EMPLOYMENT TRIBUNALS

Claimant: **Ms RA Nyametscher Severin**

Respondent: **V&A Enterprises Limited**

Heard via Cloud Video Platform (London Central) On: 8 & 9 March 2022

Before: Tribunal Judge Peer acting as an Employment Judge

Representation

Claimant: Unrepresented
Respondent: Mr Kevin McCavish of Shoosmiths Solicitors

RESERVED JUDGMENT

The judgment of the tribunal is that:

1. The claimant's claims of unfair dismissal against (1) V&A Foundation; and (2) V&A Limited are dismissed upon withdrawal.

2. The claimant's claim of unfair dismissal against V&A Enterprises Limited fails and is hereby dismissed.

3. The tribunal has no jurisdiction to hear the claimant's claim for universal credit and the claim is hereby dismissed.

REASONS

CLAIMS AND ISSUES

1. The claimant Ms Regina Abena Nyametscher Severin worked for the respondent, as a Gallery Assistant, from 26 November 2018 until 28 February 2021. The claimant presented her claim for unfair dismissal and other payments to the tribunal on 8 June 2021.

Unfair dismissal

2. The claim is for unfair dismissal arising out of a dismissal of the claimant by the respondent in January 2021. The issues for the hearing are as follows:

a. What was the reason or principal reason for dismissal? The respondent says the reason was redundancy. This was disputed by the Claimant.

b. If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will usually decide, in particular, whether:

   i. The respondent adequately warned and consulted the claimant;
   ii. The respondent adopted a reasonable selection decision, including its approach to a selection pool and/or selection criteria;
   iii. The respondent took reasonable steps to find the claimant suitable alternative employment;
   iv. Dismissal was within the range of reasonable responses of a reasonable employer.

c. If the dismissal was procedurally unfair, what was the chance of the claimant being fairly dismissed if a fair procedure had been followed?

d. If the dismissal was procedurally unfair, what remedy is appropriate? The claimant requests compensation only and does not wish for reinstatement or reengagement.

3. The claimant also claims she is owed an amount in respect of Universal Credit benefits that she says she could not claim due to redundancy payments made in March rather than February 2021.

THE HEARING

4. The hearing was a remote public hearing, conducted using the cloud video platform (CVP). The parties agreed to the hearing being conducted in this way.

5. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. There were some minor connection difficulties experienced on day one of the hearing. In particular, there was a slight time lag on the connection with the claimant. Accommodation was made by all participants in respect of this time lag to ensure that all parties could hear everything that was said by participants. On day two of the hearing, there were more significant difficulties in relation to the connection with the claimant. The hearing was adjourned, and arrangements were made for the claimant to attend and connect to the hearing from a tribunal building. This ensured a fair and effective hearing.

6. The claimant represented herself at the hearing although has received some legal assistance from Clements Solicitors in relation to the proceedings. I took care to explain procedural matters. The claimant was also enabled to call her legal representatives for support in relation to some preliminary issues which are set out further below. The respondent was represented by Mr Kevin McCavish of Shoosmiths Solicitors.

7. Evidence was heard from the claimant. Evidence was also heard from Judy Roberts (Director of People and Change), Lois Honeywill (ex-Senior Visitor Experience Manager), Vincenza Rubini (Senior Visitor Experience Manager) and Vernon Rapley (Director of Cultural Heritage Protection and Security) on behalf of the respondent.

8. There was an agreed bundle indexed to 362 pages. The respondent provided in addition a Counter-Schedule of Loss (the claimant's schedule of loss was contained within the bundle) and a probation report which I admitted into evidence. The claimant provided written submissions. I read the evidence in the bundle to which I was referred during the hearing and the page numbers of key documents relied upon in reaching my decision are cited below.

Strike out application/Withdrawal of claims

9. The claimant brought her claim (and engaged in early conciliation) against three named respondents being (1) The V&A Foundation; (2) V&A Limited; and (3) V&A Enterprises Limited and responses were filed in respect of each named respondent. The respondent applied for the claims against (1) and (2) to be struck out on the basis that there was no reasonable prospect of those claims succeeding given the claimant's employer was (3). At the hearing, it was discussed and clarified that the claimant's employer and named as such on her contract of employment was (3). I explained to the claimant that a claim for unfair dismissal could only be brought by an employee against an employer and the procedure in respect of a strike out application. After discussion with her legal advisors, the claimant was content to withdraw her claims against (1) and (2).

Application to amend response

10. The respondent applied to amend its response and in particular to amend paragraph 18 of its grounds of resistance by: (1) replacing the name Amy Akino-Wittering with the name Lois Honeywill; and (2) deleting the sentence "The matrixes were anonymous and the scoring managers did not therefore know who they were scoring."

11. I explained for the claimant's benefit as she was unrepresented that I had discretion as to whether or not to allow the requested amendments and in considering this I would need to take account of all the circumstances including factors such as the timing and manner of the application to amend and the balance of prejudice. I had to consider whether any injustice would result from either allowing or refusing the amendment.

