Case Nos. 1306651/2020
1306796/2020
1306811/2020
1307344/2020

EMPLOYMENT TRIBUNALS

Claimants: (1) Mr D Pointon
(2) Mr D Cooper
(3) Miss J Thursfield
(4) Mr S Allred

Respondent: Swift Electrical Wholesalers (S-O-T) Limited

FINAL HEARING

Heard at: Birmingham **On:** 8 to 10 November 2021

Before: Employment Judge Camp

Appearances
For the claimants: in person (Mr Pointon as spokesperson)
For the respondent: Mr O Lawrence, counsel

RESERVED JUDGMENT

(1) All of the claimants were unfairly dismissed.

(2) The reason for dismissal was redundancy in every case and therefore no basic awards are payable.

(3) Any compensatory award made to Mr Cooper should be calculated as if he:

a. had an 80 percent chance of returning to work on or around 6 July 2020, when the other warehouse workers came back from furlough;

b. had a 20 percent chance of remaining on furlough until 19 July 2020;

c. returned to work full time, from 20 July 2020;

d. remained in the respondent's employment, working full time, from then onwards.

(4) Any compensatory awards made to any of the other three claimants should be reduced in accordance with the so-called Polkey principle (see Polkey v AE Dayton Services Ltd [1987] UKHL 8):

a. by 60 percent in the case of Mr Pointon;

b. by 75 percent in the case of Mr Allred;

c. by 100 percent in the case of Miss Thursfield.

(5) **ORDERS:**

a. The claimants and the respondent must now attempt to agree compensation and any other remedies. ACAS may be able to help. Correspondence about this, including any correspondence with ACAS, must not be sent or copied to the Tribunal.

b. Within **14 days** of the date this order is sent to them, any claimant who has not by then agreed compensation and any other remedies with the respondent must notify the respondent as to whether they are interested in reinstatement or re-engagement in accordance with sections 114 and 115 of the Employment Rights Act 1996 – see:
https://www.legislation.gov.uk/ukpga/1996/18/section/114
https://www.legislation.gov.uk/ukpga/1996/18/section/115
https://www.legislation.gov.uk/ukpga/1996/18/section/116

c. **28 days** after the date this order is sent to them, the respondent must write to the Tribunal: *either* confirming that compensation and any other remedies have been agreed with all of the claimants and that these Tribunal proceedings are concluded; *or* submitting their proposals, agreed if possible, for case management orders leading up to a 1 day remedy hearing, with all relevant parties' dates of unavailability over the next 12 months being provided at the same time.

d. There is more information about remedy and schedules of loss here, in Guidance Note 6, from page 18:
https://www.judiciary.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20180122.pdf

REASONS

1. The respondent is a domestic kitchen appliance, sink and tap distributor, based in Stoke-on-Trent, providing a national trade distribution service to kitchen studios, electrical appliance retailers, and builders merchants. In June 2020, near the end of the first, Covid-related lockdown, it made a number of staff redundant. Four of the staff made redundant have brought Employment Tribunal claims for unfair dismissal, and I have dealt with the four claims together at this hearing.

Issues & law

2. The issues I am dealing with in relation to each claim are:

   2.1 first, what was the principal reason for dismissal and was it redundancy or "*some other substantial reason*", namely a business reorganisation akin to redundancy;

   2.2 secondly, was dismissal fair or unfair in accordance with equity and the substantial merits of the case, in accordance with section 98(4) of the Employment Rights Act 1996 ("ERA");

   2.3 thirdly, (by agreement made towards the start of the hearing, in circumstances where it seemed highly unlikely there would be enough time to give a decision on the first two issues and then deal with the whole of remedy if any of the claimants won) for every claim that succeeds where the remedy is compensation only, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed? This is the so-called "Polkey issue" a.k.a. "Polkey principle" – see Polkey v AE Dayton Services Ltd [1987] UKHL 8; see also paragraph 54 of the EAT's decision in Software 2000 Ltd v Andrews [2007] ICR 825. The reason for deciding that issue at the current stage of the proceedings was to help the parties to agree remedy in relation to any claim that succeeded without the need for a further hearing, in accordance with the Tribunal's duty to promote alternative dispute resolution.

3. In terms of the relevant law, I refer to respondent's counsel's written closing submissions. In addition, I would like to emphasise the following points:

   3.1 redundancy arises where the employer's requirements for employees to carry out work of a particular kind have ceased or diminished or are expected to do so. Claimants sometimes think that if the work the supposedly redundant employee was doing prior to their dismissal did not cease or diminish, for example if the respondent's business was doing well and the employee was busy, then there can't have been a redundancy situation. This is not so. The relevant part of the applicable legislation – ERA section 139 – refers to the respondent's requirements "*for employees to carry out work of a particular kind"*, i.e. it is focussed not on the needs of the business for particular work to be done but on the needs of the business for employees to carry out work:

   > *Redundancy does not only arise where there is a poor financial situation at the employers… It does not only arise where there is a diminution in work in the hands of the employer… It can occur where there is a successful employer with plenty of work but who, perfectly sensibly as far as commerce and economics is concerned, decides to reorganise his business because he concludes that he is over-staffed. Thus, even with the same amount of work and the same amount of income, the decision is taken that lesser numbers of employees are required to perform the same functions. That too is a redundancy situation.* (Kingwell & Others v Elizabeth Bradley Designs Limited [2003] UK EAT 0661-02-1902 (19 February 2003))

   3.2 it is also often suggested that the respondent is obliged to justify, in business or economic terms, its decision to make redundancies. Again, any such suggestion

is wrong in law: see the leading case of Murray v Foyle Meats [1999] UKHL 30 and paragraph 12 of the EAT's decision in Polyflor Limited v Old [2003] UK EAT 0482-02-1305 (13 May 2003): "*the question … is whether the dismissal is attributable to a diminution of the requirements of the employer's business for employees to do work of a particular kind. It is not necessary for an employer to show an economic justification for its decision to make redundancies, properly so called.*"

3.3 although the test I have to apply when looking at ERA section 98(4) is the so-called 'band of reasonable responses test'[1], meaning I should not find the dismissal unfair unless the respondent has acted as no reasonable employer would have done, and although I must not fall into a 'substitution mindset', I bear in mind (see Newbound v Thames Water Utilities Limited [2015] EWCA Civ 677) that: the band of reasonable responses test is not infinitely wide; it is important not to overlook ERA section 98(4)(b); Parliament did not intend the Tribunal's consideration simply to be a matter of procedural box-ticking.

Findings of fact; chronology of events

4. In terms of what happened in and in relation to the redundancy[2] process, very little of importance, if anything, is in dispute. I heard from 8 witnesses for the respondent, from each of the claimants, and from a further 3 individuals on the claimants' behalf. The main witnesses I heard from on the respondent's behalf were: Mr P Theobald, Business Development Director, whose main role was devising the scoring systems used to choose between individuals at risk of redundancy; Mr R Buckley, Consultant Operations Director, who scored Mr Pointon, Mr Cooper, and Mr Allred against the criteria devised by Mr Theobald; Miss V Lewis, Head of Sales Support, who scored Miss Thursfield against the criteria devised by Mr Theobald; Mr J Lawson, the respondent's Financial Director. The main witnesses for the claimants were the claimants themselves.

5. There was a file / bundle of documents running to 339 numbered pages. Some additional documents were provided by the respondent at my suggestion and without objection from the claimant part of the way through the hearing. Some additional information was provided through respondent's counsel just before closing submissions, again without objection or disagreement from the claimants' side.

6. A number of witnesses provided information about the respondent's financial position in 2019 through to the end of March 2020, coming into the first Covid-related 'lockdown'. None of that evidence was challenged by the claimants. Essentially, the respondent had new owners from March 2019 and during 2019 and into early 2020 management was looking at the business with a view to making efficiency savings. I refer to paragraphs 3 to 7 of Mr Theobald's witness statement. Covid, and impending and then actual lockdown in March 2020, gave new impetus to the need to make cost savings. In or around May 2020, by which time 45 out of 61 employees at the respondent had

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1 See Iceland Frozen Foods v Jones [1982] IRLR 439 at paragraph 24.

