and this was a key part of his case. Further, if the claimant had believed that he had agreed a three month notice period, I would have expected to see something chasing the written contract. In my view, it is much more likely that there was a conversation about it, but it was not agreed. I find that it was not agreed in 2016 that the claimant would be entitled to three months' notice to terminate his employment.

2019 and family dispute

23. It is relevant to say that the claimant and some of the directors of the respondent are related. Two of the directors – Dusan Babic is the claimant's wife's brother – the claimant's brother in law; and Ruth Babic who is Dusan Babic's wife and the claimant's sister in law. The claimant says that he and his wife live at the same address as Mr and Mrs Babic. There was a family dispute between the claimant and his wife on the one hand and the claimant's wife's brothers, including Mr Dusan Babic, on the other hand. It appears that the dispute related to a property.

24. This dispute had been going on since about 2015, but by 2019 the matter was in court. The claimant describes it as acrimonious.

25. The claimant says that in 2019 he noticed things changing at work and there was a plan to isolate him. He describes some examples of this.

26. Example 1: Two customers, CAF and Capital Coated Steel, were removed from his account. Mr Feek's evidence was "With capital coated steels, they had approached me. They are a big steel stockholder in Cardiff. Sold about 20 tons. … I had an email from the sales director of capital asking if Huw Williams could look after that business. People got moved around. Had a good relationship with customer, moved one to the other. There were occasions when sales staff would swap customers. Some were better at dealing with customers. I moved capital from Shahab to Huw at their request. CAF, manager left, business dried up. No longer getting regular business so we tried a different approach by introducing another salesman – Huw Williams"

27. The claimant said that Mr Feek told him at the time that the reason for reallocating these two customers was to give other employees more to do – he said Mr Feek did not give the explanation that CCS had requested that the claimant be removed from the account. There is an email dated 11 December 2019 in which the claimant queries the decision to remove the Capital Coated Steel account from him – he says in that email that Mr Feek "reconfirmed that the sale of Aluzinc to Capital Coated steel was going to remain as my account and responsibility as it had been the case for some time". I did not see any response to that email, although the claimant requests a discussion. It was suggested that this email showed that accounts were not moved around often and Mr Feek agreed that it did not

happen often, but said it did from time to time. I prefer Mr Feek's evidence of this. It seems unlikely that he would potentially disrupt a relationship with a customer for no good reason.

28. Example 2: That another director Felicity Feek (who is Mr Feek's wife), had contacted a customer of that claimant, Euroclad, with quotations and prices without the claimant's knowledge or involvement. This had caused problems with the quotes and deliveries and resulted, the claimant said, in a complaint from Euroclad. The claimant said he raised this with Mr Feek subsequently after a meeting with Euroclad at which they complained about the way the account had been handled with Felicity Feek's involvement. The claimant says Mr Feek "did not respond, looked uneasy and just left".

29. Mr Feek's evidence was that in all likelihood the original request for quotes had come from Euroclad and Mrs Feek had responded as part of the team. The claimant, he said, had been left out of the correspondence by mistake. He agreed that Euroclad had complained generally about the level of information flow on orders but not about Mrs Feek specifically. Mr Feek said he had no recollection at all of the alleged conversation afterwards, which the claimant said was in the car park. Mr Feek said that he and the claimant had meetings with Euroclad on a regular basis and the claimant was an important part of the team.

30. I prefer Mr Feek's evidence about this incident. The fact that the claimant went to the meeting with Euroclad at which the complaints were raised supports Mr Feek's evidence that the claimant was an important part of the Euroclad team. It would not make sense to attempt to cut the claimant off from the contract, which is what the claimant appears to be implying, and then invite him to a meeting with the customer to discuss the contract from which the claimant says he is being excluded.

31. Example 3: The claimant says he was prevented from travelling to Italy in December 2019 to the large steel mill that the respondent, and the claimant particularly, was agent for. He says that when he queried this, Mr Feek just said it was a company decision and he did not have to give a reason. In oral evidence, the claimant said that it was unheard of for him not to go to the mill but when he spoke to Mr Feek he said it was a company decision and he did not challenge him further.

32. Mr Feek said that the respondent was very worried about the costs situation at that time. He agreed that this was the first time the claimant had not gone with him and the claimant had taken his wife previously. However, as it was a straightforward sales meeting and in view of the finances, he decided to go on his own, He agreed that he did not have to justify his decision to the claimant, but said he would not have put it in the stark terms the claimant said. Again, I prefer the evidence of Mr Feek. It was within his gift to decide to go without the claimant and his explanation is plausible. I think it likely that the claimant is viewing this event retrospectively and drawing conclusions from what happened subsequently.

33. Example 4: The claimant says he was not made aware of a visit to the UK of a representative from the Italian mill in February 2020. Mr Feek said he

would be surprised if the claimant did not know about this visit. He said that sometimes he had plenty of notice about an upcoming visits and sometimes it was last minute. If possible, he would try to put on a program for the representatives with various customers. The claimant was usually involved with helping this and was involved this time. He said that the claimant attended at two customers on the Wednesday and a birthday lunch on the Thursday.

34. It is clear from the text that on the Monday before the Wednesday visit, the claimant was unaware that the mill representatives were visiting. However, this is consistent with Mr Feek's evidence that he also had notice late on this occasion. The claimant did attend and was involved in some of the arrangements. It was very clear from Mr Feek's evidence that the relationship with the Italian mill was very important to the business and he sought to maximise the time he spent with their representatives. It seems extremely unlikely that he would do anything that might risk jeopardizing that relationship and I prefer the evidence of Mr Feek in respect of this incident. I find that the claimant was not deliberately not informed of the visit of the Italian mill representatives.

35. Example 5: The claimant says that the respondent had decided he could not contact the Italian mill representatives using his work mobile phone. It became apparent that what this actually referred to was technical difficulties the claimant had using his mobile phone to phone out of the UK. The claimant accepted that there was a block on his phone and he said that when he raised this with Mr Babic, it was unblocked. The claimant's view was that as the respondent had been able to remove the block, they must have been responsible for putting it on in the first place.

36. Again, I prefer the evidence of Mr Feek on this. Just because the respondent was able to resolve the issue with the mobile phone company does not necessarily mean they had put the block on it in the first place. Given the high importance of the relationship with the Italian mil, it seems very unlikely that the respondent would jeopardise this in the way alleged. Mr Feek said, and I accept, that the respondent "live and die" by their relationship with the mill. I also refer to a text from the mill that says "Shahab what the f is going on in dnt?" in response to the claimant telling them that he would need to contact them on his own phone. This demonstrates that the respondent would not, in my view, have taken steps that would or might have damaged that relationship.

37. I find that the respondent did not deliberately stop the claimant from contacting the Italian mill on his work mobile phone.

