EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss K Reid	**v**	(1) Textron Limited; and (2) Ransomes Jacobsen Limited

Heard at: Cambridge (by CVP) **On:** 6 and 7 June 2022

Before: Employment Judge Tynan

Appearances

For the Claimants: Mr D Frame, Solicitor
For the Respondent: Mr G Baker, Counsel

JUDGMENT having been sent to the parties on 21 July 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Whilst there were two named respondents, at the outset of the Final Hearing Mr Frame confirmed that it was accepted that the second respondent was the claimant's employer and accordingly that the claim against the first respondent could be dismissed on the basis of withdrawal. Accordingly, all further references to the respondent are to Ransomes Jacobsen Limited.

2. The claimant was employed by the respondent, latterly as a Credit Manager, from 6 May 2014 until 7 August 2020 when she was dismissed by reason of alleged redundancy. She presented a claim to the Employment Tribunals in which she pursued complaints of unfair dismissal and sex discrimination and contravention of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000. The latter two complaints did not proceed, and the claim therefore falls to be considered as an 'ordinary' unfair dismissal complaint pursuant to s.98 of the Employment Rights Act 1996.

3. The claimant gave evidence in support of her claim. On behalf of the

respondent I heard evidence from Mr Simon Rainger, Vice President of the Turf Division (and also a legal director of the respondent), Mr Alan Flewitt, Manager – Accounting, and Mr Matthew Went, HR Director.

4. There was a single agreed bundle of documents running to 177 pages, albeit supplemented with additional documents.

5. Notwithstanding the claimant did not pursue her sex discrimination and part-time worker complaints, in her witness statement, the claimant nevertheless refers to having been discriminated against because she took maternity leave. Whilst I have borne in mind throughout the proceedings that the claim falls to be determined in accordance with the provisions of s.98 rather than by reference to either s.99 of the 1996 Act or s.18 of the Equality Act 2010, equally I recognise that matters that may render a dismissal automatically unfair or discriminatory may also render the dismissal unfair under s.98. However, in that regard, notwithstanding the claimant's assertion that she was targeted because she had a child and took maternity leave, I note that the respondent agreed to her request to return from maternity leave on a part-time basis and did not use a limited redundancy exercise within the finance function in January/February 2020 as an opportunity to remove her. Instead, her colleague, Michael Keats was selected for redundancy on that occasion in response to an instruction from the US parent company to reduce head count within the UK finance function.

6. If, as the claimant claims, the respondent targeted her, it begs the question why the respondent first negotiated and agreed to her flexible working request and did not move against her when an opportunity first presented itself. I further note in this regard, that Mr Flewitt actively supported her request to work flexibly, positive making the case for her proposed working arrangements to the respondent's US parent company and securing their agreement to them.

7. I find that Mr Flewitt had a positive view of the claimant and engaged constructively and positively with her flexible working request in autumn 2019 because he wanted to retain her within the team. I attach no significance to the undisputed fact that the claimant was asked to return her laptop, mobile phone and company credit card prior to going on maternity leave. In my judgement, that does not reflect some longstanding plan of action to remove the claimant that was only realised some 15 months or so later. Rather, I accept Mr Flewitt's unchallenged evidence that this was standard practice at the respondent and that such equipment was not provided routinely to employees unless they travelled with work and/or worked remotely. Thereafter, once it had been agreed that the claimant would work on a part-time basis, Mr Flewitt concluded that she would not require a mobile phone or credit card to perform her role. He himself was not provided with either.

8. Prior to commencing her maternity leave in April 2019, the claimant trained and handed over to her maternity cover, Katy Rose. In the event, Ms Rose

re-located and did not remain with the respondent, so that it was necessary for the respondent to recruit a second maternity cover, Laura Gray on a fixed-term contract. This explains the timing of the subsequent contract that confirmed Ms Gray's permanent appointment.

