EMPLOYMENT TRIBUNALS

Claimant: Ms J Finch

Respondent: The Distribution Business Ltd

Heard at: Watford ET: by CVP **On:** 1 December 2021

Before: Employment Judge Tuck QC (sitting alone)

Appearances
For the Claimant: In Person
For the respondent: Mr S Way, Counsel

JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent.
2. Had a fair procedure been followed, the claimant would have had a 33% chance of being retained.
3. The Claimant's claim of unlawful deductions from wages is dismissed on withdrawal.

REASONS

1. By an ET1 presented on 6 December 2020, following a period of early conciliation between 3 November and 3 December, the Claimant brought claims of unfair dismissal and unpaid wages. The latter has been dismissed on withdrawal.

2. The Claimant was employed by the Respondent between July 2001 and 20 October 2020, when she was dismissed, the respondents citing the reason of redundancy.

Issues.

3. The issues for determination were agreed to be as follows:

    a. Has the Respondent shown a potentially fair reason for dismissal within section 98(2) of the Employment Rights Act 1996, namely redundancy within s 139 ERA.
    b. Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant, within s98(4) ERA? This involves consideration of the procedure adopted, including:
        i. Did the Respondent adequately warn and consultation the Claimant
        ii. Did the Respondent adopt a reasonable selection decision, including its approach to a selection pool
        iii. Did the Respondent take reasonable steps to consider alternatives to dismissal.
        iv. Was dismissal within the range of reasonable responses.
    c. If the dismissal was procedurally unfair, what difference if any would a fair procedure have made ("Polkey").

Evidence.

4. I was provided with a joint bundle of documents running to 173 pages and read those to which I was referred. For the Respondent I was provided with witness statements and heard live evidence from Ms Sandra Martland, General Manager and Mr Russell Whitehair, Director and company solicitor of Mediaforce, (the holding company of the Respondent), and was provided with a signed statement from Ms Sarah Fowler, who was unable to attend to be cross examined due to a medical appointment. The parties agreed that I should read the statement, but attach limited weight to it given her non attendance. For the Claimant I was provided with witness statements and heard live evidence from her, and also from Ms Collette Lewis.

5. The Respondent provides services to regional and local newspaper companies in the UK, distributing their free newspapers door to door, or providing subscription delivery of local paid for titles, and also is concerns with inserts and leaflets either within or alongside the newspapers. Given the nature of the business, dependent upon print press, it has been in decline for a number of years, since, Mr Whitehair said, at least 2008, as advertisers, on whom the newspapers largely depend, move resources to online advertising. Ms Fowler, another (former) distribution controller said this had been obvious to her too. Whilst the Respondent was, at the period which is material for this claim, a small undertaking (with five employees reducing to three), Mr

Whitehair said its holding company was Mediaforce, and it is clear that the Respondent had access to HR and legal advice from that holding company.

6. The Claimant commenced employment with the Respondent in July 2001 as a Distribution Controller. She was responsible for ensuring the distribution of a number of free newspapers; she had responsibility for over 3500 "field distributors" and for ensuring their rates of pay complied with minimum wage legislation. She was solely responsible for the Irish title, The Limerick Leader, and dealt with HR issues relating to field agents for the whole department. She compiled reports for the warehouse and dealt with self employed drivers delivering to field agents, and compiled information for yearly audits.

7. On return from annual leave on 20 March 2020 the Claimant says she received a telephone call from Sandra Martland and was told "there is no money in the pot to pay you", and that she would be "laid off" and be unapid for six months. She says it was not until 27 March that she was told she would be paid for March, and that in that call Miss Martland said that the respondent was "looking at" the newly announced furlough scheme, but told the Claimant she would have to agree to a 20% pay cut before being placed on the scheme. The Claimant says she replied that she would need to think about this, and in her statement said that as the furlough scheme would only pay 80% of wages, therefore leaving her with only 64% of her normal wages. Miss Martland agreed that she spoke to the Claimant on the latter's return from holiday in Spain, as the Claimant had to self isolate, and agrees that she referred to the likelihood of pay cuts being imposed. However, she denies that she made any mention of a 20% pay cut, and denies she said there would be an unpaid lay off. Mrs Lewis, who was employed not by the Respondent but an associated employer (I understand within Mediaforce), said that she too received a telephone call from Miss Martland (as her employer) asking her to accept a 20% pay cut before being placed on furlough. Mrs Lewis said that she refused to accept, and Miss Martland said that Mrs Lewis and the Claimant were the only two people who had not agreed to the cut.

