EMPLOYMENT TRIBUNALS

Claimant: **Mr H. Sandhu**

Respondent: **Accles & Pollock Ltd**

Heard at: Birmingham by CVP **On:** **16 & 17 March 2022**

Before: Employment Judge Connolly, Sitting Alone

Representation

Claimant: In person
Respondent: Mr S. Willey, Solicitor

JUDGMENT having been sent to the parties on 18 March 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

INTRODUCTION

1. This is a claim of unfair dismissal. The Claimant was dismissed, ostensibly on the grounds of redundancy, on 23 October 2020. By a claim form, presented on 25 November 2020, he brought two claims: one of unfair dismissal and one for a redundancy payment. I have not been provided with the dates for early conciliation but understand that it was undertaken and the claim has been brought within the relevant statutory time period.

2. At the hearing the Claimant clarified that he was paid his redundancy payment and he consented to that claim being dismissed upon withdrawal.

3. The issues in the remaining unfair dismissal claim were discussed and identified at the start of the hearing as follows:

    3.1 What was the reason for Mr Sandhu's dismissal? Was it that he was redundant, or was it because the Respondent had a negative view of him as a troublemaker and/or he was on furlough as Mr Sandhu asserted?
    3.2 Was the dismissal fair or unfair within the meaning of **Section 98(4) of the Employment Rights Act 1996 ('the ERA 1996')**, and in this case,

having particular regard to

(a) whether the dismissal was within the range of reasonable responses where it was possible for the Respondent to have continued employing the Claimant on furlough
(b) whether the Respondent acted reasonably in selecting the Claimant for redundancy including in particular whether it reasonably identified a pool of employees from which it should make any redundancies and it adopted a reasonable selection criteria.

3.3 There was a possible issue around whether the Respondent took reasonable steps to find the Claimant suitable alternative employment.

3.4 If the dismissal was unfair, I was invited to consider whether any award should be reduced to reflect the possibility that the Claimant would have been fairly dismissed in any event.

4. It was agreed that there was no issue as to whether the Claimant was adequately warned and consulted, or whether the Respondent reasonably scored the Claimant (subject to the issue about reasonable selection criteria at [3.2(b)] above.

RELEVANT LAW

Reason for dismissal

5. It is for the Respondent to establish why they dismissed the Claimant and that the reason falls within one of the potentially fair reasons set out in **s.98(2) ERA 1996.**

6. In cases such as this, in order to determine the reason for dismissal, I have to look at the mental processes of the individual who took the decision to dismiss. The reason for their decision is the set of facts or beliefs known or held by them which caused them to dismiss (**Abernathy v Mott Hay & Anderson [1974] IRLR 213**) .

7. Redundancy is defined in **s.139 ERA 1996:**

(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.

8. in this case, there is no dispute that the Respondent's need for employees to carry out project engineering work had diminished, but there was a dispute as to whether that was the sole or principal reason for the Respondent's decision to dismiss the Claimant.

Fairness

9. If the Respondent proves it had a potentially fair reason for dismissing the Claimant, I have to go on to consider then whether the dismissal was in fact fair or unfair. The relevant statutory provision is **s.98 of the ERA 1996,** particular, **s.98(4)** which provides that:

"*…the determination of 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."

10. The burden of proving whether a dismissal is fair or unfair is neutral. The test which I apply is that set out in **s.98(4)** above and the relevant factors to which I have regard include those identified in paragraph [3] above which are derived from **Williams v Compare Maxim [1982] IRLR 83 EAT.**

11. In relation to whether an employer has acted reasonably in identifying a pool of employees from which the selection for redundancy will be made, I have had regard to a case called **Capita Hartshead v Byard [2012] ICR 1256 [31]** where the EAT reviewed the cases and set out the following guidance**:**

(a) *It is not the function of the Tribunal to decide whether they would have thought it fairer to act in some other way. The question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted (per Browne-Wilkinson J in **Williams v Compare Maxim (above)***

*(b) the Courts were recognising that reasonable responses test, was applicable to the selection of the pool from which redundancies were to be drawn (per Judge Reid QC in **Hendy Banks City Print Limited v Fairbrother and Others (UKEAT/0691/04/TM)***

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

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

for consideration for redundancy

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

12. Drawing together the above, when considering the fairness of a dismissal:

    12.1 My starting point has to be the words of s.98(4) ERA 1996
    12.2 In applying that section, I have to consider the reasonableness of the Respondent's conduct in this case, not simply whether I would have done the same, or done it differently
    12.3 I must not substitute my judgment as to what is the right course to adopt for the Respondent's judgment.
    12.4 In many cases, there is a band of what is reasonable - one employer might reasonably take one view and then another will quite reasonably take another
    12.5 My function in cases where there is a band of reasonable responses is to determine whether the relevant decision fell within that band which a reasonable employer could have adopted.

