EMPLOYMENT TRIBUNALS

Claimant: **Jimmy Sparks**

Respondent **40TUDE Ltd (Formerly J&M Insurances Services (UK) Ltd)**

Heard at: **East London Hearing Centre, by CVP**

On: **14 and 15 September 2022**

Before: **Employment Judge Sugarman**

Representation

Claimant: **In person**

Respondent: **Mr McCombie, Counsel**

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

REASONS

LIABILITY

Introduction

1. By way of a Claim Form presented on 15 May 2020, the Claimant brings a claim of (ordinary) unfair dismissal against the Respondent pursuant to the provisions contained in Part X of the Employment Rights Act 1996, specifically sections 94, 98 and 111. He withdrew his claim for a statutory redundancy payment at the outset of the hearing. That claim was dismissed upon withdrawal.

2. The Claim Form identified the Respondent as J&M insurance Services UK (Ltd). At the outset of the hearing, Respondent confirmed that it had changed its name to 40TUDE Ltd. With the Claimant's consent, the Respondent's name was amended accordingly.

3. The Respondent denies that it unfairly dismissed the Claimant. It accepts the Claimant was dismissed but contends that he was fairly dismissed by reason of redundancy following a fair and proper selection process.

4. References in square brackets below are to page numbers in the agreed bundle of documents that the Tribunal was provided with before the hearing. A different bundle was provided to the Tribunal on the morning of the hearing though it was agreed it had simply been reordered and did not contain new evidence. The Tribunal was provided with a separate bundle of witness statements.

The Issues

5. The issues were set out by Regional Employment Judge Taylor in her Case Summary following a Preliminary Hearing on 25 March 2021 [47].

6. There was a further discussion about the issues at the start of the hearing. The Claimant accepts that there was a redundancy situation and redundancy was the reason for his dismissal but contends the Respondent did not act fairly within the meaning of s98(4) of the Employment Rights Act 1996. The issues were agreed as those that often arise in redundancy unfair dismissal cases, namely

    a. Did the Respondent adequately warn and consult with the Claimant?

    b. Did the Respondent adopt a reasonable pool for selection?

    c. Did the Respondent act reasonably in selecting the Claimant for redundancy? In particular, did it adopt fair selection criteria and did it apply the criteria in a fair way?

    d. Did the Respondent take reasonable steps to find the Claimant suitable alternative employment?

    e. Was dismissal within a range of reasonable responses?

The Hearing

7. The Claimant was unrepresented. The Respondent was represented by Mr McCombie of Counsel. The hearing was conducted by CVP.

8. After some reading time, the Tribunal heard evidence from:

a. The Claimant;

b. Sian Maynard (formerly Sian Porter) whose decision it was to select Mr Sparks for redundancy;

c. Mr Daniel Hunter, who was in attendance at the "at risk" meeting;

d. Joanna Newman, the Personal Assistant to the Respondent's Chief Executive who had some (limited) involvement in the redundancy process, as set out further below.

9. The Respondent had produced statements from other witnesses in the witness statement bundle from Paul Dodds, Richard Cross, Kwabena Adjei, Edwin Osei and Callum Larkins. It was prepared to call Paul Dodds and Richard Cross to give evidence but the Claimant confirmed he had no questions for either and their evidence is therefore admitted uncontested.

10. Both the Claimant and Mr McCombie made oral submissions at the conclusion of the evidence. The Tribunal was grateful to them both for the clear, succinct and courteous way they put their cases.

Findings of Fact

11. The following findings of fact are made on the balance of probabilities. The Tribunal has not made findings on every aspect of the evidence presented which it carefully considered, but the issues it has been necessary to resolve to make a determination.

12. The Respondent operates in the insurance sector. At the material time, it had approximately 33 employees and 4 directors. It contracted in specialist HR input from an external agency.

13. The Claimant was employed as a "Sales Executive" and worked in the "Taxi" team. The Taxi team was managed by Ms Sian Maynard**.** There were 7 sales executives and 2 senior sales executives in the team: 9 in total. They all performed essentially the same work. Ms Maynard also managed the "Motor" team. That team contained 4 employees.

14. After an annual Operations meeting in January 2020, Ms Maynard discussed with the directors of the Respondent a proposal to combine the Taxi and Motor teams, which she felt would have numerous commercial benefits. The downside was likely to be redundancies. Following those discussions, it was Ms Maynard's plan to proceed with a restructure in the summer of 2020.

15. The staff, including the Claimant, were not notified of that plan or the proposed restructure at the time.

16. The onset of the pandemic caused the Respondent to bring forward the planned reorganisation.

17. On 17 March 2020 in what was the early stages of the pandemic, Ms Maynard and Mr Dodds (the Chief Executive of CUA Group Limited, which owns the Respondent, who is also a director of the Respondent) met to discuss what Ms Maynard described as "issues" the Respondent was facing given the surge of COVID-19 cases. There are no notes of that meeting.