8. On 31 March 2020 the Respondent wrote to the Claimant placing her on the (then) new government furlough scheme. A response in writing was required. The Claimant sent a text to Miss Martland saying "as I am being paid 80% by the government I am on a 20% pay cut already for 3 months may be longer so I will be only happy to send email when I am back working at my desk. Whenever that may be." I understood this text to mean that the claimant whilst on furlough would be paid 80% of her normal salary – and she confirmed this is what in fact happened.

9. As to the downturn in business sustained by the Respondent in 2020, Miss Martland said that in February 2020 the Respondent was managing 29 titles and just under 625,000 copies. By April 2000 that had reduced to 4 titles and 65,000 copies. The Respondent took the view that the decline in distribution of free print newspapers which had been ongoing for some years, had been accelerated by the pandemic, and would be irreversible. In her oral evidence Miss Martland said that in May and June 2020, publishers were indicating that they may or may not bring titles back, but were not giving any definite indication; she did not share this information with staff. She subsequently added that July 2020 the Respondent took the view that there would only ever be enough work for one distribution controller. It was not clear whom she discussed this with or what imperial data she was relying on in reaching the conclusion.

10. On 17 July 2020 Miss Martland said that she tried to telephone the Claimant, but received no answer. She did speak to Ms Fowler on that date. On 20 July she attempted to call the Clamiant again, and again got no answer. It was not disputed that on the 20 July Miss Martland did speak to Mrs Lewis and told her that she was at risk of redundancy; Mrs Lewis was content to be made redundant and so effectively that was the end of her 'process'. In their conversation on 20th July, Miss Martland said she had not been able to reach the Claimant, and Mrs Lewis advised that the Claimant was looking after her young granddaughter, and would not be able to answer calls until early evening.

11. The Claimant said that she spoke to Miss Martland after 6pm on 20 July, in a call which her mobile phone records indicate lasted for 1 minute and 37 seconds. She adduced those phone records. She said that in that call she was told that she was at risk of redundancy as the company situation had not improved, and that Miss Martland would update her the following day. Miss Martland denied that she spoke to the Claimant on 20 July.

12. Miss Martland and the Claimant agreed that they did speak on 21 July 2020; the Claimant said it was "after a flurry of missed calls". Miss Martland sent a text to the Claimant saying "Hi Julie have tried to call a few times no answer would you give me a call please Sandra". This text does not assist with whether the two had spoken on 20th or not.

13. Miss Martland did not write any note, or confirm in email or make any other record of any of the conversations she had in relation to redundancies. I consider this a startling omission from an experienced manager who had HR support available to her.

14. The Claimant stated that she was told on 21 July 2020 that she had been selected for redundancy; she says she replied by asking Miss Martland what the criteria for selection had been and says Miss Martland replied that she did not know because it was being handled by the company solicitor, Mr Whitehair. Miss Martland says that on 21 July she had a first conversation with the Claimant, and told her that she was at risk of redundancy, and talked the Claimant through what selection criteria she was going to be scoring the Claimant and the other two distribution controllers against. I return to this dispute of fact below, because in determining it, I have had regard to what subsequently happened (as both parties urged me to).

15. Mrs Lewis said that on 22 July 2020 the Claimant came to her home, and told her that Miss Martland had told her the previous day she was dismissed by reason of redundancy. Mrs Lewis said that she and the Claimant telephoned ACAS to seek advice (Mrs Lewis was particularly concerned about how her notice period would be paid and whether it would be on the furlough 80% rate or not).

16. In the bundle before me were three “employee assessments” which Miss Martland said she completed on 24 July 2020 to select which of the three distribution controllers would be retained, and which two dismissed by reason of redundancy. Her evidence was that the selection criteria / scoring scheme was one she had first come across when employed by a publishing company years before, and that she had used it numerous times with the respondent. It was not in dispute that the first time the Claimant saw this document, either in ‘template’ form or completed for her, was during disclosure for this ET Hearing. Miss Martland did not offer any explanation as to why, if she was experienced in conducting redundancy exercises, she did not set out in writing to the Claimant (and others affected) that the Respondent had formed the view there was a redundancy situation, and that it proposed to pool the three distribution controllers together and retain only one, and that it proposed to use the selection criteria she had previously used. When I asked Miss Martland whether providing blank templates to effected employees could have allowed them to given examples of their work to be taken into consideration, she said she “took that on board”.

