EMPLOYMENT TRIBUNALS

Claimant: Mr Trevor Hampson

Respondent: Man Energy Solutions UK Limited

Heard at: Manchester **On:** 20 & 21 December 2021

Before: Judge Abigail Holt (sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Mr Paras Gorasia (Counsel)

JUDGMENT

The judgment of the Tribunal is that:

I. **The claimant was not unfairly dismissed and so the claim for unfair dismissal does not succeed and this claim is dismissed.**
II. **The claim for outstanding holiday pay is dismissed.**

REASONS

Introduction

1. The claimant was employed by the respondent as a Supplier Quality Auditor from 14 August 2017 until 13 October 2020. The claimant was dismissed on 13 October 2020. The claimant alleges that the dismissal, which was terminated by redundancy, was unfair. The respondent alleged that his dismissal was fair by reason of redundancy and/or some other substantial reason, namely business reorganisation.

Claims and Issues

2. No doubt because the claimant is a litigant in person, there was no list of agreed issues in the case. Nonetheless, the issues that I have to determine are:

i. What was the principal reason for the claimant's dismissal and was it a potentially fair reason under section 98 Employment Rights Act 1996? The respondent relies upon: redundancy; and/or some other substantial reason (being a business reorganisation).

ii. Did the respondent act reasonably in all the circumstances in treating redundancy as a sufficient reason to dismiss the claimant, in accordance with equity and the substantial merits of the case? Relevant to this issue will be, 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 and any scoring within the pool;
   c. the respondent took reasonable steps to find the claimant suitable alternative employment; and
   d. dismissal was within the range of reasonable responses.

iii. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed? If so, should the claimant's compensation be reduced and by what percentage?

iv. What remedy should be awarded (if the claimant succeeds in his claim)?

3. I note that Mr Gorasia argued that the third and fourth issues, that is whether the claimant would have been fairly dismissed in any event (commonly referred to as Polkey), would be considered alongside the other liability issues. I announced at the end of the hearing on 20 December 2021 that the final issue, that of remedy, would only be determined if the claimant's claim succeeded.

Procedure

4. The claimant represented himself at the hearing. Mr Gorasia represented the respondent.

5. The hearing was a "hybrid" one conducted by me sitting at the Tribunal hearing centre in Manchester, but with the parties attending by way of CVP video technology. There were no problems with the technology, and verbal communication issues were clarified as the hearing progressed.

6. I was provided with an agreed bundle of (electronic) documents prepared in advance of the hearing. The bundle ran to 416 pages. I have referred to page numbers in the bundle in brackets: [eg 123]. I was also provided with a separate bundle of witness statements. The Tribunal read the witness statements and the documents in the bundle which were referred to in those statements or to which the Tribunal was directed by the parties. It should be noted that, at the beginning of the hearing, I clarified that the parties both had exactly the same documents.

7. The Tribunal heard evidence from the respondent's witnesses (i) Mr Adrian Maddock (who had provided two witness statements) and also from (ii) Ms Louise Durose, who also had provided a witness statement. After they had confirmed their witness statements, Mr Hampson asked them cross-examination questions with some assistance from me in focussing his questioning on relevant issues. Later, the claimant confirmed his witness statement to me, he declined to give any supplementary evidence, but then answered cross-examination questions put by Mr Gorasia. In relation to all three "live" witnesses, I asked questions of clarification as we went along. I also ascertained that the claimant's witness, Mr Alan Ellis, who had provided a witness statement dated 2 December 2020, would not be attending the hearing. I noted that he is ill and the claimant confirmed that he proposed to rely simply upon Mr Ellis' witness statement which formed part of the witness statement bundle.

8. For the sake of completeness only, I note that, initially the claimant objected to Mr Maddock's supplementary witness statement because it had been served a few days late. Nonetheless, the claimant indicated that the contents did not take him by surprise and he did not object to it forming a part of the evidence that I should consider.

9. After the oral evidence had been given, each of the parties made submissions. Given that Mr Hampson was not legally represented, I helped him to formulate his arguments about his main points in the case.

