EMPLOYMENT TRIBUNALS

Claimant: Mr Gary Graham

Respondent: Emcor Group (UK) Plc

Heard at: London South by MS Teams **On:** 21 and 22 December 2022
6 January 2023

Before: Employment Judge Jones KC

Appearances:

For the claimant: In person.
For the respondent: Hitesh Dhorajiwala, counsel

JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent
2. The Claimant is entitled to:
   (a) A nil basic award;
   (b) £350 for loss of statutory employment rights; and
   (c) A compensatory award in the sum of £3780.86

REASONS

Introduction

1. The case was heard over 3 days on [DATES]. The Claimant was represented by his partner Ms Hanning. The Respondent was represented by Mr Dhorajiwala of counsel. I was greatly assisted by both representatives. They each conducted themselves in an exemplary way. Ms Hanning, represented the Claimant with a dedication and skill that was particularly striking.

2. I heard from a number of witnesses for the Respondent:

   (1) Mr Mark Taylor (Head of Technical and Design for the Respondent) who was formerly the Claimant's line manager and one of those who scored him in the redundancy selection exercise which is at the heart of this case;

   (2) Mr Jason Levitt (Head of BT Projects for the Respondent) who also participated in the redundancy selection exercise;

   (3) Mr Stuart Holpin (Account Manager for the Respondent) who, again, participated in the scoring exercise as part of the redundancy selection process;

   (4) Mr Howard Hawkins (Business Improvement Manager for the BT contract) whom the Claimant alleges had a conversation with him ahead of the redundancy exercise in which he is alleged to have suggested that the Claimant apply for voluntary redundancy; and

   (5) Mr Ian Neal (Account Director for the Respondent) who heard the Claimant's appeal.

3. I heard evidence from the Claimant who called no other witnesses.

4. I had an electronic bundle of documents and both parties made oral submissions which supplemented written submissions. I reserved my judgment.

The Claims

5. The Claimant brings a single claim which is for unfair dismissal. He alleges that his dismissal for redundancy was unfair. He does not deny that the Respondent had decided, in good faith, to make redundancies. However, he says that the dismissal was unfair in a number of ways. I summarise those ways as follows:

   (1) The Claimant suffered from poor health and had been assigned to a role which he could not safely perform without risking aggravating his conditions.

   (2) The Respondent, in consequence, wanted to be rid of him and ensured that he was selected for dismissal; alternatively

   (3) The selection process was outside the range of approaches open to a reasonable employer in a number of specific ways; alternatively

   (4) The Respondent failed to provide the Claimant with the support that his poor health called for which meant that he was unable to represent his own interests in the redundancy; further and alternatively

   (5) The appeal was dealt with in a manner which rendered the dismissal unfair.

Background

5. The Respondent is a facilities management company. It engaged employees in a wide range of roles. The Claimant's employment commenced on 23 January 2005. At the time of his dismissal, the Claimant was employed as a Building Supervisor. He had been appointed to that role on 1 July 2016. He accepted in cross-examination that he might, from time to time, be expected to carry out some non-supervisory functions. Such functions were referred to in the

business as "being on the tools". By way of example, shortly before his dismissal he had been decorating rooms in a building in Slough.

6. In 2016 the Claimant suffered heart problem. He had two operations to insert stents. The latter operation took place in February 2017. In addition, he suffers from psoriasis which can flare up when he is the subject of stress. He suggests (and the Respondent does not dispute) that his line manager, Mr Mark Taylor, was aware of his conditions. I pause to note that the Claimant has not brought any disability discrimination claim. His evidence did suggest, however, that he felt that there was insufficient acknowledgement of and accommodation made for his poor health. He described that, in evidence and submissions, as a failure on the Respondent's part to meet its "duty of care".

7. The Respondent had been appointed to work on what was described as "black sites" owned and operated by British Telcom. The sites were being upgraded as part of something called the "Metronode" programme. Three locations in particular featured in evidence: Faraday House, Colombo House and a building in Slough.

8. The Claimant's evidence was that he had been asked to "set up" a number of sites including Faraday House. The last site that he was asked to set up was Colombo House. In early 2020 the Claimant had a conversation with his line manager, Mr Taylor, in which he told him that he was finding the task of running Colombo House caused him "immense" stress which was, in turn, adversely affecting his health. He mentioned his heart condition and his psoriasis. The Claimant did not think the job could be done by one person. Mr Taylor was asked about this conversation. He did not specifically recall it. However, he did suggest that there had been some conversation about the Claimant needing help at Colmobo. He told the Tribunal that he thought that Colombo House needed the support of Project Manager and that the appointment of a Mr Mick Petford to that role would address that issue.

9. At about the same time, BT informed the Respondent that it wanted to reduce the amount of work being delivered by the Respondent. According to the evidence of Mr Holpin (who was the account manager):

> "The client was in the process of concluding the Metronode Project Delivery at the Colombo building and, as a result, the services of the Respondent would be reduced".

9. Mr Taylor was, in early 2020, starting to transition into a new role. He ultimately gave up his line management responsibility for the Claimant in May 2020. Thereafter, the Claimant's line manager was Mr Mick Petford.

10. The other significant development in the first half of 2020 was the pandemic. This resulted in a further reduction in demand for work on the BT contracts. Lockdown came into effect on 23 March 2020 and BT closed all of its sites. On 1 April 2020, the Claimant was sent a letter placing him on furlough with effect from 6 April 2020. By email on 2 April 2020, the Claimant asked whether he would be able "to still monitor emails and work phone, and [respond] to anything while [he was] furloughed". The questions were addressed internally and the suggestion was that the Claimant could still monitor his emails. However, there is no communication in the bundle which informs the Claimant of that fact.

11. A decision was taken to end the Claimant's furlough with effect from 4 May 2020. The intention was not, however, that the Claimant should simply pick up where he had left off. The demand for work had not returned to its former level and consideration was given as to

where each person might best be deployed. Mr Holpin had a discussion with Mr Steve Clifford, the Projects Director, on or about 1 May 2020. The two men discussed the fact that there was likely to be a reduced requirement for building supervisors and that the reduction in required work was being exacerbated by the pandemic. In an email dated 1 May 2020 from Mr Clifford to Mr Holpin and copied to (amongst others), Mr Taylor, Mr Levitt, Mr Petford and Mr Hawkins, the question of the Claimant's deployment was specifically addressed:

> "As discussed could you use Gary Graham though on the tools and not as a supervisor? However, once Croydon is up and running and Steve Kersey returns to that site, Gary could then take his role at Slough. What do you think? Could that work? I will give him a call this afternoon and update him one way or the other."

From the Claimant's perspective, this exchange demonstrates that, because of the concerns that he had expressed to Mr Taylor in early 2020, a plan was being formed to remove him from the business. From the Respondent's perspective, by contrast, the discussion shows that thought was being given to how the Claimant could be best deployed given the very significant reduction in the work available. I consider that the most natural reading of the email is that contended for by the Respondent.

12. The Claimant did return "on the tools". He was given a "cable pull" to do. It was strenuous work and although he drew the attention of the Respondent, again, to his angina, no steps were taken to assess whether the work was suitable for him. Thereafter, he transferred to Slough where he was given a job painting a room. He was supervised at Slough by a Mr Marc Foden.

13. The Claimant and Mr Foden did not have an entirely easy relationship. The Claimant says that, on his first day, he was late for work because he had found it difficult to find the car park. Mr Foden took him to task. Mr Foden subsequently reprimanded the Claimant for spending too long on a break. The Claimant explained that he had to take medication at regular intervals and had to do so with a meal. He had taken a break to take his medication along with breakfast. Mr Foden was unsympathetic and told the Claimant to eat his breakfast before starting work, which the Claimant then did from then on. Finally, Mr Foden complained that the Claimant had made insufficient progress with his painting. The Claimant considered that criticism to be unfair.

14. On 7 July 2020 Mr Holpin wrote to Mr Clifford as follows:

> "I appreciate that we have discussed Gary a few times now, what is the end result. Is he returning to Furlough this Friday or staying at Slough for the foreseeable future. Either way if you let me know then we can have the conversation, one thing is for sure is he is NOT returning to Columbo [sic]".

When asked about this email in cross-examination, Mr Holpin explained that the reason for his emphatic suggestion that the Claimant would not be returning to Colombo House was that there was no work to be done there. It was not a question of wanting to keep the Claimant away from the site. An organisation chart prepared by Mr Holpin on or around 27 July 2020 shows the Claimant working at Faraday House and reporting to Mr Petford.

15. Despite what was said in the email of 7 July 2020, the Claimant was next redeployed to Colombo House but it appears that he was on the tools. He did not resume his full supervisory responsibilities. Consistent with the organisation chart, the Claimant believed that this was a

temporary arrangement and that he would be transferred to the role of Building Supervisor at Faraday House once work commenced in earnest at that site.