18. Ms Maynard's evidence was that following the meeting, she intended to explore the possibility of bringing forward the restructure. There is however no evidence about what form that exploration took, if any. The Respondent has produced no documents relating to the original or the expedited reorganisation proposal, whether describing or identifying the business case for the same or the rationale or describing what the proposals were in practical terms, and in particular in terms of proposed headcount reduction. Ms Maynard's witness statement did not shed any light on these issues either.

19. It was only at the hearing in oral evidence that Ms Maynard explained what the "proposals" in fact were. She said that she intended to make 2 redundancies from the Taxi team and 2 further redundancies from the Motor team and thereafter to combine the teams together. She said it was necessary to retain some taxi and some motor expertise in the new combined team and as such she did not want to pool both teams together and then make redundancies, as that would risk losing too much expertise from one of the teams. 2 redundancies were therefore to be made from each team before the teams were combined.

20. On 19 March 2020, the Claimant was called into what has been described as an "at risk" meeting with Ms Maynard. Mr Hunter was also present. The Claimant was told that the business had intended to restructure nearer the summer but had to "dramatically change" the time scale of the proposed restructure because of COVID-19 and its effects on the UK as a whole. A document sent to him after the meeting [122] confirms the content of the meeting. It states that COVID was placing "immense pressure on businesses across the country including ours" and as such the Respondent was looking to make redundancies and that his role was "at risk of redundancy".

21. No evidence has been adduced by the Respondent about the asserted "immense pressure" that required the Respondent to act so suddenly and at the breakneck speed it did over the following days.

22. The 19 March meeting was the first the Claimant knew of proposed redundancies or that his role was at risk. He was told that an update would be provided on Monday 23 March and at that meeting he would be given the opportunity to ask questions and

make any comments. He was not told that the 23 March meeting was going to be one which confirmed a decision.

23. It was not explained to the Claimant in any detail what the reason for the urgent restructure was, other than in the very general terms outlined above. It was not explained how many people the Respondent proposed to make redundant nor from what teams or why. It was not explained to him how it was proposed to select the redundant employees, there was no discussion of any selection criteria and it was not explained what steps if any the Respondent proposed to take in terms of looking for alternative work. There was no consultation, whether about possible ways of avoiding the redundancies, the proposed selection criteria nor how the criteria were to be applied in practice, whatsoever.

24. The Claimant was however given a copy of the Respondent's 2 page "Redundancy Policy" [127-8]. The policy made promises of meaningful consultation on redundancy proposals and their implementation and referred to selection for redundancy being made on "clear criteria that will, as far as possible, be objectively and fairly applied" though it did not set out what those criteria were to be.

25. Curiously, at the conclusion of the meeting, the Claimant was immediately sent home and placed on garden leave.

26. There is a dispute between the parties as to how the Claimant took the news in the meeting on the 19th. On the balance of probabilities, he probably did not come across as particularly upset at the news. Mr Hunter's oral evidence was that the Claimant was not happy in his role and had been looking to get into HGV work, though that had been an on-going issue for a period of 12 months and the Claimant nevertheless continued at work with the Respondent. The Tribunal accepts he had been looking to leave the business at some point in the future and at that point in time, he likely anticipated a redundancy payment that he would not otherwise have received.

27. The Tribunal does not however accept the Claimant was "happy" at the news, as Mr Hunter suggested, but even if he was, that would not relieve the Respondent of its obligations to act fairly in selecting him for redundancy at a time not of his choosing. It is not the Respondent's case that he volunteered to be made redundant.

28. At the time of her meeting with the Claimant on 19 March, Ms Maynard had not done any scoring of those in the Claimant's pool, namely the 9 employees in the Taxi team. That was her evidence. However, the Claimant was the only person in his pool invited to an "at risk" meeting and the only person to be put on garden leave. Both of these matters were accepted by Ms Maynard. The other person ultimately made redundant from the Taxi pool was in a probationary period and was treated differently as a result.

29. Ms Maynard was asked about the reasons for singling out the Claimant in this way. Her answer was that she would only have invited everybody else in the pool to attend

a meeting if more than 20 employees were to be made redundant. That explanation makes little sense to the Tribunal.

30. There were other employees, in different pools, who had "at risk" meetings that day. They were also employees yet to be scored, but yet they happened to be the employees ultimately made redundant.

31. In his submissions, Mr McCombie suggested the reason the Claimant was the only one from his pool to be invited to an at-risk meeting and put on garden leave *before* any scoring was done was because he was regarded as the most likely person to be selected, bearing in mind the background knowledge that Ms Maynard would have had. The difficulty with that submission is twofold. First, it is not consistent with Ms Maynard's evidence – she did not say she regarded the Claimant as the most likely person to be selected. Secondly, even if it were true, it would suggest she had approached the selection exercise with a predetermined view.