38. Example 6: Claimant being excluded from general discussions in the office for example in relation to market conditions. Mr Feek said that they worked together in an open plan office and often had discussions, including about market conditions. The claimant said that it was not a wholly open plan set up – Mr Feek and the other directors have offices.

39. The claimant did not provide any further detail about the circumstances when he said he had been excluded and he had not raised it previously –

whether in the course of the redundancy process or in his claim form. The claimant has not shown on the balance of probabilities that he was excluded from any conversations.

40. Example 7: The claimant's emails were being monitored at work. It was agreed by Mr Feek that they were. He said "We see or can have access to all emails. From about 2016 or 2017 C emails did go in copy to felicity. Because we are a team. The claimant is not such a team player as members of DNT. Things might not be available and not fully aware. Felicity is the back up on most of day to day admin and sales". Mr Feek accepted that only the claimant was subject to this monitoring as other team members copied him in. He also said that the claimant started copying in Mr Feek when it was raised, but that it was important that Mrs Feek was kept informed. He did not say that the claimant was asked to copy in Mrs Feek or had refused to do so.

41. The claimant said that the monitoring had started in April 2019 to his knowledge as he received an out of office from Felicity Feek to an email he had not sent to her. It was the claimant's case that this, as well as the other examples set out above, was because of the family dispute.

42. The claimant relied on the fact that this behaviour by the respondent started in 2019, when the court case became more acrimonious, as demonstrating the link. There is little other evidence – no evidence of correspondence about family matters in work emails for example – that the claimant has relied on to demonstrate a link. Mr Feek said he was aware of the family issue and when it came up the claimant assured him it would be separate and not impact on work. He said of the claimant "Everything ran as normal and wouldn't have believed an issue. Work was work and private was private tried to separate the two. He was very good at that".

43. On the other hand, there clearly were concerns about the claimant in 2019 (see below).

44. Mr Feek said the monitoring had been going on for years and his only concern was the success of the business. It is clear that the claimant's emails were being monitored. It seems extremely unlikely that the claimant would not have notice previously if it had started in 2016 or 2017 and Mr Feeks' explanation is unconvincing. If it was as Mr Feek had said, there would have been no reason for him not to tell the claimant about it. I think it likely that emails did start to be monitored in April 2019 and this coincided with the family dispute getting more serious. I find that, on the balance of probabilities, the claimant was singled out to have his emails monitored and this was for matters not directly connected with his work.

Legal advice and grievance

45. The only other relevant evidence related to advice obtained by the respondent in November 2019. I was referred to a document dated 7 November 2019 which was correspondence between the respondent and MFG solicitors. It was agreed that this document be admitted. As far as relevant this says:

Your objectives and instructions

To advise you In relation to the Issues concerning Huw Williams, your Commercial Director and his complaints against a fellow employee.

Retained advice to include:-

a. Advising you on the difficulties associated with Shahab Seyfollahi;

b. To advise you on your options with respect to terminating his employment;

c. To advise you on the grievance process following submission of a grievance by Huw Williams.

46. Mr Feek said that MFG had been asked to advise on a matter unrelated to the claimant's family dispute. He said that Mr Williams had made a complaint against the claimant. The claimant had never previously been informed of this and was not aware of it until this hearing. Mr Feek said that that was because the complaint was subsequently withdrawn, and he believed that to be a good thing as the issue had gone away. Mr Feek also said that the advice the respondent received was that it was not possible to terminate the claimant's employment on the basis of the complaint from Mr Williams. The grievance was said to be about abusive/threatening phone calls and an issue over exchanging a large amount of euros.

47. The claimant said that he had no idea what the grievance was about – he had certainly never made any threatening phone calls and he had never offered to exchange any euros.

48. It is clear, and I find, that the respondent did seek advice in November 2019 about terminating the claimant's employment.

49. In respect of the reference to difficulties in the letter from MFG, Mr Feek denied that that related to the claimant's family dispute, but related to the grievance from Mr Williams. In my view, the reference to "difficulties associated with Shahab Seyfollahi" and on a fair reading must go further than the issues raised in the grievance. In my judgement it must refer to ongoing problems the respondent perceived they had with Mr Seyfollahi and it is likely that that included the family dispute. This also supports my conclusions in respect of the email monitoring, above.

Conversation between Mrs Feek and Mr Williams

50. The claimant said, in his witness statement, that before the redundancy process formally commenced he "overheard conversations in the office between HW and FF regarding how they were going to ensure that he would not be made redundant due to the fact that I have considerably more experience and expertise. HW and FF were discussing this in FF's office with the door not fully closed. FF said they will try to base their decision on computer skills and IT only. Furthermore, it is worth mentioning that HW is a

very close friend of FF and her husband TF and they regularly meet up at weekends and socialise together".

51. The claimant did not mention this at any point during the redundancy process and he did not mention it in his claim. His explanation was that he had, effectively, mentioned the situation obliquely in that he said there were "other factors" behind his dismissal. He said the company knew what they were and, I understand, he did not want to be explicit so as to maintain the possibility of an ongoing relationship.

52. This explanation certainly makes sense in the context of the claimant wanting to avoid dismissal and maintain reasonable family relationships. However, there is no good reason for the claimant failing to mention this in his claim form. By that point he had been dismissed. The claimant was, however, also similarly reticent in disclosing the document from MFG even though, on the face of it, it is quite damning.

53. Mr Feek's evidence was that he was not aware of the alleged conversation and could not imagine it happening. I prefer the evidence of Mr Feek. I think it unlikely that the claimant did overhear the conversation – the reference to IT skills being the basis of the decision is unconvincing and I think that the claimant's recollection of the alleged conversation is likely to be a consequence of having seen the scores and coming to retrospective conclusions. I find, on the balance of probabilities, that the claimant did not overhear the conversation between Mrs Feek and Mr Williams as described in his witness statement.

Redundancy announcement

54. On 16 March 2020, the claimant and Mr Williams (the other Commercial Director) attended a meeting with Ms Karie Burbeck who informed them that that due to financial difficulties the company was reducing the number of Commercial Directors from two to one. Ms Burbeck did not work for the respondent but was an acquaintance of Mr and Mrs Feek, and to a lesser extent Mr and Mrs Babic. Ms Burbeck is the owner of another company and has, she says, HR experience. The role of Ms Burbeck was said to be to manage the process as an independent person, although Mr Feek was to make the decisions.

55. The claimant said that after that meeting, he saw Mr Williams laughing with Mr Babic which he found strange in view of the sudden notification. Ms Burbeck said she did not see anything as she left straight after the meeting.

56. The claimant's account was not challenged and I accept his account, and that he found it strange.

First consultation meeting

57. The first consultation meeting with the claimant and Ms Burbeck was on 1 and 2 April 2020 conducted by video having been rearranged because of the lockdown restrictions and technical issues. The claimant was accompanied by his trade union representative, Ms Sharon Harding.

