EMPLOYMENT TRIBUNALS

Claimant: (1) Terry Vincent Kirkhouse
(2) Peter William Lewis

Respondent: Morganite Electrical Carbon Ltd

Heard at: Cardiff **On:** 6th & 7th April 2022

Before: Employment Judge Grubb

REPRESENTATION:

Claimant: Miss Collins (Counsel) **Respondent:** Mr Scrase (Solicitor)

Reserved Judgment

1. The respondent did not unfairly dismiss the Claimants contrary to *section 94 of the Employment Rights Act 1996.* The Claim for unfair dismissal is not well-founded.

Reasons

Introduction

1. This is the Claimant's claim for unfair dismissal arising out of redundancy procedures that took place between September and December 2020.

Background

2. The Respondent is a multinational company that designs, manufactures and sells a broad range of linear transfer and electric carbon systems; specifically, carbon brushes and pantographs (a device that collects electric current from overhead lines for electric train or trams). It has sites in different parts of the world including Swansea and Budapest.

3. Both Claimants started work with the Respondent in 1982 and worked in various roles.

a Mr Kirkhouse started working for the Respondent in April 1982 as a production operative. Over the 38 years he was employed by the Respondent, he had worked in most departments and specifically mentions working in the impregnation department for 10 years before transferring to the collector department for the last 3 years of his employment.

b Mr Lewis started working for the Respondent in February 1982 as a cleaner and then progressed to production operative. He worked around 20 years in the packing and stores before moving to the impregnation department for 11 – 12 years before spending the last 8 years of his employment in the collector department.

4. As a result of a number of factors, the Respondent proposed to refocus the purpose of the Swansea site to become a specialised raw material and metallisation facility. This proposal included an internal restructure and transfer of final assembly to the Respondent's site in Budapest.

5. At the time of matters giving rise to this claim, the manufacturing operations in Swansea were split into different cells: Theta, Linear, Materials, Collector (colloquially also known as the Pantograph department), Stores & Dispatch. The Collector cell had two functions: the first was the preparation function and the second was finishing function. The former process was where materials were prepared before being sent to other sections for further processing and the latter was where products that had been processed in other sections were then finished into a final product.

6. The proposed restructure would transfer all of the finishing functions from the collector cell to the Budapest site, but only some of the preparation functions. The

extent to which preparation functions are still carried out at the Swansea site is a matter of dispute I shall address further below.

7. In practice, the proposals meant that positions in Theta, Linear and Materials would be largely retained, but fewer operatives would be needed in Collector, Stores & Packing.

8. On 14 September 2020 the Respondent entered into collective consultation with the recognised trade union, Unite ('the Union'), about a proposal to make 48 redundancies (including 25 Production Operators) and the creation of 18 new roles. Collective consultation took place over 45 days and there were a total of 11 collective consultation meetings.

9. At this stage, it is important to note that there had been a number of redundancy exercises carried out over the years that form the backdrop for negotiations in respect of this redundancy exercise. In 2010/2012 the Respondent and Union had agreed a selection criteria matrix for use in redundancy situations. In 2016 a redundancy agreement had been agreed between the Respondent and the Union, known as the *'Rainbow Agreement'*. Under the Rainbow Agreement, it was agreed that in the event of future redundancies, all Production Operators would be included within a single pool. At that time, there was an intention to move to a flexible, agile workforce; meaning essentially that operatives would be trained on how to use machines in different sections so that they could move around should the need arise. That training did not take place.

10. At the outset of the 2020 redundancy exercise, the Respondent sought to agree a variation to the Rainbow Agreement to split the Production Operators into different pools according to the sections in which they worked. This was because the Respondent only intended to reduce activity and employee numbers in certain sections. The Union refused to agree to this. After consultation, the Respondent agreed with the Union's request that all Production Operators would be included in a single pool as per the 2016 agreement.

11. Negotiations then moved on to the selection matrix. The selection matrix that had been agreed [p. 200] in 2010/12 and was out of date. For example, it contained scoring for skills on machines that were no longer in operation at the site such as PTS, Brush holder and Brush inc. Packing. The Respondent consequently consulted with the Union on changes to be made. Its proposal was to score for the skills and competencies that the company wished to retain in Theta, Linear and Carbon Processing and not score for skills that were either no longer in use or in sections where activity on site was to be reduced.

