EMPLOYMENT TRIBUNALS

Claimant: Mrs R Khamar

Respondent: PIE Pharma Limited

Heard at: Watford (CVP) **On:30 & 31 March 2023**

Before: Employment Judge A.M.S. Green

Representation

Claimant: Ms J Khamar – the claimant's daughter
Respondent: Mrs V Doshi - HR and finance director of the respondent

RESERVED JUDGMENT

1. The claim for unfair dismissal is well-founded.

2. The respondent will pay the claimant a total of £2616.71 (subject to necessary deductions – tax and National Insurance). The claimant has received Jobs Seekers' Allowance. Consequently, the award is subject to recoupment. The amount of the prescribed element is £2116.71. The prescribed period is 28 February 2022 to 30 March 2023. The balance payable to the claimant is £500.

REASONS

Introduction

1. The claimant presented the claim of unfair dismissal against a different named respondent Mr Anuj Shah. Mr Shah is one of the directors of the respondent. It was common ground between the parties that the correct entity is the respondent and not Mr Shah. I have amended the name of the respondent by consent.

2. The claim form was presented to the Tribunal on 11 May 2022 following a period of early conciliation which started on 11 March 2022 and ended 21 April 2022. The claimant's employment ended on 9 May 2022.

3. The claimant claims that she was unfairly selected for redundancy. It is common ground between the parties that her position as a member of the labelling staff/warehouse team was redundant.

4. At the hearing, we worked from a digital bundle which was augmented by additional documents. Mrs Doshi adopted her witness statement and gave oral evidence. The claimant adopted her witness statement and gave oral evidence through an interpreter; the language was Gujarati. Both representatives provided written submissions. At the end of the hearing, there was insufficient time for me to give a judgment with oral reasons; I reserved judgment. I asked the representatives to send me a revised schedule of loss and a counter schedule of loss. They were asked to do this by close of business on 3 April 2023.

5. The claimant must establish her claim on a balance of probabilities. In reaching my decision, I have carefully considered the oral and documentary evidence and the written representations. The fact that I have not referred to every document produced in the hearing bundle (as updated) should not be taken to mean that I have not considered it.

The issues

6. These are the issues that the Tribunal must determine. What was the reason or principal reason for dismissal? The respondent says the reason was redundancy. If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will usually decide, in particular, whether:

    a. The respondent adequately warned and consulted the claimant;

    b. The respondent adopted a reasonable selection decision, including its approach to a selection pool;

    c. The respondent took reasonable steps to find the claimant suitable alternative employment;

    d. Dismissal was within the range of reasonable responses.

Findings of fact

7. The respondent is a company that engages in the parallel importation of medicines from Europe. This includes repackaging of medicines. The respondent is licensed by the Medicines Products Regulatory Agency. The licenses stipulate how each product is to be packed or repacked prior to sale in the United Kingdom. The respondent is a member of a group of companies carrying out this business. The other group companies are Servipharm Limited and Drugsrus Limited. The respondent is a small family run business.

8. The following people associated with the respondent for the purposes of this claim are as follows:

    a. Mr Anuj Shah. Mr Shah is one of the respondent's directors and is responsible for the company's direction and strategy. He was also

responsible for initiating the redundancies that were made at the respondent.

b. Ms Vishali Doshi. Ms Doshi is also a director. She is a chartered accountant and joined Drugsrus in April 2021 as part of the management team. Her primary role is finance manager. For the purposes of this case, she was responsible for the redundancy process. Prior to joining the business, she worked in financial services from 2007 to 2021. She has covered various areas within corporate finance including payroll, and regulatory functions. The respondent does not have an HR department. Ms Doshi fulfilled this function.

c. Ms Sita Bhundia. Ms Bhundia is a qualified pharmacist. She is the respondent's quality assurance manager and is part of the management team. She was involved with the redundancy process.

d. Ms Shweta Shah is a member of the management team. Her primary function is as the manager for the production staff. She was also involved in the redundancy process.

e. Supervisors 1 & 2 who worked were members of the production staff and who were consulted by management in the redundancy process. They did not wish to be named in this case.

9. The respondent employs production staff. They work on re-labeling and repackaging products which are primarily medicines. They check and complete all the associated paperwork for the production process. They are also responsible for maintaining the production work environment. The entire production function follows a structure set out across multiple standard operating procedures. All staff in this function receive training on joining the business and training updates, as required. They undergo on-the-job training. Under cross examination, Ms Doshi admitted that the respondent does not operate a formal appraisal scheme. She said this was because it is a small business, and the respondent had no capacity to perform appraisals.