10. The Tribunal was grateful to the claimant and the respondent's representative for the way in which the hearing was conducted: calmly and respectfully as was entirely appropriate.

Findings of Fact

11. The claimant was employed by the respondent for just over 3 years. He worked 37 hours a week and was paid around £2,313 a month which was agreed at £1,800 net.

12. The claimant agreed during the hearing, and so it is uncontroversial in the case, that the defendants manufactured two and four-stroke engines. They employed 210 employees in the UK at four sites, including one in Colchester. The claimant was one of three Supply Quality Auditors working at their premises in Stockport.

13. The case centres on the fact that the respondent claims that their business had recently suffered reduced demand for diesel engines and turbo machinery, including spare parts which, presumably, are used in repairs. In particular, in 2019 the respondent lost two main customers: (i) East Midlands Trains, which adversely affected the respondent's engine business overall; and (ii) they lost contract work for the MOD. (I note that the claimant accepted the loss of this work stream to the respondent). The loss of customer demand included that there was a loss of sales and spare parts for diesel engines; work which the claimant was engaged upon in Stockport. Therefore, the loss of these contracts directly impacted on the claimant's work.

14. Further, the respondent's activities were adversely affected by the COVID-19 pandemic in early 2020 and, they say, by July 2020 their business was 50% below budget in relation to order intakes and sales. Against this background, therefore, the defendant claimed that they needed to make redundancies, including the closure of the Colchester site. (The claimant did not challenge the assertion that they had to make around 2,600 redundancies world-wide when he was specifically asked about this at the hearing).

15. Against this background the respondent conducted a "pooling" exercise and, so far as the claimant is concerned, they identified that there were three employees that did the same work as the claimant at Stockport. The respondent then took the following steps which I will set out at paragraph 17 below.

16. However, before I consider the steps taken in relation to the claimant's redundancy, I have to set out an important background matter which is at the heart of the claimant's assertion that the redundancy was unfair and thus unlawful. At the time of the redundancy steps being undertaken, the claimant was subject to a disciplinary process and this included a temporarily suspension, although he was back working in June 2020. Below is what happened in outline. Again, this chronology is not challenged not least because I have taken the evidence from the agreed bundle of documents:

i. At the beginning of March 2020, the claimant took annual leave and went to the far East on a long-standing arrangement to visit family and to enjoy a cruise. Unfortunately, this coincided with the start of the COVID-19 pandemic.

ii. For the record, I take judicial notice of the fact the pandemic started in China and spread around the world reaching different counties at different times. At the end of February 2020, the pandemic was taking hold in Europe, especially Italy, and whilst knowledge of COVID was fast gaining traction in the UK in March 2020, the UK government did not announce the first lockdown until 23 March 2020. Therefore, the period at the beginning of March 2020 was a period of great uncertainty for all individuals and businesses.

iii. I understood that the claimant came back from his holiday early as a result of the pandemic and found that he had remaining holiday days outstanding. Presumably because he wanted to retain his holiday entitlement, he asked the respondent if he could go back to work early. The respondent refused and so he was required to use his pre-booked holiday in order to self-isolate at home in Stockport, which he did.

iv. When he returned to the workplace, however, the respondent had changed various protocols in the workplace in order to do what they could to make it "COVID safe". This included that they had provided various hand sanitisers and put in place other measures and policies to try to prevent the workforce contaminating their colleagues with the COVID virus, for example when they shared tools.

v. The claimant and his immediate superiors fell into disagreement over certain details of the new COVID protocols in the work place. At the hearing before me the claimant emphasised particularly that he had objected to the hand sanitisers provided because he was concerned about the chemicals used.

vi. Consequently, the respondent triggered their disciplinary procedures following an email complaint that the claimant was not cleaning correctly as he went along [see email, 81]. He was suspended [see email, Darren Tyrell 20.04.20, [82] and letter from Richard Power of the same date [83]]. The respondent then held a series of investigatory meetings with the claimant [Nigel Goddard 22.04.20 [84], Gary Greenbank 22.04.20 [86], Nigel Jones 22.04.20 [90] and Steve Myatt 22.04.20 [93]]. Richard Power held an investigatory meeting on Friday 24 April 2020 [95] and subsequently provided a disciplinary investigation report dated 4 May 2020.

