



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case Number: 4103222/2020 (A)**

**Hearing held remotely at Glasgow on 13 and 14 October 2020**

**Deliberation on 15 October 2020**

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**Employment Judge Hoey**

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**Mr A McMillan**

**Claimant  
Represented by:  
Himself**

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**Electro-Mechanical Assembly Ltd**

**Respondent  
Represented by:  
Ms Pollock  
(Director)**

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### **JUDGMENT**

The claimant was fairly dismissed and his claim of unfair dismissal is not well founded.

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### **REASONS**

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1. This was a claim of unfair dismissal which was lodged by the claimant on 7 June 2020. ACAS early conciliation commenced on 20 April 2020 with the certificate issued on 20 May 2020.

2. The hearing took place remotely via CVP with the claimant representing himself and Ms Pollock, director, representing the respondent. Each of the parties was able to participate in the hearing, seen and be seen, and communicate effectively. The parties also had access to the bundle of productions to which reference was made.
3. The Tribunal was satisfied that the arrangements for that hearing had been conducted in accordance with the Practice Direction dated 11 June 2020, and ascertained that the appropriate notice as to that hearing was on the cause list. It was satisfied that the hearing had been conducted in a fair and appropriate manner such that a decision could be made on the basis of the evidence led.
4. The hearing began by my making reference to the overriding objective set out in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, namely that everything that is done is done fairly and justly and to ensure that the parties are on an equal footing.

**Issues to be determined**

5. We then discussed the issues arising in this case. The claimant accepted that there was a redundancy situation as defined by law and that he was dismissed by reason of redundancy. He argued that he was unfairly selected because he believed he should have been scored better than how he was scored. He believed that he had been singled out. He believed that he was the best machine operator (in respect of the machine he operated) and he should not have been dismissed. The claimant accepted that this was his challenge to the dismissal.
6. The respondent argued that they had sought to retain the staff with the greatest range of skills needed for production operators and that they had applied a matrix that assessed staff fairly. The claimant had scored the least points in the selection process. They denied that they treated the claimant any

differently to other staff. They had focused on the criteria and carried out a fair assessment of all production operators.

- 5 7. The issue in this case was therefore whether or not the claimant had been selected fairly when he was dismissed by reason of redundancy.

### Facts

- 10 8. The Tribunal heard evidence from the claimant and the 2 individuals who had scored the claimant and who had met with him to explain the scoring in detail, Mrs Hunter, Production Manager, and Mr McDonald, Operations Director.

- 15 9. The Tribunal made the following findings of fact from the evidence led, which facts are necessary to determine the issues in this case.

10. The respondent is a small sub-contracting electronic manufacturing company.

- 20 11. The company had a small staff cohort with around 15 production operators, 1.5 store staff, 4 or 5 administrative staff and 2 directors.

- 25 12. The claimant was part of the production team. He was employed as a production operator which was the same job title as the others who worked in the production team.

- 30 13. Each day a decision would be taken as to what work was needed and what each production operator would do. This depended upon the daily orders. The kit would be set up and each day production operators could be asked to carry out different tasks, ranging from mechanical work, testing, soldering, computer work, machine operating (there are a around 8 different machines), wiring, reworking, wire cutting and debugging.

14. The majority of operators do a bit of everything and they are rotated to do different things. They are all employed on the same contract. Some operators focus more on one area than others and the respondent would focus on the individuals' strengths where possible.

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15. Mrs Hunter is production manager for the shop floor. All the production operators, including the claimant, reported to her on a daily basis. She worked with them on a daily basis and knew their skill sets. She has worked with the business for over 30 years and worked with the production operators for the duration of her employment. She knew how each of the production operators worked and knew where skills and knowledge gaps were. She was responsible for determining the work on a day to day basis and who did what each day.

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16. The respondent's production operators have lengthy service. The longest serving production operator has been employed for around 40 years. The shortest serving production operator has around 10 years' service. Mrs Hunter provided the production staff with work to be done each day. She understood the work that required to be done and the production operators' capabilities.

