EMPLOYMENT TRIBUNALS

Claimant: **Mr Simon Danson**

Respondent: **AVL UK Ltd**

Heard at: Birmingham **On:** 14, 15 and 21 February 2022 (Conducted remotely by CVP)

Before: Employment Judge Gilroy QC

Representation

Claimant: In person
Respondent: Ms T Hand (Counsel)

JUDGMENT

The judgment of the Tribunal is that the Claimant's claim of unfair dismissal is dismissed.

REASONS

Introduction and Background

1. The Claimant was formerly employed by the Respondent as a Service Engineer. His employment was terminated on the stated grounds of redundancy. He claimed that he had been unfairly dismissed. The Respondent admitted that the Claimant was dismissed but asserted that his dismissal was for the potentially fair reason of redundancy and further that dismissal was not unfair in all the circumstances.

Evidence and Material before the Tribunal

2. The Tribunal heard oral evidence on behalf of the Respondent from Mr Nick Banks (Service Delivery Manager), and Mr Danny Burchill (Operations Director). The Claimant also gave oral evidence.

3. The Tribunal was provided with witness statements on behalf of the Claimant and the witnesses who gave live oral evidence on behalf of the Respondent. The Tribunal was also provided with an agreed bundle of documents. The Claimant provided some further documents at the commencement of the hearing, in the form of a 2019 Planner showing the Service and Commissioning pool for the calendar year 2019, and a 2020 Planner showing the same details in respect of the period from January to October 2020. The Claimant also produced copies of a chain of emails passing

between himself, Mr Banks, Mr Peter Strange, Mr Kelvin Hughes, Mr Gernot Grasser and Mr Hugo Murgard (all employees of the Respondent) on 4 July 2019.

4. The Hearing was conducted remotely by CVP.

The Issues

5. The issues to be determined by the Tribunal were as follows:

   (i) Was redundancy the real reason for the dismissal of the Claimant, meeting the definition of redundancy set out in s.139(1)(b) of the Employment Rights Act 1996 ? ("ERA") In particular;

      a. had the requirements of the Respondent for employees to carry out work of a particular kind, ceased or diminished or were they expected to cease or diminish ?, and

      b. was the dismissal of the Claimant caused wholly or mainly by a diminution in the Respondent's requirements for Service Engineers ?

   (ii) Was the decision to dismiss the Claimant within the range of conduct that a reasonable employer could have adopted ("the band of reasonable responses test"), having regard to s.98(4) of the ERA, and the principles of fairness. In particular, did the Respondent:

      a. consult the Claimant about the proposed redundancy ?;

      b. adopt a fair basis on which to select for redundancy, including selecting an appropriate pool of potentially redundant employees and appropriate selection criteria ?, and

      c. consider suitable alternative employment within the Respondent's organisation ?

   (iii) If the dismissal did not amount to a redundancy, did the circumstances giving rise to the dismissal of the Claimant amount to a substantial reason of a kind to justify the dismissal as fair for some other substantial reason, namely a business reorganisation carried out in the interests of economy and efficiency ?

   (iv) If the Tribunal finds that the dismissal was procedurally unfair, would it be appropriate for compensation to be reduced on the basis that the Claimant would have been dismissed in any event had a fair procedure been adopted ?

The Law

6. The relevant legislation in relation to the Claimant's claims provides as follows:

Employment Rights Act 1996

98. General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it -

(c) is that the employee was redundant…..

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

139. Redundancy

(1) For the purposes of this Act 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.

(6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.

Findings of Fact

7. The Tribunal made the following findings of fact.

The Claimant

7.1. The Claimant was employed by the Respondent from 10 May 2016 until 30 October 2020, "the effective date of termination". His contract of employment provided that his role was that of "Service Engineer".

The Respondent

7.2. The Respondent is the UK arm of a wider multinational business which was founded in Graz, Austria, and is engaged in the business of development, simulation and testing in the automotive industry and in other sectors, providing its customers with simulation, measurement and testing technology.

The Reason for Dismissal

7.3. The Claimant's employment with the Respondent was terminated as part of a reduction in headcount conducted by the Respondent during the course of (and on the Respondent's case essentially because of) the global pandemic which began in the early part of 2020.

General background

7.4. The Claimant's principal duties involved the commissioning of the Respondent's products, test facilities or contractually defined equipment and/or services at customers' sites in the UK and across Europe. He was also involved in the maintenance, repair, calibration and service of the Respondent's (or competitor) equipment.

7.5. The Claimant performed tasks as a Commissioning Engineer, working in a team of 10. As stated above, his contracted role was that of "Service Engineer", but this was a generic title applied to all engineers at the time of his employment. At the relevant time, there were four distinct engineer roles within the Respondent, namely Service Engineers, Emissions Engineers, Commissioning Engineers and Applications Engineers. Commissioning Engineers and Applications Engineers were managed by Mr Nick Banks as Service Delivery Manager.

7.6. The role of Commissioning Engineer is generally considered within the Respondent's business as more highly skilled than that of a Service Engineer. Commissioning Engineers are sub-contracted to the Project Management Team in order to get the automation system for a project operational and signed off by the customer, whereas Service Engineers tend to work directly for the Respondent's Hotline and are responsible for handling service calls and the routine servicing of devices. The roles are quite distinct on the Respondent's planner document which is used to plan the work for each set of engineers.

7.7. It was agreed evidence that it was not uncommon for Commissioning Engineers to perform Service work related to the automation systems which helped maintain their utilisation whilst not Commissioning.

Events leading to Dismissal

7.8. The global pandemic struck in March 2020. As it continued, it became evident that the demand from the Respondent's customers for Commissioning Engineers had diminished as the number of projects coming into the business had reduced dramatically.