15. On 5 August 2020, Mr Holpin wrote to Howard Hawkins (Business Improvement Manager for the BT Contract) saying:

> "Gary Graham is to coin a phrase 'sulking' as he has been asked to go to Faraday. I did speak to him at Columbo yesterday and he specifically says he is fine and no issues but you can visually see he is not.
>
> Sheena [MacDougall] has called me this morning … He is being very quiet, not engaging and as far as he is concerned he is working 7.30 till 15.30 although we need him [there] till 16.00pm.
>
> Mick Petford is having another chat with him tomorrow but I [feel] it maybe flogging a dead horse. Following on from Mick's chat with Gary tomorrow we may have to take further action."

Mr Holpin was concerned that the Claimant might be failing to engage with the work that was available to be done. It is unclear what was meant by the reference to "further action". If it meant that the Claimant would be subject to a performance improvement process, that was never resorted to or raised with him. Mr Holpin's evidence under cross-examination was that he could not now recall what he had meant.

16. At this point in time, from the Respondent's point of view, there was insufficient work at Colombo House to keep the Claimant busy and it was hoped that a move to Faraday House might improve matters. However, progress with Faraday House was slow. On 18 August 2020, Mr Petford emailed Mr Holpin seeking an update. He comments:

> "We are at the cross roads of not knowing when this project will start? So I have had Gary Graham sat not really being able to do [too] much. I have had him doing the odd thing at Colombo but there is not enough to keep him busy here.
>
> So the question is how long do we keep waiting for Faraday to get the go ahead? Has anyone got anything thing we can use Gary on until we get the thumbs up? At the moment it is just sucking money from Colombo's project.
>
> Any suggestions?"

17. A short while later Mr Clifford (who had been copied into the original email) replied as follows:

> "Yesterday we spoke about Liam Lambdon having [too] much work in his area, BAU needing building works. Does anything out there require Gary input.
>
> When I saw Gary at Colombo 2 weeks ago, he told me to my face that he didn't want to be site manager as he didn't want the stress due to his heart condition (Am assuming he has told you the same?)
>
> When I asked him about FARADAY he said he could cope with that as it was only a small job (Strip out approx. 5 weeks I reckon after that I it will take at 3-4 months before we get a main order, so will be in the same boat pretty soon)
>
> Sounds like if he has a use it has to be on the tools, because I do not want us to run the risk of health and stress issues.

> If we cannot find anywhere outside of just dumping him somewhere so it becomes some else's problem, we need to engage plan B which we discussed a few weeks ago.
>
> I will be at Colombo this afternoon, so if you want I will, start the difficult conversation telling him tools or nothing.
>
> Let me know what you want to do, before this becomes a nightmare."

The Claimant believes that the email shows that he was considered to be a problem; that the problem related to his health; and that rather than supporting him, the business was looking either to "dump" him somewhere or else resort to the ominously entitled "Plan B".

18. The Claimant told me that Mr Clifford had given a misleading account of what he had told him. The Claimant had never said that he no longer wanted to be a "site manager" (which he understood to be a reference to Building Supervisor), he had simply said that the Colombo House role had been too demanding and that he needed help with it.

19. The Claimant suggests that Plan B was terminating his employment which would certainly be consistent with the suggestion that was going to be put to him was "tools or **nothing**" [My emphasis]. Mr Holpin, who was one of those who received the email said that he had "no idea" what was meant by Plan B. Mr Levitt, who was also copied in, was similarly unable to shed light on what had been meant. Mr Taylor told me that he was not party to any conversation about a "Plan B". However, Mr Hawkins did claim to be able to recall what it meant. According to Mr Hawkins, Plan B was something that he and Mr Clifford had agreed upon and it involved starting works on buildings without waiting for a purchase order. In other words, if Plan B were adopted there would be work for the Claimant and others to do but the Respondent was taking a risk that they would not recover payment from the client. I have found this evidence very difficult to accept. First, if there was such a plan I would have expected the other management witnesses to have been aware of it. Second, it is not really possible to reconcile it with the rest of Mr Clifford's email. If there was a plan for Faraday House work to begin without a purchase order, why does he specifically mention that there is to be 5 weeks of stripping out but then a 3-4 month wait for the "main order". Finally, Plan B would not be a solution since the problem that Mr Clifford was addressing was not the lack of work for the Claimant so much as his alleged express unwillingness to work as a building supervisor. Bringing the Faraday House work forward and appointing him building supervisor there was something Mr Clifford was explaining could not be done. It follows that, on a balance of probabilities, he meant something else when he referred to Plan B. The most natural reading of the email is that Plan B was, as the email immediately went on to set out, the proposed ultimatum that it was to be tools or there would be nothing for him to do. That reading is also consistent with Mr Holpin's response which is discussed immediately below which suggests that Mr Wells should "fill in" at Faraday House.

20. Later on 18 August 2020, Mr Holpin replied to Mr Clifford's email saying:

> "My gut feel is he needs to go back on the tools, I will discuss with Bob at Kingston today him leaving here to go to Columbo as a matter of urgency. I will also speak to Mick as can Robert fill in at Faraday?
>
> My fear as you have now said that Gary has openly stated he is worried about stress etc, so the worry is 'could cope' and actually coping is a very thin line."

In his witness statement, Mr Holpin says that he was "aware that, having spoken to the Claimant, … he did not want to undertake the site manager role which appeared to be available as part of the proposed restructure of the Respondent's team engaged in relation to the Client's contract". It is not clear what Mr Holpin is referring to. He cannot be referring to the restructure that resulted in the redundancy exercise as that still lay in the future. It seems likely, therefore, that he is referring to the proposal that the Claimant should move to Faraday House. That would be consistent with his suggesting that "Robert", who appears to be Mr Wells, should fill in there. However, there is no indication that the Claimant had ever said that he could not cope with being a building supervisor at Faraday. Pressed on this part of his witness statement, Mr Holpin said that he could not now remember whether he had spoken to the Claimant, but that he thought it likely that he had. In the light of that response, I have not felt able to put any weight on the account set out at Paragraph 25 of Mr Holpin's witness statement.

21. Having weighed the evidence, I make the following findings:

(1) In August 2020 the Respondent was aware that the Claimant had found the pre-pandemic workload as Building Supervisor at Colombo House a source of significant stress and a threat to his health;

(2) The Claimant had not said that he did not want to be Building Supervisor, but rather he brought his concerns to the Respondent's attention and was hoping that they would take steps to alleviate the pressure. However, Mr Holpin concluded that the Claimant did not want to perform the role at all;

(3) In taking decisions as to what job the Claimant might be able to do, the Respondent had in mind that it needed to avoid any role that might subject the Claimant to potentially harmful levels of stress;

(4) The problems that had arisen as a result of the Claimant's workload were not an issue in August 2020 because:

(a) There was now insufficient work for him to do at Colombo House; and

(b) It was planned in any event to move him to Faraday House once work started there and the Claimant agreed that a role there would be manageable;

(6) There was a concern that with a reduced workload at Colombo House, the Claimant was insufficiently engaged and, not to put too fine a point on it, he was a cost charged against the project budget when he was unable (through no fault of his own) to materially contribute to the project itself;

(7) Amongst the options being considered were:

(a) Moving the Claimant onto a different project; and

(b) Putting him on the tools.

22. By September 2020, the Respondent had concluded that the downturn in work was likely permanent and drew up a business plan to reduce the number of project managers from 3 to 2.

23. On 6 October 2020 the Claimant had a meeting with Mr Hawkins. According to the Claimant's evidence, the meeting was at Mr Hawkins's behest and came out of the blue. According to Mr

Hawkins, the meeting was convened at the Claimant's request. Each remained adamant under cross-examination that the meeting had been called by the other. Mr Hawkins said that the Claimant brought up with him that he struggling in his role as Building Supervisor at Colombo House and that he was concerned that it was having a negative impact on his health. He understood that what the Claimant was asking for was a chance to work on the tools whilst maintaining his existing, higher, salary. He told the Claimant that there was no full-time engineer role available and that he would have to revert to his full Building Supervisor role once the business need for it returned. He advised the Claimant to "consider his options" and to think about what was best for him in the light of his "health issues" which Mr Hawkins understood to be stress and heart and skin conditions.

24. Mr Hawkins's statement does not identify the "options" which were available to the Claimant at that time. Indeed, the account given in his evidence suggests that the options were very limited: he could not move into a full-time engineering role (whether at a maintained or reduced level of salary) and he would be expected to resume the role that he was concerned might be harming him. It would seem to follow that the Claimant's true options were resume his former role or leave.

25. At or about this time the Respondent was considering making one of the Building Supervisors redundant. Mr Hawkins is careful to say in his statement that no *decision* had been taken at that point. He denies having suggested that the Claimant should take voluntary redundancy were it to be offered.

26. The Claimant's recollection is that voluntary redundancy was discussed and that, to his surprise, Mr Hawkins suggested that he should take it if offered. I prefer the Claimant's recollection. Given that Mr Hawkins's position appears to have been that the Claimant had no real option other than to resume his role or leave; that he knew the Claimant was finding that role a potential threat to his health; and a redundancy exercise had already commenced in the previous month it seems substantially more likely than not that there was some discussion of redundancy as a possible means of bringing the Claimant's contract to an end.

