EMPLOYMENT TRIBUNALS

Claimant: **Mr D Tracy**

Respondent: **Manchester Airport Holdings Limited**

Heard at: **East London Hearing Centre (via CVP)**

On: **3 February 2022**

Before: **Employment Judge J Crosfill**

Representation

Claimant: In person

Respondent: Mr J England a Solicitor from Eversheds Sutherland

JUDGMENT having been sent to the parties on 9 February 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. By an ET1 presented on 12 August 2021, the Claimant claims he was unfairly dismissed by the Respondent. The Respondent is the operator of Stanstead Airport and is part of the wider Manchester Airport Group.

2. The Claimant started work in September 2015 as a terminal security officer. His duties included x-raying and inspecting passenger luggage. He worked for the Respondent until his dismissal on 31 March 2021, on that date he was dismissed by the Respondent purportedly because he was redundant. He was paid an enhanced redundancy payment and made a payment in lieu of his contractual notice.

3. The Claimant contacted ACAS on 12 June 2021 for the purposes of early conciliation. He received an early conciliation certificate on 16 July and presented his ET1 to the Employment Tribunal on 12 August 2021. He claims to have been unfairly dismissed contrary to Section 94 of the Employment Rights Act 1996.

The Hearing

4. The hearing took place by CVP. All of the parties and witnesses managed to access the video platform without any major difficulties.

5. At the hearing before me the parties had agreed and provided me with a bundle of documents running to some 450 pages. I have read such pages as the parties referred me to both in their witness statements and in their questioning of the witnesses but I have not read the entirety of the bundle.

6. During of the hearing I heard from:

6.1 Mr Johnathan Fowler, he is a Customer Services and Security Director and he gave evidence in relation to the redundancy proposals and the consultation exercise that took place with the trade union; and

6.2 Mr Craig Wiltshire who is a Security Manager at Stanstead Airport who met with the Claimant on 13 January 2021 to consult with him about the potential redundancy; and

6.3 Cassius Blanchard, another Security Manager from Stanstead Airport who conducted a second meeting with the Claimant on 3 February 2021 after which the Claimant was dismissed.

6.4 I heard from the Claimant himself who gave evidence on his own behalf.

7. At the conclusion of hearing evidence, each party made oral submissions. I asked Mr England to go first to give some guidance to Mr Tracy and he agreed to do so. I will not repeat those submissions here but I am going to deal with the main points in my discussions and conclusions below.

Findings of fact

8. Under this heading I set out my findings of fact. I shall not set out the entirety of the evidence that I heard but shall highlight the parts of the evidence necessary for me to make a decision and which seemed to me the most important. Just because I do not mention some piece of evidence it should not be assumed that I did not take it into account.

9. The Claimant started work in or around September 2015 and had something like over five of completed service at the time of his dismissal. There is no suggestion of any complaint about the Claimant's ability to do his job and it is clear to me that it is a job he thoroughly enjoyed and, but for his dismissal, would have continued to enjoy.

10. I remind myself that in early March 2020 concerns about Covid 19 were increasing rapidly. On 5 March 2020, the Claimant felt unwell. He attended his

General Practitioner. The notes of that consultation record that the Claimant had many of the symptoms of cold or flu, including a runny nose and the like. The examination was, by the standards of many general practitioners, thorough and the Claimant was told that he was not, at that stage, suffering from symptoms of COVID but he was nevertheless unwell and remained off work. He missed four days of work.

11. A return-to-work interview took place on his return to work. Prior to returning to work the Claimant had contacted the NHS advice line 111. It was recorded on the return to work meeting pro-forma that the Claimant told his employers that the purpose of that telephone call was to double check the advice that he had been given that he did not have COVID. He assured the manager conducing the return-to-work meeting that he was confident at that stage he did not have COVID.

12. Only a week later, as is well known, on 19 March the national lockdown in response to the COVID pandemic struck with a consequential effect on people's ability to travel. The effect on the Respondent's business is graphically illustrated by graph found within documentation at page 111 of the agreed bundle of documents which shows the difference in footfall between 2019 and 2020. That shows that in 2019 the footfall through Stanstead Airport varied between 60 and 80,000 people per day. In March 2020 the drop off was staggering and reduced effectively to zero from the period of March through to June 2020. Thereafter the was some recovery through the summer but the total footfall never rose beyond 40,000 up to the graph ends in October 2020.