7.9. In March 2020, the UK Government set up the Coronavirus Job Retention or "furlough" Scheme to help employers to pay wages if their employees were unable to work during the COVID-19 crisis. The Respondent took the decision to utilise the scheme, and the Claimant was placed on furlough with effect from 11 May 2020. The engineers selected for furlough were chosen based on their skill sets, taking account

of the work which was available. Battery test commissioning was considered to be the Claimant's specialty, and at the relevant time there was no requirement for battery test Commissioning Engineers.

7.10. During the early part of his period on furlough, the Claimant approached Mr Banks to request training to align with his development objectives as set out in his appraisal, but because the Respondent was in survival mode, all training was on hold and the Respondent's position was where possible to use the furlough scheme if no productive work was available.

7.11. Later on it became impossible to furlough anyone who had not previously been furloughed, so the few engineers who had worked through the initial part of the scheme were then also used to cover tasks that fell outside their usual skill set, despite there being other engineers on furlough who may have been better suited or also capable of performing the relevant task. The Respondent was keen to ensure that all engineers who could not be furloughed were kept fully productive.

7.12. It became clear that steps would need to be taken to review the Respondent's headcount and to implement a redundancy exercise. The Respondent reviewed the job function and utilisation of all engineers. It was acknowledged that redundancies would occur. It was considered that simply placing individuals in a pool for selection for redundancy based on job title alone would not be representative of their actual roles. It was decided that in order to determine the job function of the engineers potentially at risk, the planner over the previous 24 months should be reviewed. In reviewing the potential candidates for redundancy, it was acknowledged that all candidates were strong.

28 September 2020 - Restructure announcement

7.13. On 28 September 2020, the Respondent announced to its workforce that due to the reduced demand for its products and services, a restructuring exercise would need to be undertaken. It was indicated that cuts were proposed not simply in relation to engineering staff, but also those employed in sales and strategic products, administration support and projects. In the announcement, the Respondent's Managing Director said as follows:

"*The COVID-19 pandemic has and continues to effect all businesses worldwide - for many of our customers this is also happening at a time of substantial change, as their products need to electrify and adapt to low carbon technologies.*

In this new world, new ways of thinking are needed, and we must respond with innovative solutions in agile ways. At the same time, we have also noticed a significantly reduced demand for AVL products, which for a long time have been the acknowledged industrial standards.

For AVL United Kingdom to remain as market leader in our industry during these unprecedented changes, we must adapt - we have no alternative. It is essential we evolve our business to support our traditional customers as they too change, but also capture every opportunity arising from new initiatives.

As part of this process, we have therefore reviewed the current structure of AVL United Kingdom and have identified where changes are necessary. Unfortunately, I need to advise you that regrettably some positions may become redundant.

We will be consulting with staff as appropriate and will be considering all the available options during the next few weeks, but this process will commence now. If your position is placed at risk of redundancy, you will be invited to meet with your line manager".

7.14. Also on 28 September 2020, the Respondent produced a written "Restructure Proposal", outlining the indicative timetable and the business case for redundancies. The total headcount reduction across all departments was to be 15, including 3 from the pool of Commissioning Engineers. In relation to "Commissioning", it was said that the Respondent was seeing a 30% drop in order intake and that numerous customers had cancelled both service and project commissioning work planned for the then current financial year. It was said that as a result, the Respondent needed to re-evaluate the size of the team in relation to customer requirements in order to remain effective. Affected staff were provided with details of the proposed new structure and informed that, if implemented, the new structure would entail a reduction in headcount from a pool of 10. The affected engineers were informed as to the proposed selection criteria and that if they were placed at risk of redundancy they would be invited to individual consultation meetings with their manager and HR to discuss the Respondent's proposals in more detail including whether there were any suitable alternatives available. Basic information was provided about the objectives of the consultation process and certain of the rights of the effected employees in relation to the process which was about to take place. Details were also provided as to the proposed timescale of the process.

7.15. Staff were written to individually on 29 September 2020 to the effect that redundancies were in the offing.

Selection pool

7.16. The Respondent decided that because commissioning work was the area which had seen the biggest decline, and due to the distinct skill sets, it was appropriate that the headcount of the specialist engineers should be reduced. Even prior to the pandemic, it had been noted that there was an imbalance in the number of engineers of various types within the engineering team.

7.17. It was decided to reduce the pool of Commissioning Engineers by 30%, based on the work the Respondent knew it had booked in going forwards, and the trends experienced since 2019.

Selection criteria

7.18. The Respondent's HR Team proposed the use of a selection criteria matrix that had been utilised by the Respondent in the past. The criteria were: Quantity of Work, Quality of Work, Initiative, Skills/Qualifications/Training, Future Potential/flexibility, Timekeeping, Absence record and Disciplinary record. Each criterion was to be scored in a range of 1 to 4. Prior to being adopted, the criteria were reviewed and approved by HR, Mr Banks and the Respondent's legal advisors. All 10 members of the Commissioning Engineer Pool were scored against the selection matrix. The scoring was independently performed by 3 managers who were all involved with the engineers' day-to-day duties, namely, Mr Banks, Mr Lee Woodcraft, the Head of Projects, and Mr Phil Shuard, the Hotline Team Leader. The scores were then assimilated in an overall table. As the Respondent had decided to reduce the headcount of the relevant group from 10 to 7, the three lowest scoring engineers were placed at risk of redundancy.

Scoring

7.19. As originally scored, the scores of the seven candidates who were not identified as being at risk of redundancy ranged from 68 to 94. The three lowest scoring candidates scored 56, 58 and 62 respectively. The Claimant's original score was 62.

1 October 2020 - Claimant notified at risk

7.20. On 1 October 2020, the Claimant was informed that as a result of the restructure, his role was at risk of redundancy. He was invited to a consultation meeting on 7 October 2020. Suggested topics for discussion were outlined. The Claimant was informed that following the meeting the Respondent would consider any submissions he made and arrangements would then be made for a further meeting to discuss the Respondent's response. Enclosed with the letter was a list of available positions, none of which, as it transpired, were suitable for the Claimant's skill set or experience.