12. The respondent submitted that the reference to Amy Akino-Wittering was erroneous as Lois Honeywill had been one of the scoring managers whereas Amy Akino-Wittering had performed the role of reviewing scoring. The respondent submitted that the deletion of the sentence was to correct the position as scoring managers were aware who they were scoring. There would be no prejudice to the claimant as this was not part of her pleaded case or referred to in her witness statement. The respondent had notified the claimant's solicitor with conduct of the case by email about this prior to

the exchange of witness statements and had no response. The respondent had agreed to an extension of time for the claimant to serve her witness statement.

13. The claimant said that cross-examination had been prepared on the basis that the scoring was done anonymously and denied there had been any prior approach by the respondent. The claimant was given time to contact her legal advisors again. The claimant then clarified that an email had been received which indicated that no formal application to amend was intended but had outlined the two requested amendments. The respondent had asked the claimant to let them know if there was any objection. The claimant had not replied. The claimant had no objection to proposed amendment (1) but objected to proposed amendment (2).

14. I considered *Selkent Bus Co Ltd v Moore* 1996 ICR 836, EAT. I considered all the circumstances of the case and the balance of prejudice and concluded that amendment (2) should be allowed.

15. The proposed amendment did not introduce a new and materially different ground of resistance but was rather a factual detail related to the ground of resistance that the scoring process was objective and designed to minimise bias. I did however reject the respondent's contention that the amendment was merely 'small' as it had the effect of putting forth a feature of the scoring system which was the opposite of that previously pleaded. The respondent now confirmed that scoring managers did in fact know the identity of the person they were scoring. Nonetheless, I accept that in the circumstances, the deletion was of the nature of clarification in the context of paragraph 18 of the grounds of resistance (51) given what was then anonymous to the scorers was the source of examples for the scoring exercise. The deletion was further to ensure the pleadings were consistent with the respondent's evidence.

16. I considered whether and to what extent this might impact on the claimant and in particular the extent to which as amended the response may have given rise to new enquiry in relation to the preparation of the case. The timing and the manner of the application is relevant. Although no formal application had been made in advance of the hearing, this application cannot be characterised as an 'ambush' or come as a complete surprise to the claimant as it had been canvassed in advance with her legal advisors and in advance of the preparation of her witness evidence. The claimant's pleadings (19) contain, and her evidence addresses, her allegation as to subjectivity in the process on the basis that *'scores were artificially and subjectively awarded with pre-determined decisions made on which employees were to be retained'*. The claimant was aware of the identities of the scoring managers.

17. I weighed up the balance of prejudice. The clarification that the person being scored was not anonymous to the scorers potentially weakened the respondent's position that the system minimized bias. However, if the deletion was not permitted there would be an inconsistency between the respondent's evidence and the pleadings left unclarified. As the issue of the scoring being subjective and giving rise to a pre-determined decision namely that the scorers knew the identity already arose on the claimant's

pleaded case, the claimant was not prejudiced and there was little to any impact on her ability to present her case. I decided to exercise my discretion to permit the amendment.

FINDINGS OF FACT

18. I considered all of the evidence before me and I found the following facts on a balance of probabilities. I have recorded the findings of fact that are relevant to the legal issues and so not everything that was referred to by the parties before me is recorded.

Background

19. The respondent, V&A Enterprises Limited, is one of a group of companies, trusts and charities which operate the V&A. The V&A or Victoria and Albert Museum in Kensington, London is a world-renowned museum with a collection covering applied arts, decorative arts and design. The respondent is the entity which engages and employs most of the staff that work at the V&A. The HR function comprises a team of approximately 18 HR professionals. The HR team is led by Judy Roberts, Director of People and Change.

20. The claimant's employment with the respondent as a Gallery Assistant assigned to the museum's Visitor Experience Department commenced on 26 November 2018 as recorded in her contract of employment (63).

21. The pandemic impacted on the museum from March 2020. The museum was closed for five months. When the museum was able to reopen in August 2020, it was for five days a week only with social distancing arrangements in place and visitor numbers were far less than the usual footfall. The museum had to close again in November 2020 for a further period of time. Pre-pandemic tourism accounted for approximately 50% of the museum's visitors. The collapse in tourism meant reduction in visitor numbers and their associated spend.

22. The financial year ending March 2021 showed visitor numbers were down by 96% on the previous year. The forecasts were that visitor numbers would remain down over the next few years with 50% predicted for 21/22 and 15% predicted for 22/23. The respondent had to rely on support from the government's Coronavirus Job Retention Scheme and 70% of staff were placed on furlough including the claimant. A Recovery Programme established the need for savings of £10 million to safeguard the financial and operational future of the museum. The Recovery Programme anticipated redundancies across all departments of approximately 14% of total staff to reduce staffing levels and costs commensurate with the financial impact on the business arising from the pandemic.

23. The use of agency staff towards the end of 2021 and in early 2022 was due the need to cover staff sickness occasioned by Covid 19. Judy Roberts said museum closure was in contemplation during this period. I accept Judy Roberts' evidence on this point. In addition, I take judicial notice of the widely known situation that sickness absence attributable to Covid 19 and in

particular the Omnicron variant occurred during this period occasioning difficulties for business.