Adjustments to Awards

13. Where a Tribunal finds that a dismissal was unfair, it must go on to consider the chance that the employment would have terminated in any event, had there been no unfairness (the 'Polkey' issue). The relevant statutory section is **123(6) ERA 1996.** There is guidance on how one considers the chance that employment would have been fairly terminated by a particular employer in **Hill v The Governing Body of Great Hay Primary School 2013 IRLR 274.**

THE EVIDENCE

14. The Respondent called 3 witnesses: Mr Horton (who was the Commercial Director, the Claimant's line manager and the decision-maker in respect of the Claimant's dismissal, although now retired); Mr Begley (the Divisional MD who heard the Claimant's appeal against his dismissal) and Ms Rammell (who was an HR officer but has now left the Respondent's employment). The Claimant also gave evidence. I was provided with 2 bundles: one a core bundle of 116 pages; the other a supplementary bundle of 150 pages which the Claimant felt were relevant. Mr Willey, on behalf of the Respondent, also provided a written Skeleton Argument which was much appreciated and of significant assistance in using the time effectively.

RELEVANT FACTS

The parties

15. The Respondent is a company which manufacturers components for use in the Aerospace sector. At the relevant time it employed 50 people. It is, however, also part of a group of companies including 3 other companies based on the same site. Some employees were engaged across more than one of these companies.

16. The Claimant was employed by the Respondent as a Project Engineer from the 11 November 2015 until he was dismissed. There is a dispute about the date of dismissal: the Respondent says it was the 23 October 2020 and the

Claimant says it was the 16 November 2020.

History prior to the redundancy situation

17. Project Engineers worked (as the name might suggest) on specific projects for the Respondent. Mr Horton described their work to be that of a liaison between the customer, the supplier and the Respondent's various internal teams, usually, when the Respondent secured new work. Their purpose was to procure and design tooling and to put in place the manufacturing processes. Mr Horton described them as the 'lynchpin' when a project was introduced into the company: the lynchpin between the customer, the supplier and the internal team.

18. The Respondent employed 3 individuals within Project Engineering: the Claimant, Mr Doody and Mr Taylor. It was agreed that the Claimant and Mr Doody were employed as Project Engineers, but there was a relevant dispute between the parties as to whether Mr Taylor was properly characterised as a Project Engineer, or a trainee Project Engineer.

19. Mr Taylor was first employed from about 2016, initially, as an apprentice. He worked across a number of companies in the group. He commenced working for the Respondent in or about 2017. He completed a HNC in 2019 and was scheduled to progress to a BEng in manufacturing engineering, thereafter, starting in September 2020. In 2019, apparently after he completed his HNC, he ceased using the term "apprentice" for example, in his email signature. Mr Horton gave evidence that was in order to give him more credibility with clients. Mr Horton said that Mr Taylor was, however, still considered to be in training by the Respondent. Mr Horton liaised with the University in relation to Mr Taylor's BEng course in or about March 2020 and wrote a letter on behalf of the company, formally agreeing to pay Mr Taylor's fees on the commencement of his course in September 2020. I note that on the 22 May 2020, in an email in the supplementary bundle [page 56], the company, internally, continued to describe Mr Taylor as an apprentice which the Claimant in turn rehearsed in his email without disputing it.

20. Mr Horton gave evidence which was not challenged that, although Mr Taylor undertook project engineering work, he was allocated a mentor, Mr Smith and he received guidance in his work from both his mentor and Mr Horton. In addition, Mr Horton said Mr Taylor undertook what he described as more mundane shopfloor tasks. Mr Taylor's salary at the time of the Claimant's dismissal was approximately 60% of the Claimant's which the Respondent, through Mr Horton, said reflected the fact they still considered Mr Taylor to be in a training role.