7.21. The Claimant was aware that it was proposed that there would be seven employees in "Commissioning" after the restructure, which entailed a reduction of 3 engineers.

7 October 2020 - First consultation meeting

7.22. The Claimant duly attended the consultation meeting on 7 October 2020. By this stage he was aware of his scores. He was accompanied at the meeting by a colleague, Mr Andrew Guyatt. Also in attendance were Mr Banks and Ms Jane Norris and Ms Kate Woodford of HR. Prior to the meeting, the Claimant provided the attendees with a one page synopsis of his experience whilst working for the Respondent, setting out what he believed to be possibilities in terms of alternative employment with the Respondent. The Tribunal was provided with the Respondent's version of the minutes of the meeting of 7 October 2020. The Claimant provided his own version of those minutes, in the sense that he provided his own copy of the Respondent's version containing in red typeface the matters he maintained were discussed but not recorded in the Respondent's version.

7.23. The process was explained to the Claimant, including how the scores had been arrived at. The Claimant was provided with a copy of his scoring sheet. He was told that appraisals had not been used for the scoring because not all appraisals had taken place for everyone in the pool. It was explained that this was due to COVID19 and the fact that many employees had been on furlough. The Claimant expressed the view that appraisals could have continued over the year. He asked Mr Banks what commissioning jobs he had gone over for his review. In response, Mr Banks gave a general overview, stating that the planner had been reviewed for the purposes of the exercise, and that consideration had been given to the allocation of work to individuals in the areas of Service, Emissions and Commissions. The Claimant said that he was aware that engineers in the Commissioning pool had moved to Service and had been doing Commissioning work, and that Application Engineers had been doing Commissioning work, and questioned why the reviewed positions were not covering the Service and Commission pools, to which Mr Banks responded that it was the Commissioning pool which was being examined. The Claimant questioned why, after he had been trained in electrification, those skills were not being used or why he had not been offered a contract in electrification. He said he had been *"spread very thinly"*. Mr Banks said that the person with the best fit for the role had been put into the relevant commission. Mr Banks said that the Claimant was not being classified as a Service Engineer because the pools were

based on what staff did, and that Service Engineers fill in between Commissions. He stated that the roles were put at risk based on the role and not the job title.

7.24. During the course of the consultation meeting on 7 October 2020, the Claimant raised concerns around the pooling and his scores. It was the Claimant's case that most of the work he had conducted for over four years prior to the termination of his employment had been service tasks covering breakdowns and calibrations and that the Commissions he had carried out all added up to less than a year.

7.25. As the Claimant disputed his scores, his matrix was re-evaluated by the scoring managers, taking the Claimant's comments into account. At this stage, the three scoring managers acted in conjunction whereas when compiling the original scores they had acted independently. As a result of the review of the scores, the Claimant's total score was increased from 62 to 65. On the basis of his revised score, the Claimant was still one of the three lowest scoring individuals in the pool.

7.26. After his first consultation meeting, the Claimant compiled and submitted a document headed: "*Objections to Redundancy and Formal Grievance regarding Unfair Selection*". As the concerns raised in that document related to the redundancy process, the document was treated as part of that process rather than as a grievance per se.

7.27. In his document, the Claimant queried why only three people from the pool of 10 had been considered, stating that two of the three had been on furlough for the most part, leading him to the conclusion that the two concerned, including himself, had been pre-selected. He pointed out that no one had been asked if they wished to apply for voluntary redundancy. No alternative engineering positions had been offered. He again queried why he was being considered as a Commissioning Engineer given that his contract was as a Service Engineer. He observed that the selection criteria were *"wholly subjective and open to manipulation"*. He observed that there had never been any concern with his performance, whether informal or formal. He stated that he had been tasked with too many overall tasks and not focused on one or two areas to achieve a level of expertise. He maintained that he had been sidelined and that new engineers had been offered electrification contracts
and given the training and opportunities to succeed. He pointed out that he had been given no opportunities to work whilst on furlough.

7.28. By letter dated 16 October 2020, Ms Norris confirmed to the Claimant what had been discussed at the meeting on 7 October and invited him to a second consultation meeting which was to take place on 21 October 2020.

<u>21 October 2020 - Second consultation meeting</u>

7.29. At the second consultation meeting, the Claimant was again accompanied by Mr Guyatt. Also again in attendance were Mr Banks, Ms Norris and Ms Woodford. Mr Banks indicated that he would work through the issues which the Claimant had raised in order to answer his questions.

7.30. Mr Banks stated that the scoring review had been conducted over two days and had covered all work performed. When challenged by the Claimant as to his knowledge of the Claimant's work, Mr Banks said that he had looked back over the planner for 2019. Mr Banks indicated that all 10 engineers had undergone the same scoring process with those receiving the three lowest scores being provisionally selected for consultation meetings. As to the suggestion that those placed on furlough had been unfairly pre-selected, Mr Banks said that there were two engineers who had been

furloughed longer than the Claimant, but they had not been provisionally selected, as they had scored higher in the scoring process. As to the suggestion that nobody had been asked if they wished to apply for voluntary redundancy, Mr Banks said that one person had made such a request, but that no one else in the company had come forward.