58. At that meeting, the claimant had a copy of the selection criteria, which had been provided in advance and a further copy was sent to Ms Harding after the meeting. The selection criteria comprised of a scoring matrix which Tony Feek was to complete. I find that at this meeting, Ms Burbeck initially agreed to send the uncompleted matrix to the claimant and Ms Harding to feedback on it before the scoring was undertaken. Ms Burbeck set out the criteria to be applied in the redundancy, they were

    1. Length of Service
    2. Performance in Role, including
        a. Customer Service
        b. Account Management/Stock Management
        c. Use of Systems/Computers
        d. New Business Development
        e. Ability to work as part of a team
    3. Experience
    4. Skills, in particular
        a. Computer Skills
        b. Commercial Acumen
        c. Communication Skills
        d. Developing Systems
    5. Additional Skills such as versatility
    6. Attendance record
    7. Time keeping
    8. Disciplinary record
    9. Future Potential

59. At that meeting, Ms Burbeck said that the reason for the need to make redundancies was because of the company's financial position over the last year (form 2019). She said that the decision had been made to reduce the Commercial Directors from two to one as the company could not afford two commercial directors.

60. The claimant requested that consideration be given to pausing the process and furloughing him. Ms Burbeck was reluctant to consider that as the consultation had started with Mr Williams and the purpose of the furlough scheme was to protect jobs, whereas this process, she said, started before

the lockdown and was unrelated to Covid. Ms Harding had requested this prior to the meeting and Ms Burbeck's evidence, which I accept, was that she had discussed this with Mr Feek before the meeting.

61. The claimant said that he sought to clarify at the meeting that the only reason for the redundancy process was financial because he thought there were other important background factors that were the real reason namely the family problems previously referred to. Ms Burbeck said that that was never referred to and her notes reflect that. The claimant's notes say

    "At this point SH confirmed that the note taker has been lost and has gone offline and there are important points that are being discussed. KB was not aware of this.

    SS mentioned that the proper choice would be for the process to be suspended as SH suggested as there is no downside to the Company in any shape and in fact there is all upside to it and does not understand. Things do not ring true and that is why SS asked if that is the only reason (financial position) because it does not appear to be the only reason and that there are other factors which the Company does not want to say, and they keep pushing on this fact when there is no need".

62. The respondent's notes do record that the recording stopped. Ms Burbeck says that this conversation never happened and that the claimant's notes of the meeting are inaccurate.

63. I prefer the claimant's notes of evidence. They are broadly comparable throughout and I prefer the claimant's evidence that he kept a note of the meeting. However, the reference to other factors is not specific and the context is that the claimant was keen to confirm that financial problems were the reason for the redundancy process, nothing else. That is also recorded elsewhere in Ms Burbeck's notes. I find that the claimant did say that the financial position does not appear to be the only reason and there are other factors that the company does not want to say, but he was not specific about what those factors might be.

64. In the course of the meeting, the claimant raised a number of potential ways to avoid redundancies, including furlough. The other possibilities raised were a pay cut and reduced hours. It does appear, however, that Ms Harding asked that those suggestion were not put forward until she had seen the matrix and had an opportunity to advise the claimant and the option of furlough was reconsidered by the directors.

65. Ms Burbeck said that once the scoring had been undertaken the respondent's accountant. Vasim Haq, would review the scores to ensure impartiality.

66. Ms Burbeck said that a letter would be sent to the claimant summarising the outcome of the discussion and setting out the next steps, including an invitation to a further meeting to discuss the scoring and consider mitigations to avoid redundancy. It is clear therefore, that the respondent intended to undertake the selection process prior to the next meeting.

67. In the event, a letter was not sent and on 3 April Ms Burbeck emailed the claimant stating that the claimant would be furloughed form 6 April 2020 and the redundancy process was to be put on hold. It was subsequently confirmed that Mr Williams was also to be furloughed. The claimant asserted that Mr Williams was working during the Furlough period. This is not relevant to the matters I need to decide so I make no findings about that.

Matrix and scoring

68. The actual matrix used by Mr Feek to score the claimant and Mr Williams was not exactly the same as that which was shared with the claimant at the first consultation meeting. Particularly, the matrix does not include “New Business Development” or “Ability to work as part of a team” under performance. Mr Feek could not explain the difference. Aside from that, the criteria used were as described above. The claimant would be scored from 1 – 5, 5 being the best, in each category. The different categories were given different weightings as follows:

    Length of service: 8

    Performance in role:

    a. Customer Service: 12

    b. Account Management/Stock Management 12

    c. Use of Systems/Computers: 12

    Experience: 10

    Skills:

    a. Computer Skills: 12

    b. Commercial Acumen: 12

    c. Communication Skills: 12

    d. Developing Systems: 12

    Additional skills: 13

    Attendance records: 11

    Time Keeping: 11

    Disciplinary record: 10

    Future potential: 13

69. Each of the categories carried a score between 1 and 5 and the relevant weighting. This mean that there was a total score available of 800.

70. There was no additional guidance as to what these categories meant or how they were to be scored. It was agreed that length of service, attendance records, time keeping and disciplinary records were objective criteria and they were not contentious. The claimant scored the maximum score for each of those.

71. It was agreed that the remaining criteria were subjective. They were based solely on Mr Feek's opinion and were not supported by any contemporaneous documentary evidence.

72. The main points of contention were the criteria: use of systems/computers (score 2); computer skills (score 2); and developing systems (score 2). There were significant disputes about the extent to which the claimant had access to the respondent's computer based systems, the extent to which he needed such access, the extent to which he was required to develop and maintain systems and the extent of the claimant's computer skills.

73. It is not necessary to rehearse that evidence in detail. It is clear, however, from the disagreement about the way in which these criteria were assessed that they were not transparent to the claimant, the Tribunal or even in some cases, to Mr Feek. Mr Feek was, particularly, unclear to what extent the claimant was required to access, maintain or develop system in his role and going forward. I find that Mr Feek's score in relation to these three criteria were based on an impression he had of the claimant's computer skills. It is also not clear from Mr Feek's notes in the matrices how the scores were justified.

74. It is equally clear that Mr Feek placed a great deal of weight on the computer skills of Mr Williams who scored 4 for each of those criteria.

75. It was put on behalf of the claimant that the three criteria – use of systems,/computers, computer skills and developing systems overlapped and together accounted for 22.5% of the available scores and this was unreasonable. Mr Feek agreed that there is a degree of overlap but that computer skills and systems would be important for the future.

76. I find, having heard the evidence about the matters taken into account for each criterion by Mr Feek, that there is a very high degree of overlap and that consequently computer skills or computer related skills did account for 22.5% of the available scores. It is not for me to decide whether it was appropriate to the respondent's business to prioritise computer skills in a sales role. The question of fact for me is whether Mr Feek genuinely considered that computer skills warranted this level of priority in the redundancy selection exercise.