2 I am referring to it as a redundancy process for convenience sake; I appreciate that at least some of the claimants allege that there was not a redundancy situation and/or that even if there was, this was not the reason for their dismissals.

been put on furlough, including all four claimants, management decided that redundancies would be necessary.

7. The respondent decided that there should be a number of redundancy 'pools'. Amongst others, there was: a pool of 15 drivers, which included Mr Pointon and Mr Allred, from which the respondent intended to make 5 redundancies; a pool of 5 warehouse workers, including Mr Cooper, out of which the respondent wanted to make 1 redundant; and the pool consisting of the 8 members of the Sales Order Processing (SOP) Team, including Miss Thursfield, of whom the respondent proposed making 3 redundant.

8. From the respondent's own uncontradicted evidence, it is clear that there was an artificiality to parts of what the respondent was doing; to an extent it was 'ticking boxes' it had been advised it had to tick by its then legal HR Advisors. What I mean by this is, as appears from Mr Theobald's statement, a decision that there would be redundancies, as to what the redundancy selection criteria would be, as to how many redundancies there would be, and as to what the redundancy pools would be, was taken in May 2020; and a decision was taken at that time that the actual redundancies would be implemented in June 2020, so that the process would be complete by the start of July 2020, when the respondent envisaged furloughed staff returning to work. However, in a redundancy situation there is nothing inherently wrong or unreasonable with the employer having a detailed plan that it is intending to implement, so long as it is reasonably open to suggestions from affected employees and is willing in principle to change its mind. The allegation that absolutely everything was set in stone in May 2020 and that any consultation was a sham was not put to any of the respondent's witnesses. In those circumstances, I am prepared to give the respondent the benefit of the doubt on this.

9. The potentially affected employees were first written to warning of possible redundancies on 11 June 2020. The letters written to them were all similar and I refer to them. They came from the owner of the business, Mr C Honer. Key parts of the letters read: "[the] *downturn in sales has clearly been aggravated by the current complete suspension of business due to the global pandemic …. we expect a prolonged period of reduced sales once the lockdown has eased. As a result of these two combined factors we expect business activity going forward will be significantly reduced even after the business has worked through the current national crisis. … we have concluded that there is a risk that there will be insufficient demand to be able to provide work for all members of the Swift team going forward and therefore we may have to make some redundancies.*"

10. Pausing there, these letters were a little disingenuous, in that (as just mentioned) it is clear from the respondent's own evidence that by the time these letters were written, redundancies were not merely a possibility – specific numbers of redundancies in specific areas had been planned. Be that as it may, I make similar observations about this to those I made earlier: the respondent was entitled to have decided what it would do before it warned and consulted with employees about redundancies, so long as its decision was not set in stone; and it was not suggested to the respondent's witnesses that they were completely unwilling to change their minds.

11. The letters continued: "*I am committed to continuing to explore ways of avoiding compulsory redundancies and minimising the number of employees affected. If you*

have any suggestions on ways to avoid redundancies, please let me know. I remain open to any constructive suggestions regarding alternatives." On the evidence, none of the claimants put forward any suggestions to avoid compulsory redundancies in response to their warning letter.

12. Each letter then continued by explaining what pool the employee it was written to was in and how many jobs were at risk within that pool. It stated, "*If redundancies are necessary, we will have to decide which individuals from the pool will be selected for redundancy. This will be done using objective and quantifiable selection criteria. The criteria selection form is attached for your reference.*" Attached to each of the letters was a blank[3] "Redundancy selection assessment form". The potentially affected employees were not invited to comment on the form and were not given any indication at that stage that they could do so, by, for example, suggesting a different redundancy selection process, using different criteria, or a different scoring system, or different weighting of criteria. I shall come on to each claimant's particular situation vis-à-vis the selection criteria later in these Reasons.

13. Finally, the letter said that "*Interviews with all individuals affected will be held on 19th June.*" The fact that interviews had already been lined up underlines the fact that the letter was not really what it purported to be, namely a letter warning of possible redundancies, but was instead notification of planned redundancies.

14. On 16 June 2020, each of the affected individuals, including the four claimants, were written to by Mr Honer and told that they had been provisionally selected for redundancy. In other words, the respondent had in a single step gone through a number of stages of a redundancy process, the stages it had gone through being: taking a final decision that compulsory redundancies needed to be made; taking final decisions as to what the redundancy selection criteria should be, as to the numbers that should be made redundant, as to the selection pools, as to the scoring system to be used, and so on; providing an opportunity for affected employees to comment on what their scores should be, i.e. confirming to them that compulsory redundancies were going to be made and inviting them to comment on what was proposed in light of that information (this would in fact have been impossible for the affected employees to do on the basis of the information they had been given, for reasons I shall explain); finally, scoring each employee.

15. The respondent had, then, skipped from warning of possible redundancies to selecting individuals for redundancy in the space of 5 days, including a weekend. I understand the respondent was doing what it was advised to do. All I can say is that if it was, it doesn't seem to me to have been very good advice.

16. The letters of 16 June 2020 notifying individuals of their "*provisional selection for redundancy*" invited them to what was described as a "*consultation meeting*" on 19 June 2020. The letters included this: "*I should stress that this is only a provisional decision and we will consult with you to continue to try to identify ways in which your redundancy can be avoided. If you think that there are ways in which we can avoid having to make you redundant I am keen to hear them.*" Each employee was offered a face-to-face meeting on 19 June 2020, or, alternatively, a telephone meeting. They

[3] By which I mean they hadn't been filled in.

were not given their redundancy scores in the letter, nor, prior to their meetings, any other information over and above that contained in the letters themselves.

17. The letters continued:

> *The aim of the meeting is to give you a chance to discuss the proposed redundancies in more detail and how they affect you. Issues for discussion may include:*
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> - *Why it has been decided that it is necessary to make redundancies now.*
> - *How we identified the candidates for selection.*
> - *Why your position has been provisionally selected for redundancy.*
> - *The terms on which any redundancy would take place.*
> - *Any ideas you may have for avoiding redundancy or reasons why you think the company should not select you for redundancy.*
>
> *Following that meeting we will consider any submissions you made at the meeting. These will need to be submitted in writing by the 23rd July 2020.*
>
> *… If your selection for redundancy is confirmed, you will not be expected to work through your notice period. Your final date of employment will be Tuesday 30th June 2020.*

18. Meetings duly took place on 19 June 2020. Mr Pointon's meeting was by telephone. The other three claimants' meetings were face-to-face. The meetings were short. It appears they were not minuted; at least I do not have any meeting notes of any kind in the bundle beyond a few comments scribbled on the face of people's provisional selection letters. I assume scripts of some kind were prepared for the meetings, but heard no witness evidence about this and, once again, there is no documentation around this.

19. Affected staff were told what their redundancy scores were and the basis of scoring, albeit in Miss Thursfield's case, at least, everything said in her redundancy selection assessment form was not read out to her because there was quite a lot in it and there simply wasn't time. Staff were invited to comment on the scores; unsurprisingly, as they had only just been told about their scores, none of them did so. Those who were physically present were handed their score sheets at the end of the meeting to take away. Those like Mr Pointon who attended by telephone had their score sheets sent to them together with their termination letters. They appear not to have been reminded that they had, in their provisional selection letters, been given until 23 June 2020 to provide any comments in writing. None of the claimants made any relevant comments or further suggestions as to how their own redundancy should be avoided, or otherwise challenged the selection that had been made or the basis for it.

20. During cross-examination, Miss Thursfield, for the first time in the course of these proceedings so far as I can tell, suggested that she had sent an email to the respondent following receipt of her provisional selection for redundancy letter proposing that she and others work part-time to tide the respondent over until business picked up, thereby avoiding or reducing the need for redundancies. However, there is no corroborative evidence to support this, she did not mention this in her claim form or her witness statement or anywhere else, it was not put to any of the respondent's witnesses, and

any email she sent was not disclosed by her within these proceedings. In those circumstances I am not satisfied that her evidence is accurate in this respect.

21. That evidence does, though, highlight the fact the respondent does not seem to have looked at various possibilities that I would expect an employer in that situation to have looked at. Unanswered, or inadequately answered, questions for the respondent include: why were volunteers for redundancy not sought?; was the possibility of part-time working and job sharing to avoid redundancies considered at all, and if so why was it rejected?; why could certain individuals, being made redundant because of a concern business might not pick up, not have been kept on furlough for a little while longer to see what in fact happened to business? However: none of the things I have just mentioned was suggested by any of the claimants at the time; the respondent's witnesses were not asked about them in cross-examination.