7.31. As to the lack of alternative openings, Mr Banks stated that the areas affected were sales, admin and commissioning and that as of the then current position, the Respondent had enough work for the engineers with the reduced headcount. As to the suggestion that the Claimant was a Service Engineer with around 75% of his tasks involving Service work, Mr Banks said that since January 2019, only 10% of the productive work had been service related and 57% had been Commissioning/Breakdown. The Claimant asserted that the time he had spent on Training/Shadowing (shown as 76 days) had been productive rather than unproductive time. Mr Banks replied that all engineers needed to maintain 85% utilisation and that if there was not enough project work, they would be asked to perform Service work, and that commissioning work remained their primary function. Mr Banks also indicated that Applications Engineers must also maintain an 85% utilisation, and that to achieve this, they needed to also perform some Service and Commissioning work if available. Mr Banks stated that the Respondent was also losing two Applications Engineers at the end of October 2020, negating any requirement to reduce this pool of engineers. As to the suggestion that the criteria were wholly subjective and open to manipulation, Mr Banks said that the criteria provided a wide comparison of differing skills and included tangible measures such as absenteeism and warnings. The same criteria had been used previously, and to minimise any bias, three different managers had conducted the scoring independently. The scores had been collectively discussed thereafter and in certain instances adjusted. As to the Claimant's observation that no Commissions or Service tasks were reviewed for the purpose of the scoring exercise, Mr Banks stated that all work performed was taken into consideration. Mr Banks expressed disagreement with the Claimant's assertion that he had been tasked with too many overall tasks and not focused in one or two areas to achieve a level of expertise. As to the suggestion that the Claimant had been sidelined and new engineers had been offered electrification contracts and given the training and opportunities to succeed, Mr Banks said that the Claimant's training far outweighed that which had been given to most engineers - 76 days of training/shadowing since January 2019 - and he had also undergone previous official electrification training in Graz. In relation to the Claimant's complaint that no efforts had been made to prevent his skills from fading and to gain extra pay beyond the furlough scheme, Mr Banks said that the furlough scheme was to protect the Respondent from paying unnecessary overheads whilst there was no work for engineers, and that out of 176 employees, 92 had been placed on furlough.

7.32. As to the suggestion that Mr Banks had constantly said that there had not been any jobs that he could task the Claimant with, whereas the planner had shown that there had been many maintenance tasks he could have done, Mr Banks stated that the tasks were given to engineers who were available at the time, with a priority of keeping all engineers 100% utilised, even if this meant that they were not doing work considered to be within their usual skill set. Where no work was available, engineers were furloughed, but not all engineers could be furloughed.

7.33. There was a discussion about "the Scania Project" and the Claimant pointed out that Projects had used a Graz engineer because they were faster and cheaper, which he could not understand, to which Mr Banks responded that the cost to the Respondent

for a UK engineer was the same as a Graz engineer and that the benefit of Graz was that they quoted a fixed price for the task.

7.34. The Claimant said that he had noted with interested the fact that two colleagues with no prior electrification training and minimal experience up to furlough, who had up until then covered Engine Puma commissioning, were now being trained and would now be working on electrification projects. The colleagues in question were Mr Eddie Goode and Mr Andy Gibson. Mr Banks responded that Mr Goode was now temporarily based at TCC (Testing Tech Centre Coventry) and that the Respondent was trying to up-skill his knowledge in E-Storage to deal with the many issues on site, and that Mr Gibson could not be furloughed, and there was no available project work, so he was shadowing for training into E-Storage. Mr Banks observed that all Commissioning Engineers required training in E-Storage going forward. Mr Banks further stated that the reason for the redundancies was that there was not enough work for 10 engineers and that for the remainder of the year and into the next year, the Respondent would have two to three projects for 7 engineers.

7.35. For the remainder of the second consultation meeting there ensued a discussion about the Claimant's dealings with HR in respect of the process and there were further discussions about the scoring the Claimant had achieved, followed by an exchange about formalities.

7.36. At the meeting on 21 October 2020, each of the issues the Claimant had raised was dealt with and a hard copy of the answers in the form of meeting minutes was produced.

7.37. During the course of his consultation meetings, the Claimant generally took issue with the selection pool and the criteria but did not put forward any suggestions as to how redundancies could be avoided.

<u>23 October 2020 - Notice of termination of employment</u>

7.38. Notwithstanding the representations made by the Claimant at the second consultation meeting and his revised scores, on 23 October 2020, the Respondent informed the Claimant by letter that it was terminating his employment on the ground of redundancy because its requirements for a Service Engineer had ceased or diminished. He was informed that he would receive payment in lieu of 12 weeks' notice together with statutory redundancy pay, accrued annual leave and a payment in lieu of his car allowance. He was informed that he had a right to appeal against his dismissal.

<u>27 October 2020 - Claimant submits appeal against dismissal</u>

7.39. By letter sent by e-mail on 27 October 2020, the Claimant submitted his appeal against dismissal, stating that the reasons for his appeal had been highlighted in his "objections to redundancy and formal grievance letter". He said that he had wide experience of equipment and roles covered, that he was one of the most versatile engineers in the Commissioning and Service Pools, that he had adapted to the changing roles required of the Respondent, including Commissioning, Service work, installation and work as a testbed operator. He referred to the diverse range of devices and systems he had worked on, and stated that he had worked abroad due to a shortfall in available work for weeks at a time, and that he had covered breakdowns at the beginning of the COVID-19 outbreak. He stated that he disagreed with the unfair process of the selection of the three engineers from the Commissioning pool, stating that out of 10 Commissioning Engineers, three had

been reviewed and three were being made redundant, but *"What about the other 7?"* He stated that the selection criteria were wholly subjective, that no account had been taken of previous appraisals, skills and matrices or reviews of work, that the negative summaries in the selection criteria had never been brought up in any previous appraisals, that his last Project Manager at Scania had not been asked for any feedback, that there had never been any feedback on Commissions or Service work, that the feedback he had been given at the second consultation meeting in relation to his objection letter showed percentages of work which were misleading and inaccurate, and that matters he had raised in both consultation meetings had been missing from the minutes. He said that he had undergone official electrification training on E-Storages, and covered service and breakdown tasks on Puma E-Motor and Hybrid test cells as well as Links Battery test cells, and observed that he was being made redundant and yet colleagues who were Puma Commissioning Engineers were to be given training until December on electrification.