32. The Tribunal finds there is no good reason why the Claimant, from a pool of 9, would be the only one invited in an at risk meeting and put on garden leave unless in fact the decision had already been made to make him redundant. That is the most likely explanation for the Respondent's approach.

33. After placing the Claimant on garden leave, Ms Maynard carried out a scoring process using a matrix, purportedly relying upon the document which is contained in the bundle [129-159]. Although that document is described in the index of the bundle put together by the Respondent as the Respondent's redundancy policy, Ms Maynard's evidence was that it is not in fact part of its redundancy policy but is only a guidance document issued to managers ("the Guidance"). Either way, the process which she followed did not then comply with the Guidance.

34. The Guidance states that two managers as a minimum shall undertake the selection exercise independently, after which the two managers are to meet and discuss and agree their final selections in presence of an independent moderator from HR, a process which is designed to provide technical and professional assistance and ensure the process was fair and transparent. That did not happen.

35. Only Ms Maynard scored those in the Claimant's pool. She then sent her scores to Ms Newman. Ms Newman in oral evidence said that she was simply providing administrative support to the process and took no part in the decision making. She merely checked that the process *appeared* to have been done properly, what she described as a sense check. Given her role, she was not in a position to challenge Ms Maynard's scoring. Her witness statement had suggested a somewhat different and expanded role, namely to ensure a through and fair process.

36. Ms Newman forwarded the scores on to Alison Clegg, the Respondent's external HR support. Ms Newman understood that Ms Clegg would review the scores to make

sure the process had been done properly. There is no evidence before the Tribunal from Alison Clegg as to what that review consisted of and there is no evidence that the review elicited any concern from Ms Clegg about the process followed to that point, including the fact that only the Claimant in his pool had attended an at risk meeting and been put on garden leave. Ms Newman's evidence was that Ms Clegg confirmed the scoring matrix had been completed properly. As such, it appears her review was a very high level one, checking that the matrix appeared to have been completed properly. It did not involve any challenge of, or discussion with, Ms Maynard.

37. The matrix which was filled in by Ms Maynard appears in the bundle in typed [143] and handwritten [162] formats. It shows that Mr Sparks received a score of 7 overall, broken down as:

    a. Knowledge: 4

    b. Skills: 4

    c. Experience 3

    d. Attendance -4

38. It is clear then the Claimant's attendance score brought him down. His score for that category was the worst of the whole pool. He accepted that score was properly given applying the formula set out in the Guidance. I heard no argument as to whether the attendance criteria, and in particular the way it was weighted, was fair or otherwise and I make no findings on that issue.

39. Ms Maynard's score for the Claimant's experience, 3, was despite him being the second longest serving sales executive with 5 years + experience. Ms Maynard's evidence was that the Claimant only scored 3 because his inexperience was due to a poor sales record, a historically negative reaction to change and regularly needing reassurance. It is not clear to the Tribunal why these matters, if correct, would make the Claimant "inexperienced". The factors seem to relate to other matters such as performance and attitude, which were not being scored under that criterion.

40. The scores of his other colleagues are also shown on the matrix. They show:

    a. The longest serving employee (12 years) scored a 5 for experience. The third and fourth longest serving (3 years and 2 years) both scored 4. One employee who had been employed for a week and was in their probationary period scored 3 for experience, the same as the Claimant;

b. Two other two colleagues, HC and LD, employed for 7 months and a year respectively, scored the same as the Claimant for knowledge (4), skills (4) and experience (3);

c. The next lowest scorer, LD, scored 9 in total (including -2 for attendance). CL who had been employed for 3 years scored 11 (including -3 for attendance).

41. Ms Maynard said that longevity was not necessarily an indicator of experience, it is possible someone with a short period of service had come from a sales background. The Claimant disputed that the marking was appropriate even taking that into account. He pointed to colleague HC, said to be only 21 and who had limited previous experience, knowledge and skills. Ms Maynard responded that because the Respondent was regulated by the FCA, a certain level of experience, knowledge and training was required and all of those in the pool were at the level to do the sales role. She said HC had become knowledgeable and experienced because of how they had adapted in the role in their 7 months of employment.

42. The Guidance which the Respondent said it was working to stated that if managers were to use knowledge, skill and experience as criteria, the specific requirements in relation to these areas should be identified at the outset. Ms Maynard did not do that prior to scoring.

43. The Claimant submitted the matrix was not filled in on 19 March 2020 after the meeting with the Claimant, as Ms Maynard had claimed in evidence, and not sent on the 20th to Ms Newman, which is the date recorded on handwritten version [162]. It is his case it was prepared after the event to justify his dismissal. The Tribunal does not accept that submission. Even though the Respondent did not give the scoring matrix to the Claimant at the time and did not provide it to him, despite various requests, for some time after his dismissal, Ms Maynard's evidence, that it was sent on 20 March 2020, was corroborated by Ms Newman. The Tribunal accepts that evidence.