12. The Union refused to agree to this although there was agreement that some variation to the matrix was necessary to reflect the fact that some functions in the 2010/12 matrix were no longer being carried out at the site. No agreement was reached and so the Respondent took the unilateral decision to vary the matrix, specifically the sections relating to business skills in the following way (this can be found at page 221 of the Bundle):

a Each employee was no longer scored on skills within their own cell as a matter of course. Instead, everyone was to be scored against general business skills only.

b General business skills under the new matrix were awarded for competencies in processes relating to Theta, Linear and Carbon Processing only and did not award points for skills on machines in the Collector cell.

c Also, points could only be obtained for such skills if a person had worked at least 2 weeks in a particular section in the last 12 months. No issue has been taken by the Claimants in respect of this criterion.

13. As a result, neither Claimants, or indeed anyone working in the Collector section scored any points for business skills on the selection matrix and they found themselves below the break score of 38 (the Claimants having scored 37) and at risk of redundancy [p. 224].

14. The Claimants were placed at risk for redundancy by letter dated 10th November 2020, which enclosed a copy of scores. The letter also provided them with details of all vacancies at the Swansea site and a list of current vacancies across the company.

15. As already noted: the Respondent was proposing to create 18 new roles including 4 new Carbon Prep Operator roles, Production Operator roles and additional roles in Warehouse and dispatch. Those at risk of redundancy, including the Claimants, were advised to apply for some of these roles by way of internal application form from HR, CV and interview.

16. Peter Lewis applied for all 3 roles, Mr Kirkhouse applied for the role of Carbon Prep Operator and Production Operator. Mr Kirkhouse attended separate interviews for both roles on 25th November and Mr Lewis attended separate interviews in respect of the 3 roles he had applied for on 26th November. The Claimants were informed by letter on 27th November 2020 that they had not been successful in securing any of the new positions.

17. Both Claimants submitted written grievances on 30th November 2020 against their selection for being placed at risk of redundancy on the basis that the selection criteria was unfair.

18. The Respondent treated these grievances as being part of the consultation. Both Claimants had separate consultation meetings with Cellan Thomas (with Melanie Sullivan taking notes) on 1st December 2020. At the hearings the Claimants reiterated concerns that the scoring matrix was unfair, because it gave them no credit for skills in any of the roles they could do [315].

19. A further individual consultation meeting took place on 10th December 2020 to discuss why they had not been successful in applying for their new roles. At the end of the meetings the Claimants were given notice that their redundancy was confirmed and their employment would cease on 31st December 2020.

20. The Claimant's appealed against the redundancy by email dated 14th and 16th December 2020 respectively and separate appeal hearings conducted by Wayne Griffiths, took place on 20th January 2021. The Claimants argued that preparation skills were still valuable to the business and they should have been scored on those. The Respondents reason for not including these skills in short was that the competencies in the preparation side of the Collector section were not priority skills that the Respondent wished to retain.

21. The appeal was not upheld and the Claimants were informed of this by letters sent on 2nd February 2021.

Issues

22. The issues to be determined by the Tribunal were agreed at the outset of the hearing as the issues identified at paragraph 65 of the case management order of Employment Judge Ryan, dated 4th January 2022. Evidence and submissions before me concerned liability only and so the issues to be determined in this judgement are as follows:

a What was the principal reasons for dismissal? The Respondent says it was redundancy.

b If the reason was redundancy did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimants. Taking into account:

i Whether the Respondent adequately warned the Claimants;
ii Whether the Respondent adopted a reasonable selection decision including selection pool;
iii Whether the Respondent took reasonable steps to find the Claimants suitable alternative employment.
iv Whether the dismissal was within the range of reasonable responses.

c With reference to the Claimants' specific allegations:

i Whether the Claimants' work had ceased or the Respondent intended to cease it at the Swansea plant.
ii Whether the work in question continues with employees recruited to replace the Claimants.
iii Whether the Claimants were targeted.
iv If so whether this led the Respondent to exclude the Claimants' skill base from the selection criteria.

23. In the event that the dismissal is found to be unfair for failing to follow appropriate procedure, is there a chance that the Claimant would have been fairly

dismisses anyway, if so what reduction should be made to the award under the principle set out in *Polkey*?

Procedure

24. I heard an application by the Respondent to admit a supplemental statement of Melanie Sullivan filed at court on 30th March 2022. This was opposed by the Claimants on the basis it had been filed late. However, on exploring the matter it became clear that the Claimants were not materially prejudiced by its admission. The evidence it contained would likely have come out in the course of oral evidence in any event. I therefore allowed the statement to be admitted.