22. The only one of these suggestions that featured to any extent during this final hearing (apart from Miss Thursfield's evidence about sending an email, just mentioned, that I have rejected) was Mr Cooper's evidence in his statement that, "*At the time I was made redundant (June 2020) the government were running the furlough scheme until October but then moved this to September 2021. Swifts* [the respondent] *could have kept me on furlough and asked me to work on the days they were busy.*" The respondent in evidence did provide at least a partial answer to that: there was ongoing uncertainty as to how the furlough scheme would operate in the future and how long it would operate for at the time when the decision to make redundancies was being taken, in May 2020; flexible furlough had not come in. This is not an entirely satisfactory response, as I shall explain. But the main point in the respondent's favour is that the suggestions were not made to the respondent at the time by anyone, including Mr Cooper.

23. Letters from Mr Honer confirming termination of employment were sent out on 24 June 2020. The letters included this: "*As you know, the Management Team and I have considered all employee inputs and explored all ways in which your redundancy could be avoided, including the possibility of alternative employment. Unfortunately, we have not been able to identify any suitable employment for you, or any way in which your redundancy could be avoided.*" In fact, the truth was that nothing had been considered since the provisional decisions had been made because nothing had been put forward by the affected employees.

24. Each of the claimants was given details of what their redundancy payment and pay in lieu of notice would be. They were told in their letters, "*You still have the right to appeal against the Company's decision to make you redundant. Please submit any appeal to in writing by Friday 3rd July specifying the grounds on which you are appealing.*" [sic][4] None of the claimants appealed. Their next relevant communication with the respondent was when they initiated the early conciliation process, which in everyone's case apart from Mr Allred's was in mid to late July 2020 and in Mr Allred's case was on 18 August 2020.

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[4] The letters did not specify who any appeal should be submitted to, but they did provide a contact email for any questions, so this is not a significant procedural error on the respondent's part.

Basis for redundancy selection

25. I now turn to the basis upon which the claimants were selected for redundancy and to the redundancy selection assessment forms in particular.

26. The scoring systems were devised by Mr Theobald (according to him) "*in conjunction with*" the respondent's then solicitors. His evidence that he, "*was not involved with the day to day running of the departments involved and did not know the individual circumstances of the staff so did not consider how any particular individuals might score*" was unchallenged.

27. The same basic framework for redundancy selection was used for the drivers, such as Mr Pointon and Mr Allred, and the warehouse workers, such as Mr Cooper. Blank forms provided with the warning letters of 11 June 2020 specified the criteria that would be used and the weighting that would be given to each criterion. In relation to each criterion, a score of between 1 and 5 was awarded. The criteria were: length of service, given a weighting of 55 percent (i.e. the score awarded for length of service made up 55 percent of the total score available); "*customer service approach*" / "*approach to customer service*", given a 15 percent weighting; "*flexible approach adapt*", given a 15 percent weighting in relation to Mr Cooper (and presumably the other warehouse workers too) and 10 percent in relation to the drivers like Mr Pointon and Mr Allred; qualification/skills, given a 10 percent weighting; and "*disciplinary record*" / "*disciplinary offences*", also given a 10 percent weighting.

28. A total score out of 5 was calculated using the weighting. For example, a driver who scored 5 for length of service would get 2.75 (55 percent of 5) towards their total score. An arithmetical error was seemingly made in relation to the warehouse workers because 55 + 15 + 15 + 10 + 10 is 105 and not 100. This arithmetical error appears to have been overlooked, but made no practical difference to what happened – it just meant that a warehouse worker could in theory get a total score of 5.25[5].

29. The blank redundancy selection assessment forms provided with the warning letters to drivers and warehouse workers gave a misleading impression as to how scores would be awarded in each category or criterion. At the bottom of the forms, under the heading "*Scoring*", they suggested the scores would be: 1 for "*Poor*"; 2 for "*Below average*"; 3 for "*Average*"; 4 for "*Good*"; 5 for "*Excellent*". No details at all were provided on or with the forms as to the basis upon which the respondent would decide that employees had, for example, an "*Excellent*" or "*Average*" disciplinary record or length of service. But that did not matter because, in fact, the scoring system used, which was not to any extent explained to staff until their consultation meetings on 19 June 2020, after they had been scored – so too late for them to object to the scoring system or to provide any input as to what they thought their scores should be – bore almost no relation to what was on the forms. It was:

    29.1 length of service – employees were given either 1 point or 5 points, and nothing in between. Warehouse workers were given 1 point for less than 5 years' service and 5 points if they had 5 or more years' service; drivers 1 point for under 10 years' service and 5 for 10 or more years' service. Because length of service was weighted so heavily as a criterion (and because the lowest possible score in each

[5] The percentage weighting was applied as if the total score was 5; (55% of 5) + (15% of 5) + (15% of 5) + (10% of 5) + (10% of 5) = 5.25

criterion was one and not zero) it was arithmetically impossible for someone who did not get 5 points for length of service to score overall more than someone who did. What this meant in practice was that if somebody who was a warehouse worker or driver had, respectively, 5 or more or 10 or more years' service, they were completely safe from being made redundant, however low their scores in the other criteria;

29.2 approach to customer service – employees could in theory get 1 or 3 or 5 points (not 2 or 4), 1 being poor, 3 average, and 5 "*above and beyond*";

29.3 flexible approach to adapt – again, the theoretically possible scores were 1, 3 or 5, 1 being, supposedly[6], for "*non-acceptance of new working practices*", 3 for "*acceptance of new working practices*" and 5 for "*good attitude to new practices*";

29.4 qualifications/skills – all the warehouse workers were simply awarded 3 points. The drivers got either 1 or 5 points: 5 points if they were a 7.5 tonne HGV driver and 1 point if they were only a 3.5 tonne van driver;

29.5 disciplinary record – in this category, 5 points were awarded to staff with no un-elapsed offences on their disciplinary record. All of the 'at risk' drivers and warehouse workers were in this category, so all of them got 5 points. The respondent has produced no evidence at all to suggest that doing something other than awarding 5 points to everyone was considered. In particular, no indication has been given as to the basis upon which, had things been different as a matter of fact, someone might have been awarded any particular score less than 5.

30. The scoring system for office workers on the basis of which Miss Thursfield and a Mr Knight, who gave evidence on Miss Thursfield's behalf, were made redundant was completely different. Length of service was not a criterion. This is rather surprising given the emphasis put in the evidence as to how important loyalty was to the respondent, this being put forward as part of the explanation for why length of service had been so heavily weighted in the scoring system used in relation to warehouse workers and drivers. The blank redundancy selection assessment forms provided to office workers suggested that a score between 1 to 5 would be awarded in each of the following categories: telephone manner, with a 15 percent weighting; product knowledge, also given a 15 percent weighting; call volume throughput, also 15 percent; order processing accuracy, likewise 15 percent; customer service, given a 10 percent weighting; attendance and timekeeping, given a 5 percent weighting; future potential, given a 10 percent weighting; and disciplinary record, with a 5 percent weighting.

31. No indication was given on the forms as to the basis upon which office workers might be awarded any particular score between 1 and 5 for any criterion. In fact, the scoring was apparently done using scores of 1 for "*Poor*" through to 5 for "*Excellent*", as (misleadingly) set out on the blank forms sent to the drivers and warehouse workers. However, nothing objective was specified in terms of what would earn them a particular score in a particular criterion.

32. The arithmetical error that was made when devising this scoring system – 15 + 15 + 15 + 15 + 10 + 5 + 10 + 5 being 90 rather than 100 – was identified and corrected before

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[6] See paragraph 65 below.

it was used by increasing the weighting of each of attendance and timekeeping and disciplinary record to 10 percent. For reasons not revealed by the evidence, the overall scores for office workers were given out of 50 rather than out of 5, but the only difference that made was as to where the decimal point was.