vii. In the light of the various steps of the investigation set out above, Andrea Haughton wrote to the claimant on 17.06.20 to invite him to a disciplinary meeting to be held on 19 June 2020 [117]. In the meantime, the claimant had seen Occupational Health consultant, Dr Lennox (of Wellness International) who provided a medical letter/report [114] dated 15 May 2020 and who noted that the claimant, inter alia, was anxious and angry about what had happened to him connected, impliedly, to events at the workplace and the respondent's response in terms of the disciplinary process.

viii. The planned disciplinary meeting was put back to 1 July 2020 when the meeting was chaired by Derek Wendel (Head of PrimeServ UK). (The claimant took a colleague, Mr John Hayes to that meeting). At the end of the 1 July 2020 meeting, the claimant was asked to provide a copy of a witness statement which he had read at the meeting. There then followed email exchanges between the claimant and Mr Wendel (much conducted through the respondent's HR department) and the claimant eventually provided a long statement of information which included materials such as photographs. The disciplinary meeting was scheduled to resume on 17 July 2020.

ix. The disciplinary process was never finalised and was overtaken by events when the respondent commenced their redundancy process. (See email from the claimant to Andrea Haughton dated 7 August 2020 when he sought an up-date [251]).

17. The **chronology** of steps that the respondent took in response to the downturn in business and redundancy process is set out below. Again, that the steps were taken is not in dispute. The claimant's concerns, and this resulting case, focus on what took place "behind closed doors" and the decisions that were made, culminating in the confirming of the redundancy decision by the respondent's personnel,

15 July 2020	The respondent held a company-wide meeting to announce proposed redundancies and explain the rationale for the redundancies to the workforce. [213] The respondent's managing director held a further meeting with affected employees to announce that a €45 million cost-reduction exercise was required and a loss of 2,600 jobs and that it would be implemented in accordance with a job-scoring exercise.
15 July 2020	The respondent (Richard Power) wrote to the claimant personally to inform him that he was at risk of redundancy. The letter set out how the respondent would carry out the processes of assessing and scoring individual employees, including the claimant, who were at risk of redundancy. He was told that the criteria to be considered and scored were: quantity and quality of work, initiative and ownership, teamwork, skills/qualifications/training, future potential/flexibility/adaptability, timekeeping, absence record (in last 12 months) and disciplinary record [215].
30 July 2020	The claimant underwent a scoring assessment and scored the lowest score according to those that were doing the same job as him. The scoring exercise was conducted by Adrian Maddock, Steve Myatt, Richard Power and Craig Greenbank. He scored 27. Two others identified in the same pool of three scored 37 and 35 points [235].
5 August 2020	The claimant was advised of his provisional scores and that he had been provisionally selected for redundancy [249].
11 August 2020	First consultation meeting: The claimant was given the opportunity to put forward his views, suggestions and representations. He was told that he could be accompanied and that he could put forward his view on possible alternative employment arrangements. The meeting was held with Adrian Maddock (general manage supply chain of logistics) chairing the meeting and Poly Ormerod (HR co-ordinator) was the note taker. The claimant was accompanied by John Hayes (sub assembly fitter). [253]
18 August 2020	Second individual consultation meeting: Anita Foster, (PA to the managing director) took notes at this time and the claimant was invited to make proposals. The main