17. The criteria Miss Martland used were:
    a. Performance
    b. Adaptability
    c. Personal drive
    d. Skills
    e. Team relationships

f. Attendance
g. Disciplinary record

Miss Martland did the scoring herself, and said she did not consult with anybody else – including the Claimant's line manager. In her oral evidence she said she "knew Julie's work and ethic". She did not consult or have regard to any written evidence, and there were no appraisals or targets set for employees. The Claimant was scored at 44, and the other two employees at 49 and 52. There is no real rationale for any of the scores given. The matrix required performance to be measured against "work objectives and targets" – but there were none in this workplace. Even under the heading of attendance there is no record of the number of days of absence despite it being required to generate a score. The Claimant scored less well than her colleagues on team relationships and "adaptability". As to team relationships, the employee retained was noted as being "well liked" in scoring full marks for team relationships. The Claimant was marked as having "issues as a team player which we have been working towards improving". No examples were given as to what these issues were, when they were raised or in relation to what work she had been required to show improvement. As to adaptability, the Claimant was noted as "not always adapt[ing] to change easily" and again it is noted that issues were being worked on. Again not a single example was given. Orally Miss Martland sought to rely on an incident she said had taken place in 2014, six years prior to the redundancy, and the Claimant was adamant that the matter had not been raised with her, either in 2014 or in 2020 when being made redundant.

18. On 27 July 2020 Miss Martland states that she told the Claimant she had been scored against the other two distribution controllers and that she had not received the highest score and would therefore be made redundant. Miss Martland says she told the Claimant that the Claimant did not have the skills relating to direct delivery and software abilities required for subscriptions, and that "her adaptability, team relationships and attendance had brought her overall score down". The Claimant denies that she received any call from Miss Martland on 27 July 2020. Miss Martland did not in her evidence say what the Claimant's response to had been to being told about her relatively poor scores under the heading of adaptability, team relationships and attendance.

19. On 28 July 2020 the Claimant sent a text to Miss Martland saying "Hi sandra, received no email or letter yet!". She said that was because it had been a week since she had been told she was redundant. On the same date the Claimant also sent a social media message to Mrs Lewis saying "Another thing for ACAS. Left hanging and had to chase for a response after over a week of being told". Miss Martland replied to the Claimant on 28 July saying "they are in the process of being prepared I believe and should be with you this week".

20. The decision to terminate the Claimant's employment by reason of redundancy was confirmed in an email sent on 28 July 2020. The Claimant replied the same day saying that she wanted a copy of the redundancy policy, and wanted to know what criteria had been used. Mrs Lewis was also sent a termination letter on 28 July (it not being in dispute that she had been confirmed as redundant on 20 July). The Claimant replied by email at 17.44 on 28 July and asked for a copy of the redundancy policy. She also wrote "I would also like to know the selection criteria that determined which of the three controllers was chosen for the available vacancy".

21. On 29 July 2020 Miss Martland replied and said "as discussed on our call selection criteria and process has been diligently followed by the company to make an objective decision as to who has the best aptitude, skill and experience for the work within which it will be involved in the new prevailing environment into the future -so far as it can see".

22. The Claimant did not formally confirm receipt of her dismissal letter and was chased by Mediaforce HR on 11 August 2020. In response, on 14 August 2020 the Claimant said she had sought advice, and "would like once again to request a copy of the company redundancy policy, and would also ask that as part of my consultation process you advise me of the selection criteria used, and my resulting score in that process in relation to the other candidates. You advised me that the company solicitor would be handling the selection process, as per our conversation on 21 July, so I understand if you need to consult with him before getting back to me". Miss Martland replied on 18 August and in that reply said "selection is based on the requirements of the business… and takes into account performance, adaptability, skill set, team relationships, application and anticipating circumstances post lockdown…" The Claimant responded to this on 21 August listing some of the works she had undertaken at the respondent and that she did not understand how she did not meet the required level for the role available.