25. 11 people attended the second day of the hearing, which meant the hearing room was over the 10-person permitted capacity. As the Respondent's witnesses had given their evidence, and 2 of the Claimant's witnesses had not been present on day 1, I asked the Respondent to elect one of the 3 witnesses in attendance to remain outside of the hearing. The Respondent elected for Cellan Thomas to remain outside. I confirmed with Mr Scrase that he was content that this did not prejudice the Respondent.

26. I heard evidence from Marton Jenovari, Cellan Thomas, Melanie Sullivan and Wayne Griffiths on behalf of the Respondent. I heard oral evidence from Terry Kirkhouse, Peter Lewis, Ian Rosser and Steven Davies on behalf of the Claimants. Steven Davies provided supplemental information in his evidence in chief. A 10-minute adjournment was consequently granted so that Mr Scrase could take instruction on the additional evidence before commencing his cross-examination.

27. I reserved judgment.

Oral Evidence & Submissions

28. Marton Jenovari, is the HR Director responsible for strategic decisions and took the lead in negotiations with the Union during the consultation process. He was not involved in the day-to-day operations of the Swansea plant. He did not recall the Trade Union ever raising an issue that the matrix did not include skills that were remaining in the plant. I have considered the minutes of the consultation meetings and could find no reference to the Trade Union raising this point.

29. Mr Jenovari went on to say that had they raised this issue it would have been considered and the matrix might have been different, however this was the best scoring matrix that could be provided on the information available.

30. He was not involved in the individual consultations process and was not given any feedback that employees were saying the criteria was unfair for not including skills that were to be retained in the business. He is not sure what he would have done had he received this feedback after the individual consultations. It would have been better

had this been raised during collective consultation. His generic understanding was that the individual consultation was to discuss the outcome. The scoring criteria had come about as a result of 45 days of discussions.

31. Cellan Thomas recalled issues being raised about the wet grinder machine. A number of operatives in the department had raised issues about it, not just the Claimants. He accepted that the Claimants had refused to work on the grinder while others had not. He denied that this was a black mark against them. A lot of money had been spent improving the site and the Respondent took pride in health and safety. This was promoted by way of notices and raising health and safety issues was encouraged within the bonus scheme. It was incorrect that it was only those who had not raised concerns about the wet grinder that obtained alternative employment in the redundancy process.

32. He was keen to emphasise that Collector were one department with operators working between the prep and finishing sides, although he accepted that there were some operators more skilled on certain machines than others. Had scores for machines remaining in collector been included in the matrix, skills scores would have varied. He denied that the Claimants were skilled in each of the skills that were being retained.

33. He was involved in the individual consultations and was aware of the issues being raised by the Claimants about the scoring matrix not including skills that were to continue on the site. He did not raise these issues with more senior decision makers. There was no way the matrix would have been changed irrespective of what had been suggested.

34. He accepted that the role of the Carbon Prep Operator involved the majority of the skills required on the preparation side of the collector area, but at a much-reduced level. Sandblasting and jackhammer, for example had reduced by 95%. He accepted that the majority of the machines used on the preparation side were still there, but stated they were being used much less. The main difference was that a Carbon Prep Operator was to be more flexible across site to assist with packing, inspection and press.

35. Melanie Sullivan was keen to emphasise that the Collector was all one department: When asked whether parts of the Collector departments' functions remained in Swansea, she said that for redundancy purposes the collector was classed as one department. When asked whether there were preparation processes remaining, she answered that in totality the work had greatly reduced. When it was put to her that people had not received the training in skills in other sections as envisaged by the Rainbow Agreement, she was keen to emphasise that a lot of training had taken place and listed training sections had been given in their own areas. She was however unable to provide similar examples of any cross-sectional training.

36. She denied that the scoring matrix placed those from Collector in a worse position or was discriminatory. 9 out of 18 in the Collector were women compared to 2 in Linear, and there were no women working in Theta and Materials.

37. She denied that the role of Carbon Prep Operator was critical to the business. She did not proactively offer assistance to the Claimants on CV writing or interviews when applying for new roles, but operated an open-door policy and so would have offered help if asked. Others had asked and she had helped. The Claimants had not asked for help. She did not consider help would have made a difference as the Claimants' applications were both of a very high standard, other candidates just did better. She had also arranged for Adecco to come in for a day and provided employees with details of roles available throughout the business.