	focus of the meeting was the scores that the claimant had been allocated. At this meeting the claimant also asked why voluntary redundancy had not been offered. [270]
26 August 2020	Mr Maddock wrote to the claimant summarising their discussions that had taken place on the previous meeting (18 August 2020). Mr Maddock told the claimant that he was satisfied that the scores should be maintained, that no other positions were available and that voluntary redundancy would be considered by volunteers who put themselves forward, but, nonetheless, the respondent was entitled to retain their choice of mix of skills and skilled personnel for the future [317].
2 September 2020	Third consultation meeting: Inter alia, at this meeting the claimant was informed that no viable alternative to redundancy had been identified [325].
14 September 2020	The claimant received written notice of his redundancy which included the terms that: his last day of work would be 13 October 2020; he was entitled to a statutory redundancy payment £2,402.59; and that he had a right of appeal [333].
15 September 2020	The claimant exercised his right of appeal [337].
25 September 2020	The appeal meeting was chaired by Ms Louise Durose (the respondent's general counsel). Polly Ormerod was the notetaker. The claimant was accompanied, again, by John Hayes. At this appeal meeting, the claimant challenged the scores, expressed dissatisfaction with the four people who had done the scoring process and asked for clarification regarding his holiday entitlement. The respondent says, through Louise Dunrose in her witness evidence, that following the appeal meeting she followed up with the manager, Mr Derek Wendel. She ascertained that Mr Wendel was not involved in the redundancy process, nor the floor managers who had done the investigation. Ms Durose also considered the scores that had been allocated to the claimant as per the scoring system and awarded one extra point under two headings (to take the claimant from one point to two points). Nonetheless the claimant still remained with the lowest score out of the three men in his pool. Ms Durose also considered, particularly because the claimant had highlighted it, that his colleague, Mr Alan Ellis, was on sick leave and that he had suggested that he fulfil Mr Ellis' duties whilst he was on sick leave.

	Nonetheless, Ms Durose ascertained that the respondent wanted to keep Mr Ellis' skills and that they could manage to cover Mr Ellis' workload in his absence. Finally at the appeal it was also confirmed that the period of self-isolation following a holiday in March of 2020 it would be treated as holiday [341].

Submissions and arguments made at the hearing

18. In making my decision I have not set out all the evidence I heard at the hearing on 20 December 2021, but have selected those details which are most important to my decisions. Just because I have not mentioned something does not mean that I have not considered it.

19. In this case, the claimant emphasised: through his cross-examination questions of the respondent's witnesses; through his answers to the questions that he gave when he was cross-examined; and in his submissions, that he believed that the process of redundancy was unfair on the basis of disciplinary issues which were on-going at the time that the redundancy process started. He emphasised to me that, prior to the redundancy process being announced, he had been criticised for his approach to COVID sanitary rules that had been brought into the workplace. As a result of this, he told me at the hearing, that he ended up on sick leave and *"under the doctor".* The thrust of his objection to the redundancy was that the respondent's investigators were prejudiced against him from the outset and those that made the decisions, mainly Mr Maddock and Ms Durose, were not impartial by virtue of the outstanding disciplinary matter. He asserted that the redundancy process was unfair because they were "*trying to get rid of him anyway on the back of the ongoing disciplinary process*".

20. In contrast, the respondent's position was that they had not acted unfairly, explicitly, because the disciplinary process had never been finalised and, within the redundancy process, they treated him as somebody with a pristine disciplinary history.

21. The claimant says that Mr Maddock was influenced by the background disciplinary process because on an unspecified date he had a word with the claimant in Mr Maddock's office where Mr Maddock advised the claimant to ensure that he always acted professionally at work and to get on with his colleagues, even if he did not like them all, and that he should at all times behave "like an adult" (or words to that effect). Mr Maddock answered cross-examination questions on this topic, and said that his recollection of this informal meeting was that he had simply encouraged the claimant to concentrate on his duties at work, that he was aware, in general terms, of the background disciplinary matter, but that he put this from his mind when he was asked to be involved in relation to the redundancy. Mr Maddock said that he was aware "at a high level" about the disciplinary problem, but did not know the details.