13. I am told and accept by the Respondent as a consequence of this drop off in business at the airport it was haemorrhaging money on a daily basis. It wanted to introduce measures to reduce its expenditure. In order to facilitate this the Respondent engaged in a period of collective consultation with the trade unions with whom it had recognition of agreements.

14. Amongst the proposals discussed with the trade union were many that affected the terminal security officers, including the Claimant. The consultation was broad-ranging and included, and summarise the document setting out the proposals, '*package of change airport wide'* including the following categories:

14.1 operating model changes which were said to better align activity reduce duplication and maintaining clear line of reporting and accountability;

14.2 roster changes, creating new roster patterns which allowed flexibility to meet fluctuations in passenger numbers during the day by the day of the week and across the seasons.

14.3 What is described euphemistically as a 'right sizing' through redundancy to reflect the huge reduction of passenger number and protect Stanstead in the long-term; and

14.4 pay, providing certainty for colleagues in respect of pay in the year ahead.

15. The proposals were therefore not only to make redundancies but also to vary the terms and conditions of those people who would remain in employment. In particular, tailoring their flexible working patterns to be more efficient for the business. The proposals included a proposal to lose the equivalent of 376 full-time employees doing the type of work done by the Claimant.

16. In negotiating with the trade unions, the process included discussing how, if redundancies were to be made, they were to be implemented. What was discussed included the fact that the terminal security officers would be invited to express their preferences for the new identified shift patters in descending order of preference. Each terminal security officer would be scored against agreed criteria. Thereafter, in order of merit, the terminal security officers would be allocated their preferences. Where it was not possible to allocate a terminal security officer to their choices or their preferences, they would be permitted to apply for any remaining vacancies.

17. The proposals in respect of the criteria to be used in the scoring exercise were discussed with the trade union in some detail and I will return to that below.

18. Following the collective consultation, agreement was reached between the Respondent and the trade unions. The trade unions adding to the document which was then prepared for release to the employees in a collective announcement endorsing the proposals as being the best that could be obtained in the difficult circumstances that existed. Within those documents there was a description for the employees of the selection criteria which is found at page 136 of the agreed bundle and they were listed as follows:

18.1 the core capabilities required for the role;

18.2 the key technical skills required for the role;

18.3 demonstration of ‘MAG values’ where applicable, sickness absence record, excluding disability and maternity pregnancy absence and COVID-19 related absences;

18.4 disciplinary record and

18.5 cost in the business and against length of service in what might be a tie-break situation.

19. Negotiations with the trade union in respect of the specific selection criterion which were to be applied to the terminal security officers descended into somewhat greater detail than was announced at that initial meeting. The selection criteria that were ultimately adopted are described at the head of the matrix that that was ultimately adopted a copy of which was included in the agreed bundle. The selection criteria included four competency-based criteria which are NXCT attempts, NXCT threats, TIP in NXCT clears.

20. NXCT refers to an annual test that have to be undertaken by all terminal security officers which tested their ability to conduct x-ray examinations, spot threats etc. The criteria they used was to take the test results of the previous year. In addition to those, the selection criteria included criteria of disciplinary record and absence record calculated in accordance with the scoring system used by the Respondent which is based on the well-known Bradford scoring system. The original proposal was that each of those criteria would be scored out of four. However, in discussions with the trade union, it was agreed that in respect of the criteria of absence calculated on the basis of the Bradford score, any person with the score of zero would receive additional recognition in respect of that.

21. Somewhat convolutedly in my view, the decision was taken to score both the Bradford score criteria and the disciplinary criteria by using descending negative scores to reflect the performance. So, for example, somebody with no disciplinary record whatsoever would get zero whereas someone on a final written warning would get minus 4. For the Bradford score to reflect concerns raised by the trade union, a decision was made to give somebody with a zero Bradford score one point and somebody in the highest percentiles would be given minus 4 points. It strikes me that that could have been made significantly simpler by reversing the process and giving positive scores, which would have made the process somewhat more transparent and certainly a lot clearer to the workforce. I would accept that this was a matter of presentation rather than substance as the scoring criteria did allow the employer to differentiate between employees.