23. The Claimant presented a formal letter of appeal on 14 October 2020 to Mr Whitehair. She again made reference to having "repeatedly asked to be informed of what the selection criteria were, but even without that information I find it hard to believe that I was lower scoring on the criteria than any other member of my team…". It seems (he has no notes and does not specifically recall doing so) that Mr Whitehair asked Miss Martland to set out chronologically what had happened, which she did in an email on 16 October 2020. Miss Martland in the same email responded to the Claimant's letter of appeal commenting on each paragraph. Mr Whitehair said that he was provided with the three scoring matrixes of the Claimant and other two controllers. He did not interview the Claimant or the other affected employees, and does not recall whether he had conversations with Miss Martland, but

said if he did, they were not minuted. He did not seek from Miss Martland any explanations for her scores, or challenge the scant / absent information within the matrix forms. His outcome letter of 2 November 2020 simply adopted what Miss Martland had told him saying that "all aspects [had been] covered off in a fair and objective manner".

24. Returning to the key dispute of facts as to when the Claimant was told of her redundancy, and when she was first informed of the criteria being used:

    a. Mr Way submitted that it is much more logical that the Claimant was told she was at risk on 21st July, scored against the matrix on 24th and informed of her redundancy on 27th July. He asked rhetorically why Miss Martland would have completed a scoring matrix on 24th July if she had already informed the Claimant of the result on 21st. The outcome letter on 28th July confirmed the conversation "on Monday", and I have also had regard to Miss Martland's email of 18 August in which she said "as explained selection is based on the requirements of the business….". I have also had regard to Ms Fowler's statement which says she was called on 17th July and told she would be3 "assessed in relation to performance, skills amongst other things" (sic).
    b. The Claimant has consistently said that she was told she had *been selected* (her emphasis) for redundancy on 21st July. I note that the Claimant has gone to some efforts to seek to establish with evidence from her phone company when calls were made (she could not be provided with information about incoming calls, apparently due to data protection protocols). Mrs Lewis confirms that by 22 July when she and the Claimant telephoned ACAS, the Claimant reported being told she had been made redundant, and the whatsapp message on 28th complaining of having been "left hanging" for a week supports this contention.

       As to the suggestion that Miss Martland had discussed the selection criteria with the Claimant (on 21 July, or indeed at all prior to her dismissal), this is at odds with the Claimant's emails of 28 July and 14 August which firmly state that she was at that stage unaware. Furthermore, I am unable to accept the suggestion that had the Claimant been told the criteria and her relatively lower scores during a conversation with Miss Martland – on 27 July 2020 or indeed any other date – she would not have sought details about her scores and challenged the rationale. I also note that while Miss Martland referred to some of the criteria she had assessed in her email of 18 August, she did not list them as they appear on the scoring sheets and omitted some.

    Taking all these factors into account, on a balance of probabilities, I prefer the evidence of the Claimant and Mrs Lewis. They were clear and

consistent, and their evidence was supported by such contemporaneous communications as there were. Miss Martland referred to having undertaken several redundancy exercises, and as an experienced manager ought to have made a note of her conversations, and indeed have confirmed them in emails/ letters thereafter.

Submissions.

25. Both parties prepared written submissions which were submitted prior to the case. Both spoke to those submissions. Both submissions referred to a wealth of caselaw, which I considered fully.

26. Mr Way said that there was no real challenge to the fact of a redundancy situation. Employment tribunals must, he said, take a very light touch to the employer's evidence about diminution of the requirements of the business for employees to carry out work of a particular kind. In fact, Ms Martland and Mr Whitehair confirmed that in fact the pandemic from March 2020 merely accelerated trends which had been apparent for some years.

27. The real issue therefore is section 98(4). Mr Way said that there could be no real challenge to the selection pool of the three distribution controllers. As to criteria, he said these would inevitably involve some subjective element, and cited the case of *Tattershall* UKEAT/0605/11. Mr Way said that the criteria were fairly applied by Ms Martland who knew those she was marking very well and was in a good position to do that. He said she had properly applied her mind to that test, and it is not for the tribunal to consider whether she was correct or not – but to ask whether she has behaved reasonably (applying the range of reasonable responses).

28. As to consultation, there are disputes of fact as to when telephone calls were placed from Ms Martland to the Claimant, and what was said. Score sheets are dated 24 July 2020, and Mr Way said it would make no sense to score after she had informed the Claimant she had been selected as redundant. The Claimant had no explanation as to why Ms Martland would do this. He urged me to find that there had been an at risk call, scoring, then a final call took place informing her of her selection for redundancy. That makes more sense than there being dismissal followed by a scoring exercise. The consultation period of a week is a short period, but just as Ms Martland is correct about the dates, so too is she correct about the content. As to why the Claimant asked to be told what the selection criteria were on 28 July and 14 August 2020, Mr Way said she had forgotten.

