EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107983/2020

Held via Cloud Video Platform (CVP) and in person in Glasgow on 12 and 13 September 2022

Employment Judge J Young

Mr S Reid	**Claimant In Person**
Alba Ultrasound Ltd	**Respondent Represented by: Mr I Wheaton - Counsel**

JUDGEMENT OF THE EMPLOYMENT TRIBUNAL

The judgement of the Employment Tribunal is that the claimant was not unfairly dismissed by the respondent in terms of Section 98 of the Employment Rights Act 1996.

REASONS

1. In this case, the claimant presented a claim to the Employment Tribunal complaining that he had been unfairly dismissed and discriminated against because of the protected characteristic of disability. However, in a previous decision, the claimant was found not to be disabled as that is defined in section 6 of the Equality Act 2010 and the remaining claim before the Tribunal is unfair dismissal. That arises consequent upon the claimant's termination of employment by the respondent on grounds of redundancy with effect from 23 October 2020.

Issues for the Tribunal

2. The issues for the Tribunal were:

a) Did a redundancy situation exist as defined in Section 139 (1) of the Employment Rights Act 1996. (ERA)?

b) If so, was dismissal by reason of redundancy or for a reason which was not potentially fair under Section 98 (1) or (2) of ERA?

c) If the dismissal was for redundancy, was dismissal unreasonable under the general unfair dismissal provisions in Section 98 (4) of ERA?

d) In particular did the respondent follow a proper procedure in identifying the selection pool for redundancy; identifying the appropriate selection criteria; and applying the criteria fairly and consistently to the selection pool?

e) Was there any failure by the respondent in providing an opportunity of alternative employment for the claimant?

f) Was there any failure by the respondent in the appeal process?

g) If there was a procedural failure what was the impact of the case of ***Polkey v AE Dayton Services Ltd*** (1987) ICR 142 on whether or not dismissal would have resulted in any event and thus affect compensation?

h) If the dismissal was not by reason of redundancy was it for some other substantial reason and if so was it a fair dismissal on those grounds?

i) If the dismissal was unfair (on either basis) what compensation should be awarded?

Documentation

3. The parties had helpfully liaised in producing a file of documents paginated 1-231 (J1-231).

The Hearing

4. At the hearing evidence was given by Mark Harrison who had been employed by the respondent since 2008 and who at date of hearing had held the position

of Production Manager for approximately three years; Edward Duncan McMurdo, Operations Manager who had been employed with the respondent since 2009; Simon Whitely, Technical Director with the respondent since 2018; and the claimant. On account of contracting COVID, evidence from Mark Harrison and Edward Duncan McMurdo was heard by means of CVP. Otherwise, evidence was given in person.

5. From the relevant evidence led, documents produced, and admissions made I was able to make findings in fact on the issues.

Findings in fact

6. The respondent's design and manufacture bespoke Transducers and Arrays in the field of underwater sonar for both defence and commercial application.

7. The claimant was employed under a Statement of Particulars of Employment signed 20/22 July 2011 and had continuous employment with the respondent in the period from 13 June 2011 to 23 October 2020.

8. The claimant was a production technician as part of the assembly team and initially his role in the manufacturing process consisted of preparing, assembling, gluing, electrically testing components, mixing chemicals, filling moulds, preparing metal work, and grit blasting. In 2015 he became sensitive to a chemical within the epoxy adhesive used in the gluing process and it was agreed that his duties would be amended from end 2015/beginning of 2016 to eliminate any gluing work. The claimant's duties then involved preparing metal work for assembly through grit blasting and cleaning, electrical testing, pressure testing, inspection, and any other ad hoc duties.

Appraisal of employees

9. The respondent conducted appraisal of their employees on an annual basis. Appraisal forms for the claimant were produced for the period 2014-2019 (J113-131). The last appraisal for the claimant prior to termination of employment was for the period April 2018/April 2019 (J128-131). The claimant was reviewed by Mark Harrison his line manager.

10. The process involved the claimant conducting a self-appraisal and rating himself against nine attributes being housekeeping and safety; attendance; productivity; attitude; team worker; relations with others; dependability and flexibility; job knowledge; and quality of work. The claimant self-assessed those attributes in respect of the period April 2018/2019 (J128-129).

11. Thereafter discussion on those attributes took place with the claimant's line manager and an agreed rating for each was determined and noted. (J128).

12. Mr Harrison conducted appraisals for all production technicians in the period April 2018/April 2019 in the same way.

Impact of COVID

13. Prior to the nationwide lockdown announced on account of the COVID pandemic as from 23 March 2020, the respondent employed approximately 37 people of whom 27 worked on the shop floor including the claimant.