<u>30 October 2020 - Appeal hearing</u>

7.40. The Claimant's appeal hearing took place on 30 October 2020 before Mr Danny Burchill (Operations Director). The Claimant was again accompanied by Mr Guyatt. Ms Woodford from HR again attended. Mr Burchill had not had any involvement with the redundancy process prior to the appeal and did not have much knowledge of the Claimant personally as he had very little contact on a day-to-day basis, as the Project Managers, or Mr Woodcraft would be the Claimant's usual point of contact. Prior to the appeal hearing, Mr Burchill reviewed the process and the minutes of the meetings which had been conducted, along with the Claimant's amendments thereto. He digested the issues raised in the Claimant's letter of appeal.

7.41. The Claimant's appeal was essentially on two grounds, namely (1) that the selection pool was incorrectly identified, and (2) that the selection criteria were subjectively scored.

7.42. As to the pool, the Claimant maintained that the employees placed at risk of redundancy and forming the selection pool had not been identified correctly as this decision had been based on the primary job function of the affected employees.

7.43. The Respondent's position was that the decision as to who should form part of the pool was based on the fact that due to a decrease in project order intake, the commissioning activity had been heavily reduced, therefore at risk employees were identified by reference to the previous 24 months jobs as indicated on the "planner" (a detailed history of jobs and projects undertaken and by whom) as this was considered to be the fairest method of determining which employees fell under the job function of Commissioning Engineer rather than simply taking job titles at face value. The Respondent took the decision to consider a longer period of time due to the fact that the furlough scheme had been utilised and therefore it would not have been fair to only take account of the 12 month period immediately preceding the time when the pooling decision was made.

7.44. As to the scoring of the criteria, the Claimant maintained that it was subjective.

7.45. The Respondent's position was that it decided not to use appraisals from each project the engineer concerned had worked on as there was a concern that this could result in bias and may not yield a fair assessment. Instead, three individual managers from different areas of the business independently scored each employee in the pool. In doing so, the Respondent acknowledged that there would be a degree of

subjectivity in the process, but the scores given were supported by documentary evidence as far as possible.

7.46. After the appeal hearing, Mr Burchill again reviewed the process and the relevant documents and spoke to Mr Banks about the process used as well as the scoring methods.

7.47. Mr Burchill's conclusion was that the Respondent had not acted unfairly when selecting the Claimant for redundancy. He found that the pool had been properly determined based upon primary job function and what appeared on the planner in terms of the kind of jobs taken on by those concerned. Affected staff were fully informed as to the basis upon which the pool had been determined. Mr Burchill considered the information contained within the planner, the Claimant's job function, the oral representations made by the Claimant, and his Annual Performance Reviews and satisfied himself that the Claimant had been correctly pooled as a Commissioning Engineer. In Mr Burchill's opinion, the decision in respect of the pooling was fully justified and transparent. Contrary to the Claimant's view that only three individuals had been scored, Mr Burchill concluded that all 10 engineers identified as being part of the pool were scored, with the three scoring lowest being selected for redundancy.

7.48. During the pandemic, there were times when increased crossover occurred between the roles whereby two Service Engineers carried out commissioning work due to the fact that the Respondent was unable to bring overseas engineers in to support on projects. The two engineers in question were historically regarded as Commissioning Engineers, but they both moved into Service following a discussion and agreement during their 2019 annual appraisals. A further reason for that move was the fact that, for some time, the Respondent had acknowledged that the engineering structure was top heavy, and the business was carrying more Commissioning Engineers than it required.

7.49. Mr Burchill found it very difficult to narrow the Claimant's concerns down in respect of the selection criteria. He spoke at length in the appeal hearing about how he performed well in Sweden and that a Project Manager had requested him back. Mr Burchill looked into this with the Project Manager assigned to the project and confirmed that this was correct. In Mr Burchill's view, the inclusion in the process of the Head of Department, Mr Woodcraft, enhanced the objectivity of the process because it ensured that personal relationships were not a factor, with the consequence that the scoring was more even-handed. Mr Burchill considered that he would have preferred a broader range of scoring as the 1-4 bracket did give the impression that an employee was underperforming with a score of 2, but the scoring process was in his view consistent across all candidates.

7.50. He also considered that the decision for individuals from different areas of the business to conduct the scoring was fair and reasonable and ensured that the scoring was not unfairly biased. The scoring given by the three scorers was fairly consistent with only the odd point of difference between the three. If there had been vast differences, this would have given him cause for concern, but he formed the view that the scoring overall was consistent. On this basis, Mr Burchill did not feel that it was necessary to speak with all of those who had scored the Claimant's matrix. Mr Burchill did not consider that the feedback given by the Swedish Project Manager changed the complexion of the scores given, but he would have given the same opportunity to other individuals for positive feedback had they also lodged appeals against the outcome. It was Mr Burchill's view that this aspect did not change the ultimate position in terms of the scores. Mr Burchill was of the view that the Claimant

was an extremely good engineer but that in all the circumstances the decision to identify his role as being redundant had been a fair one.

9 November 2020 - Appeal dismissed

7.51. By letter dated 9 November 2020, Mr Burchill confirmed to the Claimant that his appeal had been dismissed. In his reasoning, he essentially covered the points dealt with at paragraphs 7.47 to 7.50 above.

7.52. The Claimant's last day of employment was 30 October 2020.

7.53. Whilst prior to his first consultation meeting, the Claimant provided details of *"possibilities for alternative employment"* within the Respondent, there was no evidence before the Tribunal of any specific alternative role which might have been considered suitable alternative employment for him.

