EMPLOYMENT TRIBUNALS

Claimant: Mr K Matusiak

Respondents: Centriforce Products Limited
Mr Stewart Lawrence

Heard at: Liverpool **On:** 25, 26, 27, 28, 29 April 2022

Before: Employment Judge Aspinall
Ms Ross-Sercombe
Mr Stemp

Representation
Claimant: Mr Werenowski
Respondent: Mrs Skeaping

REASONS

JUDGMENT having been given orally on 29 April 2022 and sent to the parties on 9 May 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

Background

1. By a Claim Form dated 15 July 2020, having achieved an early conciliation certificate from ACAS on 2 July 2020, the claimant brought complaints of unfair dismissal and race discrimination. He had worked as a multi-skilled engineer for the respondent which makes recycled plastic products, from 23 September 2013 until 15 June 2020 when he was dismissed. He is a Polish native. The respondent defended the complaints saying that the reason for dismissal was redundancy. The claimant says he was unfairly selected for redundancy and selected because of his nationality which amounted to direct race discrimination.

The Hearing

2. We met at Liverpool in person. The claimant required an interpreter to assist him during his evidence and that of the respondent's witnesses. He had not needed an interpreter at case management stage. His solicitor spoke Polish and they were happy to proceed on the first morning to finalise a List of Issues, to agree a timetable and to address disclosure applications without an interpreter. The interpreter was requested for 2pm but was not available. The Tribunal agreed to use the first afternoon to read and the timetable was adjusted to allow the second day and morning of the third for the respondent's evidence and the afternoon of the third day from 12 noon for the claimant's evidence with closing submissions at 11.00am on day four. Deliberation was planned for day four and day five with judgment and remedy on day five if appropriate.

3. Mr Vick, a witness for the claimant, could only appear between 12 noon and 1pm each day by CVP so it was agreed he would appear on Wednesday at 12 noon. There was discussion as to running order, reference to EJ Horne's case management order and it was agreed, for ease of attendance by the witnesses, the respondent would go first.

Documents

4. We had a bundle of 291 pages. A page was added by consent. The claimant had sent to the Tribunal, three extra documents. They were

- GTW Agency advertising for skilled engineer work at the respondent.
- The respondent's corporate accounts.
- An email requesting specific disclosure of Mr Waldowski's CV. Mr Waldowski was employed by the respondent after the redundancy of the claimant. The claimant's allegation was that the respondent had deliberately sough to employ a Polish national once it became aware of the claimant's claim so as to deflect allegations of racism.

5. Following discussion about the List of Issues the claimant did not need the documents to be included in the bundle. The GTW advertisement was already in the bundle. The claimant confirmed that he was not advancing an argument that there was no redundancy so there was no need to look at accounts. He accepted that there was a reduction in the need for multi-skilled engineers. He wanted proof of the date on which Mr Waldowski was engaged as he said it was after the employer knew of his claim.

6. The claimant also wanted to obtain the name and address of a Mr McGeagh from the respondent. He was a multi-skilled engineer in the pool who scored higher than the claimant and was retained only to resign a short while after the redundancies. The claimant said Mr McGeagh could not have managed in the role without the claimant and wanted to ask him to be a witness as to why the claimant should have scored higher. The claimant was objecting to the respondent refusing to disclose its former employee's address.

7. The Tribunal explored the relevance of Mr McGeagh's potential evidence with the claimant and explained that it does not substitute its view of what the

scoring should have been for that of the respondent. It looks at what the respondent did and applies the law in Section 98 Employment Rights Act 1996 and Section 13 Equality Act 2010. Mr McGeagh's opinion as to the relative scores of the claimant and himself would be of little if any relevance to the issues. It was the factors operating on the mind of the person doing the scoring, Mr Lawrence, that would matter.

8. The claimant argued that Mr McGeagh was the comparator for the claimant. The claimant then said he wished to rely solely on a Mr Easton as the comparator. Mr Easton was also a multi-skilled engineer and the claimant says he ought to have scored at least as high as Mr Easton. The claimant no longer wished to have Mr McGeagh attend.

The List of Issues

9. There had been clarification of the issues in the case management order of EJ Horne but no List had been prepared. The Tribunal required the parties to agree the issues before proceeding further. The issues were discussed and agreed and the parties went out to prepare a document. The document that came back was incomplete so, in the event, the Tribunal amended what had been agreed and circulated a document. The issues were agreed to be:

(1) Did Mr Lawrence treat the claimant as alleged

a. At their first meeting on 5 January 2020 did Mr Lawrence, hearing that the claimant had a foreign accent, refuse to engage with C in an issue about temperature gauges and walk off as C was mid sentence explaining that R1 used Shinko gauges and the reasons why it should not switch to Gfram gauges as Mr Lawrence had suggested and, later that day, describe C as a low skilled engineer

b. Was Mr Lawrence gratuitously rude to C on several occasions without good cause specifically (i) on 10 January 2020 did Mr Lawrence refuse to engage with C, turn his head away and walk away and (ii) from January 2020 to 23 March 2020 did Mr Lawrence ignore C's greetings

c. Did Mr Lawrence then (under)score C for redundancy with a racially discriminatory motive and with scant knowledge of C's true worth (resulting in him losing his job)?

(2) If so, what is the reason for that treatment? Was it because the claimant is Polish or was it wholly for other reasons? C relies on Mr Eastham as the actual comparator in relation to the scoring.

(3) Were acts complained of prior to 4 April 2020 out of time? If so, were they part of a course of conduct extending over a period which ended on or after 4 April 2020? If not, would it be just and equitable to extend time?

(4) What was the reason for dismissal? Was the sole or principal reason redundancy? The claimant concedes that a genuine redundancy situation had arisen in May 2020 but contends that he ought not to have been selected for redundancy. The claimant concedes that he was properly placed in a pool of 13 for selection.

(5) Was the claimant unfairly selected for redundancy?

(6) Did the company act reasonably or unreasonably in treating that as sufficient reason to dismiss the claimant?

a. The claimant says the scoring was unfair as it was motivated by race and was done with scant knowledge of his skill? The claimant says he should have scored at least as well as Mr Eastham.

b. The claimant says Mr Dawson hearing the appeal against his redundancy selection / decision to dismiss was unreasonable as he was not impartial because he had been involved in the scoring process.

c. The claimant says the appeal against his grievance outcome was unfair as it was dealt with in a cursory way, Ms Eva having made an informal decision which was ratified by Mr Keeley.

(7) Did the respondent consider alternatives to redundancy or mitigation of the effect of redundancy on the claimant?

(8) If the dismissal was unfair would the claimant have been dismissed by reason of redundancy or otherwise anyway and if so, when?

(9) If remedy arises how much compensation is to be awarded to the claimant?

(10) Does the ACAS uplift apply? The claimant says the respondent failed to follow the ACAS code in its handling of his grievance appeal at 5b above.

Applications

10. The claimant had written to the Tribunal on 20 April and 22 April 2022 to make applications for specific disclosure. The respondent objected on the grounds of relevance. The claimant wanted to see Mr Lawrence's CV, proof that Mr Lawrence had undertaken equality and diversity training, Mr Waldowski's job advertisement and resignation letter. The claimant was invited to consider, in the light of the list of issues and clarification as to the role of the Tribunal whether he

still wished to make those applications. He did.

11. The Tribunal heard and determined the specific disclosure applications. The Tribunal's power to make orders for disclosure is contained in Rule 31 Employment Tribunal Rules of Procedure 2013. The Tribunal has a broad discretion in relation to case management powers but must exercise that discretion to give effect to the overriding objective in Rule 2. The test is one of "relevance and necessity" Canadian Imperial Bank of Commerce v Beck 2009 IRLR 740 CA. A document must be both relevant and necessary for a fair trial if its disclosure is to be ordered. In Rolls-Royce Motor Cars Ltd v Mair and others EAT 794/92 the EAT stated that the disclosure application should be determined in relation to the particular issues in the case and confined to particular relevant issues. For this reason the List of Issues was finalized before the disclosure applications were heard.

12. The Tribunal heard submissions from the claimant and respondent and determined the applications as follows:

A. The claimant's application for specific disclosure of the CV of Mr Lawrence was declined. The claimant submitted that Mr Lawrence had moved jobs often and that his CV would show this and an inference could then be drawn in the claimant's favour. The claimant was not specific as to what that inference might be other than to say that Mr Lawrence had been "moved on". The respondent's submission that Mr Lawrence's career pattern was neither relevant to the issues in the case nor necessary for their fair disposal was accepted. Even if the CV showed that Mr Lawrence had moved often it could not be inferred that was because he had unfairly selected people for redundancy or because of race discrimination. The Tribunal had regard to the List of Issues and as the claimant could not identify an issue on that List to which the CV would be relevant and necessary the application was declined. The claimant's argument that Mr Lawrence's employment history could support an adverse inference of race discrimination could be put in cross examination and closing submission.

B. The claimant's application for specific disclosure of certificates to prove the content of Mr Lawrence's witness statement where he had stated he was trained in equality and diversity was declined. The Tribunal posited that even if Mr Lawrence were fully trained with a documented history of that training he might still treat the claimant less favourably because of his race and the opposite was true, he might be untrained but act without unlawful discrimination. The claimant submitted that it was a credibility point, that if Mr Lawrence said he was trained and couldn't prove it then he was not to be believed. The Tribunal envisaged a range of scenarios in which training certificates might not be available despite a person having been trained so that the presence or absence of certificates would not be determinative of the witness's credibility on the points on the list of issues. Further, the witness might not be credible on the training point, no certificates being adduced, but wholly credible on other points.

C. The claimant's application for specific disclosure of the advertisement for the role of skilled engineer subsequently taken up by Mr Waldowski is granted. The claimant submitted that this was relevant to the overall fairness of the dismissal. The Tribunal accepted the submission that the availability of skilled engineer work at the respondent business possibly within a month of termination of the claimant's employment may be relevant to the determination of whether the respondent acted reasonably in treating the redundancy situation as sufficient reason to justify dismissal of the claimant. Sight of the advertisement would be necessary so as to make findings of fact as to the date and nature of the role that was available.