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17. Mr McDonald is operations director. He also worked closely with each of the operators and knew them individually. He could also carry out the tasks needed in respect of the role. He knew the skills and knowledge gaps of each of the production operators given his lengthy service and day to day working and supervision of the staff.

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18. The business was small with managers (including directors) working closely with staff on a day to day basis.

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**Directors decide to consider redundancies**

19. On 11 December 2019 at a directors' meeting, it was noted that there had been a reduction in work. Measures were needed to protect cash flow. The directors

looked at orders from customers and the forecast from which they could identify how many hours per week were needed from production operators in the months ahead. From the forecast it looked like there were 4 positions too many.

5 **First all staff meeting takes place**

20. On 17 December 2019 an all staff meeting took place. Staff were told that there had been a significant downturn in business. All staff were present, including the claimant. Staff were told that any ideas as to cost saving would be considered and staff were to approach managers with any ideas to save costs, reduce headcount or reduce hours. That could include voluntary redundancy, job sharing or reducing hours. Staff were asked to revert by 8 January 2020 with any ideas. If any employee wished to be considered for voluntary redundancy that would be considered. A further all staff meeting was to take place on 14 January 2020.

**Second all staff meeting takes place**

21. There was a further all staff meeting on 14 January 2020. Staff were told that the situation was such that compulsory redundancies required to be considered. The forecasting had been such that 4 positions were required to be considered for redundancy. That remained the position.

22. Staff were advised that a scoring system would be devised to focus on general skills. Each employee would be assessed and the bottom 4 would, in all probability, be dismissed as redundant.

23. Before the selection process was carried out, 2 staff asked for voluntary redundancy, which was approved. That resulted in the respondent needing a headcount reduction of 2 production operators.

**Selection process devised**

24. The business needed as much diversity in production operator skills as possible given the challenges it faced going forward. The aim was to create a matrix that would identify those with the broadest set of skills and knowledge together with contribution to the business.
25. A matrix was created with 3 criteria. These were knowledge, skills and contribution. The scoring system was as follows:
26. For skills, candidates would be scored a 1 (insufficient knowledge to operate effectively without close supervision), 2 (has limited skills required for the role, is able to carry out tasks with help and supervision, struggles to understand documentation and lacks diligence), 3 (displays some of the required skills but there are clearly identifiable gaps compared to the skills required is able to carry out most tasks without supervision, has limited understanding of relevant documentation and has a diligent approach to the job), 4 (displays a good range of skills required can carry out most tasks with confidence, can share knowledge with others, has some understanding of relevant documentation and a diligent approach) or 5 (displays the full range of skills required, can carry out all tasks with confidence, can share knowledge with others, has an understanding of documentation and diligent approach).
27. For knowledge, candidates would be scored a 1 (insufficient knowledge to operate effectively without close supervision), 2 (displays limited knowledge in relation to the job role, finds it difficult to transfer knowledge and has limited understanding of company requirements), 3 (displays some of the required knowledge but there are clearly identifiable gaps in knowledge required for the role, finds it difficult to transfer knowledge and has a basic understanding of company requirements), 4 (displays the core knowledge required for the post, has knowledge that is transferable within the company and understands the requirements of the company) and 5 (displays the full knowledge required for

the role, has a broad and varied knowledge of the role with transferable knowledge and understands company requirements).

28. For contribution, candidates would be assessed a 1 (negative impact with regards to the business), 2 (makes no contribution to the business, cannot work without supervision, unable to take responsibility, lacks confidence, lacks understanding of written or oral instructions, does not question process, or understand how attitude can affect morale and requires constant reminders of attitude and housekeeping requirements), 3 (makes minimal contribution to the business, limited to jobs without supervision, refuses to take responsibility for actions, can work as a team member, lacks understanding of oral or written instructions, tendency not to question process, does not understand how attitude can affect morale and requires reminders of attitude and house keeping), 4 (makes a good contribution to the business, works without supervision, reluctant to accept responsibility for actions, works as a team member but prefers to work alone, understands written or oral instructions, tender not to ask questions or challenge process, understands morale) or a 5 (contributes fully in all aspects of the business, works without supervision, takes responsibility, works as a team or on own, has a good understanding of oral and written instructions, is not adverse to asking questions and challenging process and understands how attitude affects morale).