7.54. Shortly after the Claimant was made redundant, the Respondent recommended to him that he should contact a certain recruitment consultant with whom the Respondent had a relationship. The consultant had a number of customers who were keen to recruit engineers from the Respondent. One was a customer who had equipment that the Claimant had commissioned, meaning that he would probably stand a good chance of getting the role. The Claimant decided not to pursue this opportunity.

Respondent's submissions

8. In her closing submissions, Ms Hand for the Respondent submitted that there were essentially two issues, namely whether there was a genuine redundancy situation within the meaning of s.139 of the ERA, and whether the dismissal was unfair applying s.98(4) of the ERA.

9. In relation to s.139, Ms. Hand submitted that it was clear that the Respondent's requirements for employees to carry out work of a particular kind (s.139(1)(b)(i)) was plainly established. There was clear contemporaneous evidence in the form of the Respondent's "Restructure Proposal" announcement of 28 September 2020 that there had been a 30% drop in order intake and numerous customers had cancelled both service and project commissioning work planned for the then current financial year. The Claimant had maintained the position that his selection for redundancy was a sham and/or had been pre-determined. However, he was only one of three made redundant in his area of the business, and other staff from other areas of the business had been made redundant.

10. The Claimant had not asserted in his claim form that his dismissal was a sham. He had run a case that he had been dismissed because he was not wanted on projects, but it would have been far easier for the Respondent to terminate the Claimant's employment for "some other substantial reason". The Tribunal could not look beyond the position if redundancy was genuinely the reason for dismissal.

11. In terms of fairness and the application of s.98(4) of the ERA, the Respondent plainly had a duty to consult and had plainly discharged that duty. There had been two 12-1 consultation meetings. The Respondent had listened to what the Claimant had said at the first meeting, reflected upon it and indeed had revised his scoring. Both consultation meetings were minuted. The Claimant had, not untypically for someone in his position, challenged some of the minutes but it was clear that he was fully aware as a result of the consultation meetings that his role was at risk of redundancy

and the reasons why that was the case. There was no deficiency in the consultation process.

12. Upon being selected, the Claimant was given the right to appeal. He had availed himself of that opportunity. At the appeal, Mr Burchill had thoroughly reviewed matters and concluded that the Claimant had been fairly selected.

13. The reality of the position was that the Claimant simply did not like the scores he had been given, or the answers he was given in relation to his challenges to those scores.

14. In terms of the selection process, it was reasonable for the Respondent to review the job function and utilisation of all engineers when formulating the selection pool. The scorers had considered the planner document. It was reasonable to proceed on the basis that the Claimant should be regarded as a Commissioning Engineer. He also did work as a Service Engineer. There was a dispute as to what the split of his work was. The Respondent did not deny that the Claimant crossed over into other areas of work, and whilst there was clearly a dispute as to the split of the Claimant's work, it was reasonable for the Respondent to focus on job function and to have regard to the evidence contained in the planner.

15. The Claimant had suggested that the fact that he was furloughed was an indication that his redundancy had been pre-determined and yet two engineers had been furloughed for longer than the Claimant but were not provisionally selected for redundancy.

16. In terms of the selection criteria, there were elements of subjectivity, but the criteria overall were sufficiently objective. The Claimant was fully aware of the criteria prior to the scoring exercise being conducted. It was fair and reasonable for the Respondent, certainly in the initial stages, to arrange for the scoring to be conducted independently by three separate managers. The Claimant seemed to suggest that all of his previous work for the Respondent should have been reviewed but this was unrealistic. The Claimant had in essence been offended by the scoring, but the Respondent's position was that this stance was not justified. The scoring was reviewed, again it was unrealistic if it was being suggested by the Claimant that the Respondent should have reviewed every score of every candidate.

17. As stated above, one of the Claimant's arguments was that the decision to place him on furlough revealed some sort of pre-determination that he would be chosen for redundancy. However, at the time he was furloughed, the Respondent did not intend to declare redundancies. It was only as the furlough scheme came to what the Respondent thought would be its end that the business had to consider whether it could sustain the pool of engineers in place. A recruitment freeze was put in place from the commencement of the furlough period, but a significant drop in sales inevitably led to a reduction in the need for Commissioning Engineers to work on new projects. Servicing work was also hit because machines in situ at customers' sites were being used less due to a decline in production, again caused by the pandemic. This led to a short term reduction in work available for the Respondent's Service Engineers. This had the knock-on effect of removing the possibility of Commissioning Engineers transferring into Service. In relation to the suggestion that being placed on furlough was a precursor to redundancy, there was in fact no correlation between the employees who were furloughed and the employees who were made redundant.

18. Ms Hand submitted that in all the circumstances, the Claimant's dismissal had not been unfair.

Claimant's Submissions

19. The Claimant produced a written outline of his closing submissions, which he supplemented orally.

20. The Claimant maintained that the Respondent did not properly warn or consult him about his proposed redundancy. During his first consultation meeting, he had been told that 19 roles had been identified as being at risk and that he was in a pool of 10 Commissioning Engineers at risk. He was then told that all 10 Commissioning Engineers had already been scored by three individuals against the selection criteria and he was handed his scoring sheet. It was the Claimant's position, therefore, that he was not properly consulted on the selection criteria because he had already been scored. He maintained that this was not fair, and that the Respondent should have listened to his concerns about the selection criteria before completing the scoring process. If he had been consulted, he would have informed the Respondent that the criteria were unfairly subjective.

21. The Claimant submitted that he had pre-selected for redundancy prior to any consultation. It was his position that during his first consultation meeting, it became clear that UK Projects did not want to use his services. Being kept on furlough was a factor as UK Projects would not use him and Mr Banks kept maintaining that no work was available for someone with his skill set, despite the Claimant having carried out other work and possessing other skills. He had been constantly ignored for Service work as it had been repeatedly stated by Mr Banks that there was nothing in his skill set to justify the Claimant being provided with that other work.