22. In addition to adopting that scoring system, after further negotiation, the scoring system was weighted. It had been initially proposed by the Respondent that each of the test results, the NXCT related test result, would be given equal weighting. After negotiation with the trade union however, a decision was taken to rate the NXCT threat test result somewhat higher applying a multiplier of 1.5 and to weight the NXCT clears somewhat lower giving a rating multiplier of 0.5. But throughout, it had been agreed by both parties, the trade unions and the Respondent, that the issue of disciplinaries and the absence scoring system, the Bradford scoring system, would be given a weighting of 30% of the total score. It had been assumed by the Respondent mathematically that that could be achieved by using a multiplier of three. In fact, that does not work precisely, nevertheless, given that the scores are used to differentiate between employees, it makes no difference in terms of how employees are ranked.

23. The Claimant was scored against those selection criteria and he completed his preference selection form. The Claimant had particular preferences for shifts to suit his personal circumstances and only listed two potential shift patterns which he was interested in. As a consequence, he was only considered or ranked against those two choices of shift pattern rather than being ranked as against all shift patterns. Had he expressed a wider range of preferences that would most likely have resulted in him being offered a new post.

24. The Claimant's scores are found on the matrix that I have seen in the agreed bundle at page 196. His weighted score for attendance was minus nine. This was achieved by taking the agreed percentiles from the Bradford scoring system which would have given him a score of minus three weighting it by a multiplier of 3, giving him a score of minus nine. The Claimant's scores on the annual testing are on par with a large number of his colleagues. The Claimant, together with the vast majority of his colleagues, obtained no score which (was in fact the highest score) in respect of the disciplinary record. The fact that numerous employees scored much the same in the other criteria meant that the absence record became the most significant measure used to distinguish between the employees.

25. Principally as a consequence of his absence score, the Claimant was ranked at not the last pace, but towards the bottom of the matrix prepared by the Respondent. When the preference of the employees for particular shifts was taken into account the outcome was that because of his score the Claimant was not offered either of his two preferred shift patterns.

26. On 15 December 2020, Mr Fowler wrote to the Claimant, and to others, informing him that his preferred shift pattern could not be accommodated. Read together with the previous information, this would have informed the Claimant that his scoring was insufficient to enable him to get his first two choices of shift pattern.

27. On 13 January 2021, the Claimant met with Mr Wiltshire and what was described as the first consultation meeting. The Respondent used a well prepared proforma and, before me, Mr England has suggested that the absence of any particular comments by the Claimant would suggest that he had very little to say in the course of these meetings. I think there needs to be a degree of realism. Whilst the Claimant did not dispute that the points set out for the manager on the proforma were indeed read to him. The meetings took some time and if the notes were taken as being 100% accurate and full, it would indicate that the Claimant was virtually monosyllabic.

28. The Claimant accepts in the course of the meeting on 13 January 2021 he was told orally what his scores were but he was not provided with the scores in writing. He was, however, able to detect that the reason why he had not been given his preferred shifts related principally to his absence score which he had been given of minus nine. He did not immediately understand quite how that score had been calculated. I find that unsurprising given the complexity of the marking scheme.

29. During that meeting, the Claimant was told that given the scores he had obtained he would have to seek alternative employment. There were, and the Claimant was told, vacancies available for him to apply for. Amongst the vacancies there was a managerial post by which the Claimant did apply for and the Claimant was given some assistance by the Respondent's HR department in clarifying precisely what he needs to do to apply for that. He applied for one other role. He was not successful in obtaining either of those two roles. In addition to those roles, there were security officer roles available but for working just 20 hours per week.

30. The Claimant was told of the outcome of his job applications on 30 or 31

January 2021. On 3 February, he met with Mr Cassius Blanchard for what was described as the second consultation meeting. Once again, there was a well prepared proforma which informed Mr Blanchard of the information that he needed to impart to the Claimant. That included telling the Claimant firstly, that if he wished to challenge any of his scores he was able to do so and secondly, informed the Claimant of a number of vacancies are still waited to be filled. It is evident that that document has not been tailored specifically to the Claimant because the vacancies include vacancies available only for female security officers.

31. The document does not record any particular discussion between the Claimant and Mr Blanchard but I am satisfied and accept the Claimant's evidence that he expressed some dissatisfaction with his score in relation to absence management and that there followed some discussion about how he would set about challenging that. Mr Blanchard corrected his witness statement at the outset of proceedings and it is quite plain, that that discussion took place. Further support for that is found in the fact that the Claimant, immediately after that meeting took place and the days that followed, sent a number of emails to the HR department. Amongst the matters he raised were the fact that he discussed his scores and his dissatisfaction with him in that meeting.