33. The scores awarded to both Mr Pointon and Mr Allred were: 1 for length of service; 3 for approach to customer service; 1 for flexible approach to adapt; 5 for qualifications and skills; and 5 for disciplinary offences. This gave them an overall (weighted) score of 2.15, which put both of them in joint eleventh place – with one other – out of 15 drivers. They had to come in the top 10 to be safe. The drivers who came ninth and tenth respectively scored 3.05 and 2.45 overall. The other eight drivers all had 10 or more years' service, and all scored over 4 overall. Mr Pointon and Mr Allred (and three others) were therefore selected for redundancy.

34. Of the warehouse workers, all five of them scored 3 points for approach to customer service, flexible approach to adapt, and qualifications and skills. As already mentioned, they were each given 5 points for disciplinary record / disciplinary offences. The only difference between them and Mr Cooper was that he had under 5 years' service and therefore got 1 point for length of service whereas all of the others had 5 or more years' service. Mr Cooper was therefore the warehouse worker with the lowest score and was selected for redundancy on that basis.

35. Miss Thursfield was given 1s or 2s in each of the eight categories. Her overall weighted score was 14.9. The next lowest score was 27.98. To avoid being in the bottom three, and so avoid redundancy, she would have to have scored more than 38.7. She was one of the members of the SOP team made redundant.

Decision on the issues – Mr Cooper

36. I shall now go through each of the claimants in turn explaining why they say they were unfairly dismissed, why I have decided they were unfairly dismissed, and what my decision on the Polkey issue is.

37. I start with Mr Cooper and in relation to him with the procedural inadequacies that apply to all of the claimants.[7] These are:

    37.1 the lack of any consultation with affected employees between them being warned of the possibility of redundancies and them being told that they had been provisionally selected for redundancy – unnecessarily[8] rushing from warning of a possibility to notification of selection in 3 working days;

    37.2 the lack of any real, or any adequate, consultation over the redundancy scoring system before affected employees were scored and the consequent denial to the claimants of the opportunity to comment on what their scores should be. In the case of Miss Thursfield, the problem was the lack of explanation as to the basis upon which particular marks would be awarded in particular categories. In relation

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[7] Had there been only one claimant I would have started with the reason for dismissal under ERA section 98(1).

[8] On the evidence, the redundancies were fully planned in May. Any time pressure on the respondent in June was self-inflicted.

to the other claimants, including Mr Cooper, it was that the scoring system suggested on the blank forms[9] was not the system the respondent actually used;

37.3 the apparent absence of consideration of voluntary redundancies or of furlough or of job-sharing as an alternative to redundancy, or, at least, an absence of any coherent explanation as to why these were not considered adequate alternatives. I note that in Mr Theobald's witness statement, it is suggested that when the management team were planning redundancies, in May 2020, they were planned on the basis that "*the furlough scheme would end in August*". In fact, by the time the redundancies were made at the end of June 2020, it had been announced that the furlough scheme, with flexible furlough from 1 July 2020[10], would not end until 31 October 2020[11]. That announcement was made on or around 15 June 2020.

38. In my view, these factors by themselves make these dismissals unfair under ERA section 98(4). In taking that view, I bear in mind all the circumstances, including the respondent's relatively modest size, the breadth of the band of reasonable responses test, and the fact that none of the claimants appealed against dismissal or raised any of these issues during the redundancy process. It is the employer's responsibility to ensure procedural fairness; it is not the claimants' fault if the respondent does not do this, particularly not in circumstances where the process was so rushed that the claimants had next to no time carefully to consider their positions. And in relation to the denial of opportunity for meaningful consultation about the scoring system and about scoring, the first real chance the claimants had to comment was at their consultation meetings, by which time it was too late. What I mean by "too late" is that the chances of any employer, let alone this respondent, changing things after it has scored everyone and selected particular individuals for redundancy – meaning it would have to, if it were doing things properly, do some re-consultation, tell everyone that the redundancy process was restarting and that those who had been told they were no longer at risk were once again at risk, re-score everyone, and identify candidates for redundancy for a second time – are inevitably much slimmer than the chances of it doing so before it has taken the time and trouble to do the scoring and make the selection.

39. Respondent's counsel has submitted that because the claimants didn't raise procedural objections at the time and because they didn't take these procedural fairness points at this final hearing, I am bound to decide that the dismissals were procedurally fair. I disagree. Fairness is a legal question and a matter of opinion – something for the Tribunal to decide and not a question of fact for witnesses. I have to make my own objective assessment of fairness in accordance with ERA section 98(4). Although I accept that fairness has to be looked at in a particular context (and therefore that it is relevant if a claimant didn't or doesn't feel their dismissal was unfair for a particular reason), I do not accept, in so far as this is being argued, that a claimant's subjective perception of fairness or unfairness, or their failure to highlight particular matters –

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9 Which would itself have been problematical in the absence of any indication as to the basis upon which the respondent would decide whether someone was poor or average or excellent and so on in relation to criteria where complete objectivity was practicable: length of service and disciplinary record; and, possibly, driving qualifications/skills as well.

10 In his witness statement, Mr Lawson suggested this came in on 1 August 2020. He is wrong about this. See: *www.gov.uk/government/news/flexible-furlough-scheme-starts-today*

11 In fact, it continued in some form until 30 September 2021.

matters established as facts – as potential sources of unfairness during cross-examination or submissions, is determinative of the question under that section. I do not accept this any more than I accept that a claimant expressing the view that they were unfairly dismissed or a respondent witness the view that they weren't makes it so.

40. None of the procedural defects identified in paragraph 37 above is, however, the main thing relied on by Mr Cooper in support of his claim. His main complaint is that at around the time he was made redundant, the respondent gave someone else what was effectively his job. That somebody else was a young man called Jamie Watson. Jamie Watson was the son of Mark Watson, who was the respondent's Warehouse Manager. In legal terms, what Mr Cooper is arguing is that because of this factor, when he was dismissed there was no redundancy situation in the warehouse (and therefore there was no potentially fair reason for dismissal); or that, if there was, that that was not the reason for his dismissal, and/or that in any event his dismissal was unfair.

41. The respondent's evidence, once again unchallenged and which I accept for that reason, is that Jamie Watson had always been seen as 'casual labour'. What the respondent seems to mean by that is that he did not have a permanent contract with fixed hours, and had no written contract. He came in first of all between 4 and 31 May 2020, to assist his father in the warehouse. This was at that stage a purely pragmatic measure. Essentially, his father needed some assistance and employing Jamie Watson was easy, convenient and cheap. Easy because the two of them lived under the same roof, so there were no concerns about social distancing and so on; convenient because he could be used as and when needed, which would not have been possible for the non-casual warehouse workers who were furloughed, because flexible furlough had not come in at that stage; and cheap because he was under 21 and could be paid at a lower national minimal wage rate than someone over 21 would have been.

42. Jamie Watson was given a P45 with a date of 31 May 2020 on it. The respondent then went through the redundancy process and Mr Cooper, together with the others, was made redundant with effect on 30 June 2020. I have already mentioned the fact that if he been given his full contractual notice, rather than part of his notice and pay in lieu for the rest, his employment would have ended on 15 July 2020.

43. On the basis of the evidence available to me – and I note that any inadequacies in this respect are down to the respondent failing to disclose all relevant documents – Jamie Watson started working again on 20 July 2020, again designated casual labour, but in practice full time. Mr Lawson states, "*The business has no plans to make his employment permanent whilst the economic uncertainty surrounding Covid-19 exists.*" However, Jamie Watson has in practice been working full time since 20 July 2020.

44. It is said on the respondent's behalf that Jamie Watson has been doing a different job from the job that Mr Cooper was doing, in that: his main role has been to assist with what are referred to in Mr Lawson's witness statement as "*Franke carrier items and similar*" – goods to be couriered, as I understand it – which had significantly increased in volume. However, there is no evidence that warehouse workers like Mr Cooper and the others in his redundancy pool had ever been treated as doing different jobs on the basis of the particular type of warehouse work they happened to be doing at any given time; nor has it been suggested that Mr Cooper – someone who had worked for the respondent for over 3 years – would not have been just as capable as Mr Watson himself was of doing the task that Mr Jamie Watson – someone with a few weeks'

experience with the respondent as at 20 July 2020 – was doing. I am not satisfied that Mr Jamie Watson was doing work of a different "*kind*"[12] from the work that Mr Cooper had been doing.