27. The Respondent points out that the Claimant never was offered voluntary redundancy. The inference that I am invited to draw is that even if the Claimant's recollection is correct, it is academic as the circumstances never arose. The Claimant's submission is that raising the possibility of voluntary redundancy with him demonstrates that terminating him for redundancy was already in the Respondent's mind and that subsequent events simply play out the plan revealed in this conversation.

28. Included in the bundle is an exchange of emails between the Claimant and an HR Assistant named Charley Peach in which he appears to be asking for copies of his contractual terms. This is not a matter which was dealt with by anyone in written or oral evidence but it appears to suggest that following the meeting with Mr Hawkins, the Claimant wished to be clear about his contractual position which I consider is suggestive of a conversation about possible termination having taken place.

29. On 15 October 2020, a Mr Bob Wells arrived at Colombo House. Bob Wells was another Building Supervisor. He did not stay. Instead, he was taken to Faraday House. The Claimant says he was told that Mr Wells would now be Building Supervisor at Faraday. That, of course, was the role that the Claimant had been given to understand that he would be taking on in

due course. Confused, he wrote to Mr Clifford (copied to Mr Taylor) asking for his position to be clarified.

30. Mr Clifford responded to say that he would be happy to catch up. He then asked HR to provide him with the Claimant's job description, line manager, place of work and cost centre number. Following the meeting he wrote a summary which he sent to the Claimant. Objectively, the summary does not resolve the uncertainty. It does not, for instance, say whether the Claimant is to move to Faraday House or not. The Claimant's uncontradicted evidence was that Mr Clifford appeared at one point to be under the impression that the Claimant intended to leave the Respondent's employment having taken a job elsewhere. That mistaken understanding having been corrected, it is not mentioned in the summary. The email concludes as follows:

> "I appreciate your concerns raised and as I have confirmed we will resolve over the next 2-3 weeks any ambiguity that has arisen to your position during this Pandemic.
>
> As I said we will ensure we discuss with you at every opportunity in allowing us to clear up this matter in ensuring all parties are satisfied.
>
> On a personal level as we spoke about is ensuring your manageable health concerns are placed at the forefront, so want to ensure the job role fits the removal of any undue stress due to responsibility."

Although the language is at times difficult to follow, the message was that matters would be resolved quickly and that his new role would take account of his concerns about stress.

31. On 22 October 2020, Mr Petford took over as the Claimant's line manager.

32. On 28 October 2020, Mr Clifford emailed Mr Hawkins and Mr Holpin to ask whether they had made a decision about the "next steps regarding [the Claimant]". This seems to be a reference to a possible redundancy. That emerges from the fact that he goes on to say "I know I don't need to tell you, but time is running out and if there is a cost implication to your decision, it has to be concluded before the end of 2020, as monies cannot be accrued into next year" and from the fact that the response from Mr Holpin was:

> "I have spoken to Howard this morning, the business case has been completed and Howard will run his eye over this later and the redundancy process will then be started for completion by the end of Nov."

33. The decision was that the number of Building Supervisors should be reduced from 2 to 1 and that either the Claimant or Mr Wells should be dismissed.

34. The Claimant does not deny that there was a business case for making a redundancy. Nor does he suggest that the pool for selection is the wrong pool. The selection was made by reference to a set of selection criteria. He has no objection to the criteria that were used to make the decision. He told me that he does not know Mr Wells and he accepts that it might be that an objective scoring of their respective abilities would have resulted in the same outcome. The findings below focus, therefore, on what he does complain about.

35. On 30 October 2020, the Respondent sent the Claimant an email to which was attached a letter informing him that he was at risk of dismissal for redundancy. The letter suggested that consultation served two purposes: exploring ways of avoiding redundancy and identifying the Claimant's needs so that the Respondent could offer him "any support or assistance" that he might require. He was told of his right to be accompanied by a work colleague or trade union

representative. The letter concluded with an invitation for the Claimant to make contact with Ms Terry, the HR Business Partner, if he had "any queries or would like to discuss any aspect of the process further". The Claimant did not raise any query or seek any discussion. Mr Wells received an identical letter.

36. The first step in the redundancy process was a virtual meeting with the Claimant conducted by Mr Holpin using Teams software on 3 November 2020. Ms Terry also attended. The Claimant was told that his redundancy selection scores would be "moderated" by three people. He was not told who they were and did not ask. The basic structure of the exercise was run through. The Claimant confirmed that he had the weekly vacancy list, but said that he had not looked at them. He was also told that he would be sent a redeployment form and was asked for a CV, the intention being that the Respondent's recruitment department would could search for suitable jobs for the Claimant within the group. The next day, the Claimant was sent the notes from the meeting; the promised redeployment questionnaire; a copy of the selection matrix and copies of the briefing presentation and the vacancy list.

37. The three people who completed the scoring matrix from the Claimant and Mr Wells were:

    (1) Mr Holpin;

    (2) Mr Levitt; and

    (3) Mr Taylor.

    None of them were given any training. It does not appear that there was any discussion in which they all involved in which any attempt was made to ensure that they had a consistent understanding of how to score the two men. Indeed, the Respondent's witness statements stress the ack of contact between the markers (presumably on the basis that it implies independence of assessment).

38. The Claimant says that he never worked directly with or for Mr Holpin and that he does not understand how "he could have had sufficient consistent direct and relevant information to base his scores on, without having to defer to assumptions hearsay and/or opinions". He points out that Mr Holpin scored him a zero for "Tool box talk delivery" on the (now admittedly) erroneous basis that the Claimant did not do them. In fact, he did them regularly.

39. Mr Holpin told the Tribunal that he had direct experience of both the Claimant and Mr Wells. Both he and the Claimant had worked on a contract for Thames Water immediately before working on the BT contract. The quantity and quality of Mr Holpin's experience was much harder accurately to assess. Mr Holpin said that he would see the Claimant in the office or on site whenever he made a visit to where the Claimant was working. He accepted that at the relevant point in 2020, as there was little being done at Colombo House he would only have seen the Claimant "on occasions". His approach was to give the person a low score if he had not seen them doing the relevant part of their job. As Ms Hanning pointed out to Mr Holpin, that meant scores depended on the "luck of the draw", i.e. whether he had happened to see the relevant task being performed. This explained why the Claimant had received his inaccurate "tool box talk delivery" score. It seemed to the Tribunal that Mr Holpin's experience was, in essence, sporadic casual observation but that he felt that since that was equally true in Mr Wells's case, any shortcomings in his experience cancelled out.

40. Mr Holpin submitted his scores on 5 November 2020. He gave the Claimant a score of 122 and Mr Wells a total score of 140.

41. The Claimant says that he had never worked directly with Mr Levitt whilst he was a building supervisor either. He was Mr Wells's line manager. To be fair to Mr Levitt, he did not pitch his knowledge particularly high in his witness statement:

> "I worked in and out of Columbo [sic] House and also at the site at Slough so would probably interact with the Claimant one [sic] a week. I therefore had knowledge of the Claimant's work".

The statement does not make it clear whether the interactions were about work (rather than merely at work). He was asked about this in supplementary questions. He told the Tribunal that in early 2018 he worked out of Colombo House and Faraday House. He said he worked "alongside" the Claimant and had a lot of conversation with him, but accepted that they were "not so much work-orientated". He said that the office was small and suggested that they would all "know what was going on". He put the frequency of interaction at 6 or 7 times a month. Under cross-examination, his position modified somewhat. When it was put to him that he accepted that his interaction was "not so much work-orientated" he now said he disagreed, but did not explain what work-orientated interaction he would expect to be having with the Claimant. He said that he sat next to the Claimant and "knew exactly what he was up to".

42. Ms Hanning asked him to explain the scores that he had given. Mr Levitt said that the Claimant was not very proactive but, beyond that, made it clear that his memory had faded and that he could not now recall the rationale for his scores. It emerged under cross-examination that Mr Levitt had likely spoken to Marc Foden before scoring the Claimant and heard Mr Foden's dissatisfaction with the Claimant's performance in Slough although he could not remember the specific conversation. That appeared from a reference made in the appeal outcome letter:

> "On speaking with both Mark Taylor and Jason Levitt … they felt they were justified marking you against some criteria as 'poor' because they are aware of occasions where your performance has dropped below expectations. In particular, your time keeping, lack of commitment and lack of progress in completing certain jobs. Both Mark and Jason have indicated that you were spoken to on these matters by Marc Foden and it is their opinion that you have been marked appropriately …"

Mr Levitt was at pains to stress that there were "plenty of other examples" although they did not stretch much beyond saying: "he'd be outside smoking his vape" and that he might be "walking around talking to people or in the canteen". He later suggested that the Claimant would arrive at work late and be first to leave. This is something that the Claimant hotly disputed. He told the Tribunal that he would always be last to leave and that this was easily established by reference to clocking records. No clocking records were produced by the Respondent.

