EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4107973/2020, 4107797/2020 and 4107676/2020

Final Hearing Held in Edinburgh on 30 and 31 August and 1, 2 and 3 September, and 28 and 29 October 2021 and Deliberation by Members' Meeting on 22 December 2021

Employment Judge M Sutherland
Tribunal Member F Paton
Tribunal Member A Grant

William Cunningham	**First Claimant** **In person**
Derek Paul	**Second Claimant** **In person**
Robert Paul	**Third Claimant** **In person**
Tilbury Douglas Construction Ltd	**Respondent** **Represented by:** **Mr G Cunningham,** **Counsel instructed by,** **R S Mitchell, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that:-

First Claimant

(1) The claim for unfair dismissal was not presented within the statutory time limit and is therefore dismissed.

(2) The claim for notice pay and holiday pay is dismissed following withdrawal.

Second Claimant

(1) The claim for unfair dismissal does not succeed and is therefore dismissed.

Third Claimant

(1) The claim for unfair dismissal does not succeed and is therefore dismissed.

REASONS

Introduction

1. The Claimants each made complaints of unfair dismissal under Section 98 of the Employment Rights Act 1996 ('ERA 1996').

2. The First Claimant also made a complaint for notice pay and holiday pay outstanding on termination of his employment. The First Claimant advised that he had been paid additional monies in satisfaction of this complaint. Following discussion this complaint was withdrawn and is accordingly dismissed.

3. Following discussion (both at a prior Case Management Preliminary Hearing and at today's hearing) the Claimants each confirmed that they accepted that there was a redundancy situation and that they were dismissed by reason of redundancy. The Claimants each confirmed that were not seeking to challenge the choice of selection criteria or the redeployment exercise as unfair. The Claimants each sought compensation only as a remedy and did not seek re-instatement or re-engagement.

4. The First Claimant asserted that his dismissal was unfair because Dylan Smith, another Labourer (General Operative) in the same selection pool who scored lower than him, was not dismissed. It was accepted that his complaint was not submitted within the 3 month time limit (extended by Early Conciliation). The First Claimant asserted that it was not reasonably practicable for him to submit his complaint within that time limit because:

he thought he was still employed by the Respondent during the appeal process; in October and November his time was taken up engaged in communication with the Respondent after his dismissal; he struggles with reading and writing and in early December he took steps to obtain assistance from a friend.

5. The Second Claimant asserted that his dismissal was unfair because two of the three people who scored him by applying the selection criteria don't know him and his work, and because he had a lot more knowledge and experience than the other Foremen in his selection pool who were not dismissed. He provided further particulars that his score for current work performance was wrong taking into account his personal drive, his development and mentoring of others, his customer awareness, his planning and organisation and his communication. He asserted that steps ought to have been taken to obtain information about the nature of the work previously undertaken by him.

6. The Third Claimant asserted that his dismissal was unfair because of a failure to include Jamie McGill ('JM'), another Ganger, in his selection pool, and because two of the three people who scored him by applying the selection criteria don't know him and his work well. He provided further particulars asserting that his score for relevant qualifications was wrong (he has better qualifications than JM and holds an SMSTS); his score for time keeping was wrong (he has worked nightshifts and weekends); his score for current work performance was wrong (he had his own squads of people where as JM did not; he dealt with clients but JM did not; he has run sites himself where as JM did not; he has 21 years of experience across all areas in construction whereas JM only "pushed a brush about"); his score for suitability for available work was wrong and for additional training was wrong (for the same reasons). He asserted that other people should have scored him or steps ought to have been taken to obtain this information.

7. The Claimants appeared on their own behalf. At each stage the Claimants were provided with an explanation of the process. The Respondent was represented by Mr Cunningham of Counsel.

8. Parties had prepared a joint bundle of documents. Following discussion additional documents were lodged during the hearing. Adjustments were made to support the First Claimant in respect of that bundle.

9. The Respondent led evidence from Cameron Stewart, Contract Manager; S Burgess, Project Manager; Richard Kelly, Contract Manager; John Gittins, Divisional Director. The Claimants gave evidence on their own behalf.

10. The Respondent prepared written submissions which were expanded upon in oral submissions. The Claimants gave oral submissions in response.

11. The issues to be determined are as follows –

    a. In respect of the First Claimant only - Was the claim presented within 3 months (extended by ACAS Early Conciliation) of the termination date? If not, was it not reasonably practicable to present the claim within that period? If not, was it presented within such further reasonable period?

    b. Was the dismissal fair having regard to Section 98(4) of the Employment Rights Act 1996 including whether in the circumstances the Respondent acted reasonably in treating it as a sufficient reason for dismissing the Claimant? Did the decision to dismiss (and the procedure adopted) fall within the 'range of reasonable responses' open to a reasonable employer? *Iceland Frozen Foods Ltd v Jones* 1983 ICR 17

    c. Did the Respondent adopt a reasonable procedure? Did any procedural irregularities affect the overall fairness of the process having regard to the reason for dismissal?

    d. If the Respondent did not adopt a reasonable procedure, was there a chance the Claimant would have been dismissed in any event? *Polkey v AE Dayton Services Ltd* 1987 3 All ER 974.

    e. To what basic award is the Claimant entitled?

f. What loss has the Claimant suffered inconsequence of the dismissal? What compensatory award would be just and equitable? Has the Claimant taken reasonable steps to mitigate his loses?