32. Despite the fact that on their face the minutes of the meeting were agreed by the Claimant I do not find that they were a verbatim or particularly complete record of the discussions. I level no strong criticism against the Respondent in this respect nor against the Claimant for apparently agreeing their contents. It is not surprising that in a difficult and stressful meeting, neither party are likely to be keeping a full record.

33. The concerns raised by the Claimant in the meeting and thereafter included his contention the absence he had in March 2020 should have been discounted on the basis that amongst the agreed selection criteria there had been agreement that absences due to Covid 19 would not be counted. In addition to that he made enquiries about the scope of the pay protection. Essentially his question was whether if he accepted a shift pattern of 20 hours per week would his existing overall pay be protected for the proposed 12-month period.

34. The Claimant got a response in respect of both of his queries in respect of the COVID 'discount' that the Claimant sought, that matter appears to have been considered by the HR department who took the view that as the Claimant had not in fact had COVID, and relying on what he had told them on the return-to-work interview form, that the discount should not have applied in his case and therefore the score he got was properly allocated.

35. In respect of the query about pay, the Claimant was told that the pay protection that had been proposed was not maintain his pay at the overall rate he was paid for working 32 hours if he dropped to 20 but simply to guarantee that the hourly rate would not drop any further for at least a period of one year. That reflects the collective consultation documents that I have seen.

36. Thereafter, there was some delays. The Claimant did not apply for any of the 20 hours a week role. He was told that he was to be dismissed on a date to be confirmed. It is clear from the evidence I heard and read that the Respondent was examining the scope of the job retention scheme which had been introduced and was examining

whether or not the dismissals could be justified in the light of extensions and changes (actual and proposed) to the furlough scheme.

37. Ultimately a decision was made by the Respondent to proceed with the proposed redundancies. Mr Fowler wrote to the Claimant and told him that he was to be dismissed. The Claimant was told that he had a right to appeal that dismissal. The Claimant did email fairly swiftly in response to that letter set out his view of the manner in which he had been treated. However, his email is somewhat unclear in that it does not make it reasonably plain that he was exercising a right of appeal. It certainly sets out some complaints.

38. The Claimant got a response from the Respondent which dealt with in writing with the complaints that he had made and repeated the possibility of bringing a formal appeal. The Claimant did not take up that invitation. The Claimant's dismissal took effect on 31 January 2021

Unfair dismissal, the relevant law

39. The right not to be unfairly dismissed is conferred by Section 94 of the Employment Rights Act 1996. It is a right available only to those who have been continuously employed for at least two years or those dismissed for what are generally referred to as automatically unfair reasons. Where, as here, there is no dispute that an employee with more than two years continuous service was dismissed, the question of whether any such dismissal was unfair turns upon the application of the test in Section 98 of the Employment Rights Act 1996. The material parts of that section are as follows:

> *"98 General.*
>
> *(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) A reason falls within this subsection if it –*
>
> *(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*
>
> *(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.

(3) ...

(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.

40. The first part of the test focuses on reason for the dismissal. The burden of proof is upon the Respondent to show that the dismissal was for a potentially fair reason. Where there is more than one reason for dismissal it is necessary for the Respondent to show that the principle reason was potentially fair.

41. In this case the Respondent says that the principal reason for the dismissal was 'redundancy'. A dismissal will not be by reason of redundancy unless the statutory definition of redundancy is met. Redundancy is defined in section 139 of the Employment Rights 1996. The material parts of that section read as follows:

139 Redundancy.

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or
(ii) to carry on that business in the place where the employee was so employed, or

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

(i) for employees to carry out work of a particular kind, or
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

(2) - (5)….

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

(7) …

42. Sub-section 139(1)(b) of the Employment Rights Act 1996 refers to the 'requirements' of the employer. Where the employer has taken the decision to reduce the numbers of employees for a genuine business reason it is not open to a tribunal to investigate whether that decision was sensible see- ***James W Cook & Co (Wivenhoe) Ltd v Tipper*** **[1990] IRLR 386**. That does not preclude a tribunal from investigating whether the employer held a genuine belief in the facts relied upon to conclude that employees needed to be made redundant. In forming that belief, it was said by Slynn J in ***Orr v Vaughan*** **[1981] IRLR 63,** that the employer must act on reasonable information reasonably acquired.