77. He said that had he only used one criterion referring to computer skills, this would have attracted a higher weighting and denied that the emphasis on computer skills was to ensure the claimant was not successful in the selection exercise.

78. He also said that, were he forced to choose between someone with only sales ability and someone with only computer skills he would have to

choose sales ability. However Mr Feek also referred to computer usage or systems in the criteria of account management, stock management and future potential in his letter of 9 July 202 to the claimant.

79. I find that, whether consciously or unconsciously, Mr Feek gave a very high priority to computer skills in the redundancy selection exercise. In my view, this was because Mr Feek already had an impression of the claimant as poor with computers and he was impressed by Mr Williams' computer skills. This is clear from the notes on the respective matrices. The criteria were, I find, designed or scored with the perceived respective skills of the claimant and Mr Williams in mind and again, consciously or unconsciously, Mr Feek had a preference for Mr Williams to remain in the role of Commercial Director.

80. I refer also to two additional matters. Firstly, future potential. The claimant has scored 3 with the comments: "A reliable. Loyal member of the team. He has a solid understanding of the DNT business as a whole and has very good commercial acumen. He has not perhaps developed new sales but he has operated at a very good level to maintain his existing customer base".

81. Mr Williams, conversely, scored 4 for future potential with the following comments: "He is creative, passionate and has a strong desire to develop new accounts, grow sales and take the business forward with energy and commitment. He is versatile and flexible. He will work from home or alone or work as a team. His technological skills are an asset to the business and his marketing ability is an additional in-house resource. He has leadership qualities and he motivates the team with good humour and a quick it. He is excellent at prosecting for new customers and taking new products to market. Sales and marketing are an essential requirement for the future of the business".

82. Again, computer literacy is referred to as a positive factor but there is also a clear difference in the criteria considered. There is no reference to the claimant's potential leadership (positive or negative) and no reference to the claimant's personal character, again whether positive or negative, when Mr Feek makes reference to Mr Williams' good humour and quick wit.

83. In my view, this reflects a predisposition to see positive attributes in Mr Williams that is not obviously apparent in the claimant's scoring.

84. Mr Feek wrote the scoring criteria and it is clear that he has placed a very high degree of importance on computer skills. He scored these on the basis of his own experience. It is obvious, therefore that he had a perception of Mr Williams as highly computer literate and the claimant as having a low degree of computer literacy. It is impossible to think that he did not have this information in mind when drafting these matrices and I find that that was because he had a clear preference for Mr Williams to remain employed after the redundancy exercise. I find, therefore, that the reason he placed such a high degree of importance on computer skills in the selection criteria was because he wanted Mr Williams to remain in post, rather than Mr Williams remaining in post because he satisfied the criteria that Mr Feek objectively considered most important for the role going forward. In other

words, Mr Williams was always going to be successful and the claimant was always going to be unsuccessful on these criteria.

85. The second additional matter relates to the grievance against the claimant referred to above. In his witness statement, Mr Feek said "The grievance was eventually withdrawn, and the matter resolved, although the issue was reflected in the scoring". In cross examination he denied this and on further questioning said he could not remember what he had done.

86. In my view, the fact that a grievance had been brought against the claimant did impact on the scores Mr Feek awarded and in all likelihood that was a negative impact

Second consultation meeting

87. The second consultation meeting was on 6 July 2020, again after some rescheduling and after the furlough period. The claimant was again accompanied by Ms Harding, the meeting was conducted by Ms Burbeck and, as in the first meeting, Mrs Feek took notes. The claimant was sent a copy of the completed selection matrix prior to the second consultation meeting. I find, and it is clear, that the claimant was not given an opportunity to comment on the proposed selection criteria before they were used.

88. Ms Burbeck said that the need for redundancy was based on losses last year (2019). She confirmed that the selection had been undertaken by Mr Feek and the scores verified by Vasim Haq. It was agreed that in fact this only amounted to Mr Haq checking the arithmetic – he did not assess the actual scoring at all.

89. Ms Burbeck said that the respondent was not obliged to seek agreement with the scoring matrix itself.

90. She confirmed that the selection criteria were split into objective and subjective, the objective criteria being length of service, attendance records, time keeping and disciplinary records, the subjective ones being performance in role, experience, skills, additional skills (versatility) and future potential.

91. Ms Burbeck invited the claimant to go through the scoring with her. Ms Burbeck confirmed in the meeting, however, that regardless of what the claimant said she was not going to challenge the score and it would not be changed. The claimant would receive a reply to his questions.

92. The claimant challenged the scores – in respect, particularly of computer skills, Ms Harding said that on behalf of the claimant that he did what he needed to do – it was unfair to mark him down on something he did not do and was not needed for the job.

93. The claimant says that the scores do not make sense. It is clear that he is unclear about the scores relating to computers and systems and how they have been assessed.

94. After hearing the claimant's comments, Ms Burbeck says that the claimant will be at risk for a week and then at the next meeting consideration will be given to alternative employment - the scoring has been done.

95. The claimant asked if the process was genuine and raised questions about consultation. It was abvious, in my view, that nothing was going to change the outcome at that point, the decision that the claimant had been selected to be made redundant had been irrevocably made.

96. Mr Feek responded on 9 July 2020 to the points raised in the meeting, by providing an explanation of his decision in respect of each criteria. He also said that there were no alternative jobs available for the claimant. I find that Mr Feek did not give any consideration to changing his decision in response to the claimant's representations.

Third consultation meeting

97. There was a further meeting with Ms Burbeck on 14 July 2020. Again the claimant was accompanied by Ms Harding and Mrs Feek attended to take notes.

98. At that meeting, the claimant challenged again the rationale of Mr Feek in coming to the scores he did, observing that they were not justifiable. The claimant suggested job sharing or reduced hours as a way to avoid his dismissal. Ms Harding requested further information about the financial position of the company. Ms Burbeck again said she would take that back to Mr Feek.

99. Ms Burbeck wrote to the claimant on 22 July 2020 in response to the points raised at the meeting on 14 July and included further financial information from Mr Feek. This said that Mr Feek had analysed the sales performance of the company over the preceding 5 years. It also records that credit insurance costs doubled in the preceding year and set out some comparison sales figures between 2016 and 2019. It summarises that there had been a 30% reduction in sales.

100. Mr Patel put it to Mr Feek that the goal posts had changed in considering the position over the last 5 years rather than the last year. Mr Feek's answer was that the reference to 5 years was only to the bad debts, not financial position generally. I do not agree, the letter clearly refers to the fact that Mr Feek has analysed the sales figures over the last 5 years. It was also suggested that profit margins would be relevant, rather than just sales figures and Mr Feek agreed.

101. I find that this correspondence represented a genuine attempt by Mr Feek to explain the financial position of the company to address the claimant's concerns. I place no weight on the fact that he went back five years in trying to explain this rather than just the last year. The accrual of bad debts is clearly relevant and particularly to the fact that insurance costs had increased in the preceding year. Mr Feek also refers to the additional difficulties produced by Covid-19.

