EMPLOYMENT TRIBUNALS

Claimant: **Mr C Rowan**

Respondent: **DWPF Services Limited**

RECONSIDERATION JUDGMENT

The Claimant submitted an application on **1 June 2022** for reconsideration of the majority judgment sent to the parties on **19 May 2022.** The majority (Employment Judgment E Burns and Mrs Craik) have decided not to vary or revoke the original judgement as a result, save to the extent that we have expanded on the original reasoning in this judgment as set out below.

REASONS

PROCESS

1. The Claimant made a formal application on 1 June 2022 for a reconsideration of the reserved judgment on liability. The judgment was promulgated and sent to the parties on 19 May 2022 and therefore the application for the reconsideration was received within the time lime set out under Rule 71 of the Tribunal Rules.

2. Employment Judge E Burns decided that it was in the interests of justice to reconsider the judgment. The aspects of the judgment which were the subject matter of the application were decided by a majority of two with a dissenting minority which is relatively unusual and this alone led to me believing the majority should take the opportunity to reflect on our decision.

3. As required under Rule 72(1) I sent a notice by email to the parties asking them for any response to the application and to indicate whether they considered a hearing was necessary. Although the Respondent requested a hearing, the Claimant asked that the matter be dealt with on the papers.

4. The majority decided to determine the matter in chambers without a hearing. We considered that Claimant's written submissions were clear and could be

easily understood. We also had the benefit of written submissions from the Respondent which were also very clear.

5. Employment Judge E Burns and Ms H Craik therefore reviewed the application together with the submissions from the Respondent in Chambers on 8 August 2022.

The Application

6. The application concerned two aspects of the Judgment, namely:

   a. The decision made by the majority that the principal reason for the Claimant's dismissal was redundancy; and

   b. The decision made by the majority that there should be an 80% *Polkey* reduction.

7. The majority considered the Claimant's written submission on our finding that the principal reason for the dismissal was redundancy and therefore there was a fair reason for the claimant's dismissal. Our conclusion was that our original decision was correct. We also considered that our original conclusion that there should be an 80% Polkey reduction was correct.

8. The Claimant cited the authorities of *Timex Corporation v Thomson* [1981] IRLR 522 and *Berkeley Catering Ltd v Jackson* UKEAT/0074/20 (27 November 2020, unreported to us saying, "*It is not entirely clear whether the majority had these authorities, or the principle derived from them, fully in mind when reaching their conclusion as to the reason for dismissal*" and adding:

   "*It is submitted, respectfully of course, that the majority may have conflated the concept of whether a genuine redundancy situation existed with whether that was the true reason for dismissal, as opposed to considering whether …. redundancy was used as a pretext for a dismissal on other grounds."*

9. We confirm that, although we did not refer to the *Timex* case in the law section of our judgment (on omission for which we apologiase), we did indeed have the authority and principle derived from it in mind when reaching our decision.

10. Our understanding of the *Timex* decision is that even when there is a genuine redundancy situation, namely one that meets the requirements of section 139 of the Employment Rights Act 1996, we should not assume that redundancy is the principal reason for an employee's dismissal. Instead, we must consider whether the respondent had an alternative reason for dismissal and was simply suing the redundancy situation as a pretext.

11. The majority were particularly sensitive to this possibility because: (a) it appeared to us that the respondent had other reasons for wanting to exit the Claimant from the business, and (b) our colleague Dr Weerasinghe was of the view that one or more of these other reasons did form the respondent's true motivation.

12. The view of the majority was that, although there were concerns about the Claimant's performance (i.e. his income generation had reduced considerably in recent years) and his conduct (i.e. he was refusing to report to Mr Tyerman in his new role as CEO), neither of these were the principal reason for his termination. Instead, we were satisfied, based on the evidence before us, that the poor financial position of the Respondent created a genuine redundancy situation which led to the Claimant's dismissal.