22. The Claimant maintained that the second consultation meeting did not constitute proper consultation. He had tried to explain why he felt that the scores had been applied unfairly and subjectively to which Mr Banks had responded that he could not see that there would be agreement on any of the scores and so *"we should move on"*. At the end of the process, the Claimant was told that he was to be made redundant. Accordingly, submitted the Claimant, this was not proper consultation as a decision had already been made.

23. The Claimant submitted that the Respondent did not adopt a fair basis upon which to select for redundancy. He was wrongly placed in the Commissioning Engineer pool when he in fact was a Service Engineer as provided for by his contract. He had only done 25% Commissioning work over 4 years. Mr Banks admitted that he did not know how many commissions the Claimant had done. The Claimant had told him that he had been used for 75% of Service to which Mr Banks replied that the Claimant was not classed as a Service Engineer as the pools were based on what staff do and that Service fills in between commissions and that the roles put at risk were based on role and not job title. The Claimant had not been consulted about being placed in the Commissioning Engineer pool. The Respondent was itself in possession of the documentary evidence showing that engineers had been doing tasks outside of their contract description and that Commissioning had been done by Service, Applications and Resident Engineer Pools.

24. The selection criteria were subjective. Their application was unclear. The Claimant had been given contradictory information about how the selection criteria would be applied. A review of the pool using the planner as presented during the second consultation meeting showed that it went back over the previous 24 months. The net

result was unfairness to the Claimant because he had been placed on furlough for a significant period during COVID-19. The Claimant had serious concerns as to how the assessment against the criteria had been made. Reference should have been made to written records such as performance appraisals, but this did not happen. No evidence was provided on how he had been assessed, or the data from which his scores had been derived. This was grossly unfair because tasks in which he had been engaged could have been delayed for reasons outside of his control. The Claimant submitted that whilst he appreciated that the Tribunal did not generally get involved with the detail of how individual scores were arrived at, it could scrutinise the scores in exceptional circumstances, such as where bias was apparent or obvious mistakes had been made. The Claimant maintained that the subjective criteria were grossly unfair and had been applied without an appropriate basis, knowledge or independence. Mr Banks' witness statement contained a contradiction, that engineers were strong and would expect the marks to be mainly 3's whereas the scoring was of 2's and 1's. The Claimant maintained that his alleged shortcomings had never been highlighted to him.

25. The three scorers had an internal meeting with HR to go over the low 1 marks. They colluded for negative summary comments which Mr Banks wrote down and no HR minutes were taken. Mr Woodcraft had limited experience of the Claimant. Mr Banks, the commissioning marker showed no knowledge of the 3 Commissions the Claimant had previously completed under him before the scoring took place. He then said in the second consultation meeting that his score had covered those 3 commissions. The scores did not take account of a positive review he had received from the Scania Project Manager, for whom the Claimant had been working for 5 months. Mr Banks had shown bias when comparing the Claimant with Mr Gibson, stating that he would figure out situations quicker with no facts to establish that view. The marks were suspiciously in line with each other. The Respondent had shown positive bias to a newer colleague marking 14 points higher whilst doing less than 25% of his work in the limited planner period.

26. The Respondent had not searched for or offered suitable alternative employment despite it being available. The Claimant had handed in a document during his first consultation meeting setting out what he believed to be possible openings for him within the Respondent. He was told that this would be considered, but it was not. In his second consultation meeting, rather than discussing the document the Claimant had provided, the Respondent told him that he had not applied for any other jobs and Mr Banks simply stated that no alternatives had been found to avoid redundancy. The Claimant maintained that Mr Banks came to the conclusions he had reached by considering the Claimant's suitability for work within a very narrow skill set, whereas he had carried out other work and possessed many other skills.

27. In conclusion, the Claimant submitted that he had been made redundant in the most difficult of times. The redundancy process had been grossly unfair, pre-determined, subjective and opaque. Major sections of the minutes of the various meetings had been missing. He was not appropriately consulted, he was not placed in an appropriate selection pool, the criteria were unfair and/or applied unfairly and he was not offered suitable alternative employment despite it being available. The Claimant submitted that in the circumstances he had been unfairly dismissed.

Respondent's Submissions in Reply

28. Ms Hand made brief submissions in reply. The Respondent had not been obliged to consult the Claimant on what selection criteria to use. As to the submission that the number of Commissions the Claimant had performed had not been considered, such

an exercise would not have resulted in a fair comparison. The Respondent had utilised a two year period for examining the work the members of the pool had conducted, by reference to the planner. It had been reasonable for the Respondent to do so. As to the suggestion that the Claimant had not been offered suitable alternative employment, no such employment was available, and he had not produced any evidence of what he maintained was available. The Claimant had not applied for any alternative jobs because he did not think that anything was suitable for him.

Discussion

29. Whilst the specific elements of s.139 of the ERA are addressed below, one matter which can be readily disposed of is the general suggestion made by the Claimant that there was in fact "no redundancy situation" in the first place. The Claimant was one of several employees (from different parts of the business) who were dismissed as part of the same exercise. This was no sham exercise.

30. Another issue which the Tribunal was able to readily dispose of was the suggestion that those who were made redundant, including the Claimant, were in some way pre-selected. The Tribunal concluded that in conducting the relevant exercise the Respondent acted in good faith. The Claimant suggested that the fact that he was furloughed was an indication that his redundancy had been pre-determined and yet two engineers had been furloughed for longer than the Claimant but were not provisionally selected for redundancy.

31. In terms of the detail of the parties' respective arguments, the Tribunal concluded that the essential components of those arguments could be distilled as follows.