24. Judy Roberts was involved with the Recovery Programme and the design of the selection process and criteria and explained that reduction from 126.1 FTE to 72.85 FTE was expected in respect of Gallery Assistants. Due to the overall numbers of proposed redundancies, government approval for the plans was necessary and sought and Judy Roberts was responsible for this.

Chronology

- **Performance review**

25. In March 2019, the claimant emailed her line manager, Mariessa Joseph, to request two hours overtime pay for time spent writing up her objectives and self-assessment. The claimant said that other Gallery Assistants had told her she was not supposed to do this in her own time but she trusted the line manager would make the pay adjustment. Mariessa Joseph rejected the request on the basis that no indication had been made that the claimant should work on the document outside contractual hours. The claimant sent a reply stating that it was unacceptable that the request for reimbursement was declined as Mariessa Joseph had failed to inform her that she was not supposed to do the write-up in her own time and that further Mariessa Joseph's conduct of the meeting had been highly unprofessional given radio call interruptions and moans about the museum's management.

26. Mariessa Joseph escalated the matter on the basis that the allegation she had moaned about the museum was simply untrue and gave examples of what she referred to as 'the confrontational tone of the conversations' she had with the claimant.

27. The appellant completed her probation successfully and was awarded a pass when her probation was signed off on 23 June 2019.

28. On 18 July 2019, the claimant sent an email headed 'Grievance concerning Line Manager Mariessa Joseph' (79). The email set out the claimant's view that her line manager's style of managing was 'profoundly inept', was causing her anxiety and stress, and needed to be addressed. The email refers to various incidents (with Martin Robinson, a cleaner and a security guard) and the claimant's view that her manager was seeing her as the problem and requiring her to accept responsibility rather than being interested in her version of events. On 30 July 2019, the claimant emailed a manager noting that the matter wasn't dealt with until that manager had stepped in.

29. In evidence before me, the claimant said that it was very difficult initially to communicate with her line manager. During her internal appeal hearing, the claimant referred to a 'very positive development' and said that she was on good terms with her line manager and she did not have any grievance against a manager. Before me the claimant confirmed that she had no grievance with Lois Honeywill and the grievance with Mariessa Joseph had been addressed informally.

30. The claimant explained that the incident with Martin Robinson related to a change of beat and was a misunderstanding which they had resolved amicably and she had not walked off or been angry. The claimant said that Martin Robinson had been aggressive towards her. The claimant did not recall the incident with the cleaner initially but said that person had been aggressive to her. The claimant's email of 18 July 2019 refers to her feeling 'violated' and 'exposed to male aggression' in relation to the incidents where a cleaner in the canteen had indicated he had not seen her water bottle and a security guard had asked to see her security pass.

31. An email of 21 July 2019 (77) requests Mariessa Joseph to speak with the claimant about a refusal to do a shift in food. The claimant said in evidence that she absolutely did not refuse but requested to be transferred to another 'beat'.

32. On 12 January 2020, the claimant emailed her line manager following a 'productive and lovely meeting' with information regarding her work objectives and her idea for an on-line gallery for works on the decolonization theme. On 13 January 2020, Mariessa Joseph replied noting how impressed she was with the claimant's ideas, her fantastic work and that she was sharing her progress with the rest of the management team as it was deserving of recognition.

33. On 24 January 2020, Vincenza Rubini emailed out to confirm the Behind the Scenes – Cars Exhibition Tour had been allocated on a first come first served basis. The claimant helped host the tour on 5 February 2020. The claimant's participation arose due to her volunteering for this role and not through selection as she asserted.

34. On 17 March 2020, staff were informed that the museum was closing to the public due to Covid-19.

35. On 18 March 2020, Lois Honeywill sent an email to VE teams about meetings and ways of working at that time. The claimant said that she raised concerns at one of these meetings and was threatened with loss of her job by Lois Honeywill. Lois Honeywill said in evidence that the issue was the way the concerns were conveyed which was hostile and upsetting and she sought a conversation with the claimant to understand. The claimant said that she had not reduced the colleague to tears. She said she reduced me to tears. Lois Honeywill said that she had in no way threatened the claimant with loss of her job but she had said in response to the claimant saying she would not come into work that an outcome of being absent without leave could be dismissal.

36. For the appraisal period 2019/2020, the claimant prepared a self-assessment. The self-assessment took account of her personal objectives and the WATER objectives (103). All Gallery Assistants in the VE team have their performance assessed against the WATER objectives and WATER is an acronym for various facets of delivering VE such as welcoming and action to actively engage the visitor.

37. The claimant's performance review was not completed and no award was allocated (102).

- **Consultation**

38. On 12 October 2020, the respondent commenced consultation (108-118) which continued until 25 November 2020. The respondent engaged in collective consultation with trade union representatives from Public and Commercial Services Union (PCS), Prospect and FDA. The respondent consulted with staff representatives elected by and for those staff who were not covered by existing union recognition agreements. At some point in the process, recognition was extended to cover all staff.

39. On 15 October 2020, the claimant was individually notified in writing that her role was one at risk of redundancy (132-133). The letter sent notified the claimant that she would shortly be invited to and asked to agree a time for an individual consultation meeting.