D. The claimant's application for specific disclosure of Mr Waldowski's resignation letter is declined. The claimant could not say for sure that the letter existed, nor how the termination of his employment came about. The Tribunal accepted the respondent's submission that this was a fishing expedition. Further, the Tribunal considered that the document, if any existed, was unlikely to prove what the claimant thought it might prove, that Mr Waldowski had resigned because of racism. The claimant was not at all clear what his submissions were on this point as he alternately said that the respondent had engaged Mr Waldowski to attempt to defeat an allegation of racism and that Mr Waldowski left because of racism. The claimant had no evidential basis for either of those positions. The claimant could not establish that the termination of Mr Waldowski's employment was relevant or that the resignation letter if any was necessary for the fair hearing of the issues in his case.

Timetable

13. The agreed timetable for witnesses was:

Tuesday 10am Mr Lawrence
Tuesday 2pm Mr Dawson
Tuesday 3pm Mr Keighley

This was subsequently revised to hear Mr Keighley on Tuesday afternoon and Mr Dawson on Wednesday morning.

Wednesday 12 noon Mr Vick (who could only be available between 12 and 1 each day)

Wednesday 2pm the claimant.

Thursday 11am closing submissions. We agreed that the claimant would go first and have a maximum of 45 minutes. The respondent would conclude with 45 minutes of submission.

Evidence

<u>Interpreter</u>

14. The interpreter was sworn in and assisted the Tribunal throughout the hearing.

15. The Tribunal heard evidence from the claimant. The Tribunal found him to be a witness who was careful to be accurate, who made concessions that were not helpful to his case so as to be honest and who was able to answer from memory. The claimant answered directly and succinctly on the issue of Mr Lawrence turning his back and walking away from the claimant when the claimant was speaking on 6 January 2020. He spoke with certainty about that event.

16. During his evidence the interpreter translated documentation for him and relayed questions and answers. On the point of what was said in a telephone consultation meeting the Tribunal asked that the claimant answer in English because the Tribunal wished to form a view as to how effective consultation could have been in English. The claimant was consulted as to whether he was happy to do this and he was. He answered concisely from memory and in good English as to the content of the telephone consultation meetings. He was able to explain the reasons that had been given to him for the redundancy, using appropriate vocabulary specific to redundancy (saying that there was a reduction in the need for people to do the work) and explaining the context factors such as the pandemic and reduced orders that had led to that situation. The Tribunal found that he was a credible witness on the point of what had and had not been said at the individual consultation meetings which had taken place in English and his evidence was preferred to that of Mr Lawrence on the content of those meetings.

17. Mr James Vick appeared for the claimant and gave his evidence in a straightforward way though he swore to the truth of his witness statement saying it was in front of him when it later transpired he did not have it. When this came to light a copy was provided electronically, he was given time to read it and again affirm its truth. He had said in his statement that he had heard Mr Lawrence describe the claimant as low skilled. This was also noted in Mr Dawson's note contemporaneous note of the appeal. This was not something that he could now attest to, due to the passage of time. The Tribunal attached little weight if any to the oral evidence of Mr Vick because his recollection was poor and because he had been part of the same pool as the claimant and had also been made redundant. He had provided a reference for the claimant and was generally empathetic towards him.

<u>For the respondent</u>

18. Mr Stewart gave his evidence in a straightforward way. He was asked supplemental questions about his employment history and shared his previous work history. He was given an opportunity in supplemental questions to say whether he had employed Mr Waldowski to deflect from racist selection of the claimant, he reacted calmly saying that Mr Waldowski was employed for his skills not nationality as his LinkedIn exchange would show. Mr Lawrence volunteerd information that there was no advertisement for Mr Waldowski's role but a private message exchange seeking a skilled worker in July 2020 which he would share. He shared this information in satisfaction of the Order for Specific Disclosure.

19. Mr Stewart gave evidence to the Tribunal that there were six criteria he had

used for arriving at the scores he gave to the multi-skilled engineers. He shared the scores he had given the claimant and accepted that the six criteria were not in his witness statement and did not exist in a documentary form anywhere. He said that he had had a meeting with Mr Dawson to sign off the scores. Mr Stewart was not credible on those points.

20. Mr Stewart was not credible when he said that he had not spoken to the claimant on 6 January 2020 and that he had found out that the claimant was Polish from someone, he could not remember who, telling him that the same day. At this point in his evidence he became defensive and spoke abruptly saying *no, never spoke to him, never heard his accent* in contradiction of his own evidence that he gave instruction that day to the claimant and a co-worker at that time. Elsewhere Mr Stewart appeared calm when giving evidence.

21. He was open and entirely credible when he said that he had not heard that there was a tribunal claim of racism against him until March 2021. This was credible because he told the tribunal that he had seen the call from Ms Eva and assumed it was about his outstanding pay. He went immediately and openly to his thoughts at the time and shared them.

22. The Tribunal heard evidence from Mr Dawson. He was not credible when he said that Mr Lawrence had told him about the six criteria scoring system and scores given to each employee at a meeting. The Tribunal found his evidence not credible because (i) it was not contained in his witness statement nor that of Mr Lawrence (ii) there was no contemporaneous documentary evidence of the six criteria (iii) they were not referred to in the Response Form (iv) there were multiple references in the documentation to the four criteria assessment matrix.

23. The Tribunal found that Mr Dawson anchored his evidence to that of Mr Lawrence whose evidence he had heard the previous day saying, for example, *he would have explained them to me* rather than *he did*, and *it would have been the hybrid Stewart applied which made up the score* rather than *it was.* He was supposing what the position would have been if he had known about it at the time. The Tribunal found he was constructing his position in the witness box to align with that of Mr Lawrence. Mr Dawson said *I can't recall (the scoring criteria used) but I heard the evidence yesterday and that was a true reflection.* Mr Dawson could not give a clear account of how Mr Lawrence's scores on his six criteria became the scores on the 4 point assessment matrix, how 5 out of twelve in the six point system became a five out of ten, or ten out of twenty in the 4 point assessment matrix.

24. Mr Dawson was not credible when he said that the reason he had heard the appeal against redundancy even though he had had a hand in the scoring and heard the grievance even though it was about the scoring was that *there was literally no one else.* Mr Dawson elsewhere spoke about the two Directors.

25. Elsewhere Mr Dawson made frank admissions for example he accepted that Mr Lawrence had done the scoring on 11 May and that was, in his words, *far too fast* and that he had told the collective consultation meetings that matters held on record would be taken into account in assessing performance and training would be taken into account and yet he accepted he had not seen the claimant's

appraisal documents or training certificates until he saw the bundle for this hearing and had not checked that Mr Lawrence had taken them into account.

26. During Mr Dawson's evidence Mr Werenowski asked the witness had he been coached. The Employment Judge asked Mr Werenowski to pause and think carefully about any allegation he was making and to say if he had any evidence to support an allegation of coaching. He did not, he made no suggestion of coaching and withdrew his question. Mr Dawson did not answer.

27. The Tribunal heard from Mr Keighley. Mr Keighley was clear that he had never come across racism in any form (except for Indians and Pakistanis in the past) and that he would know if he had as he can read people. When asked what he had done to investigate the grievance and appeal he answered *we,* and readily admitted that he had delegated investigation to Ms Eva and Mr Ward. Ms Eva took notes of the meetings she had, Mr Ward did not. He was frank in admitting that he was not concerned that Ms Eva was investigating even though she had previously advised on some of the matters she was investigating. He said Ms Eva was *truly independent* and *his HR Conscience* and he had *no reason to disbelieve her.* He was less than frank when he said he trusted her to follow procedures only to have to admit, when asked, that there were no written procedures and he had had no discussion with her about an appropriate procedure or process for her to follow. We found him to be a witness who wanted to say the right thing to exonerate the company rather than to respond accurately from recollection.

The Facts

28. The claimant worked for the respondent for five years and trained up so that by May 2018 he was working as a multi-skilled engineer doing both mechanical and electrical engineering work on the respondent's machinery. He was managed by Mr Parr who left the business in July 2019 and previously by Mr Hall. He had had good appraisals that were on record with the respondent. In August 2017 Mr Hall recorded him to be:

> "*a proactive individual who frequently seeks to bring equipment issue to the fore. His previous training as an electrician has shown and having recently completed his C&G he should look to build further on professional development. His initiative and problem solving are both good and he uses his time well in an ever changing environment. Krystian communicates well at all levels both technically and personally and is a well respected member of the team."*

29. In December 2017 Mr Hall appraised the claimant again and recorded that he was "*near the top of the training matrix*". The claimant was "*the first to volunteer for any task*" and Mr Hall recorded "*his problem solving has grown in recent months and he proactively seeks solutions to issues as encountered*". Again it was recorded that he "*communicates well at all levels*".

30. In April 2019 the claimant's salary was reviewed by Mr Parr, his new manager, and increased to £ 34 680 plus a £3000 shift allowance. At this point he had been employed for over six years.

31. In June 2019 ZM joined the business as a multi-skilled engineer from a background in plastics manufacturing. In July 2019 Mr Parr left and Mr Vick stepped up as acting manager of the multi-skilled engineers. In December 2019 Mr Lawrence joined the business as Engineering Manager. He was asked to meet the staff and was gently criticised by his bosses after a week for not having gone out around the factory to have done that sooner. He was considered abrupt by some of the staff.

32. The claimant's role involved being called to a line or a machine to fix it, to get it back up and running. Sometimes there were technical drawings that could assist in diagnosing faults but generally there were no drawings or where they did exist there had since been modification to the machine so that the drawings did not accurately reflect, for example, the electrical circuitry in place.

33. The claimant had worked as a multi skilled engineer fault finding for 3 years before Mr Lawrence joined the respondent and he knew the machines well so that he had working models in his head of their layouts and quirks. He worked regularly, almost daily, with risk assessment documents, height permits and electrical isolation permits to carry out his work in a safe way. He had built a good working relationship with DE and they worked individually or together to fault find and repair breakdowns. ZM had less knowledge of the history of the machines so that sometimes he needed support from the claimant to fault find and repair breakdowns because the technical drawings were not up to date and the claimant's experience meant that he knew the layout and quirks of the machines.