38. Wayne Griffiths disagreed that he was the driving force behind the selection criteria in the matrix, his involvement was merely to provide the financial background and context to the decision to refocus the purpose of the Swansea plant. He took a step back after the meeting on 1st October. He disagreed that pre-machining skills from the collector section should have been included in the matrix. The ones selected were the appropriate skills to maintain the business. Pre-machining came at the end of the process and without the other skills there could not be pre-machining.

39. Terry Kirkhouse, accepted that this was a genuine redundancy situation and that the roles in the collector section had significantly reduced. He was however emphatic that the machines he and Mr Lewis operated remained busy and should have been scored in the matrix. They could both operate these machines on a solo basis.

40. He accepted that the consultation with the Union had been reasonable. He accepted that the matrix needed to be changed as there were some machines no longer in use. He did not accept that the Respondent could press ahead with their proposals in absence of alternative proposals from the Union. The criteria still had to be fair.

41. He disagreed that he had not been targeted, but was unable to provide specific details of how or why other than that some of the people who got the new positions had no experience of carrying out work in that area and had scored lower on the redundancy exercise. He was effectively being asked to apply for his own job. He did not apply for other jobs, because it was unlikely, he would be successful in getting other jobs if he could not get that one. He did not accept that there were more suitable candidates for the role.

42. Peter Lewis also accepted that this was a genuine redundancy situation, however the scoring matrix was unfair as the skills remaining in the preparation side of Collector should have been included. Had this been the case then he would have been safe. He could operate all the machines listed at paragraph 13 of his statement himself except the duplex.

43. He got the same information about the consultation from Steve Davies as everyone else did. He was emphatic that carbon prep was basically the same job he had been doing and that this work continued after the redundancy. Although the only information he had to base this on was the job description. While he accepted that the work in collector had reduced by 90% this was overall and not the preparation section. The work in the preparation side largely remained. He also accepted that the

Respondent's consultation with the Union had been reasonable. However, someone should have flagged up that there was an issue with the scoring matrix.

44. Being put at risk and not getting the 3 roles he applied for did make him think about the health and safety issue he and Mr Kirkhouse raised when they refused to work extraction. It was curious that he had produced a good CV, but some of the people that got the job *'walked in with a piece of cardboard.'*

45. He estimated that in a shift, around 2 people worked in preparation with the remainder working in finishing. His only knowledge of the Carbon Prep Operator role was what he had read in the job description.

46. Steven Davies was a cell leader in the Collector finishing department and Union rep. He was also made redundant during the process, which he considered to be a *'crime.'* The Department was organised into 3 shifts with around 4 on the morning shift, 4 on the afternoon shift and the remainder on the day shift. He would decide who worked where. There were some operators that could only do certain jobs.

47. He said he had never been in a consultation as bullyish as this one with situations of discrimination and racism. His job was to ensure the matrix was fair and what was being proposed was unfair. He felt that a number of people were being targeted not just the Claimants and mentioned Ian Rosser as an example. The matrix was also changed so that another employee would not be placed at risk.

48. He was taken to minutes of the consultation meeting on 16th October where he was proposing to *'use the current matrix'*[p. 162]. He denied he was referring to the 2010/2012 matrix, but was referring to the 2016 agreement. I have considered the full notes of the meeting and it is clear that it was the 2010/12 matrix being discussed.

49. Mr Davies said that some of the minutes were inaccurate. He was provided copies of the minutes after each meeting and never took issue with them although in hindsight he thinks he should have.

50. It was his view that the collector skills should have been included. The average age of an operator at the plant was 52. If there was anyone capable of doing the Carbon Prep Operator roles it was the Claimants.

51. Ian Rosser was a Union rep and still worked at the Respondent company. He had not been involved in the consultation but had been involved in the Appeal process. He says that the Carbon Operator role is the same as the old prep role in the collector department. He has observed that the Carbon prep operators work on the old collector preparation machines 99.9% of the time.