12. The following initials are used by way of abbreviation in the findings of fact -

Initials	**Name**	**Role**
CS	Cameron Stewart	Regional Director
JG	John Gittins	Divisional Director - Northern
RK	Richard Kelly	Contracts Manager
SB	Stuart Burgess	Project Manager

Findings in fact

13. The Tribunal makes the following findings in fact:-

12. The Respondent is a construction company previously known as Interserve Construction Limited. The Respondent is a large employer with a turnover of around £150m and has a dedicated HR function.

13. On 14 July 2020 the Respondent announced that it required to reduce the total number of its employees by 10% because of current economic circumstances.

14. JG was the Director of Scotland and the North of England. CS as Regional Director reported to JG. RK as Contracts Manager reported to CS. SB as one of four Project Managers reported to RK. The four PMs managed between them the site teams which comprised a Site Manager, Foremen, Gangers and Labourers (Operatives). Taken together the site teams comprised around 30-40 staff.

15. The redundancy exercise was conducted by RK, SB and CS (‘the scoring managers’) with advice and assistance from HR. They were provided with

Guidance Notes For Redundancy Selection which were considered by the scoring managers.

16. The Guidance Notes stated employers must carry out a fair selection procedure using objective, transparent and consistent selection criteria and should not use length of service (unless there is a tie-break).

17. The Guidance Notes recommended that where possible three managers should be involved in the scoring of the groups of staff identified and if none of the three Managers are Line Managers information should be sought from the relevant Line Manager.

18. The Guidance Notes gave detailed guidance regarding the following selection criteria: A. relevant and current qualifications and experience; B. Conduct: C. Attendance: D. Time Keeping; E. Current Work Performance; F. Suitability for Available Work. In respect of E. Current Work Performance, managers were to agree a scoring following review of appraisal information, current line managers' view, delivering on time, complaints received, 1-2-1 notes, informal chats, etc. The Guidance Notes advised that length of service (i.e. LIFO – last in first out) should not be used as a selection criterion because it was potentially age discriminatory but could be used in a tie-break. The scoring managers were to agree scoring following review of HR records including appraisals.

19. The scoring managers utilised those selection criteria with the exception of C. Attendance. The scoring managers identified redundancy pools based upon job roles. The scoring managers identified which staff were contracted to perform which job role. The scoring managers determined how many staff were to be selected for redundancy from each pool. The relevant Line Managers were absent from work on furlough and the scoring managers were advised that the Line Managers could not therefore be contacted to provide information. The Respondent considered that the scoring managers were the most appropriate people to conduct the scoring in the circumstances. The scoring managers scored the staff in each pool based upon their own knowledge and HR records including any appraisals and completed a scoring matrix for each pool. The scoring managers discussed their approach to scoring with a view to ensuring that they took

a similar approach. The scoring managers each undertook the scoring individually and then these scores were averaged. Those who scored lowest were identified as being at risk of redundancy. Those who score highest were not issued with at risk letters and were not invited to consultation meetings. The Respondent considered that to do otherwise risked unnecessary upset and disruption to the business.

The First Claimant

20. The First Claimant was employed by the Respondent as a Labourer (General Operative) from 1 November 1999 until 12 August 2020. He had 20 years service at termination of his employment.

21. The First Claimant was placed in a redundancy pool with 5 other Labourers (General Operatives). The scoring managers determined that they required to identify 4 Labourers at risk of redundancy unless alternative employment could be identified. The scoring managers applied the selection criteria to the pool of 6 Labourers.

22. On 28 July 2020 RK advised the First Claimant that he had been identified as being at risk of redundancy. He was provided with details of the scoring criteria but not the completed matrix. He was invited to a redundancy consultation meeting and advised of his right to be accompanied. He was advised that there would be a 2 week period of consultation which would include exploring redeployment opportunities. He was advised that he was at risk of his employment being terminated.

23. On 29 July 2020 the First Claimant attended a Redundancy Consultation Meeting with RK. He was provided with a copy of the redundancy scoring matrix for his pool with the names of the other Labourers redacted. The scores in his pool ranged from the lowest at 230 to the highest at 292. The First Claimant ranked third out of six with a score of 269 and was therefore advised that he was at risk of redundancy. The First Claimant was invited to a meeting to appeal against the scores. He was advised that a possible outcome of that meeting was that the scores would be alerted such that he would no longer be at risk of redundancy (and another colleague would instead be at risk). He was advised that the scores could not be challenged

at any further appeal following dismissal. The First Claimant declined to attend the scoring appeal.