#### **Production operator selection pool used**

29. As production operators were all employed on the same contract and required to carry out the same work, they were treated the same. They were all employed to do the same thing, even if in practice there was a large variety of different tasks done. No one person could do everything but, with some training, each of the tasks could be carried out in principle by each production operator. Each of the 15 production operators would be assessed in the same way.

30. Staff had been advised as to the process and that the selection process would apply to each of them.

**Selection process takes place**

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31. Mrs Hunter and Mr McDonald independently assessed each member of staff as against the matrix. This was done using their direct knowledge and experience of the staff having worked with the individuals for the duration of their employment together with training and staff records.

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32. The claimant had a good working relationship with both individuals and had worked with them closely. There was no reason to challenge their professionalism (and the claimant did not do so). Both Mrs Hunter and Mr McDonald assessed the staff with reference to the criteria.

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33. The 2 scores of each assessor were averaged and totalled. The assessments of both assessors of each individual were broadly similar. The bottom 2 individuals were the same on both assessments, with the claimant being bottom in both assessors' assessments.

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**Claimant has lowest score**

34. On 21 January 2020 the claimant was advised that he had been selected as the lowest scoring production operator. He was given his score for each of the criteria and a summary of how each criterion had been assessed (which was a summary of what each score within the matrix would entail). The claimant had the lowest score. He was told that if he wished to discuss matters he should contact Ms Pollock, director.

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35. With regard to knowledge, the claimant scored a 3. There were a number of areas where the claimant's knowledge was lacking. For example, he had little

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5 knowledge of soldering. While he had good knowledge of the machine on which he regularly worked, he had considerably lesser knowledge than others with regard to the role, namely the other work required by a production operator. That was because the claimant had spent more of his time on the one machine rather than having gained knowledge on the other areas of the shop floor. Some areas of his knowledge were (relatively) basic, such as programming. He had limited knowledge of other parts of the production operator role.

10 36. With regard to skills, the claimant scored a 3. There were certain skills gaps. It was important for production operators to know the products used by the respondent and the faults that could arise. It was also important to be able to inspect matters from start to finish. Other staff had greater skills relative to the claimant. There were also areas required of the production operator role where  
15 the claimant required supervision (which was greater than other staff). Areas where the claimant lacked skills, in comparison to other staff, included maintenance, general housekeeping and documentation. If an issue developed the claimant would often live with it, rather than raise it, come forward and question what was happening to try and do something about it.

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37. In terms of contribution, he scored a 2.5 (an average of 2 and 3). Broadly the claimant had done a good job at the machine on which he worked but he rarely contributed to the bigger team. He rarely asked questions or volunteered for other work. The claimant was a good worker on high volume automotive  
25 electronics and was happy doing that but he was not contributing to the business as others did. The claimant's contribution was limited in some areas. While other staff could contribute significantly by working on their own, the claimant often needed supervision. The claimant was not as good at reading instructions as others. His work in that regard required to be checked. Time  
30 sheets could be an issue.

38. While the claimant believed that he ought to score better, the above represented the respondents' assessment of the claimant from the information before them. The claimant had scored lower than other production operators in terms of his skills, knowledge and contribution.

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**Claimant given detailed explanation as to scoring system and his scores**

39. The claimant contacted Ms Pollock and asked for a more detailed explanation as to how he had been assessed. He attended a meeting on 24 February 2020 with both assessors. He was given the detail that had been used to score him in respect of each criterion. He had asked whether that made him a "bad operator" and was told "far from it". He was considered a very good operator but that his general skill set and knowledge had been limited compared to the other staff. He had also contributed less to the business than others.