44. Ms Maynard was however unable to say how long she had spent filling in the matrix documents on 19 March 2020.

45. On Monday 23 March 2020, the Claimant attended the second meeting. At the meeting he was told he was being made redundant. There was no further discussion or any consultation. He was not told what criteria he had been scored against nor what his score was nor his relative position within the pool. There was no discussion about alternative employment. Whilst the Claimant did not ask about these matters, that is not surprising given that he had not been told how he was going to be selected, nor that he was going to be scored but had been told that the decision was already been made. The Tribunal does not accept he did not ask and/or the Respondent did not volunteer the information because he was "happy" to be selected for redundancy, as the Respondent has suggested.

46. The Guidance envisaged a different and more usual procedure. Once a selection decision was *provisionally* made, managers were supposed to meet affected employees to discuss the results of the selection exercise, the scoring, explain the specific methods and calculations used in the process and give the employees the option to challenge any of the points which they had been allocated. None of that happened. The Claimant was not even asked whether he would like to know that information.

47. The letter which followed the meeting [124-5] was confused, stating that he was dismissed "with immediate effect" but then also stated his last day would be the 23 April 2020, though he was to remain on garden leave throughout that period. It was in fact agreed in the meeting his effective date of termination would be in April and he was not dismissed immediately.

48. The letter informed the Claimant what his redundancy pay was going to be and that he was on garden leave but it did not refer to him having been scored, let alone what his score was or his position on the matrix. He was not provided with the matrix, whether redacted or otherwise. The Claimant was given a right of appeal in that letter and did so on the 25 March 2020 [67], illustrating only a couple of days later that he was not happy at having been selected for redundancy.

49. In his appeal letter, he pointed out that he believed the Respondent ought to have completed a selection criteria matrix and he requested a copy of it, so he could be assured that he had not been singled out and that the decision was not predetermined.

50. The Respondent's Redundancy Policy [128] provided that there would be an appeal meeting.

51. Having not received a response to his appeal by 31 March 2020, the Claimant emailed the Respondent to ask why he had not had any acknowledgment of his appeal.

52. On the same day, Mr Cross wrote back stating:

> *"We confirm receipt of your email but we are currently not in a position to be able to answer your questions fully for the time being due to key staff members being unable to attend the office to source the information that you requested regarding your contract….*
>
> *I can assure you the process for redundancy was followed in line with the guidance and followed ACAS guidelines, we are unable to reverse our decision or accept your appeal."*

53. Mr Cross did not provide the selection criteria or scoring matrix. There was no appeal hearing.

54. There is no documentary evidence provided by the Respondent of any steps taken by Mr Cross to investigate whether the process was in fact followed nor how it had come to be that the Claimant was the only person in the Taxi team who had been put on garden leave before the scoring was in fact ever done. Mr Cross' witness statement merely states "after internal discussion, I confirmed in response to his first point about the redundancy process undertaken was fair, correct and standard procedure." He did not say what those internal discussions were nor what view if any was taken about the matters identified above nor why Mr Cross dismissed the appeal without a hearing, in breach of the Respondent's policy. The Tribunal concludes Mr Cross' consideration of the appeal was cursory.

The Law

55. The relevant statutory provisions are contained in sections 94 and 98 of Employment Rights Act 1996.

56. It is for an employer to show the reason or principal reason for dismissal and that is a potentially fair reason under s98(2). Redundancy is a potentially fair reason for dismissal under s98(2)(c).

57. Under section 98(4)

> *(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.*

58. In applying the statutory test, the Tribunal must not substitute its view for that of the employer and must apply the band of reasonable responses test. It must consider whether dismissal lies within a range or band of decisions which a reasonable employer could have adopted.

59. The well-known guidance in the case of **Williams v Compair Maxam Limited** [1982] ICR 156 suggests, in summary, the following is good industrial practice when dealing with redundancies:

a. Early warning;

b. Consultation, which may be with a recognised union if there is one;

c. Fair selection criteria which do not depend solely on subjective opinion;

d. Fair selection in accordance with the criteria and consideration of representations about the selection;

e. Consideration of alternative employment.

60. Failure to follow one or more of the **Williams** steps does not necessarily to lead to a finding of unfair dismissal (**Grundy (Teddington) Ltd v Plummer** [1983] ICR 367). The guidance is not to be treated as a list of mandatory criteria (**Rolls-Royce Motors Ltd v Dewhurst** [1985] ICR 869. However, as Lord Bridge said in the well-known case of **Polkey v AE Dayton Services Ltd [1988] ICR 142***:*

> *"the employer will not normally act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by deployment within his own organisation."*

61. In **Langston v Cranfield University [1998] IRLR 172,** the EAT held that whilst the burden of proof in s.98 is neutral, an employer could normally be expected to lead some evidence as to the steps it had taken to select an employee for redundancy, to consult and to seek alternative employment.