22. In relation to the redundancy situation, in his questions and also submissions, the claimant challenged why Mr Ellis (on long-term sick leave) had not been selected for redundancy. Mr Maddock confirmed, and Mr Gorasia asserted, that Mr Ellis had been in the pool and was considered and scored. Nonetheless, Mr Ellis scored higher

than the claimant. (The score sheets, the criteria and the scores appear at several places in the papers). One area where the claimant only scored one point was under the heading of *"Future potential/flexibility/adaptability"*. The claimant was awarded only one point because the claimant was considered to be somebody who did not always get on with his jobs and was somebody who was not *"prepared to go to the extra mile."* As a result, Mr Maddock considered that the claimant was somebody who would be unlikely to be promoted. There was also evidence, that on occasion, Mr Hampson had been disrespectful or even rude to other members of staff. At the hearing before me, Mr Maddock emphasised that this low scoring, and the reason for it, was not that the claimant could not do a good job but, looking into the future, it was not perceived that the claimant was somebody that would "step up" to a new role. Nor was it considered that he would embrace the challenge of a promotion. In evidence and also submissions, the claimant did not have a coherent response to this, other than to vaguely asserted that those assessing were biased against him. Fundamentally, this area of scoring embodied a subjective element of assessment made within the context of the claimant's recent past performance of his duties within the workplace.

23. The claimant also queried why four managers were involved in scoring him, to which Mr Maddock's response was that this was with a view to ensuring that the process was particularly robustly fair, and that it was believed that four different managers would each give reliable, independent assessment and views of the claimant.

24. The claimant drew my attention to an organisational flow chart which identified a possible new role in an "organogram" document. The claimant claimed that he was not considered for this role. Nonetheless, Mr Maddock said that he did not recall what had happened with this role. He did not believe it was available although the claimant suggested that Darren Tyrell had taken the position. I noted, however, that the claimant did not provide any written confirmation of Mr Tyrell (or anyone else) taking such a new role, however. In short, the claimant did not satisfy me that a new role had ever been created, so it is irrelevant to investigate whether he might have considered, never mind to criticise the respondent for not considering the claimant.

25. The claimant challenged Ms Durose regarding the role of Mr Wendel had played in the investigation giving rise to the redundancy decision. She confirmed that she had believed that he was a completely independent investigator who was Head of Turbo, and thus an appropriate person to investigate the claimant's situation and performance in the company. Ms Durose confirmed that she checked the scoring of the investigators and considered it to be fair. The claimant also challenged her with the general assertion that Mr Wendel not impartial because his view of the claimant had been contaminated by his involvement in the disciplinary matter which he knew about. Nonetheless, the claimant did not assert or draw my attention to evidence that Mr Wendel had in fact acted in an unfair or disciplinary fashion when carrying out his investigation. The claimant's compliant was simply along the lines that Mr Wendel *must* have acted unfairly simply because he knew of the background disciplinary matter.

26. Further, the claimant also claimed that after he had left, an apprentice, Matt, had taken over his job although, again, he did not point me to no evidence to corroborate this assertion. The claimant did not bring up the issue of the apprentice

allegedly replacing him, either in the internal appeal nor in his witness statement. It was something that he claimed, apparently for the first time, at the hearing before me.

27. In making my decision I have taken into account that, in cross-examination from Mr Gorasia, the claimant conceded that he had seen the redundancy notice. He accepted that the company had been adversely hit by COVID in July 2020 and that COVID had had a big impact on industries and sectors connected to the respondent. He agreed that, as a result, the respondent had seen a decline in sales. He also confirmed that the business had lost sales to East Midland Trains and changes in the MOD supply contracts. He conceded that the Colchester site had been greatly reduced in size and activity, but said that he believed that it was still open. He conceded that there had been 2,600 redundancies world-wide and that the respondent had been trying to save €45 million. He conceded that he had received a first letter in relation to the redundancy. In short, to this point, the claimant accepted, or seemed to accept, that the redundancy process was as how the respondent claimed.

28. In relation to the scoring exercise, the claimant conceded that in relation to his disciplinary score, he had been allocated the full score, namely four. Nonetheless, the claimant did not accept that he had not been disadvantaged by virtue of the background disciplinary matter, despite the full score in relation to disciplinary matters generally. He repeatedly told me that the respondent simply wanted to make him redundant and that is the reason why they had never completed the disciplinary procedure. In contrast, Mr Gorasia emphasised to the claimant in questioning and to me in submissions that the scores of the other individuals to whom the claimant was compared received, 37 and 35, therefore, that there was an 8-point difference between him and the closest comparable member of the team pool. The claimant did not provide me with any alternative forensic explanation for the differences in scores between him and these two colleagues.