9. In any event, I accept what was essentially Mr Flewitt's unchallenged evidence that Ms Gray continued to be employed under her fixed-term contract in case the claimant decided, notwithstanding her request to work flexibly, that she wished to return on a full-time basis in the exercise of her statutory maternity rights. In those circumstances the respondent would not have had sufficient workload or head count approval to employ two staff on a full-time basis. I find that the claimant is mistaken, or simply wrong, in her belief that the workload had increased sufficiently during her maternity absence to support the employment of two full-time employees, as she suggests at paragraph 13 of her witness statement. Instead, a temporary worker had been engaged during the claimant's absence to deal with a specific project related to a recent corporate acquisition; as the respondent had anticipated, that worker was let go in early 2020.

10. The claimant and Mr Flewitt discussed the claimant returning to work on a part-time basis in October 2019. It seems not to be in dispute that the claimant made clear to Mr Flewitt that if it was thought by the respondent that the role could not be done on a part-time basis she could and would return on a full-time basis. In any event, nothing turns on the matter since there is no evidence before the Tribunal that the claimant's part-time working arrangements were a factor in her selection for redundancy, in particular as regards her redundancy scores. The claimant, of course, withdrew her complaint under the 2000 Regulations.

11. As part of their discussions regarding flexible working, it was necessary for Mr Flewitt to put forward a business case in this regard to the US parent company. As I have noted already, he actively supported the arrangements. In a summary note, he identified that workload was expected to decline over time as activity resulting from the acquisition settled down. He noted that their temporary resource remained under weekly review. I am satisfied that this expected reduction in future workload was specific to the acquisition rather than reflective of a more pronounced reduction in workload that called into question the respondent's then identified need for 1.5 full-time equivalent head count in credit control/management. In order words, I find that the respondent, and Mr Flewitt in particular, genuinely believed that there was an on-going need for both the claimant and Ms Gray going into 2020.

12. As part of the flexible working arrangements, the claimant relinquished her responsibilities as a first aider and trustee of the pension scheme. Whilst I find that this was not at the claimant's instigation, I accept Mr Flewitt's evidence that this was intended to enable the claimant to focus on her core responsibilities, particularly given her reduced working hours. It does not evidence to me, as the claimant suggests, moves on Mr Flewitt's, or indeed the respondent's part, to engineer the claimant's removal. On the contrary, I

find it was intended to secure the claimant's position by ensuring the parent company's approval of the flexible working arrangements and their long-term success.

13. The claimant's maternity leave ended on 27 January 2020 though she only returned to work on 3 March 2020 following a period of leave. Accordingly, her return to work coincided with the rapidly evolving circumstances of the emerging coronavirus pandemic. Just two weeks after her return from leave, the UK government instructed that workers should work from home wherever possible. On Monday 23 March 2020, the country entered a national lockdown. It is a trite observation that the impact of the pandemic upon both the global and UK economies was unprecedented, even if by the second half of 2021 much of the steep decline in economic activity and output had been reversed. The respondent is not to be judged with the benefit of hindsight, rather by reference to how it assessed the situation to be in June and July 2020 when it embarked upon redundancies. It must be remembered that schools and non-essential retail had only tentatively re-opened in June 2020. The respondent had by then experienced a significant decrease in revenue. Its order book had declined by approximately 40%. Many of its staff were either working from home or were furloughed. This figure was as high as 78% at the peak of the pandemic. A program was implemented across the business to address direct and indirect expenditure, including head count.

14. Whilst, superficially, Ms Gray was still employed in March 2020 on a fixed-term contract, I am satisfied that the paperwork lagged the reality of her situation, namely that she had been confirmed as a permanent employee in light of the claimant's return to work on a part-time basis. It was first communicated to finance colleagues in November 2019 that Ms Gray would remain part of the finance function following the claimant's return. I find that the decision to make her position permanent was settled by early 2020.