32. The Tribunal was satisfied that the requirements of the Respondent for employees to carry out work of a particular kind had diminished. The Claimant did not challenge the proposition that the Respondent was facing a 30% drop in order intake, and that both service and project commissioning work planned for the then current financial year had been cancelled. It is not the function of the Tribunal to tell an employer how to run its business. The above factors, taken against the background of the impact of COVID-19, must be seen as the context in which the Respondent made the decision in the autumn of 2020 to conduct a restructuring exercise.

33. The Tribunal was also satisfied that the dismissal of the Claimant was caused wholly or mainly by a diminution in the Respondent's requirements for Service Engineers.

34. In the circumstances, the Tribunal concluded that the Claimants dismissal came within the definition of redundancy set out in s.139(1)(b) of the ERA.

35. The Tribunal concluded that the reason for dismissal was the potentially fair reason of redundancy. In the circumstances, the question of whether dismissal occurred for "some other substantial reason" did not arise.

36. The Tribunal considered the selection pool and the selection criteria. It is not the function of the Tribunal to decide whether it would have thought it fairer to devise an alternative selection pool or alternative selection criteria. The Tribunal must review what the employer did and ask itself at every stage of the process whether the step or steps actually taken by the Respondent fell within the band of reasonable responses. It is firmly established that the reasonable response test is applicable to the selection of the pool from which the redundancies were to be drawn. It is also

firmly established that there is no legal requirement that the pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine and it is difficult for an employee to challenge it where the employer has genuinely applied its mind to the position. It is also well established that a Tribunal cannot substitute its own principles of selection for those of the employer and that the Tribunal must ask itself whether the criteria adopted were such that no reasonable employer could have adopted them or applied them in a way in which the employer did. Tribunal concluded that it could not be said that no reasonable employer could have adopted them or applied them in a way in which the Respondent did. A Tribunal will not readily carry out a detailed re-examination of the way in which an employer has applied selection criteria for redundancy. Whilst the criteria should not depend solely upon the subjective opinion of a particular manager, objectivity cannot be considered an absolute requirement and ultimately this all remains a question of balance. Few sets of criteria can ever be wholly objective, and an element of judgment and/or assessment will often be involved. The overall question remains whether that element is carried out fairly.

37. There was no obligation on the Respondent to consult the Claimant as to what the selection criteria should be.

38. The Tribunal concluded that it was not unreasonable for it to be determined that the pool should be made up of Commissioning Engineers, and further to regard the Claimant as being a Commissioning Engineer for the purposes of the selection exercise. The Respondent had acknowledged that there had been crossover as between the Engineers as to the types of work they performed.

39. The Tribunal concluded that it was reasonable for the Respondent to proceed on the basis of primary job function and what appeared on the planner for the previous 24 months in terms of the type of work in which members of the pool had been engaged.

40. It was reasonable for the Respondent not to make appraisals the focus of the selection exercise, given that one consequence of COVID-19 was that as a result of the use of the furlough scheme, not all members of the pool had received their appraisals in the normal way. The approach taken by the Respondent in this regard was an approach which was open to it to take.

41. The selection criteria contained sufficient elements of objectivity, and the Tribunal accepted the Respondent's general argument that for the scoring to be conducted independently by three separate managers further bolstered the objectivity of the exercise. In the original scoring exercise, the Claimant scored one of the three lowest scores in the pool. Following representations made by the Claimant, the three scoring managers, now acting in conjunction, reviewed the scores, which resulted in the Claimant achieving a higher overall score but a not sufficiently high score to elevate him out of the lowest scoring three in the pool.

42. The Tribunal was satisfied that all 10 members of the pool were scored, not simply the three employees who were ultimately made redundant.

43. In relation to scoring, the Respondent acknowledged that there would be a degree of subjectivity in the process, but the scores given were supported by documentary evidence as far as possible.

44. Clearly, in a redundancy situation, individual consultation or warning is of the utmost importance. Fair consultation means, in essence, (a) consultation when proposals

are still at a formative stage; (b) adequate information on which to respond; (c) adequate time in which to respond, and (d) conscientious consideration of the response to consultation.

45. The Respondent gave the Claimant adequate warning of his proposed redundancy and entered into adequate and meaningful consultation with him, conducting two separate consultation meetings, which were both of some substance. By the time of the first consultation meeting the Claimant had been aware for some 6 days that his role was at risk of redundancy. He therefore had a reasonable amount of time to prepare himself for his first consultation meeting. There is clear evidence that the Respondent gave due consideration to the matters raised by the Claimant both before and during his first consultation meeting, as revealed, amongst other things, by the minutes of the second consultation meeting. There is clear evidence that the Respondent gave due consideration to the matters raised by the Claimant during his second consultation meeting. Again, the minutes of that meeting confirm that this was the case.

46. The Claimant was given a meaningful right of appeal. His appeal was conducted by an independent senior manager. The Tribunal was satisfied that Mr Burchill took some care in preparing for and conducting the appeal hearing, as well as formulating the appeal outcome letter.

47. The Tribunal concluded that it was open to Mr Burchill to reach the conclusions set out at paragraphs 7.47 to 7.50 above.

48. There was no suitable alternative employment for the Claimant.

49. In all the circumstances, the Tribunal concluded that the decision to dismiss the Claimant fell within the range of reasonable responses, having regard to s.98(4) of the ERA.

Conclusion

50. For all of the above reasons, the Claimant's claim of unfair dismissal fails and is dismissed.

Postscript

In his "Objections to Redundancy and Formal Grievance regarding Unfair Selection" document, the Claimant stated: *"My confidence in this process and the fairness in any outcome is completely shattered. My trust and confidence in the process and my employer is consequently, completely destroyed. The process is procedurally and materially unfair and will lead to my unfair dismissal when it is confirmed"*. The Respondent did not place any substantive reliance on this aspect but it could be said that once the Claimant had communicated with the Respondent in the above terms, it was inevitable that his employment was going to come to an end.

Employment Judge Gilroy QC
29 April 2022