43. In ***Safeway Stores plc v Burrell*** **[1997] IRLR 200**it was suggested that there are three questions: First, has the employee been dismissed? Secondly, if so, has the requirement of the employer's business for employees to carry out work of a particular kind ceased or diminished? And thirdly, if so, was the dismissal of the employee caused wholly or mainly by that state of affairs?

44. The existence of facts that might support a genuine need to make redundancies does not by itself demonstrate that an employee dismissed in those circumstances was dismissed for the reason, or principle reason, of redundancy. Whether that is the case is a question of fact and causation for the tribunal see ***Manchester College of Arts and Technology (MANCAT) v Mr G Smith*** **[2007] UKEAT 0460/06**

45. If the Employer is unable to show that a dismissal was for a potentially fair reason, then the dismissal will always be unfair. If that burden is discharged, then the Employment Tribunal must go on and apply the test of fairness set out in sub-section 98(4) of the Employment Rights Act 1996 set out above.

46. The correct test is whether the employer acted reasonably, not whether the tribunal would have come to the same decision itself. In many cases there will be a 'range of reasonable responses', so that, provided that the employer acted as a reasonable employer could have acted, the dismissal will be fair: ***Iceland Frozen Foods Ltd v Jones*** **[1982] IRLR 439**. That test recognises that two employers faced with the same circumstances may arrive at different decisions, but both of those decisions might be reasonable.

47. The Employment Appeal Tribunal in ***Williams v Compair Maxam Ltd*** **[1982] IRLR 83** gave general guidance to the factors that need to be considered when assessing the fairness of a dismissal by reason of redundancy. It was said:

'In law therefore the question we have to decide is whether a reasonable Tribunal could have reached the conclusion that the dismissal of the applicants in this case lay within the range of conduct which a reasonable employer could have adopted. It

is accordingly necessary to try to set down in very general terms what a properly instructed Industrial Tribunal would know to be the principles which, in current industrial practice, a reasonable employer would be expected to adopt. This is not a matter on which the chairman of this Appeal Tribunal feels that he can contribute much, since it depends on what industrial practices are currently accepted as being normal and proper. The two lay members of this Appeal Tribunal hold the view that it would be impossible to lay down detailed procedures which all reasonable employers would follow in all circumstances: the fair conduct of dismissals for redundancy must depend on the circumstances of each case. But in their experience, there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:

(1) *The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.*

(2) *The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.*

(3) *Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.*

(4) *The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.*

(5) *The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.*

The lay members stress that not all these factors are present in every case since circumstances may prevent one or more of them being given effect to. But the lay members would expect these principles to be departed from only where some good reason is shown to justify such departure. The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim.'

48. When choosing who should be made redundant and who should be retained an employer may need to identify a pool of employees from which the redundancies will be made. There is no requirement that the pool be limited to employees doing the same work see ***Taymech v Ryan*** **[1994] EAT/663/94**. The question will be whether the employer has genuinely applied its' mind to the question and whether its conclusions fell within a band of reasonable options see ***Capita Hartshead Ltd v Byard*** **[2012] IRLR 814**.

49. Whilst the focus of the EAT in ***Williams v Compair Maxam*** was towards collective consultation the importance of consultation in general but also with individual employees was emphasised in ***Mugford v Midland Bank plc*** **1997 ICR 399**, EAT where HHJ Clarke giving the judgment of the tribunal said:

'(1) Where no consultation about redundancy has taken place with either the trade union or the employee the dismissal will normally be unfair, unless the industrial tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.

(2) Consultation with the trade union over selection criteria does not of itself release the employer from considering with the employee individually his being identified for redundancy.

(3) It will be a question of fact and degree for the industrial tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy.'

50. The suggestion in ***Williams v Compair Maxam*** that fair selection criteria should be capable of being objectively checked does not mean that it a dismissal will be unfair just because assessment against some ostensibly fair criteria requires some exercise of judgment by the manager doing the scoring. In ***Samsung Electronics (UK) Ltd. v Monte d'Cruz*** **(UKEAT/0039/11/DM)** , at para. 27) Underhill J (as he was) said:

> *' "Subjectivity" is often used in this and similar contexts as a dirty word. But the fact is that not all aspects of the performance or value of an employee lend themselves to objective measurement, and there is no obligation on an employer always to use criteria which are capable of such measurement….'*

51. Where an employer has adopted a reasonable system for selecting between employees affected by a redundancy system then, absent any conduct which mars the fairness of the scheme the employer will have acted reasonably - ***British Aerospace plc v Green and ors*** **1995 ICR 1006, CA**. It follows that it is not the role of the employment tribunal to minutely scrutinise any scores allocated by an employer absent any underlying unfairness.