15. In the course of the Hearing I heard evidence as how the claimant came to be selected to be furloughed. Mr Flewitt can perhaps be criticised for making assumptions about the claimant's family situation and the availability (or otherwise) of childcare, but he acted in what he believed to be her best interests. Furthermore, the respondent's staff were not generally consulted about who was to be furloughed or for how long they would be furloughed. The claimant was treated no differently to others in this regard. It certainly does not suggest to me that a decision had already separately been taken regarding the claimant's long-term future with the respondent.

16. The finance function was slower than other areas of the respondent's business in identifying and implementing cost efficiencies. Mr Flewitt was not challenged when he said that he and his senior colleague had pushed back strongly when they were told they would have to lose two employees in addition to the January/February 2020 head count reduction. They were instructed, amongst other things, that head count within credit control/management would need to reduce to one full-time equivalent. The respondent's proposals in this regard are detailed in an announcement from

Mr Went dated 16 July 2020, a copy of which is at pages 104-107 of the hearing bundle and to which was appended a draft redundancy selection matrix. Mr Went wrote in the announcement,

> "We will of course continue to look for alternatives to redundancy and consult with you on any ideas you have in this regard."

He did not state, in terms, that this consultation extended to the selection matrix that was appended to the announcement, though that is implicit in so far as Mr Went referred to "proposing" to use the matrix. Somewhat confusingly the announcement also stated,

> "We will notify you of the proposed selection criteria as part of the consultation process." (page 105).

Though this was not the claimant's evidence, it may not have been clear to affected employees whether this was referring to something other than the appended matrix.

17. The claimant was pooled with Ms Gray for selection purposes. Mr Flewitt's evidence was that Ms Gray became quite emotional and that he sought to reassure her. I accept that whilst he showed concern and sought to allay Ms Gray's anxieties at a time of considerable global and national uncertainty, in so doing he did not, as the claimant suggests at paragraph 53 of her witness statement, state or imply that she would be secure in the process and would be retained in preference to the claimant. I accept his evidence that he merely committed to follow due process. It is equally understandable that the claimant experienced significant uncertainty and anxiety during the process. However, I find that her feelings of unease about the respondent's motives and her belief that the respondent had already predetermined her fate, as she described it, were founded in those feelings rather than objectively based. Equally understandably, she discussed the matter with Ms Gray who, it seems, was also of the view that two full-time Credit Managers may be required. Ultimately, this was a decision for the respondent.

18. Mr Flewitt held an initial consultation meeting with the claimant on 27 July 2020, the summary minutes of which are at page 108 of the hearing bundle. During the meeting the claimant reiterated her willingness to return to work full-time, though there was also discussion regarding a potential job share albeit this was ruled out by Mr Flewitt for the reasons he gave during the meeting. The minutes otherwise evidence that the focus of the discussion on 27 July 2020 was the business rationale for the proposed reduction in head count rather than the selection criteria or scoring methodology in any redundancy selection exercise. The meeting concluded on the basis that the respondent intended to proceed with the proposals outlined in Mr Went's announcement. There is no indication in the minutes that the claimant raised any concerns with Mr Flewitt that Ms Gray had been recruited or confirmed in her role or that it was potential discrimination.

19. In his witness statement, Mr Flewitt refers to a second consultation meeting with the claimant on 31 July 2020, albeit the meeting is not evidenced in the hearing bundle by way of a calendar invite or meeting minutes. It is, however, referred to in Mr Flewitt's letter to the claimant dated 1 August 2020 at pages 110-111 of the hearing bundle. Mr Flewitt's witness statement provides no further details as to what was discussed at the second consultation meeting.

20. At paragraph 67 of her witness statement, the claimant refers to having spoken with Mr Flewitt about concerns she had that she was being excluded from working on approximately 300 accounts that were transferring from Jacobsen US. She does not say when this conversation took place though it evidences to me that she felt able to raise her concerns and suggestions, and to put forward, as the minutes evidence she did on 27 July 2020, why she felt there was sufficient workload to justify the retention of both Credit Manager positions.