29. There was an appeal which Mr Way said operated to extend the consultation period. She had an opportunity to say why her scores should have been different. He said this was a small undertaking – though agreed that I could take into account the fact that there is a larger structure behind the respondent as it is part of Mediaforce, which provided HR and legal support when needed (albeit he submitted that I should place little weight on this as he said the respondent operated as a lone entity).

30. Mr Way said that there was no suitable alternative employment. As to the existence of the 'furlough' scheme he noted that the Claimant did not ask to remain on furlough at the time, and that in any event the respondent reasonably took the view that furlough was there to support sustainable jobs. As to conversations with distributors who were not sure what their future business intentions were post pandemic lockdowns, and the question of whether furlough would have allowed consideration of this to be paused, he said the scheme was not designed to prevent any and all redundancies.

31. Finally, as to *Polkey*, he said that if the criteria had been different or the Claimant had received the opportunity to have input into the scores she received, the result would have been no different (and there was a 0% chance of this changing). Both the other employees scored higher than her; he said a further phone call would not have extended the redundancy consultation period in any meaningful way – the period would have been extended by a few days at most. Mr Way submitted that the relevant question is what this employer would have done – and the answer is dismissal would have been in the same time period. Alternatively, if furlough would have been an alternative to redundancy, the relevant question is when would the Claimant's dismissal have been fair notwithstanding the existence of the furlough scheme. He says the approach should be akin to a party in breach of contract where one asks what the most beneficial way of breach is performing it is.

32. Ms Finch relied on her detailed written submissions. In particular, she says she was not told of the fact that one of the three controller posts was being retained, was not told of the selection criteria, and had the scoring been objective she would have been retained. Orally she added simply that after 19 years, her career ended after two calls lasting less than 15 minutes. Her accounts had always been consistent that she was 'warned' on 20th July and dismissed on 21st July.

33. I asked the Claimant what her submissions as to Polkey were. She said that had there been a fair procedure she would have been kept on, and there was a 95% chance of this as she was the most experienced person in the role. She said that she had broader experience than Mandy Jovic who was retained. The Claimant thinks it was essentially down to being "well liked" as had been recorded in the selection criteria.

Law

34. The right not to be unfairly dismissed is set out in s.94 of the Employment Rights Act 1996 (ERA 1996). It is currently afforded to employees with two or more years of continuous service with an employer.

35. As set out by the EAT in *London Borough of Hammersmith and Fulham v Keable* UKEAT 0333/19, 26 October 2021:

> "69. The fairness of a dismissal is determined in accordance with the principles set out in s.98 of the ERA 1996. An employer bears the burden of establishing that the dismissal is for a potentially fair reason within the meaning of s.98(2) ERA 1996, and then, if that is established, the Tribunal will determine whether that dismissal was fair or unfair, (having regard to the reason shown by the employer). That determination will depend upon *"whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and, shall be determined in accordance with equity and the substantial merits of the case".* The critical question, therefore, is whether, having regard to those matters, the employer acted reasonably or not in treating the particular, potentially fair reason, as a sufficient reason for dismissing a particular employee.
>
> 70. It is implicit within those words that the question the Tribunal must address, is not whether the Tribunal members themselves would have made the decision to dismiss the employee; they must not simply substitute their view for that of the employer (**Morgan v Electrolux Ltd** [1991] IRLR 89 CA; **London Ambulance Service NHS Trust v Small** [2009] IRLR 563, CA). Over the years, Tribunals have been reminded that they must judge the standard of a fair dismissal, not by that which they would, or might have done, but by reference to the options open to a reasonable employer, in other words by an objective standard. A dismissal is only to be held to be unfair if it was outside the range of reasonable responses open to a reasonable employer. This assessment, of whether the decision to dismiss this particular employee in respect of a particular matter or issue, came within the range of reasonable responses open to a reasonable employer lies at the heart of the law relating to unfair dismissal; it is the litmus test by which each stage of the dismissal process and the decision to dismiss is to

judged. **Sainsbury's Supermarkets v Hitt** [2003] IRLR 23, particularly para. 30.