21. Leaving Mr Taylor and turning to the chronology of events, in November 2018, the Claimant received a final written warning for misconduct (which expired in November 2019). This disciplinary process prompted a written complaint from the Claimant, on the 29 October 2018, about the way he had been spoken to or dealt with by various individuals. He felt he had been bullied. The complaint did not involve anyone directly involved in the subsequent redundancy process. The Claimant said the Respondent did not respond to his complaint. Mr Horton gave evidence that he was aware the Claimant was dissatisfied after the disciplinary process and he set up a practice whereby he would meet the Claimant once a week to talk through

and resolve any issues.

22. There are no other relevant events until March 2020 when as we all know, the country, indeed the world, was affected by the Coronavirus (Covid-19) pandemic. The aerospace and aviation industries were particularly badly impacted with large number of planes grounded and most people prevented from travelling. The Respondent's orders fell by between 65%-70%. By April/May 2020, a number of employees had agreed to be placed on furlough while the Respondent considered its position. The Claimant continued to work from home.

23. On 14 May 2020, during the ordinary course of his work, Mr Horton had occasion to email the Claimant to say that he did not like the tone of an email from the Claimant to a colleague which the Claimant had copied him into. It is fair to say the Claimant's email to his colleague was critical in its substance and forceful in its terms. On the 21 May 2020, Mr Horton contacted the Claimant to inform him that the Respondent wanted to place him on furlough under the Coronavirus Job Retention Scheme. A significant number of other employees were on furlough at that time. It is fair to say that the Claimant was initially unhappy to be the only individual offered furlough within project engineering. He made a connection in his own mind between Mr Horton's criticism of the tone of his email and the decision to offer him furlough.

24. Mr Horton explained in evidence that the Claimant was offered furlough because the projects on which he was working came to an end. The Claimant, for his part, largely accepted that his projects had concluded by this stage, although he maintained that one project had been moved to Mr Doody at an unknown time before the furlough decision, possibly in the region of 2-weeks or so, but he could not remember clearly. I note that the Claimant accepted that the work he was doing had come to an end in the Appeal Hearing notes [page 70]. I note also in an exchange of emails [page 133 of the supplementary bundle], that the Claimant accepted that the decision to offer or place him on furlough was fair. In evidence he accepted that this was an accurate description of the view he took at the time.

Existence of a redundancy situation

25. By June 2020 the Respondent envisaged it may need to make redundancies and made an announcement to that effect. By August / September 2020, the Respondent's senior management team decided that up to 19 of 50 roles within the company would need to be removed from the structure. The managers, including Mr Horton, considered whether they could simply continue with employees on furlough. They took the view that the recovery time in the aerospace or aviation market would be between 3-5 years. This view, according to Mr Horton was in keeping with other specialists in the industry. In the circumstances, they felt it was unrealistic to think that recovery would occur before the end of the furlough scheme or to think that the scheme would therefore facilitate the long-term retention of roles in their industry. They took the view that a decision had to be taken on which roles could be retained going forward.

Pool and selection criteria for redundancy

26. The Respondent I believe recognises Unite the Union. Certainly whether they are recognised or not, in consultation with them, the Respondent identified and agreed pools of employees from which redundancies would be made and the selection criteria which would be used.

27. In relation to project engineers, the Claimant and Mr Doody were put in one pool. Mr Taylor was put in a pool with those in training which included two training process engineers. The Respondent took the view that the business required one fully qualified project engineer and one trainee, either in process or projects.

28. A set of criteria was also developed against which the project engineers would be scored in order to select an individual for redundancy. These criteria comprised: a range of 25 skills which attracted a total of 75 points, then moderated to a score out of 50; absence record which attracted a total of 10 points and disciplinary record which attracted a total of 10 points.

29. The 25 skills identified covered various aspects such as customer support, quality, design, product knowledge, software knowledge, practical skills, qualifications, experience and commercial skills. Mr Horton explained that the purpose in using skills and including a range of all skills deployed in the role, was for the Respondent to ensure that whoever it kept in place, had the widest skill-base possible to be able to react to the potential market and what it required. In respect of product knowledge, in particular, Mr Horton said that these skills were required to take the company forward and couldn't be ignored.