21. Ms Gillies, HR Business Partner, wrote to the claimant on 1 August 2020 to invite her to attend a further consultation meeting on 3 August 2020. The purpose of the meeting was stated to be to,

> "… outline the selection results based on the scoring matrix which you have the opportunity to review".

22. Since the minutes of the meeting on 27 July 2020 do not evidence any discussion of the matrix this seems to be a reference to the fact that the matrix had been appended to the 16 July 2020 announcement.

23. Mr Flewitt also wrote to the claimant on 1 August 2020 setting out the company's response to what he referred to as the "alternative proposals" put forward by her. He addressed these under six numbered points. It evidences the respondent engaging with the claimant in relation to the points that were identified as having been raised by her, including the potential for workload to increase. Mr Flewitt explained why the transition of accounts from the US may not in fact give rise to increased workload. Mr Flewitt's letter concluded,

> "At our last meeting all persons have indicated they are happy with the matrix provided in the document dated 16 July 2020. We will therefore use the matrix in the document dated 16 July 2020 to determine selection".

There is no evidence in the bundle, and the claimant does not suggest in her witness statement or in her evidence at Tribunal that this statement was inaccurate.

24. At their subsequent meeting on 3 August 2020 the claimant was presented with her scores. Mr Flewitt's evidence was that the meeting lasted 15, maybe 20, minutes. The meeting minutes at page 120 of the hearing bundle are again in summary form. In response to a question from me, Mr Flewitt confirmed that by the conclusion of the meeting the claimant's

selection has been confirmed and that she remained at risk of redundancy subject only to a further period of consultation during the remainder of that week when the respondent gave consideration to the potential for redeployment.

25. The claimant had not been provided with her scores prior to the meeting on 3 August 2020 and, given that her selection for redundancy was confirmed during the meeting, there was no opportunity for her to reflect on the scores or to question the scoring methodology which was not indicated on the face of the matrix.

26. The minutes evidence that the claimant sought to understand during the meeting why she had been scored '2' for customer focus. Mr Flewitt was noted to have referred to audits before going on to identify her weaknesses, as being in reporting and business acumen for which she had been scored '1' in each case. The minutes do not evidence that his observations were supported in either case with specific examples or further explanation.

27. Mr Frame makes the valid point that, in his witness statement, Mr Flewitt does not address why the claimant was given the scores that she was. I refer in this regard to paragraph 20 of Mr Flewitt's witness statement. In the course of his evidence at Tribunal, Mr Flewitt explained, seemingly for the first time, that on occasion he had had to correct the claimant's figures in the month end reports, something he referred to as "quite poor". Otherwise, he did not elaborate as to why he had settled on the scores that he had. He did say at Tribunal that there were upwards of 70 detailed competencies against which staff could be assessed. He said he presumed that any relevant competencies had been shared by the respondent's HR with the claimant. In his evidence, Mr Went relied upon the fact that the claimant had attended a leadership training event in or around October 2017 when he said she would have been made aware of the competencies. In any event, there is no evidence that the claimant was scored by reference to specific competencies. Instead, Mr Flewitt said that he had scored the claimant and Ms Gray from his own direct knowledge and observation of their respective capabilities. Asked by Mr Frame whether, in the case of the claimant, he had looked for example from her appraisals, he said he would not have needed to, that he had sufficient knowledge of the claimant. He said he had a photographic memory and also said that the open plan environment and small team meant that he was able to observe firsthand how each member of team was performing.

28. I pause to observe here that Mr Flewitt failed to check his assumptions regarding the claimant's childcare situation when deciding to furlough her.

29. When the claimant was informed by Mr Flewitt on 3 August 2020 that she had scored lower than Ms Gray this led her to make certain comments regarding Ms Gray's performance, skills and competencies, with the result that there was no further discussion of her own scores. On the strength of the meeting minutes I can only reasonably conclude that any discussion regarding the claimant's scores was relatively perfunctory, with no

discussion of the scoring methodology and any substantive discussion limited to the issue of the claimant's customer focus.