52. He had concerns around the fairness of the scoring that certain operators were awarded half points.

53. Miss Collins made detailed and helpful submissions on behalf of the Claimants. She quite properly accepted that it was primarily a matter for the Respondent to determine the selection criteria, however these needed to be fair. To be fair, the selection criteria should have been determined in accordance with the principles of the

Rainbow agreement. While some modification was necessary to take into account for the fact that some skills in the older matrix were no longer at the factory, skills remaining on site should have been counted. The skills required for the Carbon Prep role were skills needed by the business and should have been included and/or the Carbon Prep role should have been recognised as an old role and not a new role.

54. Given that flexibility was already written into the operatives' contracts, the Carbon Prep Operator role could not properly be described as a new role simply because it required flexibility. Those setting the criteria knew the workforce and so could make an educated guess on how the scoring would pan out. While it was possible in theory for those in collector to score enough to be safe this would clearly not be the case in practice. This was indeed the case: every person in the collector department was placed at risk of redundancy.

55. The Respondent's initial approach was to place the operators in the Collector section in a separate pool at risk of redundancy. Their selection matrix criteria were designed to achieve the same result.

56. The collective consultation did not absolve the Respondent from making the individual consultations meaningful. The Claimant's may have had a higher hurdle if the Union had agreed the selection criteria, but at every stage they had said the criteria was unfair. The point of individual consultation is to see how the process affects the individual. The Respondent had used the analogy that if you start playing a game and change the rules at half time this would create chaos, but this only works if the rules are fair to begin with. It may well have been inconvenient to go back to the drawing board, but it was clear from the evidence that there was no consideration of the issues raised by the Claimants. Rescoring could have been undertaken relatively quickly.

57. Both Claimants spoke from the heart about feeling targeted. While it was accepted that those in the Collector department were targeted equally for redundancies, it is much harder to challenge an interview process rather than redundancy process and those carrying out the redundancy process knew that. This approach made it easier for the Respondent to select those they wanted to remain. While the Claimants cannot identify a smoking bomb, they would have had a sense of what was going on and this should not be easily written off.

58. On *Polkey* Miss Collins submitted the facts justified no more than a 20% reduction at its highest. There was clear evidence that had their skills been included in the matrix they would have remained. Detailed evidence had been provided of the Claimants' skills in the business. They were one point under the cut-off point for being at risk. The Respondent provided little evidence of other members of staff whose points were only one above the Claimants.

59. On behalf of the Respondent Mr Scrase submitted that the Carbon Prep Operator role was not the same as the role being carried out by the Claimants and I was asked to prefer the Respondent's witness evidence on this point. While some of the machines the Claimant's worked on remained, this was quite different from the same level of work continuing. Confusion has arisen because the machines remain in situ.

60. The Respondent had gone above and beyond in the consultation having consulted for 45 days instead of the required 30. However, the law does not require the employer to reach an agreement merely to consult. Mr Scrase referred me to the guidelines in the case of *Williams v Compair Maxam* and the case of *Earl of Bradford v Jowett (No. 2) [1978] IRLR 16*, which re-iterated the principle that the tribunal can only interfere with selection criteria if no reasonable employer would have acted the way the Respondent did.

61. He accepted that the approach advocated by the Claimants was a reasonable one, but that was not the test. The Respondent's approach also fell within the range of reasonable responses and so was not unfair.

62. It would have caused chaos had the Respondent revisited the selection criteria when objections were raised in the individual consultations in December. Those points had not been raised by the Union in consultation and it was reasonable to feel that all points had been thrashed out with the Union in the detailed consultation with them. As such the individual consultations had been fair and appropriate.

63. Attempts had been made to find suitable alternative employment, both in respect of internal vacancies on site and providing information of roles company wide. There was no evidence that the Claimants had been targeted: the scoring affected everyone in the collector department equally.

64. As such, the approach fell squarely in the range of reasonable responses and so was fair. If the tribunal considered this was not the case, then I was invited to make a 100% Polkey reduction. There was no evidence that the Claimants would have been kept had the criteria been changed. It was not too much of an assumption that those who scored higher and secured the carbon prep-roles would have scored higher than the Claimants in the redundancy process.

Law

Unfair Dismissal

65. *Section 94 of the Employment Rights Act 1996* ('ERA') states that an employee has the right not to be unfairly dismissed by their employer. Redundancy is a potentially fair reason to dismiss an employee under *s. 98(2)(c)ERA*. Dismissal is also potentially fair if it's done for the purpose of restructuring the company as this could be some other substantial reason permitted under *s. 98(1)(b) ERA*.