36. Redundancy is a potentially fair reason for dismissal, and s139 ERA provides:

> "(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*) …
> (*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."

37. As identified in the issues, when considering redundancy cases, it will be important to have regard to consultation, any pool for selection, selection criterion and alternatives to redundancy.

38. Both parties referred to *R v British Coal Corporation and Secretary of State for Trade and Industry, ex parte Price [1994] IRLR 72*:

> "Fair consultation involves giving the body consulted 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. It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting."

The key components of fair consultation were further identified in British Coal as:

> Consultation when the proposals are still at a formative stage.
>
> Adequate information on which to respond.
>
> Adequate time in which to respond.
>
> Conscientious consideration of the response to the consultation.

39. The claimant highlighted the well known case of *Williams v Compare Maxam Ltd* [1982] ICR 96 and the need for selection criteria to be objective an d capable of independent verification. Mr Way, as set out above, cited *Mitchells of Lancaster (Brewers) Ltd v Tattershall* UKEAT 0605/11 that almost all criteria involve issues of judgment, and this does not mean they cannot be assessed in a dispassionate or objective way. Furthermore, the ET should only interfere in selection criteria if they were such that no reasonable employer could have adopted them in the away in which the respondent did – applying the 'range of reasonable responses' test.

40. As to scoring employees against criteria, the claimant cited the following cases:

> "John Brown Engineering Ltd v Brown [1997] IRLR 90
>
> Dismissals were unfair and the appeal process was described as a "sham" where individual scores were withheld from employees.
>
> Alstom Traction Ltd v Stephen Birkenhead and others UKEAT/1131/00
>
> The dismissal was unfair because the employee was not provided with a breakdown of his scores and had no means of challenging how the scores had been arrived at.
>
> Graham v ABF Ltd [1986] IRLR 90
>
> The lack of consultation on how an employee scored was fatal to the fairness of the dismissal, particularly since the decisive criterion, "attitude", was nebulous and subjective
>
> Pinewood Repro Ltd (t/a County Print) v Page UKEAT/0028/10
>
> EAT found that the tribunal was entitled to make a finding of unfair dismissal where the employer failed to give the employee an explanation of why he received lower scores than two other people."

Conclusions on the issues.

41. I am satisfied that the Respondent has shown a potentially fair reason for dismissal within section 98(2) of the Employment Rights Act 1996, namely redundancy within s 139 ERA. Miss Martland gave evidence setting out the decline in the numbers of newspaper titles and copies in early 2020, showing a decline in work leading to a reduced need for employees to carry out work as distribution controllers. I accept her evidence that this was the reason for the Claimant's dismissal.

42. I am **not** satisfied that the Respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant, within s98(4) ERA.

43. Consultation ought to occur when proposals are at a formulative stage, and allow for meaningful input from an affected employee. Even taking Miss Martland's evidence at its highest, she telephoned the Claimant after a decision within the Respondent had already been made to implement redundancies. She did not write to or email the claimant in advance to warn her what the call would be about. There was no opportunity for the Claimant – or indeed other employees affected – to make representations prior to this decision being reached, for example to urge any decision to be delayed until after the end of the Covid lockdown / the impact of the pandemic was more fully understood. I will return below to the existence of the Coronovirus Job Retention Scheme and its utility as an alternative to dismissal, but for the purposes of considering whether there was meaningful consultation, I have concluded that not even permitting a discussion about this was wholly outwith what a reasonable employer might have done. This was particularly so in circumstances in which Miss Martland said that in May and June the Respondent's publisher clients had not made definitive decisions about their future intentions during the UK Nationwide lockdown.

44. Reasonable consultation should also include consulting about appropriate pools for selection and selection criteria. I am satisfied that consulting on the former (pools for selection) would have served no purpose as it was eminently reasonable to group together the three distribution controllers. However, as to selection criteria and how that would be marked, Miss Martland gave evidence that she used a matrix she had first come across in former employment and used many times before. This made it abundantly clear that she had no intention of consulting on it as an appropriate matrix for this role / in this workplace. She had made a decision to use a set matrix and did not afford any opportunity for comment.