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40. The claimant was told that the process was objective with focus on the criteria and not the individuals. The claimant knew his assessors throughout his 15 years' service. He was considered to be a good operator and he was good in operating the machine on which he focussed but he had a number of skills and knowledge gaps. The claimant had been advised as to the issues that arose during his employment and they were not new to him.

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41. The meeting concluded with the claimant signing a document to confirm that he "understood the process and was happy with the answer given to him" which was accurate.

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42. The claimant did not challenge the scores he had been given at the meeting nor suggest that they were incorrect. He did not provide evidence to support any increase in any of the scores. There was also no suggestion that other staff had been given any unfair preference or unfairly scored. He accepted the assessment he had been given.

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**Claimant's employment ends**

43. The claimant's employment was due to end on 14 April 2020 but it ended on 26 March 2020 at his request as he had secured another job which was starting on 30 March 2020. The claimant was paid up to the date his employment ended and received a statutory redundancy payment.

44. The claimant did not subsequently raise any further challenge to his dismissal until he presented his claim form to the Tribunal.

**Claimant secures another comparable role**

45. The original role the claimant secured did not materialise but he secured another role, earning an income not less than that he received from the respondent, which commenced on 19 April 2020.

46. He had secured benefits for the period from 30 March 2020, yielding £74.35 per week.

47. His income from the respondent was £306 gross a week which is £261 net.

**Law**

48. Under section 94(1) Employment Rights Act 1996 ("ERA") an employee has the right not to be unfairly dismissed by his employer.

49. Under section 98(1) ERA, in determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -  
(a) the reason (or, if more than one, the principal reason) for the dismissal, and  
(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee

holding the position which the employee held. Under section 98(1) ERA, a potentially fair reason for dismissal includes redundancy.

50. Under section 98(4) ERA, where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case.

51. In **Williams v Compair Maxam Ltd** 1982 ICR 156, the Employment Appeal Tribunal laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. The Employment Appeal Tribunal stated that it was not for the tribunal to impose its own standards and decide whether the employer should have acted differently. Instead, it should ask whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. The factors which a reasonable employer might be expected to consider were

- a. Whether the selection criteria were objectively chosen and fairly applied
- b. Whether employees were warned and consulted about the redundancy
- c. Whether, if there was a union, the union's view was sought
- d. Whether any alternative work was available

52. In **Buchanan v Tilcon Ltd** 1983 IRLR 417, the Court of Session ruled that, where an employee makes a general complaint of unfair selection, the employer does not have to prove to a tribunal that its grading of employees was carried out accurately. The Court of Session held that where an employee's only complaint is unfair selection, all that the employer has to prove is that the method of selection was fair in general terms and that it was reasonably applied to the employee concerned. Where the Tribunal accepted

that the senior official doing the selecting had made his decision fairly, using information he had no reason to question, to demand that he set up the accuracy of that information by direct evidence was unreasonable and unrealistic.

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53. The **Buchanan** case was subsequently followed in **Eaton Ltd v King** 1995 IRLR 75 on this point. On a proper application of the principles established in the **Buchanan** case, all that the employer had to show was that it had set up a good system of selection which had been reasonably applied. In the Employment Appeal Tribunal's view, there was no reason why the managers who took the decision to dismiss should not have relied on the information supplied to them by the supervisors who carried out the assessments, and the managers could not be expected to be able to explain each marking. Furthermore, there was nothing in the tribunal's findings to suggest that the assessments were not carried out honestly and reasonably. The Employment Appeal Tribunal considered that, while there may be cases where an inference could be drawn from the markings that there was something unfair about the application of the selection process, this was not such a case.