34. The shift patterns were such that Mr Lawrence and the claimant were only on site together on 16 occasions from December 2019 until the claimant was furloughed in March 2020.

35. In early January 2020 an issue arose on Line 6. The claimant and another engineer were there. Mr Lawrence attended and gave some instruction. The colleague headed off to act on it and the claimant spoke to Mr Lawrence. He spoke directly to Mr Lawrence with eye contact. Mr Lawrence did not respond and turned and walked away.

36. The claimant told his colleague DE about this and a couple of other occasions when the claimant felt Mr Lawrence had been rude to him. They agreed that the claimant should wait because it might settle down when Mr Lawrence got to know the claimant better. The claimant did not report it.

37. At some point between January and March 2020 the claimant asked Mr Vick if he could have support with English lessons to improve his written English. The request went to Mr Lawrence who turned it down.

38. In March 2020 the claimant was placed on furlough. Mr Lawrence made the decision as to who to furlough based on retaining a good mix of mechanical and electrical engineers on site. The claimant did not want to be furloughed but accepted the decision and asked and was given an assurance by Mr Dawson that the plan was to bring him back to work as soon as possible.

39. In May 2020 the respondent identified the need to reduce the workforce. It planned a reduction of 42 posts across its site and began collective consultation.

11 May 2020 redundancy consultation

40. The respondent informed the workforce of a redundancy situation. It created pools based on the kind of work the workers did. The engineer pool contained all engineers including the claimant. There were 13 people and only 5 posts needed. The engineers comprised some electrical, some mechanical and some multi-skilled. An immediate decision was made to make all single skilled engineers redundant. This resulted in a reduction of the pool to 7 multi-skilled engineers. Two posts would have to be made redundant.

The scoring process

41. On 11 May 2020 Mr Lawrence undertook a scoring exercise for the multi skilled engineers. He looked at the redundancy selection document provided by HR which had a four point assessment matrix scoring workers on 1.Relevant skills and experience, 2. Performance, 3. Disciplinary Warnings and 4. Attendance.

42. He thought that the claimant was a less skilled engineer than JS, JR, ZM, DE, and DC. He thought this because i) he had albeit limited experience of directly observing their work, he knew the claimant to be qualified to the lower level of UK equivalent to NVQ level 2 and believed the other engineers to be higher qualified. He had observed the claimant to be someone who was less communicative than the other engineers, someone who generally hung back, and someone who was good but less able than those who scored above him in breakdown management and fault finding. He knew the claimant worked really well with DE and he knew that the claimant was supporting ZM to gain more knowledge of the layout and quirks of the machines, but he thought the rank order was as he ranked it. His rank order left the claimant and John Cubbins JC as the bottom two. Mr Lawrence then matched scores to his perception of the engineers' performances. He scored on relevant skills and experience and performance. He took a rounded approach and came up with figures for the boxes on the form to match the descending order to his perception of the performance.

43. JS comes top with 10 plus 10, the maximum scores for skills and experience as does JR who comes joint top with 10 plus 10. ZM comes next with 8 plus 8. He had knowledge of the plastics industry. DE gets 7 plus 7 as does DC 7 plus 7 who are both UK qualified engineers above level 2. The claimant was next on the list with a 13, 6 plus 7, he was a good worker but lower qualified. JC comes last with 2 plus 2.

44. At this point it looks as though the claimant and JC will be made redundant. Mr Lawrence then had to add in scores for disciplinary and attendance which must have been provided to him from company records. Everyone was given 10 plus 10 unless there was a live disciplinary warning. JR was the only multi skilled engineer with a disciplinary warning so he got 10 plus 2. When those scores were added in the rank order changed.

45. JS was still top with 40. ZM has 36. DE gets 34. DC gets 34. We saw a document at page 128 of the bundle with a total score for the claimant at 33 (it also recorded 30). JR, because of his disciplinary, has dropped to 32 and JC gets 24.

46. At this point it looks like JR will be made redundant but Mr Lawrence cannot

allow JR to go as he has automation skills that need to be retained. Mr Lawrence needed to adjust the scores to protect and retain JR. He couldn't up JR scores as JR was already top of each of the three categories and the couldn't up the disciplinary score of a 2 at all as the disciplinary was on record. He could only drop someone else's. Next on the scores was the claimant so Mr Lawrence adjusted the figures to drop the claimant's score below that of JR. He gave the claimant 5 plus 5, dropping him to 30, back to where he had been in the bottom two.

47. The scoring matrix had space for comment on each of the criteria and then for comment on total score at the bottom. Mr Lawrence made comments on each multi-skilled engineer he scored at the time he completed the scoring matrix for them.

48. He used the following descriptors:

- DC scored 7 and was described as *well rounded, cheerful, someone who personifies the core values of Centriforce*, *takes pride in showcasing his work.*

- JC scored 2 he was described as *a poor engineer, below average, fault finding skills are very below average.*

- DE scored 7. He was described for RSE as *a well rounded engineer that can perform in a team and work just as well on his own.* For PERF he was described as *always performs well and is very meticulous about his work and takes pride in what he does.*

- The Claimant scored 5. He was described for RSE as *a good engineer but lacks the skills that others process especially in fault finding capability and ownership of breakdowns. F*or PERF he was described as *always performs well and can overachieve…it can be key things (fault finding) that let him down.*

- On total score Mr L wrote he is a good engineer but a lack of certain skill sets and confidence let him down.

- ZM scored 8. He was described for RSE as *a very experienced engineer in the plastics industry. This shows within his skill set particularly with fault finding.* For PERF Mr L wrote *ZM always performs above and beyond, very proactive in approach, he needs very little direction and is always upbeat in his attitude.*

- On total score Mr L wrote *ZM is very much a stand out engineer that is always upbeat and very rarely struggles with the demands of the factory.*

- JR scored 10 p130 and was described for RSE as *very much a standout member of the team...our automation and controls engineer...an integral part of the workforce.* For PERF *always performs above and beyond.*

- On total score Mr L commented *an engineer that the company needs to*

consider and retain ..detrimental(instrumental) in the upcoming automation projects.

- JR had a disciplinary warning and so was deducted 8 marks giving him a total score of 32.

- JS also scored 10 and was described as RSE *a standout leader*. ON PERF Mr L wrote *always performs above and beyond.* On total score, *can follow direction with little input.*

49. These score sheets were sent to Ms Eva and Mr Dawson saw them.

The first collective consultation meeting 13 May 2020

50. Between 11 and 13 May elections took place for employee representatives. The first consultation meeting with them was on 13 May 2020. At the first collective consultation meeting Mr Dawson told the meeting that *assessments have not been carried out by one person only*. At that point Mr Lawrence alone had scored the multi-skilled engineers.

51. A scoring matrix was shared with the elected representatives. The representative for the engineers was Mr Vick. Mr Vick saw the four point assessment matrix and a scoring system that went with it with a five point scale of scores at 0, 2.5, 5, 7.5 and 10. There was an opportunity for the representatives to put forward their questions, which they did. They were subsequently written up and a response given by Mr Dawson for the company. None of the representatives complained about the four point assessment matrix until after the notification of individual redundancies.

The second collective consultation meeting on 15 May 2020

52. At this meeting a representative for another pool asked how would decisions be made as to who would be selected. Mr Dawson said

> "*Managers are responsible for making a structured assessment based on the skills of the individuals….. we are looking at both internal training and any relevant external training ……there are 4 categories; disciplinary and attendance are based on system records so are clear. Skills do take into account external and internal skills. With regard to the level of skills on a particular line this is factored by the performance rating ie highest skilled operators have the highest performance rating, people who are training will have lower performance rating."*

53. Mr Vick asked how many redundancies would be needed in engineering and Mr Dawson said *we cannot say, it is however clear that engineering will be impacted heavily.* Mr Lawrence had already decided the scores and which two employees would be notified of redundancy, the claimant and JC.

The third collective consultation meeting on 20 May 2020

54. The claimant remained at home on furlough. Mr Dawson said *we are continuing to work through the assessment matrix and this is taking some time. There is a lot of information to work through on skills, performance, disciplinary and attendance……it is important to ensure we have retained employees with the correct skill set.* Mr Vick did not attend in person but asked questions by phone call relating to the apprentices.

22 May 2020 letter to claimant

55. The claimant received a letter dated 22 May 2020 telling him the four point assessment matrix:

- Skills matrix (skills relevant to selected operational lines)
- Performance
- Attendance record
- Disciplinary record

56. The letter said that he had been scored was in the lower band and that he was at risk of redundancy. He was not shown his scores at this point. He was invited to an individual consultation meeting.

The first individual consultation meeting

57. This meeting was held by telephone on 26 May 2020. It lasted less than fifteen minutes. The claimant asked and Mr Lawrence explained the need for redundancies. The claimant asked why he was low on the matrix and said he believed his skills should be high. Mr Lawrence did not answer this point but talked generally about the need for redundancies. He did not take the claimant through the scoring process or tell him what his score was. He did not share how he had arrived at the score. All that the claimant knew was that he had scored low.