45. Mr Lawson also stated, "*When redundancies were made in June, there was no plan to use Jamie in the future and it was only as a result of the fluctuations in business caused by the subsequent easing and then further lockdown restrictions and the changing nature of the business as we have had to adapt, that have prompted us to use his services on a casual basis.*" Strictly speaking, this may be true, but I think it is misleading.[13]

46. I don't doubt that in May 2020, when the redundancies were planned, there was considerable uncertainty as to what was going to happen and no firm plan to do anything other than make the redundancies. Because the respondent decided it would de-furlough the staff who were not being made redundant in the first week of July 2020, and therefore no one could know before that month how much work there would be for everyone once the respondent's business got up and running in some semblance of normality, it is plausible that on 30 June 2020, when Mr Cooper's employment ended, there was still no "*plan*" to engage Mr Jamie Watson as such. But what I don't accept is that the possibility – perhaps even probability – that he or someone else would be needed in the warehouse was not foreseen at the time of the redundancies. It is not credible that in a less than three week period (30 June to 20 July 2020), the respondent's senior management went from near certainty that they needed no one at Mr Cooper's level, other than the four permanent staff who he was pooled with and who were retained, to needing to engage an additional person to work full time.

47. It seems to me likely that in the sentence from his statement quoted in the last-but-one paragraph, Mr Lawson's memory was playing tricks with him. He refers to the "*subsequent*" easing of lockdown restrictions, but there was no easing of them between 30 June and 20 July 2020; they were mainly eased during June[14]. Similarly, there were no relevant[15] "*further lockdown restrictions*" between those two dates. It is also highly improbable that the "*nature*" of the respondent's business changed significant during that 20 day period. These mistakes are of a piece with his mistake about when flexible furlough came in.[16] The impression given by the sentence quoted is that he thought there was a much longer period than was actually the case between the redundancies and Jamie Watson re-starting work for the respondent. I suspect Mr Lawson is confusing the situation as it was when the redundancies were planned with the situation, over a month later, when they were implemented. It also looks very much to me as if the respondent, having made its plans in May 2020, rigidly stuck to them and failed to take into account the rapidly changing landscape during May and June 2020.

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12 ERA section 139(1)(b).

13 I am not accusing Mr Lawson of wilfully misleading me; he may well have persuaded himself, by the time he gave his statement in April 2021, that this was not just technically correct but was the whole truth and nothing but the truth.

14 For example, non-essential shops re-opened in England on 15 June 2020.

15 There was a local lockdown in Leicester from 4 July 2020, but that has not been mentioned at all in these proceedings, so far as I am aware.

16 See paragraph 37.3 and footnote 10 above.

48. With all of that in mind, I ask myself whether the respondent has proved a potentially fair reason for dismissal under ERA sections 98(1) and (2). I think the truth is that, whatever the respondent's management thought in May 2020 when they planned the redundancies, by 30 June 2020, they had no real idea, and had no expectations as to, how much work there was going to be in the warehouse once everyone was off furlough and back working. I think the reasons Mr Cooper was dismissed were:

    48.1 there had been a significant downturn in work because of lockdown;

    48.2 the respondent was optimistic that there would be enough work to sustain four warehouse workers, but was not confident that there would be enough to sustain five;

    48.3 the respondent thought that if there was too much work for four warehouse workers, it could easily and cheaply engage Jamie Watson (or, if necessary, someone else) on a casual basis, just as it had during May 2020;

    48.4 what the respondent would potentially need from July 2020 onwards, in the short term at least, was a fifth warehouse worker who could operate on an ad hoc basis, as and when required. When it planned the redundancies in May 2020, flexible furlough did not exist and had not been announced, and so the respondent did not at the time consider the possibility that this fifth warehouse worker could be an existing permanent employee on flexible furlough. It is clear from the fact that Mr Lawson mistakenly thinks flexible furlough came in on 1 August 2020 that the respondent did not consider that possibility during the redundancy process either, by when it had become a realistic possibility – flexible furlough (coming in on 1 July 2020) having been announced in mid June 2020. The most likely reason for the respondent's failure to consider that possibility during the redundancy process is that it was by then busy implementing the plans it had previously made, which it did not contemplate changing, and which had momentum. If there was something else that had a – possibly subconscious – significant effect on management thinking, it was the fact that casual labour was cheaper than employing the likes of Mr Cooper and that it would be easier to 'get rid' of a casual worker with no accrued employment rights if necessary than a permanent member of staff with more than two years' service;

    48.5 Mr Cooper scored less than the other warehouse workers in the redundancy selection process.

49. What all of that adds up to is:

    49.1 the principal reason for Mr Cooper's dismissal was that he was redundant, in that the root cause of his dismissal was that the respondent's requirements for warehouse workers had diminished during lockdown, even if it was anticipated that those requirements might well increase back up again in the short to medium term;

    49.2 a further reason why Mr Cooper's dismissal was unfair under ERA section 98(4) is that the respondent did not consider flexible furlough as an alternative to redundancy.

50. This was additionally an unfair dismissal because the redundancy selection criteria and the way in which they were applied were not within the band of reasonable responses.

In his witness statement, Mr Theobald gave evidence that, "*When the redundancy selection forms were prepared, my focus was on the criteria that were important for the roles and to the success of the business.*" If that was really the respondent's intention then the scoring system adopted, at least as applied to the warehouse workers, did not match it.

50.1 As explained above, length of service was made of pre-eminent importance, to such an extent that it was arithmetically impossible for somebody with less than 5 years' service do better than somebody with 5 or more years' service. As Mr Cooper was the only warehouse worker with under 5 years' service, this made it certain he would be selected.

50.2 I shall consider the respondent's explanation for scoring the length of service criterion in the way it did below. Suffice it to say that no sensible and logical basis for making having 5 years' service so overwhelmingly important, even in principle, has been established.

51. I accept that Mr Theobald did not realise when he devised the scoring system that in practice there was only one possible outcome from the redundancy process in the warehouse. But the respondent was, or should have been, corporately aware of this. The extent to which these selection criteria were discussed with someone with at least some knowledge of the warehouse team prior to the scoring being finalised is unclear; but if they weren't they should have been. Any reasonable employer would have realised that what they had done by choosing this scoring system was to condemn Mr Cooper to redundancy, however well he did, and however badly the others in his pool did, on the other criteria, and would have taken another look.

52. There is a connection between this source of unfairness and another one previously mentioned: the fact that the detailed basis of scoring was not shared with staff prior to them being scored; all they knew was their score for length of service was going to be 55 percent of their overall score. They were not told the only available scores were 1 or 5; they were not told about the cut-off point of 5 years (or, for drivers, 10 years); the blank redundancy selection assessment forms provided to them with their warning letter were positively misleading, giving the impression that scores between 1 for "*Poor*" and 5 for "*Excellent*" were available. In answer to the suggestion that Mr Cooper could have complained about the scoring system after he had been told he had been provisionally selected for redundancy and could also have appealed, I repeat the point made in paragraph 38 above that by then it was too late; realistically speaking, the respondent was not going to re-start the process from scratch at that point, with brand new selection criteria and/or brand new weighting.

53. I am not suggesting that length of service is an inherently objectionable criterion. It has, as I said during the hearing, rather gone out of fashion because of concerns about indirect age discrimination. But – assuming it had been done for reasons that made some kind of sense (and assuming there was no unlawful discrimination) – I would probably, for example, have accepted the respondent overtly adopting, as a conscious choice, 'last in, first out', or something of that kind.

54. That is not, though, what the respondent did; nor did it say that the reason it made having 5 – or 10 – years' service pre-eminent was that it felt the most important thing was to retain those with the longest service (and what it did was inconsistent with it feeling that). As I mentioned earlier, according to Mr Theobald the focus was on the

criteria that were important for roles and to the success of the business. Length of service in and of itself cannot possibly be important for any role, nor for the success of any business. When I challenged him on this point when he was giving his oral evidence, Mr Theobald told me that the respondent wanted to reward loyalty. That is a laudable aim, but it does not explain why loyalty was important for the role of a warehouse worker (or driver) or to the success of the respondent business. It also doesn't explain why it wanted to reward 5 years loyalty for warehouse workers, 10 years loyalty for drivers, and not reward loyalty at all for office workers. Moreover, if the respondent genuinely wanted to reward loyalty, it was irrational of the respondent to do so by giving the same the same reward to someone with 6 month's service as to someone with 4 years' 11 months' service (or, in the case of drivers, 9 years' 11 months' service), a massively greater reward to someone with 5 years' (or 10 years') service versus someone with 4 years' 11 months service (or 9 years' 11 months' service), and to give the same reward to someone with 5 years' service as to someone with 25 years' service.