14. As a consequence of lockdown, all employees in the company were initially furloughed. However, a customer in the defence industry required a continued supply of product and 14 employees returned. Of those two engineers worked from home with the remainder (being a mix of operators and technicians) working on the shop floor. The claimant continued to be furloughed.

15. The respondent's largest client, following the implementation of the UK-wide lockdown, cancelled all orders which accounted for approximately 50% of the respondent's turnover. After completing orders in June/July 2020 already placed and taking into account other drop in orders the business of the respondent reduced substantially.

Communication with employees

16. In this period, the claimant had been advised of the necessity for furlough and by text of 31 March 2020 the respondent asked the claimant to confirm that his salary would reduce to 80% during the relevant period of furlough which the claimant accepted (J60/61). By text of 30 April, the claimant asked the

respondent for any update and was advised that the respondent had a *"number of people still operational"* with the *"remaining employees still on furlough"* (J60/62) and by text of 1 May 2020 to the claimant and other employees advised that there was little to update on the position but asked if any of the employees or their family had tested positive for COVID. By further text of 13 May 2020, Mr McMurdo indicated *"hopefully we are getting closer to ending lockdown and getting some normality back into our lives"*, that a further two employees had come off furlough and were *"back operational which we are constantly reviewing"*. In the meantime, the claimant was asked to log on to a training module for completion.

17. The claimant, along with others, was asked if he would take holidays in the furlough period and on 29 June 2020, the claimant asked Mr McMurdo if there were any assurances about returning to work, whether he could defer holidays to the following year, and how many total staff were back at work. He received a response on those matters and was told that while no assurance could be given about his job there were *"currently no plans to make people redundant"* (J66).

18. However, during July 2020, there was no indication of any increase in demand for the respondent business and no sign of future orders which put the respondent business in difficulty.

Redundancy consideration

19. At this time, the furlough scheme was due to end as at 31 October 2020 and the respondent liable for an increasing contribution to salary, national insurance and pension contribution. From 1 August 2020, employer NIC and pension contributions were no longer claimable under the furlough scheme; in September 2020, the reclaimable rate for wages was reduced to 70% and in October 2020 the reclaimable rate was to be reduced to 60%. It was not known at this time if there would be any extension to the furlough arrangements.

20. The respondent in July 2020 considered that given the drop in demand for their product and the lack of future orders it was necessary to effect

redundancies. Turnover was forecast to reduce by 25% during 2020 and there was no indication of any recovery in demand from the current client base. In terms of staffing requirements, the respondent considered it necessary to reduce the workforce. Five employees were released, who were recently employed by the respondent, having less than one year's service on 20 July 2020. It was then necessary to reduce the headcount by two employees from 24 to 22.

21. The respondent considered that the proposed reduction was limited to production and did not impact the technical department or office-based employees. A note of the business case behind the decision to effect redundancies (J72) indicated that redundancy affected production comprising polymer and assembly which affected a total of 10 employees and from which 2 employees should be made redundant being one (from 2) in polymer and one (from 8) in assembly.

Intimation to affected employees

22. By a letter of 31 July 2020, the claimant and other affected employees were given warning of potential redundancy. That letter indicated that the reasons were *"due to COVID-19 the company is experiencing a significant reduction in production order book which has dramatically impacted business operations. The largest client has reduced orders by over 50%. The current forecast suggests that the company turnover will be reduced by approximately 25% during 2020. In addition, there is no indication of any recovery in demand forecast from current client base."* That letter indicated that the respondent had now commenced consultation with the affected employees with the aim of preventing or reducing the need to make redundancies and would consider proposals to avoid compulsory redundancies. The letter concluded by indicating that the claimant would be invited to a formal meeting but in the meantime, if there were any questions to be asked, these should be directed to Mr McMurdo (J74).

23. By text of 10 August 2020, the claimant asked, *"how many from my at risk group are still furloughed like me?"* and whether the selection criteria had

been *"picked"* and if so *"what are they?"*. In response, the claimant was advised that there was a meeting of affected employees on 11 August 2020 at 10am. Notes of the discussions which took place with affected employees (J75/78) explained the reasons for the need to make redundancies and answered queries. For non furloughed employees who were affected by the redundancy in person discussion took place and for furloughed employees discussion by telephone. There was view expressed by some of the affected employees as to whether or not an overall salary reduction might prevent redundancy and a separate meeting was requested and agreed for the affected employees. However, there was no agreement amongst those affected on that issue and no proposal put. In the discussion, no volunteers for redundancy came forward.