40. A Restructuring FAQs Information for Retail and Visitor Experience teams dated October 2020 was shared with staff (119-131). The document was tailored to those in the Retail and Visitor Experience (VE) teams and set out the need for restructuring and the reduction in headcount and the steps already taken to reduce costs including a recruitment freeze. Staff were told that consultation was to consider all options to reduce or avoid redundancies and the process would include consultation and feedback on proposed selection criteria.

41. On 16 October 2020, the claimant was sent an email containing a link to book her individual 45 minute consultation meeting (134). The email sets out that the meeting was to be with either a Senior Visitor Experience Manager or the Head of Visitor Operations plus an HR representative and that there was a right to be accompanied.

42. The respondent prepared a checklist setting out what was to be covered at individual consultation meetings (138). The checklist included requests for comments/suggestions on proposed new roles and pooling and the proposed selection criteria.

43. On 22 October 2020, in the context of the collective consultation, a PCS representative emailed all Gallery Assistants to seek views from staff on pre-2016 contracts and shared the names of staff representatives for those on post-2016 contracts (135).

44. On 23 October 2020, the claimant was sent an email with confirmation of her booking for an individual consultation meeting on 26 October 2020 at 2pm (136).

45. The claimant did not attend her individual consultation meeting. The claimant said she did not remember booking the appointment and did not remember the date. The claimant said she believed she was unwell at the time which is why she did not attend or rebook.

46. In cross-examination, the claimant was asked if she had provided any input or raised any concerns about the selection criteria with representatives during the consultation period. The claimant initially replied who that would

be and then said she did not understand the question. The claimant said if the question was whether she agreed with the actual scoring system she had no reason to challenge it but she assumed it would be conducted in a fair manner. I sought clarification of her answer and the claimant said she didn't believe she had provided any input during consultation into the proposed selection criteria.

47. On 25 November 2020, the consultation process concluded. An email dated 26 November 2020 was sent to VE staff with an outline of the agreement reached with PCS on next steps. The email provided details of the further opportunity to apply for a voluntary option and that selection for redundancy would begin in December and complete by 23 December with redundancy notices issued in late December or early January. The respondent stated that to provide some certainty end of service dates would not be before 28 February 2021.

48. The respondent sent a weekly email with details of available vacancies to all staff at risk of redundancy. The claimant applied for a Directors Circle Officer role but was unsuccessful and did not apply for any other vacancies. The claimant said that she had been advised by one of her solicitors not to apply because of these proceedings.

49. On 10 December 2020, VE staff were provided with details of the final restructuring plan further to the consultation (146). The selection criteria for selection for compulsory redundancy were shared. The timetable for communication of scoring results and notices was provided. The outplacement support of 12 month access to a job support portal and 3 job search webinars was referenced. The scheme to give protected status to those made redundant for available roles until March 2023 was set out.

- **Selection**

50. The Compulsory Redundancy Selection Criteria document dated December 2020 (159) provides detail of the selection process, criteria and scoring matrix. There were ten selection criteria agreed with the unions in the consultation process consisting of five phase 1 criteria and five phase 2 criteria for use if a clear scoring differential was not arrived at after scoring against phase 1 criteria. The phase 1 selection criteria were: performance review; visitor experience; visitor operations; adaptability to change and proactivity and V&A Values. The guidelines were that the line manager would provide an example giving a true representation of the staff member's typical performance which would be reviewed by another team manager. Other managers could feed in with examples given the recognition that some staff worked different shifts from their allocated line managers. The examples were then scored separately by two Senior managers.

51. Mariessa Joseph, the claimant's line manager provided some examples which were used to score the claimant (168). Lois Honeywill said that she did not discuss her scoring with Vincenza Rubini the other scoring manager and reached her scores independently. Lois Honeywill said that she had to score more than 100 people and considered she had a good understanding of what scores to give against examples provided. She said it was a really hard and sad task but she believed she had scored fairly and with

professional integrity. She said that in conversation with HR it had been decided that the Covid period would not be taken into account. Lois Honeywill said that she had taken no account of the incident in March 2020 when scoring the claimant. Lois Honeywill considered that different incidents were referred to against different categories. She said the scoring had been reviewed by Amy Akino-Wittering.

52. Vincenza Rubini said that she did the scoring independently. She said it was not possible to identify who had contributed the information and examples. Vincenza Rubini said that she considered that all the criteria were objective and scores were on the basis of factual examples provided. She explained that the phase 2 criteria were not needed as there was sufficient differentiation after phase 1 criteria had been applied and scored.

53. On 8 January 2021, the claimant had a discussion with Lois Honeywill. Lois Honeywill informed the claimant that she had scored 29 which was below the minimum score of 38.5 to secure a role and as such she was being made compulsorily redundant. The discussion was confirmed in writing by email sent later that day (178). The email records the claimant's right to appeal.