13. In our judgment, had the redundancy situation not existed, the Respondent would not have taken steps to remove the Claimant in 2020. We consider that his poor performance and insubordinate behaviour would have continued to have been tolerated while Mr Wylde played an active role in the business. Although Mr Wylde had appointed Mr Tyerman as the new CEO, he retained overall responsibility for strategic decisions. Mr Tyerman's role was largely operational. He was being tasked with developing better processes and systems to manage the business. Mr Wylde told us that he did not envisage fully retiring for several years. We therefore conclude that had the pandemic not created such an uncertain and difficult financial outlook for the business, the Respondent would have muddled along notwithstanding the concerns about the Claimant's performance or conduct.

14. The Claimant has questioned whether this is a proper decision for the majority to have reached bearing in mind what we said in paragraph 256 of the Judgment, set out in full for ease of reference:

"In the judgment of the Employment Judge E Burns and Ms Craik, the outcome, of the redundancy process was pre-determined to a degree. By this we mean that from the start Mr Wylde and Mr Tyerman were of the view that the Claimant would and should end up being the employee selected for redundancy."

15. We recognise that we have perhaps not explained ourselves sufficiently clearly in this paragraph.

16. What we meant by saying "from the start Mr Wylde and Mr Tyerman were of the view that the Claimant **would** …. end up being the employee selected for redundancy" was that, based on their knowledge of his capabilities and performance, they thought he would, most probably, be the employee that was selected when the scoring exercise was undertaken. In our judgment, having such an inkling of the likely outcome of a redundancy process does not automatically result in it being tainted with unfairness. It could, however, give rise to some form of confirmation bias acting upon the decision makers.

17. What we meant by saying "*from the start Mr Wylde and Mr Tyerman were of the view that the Claimant …. **should** end up being the employee selected for redundancy"* was that, in addition to believing that the Claimant would be likely to be selected for redundancy, they both actively wanted him to be the one selected. This was because his selection would solve the other concerns they had. Where this type of thinking is present, there is a far greater risk of unfairness seeping into a redundancy selection process

because the decision makers may be tempted to manipulate the selection process to ensure their desired result is achieved.

18. Having identified that that Mr Wylde and Mr Tyerman held these views, the majority analysed the redundancy process very carefully for any evidence that they acted in an unfair way or more significantly, manipulated the process to achieve the result they desired. In doing, so we also bore in mind that the test when judging what an employer has done in a case such as this is the reasonable range of responses test.

19. We considered the consultation process up to the point of the scoring, the choice of the selection pool, the selection criteria and the scoring methodology (i.e. who did it and using what information) all fell within the reasonable range of responses test. We also considered that, for the most part, the scores given to the Claimant and the other members of the pool were fully justified.

20. The things that fell outside of the range of the reasonable responses were some of the inexplicable scores (of which there were only a small number), the premature conclusion of the consultation process at the point of scoring and the paucity of the appeal process. For these reasons we found that, overall, the dismissal was unfair.

21. We did not consider that the Respondent was motived to do these things in order to manipulate the process. In our judgment, the Respondent genuinely, but incorrectly believed that they were entitled to bring the consultation process to an end once the scoring had taken place, the scores were fair and justified and that the appeal was appropriate in the circumstances. Having achieved the result that the Respondent expected and desired, we conclude that it felt it had done enough to achieve a fair dismissal and ran out of steam at the end of the process.

22. With this in mind, we settled on an 80% Polkey deduction. We reached this figure because, in our judgment, had the Respondent followed a fair procedure and re-examined the scores taking into account the Claimant's comments, there was a high likelihood that the outcome would not change. We did not consider, however, that we could conclude there was a 100% chance that the scores would not change such that a different person would have been made redundant. This was because some of the scores were inexplicable and might change significantly and took into account that the gap between the Claimant's score and that of Mr Withers (the next lowest scoring member of the pool) was relatively small.

Employment Judge E Burns
12 September 2022

JUDGMENT SENT TO THE PARTIES ON

12/09/2022

FOR THE TRIBUNAL OFFICE