66. Under s.139. ERA *"an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—*

> *(a) the fact that his employer has ceased or intends to cease—*
>
> > *(i) to carry on the business for the purposes of which the employee was employed by him, or*

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) 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."

67. If the employer fails to show a potentially fair reason for a dismissal it is unfair. If a potentially fair reason is shown, the general test of fairness in section 98(4) ERA must be applied which states that:

"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".

68. It is important to remember that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer. The case of *Capital Hartshead Ltd v Byard [2012] ICR 1156* makes clear that in applying this test the tribunal is not bound by rigid rules.

69. The EAT in the case of *Williams and Others v Compair Maxam Ltd 1982 ICR 156*, EAT, laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals, when asking whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. The factors suggested by the EAT in *Compare Maxam* that 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; and

d whether any alternative work was available.

70. While fair consultation is a necessary ingredient for a fair dismissal, whether the consultation is adequate in all the circumstances is a question of fact for the tribunal. I note the following principles:

a Whether a company has consulted with a trade union is a factor in assessing the reasonableness of the dismissal.

b Simply because a redundancy process is agreed with employee representatives does not mean that it is necessarily fair: *Swan v DB Schenker Rail (UK) Ltd ET Case No.1607553/09*.

c Collective consultation with a trade union does not, of itself, excuse a failure to conduct individual consultations: *Mugford v Midland Bank Plc [1997] ICR 399*.

d The degree of individual consultation that is reasonable will depend on the circumstances: *Unipart Eberspacher Exhaust Systems Ltd v Keenan EAT 1473/00*.

71. The overriding test is whether the employer's actions at each step of the redundancy process fall within the range of reasonable responses.

72. The Court of Appeal in *Gwynedd Council v Barratt and anor 2021 IRLR 1028, CA* affirmed that a dismissal for redundancy will not automatically be regarded as unfair on account of the absence of an appeal procedure. The overarching question remains whether the employer's approach fell within the range of reasonable responses on the facts of the case.

Relevant Findings of Fact

73. Both Claimants were highly skilled, well-respected employees who had worked in a number of different areas over their long careers with the Respondent. Neither had ever had any difficulty in picking up training that had been given to them and at all times displayed right attitude to be expected of employees such as good time keeping and low absence rates. This was not disputed.

74. There were also a high number of other highly skilled production operatives working for the Respondent who had also worked there a long time and it was clear from the redundancy scoring matrix [p. 224] that all employees had clean disciplinary records.

75. I find that the preparation and finishing was all part of the collector cell with the intention that operators would work in both preparation and finishing. In practice, operatives worked more in one part than another and had greater skill on some machines than others, as was accepted by Mr Thomas in his oral evidence.

76. I accept the Claimant's evidence that that the majority of their time was spent working on preparation. While the Respondents' witnesses were able to give general evidence of the set-up of the sections, none were able to give specific evidence about what each of the Claimants typically did in a day to rebut this evidence. While the Claimants did have skills relating to machines on the finishing side, this is not incompatible with them actually spending most of their time on preparation. They are

the only ones who were able to give direct evidence on this point and I found their evidence to be credible.

77. The evidence before me is that there were only a few operatives per shift working on the preparations side, with the majority of the team working on finishing. Given that the Claimants worked the majority of the time on the preparations, it is more likely than not that they would have also scored higher on the preparation machines than other operatives in their department, had this been included in the scoring matrix.

78. I now turn to consider the extent to which preparation functions are still being carried out on the Swansea site. I find that the preparation functions have reduced, but only by a small amount. I further find that the Carbon Prep Operators are spending the majority of their time on the old Collector prep machines. I make these findings because I accept the evidence of Mr Rosser on this point, who I found to be a credible witness. He has no personal interest in the outcome of proceedings and still works for the Respondent. As such there is no good reason why he would choose to come to the tribunal and not tell the truth. I further note that, while the Respondent disputes that the Carbon Prep Operators spend the majority of the time on the old collector prep machines the Respondent's evidence as to how their time is otherwise allocated is vague.

79. I note Mr Thomas' evidence that work on certain Collector Prep machines had decreased by some 90-95%. This statistic in isolation is insufficient to find that there was a significant reduction Collector Prep activity overall as it only relates to a few machines in the department. Sadly, I do not have specific detail from the Respondent on the reduction of work in the preparation side of Collector overall or any objective evidence to support the witness evidence asserting a significant decrease in preparation work. The other witnesses for the Respondent were similarly vague or were only able to give evidence on Collector as a whole. Overall, I found the evidence of the Respondent's witnesses unreliable on this point.