29. In relation to the contentious issue of the claimant's potential and his professional development, the claimant did not accept that the appraisal immediately before the redundancy exercise, namely the appraisal dated 3 October 2019 [285] was accurate and that it indicated that there was room for improvement. The claimant repeatedly asserted to me that he had not signed the appraisal because he had not agreed with it at the time, despite the fact that his disagreement with the appraisal was actually set out with the body of the appraisal. I did not find this a useful piece of evidence, nor that it supported the claimant's case.

30. The claimant acknowledged the selection for redundancy document [333], that he had been granted the right of appeal [335] and that he had undergone the internal appeal process [337]. Finally, the claimant seemed to agree with the holiday pay summary set out by Andrea Haughton in her email [340]. In short, the issue in relation to his holiday seemed to essentially unchallenged and to be related to the fact that, in March 2020 he had had to cut a cruise holiday short because of the beginning of the COVID pandemic. He therefore arrived back in Stockport early and asked the respondent if he could return to work. Because he already had holiday booked, they told him that he could not cancel his vacation leave and instead advised that he should stay at home and use the time to self-isolate before he came back to work as previously planned following his holiday. In short, whilst the claimant might have been disappointed to be spending his holiday in Stockport, rather than on the cruise, nonetheless, it was pre-booked time off work which he took. Ultimately, the claimant's

dissatisfaction was to do with the fact that he had not been allowed to preserve his holiday entitlement by going back to work early.

31. In relation to the internal appeal, my attention was drawn to the internal redundancy appeal documents and [342], in particular where there was a discussion about the claimant's low score. Here I noted the claimant's response which was *"I understand the redundancy and that has had to happen. This all happened since I came back from holiday"*. The claimant did not deny that he had said this. At the hearing before me the claimant could not explain why he had said that he understood that the redundancy had to happen, whereas he was now saying that the redundancy was wrong and should not have happened.

32. The claimant also said that he had seen the letter dated 1 October 2020 following the 25 September 2020 meeting [346-352] but said that *"I have not read it though".*

33. In closing submissions, the respondent argued that the redundancy was fair and reasonable and that the redundancy was for genuine reasons. It was argued that the 15 July 2020 letter set out the rationale for the redundancy [213] and it was not a sham document; it was a company-wide process. Ultimately, the respondent asserted that reasonable criteria have been applied and the claimant's final score was 8 points below the next closest employee. Therefore, he had been correctly selected for redundancy. There were no alternative vacancies; the issue of other vacancies was checked into, but there were none.

34. So far as Mr Ellis was concerned, [414] Mr Gorasia emphasised that he had volunteered for redundancy, but his experience was critical to the respondent and he was an important employee and the respondent were entitled to keep him as the top scorer. In evidence the claimant had conceded that Mr Ellis had 30 years of service, was a very longstanding employee with the respondent and that his situation was very different from his own.

35. The respondent also asserted that the claimant was paid in lieu of notice for 6.5 days following the termination of his employment and submitted that this was the claimant's full accrued un-taken holiday entitlement and that no further holiday pay is due to the Claimant. The claimant did not challenge these assertions at the hearing.

The Law

36. In summary, in making my decision I have had regard to the following matters within the legal matrix that applies to claims of unfair dismissal:

i. The claimant claims that he has been subject to an unfair dismissal in the context of the redundancy.

ii. In contrast, the respondent denies that the claimant was unfairly dismissed contrary to section 94 of the Employment Rights Act 1996, whether substantively or procedurally and whether as alleged by the claimant bore at all.

iii. The respondent contends the redundancy had a potentially fair reason for dismissal within the meaning of Section 98 (i) and (ii) of the Employment Rights Act 1996, namely redundancy, and/or "some other substantial reason".

iv. In this case it was, specifically, a business reorganisation carried out in the interest of economy and efficiency of the company. The respondent asserts that they acted reasonably in all the circumstances in treating the diminished requirement of employees to carry out supply quality audit work is sufficient reason for dismissing the claimant.

v. I have considered whether the procedure followed by the respondent was a fair procedure.

vi. If it was not fair, then I have to consider the case of Polkey v AE Dayton Services Limited [1997] ICR 142.

