EMPLOYMENT TRIBUNALS

Claimant: Paul Bannon

Respondent: BAQUS Group Limited

Heard at: **Southampton Employment Tribunal (Via VHS)**
On: **12th and 13th April 2022**

Before: **Employment Judge Lang**

Representation
Claimant: In person
Respondent: Mr. D. Jones (solicitor)

RESERVED JUDGMENT

1. The claimant was unfairly dismissed by the respondent, for reasons relating to the procedure.

2. There was a 50% chance that the claimant would have been fairly dismissed had the Respondent followed the correct procedure.

3. The matter should be set down for a remedies hearing on 8th September 2022 via VHS at 10am with a time estimate of 2 hours.

REASONS

Introduction

1. This is Mr Bannon's (hereafter the claimant) claim, by way of ET1 dated 6th August 2020, for unfair dismissal arising from his employment with the Respondent BAQUS Group Limited (hereafter the respondent).

2. The matter came before me on the 12th and 13th April 2022 via the Video Hearing Service platform. The Claimant represented himself, the Respondent was represented by Mr Jones, solicitor. I was provided with a bundle for the

hearing which ran to 232 pages. In addition, I received a written statement of the claimant, as well as from Mr Wakefield and Mr McNeil for the respondent. During that hearing I heard evidence from all of them. I then heard submissions from both parties. Mr Bannon has also provided a document in response to the ET3 which I have read considered. Due to time constraints this Judgment was reserved.

3. I have been slightly delayed in producing this Judgment and written reasons due to other professional commitments and no discourtesy to the parties was intended.

4. Within the claimant's statement he drew my attention to various statutory provisions. That included reference to dismissal arising from a protected disclosure. At the start of the hearing, I enquired if the claimant was asserting that there had been such a detriment as the case had not been pleaded that way. He confirmed at the outset that having had further opportunity to explore this cause of action he accepted that it did not apply to this case.

Issues

5. At the start of the hearing, I circulated a draft list of issues for the parties to consider. That list was agreed. The claimant at this stage indicated that he accepted that there had been a genuine redundancy situation, however, later in the course of the hearing he gave submissions which indicated to me he did not accept that there was a genuine redundancy situation. I have therefore included paragraph 5 as an issue which I must consider. I am satisfied from the information I have heard that the evidence has been put and submissions given by both the claimant and respondent for me to deal with this point justly.

6. Due to time no evidence or submissions were heard in respect of Remedy, however, I indicated at the start of the hearing that I would consider whether a *Polkey* reduction was appropriate and have heard evidence and submissions on this.

7. For the avoidance of doubt, I have removed the issues in respect of remedy for the purpose of this judgment. The issues I must therefore consider are as follows:

Unfair dismissal

i. Was the claimant dismissed?

General

ii. If the claimant was dismissed, what was the reason or principal reason for dismissal?
iii. Was it a potentially fair reason?
iv. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

Redundancy dismissals

v. Was there a genuine redundancy situation?
vi. What was the reason or principal reason for dismissal? The respondent says the reason was redundancy.
vii. If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will usually decide whether:
    a. The respondent adequately warned and consulted the claimant.
    b. The respondent adopted a reasonable selection decision, including its approach to a selection pool and to what extent did the previous grievances raised by the Claimant play in his selection.
    c. The respondent took reasonable steps to find the claimant suitable alternative employment.
    d. Dismissal was within the range of reasonable responses.

Remedy for unfair dismissal

a. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
b. If so, should the claimant's compensation be reduced? By how much?

Findings of Fact

8. Having heard and considered the evidence I make the following findings of fact.

9. The respondent is a property and construction consultancy company. It currently employs 42 people over 6 offices in England. That is a reduction from the 54 employees at the time the ET3 was lodged.

10. The claimant's employment began on 15th September 2003 as a Graduate Building Surveyor. His employment was terminated as of 23rd September 2020, at this stage he was employed as an Associate Director at the Chichester branch. At the outset of these findings, I accept the respondent's

assertion, which was accepted by the claimant in his evidence that he has found the process personal, that is understandable, however, for the avoidance of any doubt I make a clear finding that the claimant was regarded by the respondent, as a good employee who was good at his job, at no stage has the Respondent suggested otherwise. This is not a case which has concerned the claimant's performance, behaviour or capability.

11. It is common ground that in September 2019 the respondent undertook a redundancy process. I was told, and I accept and find that there had been a decision had been due to a reduction in building surveying work. There was an initial department meeting on 27th September 2020 [33] where the department was informed that the company decided to undertake that process. Individual meetings then followed that day. It was not intended that the claimant would form part of those at risk of redundancy, because he undertook party wall work, which was an area the company sought to grow. However, in the claimant's meeting on 27th September, he indicated that he wished to be included as one of those at risk of redundancy. It was accepted in his evidence that this was, so he was able to maintain relationships with his colleagues who had gone through the process although he did not expect to be selected for redundancy.

12. A letter followed from the respondent on 30th September 2019 [34-35]. This letter set out the timetable and the criteria which would be applied to the process. Mr Bannon wrote to Mr Wakefield by way of email on 3rd October 2019 sharing his concerns with the criteria and his observations on it. Redundancy meetings subsequently took place, however as another employee volunteered for redundancy that concluded the process. The scoring from that process is relevant. The claimant scored 80.67%, compared to Employee A who scored 75.42% and Employee B who scored 71.67% [41]. The breakdown of the scores is provided at [43] and the claimant scored full marks for General Skill levels and Qualifications. It is right that I observe that on receipt of the scoring notwithstanding being the highest scorer the claimant challenged the scores which were attributed to him as set out in an email on 5th November 2019 at 18.48 [42].

13. Throughout his employment the claimant had raised various grievances. It is accepted that these were not dealt with in a timely fashion by the respondent. Between September 2019 and November 2020 Mr Allin, based in the Chichester Office, had been promoted to Director. On 11th November 2019 an email was sent by Mr McNeil to the claimant in response to a document titled 'grievance report'. Within this email Mr McNeil records that this was discussed on 4th November 2019 and that Mr McNeil had hoped '*we could all move on and not live in the past but clearly you have tabled the matter for further discussion. That is your absolute prerogative'.* He goes on to note that Mr Allin

will review the position, and if no agreement can be reached between the claimant and Mr Allin the matter would be referred to himself.