45. Even if I had accepted Miss Martland's evidence that the 'consultation period' was a week, I would have found it to be so inadequate in content as to be outside the range of reasonableness. However, for the reasons set out above, on a balance of probabilities I consider the evidence of the Claimant and Mrs Lewis to be more likely than not, and a consultation period of just 24 hours to end the 19 year long career of the Claimant was so short as to be unreasonable. Nor was this remedied on appeal by Mr Whitehair who simply sought confirmation from Miss Martland of what she had done, and did not subject that account to any scrutiny whatsoever.

46. As to whether the selection criteria were reasonable and applied objectively, I adopt the test urged on me by Mr Way and ask whether 'no reasonable employer could have adopted in them in the way the respondent did'. Clearly some of the criteria adopted were reasonable; however, they were not tailored to this workplace, made evident for example from the references to work objectives and targets. Furthermore, even where the criteria taken into account were objective – such as attendance over the last 12 months, there was no data provided to justify the scores. Most fundamentally however, the level of reasoning recorded to show the scores given to the distribution controllers was so inadequate as to fall outwith the range of reasonableness. No examples were given as to how "adaptability" or "team relationships" had been demonstrated – or to justify relatively lower scores where the claimant was, in this hearing, alleged to have fallen short. There was a dispute of fact as to whether the claimant was told what criteria were being applied – but it was agreed that she was not provided in writing with a copy of the criteria or scoring matrix, and was not given any opportunity to make representations as to why she should achieve higher scores in certain areas. For the reasons set out above, I accept the evidence of the claimant that in fact she was not told orally what criteria were being applied to her – as is consistent with her contemporaneous correspondence asking for the information. Again, I find this outside any reasonable process.

47. I have considered carefully whether this element of failing to tell the claimant the criteria was remedied on appeal, as the Claimant was told by Miss Martland in her email of 18 August 2020 that the selection criteria "takes into account performance, adaptability, skill set, team relationships and application". However, this list omitted personal drive, attendance and disciplinary record, and did not indicate how scores would be marked against each criteria, meaning that the claimant could still not meaningfully engage. I do not therefore consider this unfairness was remedied either before or during Mr Whitehair's appeal process.

48. The next issue is whether the Respondent's took reasonable steps to consider alternatives to dismissal. Traditionally this has been a question about whether consideration is given to "suitable alternative employment". In the period of summer 2020 however, during a period when the claimant was on furlough, with 80% of her wages being paid by the government scheme (and her agreeing to forego the other 20%), I consider that the issue must encompass whether there was reasonable consideration of remaining on furlough as an alternative to dismissal. Miss Martland said that she did consider this, and that she viewed the furlough scheme as one designed to maintain jobs which were viable but for the pandemic. By contrast, she said she did not see having three distribution controllers as viable post pandemic, and did not consider maintaining non-viable jobs to be within the spirit of the scheme. It is not for me to consider whether I agree with this position or not, but to consider whether the employer's position was within a range of

reasonable responses. I accept the evidence of Miss Martland that she/ the respondent did give thought to this point, and reached a considered position, and do not therefore consider the dismissal to be unfair on this ground.

49. My conclusion as to the claim of unfair dismissal therefore, is that I consider the dismissal to be unfair as there was no, or no meaningful warning or consultation, and the approach taken to selection criteria and marking were so unreasonable as to be outwith the range of reasonable responses.

50. This leads to the final issue, of what difference if any would a fair procedure have made (the "Polkey" issue). The Respondent says the claimant was 100% likely to be dismissed in virtually the same time frame. The claimant says that she had at least a 95% chance of being retained as she was highly skilled in this job after 19 years in post.

51. It is clear that there were three distribution controllers, and the business made a decision to reduce this to one. All three had clean disciplinary records. All received the same scores for performance – though for the reasons set out above I place limited weight on this. One of the three had two years of service whereas the Claimant and the other affected employee were both very long serving – though I note that the Respondent did not seek to place any weight on this factor (and it is certainly not obliged to do so), and there is no evidence as to requiring a particular length of time in post prior to becoming proficient.

52. Whilst the Claimant gave examples of her own work achievements, I had virtually no information about the other two individuals in the pool. I have therefore concluded that I am simply not in a position to be able to safely make findings as to who, if a fair proceeding had been used, would have increased their starting chance of one third of being retained, and who would have a lower chance. I therefore have no information to depart from the point that three employees were in post but there was only one role going forward, such that the claimant had a 33% chance of being retained.

EJ TUCK QC

Dated this 6th Day of December 2021.

Promulgated on 18/12/2021

N Gotecha – For Employment Tribunal