Selection criteria

24. At this time, an indication was given that the selection criteria for redundancy would be based on the 2019 appraisals and attendance. The scoring would be based on the various factors upon which appraisal was conducted, along with attendance over a certain period. A final decision was to be made on 17 August 2020.

25. The respondent then decided that the selection criteria should be based on attendance and the outcome of the appraisal process of April 2019. Appraisals in April 2020 had not been carried out as a consequence of lockdown.

26. It was accepted that attendance was a priority for the respondent. The affected individuals were to be assessed for attendance over the period 1 January 2019 – 17 August 2020.

Scoring

27. The scoring (J97) on the criterion of attendance gained a maximum of ten points for no absences down to two points if there were more than five absences in the period.

28. On appraisal, the scoring criteria (J98) identified a maximum of five points within each of the attributes upon which appraisal was based (excluding attendance being dealt with separately) with a maximum of five points for *"very good"* down to one point for *"unacceptable, needs improvement"*.

29. Thus, the maximum score which could be achieved was 50 (5 points for each of the appraisal attributes excluding attendance and 10 for attendance) In that exercise attendance could be seen as *"double weighted".*

30. The scoring on the appraisal criteria for the affected individuals within (J98) showed that the claimant received the lowest score at 22 points. He had the maximum score of 10 for attendance (J97). The combined outcome (J99) was that the claimant and his colleague Alex Thomson (who worked in polymer) achieved the two lowest scores. The combination of attendance and appraisal score meant that, within the assembly technicians, the claimant was four points away from the next lowest score (J103).

Redundancy discussion

31. The respondent issued a letter to the claimant dated 17 August 2020 (J79) which advised that he had been selected "*at risk of redundancy...*" He was invited to a meeting of 20 August 2020 to discuss the *"ongoing consultations on your position"*. It was stated that the claimant could be accompanied by a work colleague or trade union official if he wished and that no final decision had been made and that the meeting would be the final opportunity to put forward any *"comments, concerns, or counterproposals"*.

32. The claimant did not recall receiving this letter. He did recall receiving a phone call from Mr McMurdo *"at a service station"* which advised that he had been selected for redundancy and that he was invited to a meeting at the respondent's premises on 20 August 2020. He was advised that he was the lowest scorer. He asked for the scoring results prior to the meeting but did not receive them.

33. Notes were taken of the meeting of 20 August 2020 (J85/92) and the claimant agreed that these represented an accurate account of the discussion at that

meeting. At that time, he advised that he had not received the letter of 17 August 2020. That letter was provided to him and the claimant asked if he wished to adjourn or postpone the meeting but he declined. He was also asked if he wished to have a representative to take notes or provide support and again declined.

34. The claimant was advised that he had scored lowest on the criteria within the assembly technicians and that criteria was based on attendance and each of the other key performance indicators in the appraisal. He received a copy of the scoring matrix (J101/2) which showed his scores against others and given time to peruse that document.

35. The claimant raised a number of issues within the meeting being in summary:

    i. Should he not be retained until the end of the furlough period? He was advised that there was no indication that work would pick up in the course of 2020 or 2021. The furlough scheme had been utilised as much as possible to protect jobs.

    ii. He queried how absences were calculated and was advised that the points gained were on *"the number of absences"* rather than days absent.

    iii. He was advised that the appraisals were all *"soft copy"* or electronic and that there were no hard copies.

    iv. He stated he was not aware who was brought back from furlough and when and was advised of the position.

    v. He asked when two of his colleagues had commenced employment with the company and was advised that the respondent were not prepared to *"discuss other employees"*. He was, however, advised that *"all employees within your selection pool have over one year's service."*

    vi. He believed that the appraisal system was subjective and no objective criteria had been utilised.

vii. He considered there were effectively two criteria, namely attendance and appraisal, and should be weighted 50/50. He was advised that the appraisal system contained eight performance indicators and so effectively there were nine categories being considered.

viii. He queried why he had been scored lower than others on the appraisal in certain categories and was advised that this was *"discussed at the appraisal with Mr Harrison."* Mr McMurdo was able to respond to the queries raised by the claimant on the scoring. Mr McMurdo had spoken with Mr Harrison prior to the meeting on why the claimant had a score of *"two"* on three of the factors within the appraisal being housekeeping, productivity and job knowledge. Mr Harrison was able to explain his reasoning conform to the note on that discussion. (J84).

ix. He believed that the appraisal was subjective and that the matrix was devised to *"target myself"*. He indicated that he did not consider that he and Mr McMurdo had a good working relationship which might provide the reason for him being targeted.

x. He advised that he had an allergy to glue and that impacted on the roles that he could carry out and so that affected his appraisal.