14. The Claimant responded to that email later on the 11th of November, commenting that this was the first time the points had been acknowledged or addressed by the respondent. It is correct that when the grievances had been raised in the past neither Mr Allin, nor Mr McNeil were in the position they were. I find that once brought to their attention they have dealt with the grievances.

15. I have not been provided with all the details of the grievances, however, in a letter of 5th December 2019 [52-56] the Claimant sets out a schedule of 13 items which run from October 2014 through to September 2019. Some of those matters were regarded as having been '*closed'* from the claimant's perspective others remained '*live'*. The claimant within this letter set out his position on each of them. At the conclusion of his evidence, I had asked the claimant if any of the allegations involved Mr Allin or Mr Wakefield. I was told that they did. In respect of Mr Allin this related to discussion on salary and bonus which the claimant did not consider appropriate. For Mr Wakefield it related to information held on a drive, this allegation related to July 2019. For this judgment, I do not need to make any findings in respect of the allegations of the grievances, and processes followed, save to find that Mr Allin and Mr Wakefield were mentioned within them.

16. There were various exchanges between the parties in respect of the grievances up until 19th December 2019 where Mr Allin responded to the outstanding matters with the wording suggested by the claimant. In turn on 19th December 2019 the Claimant responded "*Many thanks Richard. This is very much appreciated. I can now confirm that my grievances are appeased and for all concerned they can now be considered closed."*

17. Within his documentation the claimant draws my attention to the Bribery Act 2010. This relates to offers made by the Respondent to address some of the concerns, which related to pay, with an increase in salary including a backdating of pay. I do not have jurisdiction to resolve matters under the Bribery Act 2010, however, so far as the claimant relies on these allegations to indicate wrongdoing on behalf of the respondent, from the documentation I have seen I do not find that this conduct was intended, nor could be construed as a bribe. It was a matter of the respondent seeking to resolve the issue and I find that there was nothing wrong with this approach and I do not draw any inference from it.

18. Significantly, the oral evidence of both Mr Wakefield and Mr McNeil was that they considered the grievances had been resolved and all had moved on.

This, it was accepted in the evidence of the claimant, was the same for him. He told me he considered that the matter had been closed. He confirmed that he continued to have a collaborative relationship with those in question and that all had moved on. He had no concerns or problems with Mr Wakefield nor Mr Allin after the grievance and had no dealings with Mr McNeil. There was nothing to give him any concern. It has been suggested that Mr Wakefield and Mr Allin, and Mr McNeill have been biased against the claimant. I do not agree with that suggestion.

19. In the early months of 2020, the effects of the coronavirus pandemic were beginning to be known. On 17th March 2020 Mr McNeil wrote to all staff following the Government announcement of 16th March 2020 for home working. Within that email he stated the following:

> *We are looking in great detail at the impact of this pandemic to our business and will issue a further statement at the earliest date. This situation will have a serious impact on our trading to March 21 given over 35% of our turnover is within the leisure sector and that was effectively closed down last night* [64].

20. A follow up email was sent on 19th March 2020 to all staff from Mr McNeill. Within that email he states "*regrettably we have concluded that we need to substantially reduce overheads to match our income. A major part of this relates to our labour costs."* He confirms that there will be a reduction in staff via the statutory redundancy process which will be implemented and there would be a separate process to reduce working hours. Line managers were to have meetings with individuals.

21. On 20th March 2020 an email was sent to the claimant from Mr Allin. Within that letter the claimant was to be included in the redundancy process and it was confirmed that the intention was to reduce the department to 6. The criteria to be applied as well as the proposed timetable was set out. It was accepted by Mr Wakefield that to reduce the department to 6 would be a reduction of 3 individuals. It was further accepted that only three of these letters were sent out, that included to the claimant. Mr Wakefield and Mr McNeill both told me this was a genuine error and letters should have gone to all the department. It was not a matter, they say, that a decision had already been made. I have no doubt in finding that this error on behalf of the Respondent has left the claimant feeling that his redundancy was a fait accompli, not only in March 2020 but also in the subsequent May 2020 process which resulted in the termination of his employment.

22. The claimant wrote to Mr Allin on 23rd March at 11.53 setting out his observations on the criteria to be applied, which was the same as the earlier and subsequent processes. He also set out his observations on subjective opinion being involved. He did not challenge Mr Allin nor Mr Wakefield undertaking the process, and I have not seen any evidence to indicate that he has done so since.

23. A subsequent email was sent on 23rd March 2020 from Mr Allin to numerous members of staff, including the claimant, explaining that those who were to be included in the initial selection process have been contacted. He also noted that following consideration of the trading position a reduction in salary was sought from members of staff of 40% of salary.

24. Details of Her Majesty's Government's job retention scheme were subsequently made available and on 25th March 2020 Mr Bannon's notice of redundancy was withdrawn. Details of the scheme were circulated on 27th March 2020 and Mr Bannon agreed to become a furloughed worker that day.

25. On 27th April 2020 Mr Allin contacted the claimant by telephone. A phone call of 12 minutes took place at 11.02 on 27th April [78]. Within this call the claimant told me that Mr Allin had suggested that he, the claimant, ceases to be an employee and instead becomes a consultant. This was refused by the claimant and no further action or mention was made of this by Mr Allin or anyone else at this stage. The respondent explains this call as the company looking at their options and exploring them. However, the claimant was the only individual who had this phone call and again this action has in my judgment clearly contributed to the claimant feeling as though he was being singled out and forced from his employment. So far as this being a further redundancy situation, as alleged by the claimant, I do not find that it was, I accept it was the respondent exploring options, however, unfortunate given the circumstances.

26. By 11th May 2020 the respondent had made a decision to revise its business model which resulted in the start of a redundancy process, as communicated to all staff by way of letter [80]. There was no consultation prior to this. The change in business direction was a decision made at board level of which Mr McNeill is chair. At this stage it was forecast that effects of pandemic would last for another 12-18 months. I was told in evidence, and I find that the business had made a decision that moving forward it was going to focus on what it referred to as its core services which were cost management and project management services. It made a decision that save in London other centres would not offer building surveying as the volume of work was not there. I was told and accept that there was a significant reduction in turnover, of around 1/3. The impact on workload is corroborated by the claimant's own

oral evidence where he said that the work issue *had seen me light* and in the appraisal from 12th March 2020 [148] it was recorded, and he agreed with the consents in evidence that *as mentioned above workload is light capacity available.* The claimant queries whether or not building services are still performed by the respondent, particularly given the evidence in respect of consultant agreements, I accept the evidence of the respondent that there was a reduction in their work and that included a reduction in building services work which was to only be undertaken from their London Office.