37. In this case the unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.

38. The primary provision is section 98 which, so far as relevant, provides as follows:

"(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 sub-section (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 sub-section if it … is that the employee was redundant …

(3) …

(4) Where the employer has fulfilled the requirements of sub-section (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 reasonable 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".

39. The definition of redundancy for the purposes of section 98(2) is found in section 139 of the Employment Rights Act 1996 and so far as material it reads as follows:

"(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 requirement of that business-

(i) For employees to carry out work of a particular kind… have ceased or diminished or are expected to cease or diminish".

40. The proper application of the general test of fairness in section 98(4) has been considered by the Appeal Tribunal and higher courts on many occasions. The Employment Tribunal must not substitute its own decision for that of the employer: the question is rather whether the employer's conduct fell within the "band of reasonable responses": **Iceland Frozen Foods Limited v Jones [1982] IRLR 439 (EAT)** as approved by the Court of Appeal in **Post Office v Foley**; **HSBC Bank PLC v Madden [2000] IRLR 827**.

41. In cases where the respondent has shown that the dismissal was a redundancy dismissal, guidance was given by the Employment Appeal Tribunal in **Williams & Others v Compair Maxam Limited [1982] IRLR 83**. In general terms, employers acting reasonably will seek to act by giving as much warning as possible of impending redundancies to employees so they can take early steps to inform themselves of the relevant facts, consider positive alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere. The employer will consult about the best means by which the desired management result can be achieved fairly, and the employer will seek to see whether, instead of dismissing an employee, he could offer him alternative employment. A reasonable employer will depart from these principles only where there is good reason to do so.

42. The importance of consultation is evident from the decision of the House of Lords in **Polkey v A E Dayton Services Limited [1987] IRLR 503**. The definition of consultation which has been applied in employment cases (see, for example, **John Brown Engineering Limited v Brown & Others [1997] IRLR 90**) is taken from the Judgment of Glidewell LJ in **R v British Coal Corporation and Secretary of State for Trade and Industry, ex parte Price [1994] IRLR 72** at paragraph 24:

> **"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 with whom he is consulting. I would respectively adopt the test proposed by Hodgson J in R v Gwent County Council ex parte Bryant … when he said:**
>
> **'Fair consultation means:**
>
> **(a) consultation when the proposals are still at a formative stage;**
>
> **(b) adequate information on which to respond;**
>
> **(c) adequate time in which to respond;**
>
> **(d) conscientious consideration by an authority of the response to consultation".**

Conclusions – applying the Law to the Facts

43. I find that the redundancy arose from a situation where the respondent genuinely had need for fewer employees pursuant to section 139 of the Employment Rights Act 1996. I therefore find that the principal reason for the dismissal was potentially fair. I am easily satisfied that the reason for the dismissal was linked to the respondent's down-turn in business connected to loss of engine contracts and

exacerbated by the effects of the COVID-19 pandemic. I am bolstered in my decision by the fact that the claimant accepted that the respondent had suffered a significant reduction in business. The claimant also seemed to accept the respondent's assertion that they needed to make redundancies; rather his dispute was in relation to the way that they went about that process.

44. I am satisfied that the claimant was adequately warned about the respondent's need to make redundancies, a matter with which he did not take issue.

45. I am satisfied that the respondent put in place an objective system for selecting the claimant from a pool of three colleagues involving scoring. The claimant did not object to the scoring method, in principle.

46. I am satisfied that the respondent carefully and fairly selected the four men to carry out the scoring exercise. I was told, and accept as genuine, that four men, rather than the usual two who would normally conduct such an exercise, had been decided upon in order to add rigour to the scoring and thus bolster the credibility of the global scores.