62. The classic formulation of the duty to consult comes from **R v British Coal Corporation and Secretary of State for Trade and Industry ex parte Price and ors** [1994] IRLR 72, Div Ct. Glidewell LJ said that consultation:

> *"involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely".*

63. This generally requires consultation at a time when proposals are still at a formative stage, the provision of adequate information on which to respond, adequate time in which to do so and a conscientious consideration of the response.

64. In the case of **Rowell v Hubbard Group Services Ltd [1995] IRLR 195,** an employee was warned in a memorandum from her employer that the employer proposed to make redundancies and what the criteria were. She then received a letter informing her that she had been selected but offering her the opportunity to

discuss any matters arising from the letter. An Employment Tribunal found that was a sufficient opportunity to consult because the employer had told the employee she could raise any matters she wished, and she did not do so. The EAT disagreed, finding the letter could not be read as anything approaching consultation and it overturned the Tribunal's decision.

65. Since **Williams** in the 1980s, it is common and accepted that employers do not have to adopt wholly objective criteria, some subjective managerial assessment is permitted as Mr McCombie submitted. However, the vaguer and the more subjective the criterion, the greater the need for the employee to be given the opportunity of consultation (**Graham v ABF Ltd** [1986] IRLR 90).

66. It is well established that it is not the Tribunal's role to review the marks given to employees in a scoring exercise. An employer usually only need establish a fair system of selection was set up and administered without overt signs of bias which would mar its fairness (see for example **British Aerospace v Green** [1995] ICR 1006). In those circumstances, a tribunal ought not to embark upon a detailed critique of individual scores to determine if selection was reasonable.

67. In **Samsung Electronics Samsung Electronics (UK) Ltd v Monte-d'Cruz** UKEAT/0039/11/DM the EAT warned tribunals that reviewing scoring is an area where it is easy to fall into "vice of substitution". At para 39, it held:

> *"Good faith assessments of an employee's qualities are not normally liable to be second-guessed by an employment tribunal."* [emphasis added]

68. If the employee challenges the bona fides of the employer however, then it may be necessary to examine the scores in more detail to test the employee's theory (**Nicholls v Rockwell Automation Ltd** UKEAT/0540/11/SM).

69. In **Davies v Farnborough College of Technology** [2008] IRLR 14, the EAT held an employee should be given sufficient information that he may understand the dismissal and have the chance to challenge the accuracy of the markings and provide supplemental information if appropriate. This may be done without actually informing the employee of the markings. What the employer should disclose depends on the facts of the case.

70. The ACAS Code of Practice on Disciplinary and Grievance Procedures does not apply to redundancy dismissals. The total absence of an appeal does not automatically make a dismissal unfair (**Gwynedd Council v Barratt and anor** [2021] IRLR 1028, CA). However, the way an appeal is conducted, if there is one, can be considered in the overall assessment of fairness in the case.

71. The issue of whether there ought to be a **Polkey** deduction if the Claimant is successful, the Tribunal is mindful of the guidance given by the EAT in **Software**

2000 Ltd v Andrews and ors [2007] ICR 825 which includes that a tribunal should have regard to any material *and reliable* evidence that might assist in assessing just and equitable compensation, even if there are limits to the extent it can be confident about the world as it might have been; a degree of uncertainty is an inevitable and the mere fact that an element of speculation is involved is not a reason for refusing to have regard to the available evidence.

72. The burden of proving that an employee would have been dismissed even if a fair procedure had been adopted is on the employer (**Britool Ltd v Roberts and ors** [1993] IRLR 481).

The Parties' Submissions

73. In summary, the Claimant avers the dismissal was not fair, honest or transparent. He says the decision was pre-determined and the matrix document was falsified after the event. He does not accept there was any meaningful consultation.

74. In summary, the Respondent submitted that :

    a. The band of reasonable responses applies: there are guidelines for a fair dismissal but no hard and fast rules;

    b. The choice of pool and criteria are also matters to which the band of reasonable responses applied;

    c. In this case, the criteria were fair and were applied honestly, fairly and in a structured way by Ms Maynard: that was her evidence;

    d. There was no falsification of any documentation;

    e. Although consultation was "minimal", it was sufficient in the circumstances bearing in mind the "pressing" circumstances and the Claimant's own relaxed attitude towards redundancy;

    f. An appeal was not required but in any event it was fair;

    g. There was no evidence of any other available roles – redeployment doesn't arise on facts;

    h. If the dismissal was unfair, dismissal was inevitable or there was a high chance of the same and that ought to be reflected in a **Polkey** deduction. Even if the decision as pre-determined, that did not mean the scores were not reached in a genuine and honest manner and given the Claimant's absence score, he would have required a large swing of at least 2 points to be safe.

Conclusions

Reason for Dismissal

75. It is not disputed by the Claimant that there was a redundancy situation and that that was the reason for his dismissal. The Respondent has established a potentially fair reason for dismissal.

76. The crucial question is whether the Respondent acted within a band of reasonable responses when deciding to dismiss the Claimant on the grounds of redundancy.