27. A letter on 19th May 2020 was sent to all employees, that set out the steps being taken by the Respondent to try and reduce their costs.

28. On 22nd May 2020 the claimant was written to [85] and it was set out that he was to be included in the selection process for redundancy. There was no consultation prior to this. It further set out that candidates would be put in to one of four pools, in their office, to make the process as fair as possible. The claimant was put alongside four others in a pool who were primary fee earning staff, doing similar roles to himself in the Chichester office. It did not include Mr Allin, I was told by the respondent, and I accept this was because he had additional responsibilities over fee earning which is why he was not selected. This was subject to challenge by the claimant. I find that in creating the pool in this matter the respondent was genuinely applying its' mind to the redundancy process and I accept that they were trying to make the process as fair as possible.

29. The criteria to be applied and the marking was set out within the letter of 22nd May 2020. That was the same criteria which was applied in the previous redundancy process, and was set out as follows:

    a. General skill levels/ qualifications.
        The subsections of this criteria will be broken down and scored as objectively as we can.
        General skills (40 Marks)
        Qualifications (10 Marks)
    Client relationships (20 Marks)
    Client procurement (20 marks)
    Time keeping/ disciplinary/ work ethic 10 marks

30. It was confirmed that Mr Wakefield and Mr Allin (the author of the letter) would undertake the scoring. No other details in respect of the scoring were provided. A timetable was set out.

31. By 1st June 2020 the claimant was to set out comments on the criteria set out above. The claimant did so by way of email on 31st May 2020. Within that letter, and this is a summary, he explained that the services which the business now stated it would focus on have always been the core services with the other services being supplemental. He suggested that the pool of fee earning staff should be slightly wider in that Mr Allin should be included. He referred to his previous concerns on the criteria (which were the same as September 2019 and March 2020 save the weighting was different), he also set out that there was ambiguity in that the Chichester office would not be promoting building services but would offer services through consultants. He queried if the exercise may well be targeted, particularly given the previous actions of the respondent which he saw as an attempt to remove him from his employment. The suggestions were refuted by Mr Allin by way of email of 9th June 2020.

32. Scoring took place and the claimant was invited to a meeting on 12th June to discuss his score. He declined that face-to-face meeting due to childcare commitments but asked for details to be provided in writing. That information was communicated on 12th June 2020 with the following scoring:

    General skills 16/40 marks
    Qualifications 0/10 marks
    Client relationships 20/20 marks
    Client procurement 20/20 marks
    Time keeping/ disciplinary/ work ethic 10/10 marks.

33. The claimant therefore scored a total of 66. This placed him in position four from five, with others in the pool with the others scoring as follows: Employee A 44.50, Employee B 68.00, Employee D 80.67 and Employee E 74.00. At this stage it had still not been communicated how many people were to be made redundant and it was accepted in the oral evidence from Mr Wakefield that this should have taken place.

34. The claimant has produced a matrix [96] in response to his scoring, including a comparison between the scores he received in September 2019 and this recent exercise. Within that he includes the comments made by the respondent from the first set of scores, comments on the evidence available in reaching their scores, which he said was nil on all of them, and his comments. Whilst he commented on the lack of evidence on all elements of the criteria, his comments naturally focused on the general skills marking where he scored 16/40, and qualifications where he scored 0/10. In comparison in the September exercise, he scored full marks on each.

35. The claimant on 17th June 2020 sent an email to Mr Allin, [98] setting out his response to the initial scoring. That response was detailed but in summary he highlights the difference in scoring in the two processes, querying the changes between the two, noting the only change is the weighting which he suggests may be to achieve a "*desired"* outcome. He challenges whether General skills and qualifications are specific and noting that there has been no restriction of this [in respect of narrowing to specific restrictions] in any correspondence to him. In respect of the general skills, he highlights the change, directs the company to documents and sets out that he has the "*most diverse skill set of anyone."* He sets out his qualifications in full and his comments in respect of the scoring undertaken. At the conclusion he comments "*you will need to obtain your own evidence to corroborate the above, as the evidence I have is hardcopy only, as BAQUS have excluded me from the work server and work emails – so I am unable [sic] provide it for you".*

36. The access to the company IT systems has been a feature of this claim. The claimant states that he did not have access to the IT system, which placed him at a disadvantage as he was unable to access documentation on it. The respondent accepts that he did not have access, the reason for this was, as Mr Wakefield put it, because they were "*hamstrung",* by the HMRC rules on the job retention scheme. The other employees did, however, have access to those systems. Mr Wakefield when cross examined by the claimant, agreed that he did not consider that would be fair, but again comment on the manner in which information was given by HMRC and the need for the company to apply those rules. He considered allowing access would fall foul of them. He did not however think that it was unfair on the claimant because those who had access did not use the information as the claimant would have, in effect to strengthen his case. However, when I asked whether he considered this may have put the claimant at a disadvantaged as he was unable to then put his case in the strongest manner Mr Wakefield confirmed that it would have had that effect.

37. I find that the lack of access to the company IT systems did place the claimant at a disadvantage. The fact other employees did not make full use of the information available to them, as the claimant would have, does not mean that he was not disadvantaged. They had the access to use in the manner which they wished, he did not. While I find the respondent did take account of documents the claimant referred them too, such as the skills matrix, the denial of access to the system and other documents I find impacted on the way in which the claimant wished to draw evidence to their attention. While the respondent states that job retention rules impacted on this access because he could do work for them, the redundancy process, the meetings and the

documents the claimant produced for the process all took place during his time when placed on the job retention scheme.

38. The claimant attended a meeting with Mr Allin on 18th June 2020. That took place remotely due to the claimant's own commitments. I have been provided with the notes from the claimant [100-104] in respect of that meeting, and from Mr Allin [106].

39. Prior to that meeting Mr Allin sent an email on 18th June 2020 at 11.03 to Rob McNeill and Peter Wakefield in respect of the meeting due to take place with the claimant [107]. Within that email he sets out the proposed responses to the points raised, and at the conclusion comments *unless you have anything further to add, you do remain at risk.* Mr McNeill, who was due to be the person undertaking the appeal responded to that at 13.06 stating *Agreed. Now in Liverpool office if you need a chat.* The claimant points to that to show that Mr McNeill was clearly involved in the decision making, and in respect of concerns on the process. I was told that agreement only related to agreeing the structure not the contents However, I find that Mr McNeill from those emails was clearly involved within the process at that stage and that tainted his role in the appeal procedure.