44. One oddity is that Mr Levitt appeared to be telling the Tribunal that the Claimant's unsatisfactory performance and lack of commitment at Slough was both consistent with other, largely unspecified, examples but also so out of character that he appeared to Mr Levitt to be a "different person" causing him to be worried about him.

45. Mr Levitt had never scored anyone for redundancy before. Not only did he receive no training. He told the Tribunal that he received "no guidance whatsoever". He was Mr Wells's line manager and should be expected, therefore, to have a depth of experience of that employee that went well beyond what might be produced by a weekly "interaction".

46. Mr Levitt gave Mr Wells a total score of: 127 and the Claimant a total score of 115. He sent his scores to Ms Terry on 10 November 2020.

47. The final scorer was Mr Taylor. The Claimant says that only Mr Taylor was in a position to provide him with a meaningful score. Mr Taylor was cross-examined on the basis that his gradual move into other areas of responsibility had meant that he had had ever less direct contact with the Claimant – a point which Mr Taylor appeared to accept. However, he told the Tribunal that he attended Colombo House and also spoke to the Claimant regularly.

48. On the question of poor performance, Mr Taylor did not identify any specific shortcomings himself and accepted that there was nothing documented in the performance appraisal documentation. He said that he had talked to Marc Foden when the Claimant was at Slough and was, as a result, "aware of a few issues". He assumed that Mr Foden would have spoken to the Claimant about any concerns that he might have. He himself found the Claimant was not "buoyant" whilst at Slough. He put that down to the Claimant being asked to do something that he did not really want to do. He did not believe that the Claimant wanted to stop being a "site supervisor". Pressed on whether he felt that he had given the Claimant enough support, Mr Taylor's position was that that required a subjective judgement but that he felt that he had engaged to the best of his ability.

49. Mr Taylor believed that he was able to score Mr Wells as they had had "numerous meetings". He gave the Claimant a score of 127 and Mr Wells as score of 135. He only scored the Claimant higher than Mr Wells on one criterion: length of service.

50. On Friday 6 November 2020, the Claimant was informed over the phone that he was going to be placed on furlough again with effect from 9 November 2020. This was confirmed by letter, although there is a dispute (which I do not need to resolve) as to when it was received. Mr Wells was also placed on furlough.

51. On 10 November 2020, the Claimant was sent a vacancy list and an invitation to the next consultation meeting. This appears to have gone to his Emcor email address. At this point the Claimant was unclear whether being on furlough meant that he should not access his work email at all. This was the very question that he had asked the first time that he had been furloughed and to which he had received no answer. He did not contact HR to check the position. On the same day, he was sent a link for Microsoft Teams meeting which was copied to a private gmail address belonging to him, so it looks as if Ms Terry, who wrote the email, wanted to make sure he saw emails whether or not he accessed his work email.

52. The second consultation meeting took place on 17 November 2020. The Claimant was not accompanied at the meeting. He says that he was unable to arrange to be accompanied because he did not know who was on furlough. However, he does not appear to have made any enquiries to find out. The meeting was again convened by Mr Holpin, who was provided with a script to use. He noted that the Claimant was unaccompanied and asked him if he was happy to continue, to which the Claimant answered: "It is just me". The Claimant was told that three people had marked him and that he had been provisionally selected for redundancy. He told Mr Holpin that he would like to know the rationale. He was told that he would be sent his scores and that a meeting would be arranged for the following week to discuss the scores.

53. Mr Wells had a meeting on the same day and was told that he had been "selected for the role as Supervisor". It seems that at that point, therefore, a decision had been taken,

notwithstanding that the Claimant did not, at that point, know what scores he had been given or why.

54. The Claimant was invited to a final consultation meeting on 24 November 2020.

55. On 19 November 2020, the Claimant sent through some "initial thoughts" and asked for Ms Terry's "earliest response". The email's questions cover a broad range of issues. The most important for present purposes related to:

    (1) Who had scored him and on what the scores were based, in particular whether they were based on "consistent direct experience" or "information and/or hearsay";

    (2) The fact that he had not previously received any formal or informal "feedback" dealing with the areas in which he had been given low scores;

    (3) Whether or not he had been given enough information about the process; what the purpose of the 17 November meeting had been; and by whom (and how) he could be accompanied;

    (4) The alleged lack of effective line management and what he referred to as the "duty of care" provided to him.

    He mentions that once he has answers he may seek legal advice on the possibility that he is being unfairly dismissed. Ms Terry replied 3 hours later to say that she and Mr Holpin would discuss the questions with him the next day. The Claimant replied a little under 3 hours later, at 19:52 to say that arranging support whilst on furlough was challenging and that he was "struggling with the urgency [with which] this is being pushed along". The essence of his message is that he wanted written answers to his questions in advance of any meeting.

56. Ms Terry put together some answers and the Respondent proceeded with the meeting notwithstanding the Claimant's objections. Mr Holpin wrote ruefully to Mr Hawkins to say:

> "So much for HR will lead and I step back. This looks like stuart get in that bear pit. Lol."

    Ms Terry wrote to the Claimant to say it was up to him to approach a work colleague to join the call. She once again prepared a script for Mr Holpin.

57. The meeting went ahead on 20 November 2020. By this point the decision to give the Building Supervisor post to Mr Wells had already been made. He had been told as much. At this point, therefore, the decision was not really open to reconsideration whatever the Claimant's concerns might be.

58. On the topic of who had scored the Claimant and Mr Wells, Mr Holpin's response was:

> "To confirm that Jason was impartial, Mark was your previous line manager and I have had interaction with you."

    Mr Holpin said he could not comment on anyone else's scores. Later he said:

> "You need to understand that two people had knowledge of you and one person was impartial."

That would seem to suggest that it was assumed that Mr Levitt (who is identified as being impartial) did not have knowledge of the Claimant. It is entirely unclear how not having knowledge was expected to allow Mr Levitt to be impartial.

59. On the question of whether those marking had sufficient direct experience to mark the Claimant, Mr Holpin said:

> "You then want to know if the consistency verification based on experience of consistent direct interaction with you and the answer is yes as Mark and myself have direct interaction with you. You then ask if any element is based on information and/or hearsay from others and the answer is no"

60. The Claimant immediately took up the fact that Mr Holpin had scored him zero for meeting control and toolbox talk delivery. Mr Holpin focused on toolbox talk delivery and explained that he had scored the Claimant at zero because he had not seen him do it. The Claimant told him he had done toolbox talks.

61. In answer to the Claimant's concern that he had been marked down for matters in respect of which he had never previously been criticised and that the lack of earlier feedback denied him an opportunity to resolve concerns, Mr Holpin replied that it was a redundancy selection and not a capability study. That is, of course, true, but performance appears to have been taken into account in scoring so that it is some way from being a complete answer.

62. On the issue whether the Claimant had been given enough information about the process and about his ability to be accompanied, Mr Holpin said that these matters had been spelt out in correspondence, to which Mr Graham replied "ok".

63. On the question of duty of care, the Claimant clarified saying that he meant the lack of PPPs. This was part of a broader set of concerns about lack of direct input from line management. By the hearing in this case, the point about duty of care appeared to have developed so that it included a lack of support for the Claimant in respect of his illnesses.

64. The final consultation meeting was fixed for 24 November 2020. At 22:46 the night before that meeting, the Claimant wrote again to Ms Terry pursuing a number of concerns. On the scoring process he told Ms Terry that he continued to feel that the criteria did not embody the requirement in the Respondent's redundancy policy that the criteria would be clear and objectively, reasonably and fairly applied without discrimination. He raised specific concerns about each of those who had scored him. In respect of Mr Holpin, he pointed out that he had been given zero scores simply because Mr Holpin had not observed him doing things. He says that he had not worked with Mr Holpin in a "manner that would enable [him] to have such information to base [the] scores on" and asked rhetorically; "How would he have sufficient consistent direct and relevant information to base his scores on without having to defer to assumptions hearsay or opinions". He complains that he had had "no relevant interaction" with Mr Taylor "for a considerable period of time". As to Mr Levitt he says: "we do not work together in any way, and do not work in the same location." Again, he asks how Mr Levitt could have avoided having to rely on assumptions, hearsay and opinions. He complains that his question about who, if anyone, had ensured consistency through moderation, had gone unanswered. He reiterated his concern that no issues in respect of performance had been raised within him before the scoring exercise and, again, complains that there had been insufficient line management support. He raised for the first time a number of the issues that have featured in these proceedings, including that he had been told he would be running

Faraday House and had been "confused" when Mr Wells was taken there and that he had a "strange on-site meeting" with Mr Hawkins.

65. At the final consultation meeting on 24 November 2020, the Claimant was again unaccompanied. He said that he was "happy" to continue without a companion. The Claimant said that he did not need to hear the business reasons again and also confirmed that there were no existing vacancies in which he was interested. The Claimant was then told that the Respondent had been unable to identify suitable alternative employment and that he would be dismissed "from today" and that 24 November 2020 would be his last day of employment. He was informed of his right to appeal.