- **Appeal**

54. On 12 January 2021, the claimant appealed the decision to make her compulsorily redundant (194). The claimant said that the score and the examples painted a negative picture of her character which is hurtful, defamatory and unnecessary. The claimant said that she had never been given any verbal or written sanctions formal or otherwise in relation to the negative examples. The claimant requested clarification and documentation for the score. The claimant said that on 17 March 2020 she had been threatened with losing her job by Lois Honeywill because she shared her concerns regarding health risks in connection with being in a small space without proper ventilation. The claimant requested assurance that this incident was not connected to the decision to make her redundant.

55. In relation to the scores awarded, the claimant requested examples and explanation as to the low score for performance. The claimant said she accepted the score of 3 for VE and was content with the score of 3 for Visitor Operations. The claimant challenged the score of 1 for adaptability to change on the basis the examples amounted to character assassination and unethical and false. The claimant challenged the score of 2 for V&A Values on the basis that she did not understand example 2 and considered there was other positive evidence of her contribution to the V&A including a customer compliment, her role showing BBC executives around a car exhibition and her participation in the museum's decolonisation group.

56. In evidence, the claimant was asked about the scores that she had stated she accepted in her appeal. The claimant said she only accepted the score of 3 in the sense that she got it but she would have preferred a 4 for VE. The claimant said in relation to Visitor Operations that she deserved a 4. In evidence it was put to the claimant that her examples were examples of her performing the role of a Gallery Assistant and not of her being exceptional. The claimant did not accept this in relation to the Dior Exhibition and

considered she had coped better than some other staff under the intensity and pressure of that Exhibition.

57. On 15 January 2021, the respondent wrote to the claimant providing formal written notice of her redundancy and that her last day of service would be 28 February 2021. The letter set out details of payments to which she was entitled and that she was not required to work during the notice period.

58. On 20 January 2021, the claimant was notified that her appeal had been scheduled for 28 January and would be heard by Vernon Rapley, Director of Cultural Heritage Protection and Security. On 28 January 2021, HR provided Mr Rapley with a script for the appeal meeting setting out questions to explore each of the concerns raised by the claimant (207). The meeting had to be rescheduled and took place on 2 February 2021(215). The claimant was accompanied by a trade union representative, Steven Warwick.

59. On 19 February 2021, Vernon Rapley wrote to the claimant to confirm the outcome of her appeal (226). Vernon Rapley concluded that he agreed with the original scores awarded and upheld the decision of compulsory redundancy. Vernon Rapley had made enquiries after the appeal meeting and was satisfied that two incidents which the claimant did not recall taking place, were witnessed by her manager and she was given feedback on them at the time. Vernon Rapley also reported that after investigation he understood the incident in March 2020 related to a meeting in a large room in the days immediately following museum closure to discuss ways of working during which the claimant's behaviour was so disruptive it reduced a colleague to tears. Vernon Rapley stated that he did not believe that the claimant had been threatened with losing her job during a conversation with Lois Honeywill thereafter which was designed to understand what had driven her behaviour.

60. On 20 February 2021, the claimant replied to Vernon Rapley acknowledging the appeal outcome. The claimant suggested that an incident she attributed to racism had not been taken seriously and referred to ageism and sexism. On 24 February 2021, Vernon Rapley replied standing by his decision and affirming that each point raised by the claimant had been discussed at the appeal meeting and it had been concluded that the claimant had not been unfairly scored and the incidents she had referred to had not unfairly influenced the scores received. Vernon Rapley noted that neither ageism or sexism had been raised in the appeal and so they had not been discussed and advised the claimant of her entitlement to submit a formal grievance if she wished for any issues to be investigated. On 24 February 2021, the claimant thanked Vernon Rapley for his humane and compassionate approach.

61. In evidence, Vernon Rapley said that he had only spoken to Lois Honeywill after the appeal meeting as he considered he only needed clarification about the March 2020 incident given the other material available to him. Vernon Rapley said that he had not directly asked Lois Honeywill if she was biased and that the claimant had not raised the issue of bias during the appeal meeting itself.

- **Redundancy payment**

62. The claimant's redundancy payment was paid in March 2021 as shown on a payslip and P45 sent on 24 March 2021. Judy Roberts explained that the payment had been withheld to ensure the appeal outcome was not pre-empted. After the appeal outcome, payroll was instructed to make the payment but the closing date to put payments through the HMRC system was the 12th of the month so it had to be paid in March (248). The P45 records the claimant's last date of service as 28 February 2021.

LAW

Unfair dismissal

63. Section 94 of the Employment Rights Act 1996 ("the Act") gives employees a right not to be unfairly dismissed. The right is enforceable by way of complaint to the Tribunal.

64. The test for unfair dismissal is set out in section 98 of the Act and there are two stages. Section 98(1) of the Act provides that it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal and that it is a potentially fair reason within section 98(2). Redundancy is a potentially fair reason.

65. Section 139(1) of the Act provides that an employee who is dismissed is taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the employer having ceased or intending to cease to carry on the business for which the employee was employed or to carry on the business in the place where the employee was employed; or the requirements of the business for employees to carry out work of a particular kind or to carry out work of a particular kind in the place the employee worked have ceased or diminished or are expected to cease or diminish.

66. The second stage is for the Tribunal to consider whether the respondent acted fairly or unfairly in dismissing for that reason and the burden of proof is neutral. Section 98(4) provides that the determination of the question as to whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 this shall be determined in accordance with equity and the substantial merits of the case.

