EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110053/2021 (V)

Held by Cloud Based Video Platform (CVP) on 18-19 January 2022

Employment Judge M Sangster

Mr A Gray	**Claimant** **In person**
Oil States Industries (UK) Limited	**Respondent** **Represented by** **Ms Neukirch** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claim of unfair dismissal does not succeed and is dismissed.

Introduction

1. This was a final hearing which took place remotely. This was not objected to by the parties. The form of remote hearing was video. A face to face hearing was not held because it was not practicable due to the Covid-19 pandemic and all issues could be determined in a remote hearing.

2. The claimant claimed unfair dismissal. The respondent resisted the claim, stating that the claimant had been fairly dismissed by reason of redundancy. At the start of the hearing the claimant confirmed that he did not seek to challenge that there was a genuine redundancy situation.

3. The respondent led evidence from Paul Henderson (**PH**), Welding and Assembly Manager and David Evans (**DE**), General Manager.

4. The claimant gave evidence on his own behalf and called one witness, Patrick McNamee (**PM**), Goods in Receiver for the respondent.

5. A joint set of productions was lodged, extending to 135 pages. The claimant lodged further documents at the start of the hearing, extending to a further 21 pages.

Findings in Fact

6. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.

7. The respondent designs, manufactures and constructs drilling, work over, production, lifting and mooring systems and equipment and provides a range of services to the oil and gas industry.

8. The claimant commenced employment with the respondent on 17 September 2018, as a Grinder at the respondent's premises at Heartlands Business Park, West Lothian.

9. The respondent continued to operate during the covid-19 pandemic, as they provide key services to the oil and gas industry. A number of health and safety measures were introduced to seek to ensure that they were able to continue to do so. One such measure was the adaptation of the existing HAV (hand arm vibration) monitoring systems worn by employees, to include a safe-distance proximity tracker. The tracker operated via Bluetooth to record close contacts of employees while at work. The function of the tracker was to allow quick identification of employees who had been in close contact with an individual testing positive for covid-19, for the purposes of self-isolation and testing, and to track social distancing measures throughout the workplace to allow adjustments to be made if necessary. The trackers would emit a sound when individuals came within two metres of each other, alerting employees if they were not maintaining social distance.

10. Employees required to obtain a HAV monitor at the start of each working day. They did so by swiping their entry card on the HAV monitor docking station, which released a monitor for them to use. This was then worn on their wrist throughout the day and returned at the end of each day.

11. The respondent informed employees of the decision to introduce the use of the HAV monitors as proximity trackers on 2 September 2020, via a memorandum and question and answer sheet. These were circulated to all staff, including the claimant, and placed on notice boards. The documents explained measures taken to date in relation to health and safety in the covid-19 pandemic and the purpose of the proximity trackers. Both documents made clear that the wearing of the proximity trackers was now mandatory for everyone on the respondent's premises, including management, office staff, visitors and contractors, as the only way for the devices to be fully effective would be if everyone wore the devices at all times. The memorandum stated that *'on the basis that the wearing of this device is a reasonable instruction failure to wear the tracking device may result in disciplinary action.'* The memorandum also confirmed that *'the data collected from the tracking devices will be kept for 4 weeks, after which it will be deleted…The data collected will only be used to identify close contacts of those who test positive and to monitor social distancing more generally'.*

12. The question and answer document confirmed that *'When the HAVwear detects another device within a set distance, it emits an audible alert, vibrates and displays a message 'TOO NEAR'. Each device will download a record of a 'TOO NEAR' event to software…the data is collected from the HAVwear devices at the end of each working day or shift when it is docked in a docking station for charging. The data enables accurate reports to be quickly obtained if necessary, to identify any devices (and therefore individuals) which have been within the 2-metre proximity plus the durations spent within that zone.'* It also stated '*Wearing of the device will be mandatory for all personnel including management/office staff, visitors and contractors. This is the only way the system can be fully effective, eg, if someone who wasn't wearing the device were to show symptoms or test positive for COVID-19, the Company may have*

to send multiple personnel offsite potentially unnecessarily. Accordingly, failure to wear the device may result in disciplinary action.'