52. An employer should take such steps as are reasonable to secure alternative employment for an employee displaced because of redundancy. As a general rule it would be reasonable to provide the employee with such information about the terms and conditions applicable including the financial prospects see ***Fisher v Hoopoe Finance Ltd*** **EAT0043/05.**

Discussion and conclusions

53. Applying those legal principles to the facts of this case, the first question I have to ask myself is whether the reason or principal reason for the dismissal of the Claimant was redundancy.

54. I find that in this case there was not just one decision maker but a collective decision taken by the Respondent through its managers but in this case one executed through Mr Fowler. I am satisfied that the reason for the dismissal was redundancy. The Respondent had a situation where the footfall at Stanstead Airport had reduced by something in the order of 90%. The consequence of that was that the Respondent did not require as many terminal security officers to do the work as it had in the past. I accept the evidence given by the Respondent that, at the time, it did not envisage the situation improving completely until as late as 2025. I am not concerned with whether the Respondent is right or wrong about those projections, simply with question whether the decision that it needed less terminal security officers was a genuine reason based on reasonable information reasonably acquired - ***Orr v Vaughan*** . There is nothing in the evidence that I have heard to suggest that the decisions that were taken were not based on a genuine belief that there was a real business need to reduce the numbers of terminal security officers in order to reduce the costs of running the Airport. I take some support by the fact that the Respondent's conclusions were accepted by the trade unions as an unfortunate but necessary response. I have concluded that the reasons for the dismissal were that the Respondent's requirements for workers to carry out work of a particular kind, the work done by the terminal security officers, had diminished. That is a reason falling within Section 139(1)(b) and Section 98(2)(c) of the Employment Rights Act 1996 and was the only reason why Mr Tracy was ultimately dismissed.

55. I therefor need to address the question of whether the dismissal was fair or unfair applying the test set out in sub-section 98(4) of the Employment Rights Act 1996. It was this question that was at the heart of the Claimant's case.

56. The first point taken by the Claimant relates to the adoption of the selection criteria themselves. As I have identified above, the selection criteria included four criteria which were test base criteria which related to the ability of the terminal security officers to do their job. They related to the test results in the year prior to redundancy selection exercise. Mr Tracy did not say that relying on this measure of competency was wrong in principle but he did suggest that testing was somewhat arbitrary because precisely the same test conditions could not have been undertaken by each employee. He did accept that the test broadly was aimed at assessing the same competency. It seems to me that a reasonable employer could quite properly adopt those test result as

being a reasonable way of differentiating between employees carrying out the role of terminal security officer. What they have been tested for is their ability to undertake the core part of their role which is to ensure the security of aircraft and, as such, that was an important feature. It seems to me not unreasonable to take the last years' results. People's performance can go up and people's performance can go down. It is not unreasonable in my view for an employer to try to take a snapshot of a situation as it was at the time they were selecting the between employees. I find nothing unfair about the adoption of these criteria. I place some weight on the fact that the criteria were the product of collective consultation where the Respondent amended the criteria following the input of the Trade unions.

57. I do not see anything unfair about including the employee's disciplinary record as a selection criterion. Some employers would take the view that it was immaterial but many employers would take the view that it would be a reasonable business decision to give preference to employees with a good disciplinary record over those with a poor disciplinary record. when selecting the employees. I find that a reasonable employer could take these matters into account. Such a criterion is also capable on objective assessment because it relies on a written system of records.

58. Finally, and most controversially, is the question of absence. Absence is a problem which affects many businesses. From the employee's perspective it may appear harsh that ill health, which is not a question of fault can be held against them and threaten their job security. However, looked at from an employer's point of view, absence, and management or absence is time taking and expensive. An employer can quite reasonably conclude that if it were selecting between employees, the more reliable (in the sense that most likely the turn up to work) employees should be the ones preferred.

59. I have considered whether adopting a scoring system modelled on the Bradford Scoring system was a fair approach. Many employers do adopt the Bradford scoring system as a measure of reliability. The system adopted by the Respondent weights absences by reference to the inconvenience to the employer. As a measure of reliability it is a logical approach. I am unable to say that adopting this approach to an assessment of absence as a factor in a redundancy exercise was unfair in principle. I still need to look at whether it caused any specific unfairness in the Claimant's case. I deal with that below.