Process and scoring

30. Having determined the number of potential redundancies, pools and selection criteria, the Respondent began the redundancy process. The Claimant makes no complaint about the marking or consultation process and so I will deal with it relatively briefly.

31. The Claimant was warned he was at risk of redundancy by a letter dated 2 September 2020. He was invited to and attended a first consultation meeting with Mr Horton and Ms. Rammel on the 7 September 2020. Prior to the meeting, Mr Horton scored the Claimant and Mr Doody. Both scored the maximum possible for attendance and disciplinary records. In relation to skills, the Claimant scored 36 out of 50 and Mr Doody 48 out of 50. In evidence, Mr Horton described the Claimant as a very competent project engineer and expressed the view that it was unfortunate that he was being considered against someone whom Mr Horton considered to be an exceptional Project Engineer.

32. The first consultation took place between the Claimant, his Unite Representative, Mr Horton and Ms. Rammel. Mr Horton explained the downturn in orders for 2020 and 2021 (what is known as 'scheduling') which had led to the decision to make redundancies. He provided the Claimant with his matrix and scores. The Claimant raised his perception that it was unfair because he was on furlough. Mr Horton explained the reason he was on

furlough was because his work had come to an end and that this had had no impact on the redundancy situation. The Claimant invited Mr Horton to consider avoiding redundancy by reducing his work to 3-days per week. Mr Horton and Ms. Rammel referred the Claimant to an initiative called "Workforce Solutions" set up by the Group to try and find alternative work for anyone displaced by redundancy.

33. A second consultation involving the same people took place on 15 September 2020. At that meeting, Mr Horton explained that the cost reduction of 3-days per week was not an option in light of the company's situation: they needed to remove one Project Engineer and retain one full-time Project Engineering role. They moved on to discuss scores, in particular, whether including product knowledge unfairly favoured the other employee in the pool and whether the Claimant's score on one of the commercial skills should higher. Finally, the Claimant queried why Mr Taylor was not in the same pool. Mr Horton explained that Mr Taylor was included in a pool of other trainees. In Tribunal, Mr Horton explained that Mr Taylor had been pooled with 2 trainee process engineers in order to identify 1 of 3 trainees to be retained and that Mr Taylor had been retained.

34. After consultation, Mr Horton revisited the Claimant's scores and the criteria and accepted that, given there were 7 areas if product knowledge, each of which attracted 3 marks, product knowledge was unduly heavily weighted and so he reduced the available marks to 14 and the overall total to 68. He also revised the Claimant's mark on communication skills with the end result the Claimant scored 38.24 out of 50 and Mr Doody 47.79. The Claimant therefore remained the lowest scoring of the 2 employees.

35. The final consultation took place on the 24 September. Mr Horton confirmed the situation had not changed in terms of the reduction of work and in this meeting, he referred to a reduction to 30% of turnover (i.e. a reduction of 70%). The Claimant raised the possibility that he continue on furlough. Mr Horton explained his view that that was not realistic as I have already outlined above. The Claimant was provided with his redundancy figures and was given notice of termination of his employment by reason of redundancy. This was confirmed in a letter of the same date. The termination date was 23 October 2020. Whatever view one takes of the status of Mr Taylor's employment, it is not in dispute that, thereafter, the Respondent continued its business with 1 rather than 2 qualified Project Engineers or 2 rather than 3 employees working in Project Engineering.

36. Mr Horton maintained that the reason for the Claimant's dismissal was redundancy. He was asked whether other events played a part in his decision and he responded as follows:

    36.1 The Claimant's complaint of October 2018 - he maintained this formed no part of his decision to make the Claimant redundant and that it (and the associated disciplinary sanction) were 'long forgotten' and 'the furthest thing' from his mind when he felt he was fighting to save the company. He pointed to the Claimant's full score for his disciplinary record.