66. Once his employment had been terminated, the Claimant raised the question of the email that he had sent late the previous night. He suggested that the redundancy process had not been a "normal" one. He elaborated on his suggestion that he had had a "strange" meeting with Mr Hawkins by saying that he had been asked if he wanted to take voluntary redundancy. Mr Holpin said that he could not comment on any conversation that he had not been party to. The Claimant pressed for a discussion of his email, but Mr Holpin's position was that the email contained no new information and that the Respondent had nothing to add. At that point, the Claimant said that they would be hearing from ACAS. Shortly thereafter, the meeting closed.

67. The Claimant emailed Ms Terry again on 26 November 2020. He seems to have been in some doubt as to whether his employment continued. He asked about "next steps and timescales" and whether he was required to work his notice. The position had been made clear at the final consultation meeting. Finally, he made it clear that he intended to appeal.

68. On the same day he was sent formal notice of redundancy. The letter confirmed that his employment had ended on 24 November 2020 (albeit that it was expressed in the future tense). The letter set out what he was to receive, including a statutory redundancy payment and a payment in lieu of notice.

69. On 27 November 2020, Mr Clifford wrote to Mr Holpin thanking him for everything he had done in relation to the redundancy and expressed the hope that it was the right decision for the business. Mr Holpin's response was "… it is 100% right for the business, his attitude over the last few weeks have (sic) proved that … We need a steady ship that has no influences that will rot it from the inside out and ultimately this would have festered and done just that". Mr Holpin was asked what he meant by those statements. He told the Tribunal that the reference to the Claimant's "attitude over the last few weeks" was a reference to his "negativity" on the job. When it was pointed out to him that for the "last few weeks" the Claimant had been on furlough, he accepted a suggestion that perhaps instead he was referring to the Claimant's involvement in the redundancy process itself which he described as "very aggressive". There is nothing in the transcripts that suggests that the Claimant had been aggressive at all, still less *very* aggressive.

70. On 29 November 2020, the Claimant lodged his appeal in writing. The reasons that he gave for his appeal were as follows:

- "I feel I have been unfairly selected for redundancy.
- I feel no consideration has been made, in regards my anxiety and vulnerability while being on furlough during the redundancy consultation process.

- I feel that I have not been provided with sufficient support during the redundancy consultation process.
- I feel a failure in duty of care towards me by EMCOR UK, over a considerable period of time, has had an impact on my selection – and ability to defend myself - within the redundancy process.
- I feel that the matrix approach used during the redundancy consultation period was flawed, and not utilised or carried out in a fair objective or reasonable manner.
- I have not received responses to questions raised during the redundancy consultation period, which I feel are pertinent and relevant to my selection during this process."

The grounds are then fleshed out and supplemented over a number of pages.

71. At Mr Clifford's suggestion, Mr Ian Neal was appointed to consider the appeal. The Claimant was invited to an appeal meeting which took place on 9 December 2020.The stated purpose of the meeting was to allow the Claimant to expand upon his grounds of appeal. The meeting was to be followed by further investigation by Mr Neal. HR prepared a script for use at the meeting.

72. Once again, the Claimant was not accompanied by a colleague at the investigation but confirmed that he was happy to continue. When asked what he wanted out of the appeal his response was that he wanted to know the "real reason" why he was made redundant. He confirmed that he was not looking to be reinstated as he had lost trust in the Respondent. Mr Neal assured the Claimant that he intended to perform a "thorough investigation". When asked why he said he had been unfairly selected for redundancy, the Claimant replied:

> "I think it was a set up. From the 06th October I was asked in a conversation with Howard Hawkins if I want to volunteer for redundancy and I said no. I had a conversation with Steve Clifford because of what happened on the super hub, as I was a site manager on first super hub it was so stressful. I told Steve I would do the job but not on my own as so stressful. I had a one to one with Steve a few weeks later and he said as I was stressed he called Howard. I said I was not suffering from stress just stressed."

The Claimant's view was that, in effect, once he had said that he was finding supervising Colombo House too much for one person and it was causing him stress, a decision was taken to terminate his employment.

73. The Claimant went on to complain that there had been insufficient communication with him during his period of furlough. Mr Neal apologised to him on behalf of the Respondent. He complained that he had not had sufficient support during the redundancy exercise and, in particular, that there had been a lack of clarity as to whether he could use his laptop. That had made it more difficult to access the redundancy policy and thus to defend himself. He accepted that he had been sent copies of the policies when he had asked for them. Mr Neal then moved the conversation to the alleged failure to meet the duty of care owed to the Claimant. The core of that complaint was that as Mr Taylor transitioned to his new role it had created a lack of leadership. PPPs had been conducted by someone who did not know him.

74. On the question of the scoring matrix, the Claimant raised four points. Three of those points related to specific scores about which he complained. The first two are the zero given to him by Mr Holpin for toolbox talks and the zero he received for CDM knowledge. He complained

that he had been penalised because his SMS certification had expired. He still, he said, had the knowledge. The Respondent's position has been that the point was awarded if the employee had a current certificate. The fourth point is the more fundamental: that he felt he had been scored by people who did not know him. In the meeting this seems to have a been a point focused on Mr Holpin. Of Mr Levitt he said:

> "Jason has been to Colombo and knows how I work".

75. Finally, the Claimant complained that the questions that he had sent through the night before the final consultation meeting had not been answered.

76. Mr Neal then began his investigation. He told the Tribunal that he spoke to Mr Hawkins who gave him an account which matches, in its essentials, that given to the Tribunal, i.e. he said that he had met with the Claimant at the latter's request and that he had not suggested that the he take voluntary redundancy if it were offered. I have preferred the Claimant's evidence on that point. It does not follow, of course, that Mr Neal was obliged to do the same.

77. Mr Neal also spoke with Mr Clifford, Mr Holpin, Mr Taylor and Mr Levitt. No notes of any of the interviews have been disclosed. There is documentary record, however, of Mr Taylor contacting Mr Foden on 10 December 2020, apparently on Mr Neal's behalf, in order to obtain his account of his concerns over the Claimant's timekeeping. Mr Foden's response was as follows:

> "As discussed earlier, I did sit down with Gary at Slough to talk about his timekeeping around start times and tea breaks.
>
> Gary arrived after the start time of 0700 on a few occasions and then would sit down in company time to have his breakfast.
>
> When I asked Gary why he was having breakfast in company time and not at the agreed break time like everyone else, Gary said it was due to his medication.
>
> I then asked Gary why he could not have breakfast before he left the house in order for his medication to be taken and Gary replied because he wasn't hungry until he got to work. With the reply not being sufficient to warrant Gary having extra breaks at will, I then asked Gary to come into line with the rest of the workforce by eating before he comes to work, arriving on time at 0700 and taking his break at the agreed 1100.
>
> Gary disagreed with the request however he did follow it out."

78. On 11 December 2020, Mr Neal was chased by Ms Colette Joseph from the Respondent's HR department for a decision and summary of reasons. She chased again on 15 December 2020. According to Mr Neal, Ms Joseph produced a draft outcome letter on 18 December 2020. It was finally sent to the Claimant on 7 January 2021.

79. Mr Neal rejected the appeal. On the question of whether the Claimant had been unfairly selected for redundancy, the response begins:

> "You stated during the appeal that you believe your selection for redundancy was due to a meeting you were invited to attend on 06th October with Howard Hawkins when you allege he asked you if you wanted to volunteer for redundancy".

That, of course, is not what the Claimant had said during the appeal. He said that he thought the redundancy had been a setup and that it had flowed from his raising concerns with Mr Clifford about the stress which being the sole Building Supervisor at Colombo House had caused him. The meeting with Mr Hawkins was a consequence of the discussion of those concerns with Mr Clifford. There is no evidence before the Tribunal that Mr Neal investigated

the Claimant's actual complaint at all. Mr Neal stressed the business reasons for the reduction in the number of Building Supervisors and set out Mr Hawkins's account of the 6 October 2020 meeting which it appears Mr Neal accepted.

80. Next Mr Neal grouped together three complaints: the complaint about the lack of regard for the Claimant's anxiety and vulnerability whilst on furlough; the complaint about a failure to meet the Respondent's duty of care; and the complaint that there had been insufficient support during the redundancy process. The complaints were summarised as the Claimant feeling that the Respondent "could have done more in terms of communication during the period of furlough and the recent redundancy process". There was a focus on the specific complaint that the Claimant had not understood whether or not he could use his work laptop to access the Respondent's redundancy-related policies. The problem from the Claimant's point of view was that his email of 2 April 2020 asking whether he could continue to monitor emails was not responded to. The response to that point was that Mr Clifford (to whom the email had been sent) had spoken to the Claimant about "several of the points" that the Claimant had raised. It would appear, however, that he had not spoken to him about the specific point in issue. That can be seen from an email from Mr Clifford to Ms Terry dated 2 December 2020 in which he sets out the Claimant's question and his commentary in the following terms:

> "1 Will I be able to still monitor emails and work phone, and responding to anything, while I am furloughed? If so, can you please send approval for me to do this?
>
> > *I tried Gary a number of times on his mobile, which was turned off. So I spoke to Mark Taylor and asked him could he make contact with Gary and ask him to turn phone on so I could make contact (Genuinely I cannot remember if I called him or he called me). The main reason was I was taking time out to ring a number of staff members who were on furlough, to see how they were and to provide current update to situation.*"

Mr Neal went on in the appeal outcome letter to explain that furlough rules had changed regularly (the implication being that it was difficult for the Respondent to know what could and could not be done) but that looking at policies had been acceptable.