24. On 12 August 2020 the First Claimant attendance a final redundancy meeting with RK. He was advised that his redundancy was being confirmed and that his employment was being terminated with immediate effect. He was advised this was his last working day and he would receive a payment in lieu of his notice. He was advised of his right to appeal. He was aware he had been dismissed and was no longer employed by the Respondent.

25. On 2 September 2020 the First Claimant lodged an appeal asking for clarity that no-one scoring less than him had been retained. The First Claimant was aware that he was not employed during the appeal process. The First Claimant's appeal was heard by CS on 18 September 2020. The First Claimant noted that Dylan Smith ('DS'), Labourer had scored lower than him but he had been retained. The following circumstances were explained to the First Claimant: DS was on holiday and then in quarantine and was accordingly unable to attend the scheduled redundancy meetings; the Respondent obtained additional work whilst DS remained at risk of redundancy and accordingly DS was not dismissed but retained to perform that work. CS asked the First Claimant if he wanted to be considered for this work and the First Claimant advised that he did not want to come back because he had secured alternative employment.

26. As at the date of termination the First Claimant's gross average weekly salary including basic pay, overtime and production bonus, and travel time, was £671.13 gross and £527.46 net. His employer's pension contribution was £12.02 a week

27. At his termination of his employment the First Claimant was aware of his legal right to make a claim for unfair dismissal to an employment tribunal.

28. After his dismissal the First Claimant engaged in protracted communication with HR regarding his payment of lieu of notice which was wrong and was ultimately corrected.

29. On 27 August 2020 he telephone Citizens' Advice and attended an appointment at CAB on 2 September 2020. He was advised that he had 3 months from the date of his dismissal to submit a claim to an employment tribunal for unfair dismissal.

30. The First Claimant secured lower paid alternative employment which started on 7 September 2020. Thereafter the First Claimant had taken some limited steps to secure higher paid employment. It was difficult to secure employment in construction in the 6 month period from the termination date until February 2021. There have however been shortages of construction workers in 2021.

31. The First Claimant took 2 weeks holiday in about October 2020 but he did not travel because of COVID restrictions.

32. On 5 November 2020 the First Claimant commenced ACAS Early Conciliation which concluded on 12 November 2020. The First Claimant was aware that he required to lodge his claim shortly thereafter.

33. The First Claimant has difficulty reading and writing and required assistance to complete and lodge his claim form. The ex-colleague who usually assists him with reading and writing was away on holiday in early December. He also receives assistance from others including his sister. Around that time the First Claimant was in dialogue with the Second and Third Claimant regarding the lodging of their claim forms. He did not seek their assistance to lodge his claim. As the First Claimant described in evidence "time just flew away" and ultimately he lodged the claim on 22 December 2020.

<u>The Second Claimant</u>

34. The Second Claimant was employed by the Respondent as a Foreman (and previously a Ganger) from 25 October 1993 until 18 August 2020. He had 27 years service at termination of his employment.

35. The Second Claimant was placed in a redundancy pool with 4 other Foremen. The scoring managers determined that they required to identify 2 Foremen at risk of redundancy unless alternative employment could be identified. The scoring managers applied the selection criteria to the pool

of 5 Foremen. The scoring managers comprised RK, SB and CS. RK and SB considered that they did not know the Second Claimant sufficiently well having not worked with him. CS visited the site where the Second Claimant worked about once a month and had meetings with his line manager. CS felt he knew him sufficiently well to score him. In light of this the scoring managers took the decision that only CS would score the Second Claimant in respect of most of the criteria and RK, SB and CS would then discuss the scoring process together to ensure the scores had been fairly calibrated relative to those of other Foreman.

36. The Second Claimant considered that he could have been score by two Quantity Surveyors. The Respondent did not consider that the QS had sufficient management experience or seniority.

37. When scoring the Second Claimant CS took into account an appraisal which had recently been prepared by his line manager. CS did not check the Respondent archives to consider in greater detail the nature of the work previously undertaken by the Second Claimant. He felt he would have had to do so for all staff and this would have been unduly burdensome.

38. On 28 July 2020 RK advised the Second Claimant that he had been identified as being at risk of redundancy. He was provided with details of the scoring criteria but not the completed matrix. He was invited to a redundancy consultation meeting and advised of his right to be accompanied. He was advised that there would be a 2 week period of consultation which would include exploring redeployment opportunities. He was advised that he was at risk of his employment being terminated.

39. On 29 July 2020 the Second Claimant attended a Redundancy Consultation Meeting with CS. He was provided with a copy of the redundancy scoring matrix for his pool with the names of the other Foremen redacted.