67. In considering reasonableness, the tribunal cannot substitute its own view. The tribunal must apply the 'range of reasonable responses' test to the decisions and actions of the employer. The question for the tribunal is therefore whether the dismissal was within the band of reasonable responses of a reasonable employer.

68. In the case of *Williams and ors v Compair Maxam Ltd 1982 ICR 156, EAT*, the EAT gave guidelines that a reasonable employer might be expected to follow in making redundancy dismissals such as: warning and consultation about the redundancy; whether union views were sought; whether the

selection criteria were objective and applied fairly; and whether any alternative work was available. The tribunal must not substitute its own view and these guidelines assist a tribunal in assessing whether an employer has behaved reasonably in dismissing for redundancy and in particular whether the dismissal is within the band of reasonable responses of an employer.

69. The case of *Polkey v AE Dayton Services Ltd [1987] UKHL 8* established procedural fairness as an element of the reasonableness test at section 98(4) of the Act. Lord Bridge stated that *"the employer will not normally act 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 deployment within his own organisation."*

70. The tribunal must consider whether the employer's selection criteria are to be regarded as objective and whether they have been applied fairly but must not engage in over-minute or microscopic scrutiny, *British Aerospace plc v Green and ors 1995 ICR 1006.* Lord Justice Waite stated that *"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."*

71. In considering whether criteria are objective, the tribunal must consider whether the criteria are capable of being verifiable by reference to data or specific examples but just because a degree of judgement is required does not mean the criteria cannot be used for objective and dispassionate assessment. In *Swinburne and Jackson LLP v Simpson EAT 0551/12*, the EAT stated that *"in an ideal world all criteria adopted by an employer in a redundancy context would be expressed in a way capable of objective assessment and verification. But our law recognises that in the real world employers making tough decisions need sometimes to deploy criteria which call for the application of personal judgement and a degree of subjectivity. It is well settled law that an employment tribunal reviewing such criteria does not go wrong so long as it recognises that fact in its determination of fairness."*

72. The tribunal must not substitute its own view as to the scores a claimant ought to have received or examine the actual scoring in detail unless there is evidence of bad faith or an obvious error, *Nicholls v Rockwell Automation Ltd EAT 0540/11; Dabson v David Cover and Sons Ltd EAT 0374/10.*

73. A selection process was found fair where a selection panel included two managers against whom the claimant had previously raised grievances, *Wess v Science Museum Group EAT 0120/14.* Whether selection is fair or unfair due to prior interactions between the person being scored and those responsible for applying selection criteria is a question of fact.

Remedy/Polkey reduction

74. The principles established by the case of *Polkey v AE Dayton Services Ltd [1987] UKHL 8* provide that if I find the dismissal to be unfair, I must consider the possibility (in terms of a percentage chance) of the respondent fairly

dismissing the claimant and when this might have occurred and make a 'Polkey deduction' from any award.

ANALYSIS AND CONCLUSIONS

75. I turn to apply the law to the facts that I have found in this case.

Was there a redundancy situation?

76. In discussion at the start of the hearing, the claimant accepted that her dismissal was by reason of redundancy and there was a redundancy situation. The claimant confirmed in evidence that redundancy was accepted but the process was unfair. The claimant's particulars of claim do not take issue with whether or not there was a redundancy situation and focus on the procedure and selection as unfair. The particulars of claim state: "It is conceded that redundancy is a potentially fair reason …but it is not conceded that the procedure was fair and reasonable in all the circumstances." The written submissions provided during the hearing contend that the redundancies were made pre-emptively in circumstances where there was not a true redundancy situation demonstrated by the use of agency staff. I was mindful that the claimant represented herself at the hearing and was prepared to approach this flexibly even though such changes of position are unhelpful; the respondent pragmatically provided oral evidence regarding use of agency staff.

77. I found that the use of agency staff was due the need to cover above ordinary levels of staff sickness occasioned by Covid-19 towards the end of 2021 and early 2022. This use of agency staff is not inconsistent with there being a redundancy situation in 2020 and early 2021 when the claimant was dismissed. If anything, the ongoing impact of the pandemic necessitating agency staff to cover sickness with the possible closure of the museum being in prospect supports the prudence and necessity of the previous decisions reached rather than the reverse. The overall number of Gallery Assistants required within the new structure was informed by footfall forecasts for the next few years. The need for employees to do work of a particular kind and in the place where the claimant worked had diminished due to the impact of the pandemic resulting in the severe loss of footfall and associated spend during 2020/21 compared with the pre-pandemic situation. The decrease in visitor numbers was reasonably predicted to continue albeit with footfall increasing over time.

78. The respondent clearly faced a redundancy situation at the point the claimant was dismissed. In light of all the evidence available to me, I conclude that there was a redundancy situation meeting the definition at section 139 of the Act. On this basis, the claimant is taken to have been dismissed by reason of redundancy. The claimant raised the stated use of agency staff end 2021/early 2022 late in the proceedings as a basis on which to suggest there was no genuine redundancy situation at the time redundancies were made. There was no evidence that any other reason was in prospect at the time of the dismissal and the claimant did not advance any other suggested reason other than through her complaints that the process itself was unfair and she was unfairly selected. The respondent has

shown that the reason for the dismissal was redundancy which is a potentially fair reason for dismissal in accordance with section 98.