    36.2 His unhappiness with the tone of the Claimant's email to his colleague - Mr Horton said he regarded the issue about the tone of an email as a

very minor matter and that it was not in his mind when he was grappling with the enormous reduction in work and decisions on furlough and employment and redundancies that the Respondent was facing

36.3 The fact the Claimant was in furlough - which he said formed no part of his decision or scoring.

Alternative employment and mis-information

37. During the course of the various consultations, although it is not entirely clear which, Mr Horton and Ms. Rammel provided the Claimant with information and a pack relating to Workforce Solutions. This was an initiative set up to provide employees displaced by redundancy with alternative work. There is a great deal of confusion as to exactly what information was in the pack and exactly what was said about Workforce Solutions. As a matter of fact, they engaged employees as temporary workers and sought to place them into assignments in partnership with an Employment Agency. In respect of someone like the Claimant, the guaranteed rate of pay was substantially lower than that which he had with the Respondent. It is accepted that the information the Claimant was given as to the nature of the work and his rate of pay, was inaccurate. The Claimant remained anxious and confused about the opportunities with Workforce Solutions until this was clarified by their General Manager on the 21 October 2020 and confirmed by Ms. Rammel on the 28 October 2020. The Claimant agreed to a trial period with them, during which [page 103], they were unable to find the Claimant any engineering work at all through the Employment Agency with which they partnered. In the circumstances, the Claimant terminated his contract with them during the trial period with effect from 16 November 2020.

38. That is how there comes to be a dispute about whether the Claimant's effective date of termination was the 23 October or the 16 November 2020. The Respondent maintained the view it was the 23 October but agreed to pay the Claimant a redundancy payment on the basis of 5 years' service up to the 16 November in any event.

39. The Claimant did not suggest that there was any other alternative work which the Respondent could or reasonably should have offered him in the circumstances.

Appeal against dismissal

40. In the meantime, the Claimant appealed against the decision to dismiss him. The appeal was heard by Mr Begley on 14 October 2020. Mr Begley identified 3 bases of the appeal: firstly, whether the pool should have been extended to include Mr Taylor; secondly, whether the skills matrix was unfairly biased towards product knowledge and thirdly, whether the fact that the Claimant was placed on furlough, played a part in predetermining the decision.

41. Mr Begley upheld the decision that Claimant should be dismissed by reason of redundancy by letter dated 15 October 2020. On each of the grounds of appeal, he upheld the view of Mr Horton which I have already set out.

42. In relation to the process followed in consulting with the Claimant, taking the decision to dismiss and conducting the appeal, the Claimant accepts that the

Respondent followed 'the correct procedure, to the letter' and he makes no complaint about the same. So, I turn to my conclusions which is really the meat of the decision but is based on the facts I have already set out and I will deal with each of the issues we identified in the order we identified them, or I identified them.

CONCLUSIONS

43. I will deal with each of the issues in the case in the order in which they are identified above.

Reason for dismissal

44. What was the reason for the Claimant's dismissal? It is plain that the Respondent's need for Project Engineers had diminished and as such, there was a redundancy situation as defined in **s.139 ERA 1996.** I find that this redundancy situation was the sole reason for the Claimant's dismissal.

45. The Claimant contended he was perceived as a troublemaker, as evidenced by his complaint in October 2018 and/or Mr Horton's May 2020 email about the tone of the Claimant's correspondence. He maintained that this all led to him being unfairly placed on furlough which in turn, as he put it, all had a part to play in the decision to dismiss him. I do not accept that for the following reasons: -

    45.1 In essence, I accept Mr Horton's evidence, which I have already set out above

    45.2 I was bolstered in that conclusion by the fact it is inherently unlikely that an email of October 2018 was in Mr Horton's mind when he took the decision to dismiss in September 2020, when that email had not been referred to at all in the intervening 2-years.

    45.3 The more recent email exchange about tone was plainly, on its face, a minor matter and, again, unlikely to have had any impact on a significant decision about who to retain to put the Respondent in the best position to meet challenges going forward

    45.4 The Claimant was unable to identify any direct evidence or even evidence from which I could draw an inference that these matters played any part in the decision at all.

46. The alternative way in which the Claimant relied on these matters was to say that the failure to deal with his complaint and the decision to offer only him furlough, demonstrated that he had been dealt with unfairly by the Respondent in the past. This was, he contended, "precedent" from which I could infer that he was unfairly treated when he was dismissed. I do not accept that argument. I have to judge the decision to dismiss on its merits. I do not have sufficient information about the circumstances surrounding the complaint in October 2018, or the decision to place him on furlough to properly adjudicate upon them. Even if I did, and I thought that they were in some way unfair, or fell below best practice, they are wholly separate matters. In my view, I cannot properly draw an inference that, if one was unfair, his

dismissal was also likely to have been unfair.