102. I prefer Mr Feek's evidence about this letter and find that the letter reflects the genuine belief of Mr Feek that the respondent was in a difficult financial situation at the time.

103. Ms Burbeck sent a further letter on 14 August 2020 to the claimant rejecting his suggestions to avoid redundancy and explaining why. On 20 August 2020, the claimant wrote to Ms Burbeck stating that he disagreed with the contents of the letter of 22 July 2002.

Final consultation meeting

104. The final consultation meeting was held on 21 August 2020. Ms Burbeck went through the reason for rejecting the claimant's suggestions to avoid his redundancy that had been set out in writing. The claimant was given the opportunity to make further comments and he did so. He questioned the financial position of the company. He did not allege in this meeting that his dismissal was in any way connected with his family situation.

105. The claimant was given 10 weeks' notice and the claimant said that in fact he was entitled to three months' notice. The claimant was furloughed throughout his notice, but on full pay.

106. The claimant's dismissal was confirmed in a letter dated 21 August 2020.

Appeal

107. The claimant appealed against the decision on 25 August 2020. The claimant's grounds of appeal were that the consultation was inadequate, the scoring was not objective and was unfairly weighted against the claimant and that he was aware that the respondent had been exploring the option of dismissing the claimant before the redundancy started. The claimant also raised the issue of his notice period being three months.

108. The appeal was heard by Mr Stephen Jones who ran his own HR company. He was independent of the respondent, although he was paid by them to conduct the appeal. Mr Jones said that he was assured by Mr Feek that whatever his decision, the respondent would abide by it. I accept that that is what Mr Jones was told.

109. The first appeal meeting was on 21 September by video. The claimant was again accompanied by Ms Harding. There was no note taker. The following issues were discussed in the appeal meeting.

110. The claimant's notice period, contract and job title; and the claimant challenged the scoring in the matrix of him and Mr Williamson. He particularly took issue with the relevance of IT skills to the job and particularly that the job does not require great IT skills.

111. The claimant also made it clear this time that he considered the family dispute might be the real reason for the decision to dismiss him.

112. Mr Jones said that he would take the points raised back to the company for consideration including, specifically, make enquires whether the company

had previously been actively looking to dismiss the claimant. Mr Jones asked the claimant for copies of the information about this but the claimant said that it was currently with his legal team. This referred to the letter from MFG. This was in the claimant's possession by then. Mr Jones asked the claimant to give him details of the previous disputes with Mr Feek, but he refused, saying that the company could tell him.

113. The claimant was unable to give a satisfactory explanation as to why he did not provide a copy of this information to Mr Jones. The claimant has also not given a clear explanation as to why he did not provide Mr Jones with more details. Mr Jones said that if he had had this evidence it would have given him an opportunity to investigate the claimant's allegations. In the event, he was not provided with it.

114. Mr Jones said that he made enquiries with Mr Feek and Ms Burbeck about these matters including about the allegation that the respondent had considered dismissing the claimant previously. There is a record of a response from Mr Feek about the matters relating to how the claimant was scored in the form of an email This does not address the question of whether there had been any previous consideration of dismissing the claimant. Mr Jones also does not say what Mr Feek's response was in his witness statement and nor does he address it in the appeal outcome letter. In oral evidence, Mr Jones said

    "I discussed with Mr Feek, he denied it. Said had nothing to do with family – they weren't trying to dismiss the claimant. The claimant indicated he had evidence. I asked for evidence. He didn't tell me what the evidence was, then I held another meeting and asked for any evidence to support... He didn't come to the meeting, his representative did. There was no further evidence. I wrote and asked for evidence. They provided none. Felt one person's word against another so I couldn't prove or disprove either way".

115. The second meeting referred to was on 25 September 2020. The claimant did not attend but Ms Harding did. She did not offer any new evidence and Mr Jones wrote to the claimant after the meeting requesting any further evidence by 30 September 2020. None was provided.

116. Mr Jones did not allow the appeal and he wrote to the claimant to that effect on 5 October 2020 (although the letter is undated, the date was not challenged). Mr Jones said, in his witness statement, that he gave careful consideration to all of the points raised but on the evidence available to him he was satisfied that

    a. Losses had been incurred by the company leading to reasonable grounds for a redundancy situation.

    b. The Respondent had appointed an independent company director to manage the redundancy process in a fair and impartial manner.

    c. Suitable and fair check list criteria had been applied for selection purposes and the scoring was clear, objective and fair. It was not based on subjective criteria and was clearly reasoned.

d. The Consultancy was genuine and extensive (4 meetings over a 6-month period).

e. The Respondent had responded appropriately to the Claimant's questions throughout the consultation process.

117. The appeal outcome letter does not address each of the claimant's ground of appeal separately. Specifically, it does not address the question of whether the respondent had previously considered dismissing the claimant. He does conclude, however, "I am satisfied that the company carried out a fair, thorough and consistent selection process and I uphold the decision reached by DNT Company Ltd to terminate your employment by means of redundancy".

118. I conclude, therefore, that Mr Jones was satisfied that the reason for dismissing the claimant was redundancy. I conclude that the reason why Mr Jones did not refer to the claimant's allegations that the dismissal was not for redundancy in either his outcome letter or his witness statement is that he did not take the allegations seriously. He had the statement of Mr Feek that the claimant's allegations were not true and the claimant had consistently failed to provide the evidence he said he had. In my view it was reasonable for Mr Jones to dismiss these allegations in these circumstances. Any reasonable person would conclude that if such potentially damning evidence existed, it would be disclosed.

New employees

119. A few months after the claimant's dismissal, the respondent appointed two new employees. One of those was a qualified accountant and it was agreed that this had no bearing on the claimant's dismissal or any potential redeployment. The other role was to sell products that Mr Feek described as completely different to the products the claimant was selling. Mr Feek said that he had no experience of the products so would have been unable to train the claimant in this role.

120. The claimant candidly said that he was unable to say whether he could have done that role or not, but he said that he had experience in a multitude of products and it was agreed that he had no experience in the role he was dismissed from before he was taken on by the respondent in 2010. I find that this role was not available at the time the claimant was dismissed – it was created subsequently.

121. On balance, I accept the evidence of Mr Feek that this was a wholly new role that neither he, nor anyone else in the respondent, had the ability to do or train the claimant on.

Law

Unfair dismissal

122. Section 98 (General) of the Employment Rights Act 1996 (ERA) provides

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(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.

(5) . . .

(6) [Subsection (4)] [is] subject to—

(a) sections [98A] to 107 of this Act, and

(b) sections 152, 153[, 238 and 238A] of the Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal on ground of trade union membership or activities or in connection with industrial action).

Reason

123. It is for the employer to show the reason. In *Abernethy v Mott Hay and Anderson* [1974] ICR 323, [1974] IRLR 21, Cairns LJ said "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee".