13. A tool box talk was held on 11 September 2020 to reiterate the importance of the proximity trackers. The claimant was present at this.

14. On 22 January 2021 the respondent notified its staff that the company was facing unprecedented financial challenges, due to the covid-19 pandemic and the low global oil price. It highlighted that cost saving measures had already been taken, including significant cuts in employee numbers worldwide, salaries being significantly reduced, the 2020 annual pay review being suspended and the UK furlough scheme being utilised. Despite these measures, it was anticipated that a reduction in headcount across two of the the respondent's UK premises, including the Heartlands site, of approximately 8% (17 employees), would be required. The respondent advised that in the first instance they would seek applications for voluntary redundancies, in order to avoid or reduce the number of compulsory redundancies required.

15. Prior to making this announcement, the respondent consulted with the recognised trade union in relation to the proposed redundancies. They discussed the process they intended to follow and confirmed that they intended to use the selection criteria previously agreed with the trade union (and used on two previous occasions) in that process.

16. On 27 January 2021, the respondent announced that, following discussions with Unite, it had been agreed that the deadline for voluntary redundancies would be extended to 1 February 2021.

17. On 5 February 2021, the respondent issued a further communication to their staff. They stated that, given the applications for voluntary redundancies received, the number of employees at risk of compulsory redundancy had reduced to 9. Among the positions remaining at risk was one Grinder role. The selection pool was stated to be the 5 Grinders, which included the claimant. The communication explained that, where there was a selection pool, objective selection criteria would be utilised to provisionally select employees based on

technical ability, attendance and disciplinary record. The communication confirmed that the respondent had informed and consulted with Unite in relation to the selection criteria.

18. On 9 February 2021, an employee of the respondent notified them that he had tested positive for covid-19. The respondent utilised data from the proximity trackers to identify close contacts of that employee. This led to a partial closure of the respondent's business and a delay in applying the selection criteria to those individuals placed in selection pools.

19. On 9 February 2020, the claimant sent an email to Jacqueline McElroy (**JM**), in the respondent's HR Department, stating that he had been in close contact with the individual who had tested positive *'all through last week'*. She responded 25 minutes later stating *'we have checked the monitor contact times and nothing showed up for yourself, can you confirm you were wearing your monitor correctly and on your wrist? I take it you were also keeping 2m apart from him (this would be the reason why no contact time has been identified) and following the correct hygiene procedure.*' The claimant replied stating *'No I didn't have mines on last week as I couldn't find my pass to get it'*.

20. Stephen Devlin, the respondent's Assistant Machine Shop Manager, conducted an investigation meeting with the claimant on 25 February 2021, in relation to an allegation he had breached the respondent's policy on proximity trackers. At the investigation meeting, the claimant confirmed that was not wearing the proximity tracker throughout the week ending 5 February 2021. He confirmed twice that he was aware that the wearing of proximity trackers was mandatory. He stated that, during the week in question he lost his entry card, so was unable to obtain a HAV monitor at the start of each day. He stated that he was aware he should have reported it and that he didn't think about trying to obtain a visitor pass or a new entry card, which would have allowed him to obtain a HAV monitor on entering the site each day.

21. By letter dated 25 February 2021, the claimant was invited to attend a disciplinary hearing on 1 March 2021 in relation to an allegation of misconduct,

namely *'failure to follow company procedures or instruction to wear the required Reactec monitor for the week 5 February 2021.'* A copy of the notes of the investigation meeting were enclosed with the letter.

22. The disciplinary hearing was conducted by PH. JM was in attendance as note-taker. The claimant was accompanied by his colleague, PM. At the meeting, the claimant again confirmed that he was aware that it was mandatory to wear a HAV monitor and understood the importance of doing so. He confirmed however that he had not done so in the week ending 5 February 2021. It was put to him that, as a Grinder, there was an additional purpose for him wearing the monitor: namely hand arm vibration monitoring, which was previously the sole reason the monitors were used by the respondent. The outcome of the disciplinary hearing was that the claimant was issues with a final written warning, to stay on his file for 12 months. This was confirmed by letter dated 1 March 2021.