81. Next Mr Neal turned to the question of the matrix scoring. Mr Neal accepts that the Claimant should not have been scored zero for toolbox talks, but does not address the other specific concerns. On the more general point, Mr Neal does not engage at all with the point that at least one of those doing the scoring lacked sufficient direct knowledge of the Claimant to be able to score him. Instead, Mr Neal says:

> "On speaking with both Mark Taylor and Jason Levitt, who also scored you on the matrix criteria, they felt they were justified marking you against some of the criteria as 'poor' because they are aware of occasions where your performance has dropped below expectations. In particular, your time keeping, lack of commitment and lack of progress in completing certain jobs. Both Mark and Jason have indicated that you were spoken to on these matters by Marc Foden and it is there (sic) opinion that you have been marked appropriately. We have also carried out an exercise where we moved these scores to the 'moderate' column and can confirm that you would have still been at risk of redundancy as your score did not increase above that of your colleague's (sic)"

Instead of explaining why the three managers (and especially Mr Holpin) were the right people to do the scoring, Mr Neal says that two of the scorers felt justified in giving a low score because of unspecified "occasions where [the Claimant's] performance [had] dropped".

Notably, they do not appear to have given Mr Neal any examples from their own experience but both relied on Mr Foden. The Claimant was not shown what Mr Foden had said. Indeed, he was not asked to comment on anything that had emerged from the investigation.

82. Finally, in respect of the complaint that the Claimant's questions of 29 November 2020 had not been addressed at the consultation meeting, Mr Neal found that Ms Terry had addressed them in a letter in which she acknowledged the Claimant's appeal letter. Whilst he had a conversation with Mr Taylor about the stress he was feeling as a result of his Colombo House role in early 2020 there is no evidence that Mr Taylor did much if anything about it beyond hoping that the appointment of a Project Manager would resolve any issue. There is nothing to suggest that he communicated the substance of the conversation to anyone else or that it created any immediate risk of the Claimant's employment being terminated.

83. Following his dismissal, the Claimant made efforts to obtain alternative employment. There is no case to suggest that he might reasonably have been expected to do more. He obtained new employment at a lower level of pay from 4 May 2021. The work either caused or aggravated a knee condition and, as a result, he left that employment on 28 February 2022 and, it would appear, has not obtained another job since.

The Law

(1) Unfair Dismissal

84. The Respondent has the burden of establishing that it had a potentially fair reason for dismissal (**ERA 1996, s. 98(1)**). That potentially fair reason must either be the sole reason or, if there was more than one reason, the principal reason.

85. If the Respondent succeeds in establishing that its reason for dismissal was a potentially fair one, the Tribunal must consider whether the dismissal is fair or unfair in accordance with the test set out at **ERA 1996**, **s. 98(4)**.

86. There is no one fair way of approaching a redundancy selection exercise. As with all decisions to dismiss, it is not for the Tribunal to substitute its own opinion as to either how the process was carried out or what conclusion was reached unless it was not open to a reasonable employer to take the course that they did. This is sometimes encapsulated in the phrase that a dismissal which is within the "range of reasonable responses" open to a reasonable employer in the circumstances is not to be disturbed even if the Tribunal itself would have approached the exercise differently and/or reached a different conclusion.

87. There is familiar guidance on the issue of fairness in redundancy selection cases to be found in **William and others v Compair Maxam Ltd** [1982] ICR 156. The guidance contained in that case and others that follow or develop upon its reasoning does not amount to determinative criteria which an employer must meet in order for the dismissal to be fair (see **Grundy (Teddington) Ltd v Plummer and Salt** [1983] IRLR 98 EAT). The question of the fairness of a dismissal is always an "holistic" one. i.e. it must, as the statute makes clear, take into account all the relevant "circumstances".

88. One significant element of the guidance given in **Williams** relates to selection criteria and their application:

> "Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as

> possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service."

According to Browne-Wilkinson J, as he then was, the purpose of having objective criteria is to "ensure that redundancy is not used as a pretext for getting rid of employees who some manager wishes to get rid of for other reasons". But even absent a suggestion that redundancy is a mere pretext for termination on other grounds, a subjective process is likely an unfair one. In any selection exercise the livelihoods of sometimes long-serving employees are at stake. Such decisions should not be taken on the basis of mere impression or subjective personal preference. One consequence on focussing on the fairness of the selection decision and not merely the criteria is that becomes obvious that how the criteria are applied is also key to fairness. Even the criteria themselves are capable of being applied objectively, it is important that they are in fact applied objectively, otherwise they simply become the means by which a false impression is given of the true nature of the selection process.

89. However, the Tribunal is not free to substitute its own preferred selection process or subject the selection decision to what the Court of Appeal called in **British Aerospace Plc v Green** [1995] ICR 1006 an "over-minute investigation". The Court of Appeal went on to say that:

> "… in general the employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt sign of conduct which mars its fairness will have done all that the law requires of him"

90. Whilst it is sometimes open to the Tribunal to consider specific scores: for instance, where it is alleged that they are a sham or are perverse, the Tribunal will not generally demand that employers prove the accuracy of the information upon which they relied to make the selection decision (see **Buchanan v Tilcon Ltd** [1983] IRLR 417 CS). Nor, as a general principle, is the person making the selection decision required to check the accuracy of information supplied to them (**Eaton Ltd v King** [1995] IRLR 255 EAT).

91. Consultation must be "fair and proper" (**King v Eaton Ltd** [1996] IRLR 199 CS). The Court of Session in **King** adopted principles developed in the **R v British Coal Corporation, ex parte Price**[1] case, to individual consultation. Fair consultation means that it should take place when proposals are at a formative stage, the employee must be given adequate information on which to respond, they must have adequate time to do so and any response should be conscientiously considered. Overall, the employee must have an opportunity to contest their selection (**John Brown Engineering Ltd v Brown and others** [1977] IRLR 90 EAT).

Discussion and Conclusions

Unfair Dismissal

92. Dismissal is admitted. I find that the effective date of dismissal for the purposes of **ERA 1996**, **s. 97** was 24 November 2020.

93. In dealing with the Claimant's grounds of unfairness, I have not followed the precise structure of what are identified in Ms Hanning's very helpful summary submissions as the "questions for consideration" but have reordered some points and merged others in order that the decision set out below more closely matches the analysis required by the Law. Mr

[1] [1994] IRLR 72 CA

Dhorajiwala's submissions were equally helpful. I have focused on the matters in each set of submissions that I consider to be the most significant for the purposes of deciding the claim. That a particular point is not specifically referred to does not mean that it was not taken into account, merely that I considered other factors and circumstances to be more important to the analysis.

(1) *What was the reason for dismissal?*

94. The Respondent says that the reason for dismissal was redundancy. The Claimant accepts that there was, to use the shorthand, a redundancy situation. However, he alleges that the principal reason for termination was concern over his poor health.

95. The disclosed internal communications from the first part of 2020 seem to me to demonstrate a concern for whether there was work for the Claimant to do which has little, on its face, to do with his poor health. Indeed, the Claimant's position is that precious little if any attention had been given to his health and the impact that his working conditions might have on him.

96. As the Claimant accepts, the issue of the stress of supervising at Colombo House was overtaken by the onset of the pandemic and BT's decision to reduce the work it wished the Respondent to do. He was moved to working on the tools including a move to Slough where he had an unhappy time working under Mr Foden. By July 2020 the plan appears to have been that when worked picked up he would move to work at Faraday House. That such a plan existed is difficult to reconcile with there being any intention to be rid of him.

97. By 5 August 2020 the Claimant does seem to have begun to be viewed as something of a problem beyond the question of what to do with him. There is reference in Mr Holpin's email of 5 August 2020 to him "sulking" and not "engaging" and to the possible need to take "further action". As the start of the project at Faraday House failed to materialise the lack of a real role for the Claimant (and the consequent concern about what he was costing) featured in Mr Petford's email to Mr Holpin on 18 August 2020.

98. I have concluded that the position materially changed as a result of the Claimant's discussion with Mr Clifford. Whether or not his email of 18 August 2020 accurately reflects what the Claimant said to him, he seems to have got the impression that the Claimant no longer wished to be a "site manager" as "he didn't want the stress due to his heart condition". He did not see an assignment to Faraday House as offering anything more than a temporary solution and that he would have a "difficult conversation" with the Claimant in which he would explain that it was "the tools or nothing" because anything else would run the risk of health and stress issues and that, if he could not be dumped (as it was put) elsewhere it might become a "nightmare." It is that same email that makes reference to "plan B".