30. The claimant's evidence was that she was in a state of shock when informed that she had been selected. She said that if she had been asked her name, she have been unable to answer. She said, and I accept her evidence, that she was unable to focus on her scores. Part of the explanation is that, on her own evidence, she had gone into the meeting assuming that Ms Gray would be selected to be made redundant. She said,

> "To me it was blatantly obvious I'd come out miles on top of her".

31. Ms Gray scored more highly than the claimant in three of the five selection criteria and received the same score as the claimant in the other two criteria. In terms of Skills/Competencies, she scored '12' as against the claimant's score of '8'. Overall, the claimant scored 1 point less than Ms Gray; the difference in their respective scores was now narrowed by reason of the claimant's greater score for years of service.

32. At a third and final consultation meeting on 7 August 2020 Mr Flewitt confirmed that the claimant was to be made redundant. She was dismissed with payment in lieu of notice. The outcome was confirmed in a letter dated 7 August 2020 which confirmed that the claimant could appeal against her dismissal. She exercised her rights in that regard. The stated grounds of appeal were broadly expressed, namely

> "1. The process undertaken by the company was unfair and predetermined; and
>
> 2. The decision to select my position as redundant is based on a discriminatory selection because of my maternity leave and/or part-time status."

33. The claimant confirmed that she would expand upon these at the appeal hearing.

34. The appeal was heard by Mr Rainger and rescheduled at the claimant's request, taking place on 4 September 2020. Mr Went attended to take notes and provide HR advice. I am satisfied that represents the extent of his involvement and that Mr Rainger alone made the decision on the appeal.

35. The minutes of the appeal meeting evidence that the claimant raised many, if not all, of the points she has raised in her evidence in these proceedings. Towards the bottom of page 137 of the hearing bundle the minutes record that the claimant argued she should have "won" the scoring and that she cited various factors summarised under nine bullet points.

36. At a reconvened meeting on the 9 September 2020 the claimant advanced two further pieces of information regarding her scores and that information is at page 138 of the hearing bundle. I asked the claimant at Tribunal whether, during the appeal process, she had been able to put forward all the points she wished to make regarding her scores and she confirmed that she

had.

37. Mr Rainger interviewed Mr Flewitt on 15 September 2020. The minutes of that meeting at pages 139-140 of the hearing bundle evidence that he explored various points raised by the claimant in some detail with Mr Flewitt. However, he did not discuss the selection process with Mr Flewitt and accordingly did not discuss the skills and competencies criteria with him, the scoring methodology or how or why he had arrived at the scores which he had. Mr Rainger did, however, address both the matrix and the claimant's scores in his letter to her dated 25 September 2020 in which he confirmed that he was not upholding her appeal against her dismissal.

38. Mr Rainger's letter documented eight specific areas or factors cited by the claimant as being relevant to her scores albeit without specifically identifying the criteria to which they related. He went on to say,

> "Whilst I am grateful for your service, I cannot accept that the areas you list are more important than the key areas that are outlined in the selection matrix".

It was a curious observation on his part, and one that it is difficult for me to understand given that the areas or factors referred to by the claimant were considered by her to touch upon the scores she had received under the selection criteria rather than, as he seemed to suggest, to be separate to them. Though he went on to refer to them as 'peripheral' to her scores, indicating that he may have considered their relevance in terms of her scores; his letter is, at best, ambiguous.

39. In his evidence at Tribunal, Mr Rainger was unable to articulate a clear understanding of the selection matrix or the criteria within the matrix and how candidates were scored against those criteria. It was not something he had explored further with Mr Flewitt. His evidence at Tribunal was that he had been more concerned with the rationale rather than the actual scores. That is unfortunate given that the claimant was clearly stating on appeal that her scores were unfair. He went on to explain at Tribunal that he was concerned to check that the process for selection had been applied consistently. However, given that he did not ask Mr Flewitt about the matrix, the criteria, the scoring or methodology, it is unclear to me how he came to an informed view as to whether the process had been applied consistently or, as he said, conducted on an equitable basis.