Fairness of dismissal - Avoiding dismissal entirely

47. The Claimant contended that the Respondent was unreasonable in choosing to make a Project Engineer role redundant at all in the circumstances where they could have retained him or any Project Engineer on furlough.

48. The purpose of the Coronavirus Job Retention Scheme under which the concept of furlough was introduced was, as its title suggests, "to retain jobs". Specifically, it seems to me to allow employers to retain jobs until the impact of the pandemic had receded sufficiently or had passed and those jobs could be reinvigorated. It is clear the scheme envisaged that redundancies may still be necessary from the guidance to the scheme. This states that an employee's redundancy rights continue to apply while they are furloughed.

49. I accept that Mr Horton and the Senior Leadership Team applied their minds to this question of whether they could continue to retain the Claimant or others on furlough. They logically reasoned that, in their industry, the impact of the pandemic was likely to be long term in the sense it would exceed the duration of the furlough scheme. In the aviation industry, orders are often placed years in advance and the Respondent had regard to the schedule of orders going forward into 2021. In my view, they reached a conclusion that was open to a reasonable employer, namely, that a decision had to be taken as to the most appropriate structure to carry out the work that they had including which roles could be retained going forward.

50. I do not accept that that decision was unreasonable or that a reasonable employer was constrained to retain the Claimant on furlough in order to avoid redundancy.

Fairness of dismissal - Pool for selection for redundancy

51. The third issue concerns the pool for selection for redundancy and whether the Respondent acted reasonably in restricting the pool to the Claimant and Mr Doody and not extending the pool to Mr Taylor.

52. The Claimant's case was that all 3 of them were Project Engineers and, as such, it was appropriate that they be pooled together. The Respondent's case fell into 2 parts: firstly, that there was a distinction to be made between the Claimant and Mr Doody, on one hand, and Mr Taylor, on the other, whereby Mr Taylor was properly considered a trainee. Secondly, if it was accepted that Mr Taylor was a trainee, it was reasonable to limit the pool to those who were fully trained and proficient engineers doing similar work.

53. The Respondent's case was developed as follows: -

    53.1 Mr Taylor had started as an apprentice and was still a Project Engineer in training whereas the Claimant and Mr Doody were qualified, formally and time served, respectively. Whilst trainee was not the title used, the fact he was a trainee could be seen from his history as an apprentice and his continuation of his training on the BEng as demonstrated in the documents.

    53.2 Mr Taylor's status as an 'engineer in training' could also be seen in his

salary level which was approximately 60% of the Claimant's and

53.3 as a consequence, he did not undertake the same range or level of work as the Claimant and Mr Doody and he required supervision and mentorship for the work he did undertake.

54. I have to say this aspect of the case caused me some difficulty. On the issue of fact, as to whether Mr Taylor was properly regarded as a trainee, the evidence was relatively general in its terms, but the Claimant was unable to effectively challenge the Respondent's evidence as to the nature of Mr Taylor's work. In the circumstances, I preferred the Respondent's evidence that, although not part of his title, Mr Taylor was and remained. This was corroborated by the May 2020 email [supplementary bundle p133].

55. This finding did not, however, determine the issue: even if Mr Taylor was a trainee, I had to decide whether it was reasonable not to include him in the pool with the Claimant and Mr Doody. I had some concerns that the pool into which Mr Taylor was placed was not based on similarity of work but the fact that the individuals were in training. I had some concerns that the end result of pooling in this way was that the Respondent retained a lesser skilled trainee Project Engineer rather than a more skilled Project Engineer.

56. The Claimant, however, did not really develop these points either in evidence or submission. His case was relatively simple: they were all Project Engineers and they should , therefore, have been in the same pool.

57. In the final analysis, I remind myself of the guidance in the **Capita** case. I find that Mr Horton and the Senior Team genuinely applied their minds to the issue of how to pool the trainees in the various departments. I find that they genuinely and reasonably took the view that their work was at a different level than the work undertaken by those not in training. I accept that the Union agreed to these pools. I find, on that basis, that the Respondent was reasonably entitled to place the Claimant in a separate pool to Mr Taylor which had the effect that those doing similar levels of work, specifically the Claimant and Mr Doody were judged against each other. Whether Mr Taylor's pool should or should not have reasonably included those doing different work, it is not a matter I have to decide. My focus has to be on whether it was reasonable to limit the pool into which the Claimant was placed and to exclude Mr Taylor from it and on balance I find it was.