40. He was advised that the scores were reached by the scoring panel and that the approach used was score individually then averaged. He was not advised that for most of the criteria he was scored by only CS. The scores in his pool ranged from the lowest at 270 to the highest at 309. The Second Claimant ranked fourth out of five with a score of 282 and was therefore

advised that he was at risk of redundancy. The Second Claimant advised that the scoring panel does not know him well enough to score him. The Second Claimant was invited to a meeting to appeal against the scores. He was advised that a possible outcome of that meeting was that the scores would be alerted such that he would no longer be at risk of redundancy (and another colleague would instead be at risk). He was advised that the scores could not be challenged at any further appeal following dismissal. The Second Claimant declined to attend the scoring appeal.

41. On 12 August 2020 the Second Claimant attended a final redundancy meeting with CS. The Second Claimant advised that the scores were not correct and failed to take into account his length of service. It was explained to him that he was provided with an opportunity to appeal the scores on 6 August 2020 which he declined. The Second Claimant advised he was not formally appealing the scores. He was advised that his redundancy was being confirmed and that his employment was being terminated with immediate effect. He was advised this was his last working day and he would receive a payment in lieu of his notice. He was advised of his right to appeal.

42. On 25 August 2020 the Second Claimant lodged an appeal noting that he had been scored by RK and CS who have never met him and his score failed to take into account his 27 years of service. He asserted having more knowledge and experience than those who were kept on, one of whom had only 4 years' service. The First Claimant's appeal was heard by JG on 9 September 2020. He advised that his main complaint was that he had been scored by people who did not know him – he hadn't worked with SB or RK and barely knew CS. He asked why Steven Forshaw (SF) or Graeme Marshall (GM) who knew him better hadn't undertaken the scoring. He noted that he had run jobs/projects on his own but had scored lower than those who hadn't. JG explained to the Second Claimant that GM and SF were on furlough and were unable to score him. JG asked the Second Claimant whether he sought re-instatement and the Second Claimant advised that he had absolutely no wish to be re-instated he

simply wanted a better explanation of the scoring system. JG advised he would make enquiries.

43. On 11 September 2020 JG advised the Claimant that is their policy that scoring is carried out by three managers rather than by one individual. He acknowledged that changes in personnel resulted in there being limited individuals who have first hand knowledge of his experience and capability. He noted that the only other individuals who could have informed the process were GM and SF both of whom were unavailable during the consultation process. He advised having consulted with CS who reassured him that an appropriate and impartial process was conducted. He appreciated that a lack of awareness of his service might be a factor in his scoring but best efforts were exerted to provide a fair representation of the relative scoring against the named criteria.

44. As at the date of termination the Second Claimant's gross average weekly salary including basic pay, overtime and production bonus, and travel time, was £811.71 gross and £606.12 net. His employer's pension contribution was £15.86 a week.

45. The Second Claimant has remained unemployed and in receipt of universal credit since his dismissal. He has taken some steps to secure alternative employment in the period since his dismissal. He has made some applications for driving work and some applications for work construction. The Second Claimant did not take up agency work because he considered the pay insufficient. It was difficult to secure employment in construction in the 6 month period from the termination date until February 2021. There have however been shortages of construction workers in 2021.

The Third Claimant

46. The Third Claimant was employed by the Respondent as a Ganger from 30 March 1999 until 12 August 2020. He had 21 years service at termination of his employment.

47. The Third Claimant was placed in a redundancy pool with 1 other Ganger (JM). The scoring managers determined that they required to identify 1

Ganger at risk of redundancy unless alternative employment could be identified. The scoring managers applied the selection criteria to the pool of 2 Gangers.

48. In respect of Selection Criteria A. Relevant And Current Qualifications And Experience the Third Claimant scored 24 and JM scored 27 based upon the difference in their qualifications. The Third Claimant had an SMSTS (Site Management Safety Training Scheme) qualification which takes around 5 days to secure. JM had an SVQ 4 in construction supervision which takes around 5 months to secure. The Respondent regarded that as a higher level academic qualification.

49. In respect of Criteria B. Conduct and D. Time Keeping which were considered together both the Third Claimant and JM scored the same namely 18. Criteria C. Attendance was not applied.

50. In respect of E. Current Work Performance, the Third Claimant scored 148 and JM Scored 172. The third Claimant was rated as experienced or proficient in respect of the factors used to determine that score. JM was rated as proficient in respect of all factors which was a higher rating than experienced. The scoring Managers considered that both the Third Claimant and JM had managed staff and had dealt with clients. The scoring managers considered that both the Third Claimant and JM had relevant experience and that JM did not simply push a brush about (as had been asserted by the third Claimant). Both JM and the third Claimant were highly regarded by the scoring Managers.

51. In respect of F. Suitability for Available Work the Third Claimant scored 43 and JM Scored 48. Both the Claimant and JM were rated as proficient in respect of all factors used to determine that score.

52. When scoring the Third Claimant the scoring managers took into account an appraisal information. They did not check the Respondent archives to consider in greater detail the nature of the work previously undertaken by the Third Claimant. They felt they would have had to do so for all staff and this would have been unduly burdensome.