40. On 19th June 2020 at 15.49 [109-110] the clamant set out further submissions were made by the claimant to Mr Allin following the meeting. He set out in detail his response to the criteria including the fairness of the selection criteria in detail. Mr Allin responds on 22nd June 2020 at 17.07 where he sets out the response in detail to the points raised by the claimant. Within that letter he confirms the change in focus of the business to one of "*Cost and Project Management."* He comments that the skills from services whilst not relevant to the core services were acknowledged. With regards to general qualifications, it is commented that "*following careful consideration of your comments, and on the basis that we now acknowledge your Building Surveying degree does provide you with qualifications that are linked to core services, we have decided to reconsider our scores and confirm that yours has been increased to 69.33%, accordingly and your position has moved you from fourth of five to third of five."* The scores of the other employees are provided as follows:

    Employee A - 40.50
    Employee B – 68.00
    Employee C – 69.33 (this is the claimant)
    Employee D – 80.67
    Employee E – 77.33

41. Therefore, I find that as a result of the claimant's submissions there has been an increase in his score, and this demonstrates that the respondent did

consider his points as part of the consultation, although clearly did not accept all of them. I also find that before weighting is applied there is one mark between the claimant and the second placed employee. As part of these proceedings the respondent has produced a table which shows the scores of each employee, for each of the criteria. Significantly, at the bottom of that document the scoring criteria is provided. That provides the breakdown of each of the criterion. Of relevance are the criteria of General skills and qualifications, they are as follows:

General skills

0 no suitable or relevant skills
1-2 core skills relevant to Project Management/ Quantity Surveying
3-4 multiple skills and services that can be offered
5 full multi-disciplinary skills. Services offered/ unique service offered

Qualifications

0 no relevant qualifications
1 relevant core qualifications (undergraduate degree, etc)
2 Relevant core qualifications (masters degree or above)
3 Professional qualifications (professional bodies etc).

42. I find, as the claimant told me, that the first time he had seen the breakdown for the scoring was part of these proceedings. This was fairly acknowledged in the evidence of the respondent, and I note that again when Mr Wakefield was cross examined on that, he confirmed that it wasn't given to the claimant and '*perhaps we should have done".* I find that had the claimant been given the breakdown he would have sought to provide more evidence of the project management and quantity surveying skills. Whether or not this evidence would be accepted so to change the position is a different question, but I find he would have sought to put his case, as he has challenged those elements at this hearing.

43. The claimant has also challenged the suitability of Mr Allin and Mr Wakefield to undertake the process as neither had managed him, and therefore knowledge of his abilities and work. Mr Wakefield confirmed that he had not managed the claimant but believed that Mr Allin had undertaken some management of him, the claimant disagreed with this. From the evidence I have seen I find that there was some, albeit limited management of the claimant by Mr Allin, as he dealt with his grievances for example. I cannot make a finding as to how well Mr Allin knew of the claimant's skill and work. However, I accept Mr Wakefield's evidence that this was the same for the others in the pool. Mr Wakefield told me that when applying the criteria, he and Mr Allin looked at various documents such as, record projections, the

planner on what had been doing and working on, the CV, project management evidence of older jobs and their most recent work. However, he also told me that at the time they had not told the claimant what they were looking at and stated that they *probably should have done.* It was clear from the evidence I have heard, and the position taken that the claimant did not agree with the interpretation of the documentation. I find that he was not given the opportunity to make representations on these, and he should have been.

44. By way of letter of 23rd June 2020 [117-120] the respondent confirmed that they had made the decision to make the claimant redundant. The respondent confirmed that they have been unable to identify any alternative employment for the claimant. A three month notice period was provided with the date of termination being 23rd September 2020. A right of appeal was provided for to Mr McNeill by 10th July 2020.

45. On 25th June 2020 a generic consultancy agreement was sent to the claimant. The purpose of this was because there remained a need, on occasions, for work outside of the core service to be provided, such as the party wall work. The purpose was to help the company as well as the individuals by offering them such work. The claimant queries that if there is such a need for consultants is there a genuine redundancy situation. The evidence, which I accept, was that those who understood such work did so on a far more limited basis than a full-time employee. It would depend on a project-by-project basis but for example would be approximately 3-4 days per month. I do not find that this offer of a consultancy agreement undermines that there was a genuine redundancy situation. I also find, that as accepted that some work has been referred to the claimant from the respondent post his dismissal, including from Mr Allin. Some of that work was the party wall work which I was told is a personal commitment with the individual, but there was other work as well. The referral for additional work, I find, demonstrates that there was no ill will towards the claimant, if there was, there would not have been that referral of work.

46. The claimant exercised his right of appeal by way of an email to Mr McNeill at 08.13 on 10th July 2020 [129-130]. Mr Bannon raised 11 points for appeal summarised as follows:
    i. The respondent has not followed appropriate procedure by failing to consult before finalising the redundancy plan. They notified those at risk first missing that initial stage.
    ii. The process was administered by two people involved in the grievances raised by him and dealt with by the company in December 2019.
    iii. The respondent failed to identify how the scoring would be calculated for each of the criteria.

iv. The number of individuals at risk was never identified – and still had not been at the time of the appeal.
v. The respondent has not provided evidence to support the scoring.
vi. The respondent withheld access to the company server and email network impacting on the claimant's ability to give sufficient representation.
vii. The respondent changes the "intention" of the criteria after initial scoring to suit the objective.
viii. The respondent scored the claimant on the same criteria in October 2019 in a way which was scored drastically different to this selection.
ix. The respondent failed to consider representations made but sought to defend the scoring and ignore the evidence. He was the longest serving project manager in the Chichester office.
x. Prior to commencing the appeal process a consultancy agreement was sent out to him indicating it was a foregone conclusion.
xi. There is no allowance for additional benefits of employment in the statutory redundancy.

47. Those points were considered, and each was rejected by Mr McNeill as communicated by email on 13th July 2020 at 17.33 [E130]. In effect he stated the following:
    i. The respondent followed due process and notice was only given after individuals had been consulted with.
    ii. The grievance was unrelated to the redundancy and was closed.
    iii. The scoring was done for each individual against the criteria and reflects their assessment of them.
    iv. There is no requirement to notify of the number of roles at risk but confirms that 3 roles have been made redundant.
    v. The scoring was undertaken on the assessment of each of the criteria.
    vi. The job retention scheme was imposed which restricted access and he does not consider that it placed the claimant at any disadvantage.
    vii. It is denied that the intention of the criteria changed.
    viii. The criteria was the same as in 2019 but the previous process related to Building Surveying and this the core services which resulted in different scores.
    ix. It was denied that he was in a project management department but was in building surveying work.
    x. All staff have been offered a consultancy agreement which did not premeditate the outcome of the appeal process.

xi. The calculation was undertaken on the statutory calculation basis.