Fairness – selection criteria

58. The fourth issue was whether the Respondent was reasonable to include product knowledge as part of their selection criteria. The Claimant maintained it was unfair to include this at all because this was something of which Mr Doody had more experience because of the wider nature of projects on which he had worked. The Claimant maintained he could pick up such knowledge in the future.

59. I accepted Mr Horton's evidence on this issue, which I have already set out, namely, that the purpose in using skills and including a range of all skills was to ensure that whoever the Respondent retained had the widest skill-base to be able to react to the potential market. I accept that product knowledge is required in a Project Engineer role and could not be ignored. I entirely accept

that the Claimant is a very competent Project Engineer and I have no doubt he would be able to increase his product knowledge if given a project which involved a different product in the future. Nonetheless, I accept that someone who already had that knowledge and experience is likely to be able to respond more effectively. The Claimant could not and did not effectively undermine Mr Horton's evidence in this regard. In the circumstances, I conclude that it was open to a reasonable employer to include product knowledge in the list of skills in the redundancy selection criteria.

Fairness – alternative roles and the effective date of termination

60. The fifth and final issue concerned the search for suitable alternative employment and the effective date of termination. The Claimant accepted there was, in fact, no suitable alternative employment available for him. He was however upset by and critical of the Respondent's failure to give him accurate information about the agency work initiative launched by WFS. The Respondent accepted that the information they gave was inaccurate, that this was unfortunate and they apologised to the Claimant for the upset this caused.

61. I find that the inaccuracies were identified and resolved before 23 October 2020 by WFS and that this was confirmed before the end of the trial period by the Respondent. In circumstances where, firstly, there was no suitable alternative employment to be offered and, secondly, where the inaccuracies were rectified, I accept the Respondent's submission that this was not capable of, or alternatively does not as a matter of fact, render the decision to dismiss the Claimant unfair. The Respondent was required to make a reasonable search for alternative roles which it did. The Respondent was required to conduct a reasonable consultation on the redundancy situation and the alternatives which it had, which it did. The inaccuracies concerned alternatives which all parties accepted, were not suitable for the Claimant, but simply some form of assistance in which he may be interested.

62. It is very unfortunate that, at a stressful time when clear and accurate information is important, the Respondent failed to ensure that it provided such information. It may be that they had the best intentions in passing over what they had as quickly as they could, but in fact they did more harm than good where the Claimant was thereby misled and disappointed. No doubt the Respondent will learn from that on future occasions.

63. It is right that, in light of their errors, the Respondent agreed to pay the Claimant a redundancy payment based on 1 year's additional service than they said he was legally entitled to. The Claimant felt that his effective date of termination was 16 November 2020 and, therefore he was entitled to that additional years' service.

64. I find his effective date of termination was 23 October 2016. That comes about by virtue of **Section 138(2B)(1) and (4) of the Employment Rights Act 1996**. This section provides that, where the employee gives notice to terminate a new contract during a trial period, he will be treated as having been dismissed when the original contract came to an end and for the same reason that contract ended, namely, redundancy. That might seem odd to the Claimant where, as far as he was concerned, he was employed by the Respondent or as an associated company up to 16 November 2020. The

purpose of the provision is, however, to ensure employees' redundancy rights are preserved and that they are deemed dismissed by reason of redundancy, even where they have rejected an alternative contract. It encourages investigation of alternative work without advantaging or disadvantaging either party. Although it might seem odd on the facts, the Respondents were, in my view, correct to identify the Claimant's effective date of termination as 23 October 2020. They therefore did pay an additional weeks' redundancy pay which they were not obliged to pay.

OVERALL CONCLUSION

65. Standing back and having considered all the various arguments raised, I find, overall, that the Respondent dismissed the Claimant by reason of redundancy and that their decision to do so fell within the range of reasonable decisions, open to a reasonable employer in the circumstances that the Respondent faced.

Employment Judge Connolly

Signed on 9 May 2022