53. The Third Claimant did not consider it fair that someone who had only 6 years of experience in construction could score higher than someone who had over 20 years of experience. The Third Claimant had significant experience in concreting, slabbing, kerbing and laying drains and in running a site. The Respondent did not require those skills going forward given the nature of the work to be undertaken and given their use of sub-contractors. The scoring Managers considered that the material difference between the Third Claimant and JM was that JM had worked to secure a higher qualification (the SVQ 4), which the Third Claimant did not have, and that JM was qualified, skilled and experienced in the future work to be undertaken by the Respondent (unlike the Third Claimant, JM had a forklift truck licence and the experience necessary to undertake the technical work required for the Edinburgh Military Tattoo contract).

54. On 28 July 2020 RK advised the Third Claimant that he had been identified as being at risk of redundancy. He was provided with details of the scoring criteria but not the completed matrix. The letter explained that "This showed the criteria used to score yourself and others in your job family [pool] in order to complete the selection process." He was invited to a redundancy consultation meeting and advised of his right to be accompanied. He was advised that there would be a 2 week period of consultation which would include exploring redeployment opportunities. He was advised that he was at risk of his employment being terminated.

55. On 29 July 2020 the Third Claimant attended a Redundancy Consultation Meeting with RK. He was provided with a copy of the redundancy scoring matrix for his pool with the name of the other Ganger redacted. On advice from HR the scores had also been redacted because this was a pool of two. Accordingly his completed matrix showed blanks in the first column respect of "Person A" and then his name and scores as "Person B". The Third Claimant had inferred from this that he was in a pool of one.

56. At the Redundancy Consultation Meeting the Third Claimant was advised that "As there are others that undertake the same/ similar role as you we confirm that a scoring process has been undertaken". He was advised that "the scores were reached by the scoring panel and that the approach used was score individually then averaged". The Third Claimant had

scored 266 and, unknown to the Third Claimant, Jamie McGill had scored 298. The Third Claimant was therefore advised that he was at risk of redundancy. The Third Claimant was invited to a meeting to appeal against the scores. He was advised that a possible outcome of that meeting was that the scores would be alerted such that he would no longer be at risk of redundancy (and another colleague would instead be at risk). He was advised that the scores could not be challenged at any further appeal following dismissal. The Third Claimant declined to attend the scoring appeal because he considered it to be pointless - at the time he believed he was in a pool of one.

57. On 12 August 2020 the Third Claimant attended a final redundancy meeting with RK. It was noted he chose to decline a further meeting to discuss his scores and therefore the situation remained unchanged. He was advised that his redundancy was being confirmed and that his employment was being terminated with immediate effect. He was advised this was his last working day and he would receive a payment in lieu of his notice. He was advised of his right to appeal. The Third Claimant did not exercise his right of appeal timeously.

58. On 27 August 2020 the Third Claimant wrote to the Respondent advising that he intended to take matters to a tribunal and noting that: he had been with the company for 21 years; he wondered how he could be scored by people who hardly know him (less than a year); he has an SMSTS and other tickets; has run jobs himself dealing with clients, labour, material and related paperwork; he has worked nightshifts and away from home; for the last 3 years there has been a change in business direction seeking big jobs and not the small jobs anymore.

59. As at the date of termination the Third Claimant's gross average weekly salary including basic pay, overtime and production bonus, and travel time, was £638.22 gross and £494.18 net. His employer's pension contribution was £14.02 a week.

60. The Third Claimant secured higher paid alternative employment on 15 February 2021. It was difficult to secure employment in construction in the

6 month period from the termination date until February 2021. There have however been shortages of construction workers in 2021.

Observations on the evidence

61. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event in fact occurred.

62. All of the witnesses gave their evidence in a measured and consistent manner and there was on the whole no reasonable basis upon which to doubt the credibility and reliability of their testimony.

63. The Second Claimant asserted a start date of 1 February 1992 and that he had 27 years' of service. The Respondent asserted his start date was 25 October 1993. Given that his termination date was 18 August 2020, and having regard to his asserted length of service, it is considered more likely that not that his start date was 25 October 1993 and not 1 February 1992.

64. The Third Claimant asserted a start date of 11 May 1998, a termination date of 18 August 2020, and that he had 21 years' of service. The Respondent asserted his start date was 30 March 1999 and that his termination date was 12 August 2020. It was not in dispute that his contract was terminated with immediate effect at a meeting on 12 August 2020 and that this was confirmed in writing on 18 August 2020. Accordingly his termination date was 12 August 2020 and it is understood that the Third Claimant accepted this. Given that his termination date was 12 August 2020, and having regard to his asserted length of service, it is considered more likely that not that his start date was 30 March 1999 and not 11 May 1998.

The law

Unfair dismissal

65. A claim for unfair dismissal must be lodged within 3 months of the effective date of dismissal (extended by ACAS Early Conciliation) unless it is not reasonably practicable to do so in which case it must be presented within such further period as the tribunal considers reasonable. The Claimant has

the burden of providing that it was not reasonably practicable to present the claim within the time limit but the issue should be given a liberal construction in favour of the employee (*Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53, CA*). The issue is not what was reasonable or what was possible but what was reasonably possible.