23. The claimant appealed against the outcome of the disciplinary hearing on 5 March 2021, on the grounds that he felt that the outcome was too harsh. He also stated that *'I don't want to get anybody into trouble but I know that at one point or another I'm not the only person not to have wore the watch within the factory'* and *'I feel with the redundancies this now puts me to the top of the list to be paid off, I'm really worried now for my job.'*

24. An appeal hearing was held on 10 March 2021 and was chaired by DE. The claimant accepted that he had not worn the monitor, indicating that it was a mistake and not intentional. He stated that other people also forgot, but did not provide names of anyone who fell into that category. DE considered the points made by the claimant, but determined there was no basis to uphold the appeal. He did not consider that it was appropriate the investigate the claimant's general assertion that others failed to wear proximity devices, given that no details had been provided by the claimant of who did so or when. In any event, data was only held for 4 weeks and staff had been informed of the purposes this would be held for, which did not include general checking of who was wearing devises for disciplinary purposes.

25. The claimant was informed, by letter dated 11 March 2021, that his appeal had not been upheld.

26. It was initially anticipated that assessment criteria would be applied to those in selection pools and consultations would take place in February 2021. However, due to a covid-19 related shut-down, the redundancy scoring and consultation process required to be delayed until March 2021.

27. The respondent assessed those in the selection pools against the agreed criteria on or around 15 March 2021. After the provisional application of the scoring criteria, the claimant's score was the lowest in the selection pool he had been placed in, which consisted of the 5 Grinders employed at Heartlands. The score allocated to him was 5. The others in the pool scored 9, 10, 12 & 12. By letter dated 15 March 2021, the claimant was informed that he had been provisionally selected for redundancy and invited to attend a first consultation meeting. The scores provisionally allocated to him were enclosed with the letter.

28. The first consultation meeting took place on 17 March 2021. PH chaired the meeting. The claimant was accompanied by PM. The reasons for the redundancy situation were discussed and the claimant's score was explained to him. The claimant objected to certain elements of the scoring, including sickness absence and disciplinary sanctions, being taken into account. He claimed these scores would have been different if the scoring had been carried out at a different time. He stated that he felt that the discplinary sanction which had been applied was too harsh. The claimant also raised other skills that he had, which he felt should be taken into account. PH agreed to consider the points raised by the claimant in relation to absence and skills, but stated that the disciplinary process was separate and that had already been determined.

29. A second consultation meeting was held with the claimant on 25 March 2021. During this meeting PH confirmed that:

a. He accepted the claimant's assertion that high pressure washing was a skill that should have been taken into account in his scoring, resulting in an additional point;
b. He did not feel that use of the cutting saw was a 'skill' which fell within the same category, so no separate score would be allocated to that; and
c. The claimant's recent absence would be discounted, resulting in an additional point.

Despite these revisions, the claimant still only had 7 points, so remained the lowest scoring Grinder in the pool. The claimant disagreed with the conclusion reached in relation to the cutting saw and again objected to his final written warning being taken into account. PH again stated that the disciplinary process had been dealt with separately and would not be reopened. PH stated that there were no vacancies which could be offered to the claimant and explained his entitlements, should redundancy be confirmed.

30. A third consultation meeting was held with the claimant on 1 April 2021. The claimant was given a further opportunity to comment on his scores and raised that he felt further points should have been allocated to him for his ability to undertake fitting work (in addition to the score already allocated for this) and use the cutting saw. He stated that he had previously been doing fitting work, in addition to grinding, but was no longer doing so. The claimant again raised the issue of his disciplinary sanction and stated that other employees had also breached health and safety rules. At that stage he made reference to two individuals who he stated had not worn face coverings in a vehicle. PH confirmed the disciplinary process in relation to the claimant had concluded and the appeal had been heard. It was noted however that there had been a disciplinary investigation in relation the scenario the claimant referred to and, in any event, the individuals were not in the same selection pool as the claimant. It was confirmed that there were still no alternative positions available. After an adjournment, the claimant was advised that his employment as a Grinder would terminate by reason of redundancy.