54. In **Taylor and ors v (1) BICC Brand Rex Ltd (2) BICC Cables Ltd** EAT 651/94 employees dismissed for redundancy complained to the Employment Appeal Tribunal that an Employment Tribunal had made 'generic' findings (i.e. findings which applied equally to all the claimants) in coming to its conclusion that all had been fairly dismissed, and had failed to address the specific matters raised by the employees. In particular, a conflict of evidence over attendance and timekeeping records had not been resolved. It was argued that this fell foul of the guidelines in **Williams and ors v Compair Maxam Ltd** 1982 ICR 156, in that a Tribunal should satisfy itself that it was reasonable to dismiss each individual employee and that the selection criteria had been applied fairly to each one of them. Again, the case turned on the degree of scrutiny required of the Tribunal in such cases. Lord Justice Waite in the **Green** case (above) was quoted as saying: '**So in general the employer who sets up a system of selection which can reasonably be described as fair and applies it**

**without any overt sign of conduct which mars its fairness will have done all that the law requires of him?**

55. The Employment Appeal Tribunal thought it plain that, in order for the claimants  
5 to succeed in this case, there needed to be some sort of unfair conduct on the  
employer's part which could mar the fairness of the system, such as evidence  
of bad faith, victimisation or discrimination. In the instant case the dispute was  
over whether warnings had been given or had lapsed and the Employment  
Appeal Tribunal concluded that the Tribunal had made no error of law.

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56. In **Polkey v AE Dayton Services Ltd** 1988 ICR 142, their lordships decided  
that a failure to follow correct procedures was likely to make the ensuing  
dismissal unfair unless the employer could reasonably have concluded that  
doing so would be futile. This meant that the employer would not normally act  
15 reasonably unless he warns and consults any employees affected, 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. Further, on the  
issue of quantum, the decision holds that whether procedural irregularities  
actually made any difference to the decision can be taken into account when  
20 calculating compensation.

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### **Redundancy**

57. Under s139 ERA, an employee who is dismissed shall be taken to be  
25 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 (a) to  
carry on the business for the purposes of which the employee was so  
employed, or (b) to carry on the business in the place where the employee was  
so employed, or (c) the fact that the requirements of the business for  
30 employees to carry out work of a particular kind, or for employees to carry out  
work of a particular kind in the place where the employee was employed by the  
employer have ceased or diminished or are expected to cease or diminish.

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**Decision and reasons**

58. The challenge to the dismissal in this case was narrow. The claimant, correctly, conceded that there was a redundancy situation as defined by the Employment Rights Act 1996. Workload had diminished and fewer production operators were needed. He accepted that he had been dismissed for that reason.
59. The claimant did not challenge the criteria themselves. They were broadly objective and sought to focus on the general skills needed by the respondent to meet the challenges of the future. The criteria were reasonable.
60. There was also no challenge to the consultation carried out. The claimant knew the criteria that were being applied and he knew how he had been scored. He was given a detailed explanation of the scoring approach generally and how he had been assessed specifically. He was given the opportunity to raise any concerns he had. He knew he could raise any issues with the directors. He confirmed when leaving the meeting that he understood the process and was happy with the answer he was given.
61. The claimant's argument was that he believed he should have been scored better. The role of the Tribunal in considering dismissals by reason of redundancy in cases such as this is clear. As Lord Justice Waite in the **Green** case (above) said: 'So in general the employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt sign of conduct which mars its fairness will have done all that the law requires of him.'
62. The question is therefore whether or not there is some sort of unfair conduct on the employer's part which could mar the fairness of the system, such as evidence of bad faith, victimisation or discrimination. There was no suggestion of this in this case. Even although the claimant believed that he had been scored low, by his own admission, he was better skilled in one specific area,

the operation of the machine. While he believed he did have other skills, he accepted that there were limits and omissions.

5 63. The evidence before the Tribunal was that the focus by the respondents was exclusively on the criteria and objectively assessing each employee as against each criterion. The respondents did their best to create a system that resulted in those with the broadest skill/knowledge set and contribution being retained which was what they needed going forward. They focused on the role of production operator and the facets needed of that role in general. The claimant  
10 did not have the broadest skill set with regard to the production operator role and relatively speaking he was poorest in that regard.