66. Where there is some impediment the issue of what is reasonably practicable must be determined having regard to that impediment. Where a Claimant does not know of their right to make a claim, or of the time limit in which to do so, the issue is whether it was reasonably possible for them to obtain that knowledge (*Dedman*).

67. If the tribunal determine it was not reasonably practicable, the tribunal must then decide whether the claim was lodged within such further period as the tribunal considers reasonable.

68. Section 94 of Employment Rights Act 1996 ('ERA 1996') provides the Claimant with the right not be unfairly dismissed by the Respondent.

69. It is for the Respondent to prove the reason for the Claimant's dismissal and that the reason is a potentially fair reason in terms of Section 98 ERA 1996. At this first stage of enquiry the Respondent does not have to prove that the reason did justify the dismissal merely that it was capable of doing so.

70. If the reason for her dismissal is potentially fair, the Tribunal must determine in accordance with equity and the substantial merits of the case whether the dismissal is fair or unfair under Section 98(4) ERA 1996. This depends whether in the circumstances (including the size and administrative resources of the Respondent's undertaking) the Respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the Claimant. At this second stage of enquiry the onus of proof is neutral.

71. In determining whether the Respondent acted reasonably or unreasonably the Tribunal must not substitute its own view as to what it would have done in the circumstances (*Foley v Post Office; Midland Bank plc v Madden [2000] IRLR 827*) Instead the Tribunal must determine the range of reasonable responses open to an employer acting reasonably in those

circumstances and determine whether the Respondent's response fell within that range. The Respondent's response can only be considered unreasonable if the decision to dismiss fell out with that range. The range of reasonable responses test applies both to the procedure adopted by the Respondent and the fairness of their decision to dismiss (*Iceland Frozen Foods Ltd v Jones [1983] ICR 17 (EAT)*).

72. The Tribunal should consider whether any procedural irregularities affected the overall fairness of the whole process in the circumstances having regard to the reason for dismissal. It is irrelevant that the procedural steps would have made no difference to the outcome except where they would have been utterly useless or futile (*Polkey v AE Dayton Services Ltd 1988 ICR 142, HL*).

73. The EAT in *Williams and ors v Compare Maxam Ltd 1982 ICR 156* suggested that a reasonable employer will: seek to give warning of the risk of redundancy; consult about alternative solutions and fair selection; fairly identify and apply selection criteria; and will consider alternative employment.

74. Where an employer departs from an agreed procedure this will be a relevant factor in considering whether the dismissal was fair.

75. Many selection criteria involve a degree of personal judgment and subjectivity. "If a graded assessment system is to achieve its purpose it must not be subjected to an over-minute analysis" (*British Aerospace plc v Green and ors 1995 ICR 1006, Court of Appeal)*. Instead the issue is whether the system was in general terms inherently fair or unfair and whether there were any overt signs of unfairness in its application. "The tribunal is not entitled to embark upon a reassessment exercise... it is sufficient for the employer to show that he set up a good system of selection and that it was fairly administered, and that ordinarily there is no need for the employer to justify all the assessments on which the selection for redundancy was based" (*British Aerospace*).

76. The ACAS Code of Practice on Disciplinary and Grievance Procedures does not apply to redundancy dismissals.

77. Compensation is made up of a basic award and a compensatory award. A basic award, based on age, length of service and gross weekly wage, can be reduced in certain circumstances.

78. Section 123 (1) of ERA provides that the compensatory award is such amount as the Tribunal considers just and equitable having regard to the loss sustained by the Claimant in consequence of dismissal in so far as that loss is attributable to action taken by the employer.

79. An employer may be found to have acted unreasonably under Section 98(4) of ERA on account of an unfair procedure alone. If the dismissal is found to be unfair on procedural grounds, any award of compensation may be reduced by an appropriate percentage if the Tribunal considers there was a chance that had a fair procedure been followed that a fair dismissal would still have occurred (*Polkey v AE Dayton Services Ltd [1987] IRLR 503 (HL)*). In this event, the Tribunal requires to assess the percentage chance or risk of the Claimant being dismissed in any event, and this approach can involve the Tribunal in a degree of speculation.

Submissions

Respondent's submissions

80. The Respondent's submissions were in brief summary as follows:

The First Claimant

a. It was reasonably practicable for the First Claimant to have lodged his claim prior to 12 December 2020 (one month after the end of early conciliation).

b. Whilst there should be a liberal construction in favour of a Claimant, regard should be had to what the Claimant knew or could reasonably have been expected to know on reasonable enquiry (*Marks and Spencer plc v Williams-Ryan 2005 ICR 1293, CA*). The Claimant was aware of his rights and of the time limits. There was no practical impediment – he was fully aware that he would require assistance and he failed to take reasonable steps to obtain that assistance within the time limit.

c. Had DS, the other labourer, been available to attend his final consultation meeting he would simply have been made redundant at the same time as the First Claimant.

d. The First Claimant failed to take reasonable steps to secure alternative employment at an equivalent rate of pay and accordingly did not mitigate his losses.

e. The statutory redundancy pay should be off set against any basic award.

f. The PILON and ex gratia payments should be off set against any financial award.