31. The termination of the claimant's employment, by reason of redundancy, was confirmed by letter dated 1 April 2021. It was confirmed the claimant would be paid in lieu of notice and received a statutory redundancy payment. The claimant was also advised of his right to appeal.

32. The claimant submitted an appeal on 7 April 2021. The grounds of his appeal were that he had been unfairly selected for redundancy. He stated that the disciplinary sanction was too harsh; that his skill set, adaptability and enthusiasm had not been properly reflected in the scoring and that the criteria used was too narrow in scope to reflect this; and that he had had a good record prior to the disciplinary process which had not been taken into account.

33. An appeal hearing was held on 14 April 2021. It was chaired by DE. The claimant set out his grounds of appeal, which related to the perceived unfairness of his disciplinary sanction, his skills not being reflected properly in the score, and training he had been intended to undertake but had not yet received. He also stated that he felt that his previous record and his openness about not wearing the proximity monitor should have counted in his favour. The claimant stated that others had not worn the proximity monitors but he refused to disclose the names of the individuals who he asserted had not done so. He alleged that minutes of the previous meetings were inaccurate, but was not able to provide details of how they were inaccurate, when asked.

34. In relation the grounds of appeal, the following conclusions were reached by DE:

a. **Disciplinary Sanction** - The disciplinary sanction was issued after the respondent's disciplinary procedure had been followed, and the claimant had exercised his right of appeal under that procedure. The claimant admitted a breach of procedure and the sanction imposed was reasonable in all the circumstances.
b. **Scoring** - The claimant's scores had been uplifted in a number of respects. The scoring criteria used to produce the final score had been agreed with the trade union and was objective and reasonable in all the circumstances. The scoring was conducted fairly.

35. DE accordingly decided that the decision to dismiss the claimant should be upheld and the claimant's appeal dismissed. DE's conclusions were confirmed in a letter to the claimant dated 16 April 2021.

Respondent's submissions

36. Ms Neukirch started by noting that the claimant was dismissed for redundancy, not misconduct. She submitted, in summary, that the respondent acted reasonably when dismissing the claimant, who was employed as a Grinder, for redundancy. In particular they:

a. warned employees and the recognised trade union of possible redundancies and consulted appropriately with the affected employees;

b. adopted a fair basis on which to select for redundancy. The pool identified, the selection criteria used and the way this was applied were all reasonable; and

c. took such steps as may be reasonable to avoid or minimise redundancy. No alternative employment was available.

37. The disciplinary action taken against the claimant, the process adopted and the sanction applied were all reasonable in the circumstances. The respondent carried out a reasonable investigation and the claimant admitted the conduct alleged.

Claimant's submissions

38. In summary, the claimant submitted that:

a. The respondent didn't investigated whether others had failed to wear their HAV monitor;

b. There was no evidence produced in relation to the dates he did not wear the HAV monitor;

c. Other employees breached health and safety protocols, but no action was taken;

d. At the most, his failure to wear the HAV monitor should have resulted in a verbal warning; and

e. He was employed as a Fitter, not a Grinder, so should not have been pooled with the Grinders.

Relevant Law

39. S94 ERA provides that an employee has the right not to be unfairly dismissed. It is for the respondent to show the reason (or principal reason if more than one) for the dismissal (s98(1)(a) ERA). That the employee was redundant is one of the permissible reasons for a fair dismissal (section 98(1)(b) and (2)(c) ERA). Where dismissal is asserted to be for redundancy the employer must show that what is being asserted is true i.e. that the employee was in fact redundant as defined by statute.

40. An employee is dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that his employer has ceased or intends to cease to carry on that business in the place where the employee was so employed, or the fact that the requirements of that business for employees to carry out work of a particular kind have ceased or diminished, or are expected to cease or diminish (s139(1) ERA).