Second individual consultation meeting

58. On 28 May 2020 there was a second telephone consultation meeting this time lasting less than five minutes. The claimant again said that he believed that his skills should be high on any score. He said that he had been an operator so had high skills. Mr Lawrence said *we are assessing people in pools based on their current roles. We have scored people based on skill sets, and unfortunately you are below the cut off point for retention.*

Fourth collective consultation meeting

59. On the same day, 28 May there was a fourth collective consultation meeting. It was agreed that as individual consultation was now underway the collective consultation would stop. There was a question and answer session. In response to challenge about the people who had been selected Mr Dawson said:

"This is why we have individual consultation to allow people to question

particular points. It would be impossible to have a matrix where everyone agrees with the results, as it is inevitable that some people selected for redundancy will believe that the assessment is unfair. We believe that the system we have used is fair, and it has been applied consistently. We have been through a process of consultation which is now coming to the end and cannot rip it up and start again. We have used information that the company has on record and we are comfortable that this information is reliable. We are confident that the scores attributed are objective. If anyone requires clarification during individual consultation meetings explanations for scores will be given……"

60. Mr Vick asked if he could have a breakdown of matrix scores for individuals and Mr Dawson said yes. Mr Vick said, *"based on stated requirements for the future for the engineering department, this does not stack up with the people being retained"* Mr Dawson said *"we have looked at the skills we believe it is most important to retain and we believe we have kept the correct people".* Mr Vick asked about the safety of engineers working alone on a shift. Mr Dawson was clear *engineers will not be required to lone work on machines or in departments. We will ensure that they are accompanied.* Mr Dawson said *we will ensure that we consider people for reemployment if work does pick up.*

Mr Dawson signs off the scoring

61. Mr Lawrence had sent his scoring sheets for each multi-skilled engineer with the comments on them to Ms Eva. Mr Dawson now needed to disclose the scoring following the fourth consultation meeting. He must have obtained copies of the scoring sheets. He saw them and signed them off. There was no meeting between Mr Lawrence and Mr Dawson and no interrogation of the scoring process or criteria used to assess RSE and PERF. Mr Dawson rubber stamped the selection made by Mr Lawrence. A version of the scoring sheet was then prepared that removed the comments and sent just the four marks apparently out of ten in each of the four categories. The claimant's document no longer showed a 33 and 30 but just a 30. The scoring sheets were dated 21 May 2020 but not sent out until after the fourth meeting on or after the 28th May 2020.

62. On 29 May a scoring sheet showing the claimant achieving

Skills and experience	5
Performance	5
Disciplinary	10
Attendance	10

was sent to the claimant. It did not have comments on it.

2 June 2020 third consultation meeting

63. The claimant had a third telephone conversation consultation meeting with Mr Lawrence. It lasted 5 minutes. We were not wholly convinced that this meeting

took place. Mr Lawrence has ticked lots of boxes on the form to say that advices and information were given to the claimant during that call. We find that information cannot have been given in that time scale. There was no record of any comment made by the claimant. The claimant was informed that his employment would come to an end on 15 June 2020. There was no discussion about the claimant's scores or scoring.

3 June 2020 letter of dismissal by reason of redundancy

64. The claimant was sent a letter informing him of his dismissal by reason of redundancy. He was informed of his right to appeal within 48 hours. The claimant wrote to the respondent to acknowledge the letter and asked for an extension of his time for appeal. He is granted an extension until 10 June 2020.

Undated letter (10 June 2020) appeal and grievance

65. The claimant's representative wrote a letter for him, purporting to be from him and adopting a broken English style of writing, by way of appeal against his selection for redundancy and by way of a grievance. The grounds for appeal were:

Aa) He did not agree with the criteria: there were only 4 criteria.

Ab) Skills experience and performance were wrongly merged into one criteria.

Ac) Performance is unclear as to what was being measured.

Ad) Concerns expressed on May 28th 2020 in individual and in collective consultation were ignored.

Ae) I should not have been selected on any fair scoring.

66. The claimant also lodged a grievance. His grievance was:

Ga) Mr Lawrence made scored him on scant knowledge of him.

Gb) Mr Lawrence described me as low skilled.

Gc) Mr Lawrence ignores me.

Gd) Mr Lawrence walked away from me when I was trying to speak to him.

Ge) Mr Lawrence is biased against me because of my race.

67. The claimant's letter was acknowledged and he was invited to attend a concurrent hearing of his appeal and grievance either on site or by zoom. In the event the meeting was arranged for a zoom meeting on Friday 12 June 2020 which was to be the claimant's last working day.

Redundancy appeal meeting 12 June 2020

68. The meeting was conducted by Mr Dawson on a zoom call which the claimant conducted from his handheld mobile phone. The claimant was accompanied by Mr Vick. Mr Dawson took notes. The claimant said that his experience had not been fully considered in the scoring. The claimant raised a language barrier when he said that his individual consultation on 28 May and concerns he had raised were ignored. He listed his skills experience and training, including a three year Polish qualification which had been provided to the respondent. The claimant said he was someone who carried out improvements to the systems and said that people on shift went to him for help.

69. Mr Vick said that the claimant was being compared to the two colleagues on shift, DE and ZM. The claimant gave an example of his problem solving skills on line 23. He explained that he and DE supported ZM who had less knowledge of the respondent's machinery than they did.

70. The claimant said that Mr Lawrence should not have scored him as he had not known him long enough, the claimant having been on furlough.

71. The claimant wished to be retained and to avoid redundancy. He was appealing against the decision to select him. It was his position that on any fair scoring he would not have been selected. He did not say that he would not return to engineering. This was the Friday before his employment would end on the Monday it is not credible to suggest that he had appealed so as to not return. No offer was made to the claimant that he work as a line operator at that meeting.

Grievance hearing 12 June 2020

72. Immediately after the appeal meeting Mr Dawson conducted the grievance meeting so that one meeting flowed into the other.

73. On the first ground of grievance Ga) the claimant said that Mr Vick should have scored him as Mr Lawrence had insufficient knowledge of his work. On grounds Gb), Gc) and Gd) the claimant said that there were two examples of Mr Lawrence ignoring him one on the table saw job and one on line 6. He described those incidents. The claimant talked about Mr Lawrence ignoring him and how he had hoped that this would resolve itself over time. He also said that Mr Lawrence had described him as low skilled when Mr Lawrence was in the office and the claimant was just outside and the claimant had heard this. Mr Vick agreed that Mr Lawrence had called the claimant low skilled when he was in the office.

74. On grounds Gc) Gd) and Ge) the claimant said that Mr Lawrence walks away from him when he is speaking. The claimant said that Mr Lawrence is rude and aggressive to everyone in engineering but has walked away from the claimant and that he thinks that is because he is Polish.

75. Mr Dawson asked what the claimant wanted from the meeting to resolve his grievance. The claimant said that he wanted to understand why Mr Lawrence had behaved as he had and for his behaviour to be addressed.

76. At this meeting Mr Dawson asked the claimant had he seen the selection criteria and did he know that a 5 was a score for someone achieving targets. The claimant persisted in his argument that he should not have been selected on any

fair scoring. Mr Dawson said that he would question Mr Lawrence as to how the score had been arrived at. (This was at a date when he told us in evidence he had already met with Mr Lawrence and gone over the scores to look for outliers. On Mr Lawrence's version of events – which we reject, to which Mr Dawson anchored his evidence, the claimant scoring zero in two categories would have been an outlier)

Appeal outcome letter 17 June 2020

77. Mr Dawson wrote to the claimant rejecting his appeal. On the point about selection criteria Aa) Mr Dawson found that no objections had been raised to the criteria in the consultation process save for one objection at the fourth meeting at which point all the selections had been made. Mr Dawson said to change the criteria at that point would be unfair. This was before the claimant knew his scores.

78. On Ab) Mr Dawson said he had reviewed the information that the claimant had provided and felt the scoring was fair. He said " I can assure you that during the process all factors were given due consideration…a scoring of 5 recognises a good level of skills and experience in performing your role" Mr Dawson had not had a discussion with Mr Lawrence about how the scoring had been done and could not have known if Mr Lawrence had taken into account the factors that the claimant had raised at appeal.

79. On Ac) where the claimant said it wasn't clear what was being measured in the performance score, Mr Dawson simply said that the claimant had seen the assessment matrix and that it was clear.

80. On Ae) Mr Dawson rejected the appeal on the basis that the claimant was a stronger engineer than those who had scored above him. Mr Dawson said *each team member has been given a score based on the 4 set criterion, the company has focused primarily on the skills and experience that it requires in the future perhaps giving a greater weighting to previously under used skills".* Mr Dawson had not spoken to Mr Lawrence about how he had done the scoring. Mr Dawson had told collective consultation meetings that skills in other roles would be taken into account. Mr Lawrence had told the claimant that only skills in the current role would be taken into account.

81. Mr Dawson denied the appeal and said there was no further right of appeal.

The grievance outcome was outstanding

82. The letter did not determine the grievance outcome. The claimant wrote to Mr Dawson saying that he did not agree the content of the letter of 17 June 2020 and that he was awaiting a grievance outcome. Ms Eva replied on 18 June saying *with regard to your grievance in relation to alleged discrimination…this is a very worrying accusation…it is important we carry out a thorough investigation into your claim….it is taking us a little longer to respond to you.*

Grievance investigation

83. Ms Eva then investigated the grievance, taking a statement from Mr Lawrence on 24 June 2020. Mr Lawrence said that he had found the claimant to

be *a nice, quiet guy.* He said *"I have tried to speak with him on a number of occasions but he tended to give only yes/no responses…. I put his unwillingness to enter into general chat down to a lack of confidence with English.* Mr Lawrence said he knew that the claimant was keen to do an English course. He found him *not particularly chatty".*

84. On scoring Mr Lawrence said that he followed the selection criteria. He said that the claimant was the least qualified engineer on the team. He said that *we don't have any evidence for an engineering career path… the other engineers on his team are time served engineers and ZM had a strong experience in the plastics industry. The scoring between the claimant and DE was close but he was the lowest scoring of the two. The other two team members had greater levels of qualifications and experience that the claimant and were more proactive and effective at investigation and fault finding.*

85. Ms Eva interviewed James Vick on 24 June 2020 and Mr Vick said that he had witnessed Mr Lawrence turning his back on the claimant when the claimant was speaking, and that several of the engineers consider Mr Lawrence to be dismissive and to ignore people.

86. That same day 24 June 2020 a letter was sent in Mr Dawson's name determining the appeal. Mr Dawson said *"I have investigated and reflected on the points raised"*. He had not. Ms Eva had.

87. On ground Ga) that Mr Lawrence had scored him on scant knowledge of him Mr Dawson rejected the grievance saying that Mr Lawrence and an equal period for all staff during which to make his assessment of them. On ground Gb) Mr Lawrence described me as low skilled Mr Dawson found that the claimant had said that Mr Lawrence was talking to someone else at the time *at no point did you confirm that he had stated that you were low skilled and that is why he would not talk to you*. Mr Dawson / Ms Eva had conflated the two issues. The claimant had absolutely said at the grievance appeal that Mr Lawrence had described him as low skilled. The claimant had heard this and Mr Vick said that he had heard it too.