Adequate Warning

77. In terms of warning the Claimant about the risk of redundancy, there was very little notice at all. The first the Claimant was aware of the possibility of redundancies was when he was told on Thursday 19 March 2020 that he was at risk of redundancy. On the same day, he was sent home and placed on garden leave. Thus, he went into work that morning completely unaware of the risk of redundancies yet found himself on garden leave by the end of the day. He did not return to work thereafter. Two working days later, on Monday 23 March 2020, he was told he had been selected for redundancy and was given his notice.

78. The Respondent has not adequately explained why the whole process needed to take place over such a limited period and why more warning could not have been given. It has not provided any cogent explanation for the urgency in March. It had been contemplating a reorganisation since January yet did not warn the Claimant or other staff any stage before 19 March 2020. The Tribunal concludes that more waning could and should have been given. The warning given was unreasonable and fell outside the band of reasonable responses.

Consultation

79. The Tribunal's conclusion is that consultation was not just inadequate but close to non-existent. On 19 March 2020, the proposals were not explained to the Claimant, which would have allowed him to think about or comment on them, and the selection criteria the Respondent proposed to use were not explained either.

80. On Monday 23 March 2020, at a meeting which was supposed to be a consultation meeting, he was told he *was* being made redundant. There was no further discussion or any consultation. He was not told what criteria he had been scored against nor what his score was, nor his relative position within the pool. Indeed, it was not even confirmed to him that he had been scored. There was no discussion or consultation about alternative employment.

81. In short, he was given very limited information upon which consultation could have been based. His input was not elicited at all. There was no meaningful consultation within the meaning of **Price**.

82. The Tribunal rejects Mr McCombie's submission that the urgent nature of the process, and the Claimant's attitude, justified what he accepted was minimal consultation. As above, the Respondent has not adduced any cogent evidence to establish that there was an urgent need to make redundancies, let alone to do so without adequate consultation. In terms of the Claimant's attitude, even if it were established that had been happy to be made redundant, which is not the Tribunal's finding, it would not excuse what was otherwise a wholesale failure on the part of the Respondent to provide the Claimant with the necessary information and to at least offer to consult with him.

83. The Respondent's obligation to act fairly is not diluted simply because an employee appears to be accepting or not particularly upset at news of a proposed redundancy. It may in some circumstances mean a different approach is justified, if for example the employee makes clear they do not wish to know about their scores or have no challenge to them. That is not this case. At no stage did the Claimant indicate he did not wish to receive information or be consulted. Here, pre-determined decisions were communicated to the Claimant and there was no consultation prior to those decisions being made.

84. On the facts, the Claimant's failure to ask more questions than he did was entirely understandable given the Respondent's approach. He was reacting to what Respondent was doing, not vice versa. This is not a case where the Claimant volunteered for redundancy or where the Respondent adapted its approach in light of the Claimant's lack of engagement. It had already determined on 19 March 2020 that the Claimant was to be put on garden leave and told to reattend on 23 March 2020 and on that date, it had already decided to dismiss him.

85. The Tribunal has no hesitation in finding the Respondent's approach to consultation fell outside the band of reasonable responses.

Pools

86. In terms of pools, Ms Maynard explained why the pools had been divided in the way they were. There was no challenge to that from the Claimant. The Tribunal accepts that the pooling decision was a reasonable one in the circumstances.

Fair Selection

87. The Tribunal has had little difficulty in concluding the selection process fell outside the band of reasonable responses and was not fair.

88. As set out above, the Tribunal's finding of fact is that the Claimant's dismissal was predetermined i.e. decided upon before the Respondent even met with him on 19 March 2020.

89. There is no credible explanation for why the Claimant was the only person in his pool to be called to an at-risk meeting and the only one to be put on garden leave *before* the scoring was done. The scoring was done by Ms Maynard after the decision had been made to select the Claimant for redundancy. That undoubtedly influenced the scoring process which was then undertaken. That is unfair.

90. The scoring was not done fairly, in good faith and with an open mind but was done in order to achieve and justify a preordained result. This also provides an explanation for why the process was so rushed and proceeded without meaningful consultation. There is little point consulting when one has made up one's mind.

91. The fact the Claimant was the only one in his pool to have an at risk meeting and the only one put on garden leave is enough, without adequate explanation, to justify this conclusion. Given the finding that the scoring has not been done in good faith, it is open to the Tribunal to more carefully scrutinise the scores given. On analysis, they do not stand up to scrutiny.

92. The Claimant had been there for 5 years yet got the same score for experience as someone who had been there for one week (and employees who has been there for 7 months and 1 year respectively). Everybody else who had been employed for over a year got at least 4 points under that head. The Tribunal accepts that longevity does not necessarily equate to experience, but the reasons given by Ms Maynard for the low score did not appear to relate to experience at all, rather to performance which was not part of the criteria being assessed.