41. In ***Safeway Stores plc v Burrell*** [1997] IRLR 200 the EAT indicated a 3-stage test for considering whether an employee is dismissed by reason of redundancy. A Tribunal must decide: -

a. Whether the employee was dismissed?

b. If so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?

c. If so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

42. If satisfied of the reason for dismissal, it is then for the Tribunal to determine, the burden of proof at this point being neutral, whether in all the circumstances,

having regard to the size and administrative resources of the employer, and in accordance with equity and the substantial merits of the case, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee (s98(4) ERA). In applying s98(4) ERA the Tribunal must not substitute its own view for the matter for that of the employer, but must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer.

43. The House of Lords in ***Polkey v A E Dayton Services Ltd*** 1987 IRLR 503 held that *"in the case of redundancy, the employer will not normally have acted reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within its own organisation".*

44. The EAT in the case of ***Capita Hartshead Limited v Byard*** UKEAT/0445/11 provides a summary of the principles to be derived from the case law on the question of the selection of pool for redundancy purposes in an unfair dismissal claim (which has since been cited with approval in the cases of ***Wrexham Golf Co Ltd v Ingham*** UKEAT/0190/12 and ***Family Mosaic Housing Association v Badmos*** UKEAT/0042/13). In that case the EAT stated, at paragraph 31:

'the applicable principles where the issue in an unfair dismissal claim is whether an employer has selected a correct pool of candidates who are candidates for redundancy are that

(a) "It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted" (per Browne-Wilkinson J in Williams v Compair Maxam Limited [1982] IRLR 83 [18];

(b) "[9]...the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be

drawn" (per Judge Reid QC in Hendy Banks City Print Limited v Fairbrother and Others (UKEAT/0691/04/TM);

(c) "There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem" (per Mummery J in Taymech v Ryan [1994] EAT/663/94);

(d) The Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has "genuinely applied" his mind to the issue of who should be in the pool consideration for redundancy; and that

(e) If the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it.'

Observations on Evidence

45. The only particular area of dispute, in relation to the issues the Tribunal required to determine, was the role the claimant undertook. In his evidence, the claimant stated that he was a Fitter by the time his employment terminated, so should not have been pooled with the Grinders. The respondent stated that the claimant remained a Grinder throughout his employment, but accepted that he undertook some additional duties as a Fitter, when required. The Tribunal concluded that the claimant's principal role was a Grinder throughout his employment. This conclusion was reached due to the following:

a. It was clear from his contract of employment that he was employed as a Grinder;

b. PH and DE both confirmed that the claimant's principal role remained that of Grinder throughout his employment;

c. Whilst the claimant, along with other employees, was encouraged to work in other areas by the respondent, and the claimant had undertaken work as a Fitter, the Tribunal accepted the respondent's evidence that the claimant was not yet fully qualified in that area, and his principal role remained that of Grinder;

d. PM, a witness called by the claimant, also confirmed that the claimant was principally a Grinder, stating that the claimant was *'more than a Grinder'* and *'not just a Grinder'* as he had *'an enhanced role'*, *'working in fitting and cutting also'*;

e. The minutes from the disciplinary investigation meeting, disciplinary hearing, disciplinary appeal hearing, redundancy consultation meetings and redundancy appeal meetings all refer to the claimant being a Grinder in the heading of the minutes. There is repeated reference to this in the body of the minutes also. The final written warning also references this. The claimant did not take issue with this or dispute his job title at any stage.

f. In the last redundancy consultation meeting, when the claimant argued he should receive more credit in his score for his work in fitting, he stated that he had previously been doing fitting work, in addition to grinding, but was no longer doing so.

Discussion & Decision

46. The Tribunal referred to s98 ERA, which sets out how a Tribunal should approach the question of whether a dismissal is fair. There are two stages: firstly, the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in s98(1) and (2) ERA. If the employer is successful at the first stage, the Tribunal must then determine whether the dismissal was fair or unfair. This requires the Tribunal to consider whether the employer acted reasonably in dismissing the employee for the reason given.