48. The appeal was therefore dismissed, which has then resulted in the process for these proceedings commencing.

49. I should observe that the claimant has highlighted his concern over the treatment of other members of staff, which has included the dismissal of those under two years. As part of my decision making, I do not need to consider the rights or wrongs of such an approach, and I have not heard evidence on the individual circumstances related to those employees as it is not relevant to this decision. I do not make any finding, nor do I draw any inference, from these dismissals.

The Law

50. I turn to set out in summary the law which I have applied, it is necessarily a summary although given the issues within this case is set out in more detail.

51. I remind myself that when applying the burden of proof, the standard is the balance of probabilities, that is to say what is more likely than not.

Unfair Dismissal

52. As with any unfair dismissal the starting point is section 94(1) of the Employment Rights Act 1996. That provides that "*an employee has the right not to be unfairly dismissed by his employer."*

53. Pursuant to section 98 (1) Employment Rights Act 1996 it is for the employer to show:

(a) the reason (or if more than one, the principle 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.

Subsection 98 (2) provides that a reason falls within the subsection if:

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

[(ba) . . .]

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

54. I have had regards to section 139 Employment Rights Act 1996, which provides the statutory definition of redundancy, in particular I have considered subsections 1, 2 and 6 which states:

(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.

(2) For the purposes of subsection (1) the business of the employer together with the business or businesses of his associated employers shall be treated as one (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).

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

55. I have reminded myself of the provisions of section 105 of the Employment Rights Act 1996 which sets out that if an employee is selected for redundancy for a prohibited reason that will be unfair, although no one has suggested that they apply to this case.

56. I have considered the three-stage test as set out within ***Safeway Stores v Burrell [1997] IRLR 200*** which must be satisfied in order to establish a redundancy dismissal, as Mr Jones has directed me to. I have also considered ***Timex Corporation v Thompson EAT 1981***, which the claimant has referred me to, and which highlights that employers sometimes use redundancy situations as a pretext for dismissal. I of course must consider whether the respondent has proven the reason for dismissal.

57. I remind myself that as per ***Moon and ors v Homeworthy Furniture (Northern) Ltd 1977 ICR 117, EAT*** I must consider whether a redundancy situation exists. It is not for me to consider the reasonableness of a decision to create a redundancy situation. If I conclude that there was a redundancy

situation it does not follow that the reason for dismissal was redundancy, it remains open to me to consider whether that was the reason for the dismissal, or if there was some other reason.

58. If I conclude that there was a genuine redundancy situation, I must also have regards to whether the dismissal was unreasonable in accordance with section 98(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.

I remind myself that when considering the question of reasonableness under section 98(4) there is no burden on either party.

59. In considering redundancy dismissals the leading case is ***Williams v Compare Maxam Limited [1982] IRLR 83*** where the Employment Appeal Tribunal set out guidelines that a reasonable employer may be expected to following such circumstances, which may include the following factors:
    a. Whether the selection criteria were objectively chosen and fairly applied.
    b. Whether employees were warned and consulted about the redundancy
    c. Whether a unions view was sought and
    d. Whether any alternative work was available.

60. Within that decision it was emphasised that I must consider whether "*the dismissal lay within the range of conduct which a reasonable employer could have adopted*", it is not for the tribunal to impose its standards and to decide if the employer should have behaved differently.

61. The Employment Appeal tribunal in ***Langston v Cranfield University 1998 IRLR 172, EAT*** emphasised the principles relating to unfair dismissal were as encapsulated by Lord Bridge in ***Polkey v AE Dayton Services Ltd 1988 ICR 142, HL***, which incorporates unfair selection, lack of consultation and a failure to seek alternative employment.

62. The fact that a company does not seek volunteers for redundancy does not in itself make the process unreasonable, it will depend upon the facts of each case as to whether or not it is unreasonable.

63. There is a duty on employers to individually consult with employees and a failure to do so will make it more likely that the process is unfair. I remind myself of the words of Lord Bridge in ***Polkey v AE Dayton Services Ltd 1988 ICR 142, HL*** where he stated *in the case of redundancy… the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation*.

64. What constitutes a consultation is a matter of fact depending on the circumstances of the case, ordinarily however the tribunal would expect to see
    a. A warning that the individual has been provisionally selected for redundancy.
    b. Confirmation as to the basis for the selection
    c. An opportunity for the employee to comment on his or her redundancy selection assessment
    d. Consideration as to alternative positions of employment
    e. An opportunity for the employee to address any other matters they wish to raise.

65. I have considered the EAT decision on ***Rowell v Hubbard Group Services Ltd 1995 IRLR 195, EAT*** which provided guidance as to consultation.

66. The starting point would be for the employer to identify a pool of employees for selection, and ordinarily if the employer does not consider the question of a pool, the dismissal will likely be unfair as per ***Taymech Ltd v Ryan EAT 663/94***. Although, the Employment Appeal Tribunal has held that where there is a complete closure of a workplace, business or unit there may be no need for a selection, such as in the case of ***Zeff v Lewis Day Transport Plc EAT 0418/10***.

67. In determining the pool for selection, where there is no customary or contractual arrangement the employer has a great deal of flexibility in deciding the pool from which it will select employees for dismissal, as confirmed in ***Thomas and Betts Manufacturing Co v Harding 1980 IRLR 255, CA***. The employer need only show that they have applied their minds to the problem and acted from genuine motives.

68. In considering the pool for selection the following may relevant factors:
    a. Whether other groups of employees are doing similar work to the group from which selections were made.
    b. Whether employees' jobs are interchangeable.

c. Whether the employee's inclusion in the unit is consistent with his or her previous position
d. Whether the selection unit was agreed with any union.

However, I remind myself that when considering the choice of pool for selection, it is not the tribunal's role to substitute its view, but the fundamental question which I am considering is whether or not the choice of a pool fell within the range of reasonable responses available to an employer in the circumstances. As was put by the Employment Appeal Tribunal in ***Kvaerner Oil and Gas Ltd v Parker and Ors EAT 0444/02*** '*different people can quite legitimately have different views about what is or is not a fair response to a particular situation… In most situations there will be a band of potential responses to the particular problem, and it may be that both of solutions X and Y will be well within that band*.'