124. I was referred to the EAT case of *Associated Society of Locomotive Engineers and Fireman v Brady* [2006] IRLR 576 in which *Maund v Penwith DC* [1984] IRLR 24 was cited:

    'If an employer produces evidence to the tribunal that appears to show that the reason for the dismissal is redundancy, as they undoubtedly did in this case, then the burden passes to the employee to show that there is a real issue as to whether that was the true reason. The employee cannot do this by merely asserting in argument that it was not the true reason; an evidential burden rests upon him to produce some evidence that casts doubts upon the employer's reason. The graver the allegation, the heavier will be the burden. Allegations of fraud or malice should not be lightly cast about without evidence to support them.

    But this burden is a lighter burden than the legal burden placed upon the employer; it is not for the employee to prove the reason for his dismissal, but merely to produce evidence sufficient to raise the issue or, to put it another way, that raises some doubt about the reason for the dismissal. Once this evidential burden is discharged, the onus remains upon the employer to prove the reason for the dismissal.'

125. The EAT also referred to the case of *Timex Corporation v Thompson* [1981] IRLR 522 in which it was held that

    "Even where there is a redundancy situation, it is possible for an employer to use such situation as a pretext for getting rid of an employer he wishes to dismiss. In such circumstances the reason for the dismissal will not necessarily be redundancy. It is for the industrial tribunal in each case to see whether, on all the evidence, the employer has shown them what the reason for the dismissal, that being the burden cast on the employer by s.57(1) of the Act".

126. This means that if the employee produces some evidence that casts doubt on the employer's stated reason for the dismissal, the burden goes back to the employer to show that the reason for dismissal was a potentially fair one. As Elias J made clear, the Tribunal does not have to decide what the real reason was if the employer had failed to show that the reason for dismissal was a potentially fair one. The dismissal will be unfair if the Tribunal is simply not satisfied that the employer has shown a potentially fair reason.

127. Ms Anderson submitted that "Where a respondent employer has satisfied the Tribunal that there was a state of affairs which amounts to a redundancy situation, the Tribunal must decide whether the dismissal was wholly or mainly attributable to that state of affairs. The Tribunal must examine the evidence available to determine what was the real or, if there was more than one, the principal reason for dismissal".

128. I do not agree with this submission to the extent set out above. The tribunal is *not* required to decide what the real or principal reason for dismissal was. It is only required to decide whether the respondent has shown that the real or principal reason was redundancy. If it does not show that, the tribunal is not required to identify what the actual reason was, although it is not prohibited from doing so.

Redundancy

129. Section 139 ERA provides that

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(*a*) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(*b*) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

(2) For the purposes of subsection (1) the business of the employer together with the business or businesses of his associated employers shall be treated as one (unless either of the conditions specified in paragraphs (*a*) and (*b*) of that subsection would be satisfied without so treating them).

(3) For the purposes of subsection (1) the activities carried on by a local education authority with respect to the schools maintained by it, and the activities carried on by the [governing bodies] of those schools, shall be treated as one business (unless either of the conditions specified in paragraphs (*a*) and (*b*) of that subsection would be satisfied without so treating them).

(4) Where—

(*a*) the contract under which a person is employed is treated by section 136(5) as terminated by his employer by reason of an act or event, and

(*b*) the employee's contract is not renewed and he is not re-engaged under a new contract of employment,

he shall be taken for the purposes of this Act to be dismissed by reason of redundancy if the circumstances in which his contract is not renewed, and he is not re-engaged, are wholly or mainly attributable to either of the facts stated in paragraphs (*a*) and (*b*) of subsection (1).

(5) In its application to a case within subsection (4), paragraph (*a*)(i) of subsection (1) has effect as if the reference in that subsection to the employer included a reference to any person to whom, in consequence of the act or event, power to dispose of the business has passed.

(6) In subsection (1) 'cease' and 'diminish' mean cease and diminish either permanently or temporarily and for whatever reason.

130. In *Murray and Another (A.P.) v Foyle Meats Limited (Northern Ireland)* 1999 ICR 827 HL), Lord Irving of Laird explained that in order to determine whether the the requirements of a business for employees to carry out work of a particular kind, or have ceased or diminished requires the tribunal to ask two questions of fact:

    "The first is whether one or other of various states of economic affairs exists. In this case, the relevant one is whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second question is whether the dismissal is attributable, wholly or mainly, to that state of affairs. This is a question of causation".

131. In *James W. Cook & Co (Wivenhoe) Ltd v Tipper and others* [1990] I.C.R. 716, Neill L. J. held that an Employment Tribunal is entitled to consider whether a redundancy situation is genuine, but is not permitted to investigate the commercial and economic reasons behind the redundancy situation.

Fairness

132. In respect of Redundancy, the leading case is *Williams v Compair Maxam Ltd* [1982] IRLR 83 in which the EAT set out the standards which should guide tribunals in determining whether a dismissal for redundancy is fair under s 98(4). Browne-Wilkinson J, giving judgment for the tribunal, expressed the position as follows:

> *"… there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:*
>
> > *1 The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.*
> >
> > *2 The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.*
> >
> > *3 Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.*

4 The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

5 The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

The lay members stress that not all these factors are present in every case since circumstances may prevent one or more of them being given effect to. But the lay members would expect these principles to be departed from only where some good reason is shown to justify such departure. The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim'.'

Selection

133. As is clear from *Williams*, the selection criteria must not be wholly subjective - the decision should not depend solely on the opinion of the person making the selection, and decisions made under the criteria must be justifiable. Any criteria used must be as advertised, clear and transparent. *British Aerospace plc v Green* [1995] ICR 1006 is authority for the uncontroversial proposition that the obligation on an employer in a redundancy exercise is to set up a selection exercise that can reasonably be described as fair. The tribunal is not permitted to substitute its own selection criteria – provided the selection criteria are not such that no reasonable employer could have reasonably adopted them. I also refer to the following passage:

"The use of a marking system of the kind that was adopted in this case has become a well-recognised aid to any fair process of redundancy selection. By itself, of course, it does not render any selection automatically fair; every system has to be examined for its own inherent fairness, judging the criteria employed and the methods of marking in conjunction with any factors relevant to its fair application, including the degree of consultation which accompanied it. One thing, however, is clear: if such a system is to function effectively, its workings are not to be scrutinized officiously. The whole tenor of the authorities to which I have already referred is to show, in both England and Scotland, the courts and tribunals (with substantial contribution from the lay membership of the latter) moving towards a clear recognition that if a graded assessment system is to achieve its purpose it must not be subjected to an over-minute analysis. That applies both at the stage when the system is being actually applied, and also at any later stage when its operation is being called into question before an industrial tribunal".