93. Ms Maynard also sought to justify her score for skills by reference to the Claimant's attitude and performance, relying on purported limitations when it came to a "can-do attitude" and "self-motivation". It is difficult to see these as skills, although the latter could be. Had Ms Maynard followed the Guidance, identifying the specific requirements in relation to knowledge, skills and experience at the outset, it would no doubt have been easier to accept the scoring as fair.

94. The Claimant had no opportunity to take issue with his scoring as he did not know the basis on which he had been scored.

95. The Tribunal accepts his submission that the scores were moulded to fit a predetermined outcome. That may have been done consciously (because Ms Maynard deliberately scored in a way to ensure the Claimant was selected) or unconsciously (because she believed she was scoring fairly but could not do so because she had already decided the Claimant was likely to come bottom). Given the latter was not her explanation for singling out the Claimant in the way she did,

given the explanation she did provide made little sense and given her reasoning for the scoring was confused, the Tribunal concludes it is more likely the scoring was not done in good faith and the scores were deliberately moulded to fit a pre-determined outcome.

96. The unfairness was compounded because the Respondent failed to follow its own guidance / policy on scoring: only one person filled in the score sheet, there was no moderation and HR input was limited.

97. In short, the way the Respondent approached the scoring in this case fell outside the band of reasonable responses.

The appeal

98. The Respondent's policy provided for an appeal and the Claimant was offered one.

99. The appeal however was not conducted reasonably. There was no hearing despite that being provided for in the Respondent's policy. The Claimant was simply told by way of an email, which was a response to him chasing a response to his appeal, that the process was fairly conducted.

100. The conclusion was reached without any genuine engagement with the issues. There is no evidence of any scrutiny being applied to the process which had been completed. Ms Maynard was not even asked why the Claimant was the only person to attend an at-risk meeting and placed on garden leave before scoring was done. Her scores were not questioned.

Alternative employment

101. The Respondent has adduced no evidence that any effort was made at all to consider alternative employment. It may well be that none was available though that is not known because no effort was made to consider it at the time and no evidence had been adduced that there were no other roles available.

102. Mr Dodds' evidence was that the redundant roles remain "deleted" and the Respondent has not replaced any redundant positions, but that is a different point. The fact the Claimant was not replaced does not mean that there were no other possible roles. That said, the Tribunal accepts it is unlikely given the prevailing national circumstances at the time, the fact that the Respondent was making redundancies and the fact the Claimant has not suggested there was another alternative role available. Nevertheless, a reasonable employer would have given consideration to it and would have discussed the matter with the Claimant. The Respondent did not.

Conclusion on Unfair Dismissal

103. Overall, the Tribunal is satisfied that the dismissal fell outside the band of reasonable responses and was unfair.

Polkey

104. The Tribunal has carefully considered whether it can make a **Polkey** deduction or whether it is simply too speculative, bearing in mind the guidance in **Software 2000**.

105. Given the dismissal was predetermined and infected by unfairness throughout, it is difficult to place any weight on the scoring matrix which was prepared after the decision to select the Claimant was made. The scores, not just the Claimant's, cannot be taken at face value given they were allocated to achieve a particular result.

106. The Respondent has offered little evidence to justify the other scores award to those in the pool, particularly LD and CL, those closest to the Claimant.

107. The burden is it on it to establish that the Claimant would have been fairly dismissed in any event. The Tribunal came close to concluding that it was simply too difficult in the circumstances to conclude what the prospect of this employer fairly dismissing was.

108. However, it is right that the Respondent's policy guidance does provide for absence to be weighed very heavily in the balance in the scoring system. The Claimant did not dispute his absence score which was the lowest of all those in his pool. This would have seen him at a disadvantage in any fair redundancy process. That said, it was only one lower than CL and two lower than LD. He had been there 5 times as long as LD.

109. The Tribunal is unable to conclude that there would have been a high chance of him being dismissed any event, bearing in mind that he was the 2nd longest serving employee the Respondent has not adequately explained his scores and those of those around him in the pool. The Tribunal has not been shown any evidence that issues were raised about his performance, knowledge or skills prior to the redundancy process. It also the case that had there been any meaningful consultation, it is probable his scores would have been revised upwards.

110. Doing the best it can on the basis of limited evidence, the Tribunal concludes that there was a chance the Claimant would have been fairly dismissed in any event because of the disadvantage he would have been at due to this attendance, but it is not a high chance. The chance of a fair dismissal was 20% and therefore the Tribunal makes a 20% **Polkey** deduction to the remedy that the Claimant will otherwise be entitled to.

REMEDY

Basic Award

111. The Claimant received a redundancy payment and did not seek a basic award.

Mitigation

112. The first point of principle the Tribunal is invited to resolve on remedy is the period over which the Claimant should be able to claim loss of earnings, the Respondent having taken a failure to mitigate argument.

113. The Claimant's employment terminated on the 23 April 2020. His claim is for losses until he found new employment on the 26 October 2020, a period of approximately 6 months. During that time, he made some efforts to find alternative work. The Respondent avers those efforts were inadequate and he has unreasonably failed to mitigate his losses.