88. On ground Gc) Mr Lawrence ignores me and ground Gd) Mr Lawrence walked away from me when I was trying to speak to him, Mr Dawson responded on the basis that the claimant had said that Mr Lawrence turned his back on him. That was part only of the allegation. Mr Dawson found that Mr Lawrence can be abrupt and combative in his approach but that he is like that other colleagues (ie non Polish) too and that was corroborated by Mr Vick. The allegation was not upheld.

89. On ground Ge) that Mr Lawrence is biased against me because of my race, Mr Dawson found *this is a very serious accusation and one that is in direct breach of employment law and company policy, and therefore taken very seriously by the company.* Mr Dawson found that as this had not been raised prior to the claimant's redundancy selection and as there was no previous grievance and no evidence of Mr Lawrence behaving differently towards the claimant the allegation was not upheld. Mr Dawson said in the letter that he had spoken to Mr Lawrence who was visibly shocked and upset at the allegation. We find that no such meeting took place.

90. The claimant appealed against the grievance outcome and sent his letter on 30 June 2020. He said that the grievance had not been handled fairly. The claimant's grounds of appeal were

GrApa) Mr Lawrence knew me for too short a period to score me.

GrApb) Mr Lawrence prejudged me.

GrApc) The scoring cannot be right as I am the best engineer, others come to me.

GrApd) The grievance outcome was a foregone conclusion.

GrApe) Mr Lawrence blanked me.

GrApf) I am treated less favourably because I am a foreigner.

GrApg) The grievance and appeal should have been consider together not compartmentalized.

GrAph) Saying Mr Lawrence was aggressive to everyone is not refuting that I was treated worse than others.

GrApi) Mr Dawson approved Mr Lawrence's scoring of me so was biased to hear my appeal and grievance.

GrApj) Mr Lawrence called me a low skilled worker and is insincere

1 July discussion with DE

91. Ms Eva spoke to DE about the claimant's allegation that he had been discriminated against by Mr Lawrence. DE confirmed that the claimant had told him and others that Mr Lawrence had been rude, abrupt and had ignored him when he was speaking, interrupted him mid-flow or brushed him off. DE said that the claimant had stopped going into the office because of it and left DE or ZM to go in. DE said that the claimant had speculated that it could be because of his nationality but DE had found it difficult to reach any conclusion. DE said that he did not want this to come back to him and it was agreed his statement would be anonymised.

92. Ms Eva also spoke to ZM who confirmed that the claimant had said that Mr Lawrence had been rude to him on a few occasions. He had noticed that the claimant would avoid Mr Lawrence and leave him or DE to go into the office.

2 July 2020 discussion with Mr Lawrence

93. Mr Keighley phoned Mr Lawrence to talk about the claimant's grievance appeal. Mr Lawrence raised communication issues saying that others would make casual conversation but the claimant did not and that maybe the claimant found it hard to understand him because of his Liverpool accent. He said that the claimant usually gave one word answers.

94. Mr Lawrence told Mr Keighley that he had followed the selection criteria as published in the collective consultation and that he was not racist. He said:

> *"The sole reason for the claimant's dismissal was because of a genuine redundancy situation where he had been one of the two lowest scorers in a pool that was to be reduced by two."*

95. Mr Keighley said that he concluded that Mr Lawrence was telling the truth from the look on his face but Mr Keighley could not see his face as this was a telephone call as recorded in notes of the call.

2 July 2020 discussion with Mr Dawson

96. Mr Keighley spoke to Mr Dawson by telephone on 2 July 2020. They went through the letter of appeal and Mr Dawson gave responses to each paragraph. Mr Dawson said that it was important that the respondent had a statement from Mr Vick and that Mr Vick had not corroborated the claimant's account of discrimination. Mr Dawson confirmed that he "oversaw" the scoring process and was happy that the scoring had been fair and objective.

3 July 2020 grievance appeal rejected

97. On 3 July 2020 Ms Eva sent an email to the claimant from Mr Keighley. It said:

> *"Please be assured that I have read and understood your grounds for appeal and in response I have fully reviewed the grievance process to date and I have investigated the allegation against S Lawrence of unfavourable treatment due to nationality towards you …having investigated..myself…I can find no evidence…please see attached copies of statements taken.*

98. Mr Keighley had decided the appeal must fail. He offered the claimant another chance to meet to discuss the matter further (Mr Keighley had not discussed the matter with the claimant at all) and he said he was prepared to bring Mr Lawrence into the meeting so that the claimant could question him.

99. The claimant replied on 6 July 2020 saying that he understood Ms Eva to have spoken to the line operators and that he wished to see all the statements from any witnesses. Ms Eva replied on 7 July saying that investigations so far had not revealed any discrimination so there would be no further investigation. The claimant did not wish Mr Lawrence to attend the call on 8 July 2020. The claimant asked had the respondent spoken to the Polish line operators.

8 July 2020 meeting

100. The meeting offered by Mr Keighley to *further* discuss his rejection of the grievance appeal on 3 July took place by zoom with the claimant, Mr Vick and a note taker DG.

101. Mr Keighley said that the grievance appeal had been investigated independently and he asked the claimant was there anything else to look at to

show that Mr Lawrence had treated him unfairly. Mr Keighley said that a matrix had been used to be sure that the scoring was fair. The claimant asked had PM, GS and PL been spoken to, they were Polish line operators. Mr Keighley agreed to speak to them. The claimant said that they would be afraid to speak out, afraid to lose their jobs. Mr Keighley asked for the name of someone who had lost their job for speaking out but the claimant said many people had lost their jobs but could not name anyone in particular. Mr Keighley said that as it stood there was no evidence of discrimination but that he would speak to the Polish operators.

13 July 2020

102. Mr Keighley wrote to the claimant saying that prior to the meeting on 8 July he had instructed that statements be taken from non UK work colleagues and that those statements had been supplied to the claimant. There were no statements from non-UK national colleagues.

103. The letter rejected the grievance appeal. It said the scoring was fair, that it had been reviewed by Mr Dawson. The investigation and appeal on 12 June was appropriate and unbiased, that the claimant had provided no evidence of discrimination. He said that no statement had provided evidence of unfavourable treatment due to nationality. Mr Keighley added that he had asked Gary Ward to talk to UK and foreign nationals about any discrimination they had witnessed or were concerned about and Mr Ward had done so and found nothing to report.

104. Mr Keighley rejected the appeal and determined that the original grievance and redundancy appeal hearing on 12 June had been fair and the decision to dismiss by reason of redundancy and to reject the appeal were upheld.

105. Mr Lawrence helped some of the redundant single skilled engineers to find alternate work including a German National AM. He helped another redundant employee into a role with Cammell Laird and gave his mobile number to the redundant workers offering to help them if he could.

106. Towards the end of June ZM gave notice to leave the first respondent. Mr Lawrence was disappointed that ZM had not said that he was wanting to leave and had not volunteered for redundancy. If he had the claimant's job might have been saved. Mr Lawrence did not contact the claimant to offer him the chance to come back.

107. On 9 July 2020 Mr Lawrence used a message to a contact via LinkedIn to ask for *an electrically biased multi-skilled engineer.* His contact recommended Adrian Waldowski. Mr Lawrence contacted him and after ZM left on 27 July 2020, he was engaged by the respondent. Mr Lawrence set up a selection process involving tests and engaged AW because he was a good multi-skilled engineer with a four year track record at a reputable organization where he had worked as the sole engineer on shift.

108. The respondent also used a contractor from time to time to provide ad hoc specialist engineering services.

109. On 15 July 2020 the claimant brought his tribunal complaint. It was served on the first and second respondents at the business address in August 2020. The

first respondent filed a defence on behalf of both respondents.

110. In February 2021 Mr Lawrence and the first respondent parted company. Mr Lawrence got a phone call from Ms Eva and he thought it would be about end of employment payments so took the call. Ms Eva told him that the claimant's case was going to tribunal and involved a race discrimination allegation against him.

Relevant Law

Unfair Dismissal

111. Section 98 of the Employment Rights Act 1996 (ERA) sets out the law on unfair dismissal relevant to this case. It says:

> (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 … a reason falling within subsection (2) …
>
> (2) A reason falls within this subsection if it….(c) is that the employee was redundant…
>
> …
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

Redundancy

112. Section 139 of ERA defines redundancy. It says:

> (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 -
>
> …(b) the fact that the requirements of that business…(i) for employees to carry out work of a particular kind…. have ceased or diminished or are expected to cease or diminish.

113. "That business" means the business for the purposes of which the employee was employed by the employer: s139(1)(a).

The reason for dismissal

114. The reason for dismissal is the set of facts known to the employer, or the set of beliefs held by him, that causes him to dismiss the employee: *Abernethy v, Mott, Hay and Anderson* [1974] ICR 323, CA.

Reasonableness in redundancy

115. Where the reason for dismissal is redundancy, the tribunal must consider whether the employer acted reasonably or unreasonably in treating redundancy as a sufficient reason to dismiss. In a case called *Williams v Compair Maxam Ltd [1982] IRLR 83*, the Employment Appeal Tribunal (EAT) set out the standards which should guide tribunals in deciding whether a dismissal for redundancy is fair under s 98(4). In that case unions were involved. The EAT said that reasonable employers will seek to act in accordance with the following principles:

Warning – information

- 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.

Consultation

- 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.

Agreeing objective selection criteria

- 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.

Applying the selection criteria fairly

- 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.

Alternative employment

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

No substitution

- It is not for the tribunal to substitute its view for that of the respondent. The tribunal can intervene only where the respondent has acted so unreasonably that no reasonable employer could have acted in that way.

116. Nor is it for the tribunal to carry out a detailed re-examination of the way in which the selection criteria have been applied. It is sufficient for the employer to have set up a good system for selection and administered fairly. The Court of Appeal in a case called *British Aerospace plc v Green [1995] IRLR 437* said "in general the employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt signs of conduct which mars its fairness will have done all that the law requires of him".