15 64. That is not a criticism of the claimant nor of his skills. It instead represented the reality of the situation. The claimant had spent the majority of his time as production operator working on one machine rather than on the myriad of other tasks. The other production operators had more experience and knowledge in the general production operator role and had contributed more.

20 65. In my judgment the respondent set up a system of selection which can reasonably be described as fair. The system was applied without any sign of conduct that mars its fairness.

25 66. The claimant did not like the score he had been given. The respondent was not saying that the claimant did not have skills, knowledge or contribution nor that he was a bad operator. They fairly assessed him relative to his colleagues. That process was carried out in a fair way.

30 67. I also looked more generally at the process to consider whether the respondent acted fairly and reasonably in all the circumstances taking account of size, resources, equity and merits of the case. I considered the authorities and approach the law requires in redundancy cases. I am satisfied that the respondent did act in a way that satisfied the legal tests in this area.



68. While the process was not perfect, taking a step back and assessing the fairness, the process was fair. The respondent had warned staff in advance that there was a risk of dismissal by reason of redundancy and sought alternatives. Staff were asked to contribute to that process. While 2 staff had left by reason of voluntary redundancy, the respondent still required to reduce their headcount by a further 2.
69. The matrix that was devised fairly captured 3 specific aspects of the production operator role going forward: skills, knowledge and contribution. The marking in respect of each criterion was clear and fair.
70. The assessment that was carried out was also done in a way that was fair. Rather than rely upon one person's assessment, the process was undertaken by 2 people independently. These were persons who knew each of the relevant employee's skill set and approach. They had worked with the staff for many years. This was a small close-knit business. There was no suggestion that both individuals did anything other than assess each individual (including the claimant) on the basis of the criteria and knowledge which included the records available to them.
71. The conclusion that both assessors reached was the same, that each of the other production operators had fared better in the assessment process than the claimant. That was not a criticism of the claimant but rather a fair assessment of the position. The respondent required to retain those with the greatest breadth of skills, knowledge and contribution.
72. The claimant was asked in cross examination why the respondent would single him out given they clearly believed he was a good operator. He was unable to provide a response to that question. There was no reason for them to single him out. It was clear that the respondents valued the work that the claimant had done. They did their best to focus on what they needed in the future and

seek to ensure they fairly selected those who would best equip the respondent with the skills and approach needed for the future.

73. At a meeting the claimant had with the assessors to discuss his selection he  
5 was given full details underpinning the assessment both generally and  
specifically with regard to his assessment. Both assessors provided their  
assessment. Even if the claimant was not fully aware of the specific detail  
underpinning each of the criteria until this point, he was given full details at that  
10 meeting, both of the general approach and of his particular assessment as  
regards each particular criterion. The claimant did not then, nor subsequently,  
seek to allege that the assessment was unfair or incorrect. He accepted the  
score and did not raise the matter further with the respondent.

74. The legal test in this area is not to determine what I, as the employer, would  
15 have done, nor what a perfect employer would have done. I must assess the  
position from the perspective of a reasonable employer. Could a reasonable  
employer in the circumstances have followed the approach that was followed  
in this case. This applies not just to the process itself but also to the selection  
of the claimant. I find that the actions of the respondent were reasonable with  
20 regard to both the procedure carried out and in their selection of the claimant.

75. In all the circumstances and assessing the matter with reference to the legal  
tests, the respondent acted fairly and reasonably in dismissing the claimant by  
reason of redundancy, taking account of the size, resources equity and merits  
25 of the case. The process that was followed was fair and reasonable. The  
selection of the claimant was also fair and reasonable in the circumstances.

76. The claimant's dismissal was therefore fair and his claim of unfair dismissal is not well founded.

<sup>5</sup> Employment Judge: David Hoey  
Date of Judgment: 15 October 2020  
Entered in register: 28 October 2020  
and copied to parties