40. Even allowing for the passage of time, something that all witnesses have to contend with, Mr Rainger struggled at Tribunal to articulate the reasons for his decision on the claimant's appeal. He had no real grasp of the selection process. Instead on his own evidence he trusted that the criteria had been applied consistently and that had there been evidence of inconsistency he would have expected HR to raise the matter.

The Law and the Tribunal's Conclusion

41. Subject to any relevant qualifying period of employment, an employee has the right not to be unfairly dismissed by his employer – section 94 of the Employment Rights Act 1996 ("ERA" 1996). It is not disputed that the claimant qualified for that night.

42. S.98 ERA 1996 provides:

> 98 General
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show–
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> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it–
>
> (a) …
> (b) …
> (c) is that the employee was redundant,
> (d) …
>
> (3) …
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case.

43. Where this is in dispute, an employer bears the burden of establishing that it had a potentially fair reason for dismissing its employee. The claimant concedes that the reason for dismissal was redundancy. Had that concession not been made, I have indicated already the reasons why I consider the claimant's assertion that she was dismissed and/or selected for redundancy because she took maternity leave runs into difficulty. It was not

put to the respondent's witnesses, in particular to Mr Flewitt, that the respondent's actions and decisions were influenced by the fact of the claimant's recent maternity leave. Whilst the proximity between Ms Gray being issued with a permanent contract in or around May or early June 2020 and the commencement of the redundancy consultation process has prompted questions in the claimant's mind as to whether the two matters might be connected, I consider it to be no more than a coincidental proximity between two unconnected events. The fact that Ms Gray was issued with a contract was the implementation of a decision taken some months earlier that her position should be made permanent evidenced by the email at page 96 of the hearing bundle. In my judgement it was not done in order to secure her position or advantage her in the redundancy consultation process.

44. The claimant having conceded, and the respondent in any event having established to my satisfaction, that the claimant was dismissed by reason of redundancy, the fairness or otherwise of her dismissal falls to be determined in accordance with well-established principles applicable in cases of redundancy related dismissals, including as laid down in *Williams v Compair Maxam Ltd [1982] ICR 156*.

45. Firstly, I am satisfied that the claimant was consulted appropriately regarding the business case for redundancies. I refer again to Mr Flewitt's letter to her dated 1 August 2020 at pages 110 and 111 of the hearing bundle which evidences that he engaged with her as to the rationale for redundancies.

46. I do not rehearse Mr Frame and Mr Baker's respective submissions in this case, save to confirm that I read their respective submissions ahead of their oral submissions and I re-read their submissions in coming to this Judgment. I confirm that I have taken on board Mr Baker's invitation to consider Volume 9, Chapter 8 of the IDS Handbooks, including from paragraph 8.147 onwards. Tribunals are regularly reminded by representatives that they must be careful not to enter the substitution mindset. On this occasion, the point is well made by Mr Baker since one of the threads of Mr Frame's submissions is that the Tribunal should do precisely that, namely that it should step into the shoes of the respondent regarding the selection criteria, certainly as regards length of service, qualifications, performance and, in relation to skills/competencies, certainly as regards Excel reporting.

47. Tribunals must be careful not to subject an employer's assessment of its employees to undue scrutiny - *Semple Fraser LLP v Daly EAT 0045/09*. Having regard to Lord Justice Waites' comments in *British Aerospace Plc v Green & Others [1995] ICR1006*, I am satisfied that in this case the respondent set up a good system of selection that could reasonably be described as fair including, as it did, one selection element, namely skills/competencies, which attracted up to one third of the total available maximum points, that was subjective in nature. I note that *Mitchells Of Lancaster (Brewers) Ltd v Tattersall [2012] UKEAT/0605/11/SM* and

Nicholls v Rockwell Automation Ltd [2012] UKEAT/0540/11/SM confirm that scoring criteria can be subjective.