117. On the issue of consultation an employer will not usually dismiss fairly for redundancy unless it makes reasonable efforts to consult its employees. In the case *R v British Coal Corporation and Secretary of State for Trade and Industry ex parte Price and Others* [1994] IRLR 72, Lord Justice Glidewell quoted from another judge in another case when he said:

> "The process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in *R v Gwent County Council ex parte Bryant*, reported, as far as I know, only at [1988] Crown Office Digest p19, when he said:
>
> 'Fair consultation means:
>
> (a) consultation when the proposals are still at a formative stage;
>
> (b) adequate information on which to respond;
>
> (c) adequate time in which to respond;
>
> (d) conscientious consideration by an authority of the response to consultation.

The fairness of the procedure as a whole

118. Where the employee appeals against dismissal, the Tribunal must examine the fairness of the procedure as a whole, including the appeal: *Taylor v. OCS Group Ltd* [2006] EWCA Civ 702.

119. Where an employer has failed to follow procedures, one question the Tribunal must *not* ask itself in determining fairness is what would have happened if a fair procedure had been carried out.

120. However, that question is relevant in determining any compensatory award under section 123(1) of ERA: *Polkey v. A E Dayton Services Ltd* [1988] ICR 142. The tribunal is required to speculate as to what would, or might, have happened had the employer acted fairly.

Race discrimination

Equality Act 2010

121. Discrimination against an employee is prohibited by section 39(2) Equality Act 2010:

> **"An employer (A) must not discriminate against an employee of A's (B) –**
>
> **…. (d) by subjecting B to any other detriment."**

122. Harassment during employment is prohibited by section 40(1)(a). By section 212(1) conduct which amounts to harassment does not also amount to a "detriment".

123. The protected characteristic of race is defined by section 9(1) as including colour, nationality or ethnic origins.

124. In interpreting the Act we had regard to the Code of Practice on Employment issued by the Equality and Human Rights Commission ("the Code").

Direct Discrimination

125. The definition of direct discrimination appears in section 13 and so far as material reads as follows:

> **"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".**

126. The concept of treating someone "less favourably" inherently requires some form of comparison, and section 23(1) provides that:

> **"On a comparison of cases for the purposes of section 13 … there must be no material differences between the circumstances relating to each case".**

127. It is well established that where the treatment of which the claimant complains is not overtly because of race, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of the mental processes, conscious or subconscious, of the individual(s) responsible: see the decision of the Employment Appeal Tribunal ("EAT") in **Amnesty International v Ahmed [2009] IRLR 884** at paragraphs 31-37 and the authorities there discussed.

128. It may be appropriate for the Tribunal to dispense with constructing a hypothetical comparator if it finds that the protected characteristic had a material influence on the detrimental treatment.

Burden of Proof

129. The Equality Act 2010 provides for a shifting burden of proof. Section 136 says:

> "(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

130. It is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

131. In Hewage v Grampian Health Board [2012] IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in Igen Limited v Wong [2005] ICR 931 and was supplemented in Madarassy v Nomura International PLC [2007] ICR 867. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question.

132. If in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Time limits

133. The time limit for Equality Act claims appears in section 123 as follows:

> **"(1) Proceedings on a complaint within section 120 may not be brought after the end of –**
>
> **(a) the period of three months starting with the date of the act to which the complaint relates, or**
>
> **(b) such other period as the Employment Tribunal thinks just and equitable …**
>
> **(2) …**
>
> **(3) For the purposes of this section –**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period;**

> **(b) failure to do something is to be treated as occurring when the person in question decided on it".**

134. A continuing course of conduct might amount to an act extending over a period, in which case time runs from the last act in question. Hendricks v Commissioner of Police of the Metropolis [2003] IRLR 96 considered the circumstances in which there will be an act extending over a period.

> "The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period." I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be side-tracked by focusing on whether a "policy" could be discerned. Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed."

Early Conciliation Provisions

135. Section 18A of the Employment Tribunals Act 1996 contains a requirement that before a person (the prospective claimant) presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information in the prescribed manner about that matter.

136. The prescribed period means prescribed in Employment Tribunal procedure regulations. In relation to claims for disability discrimination the prescribed period is three months.

Applying the Law to the facts

The just and equitable extention point

137. Mr Werenowski at the conclusion of the claimant's evidence had not presented evidence that would assist the tribunal if it had to determine an extention of time. The claimant had not said why he had not brought his complaint sooner. The Tribunal had heard that he had raised concerns with DE about Mr Lawrence being rude and it possibly being due to racism between January and March 2020 but had decided to wait and see if the working relationship improved. The Tribunal heard that the claimant had been supported by Mr Werenowski in his letter writing at appeal stage. No date was given but Mr Werenowksi accepted that it might be relevant to a determination on the time point that he had supported the claimant at a time when the claimant may still have been within his primary limitation period for events complained of between January and March 2020.

138. Mr Werenowski confirmed that his argument was that the events formed a course of conduct extending over a period of time, the latest of which, the decision to dismiss was in time. He says that Mr Lawrence's view of the claimant was the discriminatory motive operating throughout from January 2020 to dismissal. He was not seeking a just equitable extention of time and if his course of conduct argument failed then he accepted that events before 4 April 2020 would fall outside of the Tribunal's jurisdiction so that only the redundancy process itself from 11 May onwards, the claimant was on furlough between 23 March 2020 and his dismissal, would be considered.

139. Mr Werenowski reverted in closing submission to a position in which he relied on a just and equitable extention of time, in the alternative, accepting that he had not adduced evidence on that point.

The Polkey point

140. At the conclusion of evidence the Employment Judge raised with Mr Werenowski that the percentage chance of the claimant having been retained or dismissed had not been put in cross examination to Mr Lawrence or Mr Dawson or Mr Keighley. The Tribunal heard from Ms Skeaping who offered to recall a witness or witnesses if Mr Werenowski wished to put that point. Mr Werenowski said that his case was that the claimant said he was the best engineer of all the multi-skilled engineers and would 100% have been retained but for the discriminatory motive informing the selection. He did not want to recall witnesses to put that point. The respondent's position was that it stood behind its scoring.

141. The Employment Judge asked that everyone make a good note that the claimant had been offered the chance to have a witness recalled and had not felt it necessary to do so. The parties were asked to make submissions on each of the issues on the List.

142. Did Mr Lawrence treat the claimant as alleged

a. At their first meeting on 6 January 2020 did Mr Lawrence, hearing that the claimant had a foreign accent, refuse to engage with C in an issue about temperature gauges and walk off as C was mid sentence explaining that R1 used Shinko gauges and the reasons why it should not switch to Gfram gauges as Mr Lawrence had suggested and, later that day, describe C as a low skilled engineer?

Walking off

143. The Tribunal finds that the Mr Lawrence did walk off whilst the claimant was talking to him on 6 January 2020. Mr Lawrence had given an instruction that a temperature gauge was to be changed to a different brand. The claimant did not agree and may have had valid reasons rooted in his knowledge of the machines but Mr Lawrence did not want to hear it and walked off expecting his instruction to be actioned. Mr Lawrence knew that day that the claimant was Polish.

Low skilled

144. Mr Lawrence was in the office. Mr Vick was there. The claimant was just

outside at a work station where small appliances could be tested and the claimant heard Mr Lawrence say he was low skilled. Mr Vick also heard this. The Tribunal prefers the evidence of the claimant because he could describe in detail the event and the location and where he was when he heard this and because this was hurtful to him and so it is likely that he would remember it having been said. The claimant's evidence is corroborated by the contemporaneous evidence of Mr Vick. Mr Vick told Mr Dawson at the appeal meeting that he heard this being said and Mr Dawson made a note of it.

145. We also find it plausible that Mr Lawrence would and did say this because it was his genuinely held belief, as early as January 2020 and having had very little time to assess any of the engineers, that the claimant was less skilled than other multi-skilled engineers.

b. Was Mr Lawrence gratuitously rude to C on several occasions without good cause specifically (i) on 10 January 2020 did Mr Lawrence refuse to engage with C, turn his head away and walk away and (ii) from January 2020 to 23 March 2020 did Mr Lawrence ignore C's greetings?

Gratuitously rude

146. Mr Lawrence was rude to the claimant and walked away from him when he was talking. There was the line 6 incident and the table-saw incident. We prefer the evidence of the claimant to that of Mr Lawrence because it was hurtful to the claimant and so he noticed and remembered it and because the claimant told his colleagues DE and ZM about it at the time. There was discussion between the claimant and DE at the time and they agreed that Mr Lawrence was rude, abrupt and dismissive generally. The claimant said that he thought it was worse for him and that might be because of his race. DE and ZM did not think that, they thought Mr Lawrence was like this with everyone and DE and the claimant agreed that the claimant should ride it out, see how it went. The claimant and DE believed that if Mr Lawrence got to know everyone better he would start to treat them better.

Ignore the claimant's greetings

147. The claimant did not meet his burden of proof here to establish that any greetings were ignored. The claimant and Mr Lawrence only had overlapping shifts on 16 occasions from December 2019 until the claimant was furloughed in March 2020. There was no evidence here other than the claimant's assertion that it had happened; no diary note of dates, no recollection anchored to another event nor specificity as to location, shift, day or time. The claimant's assertion was not enough for the Tribunal to find that this had happened when Mr Lawrence said it had not. By all accounts, that of the claimant, DE, ZM, Mr Dawson and Mr Lawrence himself who accepted that he had been gently criticized for not getting out to meet the lads sooner, he was not the friendliest of new managers.

c. Did Mr Lawrence then (under)score C for redundancy with a racially discriminatory motive and with scant knowledge of C's true worth (resulting in him losing his job)?

The scoring

148. The Tribunal found that Mr Lawrence rank scored the multi-skilled engineers in descending order and that the claimant fell in the bottom two and so was at risk. We found that Mr Lawrence did this because of his objective use of skills and experience and performance as criteria. He thought that the claimant was a less skilled engineer than JS, JR, ZM, DE, and DC. He thought this because i) he had albeit limited experience of directly observing their work, he knew the claimant to be qualified to the lower level of UK equivalent to NVQ level 2 and believed the other engineers to be higher qualified. He had observed the claimant to be someone who was less communicative than the other engineers, someone who generally hung back, and someone who was good but less able than those who scored above him in breakdown management and fault finding. He knew the claimant worked really well with DE and he knew that the claimant was supporting ZM to gain more knowledge of the layout and quirks of the machines, but he thought the rank order was as he ranked it.