60. The change pressed for by the trade union in respect of the absence criterion was to reward for those people with a perfect attendance record. When that was adopted there was a slight departure from the weighting that was originally proposed of 30% for attendance. The adoption of a scale of one to five meant in fact that the absence became a crucial component in the score. In this case it was the component that meant that the Claimant was not offered one of his preferred shift pattern. Absence as a criterion would not have been such an important matter had there been less bunching in the other criteria with a very large number of people getting the same score. I find that there is nothing illogical or unfair in awarding additional points to an employee with 'perfect attendance'.

61. The selection criteria were not evenly weighted have concluded that it was reasonably open to the Respondent to weight the various factors as they did, I take account of the fact that the factors were the subject of collecting negotiation. I would accept that that would not be a 'get out of jail free' card for an employer but it is a matter that should be taken into account.

62. In this case, I consider the criteria were, of themselves, fair and reasonable and allocating weighting in my view, was also fair and reasonable.

63. The principle point advanced by the Claimant in respect of the selection criteria was not so much the criteria themselves but the question of whether they were fairly applied in his case. He says, and the Respondent does not disagree, that it had been agreed that COVID related absences would be discounted. What he says is in March 2020, having fallen ill, in the light of the then impending COVID crisis, which was well publicised in those weeks, he acted reasonably and fairly in staying away from work where he would be required to undertake searches of people's possessions and themselves, coming to close proximity with people.

64. The question for me is whether the Respondent acted reasonably or unreasonably in not changing the Claimant's score when he claimed that it should be have been discounted.

65. When the Claimant attended his GP on 5 March 2020, he was told in no uncertain terms that he did not have COVID. He was unwell and stayed away from work; he had cold and flu. Having been absent from work through ill health his Bradford score would have been ordinarily increased to reflect that absence. It is nobody's fault that they get cold and flu, that is not what this scoring system is concerned with.

66. The Claimant very sensibly and very responsibly double checked his doctor's advice but received the same advice that he was safe to come back to work because he had had an ordinary cold and flu and not COVID.

67. When he made his complaint, after being told his scores the Claimant did not, in his email to HR, say in terms that he had been staying away from work because he was concerned that his GP's diagnosis that he had cold and flu might be wrong. What was before the HR department was that the Claimant's own self-declaration that he had been told that he did not have COVID by his GP and had confirmed that with 111 NHS Service before he returned to work.

68. The question for me is whether the Respondent acted reasonably in concluding that did not merit the discount. I am satisfied that the Respondent acted reasonably in declining to give the Claimant the 'Covid' discount. There was simply insufficient evidence at the time to suggest that the reason that the Claimant was absent was not the fact that he was unwell with cold and flu but that he was staying away from work as

a reasonable precaution in response to the Covid pandemic. Had the Claimant made the position clearer at the time either in his correspondence or by exercising the right of appeal that he was offered the position may have been different. The evidence before the Respondent at the time was that the Claimant had been told by his GP that he did not have Covid. The Claimant would have needed to present strong case to suggest that he had a reasonable basis for doubting that diagnosis and that but for his concerns about having Covid would have returned to work. The test I must apply is whether the Respondent acted reasonably at the time. On the information presented by the Claimant at the time I do not find the Respondent's conclusion that the reason for the absence was the symptoms of cold and flu rather than a covid related reason was unreasonable.

69. The next point that the Claimant makes has some real force. When the Claimant attended the consultation meetings, he was told his scores orally. The scoring system adopted by the Respondent was complex. It included negative scores and positive scores and thereafter multipliers. In my view it would have been far better to have provided the Claimant with a hard copy of his scores, along with the scoring criteria, were actually applied (which because of the representations of the Unions differed very slightly from the announcement made in November). If that had been done the Claimant could could gauge for himself where he had fallen down. I consider that it would have been a simple task to produce such information in writing. It is good practice to bear in mind that somebody facing a meeting to consult about losing their job may be assisted by having something in writing to take away and consider at a later stage and I consider the Respondent's practice in this particular aspect was poor.