10. The claimant started working for the respondent on 5 June 2000. A copy of her contract of employment was produced to the Tribunal [173]. Her job title was Labelling Staff/Warehouse Team. The job description states that she was involved in packaging and relabeling products and completing all necessary paperwork in the production process. She was also responsible for checking incoming goods into the warehouse and completing the relevant paperwork. The warehousing team was also responsible for ensuring that completed jobs and unlabeled goods, when necessary, were sent to the downstairs warehouse ready for dispatch. The claimant's place of work was at the respondent's premises in Harrow.

11. The respondent's business was adversely impacted by Brexit and declining supply changes. Several changes were implemented in the business to reduce costs prior to the redundancy exercise. These were as follows:

a. Prior to 29 May 2020 packing staff were asked not to come in on several days;

b. 29 May 2020 - all packing staff advised that the respondent had decided to close on Saturdays until further notice;

c. 29 May 2020- all packing staff advised that hours to be reduced to 9-5pm until further notice;

d. 4 February 2021 - all packing staff advised hours to be reduced to 9-4pm until further notice;

e. 14 April 2021 - all packing staff hours reduced to 11 - 4pm until further notice;

f. 18 April 2021 - all packing staff asked to increase hours again to 9-4pm;

g. 8 July 2021 - all packing staff asked to come to work 2 hours later than normal (finish time to stay the same);

h. 11 October 2021 - all staff asked to come to work 2 hours later than normal (finish time to stay the same);

i. 13 & 14 October 2021 - all packing staff advised that they should not come to work for 2 days;

j. 15 October 2021 - packing staff asked to come in again;

k. 29 November 2021 -all packing staff advised that they should not come to work on this day.

12. In October 2021, the respondent decided to make redundancies which affected 15 repacking employees. In the grounds of resistance, the respondent explains the selection criteria. It states:

> *All repacking staff were assessed on the following criteria: attendance and uninformed absences; performance including understanding, aptitude and efficiency; and experience/ability on the job. A higher weighting was given to understanding, because, due to the significant regulatory constraints of the industry and the criticality of dealing with medicinal products for human consumption, inaccuracies can be very costly to the business. Authorised absences, sickness absence and Covid/lockdown related absence were not taken into account.*
>
> *…*
>
> *The Respondent scored by using "xx" to indicate a low score against each criterion, and using 'x' to indicate an intermediate score. The Claimant was one of six employees across the group companies who scored 'xx' overall. There were a further twelve employees across the group companies who scored 'x ' .*

13. The respondent has produced a spreadsheet which shows the selection exercise, the criteria adopted and the marks awarded to the employees, including the claimant [91].The following criteria were used:

a. Understanding, aptitude.

b. Attendance.

c. Disciplinary/mistakes.

d. Performance/productivity.

These criteria do not tally with what the respondent has said in the grounds of resistance that we used nor what was communicated to the claimant (see below).

14. Under cross examination, Ms Doshi admitted that this scoring exercise was completed by management in December 2021. Nine employees, including the claimant, were identified. She further admitted that the claimant and the other employees at risk of redundancy were not consulted about the selection criteria used. Furthermore, the claimant told the Tribunal that the first time that saw the documented evidence of the selection criteria was when she received the hearing bundle [97]. She had not seen her scores before then.

15. On 14 February 2022, Ms Shah wrote to the claimant. A copy of the letter was produced to the Tribunal [79]. It said, amongst other things:

> ***Re: Redundancy***
>
> *Regrettably, we are writing to confirm our discussions on 14 February 2022, where by we are issuing you with notice to terminate your employment.*
>
> *As you know we buy medicines from Europe and repack them for the UK market. The market position is such that there is not sufficient work and as a result, we need to make significant adjustments in the company which will affect our employees. The number of staff required to do repacking work will regrettably have to be reduced. Unfortunately, this means that your position will be made redundant.*
>
> *Whilst we have considered all available alternative options, we have been unable to identify suitable alternative vacancy to offer you and it is not been possible to avoid instituting redundancies. As I explained, you have been selected for redundancy by reason of level of performance, attendance and/or experience. The selection criteria, which we have adopted have been fully explained to you.*
>
> *If you have a complaint or query about your selection or the methods and criteria used or wish to appeal against your selection, you may do so by writing to Shweta Shah within 14 days, setting out your reasons. The organisation's grievance procedure will be implemented and your complaint/appeal will be considered, you will be advised in writing of the organisation's decision.*
>
> *I confirm that your employment with the organisation will terminate by reason of redundancy on 28th of February 2022 (the termination date). We will require you to work until the termination date.*

The letter then set out the payments that the claimant would receive on termination of employment. It is noteworthy that the criteria referred to in this letter do not correspond identified in the spreadsheet which was used to score the claimant and her colleagues [91]. No reference is made to disciplinary/mistakes. No reference is made to productivity. No reference is made to understanding. The letter refers to experience which was not one of the criteria identified in the spreadsheet. This letter is a fait accompli because it clearly serves notice of termination of employment. The effective date of termination would be 28 February 2022. This is not a letter that simply warns the claimant that she was at risk of redundancy, triggering a consultation process which could yield a different outcome thereby saving the claimant's job.