69. If an employer who has excluded an employee, or a group of employees, from a selection pool who do similar work they will need justifiable reasons for doing so.

70. Having determined a pool for selection a selection criteria should be provided. In circumstances where a selection criteria has been made known to the workforce the Employment Appeal Tribunal has held that it may be unfair to take account additional factors which the employees are unaware of in deciding who to select for redundancy, as per ***Watkins v Crouch T/A Temple Bird Solicitors 2011 IRLR 382, EAT***. The criteria must not be vague or ambiguous: ***Odhams-Sun Printers Ltd v Hampton and ors EAT 776/86.*** The criteria must be objective, in other words it must not reflect personal opinion of the selector but be reference to evidence and data. It can, however, include matters of judgment as outlined in ***Mitchells of Lancaster (Brewers) Ltd v Tattersall EAT 0605/11***. I must also consider the period of time the assessment covers as that may impact upon the fairness of any assessment.

71. Again, the role of the tribunal in considering the selection criteria is not to provide over minute scrutiny (as per ***British Aerospace Plc v Green and Ors 1995 ICR 1006***, ***CA***) and is not to substitute its view for that of the employer. The role is to consider if the method of selection was fair and applied in the case in a reasonable fashion and consider whether a reasonable employer could have chosen the assessment method adopted in the particular case.

72. Once the assessment criteria have been established, I must consider the fairness of the manner of the selection and the way in which it has been applied. Criticisms in terms of the manner of selection will largely depend on a case by case basis.

73. The employees who are applying the selection criteria may also lead to the process being unfair, however, that will depend on the facts of the case. In particular in note that in ***Wess v Science Museum Group EAT 0120/14*** the Employment Appeal Tribunal upheld a decision that when a claimant had made a grievance against two managers on the panel, that did not render the process unfair albeit in that case there were other members who had no involvement with the claimant.

74. In considering the marking of the assessments I remind myself that the Court of Session decision in ***Buchanan v Tilcon Ltd 1983 IRLR 417, Ct Sess (Inner House),*** that the employer does not have to prove that the grading of employees was undertaken accurately. The employer must show that the method of selection was fair and that it was reasonably applied to the employee concerned. That decision was applied by the EAT in ***Eaton Ltd v Kind and Ors 1995 IRLR 75, EAT***, and emphasised by the Court of Appeal when considering ***British Aerospace plc v Green and ors 1995 ICR 1006 CA***. Lord Justice Waite commented that '*So in general the employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt sign of conduct which mars its fairness will have done all that the law requires of him*.'

75. There are numerous authorities that make clear that when considering the analysis of assessments, I must not subject that criteria nor application to minute, or undue, scrutiny. Again, I must be mindful not to substitute my opinion for that of the Employer.

76. In the event that an employee is selected for redundancy there is an obligation upon the employer to consider whether suitable alternative employment is available. If they fail to consider the possibility of alternative employment may result in a finding of unfair dismissal. In ***Stanco Exhibitions Ltd v Wright EAT 0291/07*** the Employment Appeal Tribunal held that the tribunal must consider on the balance of probabilities whether the employee would have found a job within the company.

77. The Court of Appeal in ***Gwynedd Council v Barratt and anor 2021 IRLR 1028 CA*** confirmed that the absence of an appeal does not in itself make a redundancy dismissal unfair, and that it is one factor to consider under section 98(4).

78. In the event that I find that a dismissal has been unfair because of a procedural irregularity I am invited to consider whether a reduction in accordance with ***Polkey v AE Dayton Services Ltd 1988 ICR 142, HL*** should apply. In short that is consideration as to what the percentage chance

that the Claimant would have been dismissed in the event that a fair process had been followed. This consideration is not an "all or nothing" approach.

79. I have considered the EAT decision of ***Williams v Amey Services Ltd EAT 0287/14*** where Her Honour Judge Eady set out the methods open to the tribunal in considering a Polkey reduction, where it was stated:

> *In making such an assessment the [employment tribunal] is plainly given a very broad discretion. In some cases it might be just and equitable to restrict compensatory loss to a period of time, which the [tribunal] concludes would have been the period a fair process would have taken. In other cases, the [tribunal] might consider it appropriate to reduce compensation on a percentage basis, to reflect the chance that the outcome would have been the same had a fair process been followed. In yet other cases, the [tribunal] might consider it just and equitable to apply both approaches, finding that an award should be made for at least a particular period during which the fair process would have been followed and thereafter allowing for a percentage change that the outcome would have been the same. There is no one correct method of carrying out the task; it will always be case-and-fact-specific. Equally, however, it is not a "range of reasonable responses of the reasonable employer" test that is to be applied: the assessment is specific to the particular employer and the particular facts.'*

Conclusions

80. I turn to my conclusions having considered the law, the findings of fact which I have made and the list of issues.

81. There is no dispute, and it is clear that the claimant has been dismissed.

82. The respondent asserts that the principal reason for dismissal was redundancy and that is a potentially fair reason for dismissal, pursuant to section 98(2) of the Employment Rights Act 1996.

83. Whilst I remind myself that it is not for me to consider the reasonableness of the redundancy situation nor to subject any decision to minute scrutiny, I am satisfied that on the balance of probabilities there was a genuine redundancy situation.

84. I have accepted the evidence and found that the respondent indented to cease providing building services at the Chichester office, whilst the claimant's position is that the core elements were always the focus of the business, I accept the respondent's position that they intended to cease other services. That in its own right satisfies the definition of redundancy as set out

at section 139 Employment Rights Act 1996. I do not consider the offer of consultancy agreements to cover the elements of work, which was undertaken sufficient to undermine that intention, however, I am in any event satisfied that the criteria pursuant to subsection 1 (b) are also met. In my judgment the evidence and findings I have made supports the contention that the requirement of the business has changed in respect of the work undertaken by employees, namely the building surveying type of work at the Chichester office. I am satisfied that is because the work has diminished. In reaching that conclusion I have done so on the basis I have found that there was a reduction in work of 1/3 coupled with the claimant's own evidence and the contemporary evidence at the time clearly indicate that his workload was light. I am therefore satisfied that there was a genuine redundancy situation.