36. The claimant was also advised at this meeting that there was no other position available and as a check on scoring another senior employee had been asked to validate the scoring with the result that scores *"within half a mark"* were achieved on that scoring exercise. In that scoring exercise (J104), a senior employee had chosen five individuals including the claimant and the scores achieved on that exercise were very similar to those achieved by the assembly technicians in the appraisal of 2019 (J104). Accordingly, the respondent was content that the scoring was fair.

37. The claimant was also advised that given the appraisal of 2019 had been used no *"targeting"* of the claimant had been conducted as that appraisal exercise was prior to any redundancy situation arising and could not have been foreseen at the time.

38. The claimant was advised that, having heard his concerns, his position would be made redundant with effect from 23 October 2020. A discussion took place on a possible appeal and the claimant indicated that he would prefer any appeal was conducted by one of the directors named Vic Murray albeit the company indicated that it was more likely to be an appeal with Simon Whitely.

39. By letter of 20 August 2020, the claimant was advised that his position would become redundant on 23 October 2020 and that he was not required to work his notice period of 9 weeks. The payments to him were outlined at that time (J94).

Appeal

40. The claimant appealed the decision by letter of 24 August 2020 (J95/96).

41. His principal grounds of appeal could be summarised as:

(i) The yearly performance appraisal was subjective and should not have been used in selection. The review by the senior technician only encompassed a few employees and not all the candidates in the risk pool and that was unfair.

(ii) He did not trust electronic records as they could easily be changed and disagreed with the scoring in the appraisal.

(iii) He pointed to various issues which would suggest his performance was good against the scores within the appraisal.

(iv) He indicated that two of the employees in the pool did not work the full calendar year in 2019 upon which he was judged and so it was unfair to compare their scores against his.

(v) He believed that his health issue on epoxy glue affected the company's view of him.

(vi) His relationship with Mr McMurdo affected the choice that had been made. He had been picked on by Mr McMurdo in the past.

42. Essentially, the appeal made by the claimant concerned (a) unfair criteria used in the selection process; (b) the claimant's health difficulty through working with epoxy resin was the deciding factor; and (c) the poor relationship with Mr MacMurdo meant he was targeted. Those concerns were reflected within the note of the meeting (J105-106).

43. Mr Whitely as technical director was on the same management level as Mr McMurdo. It was explained that Vic Murray who the claimant suggested might hear the appeal as a director of the company was mainly based in Spain at this time and had little "*hands on"* involvement with the respondent. It was decided that Mr Whitely should hear the appeal and he did so on 1 September 2020. Mr Whitely had taken a back seat in the redundancy discussion to assure that he would be available for any appeals which were made.

44. Prior to the appeal, the claimant requested and received on 25 August 2020 certain documents being appraisal documents for 2016/2017/2018.

45. The appeal was heard on 1 September 2020 and the claimant able to put forward his views and concerns by letter of 8 September 2020, Mr Whitely outlined his findings and did not uphold the appeal against selection for redundancy or the need for redundancy and gave reasons (J107-108). Essentially, it was reiterated that professional advice was taken on the criteria for selection and was as objective as possible. The appraisal in question was completed prior to the redundancy process and could not have been seen as having been scored for the purpose of targeting the claimant. It was also reiterated that there were indeed nine factors in play in the assessment process including attendance. The redundancy situation arose as a result of the drop in orders and not because of individual performance. However, the rating within the appraisal had been checked by another senior technician and found to be similar to the marks achieved in appraisal.

46. There was no evidence of health having a negative effect on the scoring and indeed the claimant's attendance record was exemplary. Mr McMurdo had no input into the scoring exercise. Attendance was fact based and scoring on the appraisal conducted by Mr Harrison and a check conducted by another

senior technician. While the claimant had objections to the use of a password which he felt was demeaning other colleagues had received a onetime password which also contained their job description and did not single the claimant out or demonstrate a poor working relationship with Mr McMurdo.

Events subsequent to appeal

47. Subsequent to the appeal the claimant made a subject access request of 18 September 2020 which was acknowledged and responded to on 7 October 2020. (J109/111) which included appraisal forms for 2011, 2012 and 2013.

48. Of the eight assembly technicians, four were brought back from furlough to continue with a particular contract around April 2020. The return from furlough of certain workers was based on ongoing orders particularly the defence contract. Those who worked on those products were brought back.

49. The three remaining individuals in the assembly team (after the claimant was selected for redundancy) remained on furlough and came back to work by the end of October. The remaining employee in the polymer section also returned to work by the end of October 2020.