47. The Tribunal considered each of set out in ***Safeway Stores plc v Burrell***. It is clear that the claimant was dismissed, so the first element was satisfied. The Tribunal accepted (and the claimant did also) that the requirements of the

respondent's business for employees to carry out work of a particular kind had diminished. This was due to the reduction in work volumes as a result of the Covid-19 pandemic and the downturn in the price of oil. The second test was accordingly also satisfied. In relation to the final point, the Tribunal was satisfied that the claimant's dismissal was wholly or mainly caused by that cessation or diminution: the respondent required to reduce it's workforce due to financial pressures caused by the covid-19 pandemic and the reduction in global oil prices. They made 17 roles redundant across the business around that time, including that of the claimant. The Tribunal were accordingly satisfied that there was a genuine redundancy situation. The Tribunal were also satisfied that the claimant was dismissed solely as a result of that.

48. The Tribunal then considered s98(4) ERA. The Tribunal had to determine (the burden of proof at this point being neutral) whether the dismissal was fair or unfair, having regard to the reason shown by the respondent. The answer to that question depends on whether, in the circumstances (including the size and administrative resources of the employer's undertaking), the respondent acted reasonably in treating the reason as a sufficient reason for dismissing the claimant. This should be determined in accordance with equity and the substantial merits of the case. The Tribunal was mindful of the guidance given in cases such as ***Iceland Frozen Foods Limited v Jones*** [1982] IRLR 439 that it must not substitute its own decision, as to what the right course to adopt would have been, for that of the respondent. Whether the Employment Tribunal would have acted in the same way is not the question to be asked. Instead, it must apply an objective test of whether dismissal, and the procedure used to reach that decision, was within the range of reasonable responses open to a reasonable employer in the circumstances.

49. In considering whether the respondent in this case acted reasonably in treating redundancy as a sufficient reason for dismissing the claimant, the Tribunal had regard to the guidance laid down in ***Polkey*** in relation to whether the respondent acted reasonably in treating redundancy as sufficient reason for dismissal. Taking each factor in turn, the following conclusions were reached.

Warning and Consultation.

50. The Tribunal was satisfied that there was adequate warning and consultation in this case. The respondent consulted with the recognised trade union in relation to the proposed redundancies. They discussed the process they intended to follow and confirmed that they intended to use the selection criteria previously agreed with the trade union in that process.

51. The respondent announced that redundancies would be required on 22 January 2021 and volunteers were sought. As a result of ongoing discussions with the trade union, the deadline for voluntary redundancy applications was extened to 1 February 2021. On 5 February 2021, the respondent announced that 9 compulsory redundancies would be required and outlined the selection pools and selection criteria to be used, confirming that the recognised trade union had been consulted in relation to this.

52. The claimant was informed on 15 March 2021 that he had been provisionally selected for redundancy, the process which led to that and the scores provisionally allocated to him. Three consultation meetings took place with the claimant in relation to the proposal prior to dismissal being confirmed. These took place on 17 & 25 March and 1 April 2021. The claimant was informed of the reasons for the proposed redundancy and the process which led to his provisional selection, including the pool for selection and selection method. He was given the opportunity to question or challenge this. He did so and PH agreed to discount his absence and to include, for all individuals in his pool, a score for the technical skill of using the High Pressure Washer. This increased the claimant's score by 2, but he still had the lowest score in his selection pool. PH explained to the claimant, during the consultation meetings with him, why it was not appropriate to include a further skill in relation to the use of the cutting saw, as the claimant had suggested. The claimant was also afforded the right of appeal.

Adopts a fair basis for selection.

53. For the reasons set out above, the Tribunal found that the claimant was employed by the respondent as a Grinder throughout his employment. Whilst the Grinders all carried out additional duties, their principal role remained as a Grinder. The Tribunal accepted that the respondent had considered what the appropriate pool should be. Having determined that they could operate with one less Grinder, which they were entitled to do, they considered the pool for selection and determined that all the Grinders should be placed in a pool together. The Tribunal found that the respondent acted reasonably in determining that the pool for selection should be limited to the Grinders. It cannot be said that the determination of this pool fell outside the band of reasonable responses open to a reasonable employer in these circumstances.