The six point scoring system – evidence rejected

149. Mr Lawrence gave evidence at tribunal that we found wholly incredible. He said that he had used the four point assessment matrix but drilled down into the skills and experience and performance category and come up with his own six point scoring system which he then used to rate each multi-skilled engineer using a three point rating scale of 0,1,and 2. This position was not contained the Response Form nor his witness statement. In a bundle of 292 pages made up largely from redundancy selection process documents including an HR1 form, selection matrix and scoring sheets, there were no corroborating documents whatsoever, no mention at all anywhere on paper of a six point scoring system with a three point rating scale.

150. The bundle and evidence made regular allusion to Ms Eva from HR who had prepared paperwork and advised and investigated throughout the redundancy process. Mr Lawrence said he checked with Ms Eva that he could use his six point scoring system and that she had said he could. We find that incredible. Ms Eva appears to be someone who documents things and if she had allowed one manager in a collective consultation process to drill down and add specificity to the agreed criteria we find it probable that she would have recorded that in writing and asked Mr Lawrence to show his workings on a scoring sheet.

151. Mr Dawson's witness statement makes no reference to the six point scoring system though he says he checked the scoring to look for outliers. If there had been a six point scoring system and the claimant had scored 0 on two of the categories that would have been an outlier. There was no such a system used in May 2020, Mr Dawson could not know about it in May 2020. Mr Dawson anchored his evidence to that of Mr Lawrence whose evidence he had heard.

152. Mr Lawrence's clarity of recollection of the six point scoring system and the claimant's scores also troubled us. This was almost two years ago, there was no paper record, when asked he said he may have had a piece of paper but must have thrown it away at the time. We were troubled that he could recollect so clearly for the claimant but not the others when at the time, when the memory would have had to be laid down, he did not know that the claimant would bring a race discrimination complaint.

153. We saw the scoring sheet that Mr Lawrence used at the time that gave the claimant 33 / 30. We saw the verbal descriptors applied by Mr Lawrence at the time and preferred those as indicators of his thinking on scoring at the time to the oral evidence that we find he had constructed after the event about a six point scoring system.

154. Further, Mr Lawrence was interviewed by Ms Eva as part of the claimant's grievance appeal. He did not refer to his six point scoring system and the claimant's scores at that time. If it had been true, that would have been the perfect moment to say, look I am not racist, I used objective scores, here they are, here's what I did. Further, Ms Eva, who he alleges he consulted about his six point scoring system doesn't bring it up at appeal.

155. And further, the claimant at two of his telephone consultation meetings was saying why am I low scoring, I should not be, and Mr Lawrence did not say well I have used this fair system, there were six points and I scored you and the others and here is how you came out so you see this is why I say it is fair. Mr Lawrence wrote the notes of those meetings and makes no reference to answering the claimant's protestations about scores at all.

156. Finally, we found it wasn't credible because Mr Lawrence hadn't planned for the appropriation of his six point scores / scored out of twelve, into the matrix with four categories each scoring out of ten. When asked about this on oath he said that he had just replicated the score into each of the skills and performance categories so that a 5 out of 12 became a 5 out of ten in each of the two categories. We think this "on the hoof" answer showed he hadn't thought it through and that if he had used the six point system at the time, as a highly skilled professional engineer he would not have moved those scores across without calibration.

157. This wholly incredible fabrication of a six point scoring system caused a significant diversion for us to our reasoning. This was the frolic:

His evidence, which we reject was,

- that the six categories were:

  A breakdown management and fault finding

  B taking instruction

  C quality of work

  D health and safety

  E internal motivation

  F lone working

That:

- He scored each multi-skilled engineer a score of 0,1 or 2 for each category making a total of 12 marks available. He scored the claimant A0, B2, C1, D1, E1, and F0. Mr Lawrence thought that breakdown management and fault finding was a weak area for the claimant. He thought the claimant lacked skills in those areas and he thought that the claimant had poor English and was a poor communicator who spoke only in one word answers and that his poor communication was a part of that issue. He scored the claimant a 2 in taking instruction. He scored a 1 for the quality of his work yet believed that the claimant always performed well and could overachieve. Mr Lawrence scored everyone a 1 for health and safety as he thought that any issues were factory wide. He scored the claimant a 1 for internal motivation yet believed that the claimant was good at getting on with his work and that there was no issue with the claimant's commitment to the company. He scored the claimant a zero in lone working. Mr Lawrence believed that there would be lone working going forward and that this was important to the respondent. He thought that the claimant's *lack of English literature* was going to be a major factor. Mr Lawrence thought that if there were contractors on site the claimant would struggle to communicate with them. He thought that the claimant's poor English would mean that he could not understand Risk Assessment documentation, work permits, electrical isolation permits, working at height permits and lifting plans.

158. Within the six competences he scored there was overlap for the claimant on communication skill so that he was scored down for it on A and F. Mr L could not recall and there was no documentary ev to show that if comm skill was contributing to two competence scores A and F this had been done for all 5.

159. Mr L had scored the claimant 0 yet his job involved breakdown and fault finding and talking to engineers and line operators and using technical drawings and RA documents and permits on a daily basis.

160. This evidence caused us to consider if the use of communication skills to mark the claimant 0 in two categories, thereby giving him a 5 and putting him at risk, was motivated subconsciously be a racial stereotype. We asked ourselves, does he mean that he scored the claimant 0 because the claimant was not a first language English speaker.

161. We looked to the narrative descriptors that were applied to the scoring sheets to consider was the scoring because the claimant was Polish.

1. If so what is the reason for that treatment ? Was it because the claimant is Polish or was it wholly for other reasons ? C relies on Mr Eastham as the actual comparator in relation to the scoring.

162. We address the scoring first. The Tribunal finds that the scoring was wholly for reasons other than the claimant's nationality. We find Mr Lawrence believed C to be a poorer engineer than JS, JR, JC, ZM, DE and DC. He was better than JC. He believed him to be less qualified and less able at fault finding and breakdown

management. That is why he was scored in the bottom two.

163. The claimant had not met his burden of proof in section 136. The section states:

> **If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **But sub-section the above does not apply if A shows that A did not contravene the provision".**

164. There were no facts from which we could decide, in the face of the explanation based on Mr Lawrence's perception of the claimant as a weaker engineer on fault finding and breakdown management than the others, that Mr Lawrence had chosen the claimant because of his nationality.

165. The claimant alleged that he was discriminated against on the basis that he was scored by someone who had scant knowledge of his ability. He was scored by Mr Lawrence who had only overlapped shifts with him on 16 occasions but so too were all of the other engineers. There is no law in the Equality Act that provides a protected characteristic on the basis advanced.

166. The claimant has not established within section 13 that he was treated less favourably in being scored by Mr Lawrence because of his nationality or race. **His claim for race discrimination in relation to the scoring must fail.**

167. We considered the comparator argument. The claimant's case had a shifting comparator. Initially it was submitted that there were two comparators, DE and ZM. Then the claimant argued that he was the best engineer so should have been top of the rank order. Then the claimant submitted that perhaps a hypothetical comparator would be appropriate.

168. It is not necessary for us to construct a comparator because applying section 13 we have found no less favourable treatment because of race.

169. If we had constructed a comparator it would have been someone with the same skill set, qualifications, experience and performance as the claimant who was not a Polish national. We find, or would have found, that the claimant was not treated less favourably than his hypothetical comparator because he would have come second from bottom too. He would have been assessed, exactly as the claimant was, by Mr Lawrence, as being less able than the other multi-skilled engineers at fault finding and breakdown management, less communicative, someone who generally hung back.

170. We deal with the time point now as the acts of less favourable treatment prior to the redundancy scoring on 11 May 2020 were out of time.

8. Were acts complained of prior to 4 April 2020 out of time? if so were they part of a course of conduct extending over a period which ended on or after 4 April 2020? If not, would it be just and equitable to extend time?

171. The claimant went to ACAS on 3 July 2020. The acts complained of were from 6 January 2020 until the claimant was furloughed on 23 March 2020. His deadline for going to ACAS would have been 23 June for those events.

172. Mr Werenowski submitted that the events prior to 11 May 2020 scoring were part of a course of conduct extending over a period of time that brought them into time. We had regard to the nature of the acts, the parties involved in them and whether they were ongoing or distinct events.

173. The claimant submitted that all the alleged acts were done by Mr Lawrence and that they were manifestations of his racism towards the claimant which began when he heard the claimant's accent on 6 January 2020 or was told that the claimant was Polish later that day.

174. We find that the acts complained of from January to March (save the low skilled remark) may themselves have formed part of a course of conduct as they were all examples of Mr Lawrence being rude to the claimant, on his submission ruder than to those who were not Polish. The last of those acts could not have happened after 23 March 2020. The scoring on 11 May was of a different nature. It was not that Mr Lawrence was being rude, it was not about communication, it was about an assessment of the claimant's relative performance. It was of the same nature as the low skilled remark on 6 January 2020. We accept the claimant's submission that in so far as they could amount to a course of conduct the acts were taken together capable of being underpinned by a potential discriminatory motive.

175. We find that we have jurisdiction to hear the allegations as they form part of a course of conduct extending over a period of time culminating in the claimant's being scored by Mr Lawrence on 11 May 2020 which fell within time.

176. If we had found in the alternative, we would not have found it just and equitable to extend time because the claimant had told ZM and DE about his concerns about rudeness and possible racism within time and done nothing about it. He had instructed a solicitor towards the end of what would have been the primary limitation period for some of the events and no contact had been made with ACAS. The claimant was able to work, engage a solicitor, and discuss his furlough in March 2020, within time, with his employer and seek assurances that he would be brought back from furlough. He was capable at that time of having raised his concerns about racism. For those reasons we would not have extended time.