Events since termination

50. At termination of employment, the claimant's earnings ran at the rate of £1708 gross per month and £1370 net per month. Since termination of employment on 23 October 2020, he had not found employment. He continued to be in receipt of benefits. The respondent produced various adverts for jobs between January 2021/August 2021which they considered were suitable for the claimant (J140-191).

51. The claimant advised that he had not made application for those jobs as they would not be suitable for one reason or another. He required to be careful which jobs he applied for as he had a mortgage and was on benefits. There was a financial equation which required to be satisfied for any particular role. He made an application on 10 April 2021 for a job advised to him by REL Recruitment (J192) but as this job was in Bathgate and he had to sell his car after he had been made redundant he had decided that this possible position

was too far from his home. He had not gone for other jobs which he considered were too far away to travel. It was necessary to consider the costs of travel when making any application. He had also ruled out zero hour contracts and was looking for a "*quality job".*

52. He stated he had attended three interviews since being made redundant. He produced information on seven jobs where he had made online application (J195-226).

53. He indicated that employers were cautious in 2021 in increasing their workforce but felt that since the beginning of 2022, the market had *"opened up".*

54. He had enrolled at Clyde College in July 2022 to obtain further qualifications in electrics which involved three years of study. He had been keen on a job repairing EVG chargers which he felt was a growth area but that had not come to fruition.

Submissions

55. Each party made helpful submissions and no discourtesy is intended in making a summary.

For the respondent

56. It was submitted that this was a "*classic redundancy"* which satisfied section 139 of the Employment Rights Act 1996. It was submitted that the respondent had acted reasonably both substantively and procedurally.

57. The claimant appeared to have a scattergun approach as to why it was that he regarded his dismissal as being unfair

58. The claimant had maintained that it was a surprise to him that people had returned from furlough shortly after the lockdown at end March 2020 but given the terms of the text messages which passed between him and Mr McMurdo, that was not a credible position.

59. The claimant maintained that there was a conspiracy in relation to the appraisals. It was suggested by him that because the appraisal forms were in electronic format, they were easily manipulated and so not trustworthy. However, these forms had been completed in conjunction with Mr Harrison in April 2019 well before any redundancy was heralded and there was no evidence to suggest that there had been any manipulation.

60. There was no evidence of any clash with Mr McMurdo or that any allergy to the glue being used was a reason for redundancy.

61. The claimant had suggested that LIFO might be the best way of dealing with this redundancy situation but that was problematic as employers were now aware that using such a method could be discriminatory and was now out of favour.

62. The respondent were clearly in a redundancy situation as a consequence of the lockdown and drop in orders. There was a diminution in business and it was necessary to make a selection. The respondent sought advice and the criteria used of attendance and the scores obtained in the April 2019 appraisal were fair and reasonable. The selection criteria and process involved were within the band of reasonable responses.

63. There were eight criteria within the appraisal forms and that score was as objective as it could be in that the claimant had himself self-assessed and there was very little difference between his self assessment and that of Mr Harrison. The reasons why the claimant had not scored particularly well on one or two criteria were explained and held water.

64. While the claimant maintained that a “50/50” split between attendance and appraisal should have been used, the eight sections within the appraisal all contributed to the whole result. The claimant had a good attendance record and benefitted by that being double counted.

65. The claimant had a good opportunity to put forward his case at the meetings of 20 August 2020 and then 1 September 2020 and that was made clear by

perusal of the minutes of those meetings and the letters subsequent to the appeal.

66. While there was an uptick in work to end October 2020 and furlough could be wound down, there was more money that needed to be paid as months went on and indeed further restrictions on movement had come into place in November 2020.

67. It was not possible to say that any redundancy situation would have resolved itself. In the event that there was any procedural failing then reliance would be placed on a ***Polkey*** reduction of any compensation of 100%. The claimant had received his redundancy payment which would account for the basic award.

68. It was submitted that the post-termination evidence on a search for employment was poor and there appeared to be no effort to find a position between August 2020/May 2021. There was a failure to mitigate loss which would in any event mean no compensatory award.

The claimant

69. The claimant maintained that he had been looking for further employment. He had only had two periods of unemployment in the last 40 years and the first year of the pandemic nobody was hiring. His age went against him and he could not simply take any job. He had to look for work to obtain benefits. He had sought to retrain to find employment.

70. He believed that the allergy to the chemical within the epoxy glue could lead to asthma and while he had been taken off gluing with the respondent and put on other duties, it was an opportunity for him to be removed in the event that his health might suffer in the future. The employee from the polymer section who had been made redundant also had health issues and both were older. He and that colleague were good employees that had not adapted to the move toward *"team days out"* introduced from the American holding company in that both he and that colleague had not attended the events, which would only make the Scottish bosses *"look bad"*. Thus, a decision was made to target

him and the colleague in the polymer section because of health issues and the reluctance to engage in such team events.