85. I must next consider if redundancy was the reason for dismissal. I am satisfied that it was. There was in my judgment a genuine redundancy situation. Three individuals from the claimant's pool were dismissed for redundancy, I have been provided with the detailed procedure which has been undertaken, and which I will return to shortly. I do not accept the allegation that the dismissal was in effect because the respondent in some manner wished to force the claimant out of his role because of the grievances raised, nor for any other reason. In my judgment that does not fit with the evidence. I have found that for all involved the grievance was regarded as having concluded the issues. The claimant when notified that Mr Wakefield and Mr Allin were undertaking the process did not challenge that at the time only at the appeal stage. There has been no evidence, nor complaint of any unfavourable conduct save those related to the redundancy processes, including the offer of a consultancy. Mr Wakefield was involved in the 2019 redundancy process, and there is no suggestion that he acted in an improper way at that time despite the point in the grievance which related to him being from July 2019. I also do not consider that if the respondent was truly forcing the claimant out for some reason other than redundancy then they would have referred work in his direction, that evidence does not fit. While I can appreciate the claimant's anxiety that there were ulterior motives, especially given the events that have taken place before and after this process, I do not agree with him on this. Nor do I agree, for these reasons that the grievance had any part in his selection for redundancy.

86. Having concluded the reason for dismissal was redundancy, I must consider the question of reasonableness as set out at section 98 (4) and whether the respondent has acted reasonably. I shall deal with each of the factors individually.

Duty to consult

87. In considering the question of consulting with the claimant. I have found, as was accepted, that during this most recent process, that prior to the letter of 11th May 2020 which notified of the process there was no consultation. Similarly, prior to the letter of 22nd May 2020, whereby the claimant was notified of his selection for the redundancy process there was no consultation. That, the claimant asserts, makes the process unfair. I have found, as accepted, that it was only after the appeal stage that the claimant was informed about the number of redundancies. I accept, as the respondent conceded that should have happened sooner. However, I do not consider that of itself is so unreasonable that it has resulted in unfairness.

88. In considering the initial consultation I am mindful of the size of this employer, which is modest. I have found that they emailed all employees on 19th March 2020 indicating that there would need to a reduction in costs, including labour costs. Whilst that was subsequently overtaken by the events of the pandemic it did raise the issue. On 11th May 2020 employees were told about the need for a further redundancy process, on 19th May 2020 the additional cost saving measures were set out and on 22nd May 2020 the claimant was notified that he was at risk. Prior to this there was no consulting with Mr Bannon. He was however then invited to consult on the criteria and process as he did. On balance I am satisfied that the respondent warned the claimant and other employees by way of their correspondence in March and May 2020, whilst it did not invite consultation at this stage, when the process had begun it did and the claimant was consulted at various stages. On balance I am satisfied that the approach taken fell within the band of reasonable responses given in particular their size and resources.

89. I also do not consider that the failure to seek volunteers for redundancy has made this process unfair.

Pool for selection

90. In determining the pools for selection, the respondent has a great deal of flexibility. I am satisfied that the decision of the employer to place the claimant in his pool fell within the band of reasonable responses. The pool was made up of individuals, who save an administrator, were fee earners, they primarily undertook work which the business was no longer going to focus on, and they shared a common location. I am satisfied that when considering those factors, the respondent has applied its mind to the problem and has acted in a genuine manner. I note that the claimant asserts that Mr Allin should also have formed part of the pool. I have accepted the evidence of the respondent that his role differed in that he did not just do fee-earning and had additional responsibilities. In my judgment the exclusion of Mr Allen on that basis fell

within the band of reasonable responses and I am therefore satisfied overall that the identification and selection of pool fell within the band of reasonable responses.

91. For the reasons I have set out above, when considering if redundancy was the reason for the claimant's dismissal, I reject any contention that the grievances formed part of the reason why he was selected.

Selection Criteria

92. In turning to the selection criteria and application of it, I remind myself that I must not substitute my view for that of the employer, nor must I subject the criteria to minute scrutiny, I must consider whether the method of selection was fair and applied in a reasonable manner.

93. I do not agree with the claimant's contention that the criteria which were identified are not objective. As per ***Tattersall*** there can within the criteria be elements which are subject to the judgment. This, due to the nature of this case, has centred around the General Skills/ Qualifications section, although the claimant has raised concerns with the other elements. In my judgment the ability to measure general skills and qualifications can be objective and measured against a matrix. There may be an element of judgment involved, such as with client relations criteria, but I do accept that a reasonable employer can apply such criteria on an objective manner, it can be tied to data and evidence, and I have found that is what Mr Wakefield did when he was considering documentation. The criteria which were to be applied are as I have set out within my findings. I do not consider that the criteria themselves would be considered unreasonable or fall outside the band of reasonableness and the subheadings which were set out in my judgment makes the criteria more objective than subjective. The problem, as I will turn to, is that the respondent did not provide these subheadings to the claimant.

94. The area where I consider that the respondent has acted unreasonably is in the application of the criteria. Whilst the claimant was provided with the headlines of the criteria, I have found, that the first time the claimant was aware of the individual sub-elements he was being scored against, was after his dismissal. I consider this has made the process unfair in two ways. The first is that the criteria which was provided to the claimant which amounted to the headings, must be ambiguous. The same criteria were used in the 2019 redundancy and the claimant scored full marks, whilst I accept that the 2019 redundancy was looking at different roles to 2020 it is the subheadings on the criteria which set out how that is being assessed. If just by having the heading an employee can receive full marks approximately 7 months earlier, and then be reduced to 40% and 0%, at the first time of the application, that must be ambiguous to the employee.

95. The second reason I consider the application to be unfair is that the Employment Appeal Tribunal in ***Temple Bird Solicitors*** considered that once the criteria has been made known it may be unfair to take account additional factors. Whilst I accept that the headings of the criteria were known, the subheadings, were not, and that is the core of what is being applied. That must in my judgment fall out of the band of reasonableness. How can an employee respond to matters which he does not know he is being assessed against? The fact that should have been provided before was accepted within the Respondent's evidence.

96. I also consider that the process was unfair to the claimant in that he did not have access to the same IT resources as the others within his pool. Whilst I have sympathy with the respondent's argument that it was grappling with the rules of the job retention scheme, in my judgment there is a clear unfairness caused to an employee where he is the only one who does not have access to systems which contains information that he can use to support his submissions to try and avoid redundancy. The fact that others did not make use of the system in the way the claimant would have does not in my judgment mean that he was not at a disadvantage. They had the opportunity to do so, he was deprived of that chance, that in my judgment cannot have been fair. Again, this was acknowledged in the evidence I heard from the respondent.