79. The real focus of the claimant's complaint is that the selection criteria were unfairly applied to her. I have considered the process overall rather than confining myself to scrutiny of the application of the selection criteria to the claimant. For a redundancy dismissal to be fair the tribunal needs only to be satisfied that the procedure used by the employer builds in the components of reasonable and genuine consultation, a fair and reasonable selection process and reasonable steps to find suitable alternative employment.

80. I find the procedure the respondent adopted to have been fair and reasonable overall. I explain my reasoning for this conclusion in more detail below.

Was consultation genuine and reasonable?

81. The respondent took reasonable steps to avoid compulsory redundancies by imposing a recruitment freeze and offering voluntary options. I find the consultation to have been considered, thorough and genuine. There was extensive collective consultation and this was conducted in accordance with statutory requirements as to the time period for consultation. The respondent ensured all staff had representation and showed flexibility in extending recognition agreements. The documentary evidence details that the respondent engaged meaningfully during the collective consultation and changes were made to the proposals as a result of the collective consultation. The changes included creating some additional posts. There was agreement as to the selection process and timetable.

82. In light of the extensive collective consultation and the size of the at risk pool of staff, I find it reasonable to have introduced a system for individuals to book on for individual consultations. The documentation regarding this was clear and provided to all staff including the VE team and the claimant. The system worked given that 85% staff attended an individual consultation and the claimant herself was able to book an individual appointment. The claimant could not recall why she did not attend the individual consultation that she had booked or why she had not sought to re-book an appointment. The claimant had the opportunity to attend an individual consultation and the checklist indicates that if she had, there would have been a detailed and thorough discussion and explanation as to the process and an opportunity for her to share views on matters such as the selection criteria. The claimant also accepted in evidence that she did not take up the opportunity to provide input into the process.

Was the selection process including the choice and application of criteria fair and reasonable?

83. I remind myself that in considering whether the respondent behaved reasonably in determining the selection pool that I must not substitute my view but decide whether the pool was within the range of reasonable responses of an employer in the respondent's circumstances. I do find that the respondent, faced with the need to reduce levels of staff, acted reasonably in placing all Gallery Assistants in the pool for selection.

84. In relation to the selection criteria, again I remind myself that my task is not to decide what selection criteria were appropriate but whether those chosen by the employer were within the range of reasonable responses. Although agreement by the unions to selection criteria does not automatically render them appropriate, in circumstances where the selection criteria were genuinely consulted on, revised further to consultation and agreed by the unions I consider this provides a strong indication that in the particular work context the criteria were reasonable and understood bases on which to assess those at risk of redundancy.

85. In cross-examining Vincenza Rubini, the claimant asked whether it struck her as odd that subjective criteria were used for the phase 1 scoring. This suggestion is of itself somewhat at odds with the claimant's acknowledgement in evidence that she had no reason to challenge the actual scoring system but she assumed it would be fairly applied to her. Vincenza Rubini put forward her view that the criteria were ones where objectivity applied and factual examples were provided. The claimant's written submissions contend that the phase 1 criteria are subjective and she sets out in her witness statement that they are vague and offer no real description as to what is covered.

86. I find that given the case law the phase 1 selection criteria are adequately objective as capable of being demonstrated and objectively verified by reference to specific examples or, in the case of the performance criteria, data held such as past performance review awards. The selection criteria further link to how Gallery Assistants were evaluated and required to deliver their work and ways of working well known to them such as the WATER objectives which underpin the delivery of VE. I accept that whether a person is 'adaptable to change' or has the V&A 'values' calls for a degree of subjectivity and judgement but the criteria call for factual examples of actions or behaviours which demonstrate the criteria. The scoring matrix gives clear descriptors as to what is covered by each criterion and as to how to differentiate between the different possible scores of 1 to 4.

87. Lois Honeywill gave evidence that she considered that having scored more than 100 people she understood how to gauge the attribution of scores to examples. The claimant put to both Lois Honeywill and Vincenza Rubini that they had colluded on their scoring and must have done so on the basis that there was a 1 in a 1000 chance that they would arrive at the same score for the claimant. The claimant produced no evidence to support this statistic which she said her solicitor had calculated for her. She did not explain how it had been calculated. If the scoring is being done within the guidelines and with an understanding of how to attribute scores to examples then it seems reasonably likely that scores will be the same and this illustrates consistency of approach and supports the system reaching reasonable and unbiased outcomes. The most obvious explanation as to why the two scoring managers who both gave evidence that they did not collude in any way which I accept is because the grid for scoring and the relationship between the examples provided was applied accurately by the scorers which actually gives confidence in the scores arrived at.