48. In my judgement, the respondent cannot be said to have acted outside the band of reasonable responses, in using length of service as one of its selection criteria or in capping the maximum score for length of service at '5' points, in scoring qualifications without additional reference to a candidate's experience in the relevant role or sector regardless of formal qualifications, or in scoring disciplinary record without further weighting or adjustment to reflect length of service. In my judgement, to have weighted the latter in favour of longer serving employees or to have discounted the scores of shorter serving employees would have been to have risked embedding age discriminatory considerations within the criteria in circumstances where the decision had, in my judgement, already reasonably been taken, seemingly on legal advice, to cap the score for length of service to 5 points and to use an average of performance appraisal scores throughout an employee's performance or to attribute a standard score of '3' points for performance to those employees who were in their first year of employment. In the case of longer serving employees this approach ensured, for example, that they were not disadvantaged if their most recent appraisal score had reflected a dip in performance as against a track record of consistently strong performance. In my judgement, there is nothing about this approach that could be said to sit outside the band of reasonable responses.

49. Nor, in my judgement, did the respondent act outside the band of reasonable responses in using a range of five criteria to determine an employee's overall score for skills/competencies.

50. However, in my judgement, and again, referencing Lord Justice Waite from the *British Aerospace* case, the system for selection was applied in a way that marred its fairness. Whilst the conduct of the respondent in question was not in bad faith and did not constitute victimisation or discrimination, in my judgement the respondent acted unreasonably, that is to say outside the band of reasonable responses, in failing to provide the claimant with her scores in advance of the meeting on 3 August 2020 so that she had a reasonable opportunity to consider them, raise questions as appropriate either in advance of or at the meeting about the methodology and the underlying rationale for the scores and prepare herself accordingly for the meeting, including so that she might put forward evidence, as appropriate, to support an increase in her scores as she thought justified. Alternatively, there was no reasonable opportunity for her to make those representations following the meeting itself, since Mr Flewitt confirmed her selection by the time the meeting concluded.

51. The available evidence is of a perfunctory discussion on 3 August 2020 with no real explanation as to why Mr Flewitt had arrived at the scores that he had. The fact the claimant was confident of her position and was 'knocked sideways' on being informed in the meeting that she had been selected, and immediately focused on Ms Gray's scores, merely confirms why, in my judgement, an employer who is acting reasonably in the matter will permit

an employee a reasonable opportunity to consider and reflect upon their scores before expecting them to engage in meaningful discussion about them.

52. In my judgement this fundamental unfairness was not rectified on appeal. As I have noted already in my findings, Mr Rainger's comments in his letter of 25 September 2020 evidence some confusion on his part as to the relevance of the points the claimant was seeking to make and which she was effectively only able to advance for the first time on appeal.

53. In summary, Mr Rainger trusted Mr Flewitt to have got the matter right and/or Mr Went to alert him if there was an issue. In my judgement, notwithstanding his letter of 25 September 2020, Mr Rainger did not adequately address his mind to the issues. Even if the appeal did not proceed by way of a re-hearing or reconsideration but instead as a relatively high level review, the minutes of Mr Rainger's meeting with Mr Flewitt confirm that he did not explore the selection process with Mr Flewitt or seek to gain an understanding of his approach and methodology. It is very difficult for me to understand in these circumstances how or why Mr Rainger could be confident that the process had been applied fairly and consistently. It was his responsibility as the appeal officer to examine the scoring process critically and in my judgement, he failed to do so. He failed to address or rectify the unfairness that had arisen at the first stage. In all the circumstances, and having regard to the fact this was a reasonably well-resourced company with an established HR capability, I conclude that the respondent acted unreasonably within s.98(4) and that the claimant's dismissal was therefore unfair.