70. I need to consider whether, having selected the Claimant for redundancy reasonable steps were taken to consider alternative employment. I find that all reasonable steps were taken to consider alternative employment. The Claimant was alerted to available vacancies. He did apply for other roles but was unsuccessful. He does not suggest that there was any unfairness in the application process. He did not apply for the 20 hours per week roles. After the second consultation meeting he made enquiries about those and decided that they were unsuitable. What I find implicitly is the fact that he considered that without pay protection that was a role which he did not particularly want to do. An employer is not required to create roles, simply to offer what is available and in this case, I find that that was done.

71. The next point made by the Claimant arose against the background of the Government offering support to employers through the Coronavirus Job Retention Scheme. The Claimant's essential point is this. Why, given the number of people who volunteered for redundancy and the very low number (possibly a handful of people who were made compulsory redundant) was it necessary to make compulsory redundancies at all? He emphasised that point by saying that at the time he was dismissed the Respondent had entered into other negotiations with the trade union and reached an agreement not to embark on any second wave of redundancies job retention scheme remained in place.

72. It is necessary to supplement my findings of fact above. I find that the Respondent had from about mid-March, engaged in a fresh consultation exercise with the trade unions in respect of further reorganisation, further changes and perhaps further job losses. An agreement was reached that there would be no further job losses until the corona virus job retention scheme ended. I accept the evidence I was given that that related to a different group of people and not to those pooled, along with the Claimant, in the redundancy selection exercise he had been engaged with. I was told by Mr Fowler that whilst the job retention scheme provided a welcome relief for the Respondent, it was not a panacea for all of the Respondent's problems. The Respondent was haemorrhaging money and the job retention scheme would only provide something like 60% of the cost of retaining an employee and he illustrated that quite clearly by referring to the national insurance cost (that is the employer's national insurance cost) and the cost of pension together with the cost of keeping employees on the payroll which, from my own knowledge, would include the cost of paying annual leave and the like. It seems to me his 60% estimate was almost broadly accurate.

73. I am satisfied that the 'no further dismissals' agreement that was reached concerned a different group of employees. However that does leave the question of whether it might have been reasonable to have retained the Claimant on Furlough pending any improvement in the aviation sector. At the time I find that the Respondent reasonably believed that there was no prospect of the situation changing in the immediate future.

74. Mr England sought to persuade me that the existence of the job retention scheme was irrelevant and that an employer did not need to consider furlough as an alternative to redundancy. I disagree, I consider that the reference to 'all the circumstances' in section 98(4) requires me to have regard to any available means of mitigating against the need to make redundancies. If the job retention scheme was going to be paying the majority of the costs of continued employment then that would be a factor which would have to be taken into account. I find it is a factor in which a reasonable employer should have regard to in weighing up the disadvantages to the employee and the advantages to the business.

75. On the facts of this case it is clear to me that Mr Fowler, and the management of the Respondent had thought about whether to stop the redundancy exercise because of the job retention scheme and had weighed up the pros and cons. In the light of the evidence given about the limited assistance of the job retention scheme and of the dire situation faced by the Respondent I am unable to say that the decision to make redundancies was not an option open to a reasonable employer.

76. Finally, although not a point highlighted by the Claimant, I have asked myself whether the failure to hold an appeal was unreasonable. An appeal is not an essential part of a redundancy dismissal process although in this case it would have given the Claimant a further opportunity to explain why he thought he ought to be entitled to the 'covid discount'. I consider that some employers in receipt of the Claimant's e-mail sent in response to his dismissal would have immediately recognised that the Claimant was dissatisfied and treated that email as an appeal in of itself. The Respondent here did

not. It replied, it gave answers but without hearing more from the Claimant. Had the matter been left there I would have been very concerned about fairness however the Respondent did remind the Claimant in its response that a right of appeal was available. That was an option not taken up by the Claimant.

77. I need to assess the fairness of the dismissal in the round taking account of all of the material circumstances have made some criticisms of the Respondent particularly in respect of the lack of transparency in making it clear quite how the selection criteria applied and how the calculations had been made. It could have been done better.

78. The test for me is whether the dismissal both procedurally and substantively fell within a range of reasonable responses. In my view it did. Other employers might have acted differently but that is not determinative. I find that in the particular circumstances of this case this employer acted reasonably in treating the redundancy situation as a sufficient reason to dismiss the claimant.

79. Accordingly I find that the complaint of unfair dismissal is not well founded.

80. I apologise to the parties for the delay in providing these written reasons. I have been dealing with a backlog of cases but recognise that delay may have caused the parties some inconvenience.

Employment Judge Crosfill

Date: 9 June 2022