54. In relation to the method of selection and the selection criteria used, the Tribunal was mindful of the fact that, provided an employer's selection criteria are objective, a Tribunal should not subject them or their application to over-minute scrutiny (***British Aerospace plc v Green and ors*** 1995 ICR 1006, CA). Essentially, the task for the Tribunal is to satisfy itself that the method of selection was not inherently unfair and that it was applied in the particular case in a reasonable fashion. Tribunals are only entitled to interfere if the selection criteria, or the way the criteria was applied, fell outside the band of reasonable responses open to a reasonable employer in the circumstances.

55. The Tribunal noted that the trade union recognised by the respondent had previously agreed to the selection criteria used and raised no objection to the proposal that it be used again on this occasion.

56. The Tribunal concluded that the criteria used were objective, they were not inherently unfair and the manner in which they were applied was reasonable. In particular, previous disciplinary action is an objective criteria, which is not inherently unfair. Whilst the claimant felt that the application of the criteria, at that particular time, produced an unfair result, this was due to the timing of his disciplinary warning, not due to the criteria being subjective or inherently unfair. Indeed, had the criteria been applied a month before, the claimant would have

had no issue or concerns with the criteria, as he would not have been selected for redundancy. The respondent did however require to apply the criteria at a particular point. While the fact that they did so in March 2021 produced an unfavourable result for the claimant, it cannot be said that the respondent's actions, in applying the criteria at the time they did, fell outside the band of reasonable responses open to a reasonable employer in these circumstances. They required to make redundancies at that time and the application of the criteria would always produce an unfavourable result for one of the Grinders.

57. The Tribunal accordingly concluded that the method of selection accordingly fell within the band of reasonable responses open to the respondent in the circumstances.

Consideration of alternative employment.

58. No evidence was led of any vacancies. The respondent's position was that there were none. The Tribunal accepted that there was no alternative employment available. None could accordingly be offered to the claimant.

Conclusions regarding Unfair Dismissal Claim

59. Given these findings, the Tribunal found that the respondent acted reasonably in treating redundancy as a sufficient reason to dismiss the claimant.

60. The claim of unfair dismissal does not therefore succeed and is dismissed.

Disciplinary Process

61. While not strictly necessary, given the findings set out above, the Tribunal wish to record the conclusions reached regarding the disciplinary process which led to the claimant's final written warning. The Tribunal concluded that a fair process was followed and that the respondent had a reasonable belief, based on reasonable grounds, following a reasonable investigation that the claimant had committed misconduct. The claimant admitted knowing that the requirement to wear the proximity tracker was mandatory and that he had

failed to do so for a week. In light of that admission, there was no requirement to obtain evidence in relation to the dates the tracker had not been worn by the claimant. He had previously been clearly informed that failure to wear a proximity tracker may result in disciplinary action. Given the implications for the respondent's business in employees not wearing proximity trackers, namely potential shut downs, the Tribunal concluded that the sanction imposed fell within the band of reasonable responses open to the respondent in the circumstances.

62. The Tribunal did not accept that the respondent's failure to investigate the claimant's assertion that others did not wear their proximity tracker rendered the process unfair. Given that the claimant did not provide any details of who had not do so or when, it cannot be said that failure to investigate this further fell outwithin the band of reasonable responses open to a reasonable employer in the circumstances.

63. The claimant did not raise the issue of two other employees breaching health and safety by not wearing a mask in a vehicle until his third redundancy consultation meeting on 1 April 2021. Given that the disciplinary process had concluded by that point, and the claimant had not raised this in that context, it was reasonable for the respondent to maintain that that process had concluded and it was not appropriate to reconsider the sanction imposed.

Employment Judge: Mel Sangster
Date of Judgment: 21 January 2022
Entered in register: 24 January 2022
and copied to parties