134. This case is authority for the following propositions: that the selection process must be judged overall for its fairness; and that the operation of the selection process must not be analysed in too much minute detail. It is not

the role of the tribunal to analyse in detail the application of the selection criteria to the claimant and then undertake it again. The Tribunal may, however, enquire further in cases of obvious mistakes or where it is alleged the scoring is undertaken in bad faith (*Dabson v David Cover and Sons Ltd* EAT 0374/10)

135. The respondent referred particularly to *Mitchells of Lancaster (Brewers) Ltd v Tattershall* UKEAT/0605/11 which was also cited in *Nicholls v Rockwell Automation Ltd* UKEAT/0540/11 as authority for the proposition that objectivity cannot be considered an absolute requirement. The passage to which a was referred is at paragraph 21 of *Tattershall*:

"*The tribunal in this case also criticised the criteria adopted by the Respondent because they were not "capable of being scored or assessed or moderated in an objective and dispassionate way". Just because criteria of this sort are matters of judgment, it does not mean that they cannot be assessed in a dispassionate or objective way, although inevitably such criteria involve a degree of judgment, in the sense that opinions can differ, possibly sometimes quite markedly, as to precisely how the criteria are to be applied, and the extent of which they are satisfied, in any particular case. However, that is true of virtually any criterion, other than the most simple criterion, such as length of service or absenteeism record. The concept of a criterion only being valid if it can be "scored or assessed" causes us a little concern, as it could be invoked to limit selection procedures to box-ticking exercises".* (my emphasis)

136. This is wholly consistent with the requirements in *Williams* that criteria that depend wholly on the opinion of the person making the decision should be avoided and that the criteria should be capable of objective justification. The underlined part of the passage form *Tattershall* shows that what the Master of the Rolls was saying was that criteria that require a degree of judgment can still be capable of being objectively or dispassionately applied.

137. In *Rockwell*, the EAT said "*it is not the law that every aspect of a marking scheme has to be objectively verifiable (by which we mean verifiable independently of the judgment of management) as fair and accurate. If overall the redundancy criteria were reasonable (as the tribunal appears to have accepted) then the fact that some items were not capable of objective verification is not fatal to the scheme*" before citing *Tattershall* as above. Again, I do not consider this to be in conflict with *Williams.* In that case, the tribunal had rejected any non-genuine motivations of the scorers and, having done that, the EAT said that "*Once the tribunal found what the reasons actually were for the scores, it could then review whether the markers acted reasonably*". In effect, this is the Tribunal asking whether the scores were assessed in an objective or dispassionate way, rather than capriciously or for non-genuine reasons.

138. I was also referred to the case of *Odhams-Sun Printers Ltd v Hampton and ors* EAT 776/86 in which the criteria "balance of skills" was held to be too vague/ambiguous. With respect, I do not think that the circumstances of that case add to the guidance set out above.

139. *British Aerospace* (above) is also authority for the proposition that the extent to which the selection criteria are consulted on may be relevant to the fairness of the selection process, along with other factors referred to, albeit that there is no obligation to obtain agreement to selection criteria outside a collective consultation exercise.

140. In respect of particular aspects of the scoring, in *Carclo Technical Plastics Ltd v Jeyanthikumar* UKEAT/0129/10/CEA, the EAT upheld the decision of the Tribunal that double counting an issue under two criteria was unfair in that it resulted in a less favourable score for the claimant than would otherwise be the case. They said

"in our judgment it cannot be said that the tribunal erred in substituting its own judgment for that of the employer in its conclusion about the unfair way in which the procedure was applied. In our judgment the use of one incident to double count, and thereby mark the Claimant down in two categories losing her eight points rather than either five or three points, was a fundamental and obvious error in the application of the procedure. In our judgment it falls a long way from amounting to the tribunal interfering with the specific assessment to the point where it may be said that the tribunal was simply substituting its own judgment".

Consultation

141. In *Polkey v AE Dayton Services Ltd 1988 ICR 142, HL* Lord Bridge stated 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 organization..."

142. In *R v British Coal Corpn, Ex p Price [1994] IRLR 72,* Glidewell LJ said:

"Fair consultation involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted and to express its views on those subjects with the consultor thereafter considering those views properly and genuinely"

143. The role of the tribunal is to consider whether the consultation provided the claimant with a fair and proper opportunity to understand the reasons for his selection and to comment upon them and challenge them if necessary.

144. In respect of the relevance of an appeal to a redundancy situation, in *Taylor v OCS Group Ltd* [2006] EWCA Civ 702 it was held that Tribunals should apply the statutory test in s 98(4) and

"should consider the fairness of the whole disciplinary process. If they find that an early stage of the process was defective and unfair in some way,

they will want to examine any subsequent proceeding with particular care. But their purpose in so doing will not be to determine whether it amount to a rehearing or a review but to determine whether, due to fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage".

145. In respect of the appeal, Mr Patel referred me to *Uddin v London Borough of Ealing* EAT 0165/19 in respect of whether the knowledge of Mr Feek should be imputed to Mr Jones as the appellate decision maker, even though he had not been informed about the letter in which reference is made to dismissing the claimant. In that case, the investigating officer had failed to mention to the dismissing officer that the complainant had withdrawn their complaint against the claimant that she had previously made to the police. HHJ Aurback said "*I conclude that Lord Wilson (and his fellow Justices) were of the view, first, that the question of whether the knowledge or conduct of a person other than the person who actually decided to dismiss, could be relevant to the fairness of a dismissal, could arise, both in relation to the Tribunal's consideration of the reason for dismissal under section 98(1) and/or its consideration of the section 98(4) question; and that, in a case where someone responsible for the conduct of a pre-investigation did not share a material fact with the decision-maker, that could be regarded as relevant to the Tribunal's adjudication of the section 98(4) question*".

146. This means that in considering the overall fairness of the process – including the appeal – any failure to disclose the information to Mr Jones by Mr Feek is likely to be relevant to the overall fairness of the decision to dismiss the claimant.

Redeployment

147. Employers are expected to take reasonable steps to mitigate against the effects of redundancy by considering whether suitable alternative employment is available. (*Williams v Compair Maxam Ltd* [1982] IRLR 83)

General

148. Finally, the range of reasonable responses applies to all aspects of the fairness decision and "*it is not the function of the industrial 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".* (*Williams v Compare Maxam Ltd* [1982] IRLR 83).

149. I must, therefore, not substitute my own decision but seek to assess whether each aspect of the dismissal process was in the range of reasonable responses of a reasonable employer.

Notice pay

150. The notice that an employee is entailed to is governed by s 86 Employment Rights Act 1996 which provides for minimum periods of notice. That provides that an employee is entitled to, as far as relevant, one week's notice for each complete year of continuous employment up to a maximum of 12 weeks' notice. If there is a contract in place providing for more notice, that applies, rather than the statutory minimum.

151. A contractual term can be in writing or verbal. However, the term must be clear and agreed. There must be an offer to enter into a particular contractual term, that offer must be accepted and there must be some consideration.