71. Additionally, two of the people in his pool were under two years employment but the company had never revealed the length of their employment. It was simply not known whether these individuals had been appraised in 2019.

72. The senior technician who had also scored the claimant gave three out of five – the exact same scores as in the appraisals by Mark Harrison. That was too much of a coincidence. Given that these appraisal forms were all in electronic format, they could easily be altered. The appraisals were suspicious because the same comment on certain performance indicators seemed to made year on year and it looked very much *"cut and paste"*.

73. Attendance should have been measured between April 2018 and April 2019 and the appraisals were in any event subjective.

74. The password of *"gritboy"* used by Mr MacMurdo in a communication was evidence of a poor relationship.

75. Nor did the claimant consider that he should have been in the pool of assembly technicians as he was unable to perform the gluing test and effectively the work that he did of pressure testing and grit blasting was still available.

Discussion and conclusions

Was there a redundancy situation?

76. Redundancy is defined in S139 (1) of ERA. In this case there was no cessation of business or intention to cease business and so the applicable statutory words are:

"For the purpose of this act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –

(b) The fact that the requirements of that business –

i. *for employees to carry out work of a particular kind or;*

ii. *for employees to carry out work of a particular kind in the place where the employee was employed by the employer*

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

77. Thus it is the requirement of employees to do work of a particular kind which is significant. If fewer employees are needed to do work of a particular kind, there is a redundancy situation. If the requirements of a business for employees to carry out work of a particular kind have ceased, or diminished, or are expected to do so, there is a redundancy situation. There is no need for an employer to show an economic justification for that decision.

78. In this case, as an inevitable consequence of lockdown, there had been a diminution in business for the respondent in work of a particular kind. The respondent had certain contracts to fulfil mainly in the defence sector but, as was stated in the letter of 31 July 2020 (J74), the respondent's largest client had reduced orders by more than 50% and the company turnover would be reduced by approximately 25% during 2020 and there was no indication of a recovery in demand forecast.

79. The assessment by the respondent was that they could do with fewer individuals given the level of demand and likely orders. It is accepted that the downturn affected the production technicians in assembly and the polymer section. Lockdown had an inevitable effect on levels of business, and it is accepted that the requirements of this business for employees to carry out work of a particular kind had ceased or diminished and that there was a redundancy situation. The respondent in this case considered that they could do with one less individual in the polymer section and one less production technician in assembly.

80. While the claimant suggested that he should not have been selected because he was involved in grit blasting and pressure testing those were aspects of assembly. Since the landmark case of ***Safeway Stores Plc v Burrell*** [1997] ICR 523 and ***Murray and Another v Foyle Meats Ltd*** [1999] ICR 827 there

is removed the need to consider exactly what an employee can or cannot be required to do under his or her contract of employment or that there must be a diminishing need for employees to do the kind of work for which the claimant was employed. The real question was whether the dismissal of the employee was caused wholly or mainly by the cessation or diminution of work of a particular kind. Here there was a downturn in orders. That affected production and there was a redundancy situation caused wholly or mainly by that diminution of work.

"Unfair" redundancy

81. A redundancy dismissal can be unfair under the general unfair dismissal provisions contained in Section 98 (4) of ERA. In ***Williams and others v Compair Maxam Ltd*** [1982] IRLR 83, the Appeal Tribunal laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. It is not for a Tribunal to impose its own standards to decide whether the employer should have behaved differently. Instead, it has to ask whether the dismissal lay within the *"range of conduct which a reasonable employer could have adopted"*. The factors suggested in ***Compair Maxam*** as those that a reasonable employer might be expected to consider were:

- Whether the selection criteria were objectively chosen and fairly applied.
- Whether employees were warned and consulted about the redundancy.
- Whether there was a union and the union's view was sought.
- Whether any alternative work was available.

82. In carrying out a redundancy exercise it is first necessary to identify the pool for selection and it is to these employees that an employer will apply the chosen selection criteria to determine who will be made redundant. The respondent in this case did consider the pool from which the selection should be made and identified the polymer section and assembly section. The

claimant was in the assembly section totalling eight employees. There was a suggestion by the claimant that he should not have been in this pool at all because he was engaged in grit blasting/pressure testing but the evidence was that this was part of the assembly process. The fact that he had been taken off gluing duties made no difference to the unit to which he was attached. The evidence from Mr Harrison was that others in the group were able to perform grit blasting/pressure testing and that the claimant was not the only person who was involved in that activity in the production process.