<u>Less favourable treatment</u>

177. Turning then to the allegations of less favourable treatment relating to walking off, and being generally rude. (we found the ignoring greetings was not proven). We find that the reason for those incidents was that Mr Lawrence was generally considered to be an abrupt and dismissive person in his dealings with the multi skilled engineers. ZM thought this, DE thought this and they told the grievance appeal hearing this. Mr Lawrence himself told us that he had been gently criticized in the early weeks of his role in December 2019 for not having

been out and about to meet the staff more. We heard that he came from a military background and may have been more used to a command style of management, perhaps not using his softer people skills. We find that the claimant was, in this respect, treated no differently from other workers. Mr Lawrence would have (and in fact there was evidence that he had) behaved in the same way to non Polish engineers with no material difference to the claimant.

178. We heard and accepted Mr Lawrence's evidence that he had worked in many diverse workforces and never had an allegation of racism before. His work in the military required good partnerships with commonwealth colleagues and we accepted his evidence that you cannot work in UK manufacturing without working well with a diverse workforce, particularly Polish colleagues. The respondent had Polish line operatives. We accept that there had never been any other allegation of racism against Mr Lawrence and that he had been upset by the allegation of racism made by the claimant.

179. In relation to Mr Lawrence calling the claimant low skilled in January 2020 we find that the reason for this was because it was Mr Lawrence's genuinely held belief based on his early and limited observation of his team of engineers at work. He genuinely believed the claimant to be less skilled than other members of the team. It was unkind to have said this to others within hearing of the claimant and Mr Vick and not to have addressed it directly with the claimant but it was not motivated by nationality. Mr Lawrence would have formed the same view and made the same remark about a non Polish engineer of the claimant's skill level. We repeat the remarks about the comparator above.

180. **The claimants claim for race discrimination based on the rudeness and low skill remark must fail**.

2. What was the reason for dismissal? Was the sole or principal reason redundancy? The claimant concedes that a genuine redundancy situation had arisen in May 2020 but contends that he ought not to have been selected for redundancy. The claimant concedes that he was properly placed in a pool of 13 for selection.

181. The claimant was dismissed by Mr Lawrence, he was the de facto decision maker as he did the scoring and he sent the letter of dismissal. The reason for dismissal was redundancy.

182. This was a potentially fair reason for dismissal. We turned then to look at whether the respondent act fairly in selecting the claimant for redundancy.

3. Was the claimant unfairly selected for redundancy?

183. The pool for selection initially comprised 13 engineers. All of the single skilled engineers were made redundant. The remaining 7 multiskilled engineers formed a pool from which two posts had to be made redundant.

184. Mr Lawrence used the 4 point matrix and formed his own, as the respondent put it, more granular, view of how to rank the multi-skilled engineers. He did not use the six point scoring system he described, we rejected that evidence, but as

we found above Mr Lawrence took into account his own observations of their performance, their qualification levels, their proactivity and communication but importantly, their skills in breakdown management and fault finding. We make these findings based on his oral evidence and the verbal descriptors on the scoring sheets.

185. Mr Lawrence prepared his rank order and had to down grade the claimant from 33 to 30 to retain JR who had automation experience when JR's disciplinary score dropped him down the rank below the claimant.

186. If the respondent had used the scoring criteria that it had publicized, we saw at page 124 of the bundle that there was a scoring matrix which provided that anyone with a disciplinary warning would score only 2.5 in that category, then JR would have scored 32.5 and the claimant, was at that point scoring 33. There was very little in it and we accept the evidence of Mr Lawrence that he considered that JR's automation skills were needed for the future. The ranking was fair and the down grading to reinstate the claimant as second from bottom, because it was based on an assessment of skill, did not concern us.

187. We then had to determine the question whether or not the dismissal was fair or unfair having regard to the reason shown by the employer. We considered whether in the circumstances including the size and administrative resources of the respondent, it acted reasonably or unreasonably in treating redundancy is a sufficient reason dismissing the claimant. We find the respondent acted unreasonably for the reasons set out below.

188. This was a large employer engaged in collective consultation. Information was given in collective consultation which proved not to be true of the claimant. Mr Dawson told the elected representatives that in scoring, skills and performance workers would be scored on the skills attained in previous roles, as well as their current role. Mr Lawrence subsequently told the claimant when he asked for his operator skills to be taken into account that he was being scored in his current role only.

189. Further, Mr Dawson told the elected representatives that matters on record, such as training, appraisals, disciplinary and attendance would be taken into account. Mr Lawrence told us in evidence that he had not looked at the claimant's training records or previous appraisals.

190. The respondents failed to engage in meaningful consultation. The claimant was only given his score sheet on 29 May 2020. It showed only the scores on the four-point matrix. The claimant scored 5 and 5 for skills and performance and 10 and 10 for discipline and attendance. He had previously protested at both the first and 2nd individual consultation meeting that he should not have been low scoring, that he should not have been selected for redundancy.

191. On 2 June 2020 the claimant had his 3rd consultation meeting. This was the first meeting at which there could have been effective individual consultation as he had not seen the scoring at the previous meeting. The meeting lasted less than 5 minutes. It was conducted by telephone. We saw a document prepared by Mr Lawrence, on which he had ticked lots of boxes to suggest that he provided

information to the claimant. If that was right then most of those five minutes would have been taken up with Mr Lawrence telling the claimant things and not in a two way conversation. There was no record of any discussion. Mr Lawrence did not explain to the claimant why he was scoring lower than his colleagues. Mr Lawrence did not tell the claimant that in his view the claimant was less able in breakdown management and fault finding than his colleagues, a less able communicator, and less qualified, and he was someone who hung back. If he had shared this information the claimant might have been able to say something to alter Mr Lawrence's perception and scoring.

4. Did the company act reasonably or unreasonably in treating that as sufficient reason to dismiss the claimant?

    d. The claimant says the scoring was unfair as it was motivated by race and was done with scant knowledge of his skill? The claimant says he should have scored at least as well as Mr Eastham.

    e. The claimant says Mr Dawson hearing the appeal against his redundancy selection / decision to dismiss was unreasonable as he was not impartial because he had been involved in the scoring process.

192. The respondent acted unreasonably in appointing Mr Dawson to hear the grievance appeal and appeal against redundancy because Mr Dawson had had a hand in the scoring. Although we have found as a fact that Mr Dawson did very little and only rubberstamped Mr Lawrence's decision-making, this was enough for Mr Dawson to have properly considered himself to be biased. Miss Eva had provided advice to Mr Lawrence on the application of the scoring matrix, and she and Mr Dawson had both seen the score sheet with the verbal descriptors on. Neither Miss Eva nor Mr Dawson were independent and impartial in the claimant's grievance or appeal against redundancy.

193. Mr Dawson said that there was literally no one else who could hear the appeal grievance. We reject that evidence. There were two directors. One of them could have heard the grievance and the redundancy appeal, in that order. The other could have been preserved for the appeal against grievance outcome.

    a. The claimant says the appeal against his grievance outcome was unfair as it was dealt with in a cursory way, Ms Eva having made an informal decision which was ratified by Mr Keeley.

194. In the grievance appeal Mr Keighley delegated the investigation and conduct of that appeal to Ms Eva. She set about investigating people including Mr Lawrence whom she had previously advised on the points the subject of her investigation. It was inappropriate for Ms Eva to be the person taking statements from Mr Lawrence.

195. A letter was sent by Ms Eva in Mr Keighley's name which prejudged and determined the appeal before the claimant had had an opportunity to make representations or attend a meeting in his appeal. Mr Keighley had a telephone meeting with Mr Dawson, the respondent to the appeal, but did not talk to the

claimant before the letter rejecting the appeal was sent out. This was not even handed of him.

196. We heard Mr Keighley in evidence that he trusted Ms Eva to follow procedures, followed by his admission that there were no written procedures. We heard from Mr Keighley that he trusted Mr Ward to investigate whether there was any concern about racism and Mr Lawrence amongst the line operators and Polish workers and to report verbally to him that there were none. Mr Keighley's trust in people does not equate to being a fair procedure.

197. We heard Mr Dawson that he trusted Mr Lawrence to be professional objective and fair. Again, his trust does not equate to there having been a fair procedure.

5. Did the respondent consider alternatives to redundancy or mitigation of the effect of redundancy on the claimant?

198. There were no meaningful alternatives considered. The respondent asked the claimant what he wanted as the outcome of the appeal and he said that he did not want to be made redundant. We reject the respondent's submissions that it considered alternate roles for the claimant.

6. If the dismissal was unfair would the claimant have been dismissed by reason of redundancy or otherwise anyway and if so when?

199. **The dismissal was unfair**. The Tribunal finds that even if there had been meaningful consultation and a sharing of the reasons why Mr Lawrence had selected the claimant, and the claimant had had a chance to engage with those reasons, it would still have been the claimant who was chosen to be made redundant. The Tribunal has reached its view on the basis of the evidence in chief of Mr Lawrence who believed the claimant to be a less skilled engineer than the others and he believed that going forward the business needed the automation skills of the other low scoring engineer. This would not have been any different even if there had been full consultation and a fair procedure followed but it would have taken longer.

200. Following the oral judgment a remedy hearing was listed and case management orders made. With the consent of the parties the Tribunal expressed a provisional view as to the length of time it might have taken to fairly dismiss and as to the application of the ACAS Code. Those views, first set out in the case management order are repeated here at paragraphs 201 and 202 and remain provisional views provided to assist in settlement. The parties have since settled the matter.

201. The Tribunal is of the provisional view that it might have taken 6 weeks to have fairly dismissed by reason of redundancy.

7. If remedy arises how much compensation is to be awarded to the claimant?

8. Does the ACAS uplift apply? The claimant says the respondent failed to follow the ACAS code in its handling of his grievance appeal at 5b above.

202. This was an unfair dismissal complaint so the ACAS uplift applies. The Tribunal's provisional view is that it is concerned at the approach of Mr Keighley in (i) delegating to Ms Eva, (ii) speaking to Mr Dawson but not the claimant and (iii) in the nature of the appeal meeting, our view is that it was a justification meeting rather than a true appeal. However, this is not a case where there was no process all. Our provisional view, subject to representations at remedy is that this might be a case where a likely uplift might be in the region of 12%.

Employment Judge Aspinall
Date: 8 September 2022

REASONS SENT TO THE PARTIES ON
8 September 2022

FOR EMPLOYMENT TRIBUNALS