99. Mr Holpin's response the same day is consistent with a view having been adopted that the Claimant is not going to be able to take up a role as building supervisor at Faraday House. He says his own feeling is that the Claimant should go back on the tools and he suggests that Mr Wells be sent to Faraday House. He is clearly concerned about the Claimant's health as he stresses the "thin line" between "could cope" and "actually coping". I think by that point there was no decision to dismiss the Claimant but he was now seen as effectively incapable of discharging the building supervisor role as a result of his health and the likely impact of stress.

100. The following month a programme of redundancies began. Against that background and in the light of the business's concerns about the Claimant's ability to resume his former role, Mr Hawkins had a conversation with the Claimant in which the he was advised that if voluntary

redundancy became available he should take it. Even at that point, on 6 October 2020, I am not satisfied that the Respondent had resolved to dismiss the Claimant.

101. By November, the Claimant was part of a redundancy selection exercise. One unusual aspect of this case is that given that the Respondent had genuine concerns about the capacity of the Claimant to deal with what was likely on the face of it to be much more demanding role (as it was meant one supervisor covering the work formerly done by two), there would be nothing wrong in their saying so. If an employer is forced to choose between two candidates for redundancy and one has, they believe, made it clear that his health condition meant he would struggle to cope, that would be, in my view, a matter that a reasonable employer would be entitled to take into account in reaching a decision. Yet, the Respondent's position has been that they did not do so; the decision was based solely on the selection criteria, objectively applied. In practice, this requires me to ask what was in the minds of the three men who performed the selection. It is more likely than not that Mr Holpin had the Claimant's health in mind. That follows from the views expressed in his email of 18 August 2020. I remind myself, however, that being satisfied that the Claimant's health was one reason for selection would not make it the principal reason for dismissal. As to Mr Levitt, he was copied into Mr Clifford's email of 18 August 2020 and to Mr Holpin's reply of the same date, so that he would have been aware of the concerns about the Claimant's health and of Mr Clifford's understanding that the Claimant did not feel able to be a building supervisor. There is no record of his expressing any view on the issue on the assumption that he read the emails at all. The position is harder in relation to Mr Taylor. The Claimant had certainly spoken to Mr Taylor about his illnesses and the impact that the stress of being building supervisor at Colombo House was having on him. However, as the Claimant suggested and as I have already found, it does not seem to have provoked any reaction at all from Mr Taylor. I have not felt able to find, therefore, that his illness was a reason, still less the principal reason for Mr Taylor's scores.

102. I find that the principal reason for dismissal was redundancy. Whilst I am sceptical as to the ability of at least Mr Holpin to have put entirely from his mind when scoring his understanding that the Claimant might not be able to cope with the stress associated with a building supervisor role, I do not feel the evidence has allowed me to take the necessary additional steps from a finding that health may have played a part in at least some of the scoring decisions to saying that health concerns were the principal reason for dismissal. The principal reason, I find, was redundancy.

(2) *Was the selection process a fair one?*

(a) *Was the Claimant denied a chance to improve through lack of warnings about performance?*

103. There are a number of different ways in which the Claimant puts his case. The first is that in so far as the scores relating to his performance were lower than they might have been, he should have had any deficiencies in his performance drawn specifically to his attention well before the selection exercise. That, he says, would have enabled him to improve his performance, increase his score and perhaps avoid dismissal. I do not consider that to be a sustainable argument. The problem with it becomes apparent when one asks what the Respondent should have done instead. Should the Claimant have been assessed on the assumption that a warning would have led to an improvement and, if so, by how much? Where Mr Wells's scores fall short of perfect, could he mount a similar argument? Should both men be given perfect scores to allow for what they might have been able to achieve? I do not consider that the Respondent had any realistic alternative but to assess on the basis of actual

rather than hypothetical performance. I also note that at least in relation to his performance whilst at Slough, Mr Foden's dissatisfaction was drawn to the Claimant's attention.

104. The Claimant also says that the information on which performance assessments were made was inadequate, because those assessing him were not in a position to judge his performance from their own direct knowledge. This is a matter I return to below.

(b) *Was the Claimant denied an opportunity properly to represent himself as a result of there being doubt over whether he could use his laptop to access the Respondent's redundancy policies/contact colleagues to accompany him to consultation meetings?*

105. When first furloughed in April 2020, the Claimant specifically enquired about the purposes for which he could use his work technology. He did not get an answer. However, letters sent during the redundancy process invited him to make contact if he had any questions. He did submit questions as part of the process but does not seem to have asked the specific question about use of his laptop until towards the end of the process, by which point he had been provided with a copy of the relevant policies. I am not persuaded that the Claimant was put to any real disadvantage and, in any event, he could have avoided any disadvantage by making an enquiry. The latter point applies equally to his complaint that he was unclear about how he could make arrangements to be accompanied at the redundancy consultation meeting. If he had concerns about who might be available given that a number of staff were furloughed, he could have asked specifically about the availability of his preferred colleagues. In any event, he confirmed repeatedly that he was happy to continue the meetings unaccompanied. I consider the Respondent was entitled to rely on that reassurance.

(c) *Was the scoring fair, objective, independent and reasonable?*

106. Two issues arise under this heading: who did the scoring and were the scores themselves fair.

107. As to the first question, the Claimant says that with the exception of Mr Taylor, those doing the scoring lacked sufficient direct knowledge of his work to allow them to score him without relying on information obtained from others. Whilst it is always preferable for a manager to have sufficient direct knowledge of those they are scoring, that is not always practicable and, as the EAT made clear in **Eaton** (above) a senior manager may rely on assessments of employees made by those with more direct knowledge of their work. For that reason, I do not consider that it was in any way unfair for those performing the scoring to rely on what Mr Foden had told them about the Claimant's time in Slough. However, the Respondent's position is that each of the three managers relied upon their own direct experience. The Claimant accepts Mr Taylor was in a position to do so. He denies that Mr Levitt was in a position to do so. However, he told Mr Neal during the appeal that Mr Levitt knew how he worked. Mr Levitt's evidence was to that same effect. As I observed above, his evidence was somewhat short on specifics and those matters that he could remember were disputed by the Claimant. Nevertheless and in particular in the light of the Claimant's concession during the appeal, I have not felt able to conclude that Mr Levitt lacked sufficient direct experience of the Claimant to be able meaningfully to score him. The case is different with Mr Holpin. Although he and the Claimant have been colleagues on two projects. He did not lay claim to experience which went much beyond seeing the Claimant in the office when he visited Colombo House. In 2020, he accepted he would only have seen him "on occasions". His lack of direct knowledge is evidenced by his having, the Respondent accepts, undermarked the Claimant on the tool box talks criterion simply from lack of knowledge of what the Claimant had done. I do not think a

reasonable employer would appoint someone with so little direct knowledge of the Claimant's role as a scorer. It might, of course, have been different had he not been purporting to use his own knowledge as the basis of his scoring, i.e. if he had been decision-maker but made sure that he obtained material from someone who actually did have the requisite direct knowledge to assist him. The problem here was his undertaking a task for which he was not properly equipped. The Respondent has made a point of emphasising that he did not consult with the two scorers who did have sufficient direct knowledge. He was careful, it seems, to maintain the bubble of his comparative lack of knowledge.

108. Turning to the scores themselves. I am mindful of the various warnings in authority not to re-score the candidates and do not, in any event, begin to have the evidence that would make that possible even if it were permissible. The Claimant raised a very limited number of specific complaints; for instance, the complaint about the tool box talks score. He also complained that he had been scored zero for SMSTS (Site Management Safety Training Scheme). I accept, however, that the Respondents were entitled to give him that score since the point was awarded for having current certification and the Claimant's had lapsed. None of the points raised by the Claimant would have had any material impact on the outcome even if made out. They would not render the dismissal unfair. That is not simply because they would have made no difference but because the complaints relate to matters which are not sufficiently significant to impact on the overall fairness of the redundancy exercise.

(c) *Was there fair and proper consultation?*

109. This ground is related to, but discrete from, the question of the principal reason for dismissal. Whilst I am not persuaded the whole process was a sham, it was, I find, a defective and unfair process. The first consultation meeting preceded the scoring process. The Claimant was only given the scoring matrix after the first meeting. His first opportunity consult about the criteria, therefore, was at the second consultation meeting. However, it is clear that a final selection decision had already been taken before that second consultation meeting. It was at the second consultation meeting on 17 November 2020 that Mr Wells was told he had been selected for the single available job. Further, it was only at the second meeting that the Claimant found out who had scored him. He was not given the rationale for his selection – that came only afterwards. That means that anything he had to say about who had done the scoring, how they had scored and whether the scores were fair was only heard once a decision had already been taken that he was redundant. All that remained for meaningful discussion was the possibility of alternative employment. The Claimant was not consulted meaningfully when the proposal was at a formative stage. He was not given the information that he needed at a point at which he could usefully respond to it. He did not, to paraphrase the EAT in **John Brown Engineering Ltd**, have the opportunity to contest selection. That is not an approach to consultation which is open to a reasonable employer, nor could it be described as "fair and proper".