88. The main weight of the claimant's challenge is that the persons involved in her scoring were persons with whom the claimant had prior interactions and that this must have influenced the scoring such that her scores were artificially low. The claimant had no outstanding grievance with Lois Honeywill and the evidence was that she had never raised any grievance against Lois Honeywill. There had been a prior interaction and the claimant and Lois Honeywill dispute the detail of that interaction. I do not resolve that factual dispute suffice to say the interaction was clearly heated looked at from either perspective and as I accept Lois Honeywill's evidence that she took no account of the March 2020 incident when scoring, it is not necessary for me to resolve the factual dispute over what occurred during the interaction. The incident took place a considerable time prior to the scoring and the award of the same score by both Lois Honeywill and Vincenza Rubini corroborates the assertion of Lois Honeywill that she took no account of the incident. I accept that Lois Honeywill approached what she referred to as the hard and sad task of scoring with professional integrity.

89. I remind myself that my task is not to engage in a microscopic level of scrutiny of the selection criteria or their application or substitute my own view as to the appropriate scores.

90. The design of the selection process called for the scores reached by the two scoring managers to be further reviewed by another independent manager. I find that if Lois Honeywill had personal bias the risk of this was balanced by the composition of the panel including others who had no relevant past experience or interactions with the claimant at all. In the circumstances, given the composition of two independent scorers and a further independent reviewer I find that the scoring process was applied in a fair and reasonable manner without bias. I conclude that the scores were within the range of reasonable responses to the examples presented.

91. The process allowed for examples to be provided by a range of persons and from a range of sources. However, I find it is relevant in the circumstances of the claimant's case to consider the fact that the scores were arrived at based on examples which present as primarily derived from the claimant's line manager, Mariessa Joseph. The question in mind is to what extent those examples provided a fair representation of the claimant given prior interactions and the claimant's case that the selection process was applied to her unfairly. The claimant and her line manager had initially had a difficult relationship. The claimant considered they were on good terms by the time of the selection process and there was no outstanding grievance against Mariessa Joseph. A grievance raised in mid-2019 had been dealt with and resolved at the informal stage. The claimant made the reasonable point in evidence that her understanding was that they were on good terms but she didn't know her line manager's thoughts about her.

92. The difficulty for the claimant is that her evidence is primarily that she was personally of the view that she should have received higher scores. In cross-examination, she was taken to her appeal and her own statements in respect of two of the selection criteria that she accepted the score given and she failed to give a direct answer and acknowledge her own statements and their import repeatedly asserting that she would have preferred a higher

score. It is unclear why the claimant refused to accept her own statements when they were fed back to her and continued to challenge the position.

93. The respondent demonstrated that there were separate incidents rather than the same incident relied upon in respect of different selection criteria such that there was no double counting. The respondent also demonstrated to my satisfaction that whatever the detail of certain interactions there were clearly interactions and difficulties of communication experienced by the claimant with a number of colleagues. The scoring process did take account of the claimant's contribution in particular in the decolonisation group. Account was taken of the claimant's self-assessment.

94. It was clear that the claimant held a very different perception of her contribution from that demonstrated by the documents and understood by others. The documentary evidence corroborated the respondent's position that participation in a tour of the Cars Exhibition was simply first come first served not via selection; a role in the Dior Exhibition was part and parcel of the job of a Gallery Assistant however intense, busy and lucrative the Exhibition may have been and was undertaken by many other Gallery Assistants. The examples provided present as factual and backed up by the evidence available to me.

95. I am satisfied that the selection process, criteria and their application to the claimant was fair and reasonable overall.

Appeal

96. The redundancy process included a right of appeal which the claimant exercised. Having considered the evidence available to me and my findings above about the content and conduct of the appeal, I find that the appeal was fair and reasonable. The approach of Vernon Rapley to the appeal was diligent and thorough and he considered and covered all the points the claimant raised in her appeal. Vernon Rapley took the step of making enquiries with Lois Honeywill about the March 2020 incident. Mr Rapley also replied and addressed correspondence sent by the claimant after the appeal raising some different points and ensured she was aware she could bring a grievance in relation to those issues if she wished. I have concluded that the selection process was applied fairly to the claimant but I also find that the appeal was conducted fairly and gave the claimant the opportunity to raise specific challenge and concern in relation to the decision in her case and have this considered by a person independent of the selection phase of the process.

Were reasonable steps to find alternative employment taken?

97. I conclude that the respondent did take reasonable steps to find the claimant suitable alternative employment. A range of vacancies were regularly notified to those at risk of redundancy. The claimant only applied for one of the roles advertised. The claimant remains eligible to apply for any roles advertised until March 2023.

98. I find the claimant's dismissal was fair in all the circumstances and well within the band of reasonable responses of a reasonable employer.

99. As I have found the claimant's dismissal was fair, I do not need to consider remedy.

100. The claimant did not satisfactorily explain how or why the receipt of her redundancy payment in March with a P45 recording her last date of service as 28 February 2021 affected her entitlement to universal credit. In any event, I have no jurisdiction to determine matters related to benefit entitlements and dismiss this claim.

Tribunal Judge Peer acting as an Employment Judge

Date 28 March 2022

JUDGMENT SENT TO THE PARTIES ON

29/03/2022.

.....
FOR EMPLOYMENT TRIBUNALS

Notes

Public access to employment tribunal decisions: Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.