54. Pursuant to s.123.1 of the Employment Rights Act 1996 where a Tribunal upholds a complaint of unfair dismissal it may award compensation as it considers just and equitable in the circumstances, having regard to the losses sustained by the claimant in consequence of dismissal. In accordance with the well-established principles in *Polkey v AE Dayton Services Ltd 1988 ICR 142, HL* the Tribunal may make a just and equitable reduction in any compensatory award under s.123(1) to reflect the likelihood that the employee's employment would still have terminated in any event. The burden of proving that an employee would or might have been dismissed in any event rests with the employer. Nevertheless, Tribunals are required to actively consider whether a *Polkey* reduction is appropriate. In *Software 2000 Limited v Andrews and Others* the EAT reviewed the authorities at that time in relation to *Polkey* and confirmed that Tribunals must have regard to all relevant evidence including any evidence from the employee. The fact that a degree of speculation is involved is not a reason not to have regard to the available evidence unless that evidence is so inherently unreliable that no sensible prediction can be made. It is not an all or nothing exercise, rather it involves a broad assessment of matters of chance. The decision of the EAT in *Contract Bottling Ltd v Cave and anor 2015 ICR 146*, is illustrative of how a purely statistical chance of dismissal by reason of redundancy was adjusted to reflect the particular circumstances.

55. This case is not a case in which it is, in my judgement, too speculative an exercise to determine what would or might have happened. However, I have to do so having careful regard to the entirety of the available documentation and evidence in the case and mindful also that having treated the claimant unfairly in the matter the respondent now has a vested interest in asserting that it was inevitable she would have left its employment.

56. Applying ***Polkey*** principles in practice requires an evidence-based approach drawing upon common sense and experience. In the final analysis any final decision must meet the requirement of justice and equity. The evidence is relatively limited in this regard. In terms of their respective scores, just one point separated the claimant from Ms Gray. I have noted already that the significant gap in terms of their adjudged respective skills/competencies was narrowed by virtue that the claimant scored 5 for length of service. Be that as it may these were the criteria that the respondent chose to use, and which I have upheld as reasonable criteria in the circumstances. The claimant would only need to have persuaded Mr Flewitt to increase her score by 1 point in respect of one of the five criteria comprising skills/competencies to have created a tie break situation with Ms Gray.

57. Mr Flewitt's evidence was that Ms Gray was outstanding. Whilst I am satisfied that he genuinely believed she had a clear edge over the claimant and scored more highly than, or the same as, the claimant against all 5 criteria used to assess skills/competencies, bearing in mind the respondent's burden in the matter, I cannot be certain that had the process been conducted more fairly the claimant would not have been able to put forward evidence regarding her skills/competencies and persuaded Mr Flewitt to increase her score by at least one point. That would, of course, have resulted in a tie break situation when perhaps both candidates would have been re-scored or even their names pulled from a hat.

58. I balance Mr Flewitt's firmly and genuinely view expressed at Tribunal that Ms Gray was outstanding (and accordingly why he says she would inevitably have been retained ahead of the claimant) against the fact that his witness statement does not address in detail or with specific examples why he says this was. Equally, I weigh in the balance that the gap between the claimant and Ms Gray was only narrowed to one point because the claimant scored highly for length of service, whereas the two key selection criteria in terms of their weighting were performance and skills/competencies, and that Ms Gray was assessed to be the stronger of the two against the latter criteria.

59. Doing the best that I can on the evidence available to me and having regard to the respondent's burden in this matter I conclude that there was a 25% chance of the claimant being retained had the consultation process been handled more fairly so as to facilitate more considered representations from her regarding her skills and competencies. In my judgment, had the

claimant been retained this would have been on a full-time basis with commensurate remuneration.

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Employment Judge Tynan

Date: 5 September 2022

Judgment sent to the parties on

4 October 2022

For the Tribunal office