Conclusions

Reason for dismissal.

152. The reason for the claimant's dismissal put forward by the respondent was redundancy - that the respondent's need for employees to carry out work of a particular kind, had ceased or diminished. The particular work was that of Sales Manager (or Director).

153. I accept that Mr Feek was the person who made the decision. It is clear that Ms Burbeck was managing the process, but it would be very unusual for her to be making the decision who to dismiss when she was not directly associated with the respondent. The first question for me, then, is whether Mr Feek genuinely believed that the respondent had a need for fewer Sales Directors. In my view he did. The financial information was not detailed, but it was consistent. By the start of the process there was evidence to show that the company was not doing as well as it had been. Mr Feek said the work of the claimant could be shared out amongst remaining staff.

154. I remind myself that it is not my place to judge the wisdom of this. The fact that sales are variable in the industry, as accepted by the respondent, and that things might have turned round quickly does not mean that the respondent did not genuinely believe it could manage with one less Sales Director. Nor did the availability of furlough change that. Similarly, I place little weight on the appointment of a new employee some months later.

155. This is only half of the question, though. The fact that the respondent decide that it could and would manage with one less Sales Director does not mean that that was the sole or principal reason for dismissing the claimant.

156. Having regard to *Associated Society of Locomotive Engineers and Fireman v Brady*, in my judgement the claimant has produced evidence that casts serious doubt on the respondent's stated reason. That evidence comprises the fact that the respondent, shortly before the commencement of the redundancy process, sought advice about ways to dismiss the claimant, the fact that, as I have found, the selection matrix was designed to favour Mr Williams and the background of the ongoing family dispute. The respondent had also been monitoring the claimant's emails without his knowledge since early 2019.

157. The advice about dismissing the claimant was around the same time as the grievance was brought against the claimant. That was a serious allegation that was not raised with the claimant. Mr Williams dropped it and shortly thereafter the redundancy process started. Taken together, and particularly in the light of the selection criteria, this is enough evidence to cast serious doubt on the respondent's stated reasons.

158. In my judgment, the respondent has not produced evidence to show the stated reason. It is correct that the respondent brought in two independent people to manage the process, but Mr Feek made the decision. He said, as did Mr Jones, that the respondent would have abided by the decision of Mr Jones on appeal, but Mr Feek withheld important evidence from him that might have altered the decision.

159. This, I find, is because Mr Feek never had any intention of dismissing anyone except the claimant.

160. This is not a case where there was a genuine redundancy process and Mr Feek was pleased that the outcome was the dismissal of a troublesome employee. Rather in my view, the respondent used the possibility of a redundancy process to facilitate the claimant's removal from the respondent's employ. So while the reduction in Sales Directors was *a* reason for the claimant's dismissal, it was not the sole or principal reason.

161. I do not know if the principal reason was the family dispute or the grievance that Mr Williams made, but I do not have to decide that. It is enough to say that the respondent has not shown that the reason for the claimant's dismissal was redundancy.

162. For that reason, the claimant's claim that he was unfairly dismissed is successful.

Reasonableness

163. In any event, however, the process was also flawed for the following reasons.

164. As referred to previously the section criteria were not selection criteria that a reasonable employer acting reasonably would have applied. I have found that this is because they were predetermined to select the claimant for redundancy. However, in particular there was a high degree of double or multiple counting. The claimant's computer skills, or perceived computer skills, were taken into account numerous times, giving Mr Williams the opportunity to amass a higher score than the claimant.

165. The selection criteria that were shared with the claimant at the first consultation meeting were not the actual criteria used by Mr Feek and the two criteria removed were ones that, on the face of it, did not involve computer skills – namely new business development and ability to work as part of a team.

166. The criteria themselves were not *capable* of objective justification. They were based wholly on Mr Feek's perception of the claimant. This is not a case where a degree of judgment is required to assess criteria – there was no objective basis to Mr Feek's assessment at all. This is reflected in the different issues that were referred to in respect of the claimant and Mr Williams in the category of future potential – Mr Williams is described as having a good humour and quick wit. None of the claimant's personal qualities are mentioned.

167. Mr Feek said in evidence that he took the fact of the grievance (although it was withdrawn) into account in scoring the claimant but in oral evidence he was unable to say why or how or even if, in fact, that was true. In *Tattershall*, the EAT said "Just because criteria of this sort are matters of judgment, it does not mean that they cannot be assessed in a dispassionate or objective way". This is not a case like that – it is abundantly clear that these criteria could not be, and were not, assessed in a dispassionate or objective way.

168. In respect of consultation generally, I find that there was no genuine consultation. The respondent was not given an opportunity to respond about the selection criteria even though he was told he could. Straight after the first consultation meeting he was furloughed and the decision was made before, or as soon as, he returned to work.

169. None of the points the claimant raised about the scoring were considered properly. An explanation was provided, but it was perfectly clear that there was no consideration at all to changing the scores as a result of the claimant's feedback.

170. In respect of alternative employment, I have found that there were no suitable jobs available for the claimant.

171. The relevance of an appeal in a redundancy case is whether it can correct any procedural defaults. In this case, because Mr Feek withheld information from Mr Jones, rather than remedy any unfairness it compounded it. Although it would have helped the claimant's case had he provided the evidence he had, that does not detract from the fact that Mr Feek already had the information and did not tell Mr Jones about it, even when asked.

172. In reality, my findings as to reasonableness go to support my findings that the real reason for the claimant's dismissal was not redundancy, but in any event, had this been a case where the claimant was genuinely dismissed for redundancy and the respondent was only pleased about that, I would have found that the claimant was unfairly dismissed in any event.

Polkey or contributory conduct

173. I have not made any findings about whether any award should be reduced on the basis that the claimant might have been dismissed at some point anyway. The claimant submitted that in the event I find that the real reason for dismissal was not redundancy, this would not arise However, in light of my findings that redundancy was <u>*a*</u> reason if not the sole or principal

reason, this may still be relevant and I therefore reserve this aspect to a remedy hearing and will invite further submissions on it.

Notice pay

174. The claimant was paid 10 weeks' notice pay. In my judgment, there was no term in the claimant's employment contract entitling him to 3 months' notice so that the statutory minimum notice period applied. This is because the claimant was clear that no explicit notice terms had been agreed at the outset. There was, in 2016, no effective variation to the contract. The claimant did not sign the new terms proposed. That means he either continued to work under the original terms (which were subject to the statutory minimum) or agreed to the new terms by continuing to work under them which also included the statutory minimum.

175. The claimant's claim for notice pay is therefore unsuccessful and is dismissed.

Remedy

176. Remedy for the claimant's claim of unfair dismissal will be determined at a separate hearing.

1311420/2020

Employment Judge **Miller**

Date 2 November 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

22/11/2021
FOR EMPLOYMENT TRIBUNALS