80. Mr Thomas' evidence is that of 49 machines, around 16 remain. The Claimants' evidence is that these machines all related to preparation rather than finishing. There is no evidence materially disputing this and so I find the 16 remaining machines all relate to preparation. Mr Lewis' evidence, which I accept, was that around 2 people a shift would work on Carbon preparation over 3 shifts. There are now 4 Carbon Prep Operators. Even taking into account an overlap in shifts this would appear to signal a reduction in bodies working on the collector prep machines in the working day and thus supports my finding of a modest reduction in the amount of work being carried out on the old Collector prep machines.

81. Given my findings that the Claimants spent the majority of the time working on Collector prep machines and so do that Carbon Prep Operators, I accept that the work being carried out by the Carbon Prep Operators is substantially similar to the work the Claimants' carried out in practice. As such, the Claimants' assessment that they were being asked to apply for their own jobs is understandable.

82. I do however find that they were different jobs: The Claimants job was as general Cell Members allocated to the Collector cell. While the Claimants in practice

worked predominantly in the preparation side of the Collector cell their job was as a member of the cell overall and to work throughout the cell. The Carbon Prep Operator role was described as working *'mainly to machine extruded carbon section into carbon product*' and so was much more specific role (notwithstanding that both roles also provided that the Operators be prepared to work in other parts of the factory if required to do so).

83. The Claimants assert that they were targeted for redundancy on the basis of their length of service and that they had refused on a previous occasion to work on the wet-grinder. There is some force in Miss Collins' submission not to discount this assertion for lack of a smoking gun: very rarely will a person who has been unfairly targeted be able to pinpoint what has gone on behind the scenes. This is why it is important to consider the evidence as a whole in order to see whether there is anything to support that assertion and, if so whether it is more likely than not that targeting took place.

84. In considering this point, I take into account the evidence of all the witnesses on behalf of the Claimants who considered that targeting had gone on. There was inconsistency between the witnesses as to who was targeted. Both Mr Rosser and Mr Davies considered it was a group being targeted rather than the Claimants personally. Mr Rosser's evidence indicated that targeting was more *in favour* of certain employees than *against* the Claimants.

85. There was little mention by the Claimants in the consultation or appeal meetings about being targeted for age or raising health and safety concerns. The main assertion at that point was that other people were being protected. Only after the redundancy process and selection did Mr Lewis look back to try and understand why he had not been selected. It was only after wracking his brains that he came up with the explanation of having refused to work on the wet-grinder.

86. The evidence does not disclose a plausible motive for targeting the Claimants for length of service. The redundancy scoring matrix makes clear that the majority of operators had been working for the Respondent for 20 years or more and there was a roughly even spread in respect of length of service for those that were put at risk of redundancy and those who were not. If anything, the evidence indicates that this was an employer that valued length of service. There is little evidence before me as to the difference in ages of those who were successful in the application process for the new roles. Even if I were to accept the length of service of those who were successful was less than the Claimants, without more, this is purely circumstantial. I consequently do not find that the Claimants were targeted because of their length of service.

87. There is also insufficient evidence before me to support the Claimant's assertion they were targeted for refusing to work on the wet grinder. I accept the oral evidence of Mr Thomas when he says that the Respondent had a health and safety conscious culture and so would not have penalised the Claimants for refusing to work on a machine that was unsafe. He stated, which was not challenged, that a way of accruing bonus was making report if machines were faulty. Furthermore, there were other operatives willing to work on the wet-grinder and there is no evidence the Claimants' refusal caused any business disruption. There is no evidence before me

that the Claimants had any negative feedback as a result of their refusal other than the assertions, they now make in relation to the redundancy process.

88. For the reasons given above, I find that the Claimants' assertion of being targeted for length of service or refusing to work on the wet-grinder was an incorrect (albeit honest) assumption made after the event, in an attempt to make sense of what happened.

89. Targeting did however take place: The Respondent accepts that the Matrix was targeted at retaining those with skills in Linear, Theta and Materials, being the areas that were continuing in the business. It was skills that were targeted rather than individuals.

Conclusions

90. I find that the principal reason for dismissal is redundancy. The Claimants both very fairly and properly conceded as much. The Respondent was looking to make 48 redundancies including 25 Production Operatives. Part of the work being carried out by the Claimants' department was being moved to Hungary and so the need for work to be carried out in the Swansea plant had diminished.