(d) *Was there sufficient support offered to the Claimant before, during and after the Redundancy Process?*

110. The Claimant complains that there were a number of breaches of the duty of care owed to him. He has been less specific about quite what that means. He does not seem to have in mind the duty of care in the sense it is used in the tort of negligence. He is not bringing (and indeed could not bring in the Tribunal) a personal injury claim. The way it was put to the Respondent's witnesses was, in effect, that they knew he had health conditions and he had complained of

stress and that they should, at that point, have moved to provide him with support both generally and specifically in relation to the redundancy process.

111. The Claimant has not brought a complaint that there was a failure to make reasonable adjustments as a result of his being a disabled person for the purposes of the **Equality Act 2010**. The issue is raised solely within the scope of his unfair dismissal claim. As to the period before the redundancy exercise, I am prepared to accept that there was a period during which the fact his line manager was moving into another role meant that he was less supported than he might otherwise have been. I also accept that, when put on furlough he would have benefitted from more and clearer communication. However, neither of those things affect the fairness of the redundancy process. The former point appears to be closely related to the argument considered above about a lack of warning about alleged poor performance. It amounts to saying that with better management he would have been a better candidate for selection to remain. For the same reasons I gave earlier, I do not accept that argument. It was fair for the Respondent to score the two men as they found them at the point the decision was taken. The second point about poor communication around furlough arrangements is, at its highest, a repetition of the point that he was confused about redundancy policies and over how to make arrangements to be accompanied. That, again, is an argument that I have considered and rejected above.

112. The Claimant raises a broader point which is that he had told Mr Clifford that he was stressed and others (such as Mr Holpin, Hawkins and Mr Levitt) knew too because Mr Clifford discussed his conversation with the Claimant in emails. Ms Hanning asked the witnesses what they had done to provide support. Whilst there were many variations of the answer, they boiled down to accepting that they had not personally done anything specific. However, equally there was a lack of specific suggestions from the Claimant as to what it was he had expected should be done. There was also something of a tension in his arguments. On the one hand it was said he had pointed out that he was stressed and no help was forthcoming. On the other hand, he is concerned that the Respondent over-reacted to what he had said to Mr Clifford. When advancing the latter argument his point was that the stress arose from a single specific (and by the point of his termination, historic) source: having to supervise Colombo House on his own. Once the pandemic started, he no longer performed that role. He was moved to the tools. On his own evidence he could have performed the Faraday House role without an equivalently debilitating burden of stress. I do not consider, therefore, that there are substantial grounds for criticising the Respondent for under-reacting (as it were) to being told about his stress at Colombo House. In any event, I do not think that it affects the fairness of the dismissal. It would, it seems to me, again invoke a hypothetical in which one asks how he might have scored had he had more support in the period in the run up to the scoring. For the reasons already given above, it is not unfair to have scored the real Claimant rather than his better-performing hypothetical version.

113. As to support during the process, there is again a lack of specific suggestion about what more should have been done. I have found that the consultation was inadequate but that is not because I think any failure to support the Claimant caused him difficulty in participating. On the contrary, his written questions to the Respondent strongly suggest that he was well able to formulate and articulate his concerns.

114. Finally, it is said he should have had more support after the process, including with drafting his CV. Again, it is not clear what specific difficulty the stress that he had encountered whilst supervising Colombo House is said to have had on his ability to produce what Ms Hanning calls

an "effective CV". In any event, I do not consider that assistance with CV drafting is an essential requirement of a fair redundancy selection exercise and, insofar as the alleged failure to support him postdates the EDT, I do not see how it could be said to affect the fairness of the dismissal. I do not accept that there was any failure to assist the Claimant with identifying suitable alternative employment. He was provided with vacancy lists and was free to apply for any role he was attracted by. None of the available vacancies appealed to him.

(3) *Was the Appeal progressed in a fair, impartial and objective manner?*

115. I have set out in my findings of fact above certain criticisms of the appeal including that Mr Neal appears to have missed (and therefore not investigated) the Claimant's principal concern that his conversation with Mr Clifford led to his dismissal because of concerns over his health. I do not accept the other criticisms made of the appeal. Mr Neal was, in my view, independent and I do not consider the appeal was in any way pre-determined.

116. The failure to investigate the Claimant's principal concern is a factor which contributes to the unfairness of the dismissal. In the circumstances, I do not think it could be said that the appeal "cured" any earlier procedural unfairness given that it was itself defective.

(4) *Polkey – if the Respondent had acted fairly would the Claimant still have been dismissed?*

117. I have found that the dismissal was unfair in three respects:

(1) Mr Holpin should not have been a scorer;

(2) There was a failure to allow fair and proper consultation; and

(3) Mr Neal failed to investigate the Claimant's principal complaint on appeal.

Would the Claimant still have been dismissed if the Respondent had acted fairly?

118. As to the first ground of unfairness, I do not think that it would have made any difference to the outcome had Mr Holpin not scored the Claimant, because the other two scorers both, independently, favoured Mr Wells. Even if the only scorer had been Mr Taylor, the same result would have eventuated.

119. As to the third ground of unfairness, had Mr Neal properly understood and investigated the Claimant's principal complaint, I work on the assumption that he would have reached the same conclusion that I did, namely that the redundancy process was not a set up and the principal reason for dismissal was redundancy. Had he acted fairly, therefore, the Claimant would not have been reinstated.

120. The second ground is less clear. I think it extremely likely that a proper consultation which allowed the Claimant to contest his selection would have resulted in the same outcome. Mr Holpin would have had before him the scores produced by Mr Taylor and Mr Levitt, both of which would still have pointed to the same outcome. However, I cannot rule out the possibility that the Claimant might have persuaded him to look again. For instance, insofar as Mr Taylor and Mr Levitt had scored the Claimant poorly on performance he may have been able to demonstrate that the specific instances that they had had in mind were disputed on their facts (as they appear in fact to have been) and that might have led to a reconsideration. He might, for instance, have been able to put past praise and appraisals in front of Mr Holpin. This is, of necessity, speculative. The Respondent suggests that if there was any unfairness there is a 90% chance of the Claimant having been made redundant. That is to put it too high, but not

by much. On balance and doing the best I can with a necessarily counterfactual situation, I consider that there was an 85% chance that dismissal would have happened in any event. I think there is a 100% chance that it would have occurred on a later date than it did because, with proper consultation, the decision to dismiss could not have taken place until after he had had a chance to make his case having received the evidence he needed. In practice, that would have meant the final consultation meeting becoming the penultimate meeting with a further final meeting being fixed, I estimate, a week later.

(5) *Remedy*

121. The Claimant obtained employment which partially mitigated his loss. His weekly net pay with the Respondent was £619, which figure is agreed between the parties. The Claimant's Schedule of Loss has not sought to contend that his pay would have increased. His weekly pay in his new job was £458.63. I consider that given that he was in the new job for 42 weeks that it was a permanent position. The reason he resigned from it was unconnected with the fairness of his dismissal with the Respondent. That, I conclude, breaks the causal chain between the dismissal and the portion of his ongoing loss that was previously mitigated. It does not break the chain insofar as the balance of loss over his mitigation is concerned. I have to estimate by what point he should have been able to obtain fully mitigating employment. Taking into account his skills and experience, the present shortage of skilled employees and his age and poor health and accepting that there is necessarily a good deal of speculation involved I determine that with reasonable efforts he should have been in mitigating employment by today's date, 23 February 2023 which is a little over two years after his dismissal. The Claimant told me that he has not been in receipt of any recoupable benefits.

121. The Claimant is entitled to a finding that he was unfairly dismissed.

122. The Claimant has received a statutory redundancy payment. Since that is set off against his entitlement to a basic award, the value of that award in nil.

123. I award the Claimant £350 for loss of his statutory rights.

123. In light of the findings above, I consider that the Compensatory Award that the Claimant is entitled to:

(1) For the period 24 November 2020 to 1 December 2020: One week's net loss of earnings, which the parties agree is £619;

(2) For the period 2 December 2020 to 23 February 2021 (which is the period covered by the payment in lieu of 12 week's notice): Nil award

(3) For the period 24 February 2021 to 3 May 2021 (which is the period until the Claimant obtained mitigating employment): 9.7 weeks pay multiplied by 0.15 in order to take into account the Polkey finding: £900.65

(4) For the period 4 May 2021 to 22 February 2022 (when the Claimant was partially mitigating his loss): ((619-458.63) x 42) x 0.15 = £1010.33

(5) For the period 23 February 2022 until February 2023 (which is the date of judgment): ((619-458.63) x 52) x 0.15 = £1250.88

Producing a total of: **£3780.86**

124. The Claimant sought compensation for "ongoing impact to mental wellbeing". I have no power to make an award to compensate for personal injury in an unfair redundancy case.

Employment Judge Jones QC

23 February 2023