55. Loyalty was the only thing relevant to Mr Cooper's case specifically mentioned by Mr Theobald when asked about why length of service was made such an important criterion. In oral evidence, Mr Buckley said something to the effect that if the respondent was going to lose a member of staff it was better if it was somebody with less experience and that with length of service comes greater product knowledge. However, it was Mr Theobald who devised the scoring system, not Mr Buckley. In any event, if length of service was being used as a proxy for knowledge and experience, this would still not explain the scoring system, which would only make sense if there was a reason for thinking that there was a dramatic difference in knowledge and experience either side of the 5 year (or 10 year) line. In addition, the redundancy selection criteria included "*Qualifications/Skills*", and knowledge and experience could easily have been made part of that if the respondent had wanted them to be, but it was so unimportant a criterion in relation to warehouse workers that it was not used at all for them: they were each awarded a score of 3 in it, not on the basis that a careful assessment of their qualifications and skills had been made which revealed them all to be average, but because the sole use the respondent made of that criterion was to differentiate between drivers, depending on whether they were qualified to drive 7.5 tonne vehicles or only 3.5 tonne vehicles.

56. In summary: the respondent has satisfied me that the reason for Mr Cooper's dismissal was redundancy; his dismissal was nevertheless unfair for a number of reasons.

Mr Cooper – Polkey

57. The question I need to answer in order to decide the Polkey issue is: was there a significant chance of Mr Cooper being fairly dismissed in any event, and if so, what reduction, if any, should be made to any compensatory award to reflect this?

58. To put it shortly, I am not persuaded there is a significant chance that if the respondent had acted fairly, Mr Cooper would have been dismissed at all.

    58.1 A fair employer in the respondent's position would have kept things under review and would have realised in June that flexible furlough was an option.

    58.2 Having realised it was, the only reasons the respondent might have had for rejecting it that I am aware of would be: a stubborn and unreasonable sticking to

the plan made in May, a plan made on the basis that flexible furlough was not an option; a desire to fulfil their possible or likely need for an ad hoc warehouse worker with someone like Jamie Cooper, who was cheaper because of his age and easier to get rid of because he lacked qualifying service – or with Jamie Cooper himself, because of his familial connections. None of those things would have made for a fair dismissal.

58.3 There is no good reason to think that had the respondent not made any of the warehouse workers redundant, the warehouse worker who was furloughed would not have been brought in towards the end of July 2020, just as Jamie Cooper was, and would not have worked full time from then onwards, just as Jamie Cooper did.

59. Further, had the respondent acted fairly and reasonably, it would not have selected the warehouse worker who was going to be flexibly furloughed on the same basis it made its redundancy selection. Assuming its focus was indeed, as Mr Theobald says it was, on what was important for particular roles and to the success of the business, and that it acted rationally (and had undertaken genuine consultation, with a reasonably open mind, over a reasonable period of time), it is doubtful that length of service would have been a criterion at all for the warehouse workers; certainly having 5 – or 10 – or more years' service would not have ended up as the be-all and end-all. The argument put forward on the respondent's behalf to the effect that Mr Cooper having the shortest length of service meant he would always have been selected presupposes that, come what may, all the criteria would have remained the same and the only criterion where the score might have been different would be length of service[17]. What this fails to take into account is that when undertaking the speculative exercise I have to undertake when looking at the Polkey issue, I assume the respondent behaved reasonably; and any reasonable employer, focussing on the things the respondent was apparently focussed on, even one that valued loyalty as the respondent says it did, would have done something quite different from that which the respondent did.

60. There are numerous fair ways in which the selection could have been made, and the evidence gives no reason for thinking that the fair way adopted by the respondent would have favoured any particular warehouse worker out of the five of them. Mr Cooper therefore had a 4 in 5 chance of not even being flexibly furloughed. I note that there is virtually no information in the documents disclosed by the respondent about any of the at-risk individuals in any of the redundancy selection pools other than the claimants. In relation to this, the respondent has inappropriately redacted some documents and has failed to disclose other relevant documents. By these disclosure failures, the respondent has to an extent handicapped itself, particularly in relation to the Polkey issue. It has only itself to blame for this.

61. Any compensatory award made to Mr Cooper should therefore be calculated as if he:

61.1 had an 80 percent chance of returning to work on 6 July 2020, when the other warehouse workers came back from furlough;

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[17] Which, on this argument, would make no difference because Mr Cooper's score in the length of service criterion would necessarily be lower, leaving him with the lowest score overall because everyone's scores in all the other criteria were identical.

61.2 had a 20 percent chance of remaining on furlough until 19 July 2020;

61.3 returned to work full time from 20 July 2020;

61.4 remained in the respondent's employment from then onwards.

Mr Allred & Mr Pointon

62. Two of the sets of reasons given above for why Mr Cooper's dismissal was unfair also apply to the dismissals of Mr Allred and Mr Pointon: the instances of procedural unfairness set out in paragraph 37 above; the way the scoring system dealt with length of service.

63. On the length of service criterion, there are some slightly different factors in play in relation to drivers as to warehouse workers, but the reasons for unfairness are essentially the same.

63.1 In relation to any suggestion that length of service was being used as a proxy for knowledge and experience, drivers were – unlike warehouse workers – at least awarded a meaningful score in the qualification and skills criterion. However, the fact remains that if it was being used in this way, the rational way of proceeding would have been to beef up that criterion, not to raise length of service, and the arbitrary dividing line of having under 10 or 10 or more years' experience, to the pinnacle of importance.

63.2 The point just made is reinforced by the fact that, according to Mr Buckley, what the respondent needed going forward was those who could drive 7.5t HGVs and not merely 3.5t van drivers, which is why scoring within the qualification and skills criterion was heavily skewed against the latter. The respondent's scoring system ensured that it retained a number of 3.5t van drivers it apparently didn't need, purely because they happened to have worked for the respondent for a long time, and lost 7.5t HGV drivers like Mr Pointon and Mr Allred it apparently did need.

63.3 In his oral evidence, Mr Buckley suggested that length of service was important because the drivers who had been employed by the respondent tended to have good relationships with customers and that an example of this was them having sets of keys to customer premises. I am deeply sceptical as to whether that was really a significant part of the respondent's reasoning at the time. Had it been, I would have expected it to be mentioned in Mr Buckley's and/or Mr Theobald's witness statements. If it was, then this ought, for fairness sake, to have been spelled out to the at-risk staff before they were scored to give them an opportunity to comment on what their score should be. I note that, for example, Mr Pointon told me during the hearing that he had sets of keys to customers' premises too. Also, the all-or-nothing-10-years-good/anything-under-10-bad scoring system would have been objectionable in any event.

64. Mr Pointon's main complaint, and one of Mr Allred's main complaints, about what happened are to do with agency drivers. The two of them, and Mr Pointon in particular, are convinced that what the respondent has done is to replace them with agency drivers. Their basis for thinking this seems largely to be what they have been told by people they know who remained employed by the respondent. There is, though, some truth in their allegations in that, as the respondent admits, trips they used regular to do

were from time to time covered by agency staff. However, I disagree with them that this makes their dismissals unfair.

64.1 The respondent planned to reduce the number of employed drivers from 15 to 10 and then did exactly that. Even if all of the work the 15 drivers had been doing before they were furloughed were still there (and the uncontested evidence of the respondent is that it wasn't) and even if immediately after the 5 redundancies the respondent engaged agency workers who did the work of 5 full time employed drivers (and I don't accept this was the case either – see below) that would still be a redundancy situation, in that the respondent's need for employees to carry out driving work had diminished. Absent any obvious ulterior motive for the redundancies, the reason for the 5 dismissals would be redundancy.

64.2 It would be far-fetched to allege that the respondent chose to replace the 5 redundant drivers with agency drivers working similar hours, given that doing so would almost certainly result in significantly increased costs, because of the need to pay the agency as well as the agency drivers. In addition, had they done so one would expect the respondent's agency costs from July 2020 onwards to have been much higher than had been the case pre-pandemic and they weren't.