The Second Claimant

a. The Respondent adopted a reasonable approach in deciding who would score the Second Claimant in the circumstances where his line managers were not reasonably available by reason of furlough and/or risk of redundancy.

b. A successful challenge to a score on a skills matrix faces a very high hurdle. The application of selection criteria will often entail some element of subjectivity. It is not for the tribunal to remark an employee's score – that would amount to substitution of their view. The focus is whether the scoring was within the range of reasonable options.

c. The Second Claimant failed to take reasonable steps to secure alternative employment and did not mitigate his losses.

d. The statutory redundancy pay should be off set against any basic award.

e. The PILON and ex gratia payments should be off set against any financial award.

The Third Claimant

a. The Respondent adopted a reasonable approach in deciding who would score the Second Claimant in the circumstances where his line managers were not reasonably available by reason of furlough and/or risk of redundancy.

b. A successful challenge to a score on a skills matrix faces a very high hurdle. The application of selection criteria will often entail some element of subjectivity. It is not for the tribunal to remark an employee's score – that would amount to substitution of their view. The focus is whether the scoring was within the range of reasonable options. The tribunal are not in a position to mark the third Claimant's scores either at all or relative to JM.

c. The Respondent attributed a higher value to holding an SVQ4 (which is regarded as an academic qualification) than an SMSTS.

d. The statutory redundancy pay should be off set against any basic award.

e. The PILON and ex gratia payments should be off set against any financial award.

The First Claimant's submissions

81. The First Claimant's submissions were in brief summary as follows:

a. It was not reasonably practicable for him to have lodged his claim prior to 12 December 2020. He was in protracted communication with the HR regarding his PILON and he required assistance to lodge his form which was not available.

b. DS ought to have been dismissed and the First Claimant who had been with the company over 20 years ought to have been offered the role instead.

c. The Respondent could reasonably have anticipated that they might have secured additional work.

The Second Claimant's submissions

82. The Second Claimant's submissions were in brief summary as follows:

a. When the Second Claimant submitted his claim he was not aware that he had been score in the main by CS. Having heard the evidence the Second Claimant accepted that the process adopted by the Respondent as regards who should score him was not unreasonable in the circumstances.

b. He considered that their archives should have been checked as regards the nature of the work he undertook.

c. He had 27 years of service and brought on two full squads. He did not consider it fair that someone with only 4 years service scored higher than someone with much longer service.

The Third Claimant's submissions

83. The Third Claimant's submissions were in brief summary as follows:

a. When the Third Claimant submitted his claim he was not aware that he was in a selection pool with JM. Having heard the evidence the Third Claimant accepted that the process adopted by the Respondent as regards his selection pool was fair.

b. The Third Claimant considered that the Respondent was no longer running a construction business. The Third claimant ultimately accepted that it was a matter for the Respondent to decide the nature of their business going forward. Nearly all of the staff retained were involved in work for the Tattoo.

c. He had been with the company for 21 years and he did not consider it fair that someone with only 6 years service scored higher.

Discussion and decision

<u>First Claimant</u>

84. The First Claimant accepts that the reason for his dismissal was that there was a redundancy situation which is a potentially fair reason. The issue to

be determined is whether his dismissal was fair or unfair in the circumstances determined according to equity and the substantial merits of the case. This depends upon whether in the circumstances (including the size and administrative resources of the Respondent's undertaking) the Respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the First Claimant in the context of the procedure adopted. The decision can only be considered unreasonable if it falls out with the range of reasonable responses open to an employer acting reasonably in those circumstances.

85. At the time of his dismissal on 12 August 2020 the First Claimant was aware that he had a right to bring a claim for unfair dismissal and was aware of the 3 month time limit in which to do so. The First Claimant was aware that he was not employed during the appeal process which ended in September 2020. The First Claimant attended Citizens' Advice in September 2020. Whilst the First Claimant was engaged in communication with the Respondent in October and November 2020 regarding his notice pay his time was not wholly taken up with that. The First Claimant engaged in ACAS Early Conciliation from 5 to 12 November 2020. The First Claimant was fully aware that he struggles with reading and writing, but he failed to take reasonable steps to arrange for someone to assist him in the period from 13 November to 12 December. The First Claimant was in communication with colleagues who were made redundant at the same time and who were bringing claims in similar terms but he did not seek their assistance. In the circumstances it was reasonably practicable for the First Claimant to bring his claim prior to 12 December. Accordingly his claim was submitted out with the statutory time limit and is accordingly dismissed.

86. Recognising the importance of the issue to the First Claimant we note what we would have decided had his claim been brought in time.