83. In this case there was no evidence that there was an agreed procedure that specified a particular selection pool. In those circumstances employers have a good deal of flexibility in defining the pool from which they will select employees for dismissal (***Thomas and Betts Manufacturing Co v Harding*** [1980] IRLR 255). They need only show that they had applied their minds to the problem and acted from genuine motives. While the claimant in this case considered that he had been *"targeted"* I could not find that the selection of the assembly technicians as a pool for selection was identified out of a desire to rid the company of the claimant. Given the downturn in production, it seemed inevitable that the pool for selection would involve those engaged in the production process. A selection pool is usually composed of employees doing the same or similar work and that was the case here. A Tribunal must judge the employer's choice of pool by asking itself whether it fell within the range of reasonable responses available to an employer in the circumstances and I find that is the case in this situation.

Selection criteria

84. Selection criteria should be objective not merely reflecting the personal opinion of the selector but being verifiable by reference to data such as records of attendances and other documents. Retention of employees who in the manager's opinion *"would keep the company viable"* was ruled to be subjective and unreasonable as well as selection of salesman based on *"cost saving"* criteria or selection of employees on the basis of *"commitment"*.

85. However, the fact that certain selection criteria may require a degree of judgement does not mean that they cannot be assessed objectively or dispassionately. It has been recognised that employers making difficult decisions on redundancy need to deploy criteria which call for the application of personal judgement and a degree of subjectivity. An Employment Tribunal reviewing such criteria does not go wrong so long as it recognises that fact in its determination of fairness.

86. Provided an employer's selection criteria meets those requirements then a Tribunal should not subject them or their application to over-minute scrutiny. The task of the Tribunal is to satisfy itself that the method of selection was not inherently unfair and that it was applied in the particular case in a reasonable fashion. Thus, employers are given a wide discretion in their choice of selection criteria and the manner in which they apply them and the Tribunal are only entitled to interfere in those cases which fall at the extreme edges of the reasonableness band.

87. In this case it was agreed that the company valued attendance of employees and as far as that criterion was concerned, it could be objectively measured by simply looking at the records of the employees involved and grading them accordingly. That particular criterion obtained a maximum of ten points (as compared with the rating of a maximum of five on the performance indicators within the appraisal). Thus effectively, there was a weighting in favour of attendance. That favoured the claimant in that he obtained a maximum of ten points for that particular criterion.

88. The respondent also considered the April 2019 appraisal forms under reference to the appraisal conducted in April 2019. No appraisal was conducted April 2020 due to the advent of lockdown and the appraisals used were the last appraisal documentation available.

89. That appraisal of course was conducted well before any redundancy situation affected the respondent and so the scoring on that appraisal could not be affected by seeking to *"target"* the claimant. I could not give any credence to his suggestion that because these documents were in *"soft copy"* they were

easily manipulated such that scores could be falsified. The evidence from Mr Harrison was that he had received self-assessed scoring from the claimant and had agreed the scores on the appraisal form with the claimant at a meeting for that purpose. There was just no evidence of any skulduggery behind the scenes.

90. That exercise involved eight different performance indicators and the rating achieved in respect of each was translated into points to determine the selection for redundancy. Even if the self-assessment of the claimant had been utilised in the appraisal and not modified then the claimant would still have been the lowest of the comparators in comparing his self-assessed score (J129) against the score achieved (J128) in the appraisal. The difference was a total of three points total given that Mr Harrison appeared to have given the claimant a higher score in quality of work than he scored himself. The difference between the claimant and the nearest score was four points.

91. The scoring in the appraisal was tested by Mr McMurdo in ascertaining the reasons from Mr Harrison as to why his scores for housekeeping and safety; productivity; and job knowledge were marked as *"development areas"*. Additionally, there was a check made on the scoring by a senior technician being asked to conduct a scoring of some of the individuals within the group and similar marks were obtained. I considered those steps were important in demonstrating there was objectivity in the selection criteria. Scoring was based on the fact of attendance and documents in terms of the appraisal of each of the employees.

92. The claimant raised the issue of whether or not two of the employees in his pool had length of service which would mean that they had been appraised in April 2019. The length of service of these two individuals was not disclosed but Mr Harrison advised that each of the employees had been appraised in April 2019 and I accepted that evidence. It would have been a stretch to make any finding that in the absence of length of service of these two employees it could be taken that their appraisal was faked or done at a later stage. The evidence did not enable such a finding to be made.