47. I am satisfied that the scores allocated were fair. The issue that the claimant focusses on is that he was treated unfairly because of the background, unfinished disciplinary exercise. However, I find his stance on this central point somewhat irrational because he was awarded the full score in relation to his disciplinary record. Further, the claimant did not draw my attention to any other element of the scoring being adversely affected by the background disciplinary investigation. At all times in the redundancy process, I find that the claimant was treated as if he had a pristine disciplinary record because the respondent recognised that the disciplinary investigation was incomplete.

48. The thrust of the claimant's objection to the way that the scoring had been performed was the vague and general assertion that the four individuals were, or must have been, biased against him. However, in relation to this central issue, he did not draw my attention to any reliable, "concrete" evidence that demonstrated that any of the four scorers were prejudiced against him and had down-scored him for unfair reasons. The core of the claimant's compliant was that these four scorers must have been unfair when assessing him, simply because of general knowledge about the unfinished business of the disciplinary issue. However, overall, I do not accept the claimant's compliant of bias, prejudice or discrimination because I dd not seen any evidence that backed up this assertion of unfair behaviour. I am not satisfied by the claimant's vague and general argument that the scorers or any of the chairs who headed the investigatory process meetings must automatically have been biased because there was no cogent evidence upon which I could make such a finding. I am satisfied that Mr Maddock was aware, in general terms, that the claimant was under investigation for a disciplinary matter, but I find no evidence that this influenced his decisions regarding the claimant in the redundancy matter.

49. In relation to the internal appeal process, I find that Ms Durose had acted independently and approached her appeal decision with an appropriately open mind, not least because she had adjusted the scores to award the claimant one extra point under two headings.

50. I am satisfied that no alternative employment was available to the claimant with the respondent. This issue was appropriately explored with the claimant in the redundancy investigations. In particular:

i. Following the redundancy pooling and scoring exercise, the respondent was entitled to decide to retain Mr Ellis due to his long service and particular skills and expertise;

ii. The respondent was genuinely able to cover Mr Ellis's role whilst he was on sick leave with existing staff and it was not necessary to use the claimant to cover for Mr Ellis;

iii. So far as the possible role identified in the organogram was concerned, I am satisfied that this was a planning, "work-in-progress"-type document for the respondent and did not identify a concrete role; the respondent's circumstances had been very fluid in 2020 because of the multiple challenges to their business; and there was no evidence that the role potentially identified by the claimant had ever been created.

51. Given that the claimant's role had ceased to exist and that it had not been possible to identify alternative employment for him, I am satisfied that the dismissal was within the range of reasonable responses for the respondent to have taken. I also accept the respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. I find that the respondent's decision to dismiss the claimant by reason of redundancy on 14 September 2020 was fair in accordance with equity and the substantial merits of the case.

52. Because I have found that the dismissal was fair, it is not necessary for me to determine whether the claimant could have been fairly dismissed in any event, nor to consider the application of the case of Polkey.

53. The claim for outstanding holiday pay is dismissed because the claimant took all outstanding holiday and was paid for the remaining days at the same time as he received his redundancy package.

54. I note the claimant's age, that he is currently not working and imagine that he is struggling to find alternative work. I also acknowledge that, during the time of the disciplinary investigations he had sought medical attention. Unfortunately, the decision made by the respondent, in these very difficult times, was that it needed to reduce costs and their workforce to address the reduction in income/business. In those circumstances the claimant's *role* at the Stockport site was identified as one placed at risk of redundancy. The fact that the claimant was made redundant in those circumstances did not reflect negatively on the claimant at all, but rather it reflected the tough business decisions which the respondent needed to make (as many employers have needed to recently).

Summary

55. For the reasons I have explained above, I find that the dismissal was not unfair. The claimant was dismissed by reason of redundancy and, in all the circumstances, the respondent acted reasonably in treating that as a sufficient reason to dismiss the claimant.

Tribunal Judge Holt sitting as an Employment Judge

Date: 10 January 2022

JUDGMENT AND REASONS
SENT TO THE PARTIES ON

20 January 2022

FOR THE TRIBUNAL OFFICE