64.3 The choice the respondent made to cope with fluctuating demand through the use of agency drivers was a rational one at the time of the redundancies. The respondent could not predict with any certainty how much demand there would be in the second half of 2020 and its desire for flexibility was understandable and reasonable.

64.4 I don't think the claimants are in fact arguing that there was enough driving work to sustain all five of the redundant drivers. Plainly there wasn't – or at the very least there wasn't expected to be when the redundancies were made. Their argument seems more to be that there was enough to keep perhaps two or three out of the five gainfully employed. That may have turned out to be the case, but this doesn't delegitimise the business decision the respondent made. The question of what the balance should be between salaried and agency drivers, at a time when future demand was particularly unpredictable, was one for the respondent to answer and it did so within the scope of its managerial discretion.

64.5 Mr Allred has suggested that the respondent could and should have retained him by the use of flexible furlough. I have considered this suggestion very carefully, bearing in mind all of the arguments I went through earlier when dealing with Mr Cooper's case. It is the aspect of the dispute around the use of agency drivers where I think the respondent's case is at its weakest. However, on balance, I am against the claimants on this too. What happened in connection with Mr Cooper and Mr Jamie Watson was a materially different situation. In particular:

64.5.1 Mr Jamie Watson was not an agency worker.

64.5.2 Only one warehouse worker redundancy was planned and only one person was potentially involved in carrying out the work the redundant warehouse worker could have been doing on flexible furlough.

64.5.3 Linked to the previous point, some redundancies amongst the drivers needed to be made in any event, in the respondent's reasonable view.

64.5.4 Because of all the above factors, although (see paragraph 48.4 above) I don't think the respondent can have considered the possibility of flexible furlough properly, in the case of the drivers, a decision to use redundancies and agency workers rather than flexible furlough was within the band of reasonable responses.

65. The final potential source of unfairness there was in relation to the drivers' redundancies is to do with the "*Flexible Approach to Adapt*" criterion. The reason this was a potential source of unfairness was that the basis upon which Mr Buckley was assessing it was opaque. As explained above, the scoring was in theory done on the basis of the extent of acceptance of "*new working practices*". However, from Mr Buckley's oral evidence, it became increasingly clear that it was really being used to score people on the basis of Mr Buckley's subjective assessment of how open they would be (if they returned to work after furlough) to working in whatever ways the respondent wanted them to in the future. Mr Allred was marked down because of his unwillingness, except as a temporary measure to help out, to do 'overnights' – which were not new working practices. Mr Pointon, who <u>was</u> willing to drive overnight routes, was marked down for a variety of reasons, some of which were nothing to do with willingness to accept working practices, new or otherwise (for example his allegedly poor relationship with the respondent's Transport Manager), and the rest of which seemed to me – when I considered the evidence as a whole – to boil down to certain people at the respondent thinking he was a bit awkward.

66. Some kind of flexibility criterion would have been reasonable. For example, the respondent could have made a list of the particular working practices (etc) it wanted drivers to accept and then done the scoring, having first consulted with the drivers, based on how many of them the drivers were willing to do. I'm sure there were numerous other fair ways flexibility could have been used, but they do not include what the respondent actually did: having a vague and ill-defined scoring system which lent itself to complete subjectivity and which was never adequately explained to at-risk staff.

Mr Allred & Mr Pointon – Polkey

67. Mr Allred's and Mr Pointon's dismissals were both unfair for substantially the same reasons. However, unlike in Mr Cooper's case, none of those reasons affected what might be called substantive fairness. Come what may, redundancies would have been made amongst the drivers. The question is whether there is a significant chance that had none of the broadly procedural defects I have identified been present, either or both of them still have been dismissed.

68. In my view, whatever happened procedurally the respondent would probably have adopted redundancy criteria not greatly different from those it actually adopted. The respondent clearly did want to use length of service as a criterion, partly because it was a completely objective criterion and partly because there was, I think, a real desire to reward those who had genuinely long service. In terms of length of service, unlike with the warehouse workers, there was a substantial gap between the length of service of the claimants and almost all of those who were not made redundant. Similarly, a willingness to work flexibly – to drive different routes at different times, and to work differently from the way they had previously worked – appears to have been important to the respondent.

69. However, it does not follow that the overall scores of those at risk would have ended up in the same order. In particular, the weighted scores for length of service would necessarily have been lower had the respondent acted reasonably. I also think that, taking the respondent at its word as to the importance of having qualified 7.5t HGV drivers, the qualification and skills criterion would probably have been weighted more heavily. Other scores might well also have been a little different had there been proper consultation. What this would have done would have been potentially to have placed in jeopardy at least one person who scored more highly than Mr Allred and Mr Pointon: the individual who had a weighted score of 4.85 but who was not a qualified 7.5t HGV driver. That person scored top marks in every category apart from qualification and skills, so any adjustments to the scoring system in other categories could only decrease their score.

70. I also need to factor in, as best I can:

    70.1 the possibility that the score of the person who came in 14th place would have improved their score sufficiently to overtake Mr Allred and Mr Pointon. (I discount the person who came last because they were not a 7.5t driver);

    70.2 the possibility that the person who had the same overall score as Mr Allred and Mr Pointon would have overtaken them;

    70.3 the possibility that they would have overtaken other people who were qualified 7.5t drivers, in particular the individual with an overall score of 2.45, who did better than Mr Allred and Mr Pointon only because he scored 3 and not 1 for flexible approach to adapt.

71. Deciding the Polkey issue is not a scientific process; it is educated guesswork and speculation. I cannot credibly attribute precise percentage chances to each of the possibilities mentioned above and do a sum. I also, because of the respondent's disclosure failures – see paragraph 60 above – know next to nothing about any of the drivers other than Mr Allred and Mr Pointon and that makes assessing their relative chances of not being selected for redundancy very difficult indeed. Nevertheless, I have to do so.

72. Using the very broad brush that is all I have:

    72.1 there are numerous things that could have changed what happened, for better or for worse for Mr Allred and Mr Pointon, such as the possibility of people being offered and taking voluntary redundancy, or furlough being considered properly, but I have chosen to discount them when looking at the Polkey issue: because it is completely impossible to say how likely they were to occur or what effect they would have had if they had occurred; and because the many possibilities there are probably cancel each other out;

    72.2 there is a significant chance that had things been done fairly, Mr Allred and Mr Pointon would still have been made redundant, likewise that either or both of them would not have been made redundant;

    72.3 Mr Allred's chances of not being made redundant are significantly worse than Mr Pointon's because of his unwillingness to do overnights other than in the short-term and because Mr Pointon was, it seems to me, unfairly and arbitrarily marked down for flexible approach to adapt;

72.4 I think the small possibility that the person who scored 1.85 overall would have overtaken Mr Allred and/or Mr Pointon is cancelled out by the similarly small possibility that either or both of them would have overtaken one or more of the drivers that I have not already specifically referred to who scored more highly than them;

72.5 including Mr Allred and Mr Pointon, there are five drivers I need to consider who I am satisfied would have had a significant chance both of being made redundant and of not being made redundant had the respondent conducted a fair redundancy process, out of whom three would have been dismissed and two would have survived. The other three are the third person with an overall score of 2.15 (who I'll refer to as "2.15"), the person with an overall score of 2.45 ("2.45"), and the person with an overall score of 4.85 ("4.85");

72.6 knowing nothing about them beyond their scores, I can't with any confidence say that 2.15 would have been in a better or worse position than either Mr Allred or Mr Pointon to take advantage of a fair redundancy process. I fully appreciate that there is something of an inconsistency between this and what I just wrote in paragraph 72.3 above;

72.7 4.85 would have had a better chance than either Mr Allred or Mr Pointon of surviving a fair redundancy process, notwithstanding their lack of HGV driver qualifications, because their otherwise perfect score shows how highly they were rated by the respondent and because length of service would in all likelihood have remained as a criterion, albeit given less weight;

72.8 2.45 would have had a better chance than Mr Allred of not being selected for redundancy in a fair redundancy process because of their score of 3 in flexible approach to adapt;

72.9 if I had to put them in order from most to least likely to have kept their jobs, I would say 4.85, followed by Mr Pointon and 2.45 jointly, followed by Mr Allred and 2.15 jointly;

72.10 bearing in mind two out of the five stood to keep their jobs, I think Mr Pointon had an approximately 40 percent chance of doing so had things been done properly and Mr Allred a 25 percent chance;

72.11 as to the timing of any dismissal had the respondent acted fairly and reasonably, I think the effective dates of termination would have been the same. This is because, although the process would necessarily have lasted longer than it in fact did, the respondent would simply have started it sooner. Its focus was always on the process being complete by the first week in July 2020; and it had made its plans in May 2020.