16. In her witness statement, the claimant says that she was deeply shocked and distressed by the news that she was to be dismissed. She says that the decision was made before she met with management on 14 February 2022. I have no reason to doubt what she is saying particularly given Ms Doshi's admission that the decision had been made in December 2021 without consulting any of the affected employees or inviting them to provide their input on the selection criteria to be used in identifying who would be dismissed coupled with the language of the letter.

17. On 15 February 2022, the claimant discovered that the respondent had made an error in calculating her redundancy payment and she spoke to Ms Bhundia and Ms Doshi about this. She questioned the selection criteria that had been used. In her statement she says that she had never been subjected to disciplinary action in the 22 years of her service. She says that she was told by Ms Bhundia that her attendance and experience were not the reason for her selection, and she speculated that it must have been because of her performance. Later in the day Ms Shah and Ms Doshi met the claimant, and she asked them the same questions that she had put to Ms Bhundia. When she challenged them on performance being used as a criterion, this was denied. When Ms Shah was probed further about the reason for the dismissal, she is alleged to have said "someone had to be let go". There are several ways to interpret this. For example, it suggests an arbitrary approach to selecting a candidate for dismissal. It also suggests and states the obvious that, in a redundancy situation, an employee or employees will have to be dismissed if there is a reduced requirement for the type of work that they perform. I am willing to give the benefit of the doubt as to what Ms Shah meant when she spoke those words and I prefer the latter interpretation. There is no disagreement between the parties that there was a redundancy situation which meant that "someone had to go". What is in issue in this case is the procedure that was followed in identifying who would be dismissed.

18. On 21 February 2022 the claimant attended a meeting with other colleagues to discuss the redundancy payment calculation. The outcome of this was that Management assured them that this would be corrected.

19. The claimant appealed the decision to dismiss her setting out her reasons for doing so in a letter dated 25 February 2022 [95]. She listed the reasons why she felt she should not be dismissed against the criteria that had been identified in the respondent's letter dated 14 February 2022.

20. On 28 February 2022, Mr Shah responded to the claimant. The letter was produced to the Tribunal [97]. Mr Shah said the following, amongst other things:

> *…*
>
> *We agree that your level of performance and attendance has been satisfactory, however, it has been observed that your ability to grasp new concepts may be lacking compared to other members of staff, and it would serve the company's productivity and longevity to retain the staff not selected for redundancy.*
>
> *I confirm that the company is not looking to fill positions in any other departments where you could be qualified and is in fact reducing positions in other departments too.*
>
> *…*
>
> *As the company is making fewer than 20 redundancies there is no requirement to follow the collective consultation rules. We have already had the following consultations with you:*
>
> *14 February 2022-a meeting was held with the staff affected by the redundancies to explain the redundancy process, where you were all invited to request a one-one-one meeting if you required it.*
>
> *15 February 2022 – a one to one meeting with Sita Bhundia and Vishali Doshi, where you explained that you had taken 6-weeks agreed holiday during the period of calculation, which we have now allowed for in your redundancy calculation. You also requested that we re-consider our decision regarding your redundancy. We informed you that we would re-visit the calculation process. You had also discussed the matter with Shweta Shah.*
>
> *21 February 2022-a meeting with the staff affected by the redundancies to explain that their calculation will be re-done to allow for leave taken during the period used for the calculations that those being made redundant would not be disadvantaged in the process.*
>
> *…*

21. On 7 March 2023, the claimant replied to Mr Shah. A copy of her letter was produced to the Tribunal [101]. She stated, amongst other things:

> *…*
>
> *I agree that the company making fewer than 20 employees redundant would remove the requirement to follow the collective consultation rules. However, the company still has an obligation to hold* ***genuine*** *and* ***meaningful*** *one-to-one consultation with every employee that is being made redundant.*
>
> *A meaningful consultation process would mean more than simply informing an employee of a decision already made. There would have to be a two-way dialogue where the employee has an opportunity to*

consider the proposal and offer suggestions to avoid the redundancy if at all possible; for example, job sharing, a reduction in working hours or simply some unpaid time off.