87. The First Claimant asserted that his dismissal was unfair because DS, another Labourer (General Operative) who was in the same selection pool but who had scored lower than him, was not dismissed. DS was on holiday and then in quarantine when the scheduled redundancy consultation meetings were due to take place. The First Claimant was dismissed by

reason of redundancy at those scheduled meetings but DS was not because he was unable to attend. The Respondent obtained additional work after the First Claimant had been dismissed but whilst DS remained at risk of redundancy. In light of that additional work DS was not made redundant but was instead retained to perform that work. This was explained to the First Claimant at his appeal hearing. He was also asked if he wanted to be considered for this work and the First Claimant advised that he did not because he had secured alternative employment. The approach adopted by the Respondent in these circumstances was considered to be within the range of reasonable responses.

88. Having regard to the First Claimant's long and good service, his obvious upset and frustration at being selected for redundancy was completely understandable. However the decision to dismiss was not unfair in the circumstances and accordingly his claim would have been dismissed even if it had been submitted in time.

Second Claimant

89. The Second Claimant accepts that the reason for his dismissal was that there was a redundancy situation which is a potentially fair reason. The issue to be determined is whether his dismissal was fair or unfair in the circumstances determined according to equity and the substantial merits of the case. This depends upon whether in the circumstances (including the size and administrative resources of the Respondent's undertaking) the Respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the Second Claimant in the context of the procedure adopted. The decision can only be considered unreasonable if it falls out with the range of reasonable responses open to an employer acting reasonably in those circumstances.

90. The Respondent adopted a reasonable approach in deciding who would score the Second Claimant in the circumstances where his line managers were not reasonably available. Having heard the evidence the Second Claimant accepted this.

91. When scoring the Second Claimant the Respondent took into account an appraisal which had recently been prepared by his line manager. However

they did not check the Respondent archives to consider in greater detail the nature of the work previously undertaken because they would have had to do so for all staff and that would have been unduly burdensome. Their approach was within the range of reasonable responses in the circumstances.

92. The Second Claimant had significantly longer service than one of the Foreman in his selection pool who was not dismissed and may well have had greater general construction skills, knowledge and experience gained from that long service. However the issue is whether the scoring of the Foremen was within the range of reasonable options having regard to the selection criteria used. Length of service was expressly excluded from the selection criteria. The criteria focused upon performance of current work and suitability for available work rather than on general construction knowledge and experience. Other Foremen scored higher than the Second Claimant because they were considered to be more skilled and experienced in the current and future work to be undertaken by the Respondent. There were no overt signs of unfairness in the application of the selection criteria. The second Claimant had an opportunity to challenge that score at a scoring appeal which he did not take. There was no basis upon which it could be said that the scoring was out with the range of reasonable options.

93. Having regard to the Second Claimant's long and good service, his upset and frustration at being selected for redundancy was completely understandable. However the decision to dismiss was not unfair in the circumstances (having regard to the application of selection criteria) and accordingly his claim is dismissed.

Third Claimant

94. The Third Claimant accepts that the reason for his dismissal was that there was a redundancy situation which is a potentially fair reason. The issue to be determined is whether his dismissal was fair or unfair in the circumstances determined according to equity and the substantial merits of the case. This depends upon whether in the circumstances (including the size and administrative resources of the Respondent's undertaking)

the Respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the Third Claimant in the context of the procedure adopted. The decision can only be considered unreasonable if it falls out with the range of reasonable responses open to an employer acting reasonably in those circumstances.

95. The Respondent adopted a reasonable approach to his selection pool which included the other Ganger, JM. The Respondent adopted a reasonable approach in deciding who would score the Third Claimant in the circumstances where his line managers were not reasonably available. Having heard the evidence the Third Claimant accepted this.

96. When scoring the Third Claimant the Respondent took into account appraisal information. However they did not check the Respondent archives to consider in greater detail the nature of the work previously undertaken because they would have had to do so for all staff and that would have been unduly burdensome. Their approach was within the range of reasonable responses in the circumstances.

97. The Third Claimant had significantly longer service than JM and may well have had greater general construction skills, knowledge and experience gained from that longer service. However the issue is whether the scoring of the Gangers was within the range of reasonable options having regard to the selection criteria used. Length of service was expressly excluded from the selection criteria. The criteria focused upon performance of current work and suitability for available work rather than on general construction knowledge and experience. JM scored higher than the Third Claimant because he was considered to be more skilled, qualified and experienced in the current and future work to be undertaken by the Respondent. There were no overt signs of unfairness or bias in the application of the selection criteria and no basis upon which this could reasonably be inferred. There was no basis upon which it could be said that the scoring was out with the range of reasonable options.

98. Having regard to the Third Claimant's long and good service, his upset and frustration at being selected for redundancy was completely understandable. However the decision to dismiss was not unfair in the

circumstances (having regard to the application of the selection criteria) and accordingly his claim is dismissed.

Employment Judge: **M Sutherland**
Date of Judgment: **05 January 2022**
Entered in register: **12 January 2022**
and copied to parties