97. I have heard evidence and I accept that Mr Wakefield considered documentation available to assist his decision, this included some, but not all the documents referred to by the claimant. In my judgment this again fell outside of the band of reasonable responses, not because Mr Wakefield was seeking for documentation to assist his decision, but because he was basing his decision on documentation which the claimant was unaware of, some of which he disagreed with, and had no opportunity to comment on. It was again accepted that should have been provided, it was not and in my judgment that cannot be reasonable as a matter of principle but also would run contrary to ***Temple Bird Solicitors.***

98. I have carefully considered whether it was appropriate for Mr Wakefield and Mr Allin to have been the individuals who applied the selection criteria. Whilst I note that as per ***Wess v Science Museum***, a grievance having been made against one of those applying the criteria does not itself make the process unfair, I am mindful the difference with ***Wess*** is that within that case it was a panel here to a degree both were involved. However, on balance I am not satisfied that it did make it unfair. As I have found, the claimant at various stages, not only during this redundancy process but also the earlier one, has outlined his concerns with process and procedure which he disagreed with.

He did not raise any concern about Mr Allin, nor Mr Wakefield, undertaking the procedure until the appeal stage. That in my judgment fits with the evidence, and my finding, that following the grievance any issue had resolved itself. The extent that Mr Allin and Mr Wakefield were the subjects of the grievance was from the evidence I have limited, they all worked productively together from that date, Mr Allin had referred work to the claimant. Both also scored the claimant with full marks on the other elements. I also reached a positive impression of the relationship between Mr Wakefield and the claimant during Mr Wakefield's evidence and the interaction between them. Therefore, on balance, and on the facts within this case I do not find it was unreasonable for Mr Wakefield and Mr Allin to be part of that process.

99. I also do not consider it unreasonable, for Mr Wakefield or Mr Allin to have been involved in the process given their limited, or absence, of management of the claimant. I must have regard to the resources of the respondent which are limited. The same applied for others involved in the claimant's pool, and they were making decisions based on documentation. I do not consider that their appointment fell outside the band of reasonable responses.

100. So far as the claimant criticises the marking of the criteria, I remind myself that the respondent does not have to prove to me that the grading was accurate I must be satisfied that the selection was reasonably applied. The application of the criteria was not applied fairly in my judgment because of the application of factors, and documents, which the claimant was unaware of.

Alternative employment

101. I accept that there was no alternative employment available for the claimant to have been offered. I accept that the offer of the consultancy was an offer to mitigate loss and help both sides, but I do not consider that this amounted to an offer of alternative employment. So far as it is suggested that the fact consultancies were offered must mean that there was a role to offer, I do not agree to that given my findings on the limited work available for such consultants.

Appeal

102. The absence of an appeal does not automatically render a redundancy process unfair. Here however, an appeal process was provided. That appeal was to Mr McNeill. The purpose of any appeal is of course to provide a method of challenge for an employee and to ensure fairness. The person undertaking that check in my judgment must be new to it, in effect a fresh pair of eyes. Given his role, Mr McNeill was not. He was, understandably as chairperson of the board involved in the decision making around redundancies, that in my judgment would not be considered unreasonable. What makes it an unreasonable step in this case, in my judgment, is the email

of 18th June 2020 where he agrees the process in dealing with the appeal meeting and the position set out. That by its nature involves him within the approach to the initial decision making. Additionally at this stage the full criteria applied was still unknown and, in my judgment, means that someone else should have undertaken the appeal stage of the process.

Fairness of the decision

103. I therefore do not consider that dismissal was in the range of reasonable responses due to the procedural errors which have occurred, and which with credit to the respondent they have largely accepted. Whilst it is submitted on behalf of the respondent the concessions demonstrate that it was not a *perfect process,* but the inadequacies are not such that it unfair, I disagree. The failures identified in my judgment go to the heart of the process and the fairness of the same. Although I make plain, I do not consider those failures to have been cause by malice nor bias.

Polkey Reduction

104. I am invited to make a 100% Polkey reduction by the respondent, who asserts that had a fair procedure been followed the claimant would likely have been dismissed in any event and they highlight those who have been retained have quantity surveyor qualifications. The claimant avers I should make no reduction, he identifies that due to the weighting there is one mark between him and the candidate whose job was retained.

105. My criticisms of the procedure which the respondent has followed were, in summary, as follows:

a. They did not provide the claimant with the full criteria which they have applied.
b. They applied a criteria and documents which the claimant was unaware of.
c. They placed the claimant at a disadvantage as he did not have access to the resources others in the pool had.
d. The appeal process.

106. I do not agree with the Respondent's contention that this case is suitable for a 100% Polkey reduction. Had the claimant been afforded the opportunity to access documentation, it was accepted, and I have found that he would have made use of them to support his position. Before weighting is applied there is one mark difference between him and the next best placed candidate. I am not satisfied that had the clamant been aware of the full criteria which was being applied, and had he been provided access to his documents, that it is certain he would have been made redundant. Nor am I satisfied that the qualifications which those who remained would have tipped

the balance, as there was potential for the score on skills to be increased. This equally applies at the appeal stage. I do accept the contention that some of the documentation identified were taken account of, but this is not a case where I am certain he would have been dismissed in any event.

107. Similarly, I am not persuaded that it is certain that the claimant would have retained his employment had the procedural irregularities have not occurred. What I am satisfied about, on the balance of probabilities, is that he would have made the best use of the resources available and would have set out why he considered the criteria was met in his case, or why he disagreed with documentation that the respondent was applying, and he was unaware of. That, given there is only one mark between them may have resulted in his employment having been retained, the respondent also considered, but dismissed some of the documentation which was said to have shown the experience which the claimant relies upon. Whilst the claimant would say that was wrong, I must remind myself that the respondent need not show that the marking would have been accurate.

108. On the balance of probabilities, I accept that there should be a Polkey reduction, there is given the fine margins a chance that the claimant would have been dismissed in any event. In my judgment that percentage reduction should be in at 50%. That reflects those points I have set out above in particular the closeness of the marking, and the fact that the claimant would have made better use of the resources balanced against the fact that those who were retained had different qualifications to the claimant in their roles and different skill sets.

Employment Judge Lang
Date: 15 May 2022

Reserved judgment & reasons sent to the parties: 27 May 2022

FOR EMPLOYMENT TRIBUNALS