91. The Respondent did adequately warn the Claimants about the Redundancies having provided initial notice about the proposed restructure on 20th September 2020, informing them they were at risk of redundancy on 10th November and further consolations on 1st and 10th December.

92. The Respondent acted reasonably in choosing the selection pool given it was in accordance with the Rainbow Agreement and wishes of the Union. It further provided those working in the Collector section an opportunity to avoid being at risk of redundancy which may not otherwise have been the case. Indeed, it has not been alleged that the selection pool was unfair.

93. The material issue however is whether the selection criteria in the matrix were fair. Specifically, whether it was reasonable to not include Collector preparation functions that continued to be carried out at the Swansea site in the scoring matrix for business skills.

94. It was clearly reasonable to change the matrix criteria given that the skills no longer reflected the work being carried out in the factory.

95. I find that the Respondent's decision not to include skills for collector preparation in the scoring matrix was within the range of reasonable responses. Even though there continued to be a need for those functions to be carried out on the Swansea site, it was within the Respondent's discretion which skills to prioritise and thus to leave these skills out of the matrix.

96. Putting all operators in one pool created a problem in ensuring that the necessary skills were retained within the business moving forward, given that it was

only work in the collector and packing sections that was being reduced. The Linear, Theta and Materials skills were prioritised because work in those sections was not being reduced and the Respondent needed to maintain the current levels of employees skilled in those sections. It is not difficult to see from the scoring at p. 224 that adding collector preparation functions to the matrix created a real risk that necessary skills in Linea, Theta and Materials would be lost to redundancy leaving the Respondent with a surplus of operatives skilled in Collector Prep. The decision to leave these out was therefore reasonable.

97. I find that the Respondent did take reasonable steps to find the Claimants suitable internal employment. They were provided with details of companywide and internal vacancies and encouraged to apply appropriate positions which both Claimants did. Unfortunately, they were unsuccessful. I accept the Respondent's evidence that there were simply better candidates on the day. The scoring process appeared open and transparent. It was not unreasonable to not offer additional interview training or CV writing support.

98. The collective consultation was reasonable: It took place when proposals were at their formative stage, adequate information on the proposals and the reasoning behind them was given, with adequate time to consider the information and provide a response. Genuine and adequate consideration was given to the responses provided by the Union and there were attempts to reach a compromise.

99. I also find on balance that the individual consultations were reasonable. I note that scoring of the remaining Collector Prep functions was not considered after it was raised by the Claimants in their initial consultation meetings. Given that the scoring matrix had not been agreed, it would have been best practice for this to have been escalated and considered.

100. However, I also take into account that there was extensive consultation with the Union. Furthermore, one of the Union representatives involved (Steven Davies) worked in the Collector section and so could have been expected to be aware of relevant issues and raise them at that stage. I also take into account had the matrix been varied in December there was a risk that this too would have been perceived as unfair. The decision not to escalate the Claimants objections was consequently in the range of reasonable responses.

101. If I am wrong on that, I would nevertheless have considered the dismissal reasonable given the overarching need to retain the skills in Theta, Linear and Materials and reduce the number of Collector operatives. The matrix criteria and criteria for the new roles was objective. It was not the Claimants' case that the criteria was not applied fairly. While I heard evidence that the Claimants had skills from having worked in other departments, it was not their case that they should have been scored more on the redundancy matrix for these. They were unsuccessful in their new roles, because other candidates scored more highly on the attributes being tested.

102. For the avoidance of doubt, had I found that the dismissal was procedurally unfair I would have made a 100% reduction to account for the fact the Claimants would likely have been dismissed in any event. While Mr Jenovari was not prepared to rule

out that the matrix criteria would have been different had the Claimants' point been raised at an earlier stage, I find it unlikely that the matrix criteria would have been varied in even if the Claimants concerns had been escalated following the individual consultation meetings. The reasons for finding this again is that there was a clear need to ensure Theta, Linear and Materials skills were retained and a variance at that stage would have likely disgruntled another section of the workforce.

103. For all these reasons, I find that the Claimants were not unfairly dismissed.

Employment Judge Grubb

Date: 13th April 2022

REASON SENT TO THE PARTIES ON 14 April 2022

FOR THE TRIBUNAL OFFICE Mr N Roche