114. The Claimant produced some limited documentation in support of his job search which was contained within the bundle and he was taken to it in cross-examination. There is an email in May 2020 relating to a job at Amazon and then further emails relating to HGV work in August, September and October 2020.

115. The Claimant was despondent following his redundancy. He was feeling very low and suffered some anxiety in relation to finding a new job. However, there is no medical evidence suggesting that he was incapable of doing so, albeit his mood is likely to have impacted on his motivation. He did however make some informal enquiries to obtain work in addition to the documented job efforts in the bundle but to no avail.

116. The Tribunal takes into account that the country was in lockdown between March and June 2020 due to the pandemic. The labour market was badly disrupted. Certainly in some areas delivery driver work was available but whether that was the case in the Claimant's area, whether there were jobs available that he could realistically have applied for or obtained is a different matter. There is no evidence on that because the Respondent has produced no evidence pertaining to the local jobs market.

117. The burden is on the Respondent to prove the Claimant acted unreasonably in mitigating his loses. It has failed to discharge that burden. It has produced no evidence of roles which the Claimant could or should have applied for. The period during which he was out of work was at the height of the pandemic. He had been made redundant from a type of job there was unlikely to be recruitment into at that time. He had no experience as a professional driver. He did find better remunerated work within approximately 6 months despite the disruption of the pandemic.

118. Therefore, the Respondent has not established that the Claimant acted unreasonably in failing to mitigate his loses and the Tribunal awards him 6 months loss, which at the agreed net sum of £1,516 per month is £9,099.

Losses beyond October 2020

119. The next issue the Tribunal was asked to determine was the Claimant's losses beyond October 2020. He claimed for extra fuel costs and compensation for having to work longer hours. The latter is essentially a claim for loss for amenity, not a claim for financial losses.

120. The Claimant failed, despite the order of Regional Employment Judge Taylor as long ago as March 2021, to provide any documentation whatsoever relating to these losses. There are no fuel receipts, there is no millage log, there are no wage slips from his new work, there are no accounts, nothing relating to his new role at all. As Mr McCombie pointed out, until his evidence at the hearing, it was not known where that role was, nor what it was, nor what it paid.

121. His evidence established that he is now earning more than he was when employed by the Respondent, some £130 a day. He may well be working longer hours and have additional fuel costs but the Tribunal is not satisfied he has proven those losses, the burden now being upon him to establish any loss alleged beyond October when he obtained better paid employment. To the extent he has any additional costs, they appear to be made up for by a higher wage. The Tribunal therefore does not award any losses beyond October.

Loss of statutory rights

122. In relation to loss of statutory rights, the Tribunal awards £500.

Cost of obtaining alternative employment

123. The Claimant has produced no evidence in support of the sums he has paid. He has not explained why he has needed to pay these sums to the extent he did, what assessment he made of the job market before doing so, why undertaking the training would be beneficial to him or what jobs it would open up access to. Some of the claim relates to clothing. No receipts have been provided, no description of what it is or why it was necessary has been given.

124. However, the Tribunal does accept that the Claimant did pay for training in an effort to make himself more employable and some expense incurred in that regard is reasonable. Taking a broad brush approach, the Tribunal awards £500 rather than £860 claimed.

Personal loss of time

125. The Claimant has claimed for a significant number of hours work on the case. However, one cannot recover compensation for unfair dismissal for the time one has had to spend pursuing the litigation. As Mr McCombie says, that is rightly an issue of costs rather than compensation and would have to be pursued as a separate cost, in this case, preparation time order application for which there are different considerations. The Tribunal makes no award of compensation for these sums.

ACAS Uplift

126. The Claimant sought an uplift on account of the Respondent's alleged failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. However, the ACAS Code only applies to certain types of dismissal, redundancy not being one of them. Where an employer fails to act fairly in a redundancy case, the uplift applicable under the ACAS code does not apply.

Conclusions

127. Therefore, the Tribunal awards the Claimant the following sums:

Basic Award	£0
Compensatory Award	
Prescribed Loss	
Past loss of earnings to 26 October 2020	£9,099
Polkey deduction (20%)	(£1,819.80)
Total Prescribed loss	£7,279.20
Non Prescribed Loss	
Loss of statutory rights	£500
Expenses incurred looking for employment	£500
Polkey deduction (20%)	(£200)
Total non prescribed loss	£800
GRAND TOTAL	**£8,079.20**

128. The Employment Protection (Recoupment of Benefits) Regulations 1996 apply. The annex to the Judgment contains further details:

    a. The total monetary award is £8,079.20

    b. The prescribed element is £7,279.20

    c. The prescribed period is 24 April 2020 – 26 October 2020

    d. The amount by which the monetary award exceeds the prescribed element is £800

Employment Judge Sugarman
Dated: 30 November 2022