73. In conclusion, any compensatory awards made should be reduced in accordance with the Polkey principle: by 60 percent in the case of Mr Pointon; by 75 percent in the case of Mr Allred.

Miss Thursfield

74. It is not in dispute that: through the redundancy process, headcount was reduced by three in the SOP team; the three people made redundant were the three with the lowest redundancy selection scores; Miss Thursfield had by far the lowest score. She appears to accept – realistically – that there was a redundancy situation.

75. The key allegation Miss Thursfield made when she was being cross-examined – an allegation that was not put to Miss Lewis – was that Miss Lewis (to quote from her oral evidence), "*made up my scores for the purposes of getting rid of me*"; that from towards the end of 2017 / start of 2018 Miss Lewis was trying to "*push me out*". Her case, in legal terms, is presumably that the true reason for her dismissal was not redundancy but was Miss Lewis having taken a personal dislike to her.

76. Miss Thursfield's allegations do not make sense as a matter of chronology. Had Miss Lewis, and/or the respondent more generally, wanted Miss Thursfield's employment to end at the end of 2017 or the beginning of 2018, and were Miss Lewis someone as ruthless and filled with spite as Miss Thursfield has made her out to be, the respondent would surely have dismissed her at the time. Miss Thursfield did not have 2 years' service with the respondent until the end of June 2018 and the respondent was therefore free, had it wished to, to dismiss her unfairly and for no good reason up to then.

77. In addition:

    77.1 in or shortly after October 2019, an independent, external trainer made a complaint about Miss Thursfield's behaviour which could easily have been made into an allegation of serious misconduct had the respondent been so minded, but which wasn't;

    77.2 also in October 2019, the claimant was given a verbal warning (which she accepted at the time) for using offensive language; again, more severe disciplinary measures could have been taken – and surely would have been taken – if anyone had 'had it in' for her, as she suggests Miss Lewis did;

    77.3 Miss Thursfield's job was largely dealing with telephone calls as part of a team. As is commonly the case in such jobs, the respondent had ways of precisely and objectively measuring aspects of her performance and that of her colleagues. The respondent's evidence that she performed very poorly in at least one particular respect in late 2019 and early 2020 is compelling. Once again: had the respondent wanted an excuse to take action against her, it could and would have performance-managed her out of the business at that point.

78. In short:

    78.1 there is no good reason in the evidence to think that Miss Lewis disliked Miss Thursfield to such an extent that she would deliberately give her lower scores in the redundancy criteria than Miss Lewis believed Miss Thursfield deserved, with a view to ensuring that Miss Thursfield was one of the three selected for redundancy;

    78.2 I therefore accept that the reason for dismissal was redundancy, in that Miss Thursfield was selected because of the scores Miss Lewis awarded her, and Miss Lewis awarded her those scores in good faith.

79. A significant portion of the hearing was taken up dealing with Miss Thursfield's allegations of what could be called historic mistreatment by the respondent and by Miss Lewis in particular. The majority of those allegations appear to relate to things that happened in 2019. Whatever the rights and wrongs of them, I don't think they are of any real relevance to the fairness of the 2020 redundancy process. They seem largely to be connected with a health issue Miss Thursfield had and has, which I won't go into

because this Judgment and Reasons is a public document and it is unnecessary for me to do so. It is possible Miss Thursfield could have brought some kind of claim arising out of those allegations in 2019, or as part of these proceedings, but she hasn't. The only claim she has is a claim of unfair dismissal and my focus has to be on what happened around the time of dismissal: June 2020.

80. None of that means I think Miss Thursfield's dismissal was fair under ERA section 98(4). I don't, for the reasons set out in paragraph 37 above; and shall now consider other possible sources of unfairness, in particular the scoring system used and the scores awarded.

81. There is nothing unreasonable about the redundancy selection criteria used, nor about the weighting of those criteria, and I don't think Miss Thursfield is suggesting otherwise. In relation the rest of the scoring system, the only substantial criticism I have is that the respondent could, I am sure, have devised something that ensured complete, or substantially greater, objectivity than was actually achieved. This applies particularly to the criteria 'attendance and timekeeping' and 'disciplinary record', but probably to 'call volume throughput' and 'order processing accuracy' as well.

82. A certain amount of subjectivity in most redundancy exercises is unavoidable, but the more of it there is, the greater the danger that the scores awarded by even the most neutral scorer will be affected by her unconscious prejudices. Having a large subjective element in scoring also leads to lack of transparency, making it difficult for the person selected for redundancy to see why they have, say, been awarded a 1 in a particular category rather than a 2, to detect any mistakes that have been made (and we all make mistakes), and to challenge their scores.

83. However, the only area where I think this caused unfairness to Miss Thursfield in practice was in relation to disciplinary record. She did not have a single 'unspent' disciplinary sanction on her record at the time of redundancy selection and yet was awarded 1: poor. If such a record deserved a 1, what scope was there to differentiate between the likes of Miss Thursfield and, for example, someone with a 'live' final written warning? In fact, Miss Thursfield seems to have been awarded 1 in this category less for her disciplinary record and more for being someone who allegedly did lots of things that could be labelled misconduct but which were deemed to be of insufficient severity to merit disciplinary action.

84. A little bit of thought on Mr Theobald's part could and should have resulted in scoring relating to disciplinary matters that was transparent and beyond reproach, such as (and this is just one of many fair ways it could have been done) awarding maximum points for someone who has never had any formal or informal disciplinary action taken against them, less for someone with no unspent formal sanctions and no informal action, and so on, down to bottom marks for someone with an unspent final written warning.

85. Putting the 'disciplinary record' criterion to one side, I have no significant criticisms of the scores awarded. Miss Thursfield naturally does not agree with them, but:

    85.1 I have already stated that I think Miss Lewis awarded them in good faith. It is not for the Tribunal to interfere with scores honestly awarded in a redundancy selection process unless they are manifestly unfair and/or otherwise wholly unreasonable (in the sense of being outside the band of reasonable responses);

85.2 Miss Lewis explained in a reasonable amount of detail why she scored Miss Thursfield as she did, both at the time and in her evidence before me. Her explanations are coherent and demonstrate that she was not careless about what she was doing and that there was some logical and objective basis for her scoring;

85.3 Miss Thursfield's main complaint appears to be to the effect that she may well have performed less well than others, but that this was down to the respondent not treating her fairly in the past in terms of providing her with adequate support, training and equipment and bullying and harassing her. When I asked her who she thought should have been selected for redundancy instead of her on the basis of performance, she struggled to answer, eventually naming someone not, she said, for their performance but for their lack of honesty. It was, though, reasonable for Miss Lewis to base her scoring on how she perceived the claimant to have been performing, rather than on the basis of how she might have been performing had things been different in the workplace over the previous 2 to 3 years.

86. In conclusion, Miss Thursfield's dismissal was unfair, but only because of the factors listed in paragraph 37 above and because of how the "*Disciplinary record*" criterion was scored.

87. That brings me – finally – to the Polkey issue in Miss Thursfield's case. I am afraid that because Miss Thursfield's scores were so much lower than anyone else's, meaning she would have to have nearly doubled them to avoid redundancy, I think there is no significant chance that correcting the defects in the redundancy process I have identified would have made any difference to what occurred. It is a difficult thing for anyone to accept, and I don't expect Miss Thursfield to accept that it, but the fact is that someone had to come bottom in the scoring, someone second from bottom, and someone third from bottom. I cannot see how, realistically, she could have avoided being one of those three people, however fair the process followed by the respondent had been.

88. In the circumstances, unfortunately for Miss Thursfield, this is one of those rare cases where a £nil compensatory award would be appropriate in accordance with the Polkey principle.

Signed by Employment Judge Camp on 26 January 2022