93. It was also contended by the claimant that LIFO would have been a fair method of selection. That was traditionally regarded as the easiest and most obviously objective method to administer but its popularity has seen a steady decline owing to a number of factors. Selection by that criterion alone can have a detrimental impact on an employer's skill base and can be indirectly discriminatory either of women who generally have shorter periods of service than men and age discrimination which would have been an issue in this case.

94. Accordingly, it could not be said that LIFO should have been substituted for the method of selection used.

95. It is reasonable for an employer to try and retain a workforce that is balanced in terms of skills and abilities. Accordingly, an individual's skills and knowledge are reasonable considerations provided there is an objective assessment. In this case, there appeared to be monitoring of performance by use of the appraisal system and it was not the case that a manager at the time of redundancy made a subjective opinion.

96. It was further contended by the claimant that his working relationship with Mr McMurdo was such that it affected his selection. Again, based on the historical record of appraisal, there was objective evidence to show that it was not Mr McMurdo's opinion of the claimant that led to his selection but the scoring on attendance and the factors contained within the appraisal. There was no evidence that Mr McMurdo had interfered with that scoring or had manipulated the system to identify the claimant for redundancy.

97. A further issue raised by the claimant related to a belief that because he had not taken advantage (along with a colleague) of *"days out"* this was a black mark against him such that the company would seek to remove him. Again, based on the factual matter of his attendance and appraisal record of April 2019, there was no evidence to suggest that this had a bearing on the selection.

Furlough

98. The operation of furlough has been an issue in relation to redundancy, the argument being that for as long as furlough continued, there was no need to make an individual redundant because the intent of the furlough scheme was to preserve jobs. However, the furlough scheme in place over July/October 2020 meant that the employer required to pay a greater share of an employee's wage and national insurance and pension contributions on a stepped basis. While that was discontinued sometime later, at the time redundancy was being considered, this respondent was faced with a requirement to pay a percentage of wages/national insurance/pension contributions that had not been in place to June 2020. That clearly brought the issue of whether or not redundancy should be effected to the fore and it was not the case that the claimant or other members in the pool could simply be kept on furlough with the government paying 80% of wages and other contributions. Thus, it was reasonable for the respondent to consider redundancy at that point rather than relying on the furlough scheme.

Consultation

99. No union was recognised in this workplace and so there was no obligation to consult with a union. However, a fair and proper consultation is a necessary ingredient of a fair dismissal. Whether the consultation is adequate in all the circumstances is a question of fact for a Tribunal. Essentially consultation involves consulting with employees affected, adopting a fair basis on which to select for redundancy and taking such steps as may be reasonable to avoid or minimise redundancy.

100. In this case there was consultation with the claimant. Consultation discussion took place on 11 August 2020 and the notes (J75/83) demonstrate that the affected employees within the claimant's pool were consulted on the issue and points made were considered. There was a suggestion that an across the board pay cut might prevent redundancy but in the end that proposal was not agreed by those in the pool and so was not taken further. There were no

other positions available in the respondent's workforce to which the claimant could be redeployed given the business background.

101. Furter consultation took place with the claimant on 20 August 2020 and again the notes reveal the points made by the claimant and a response. In this meeting the claimant was able to see and comment on the scores achieved by himself and the others in the pool. He was able to argue his case on why he considered his scores did not reflect his abilities. As indicated steps were taken by the respondent to validate the scores achieved.

102. The claimant was clearly concerned that the allergy to the chemical within the epoxy resin glue affected his position in some way. Again there was no evidence that he had been disadvantaged in any scoring exercise. It was not the case that because he could not glue he was penalised in any of the factors identified within the appraisal. His duties had been altered end 2015/beginning 2016 and some time had passed since then for the appraisal in April 2019 and there was no continuing health condition that affected him given he had 100% attendance record over the period measured.

103. In the circumstances I was satisfied that there was adequate consultation with the claimant. There were no alternative positions available, no proposals made for minimising or preventing redundancy and as narrated a fair basis for selection.

Appeal procedure

104. The claimant was able to appeal the dismissal. Mr Whitely took care in the appeal process and gave consideration to the points raised as seen in his letter to the claimant of 8 September 2020 (J107/108). I did not consider that declining the proposal for Mr Murray to hear the appeal was a procedural flaw. The essence is whether the appeal was fairly considered and conducted and I consider that to be the case.

105. In all the circumstances therefore, I consider that the dismissal was not unfair under s98 of ERA.

106. Had it been unfair, then there would have been concerns over the claimant's search for alternative employment. Those efforts did not appear to be strenuous and so I would have found that there had been some failure to mitigate loss. However, that is not an issue given that I have not found that the dismissal was unfair.

Employment Judge: Jim Young
Date of Judgment: 15 October 2022
Entered in register: 13 January 2023
and copied to parties