Here is my summary of the meetings that we have had so far:

*14 February 2022 - a meeting was called by Sita Bhundia, Vishali Doshi to collectively inform nine employees that they were being made redundant. Mrs Sweta Shah was also present. The redundancy notices were already prepared by the company **prior** to this meeting and handed to each of the employees present.*

15 February 2022-I had a meeting with Sita and Vishali to inform them of the error in my redundancy payment calculation. When I enquired the reason for redundancy, I was told by them that it was performance-based.

*In a separate discussion on the same day with Sweta, I sought further clarification on where my performance had fallen short. She informed me that the decision was **not** performance-based, contrary to my meeting with Sita and Vishali.*

21 February 2022-this meeting was merely to discuss re-calculation of redundancy payments since the initial calculations were processed incorrectly by the company.

By law, as an employee who has been with the organisation for longer than two years, I should have been consulted at least once to discuss the selection process and explore suitable alternatives. None of the aforementioned meetings satisfy this requirement.

With regards to the selection criteria, you stated in your letter that my ability to grasp new concepts may be lacking compared to other staff members. Please note, there have been no fundamental changes to my role in the last two years. As such, there have been no new concepts to grasp. Furthermore, since the introduction of a new device two years ago, I have fully understood the technology and have helped colleagues correct their errors on many occasions.

Whilst some of my colleagues have received verbal and written warnings over their inadequate performance, I have never received any such notices from the management team in relation to my work. I note that these colleagues continue to remain a part of the company and have not been selected for redundancy.

I strongly feel that the selection criteria should have been a vital part of a consultation that I never received. With my tenure of 22 years at the company, the very least I would have expected was a fair selection process when making someone with my experience and competence redundant.

22. Mr Shah replied to the claimant in a letter dated 8 March 2022 [103]. He said, amongst other things:

a) *The company has carried out the redundancy process in accordance with the legal requirements. The legal requirements for the process were provided to you in my last letter*

b) *The decisions made by management have been taken with the aim to maximise the company's future productivity.*

The company considers that the meetings held, the responses to any queries raised verbally or in writing all form part of the consultation process. The reasons for redundancy have been explained. The company has already debated alternative options such as a reduction in working hours and does not consider those suitable. Other suggested arrangements are also not suitable for the company. Following this process, and after considering all your queries and concerns, the company has adjusted the calculation for the redundancy payment and has decided not to change the decision.

23. In her oral evidence, the claimant confirmed that at no point after 14 February 2022 was there any discussion with her about alternatives to making her position redundant. No alternative jobs were advertised within the respondent's organisation. She said that she and the other eight colleagues had asked for reduced hours. I have no reason to doubt her.

24. The respondent dismissed 18 employees for redundancy across the group.

25. The claimant was given 12 weeks' notice of termination of employment. She was required to work two of those weeks and was given payment in lieu of notice for the remaining 10 weeks. Her effective date of termination of employment ("EDT") was 28 February 2022. The payment in lieu of notice covered the period thereafter until 9 May 2022. The claimant got another job which started on 8 August 2022. In the interim period of 90 days, she was unemployed and was in receipt of Job Seekers' Allowance.

Applicable law

26. A redundancy dismissal may be unreasonable (and therefore unfair) under the general unfair dismissal provisions contained in the Employment Rights Act 1996, section 98(4) (ERA). This states that:

the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) — (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case.

27. A dismissed employee may complain, for example, that he or she was unfairly selected for redundancy; that it was unreasonable for the employer to have dismissed him or her for redundancy where alternative work was available; or that the employer's redundancy procedure was defective, perhaps owing to a failure to consult.

28. In **Williams and ors v Compair Maxam Ltd 1982 ICR 156, EAT**, the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. It stressed, however, that in determining the question of reasonableness it was not for the employment tribunal to impose its standards and decide whether the employer should have behaved differently. Instead it had to ask whether 'the dismissal lay within the range of conduct which a reasonable employer could have adopted'. (In this respect, redundancy dismissals are no different from dismissals for any of the other potentially fair reasons in the ERA.

29. The factors suggested by the EAT in the **Compair Maxam** case that a reasonable employer might be expected to consider were:

    a. whether the selection criteria were objectively chosen and fairly applied;

    b. whether employees were warned and consulted about the redundancy;

    c. whether, if there was a union, the union's view was sought; and

    d. whether any alternative work was available.

30. The House of Lords' ruling in **Polkey v AE Dayton Services Ltd 1988 ICR 142, HL**, substantially changed the law of unfair dismissal, its main impact being to firmly establish procedural fairness as an integral part of the reasonableness test now found in section 98(4) ERA. Their Lordships decided that a failure to follow correct procedures was likely to make an ensuing dismissal unfair unless, in exceptional cases, the employer could reasonably have concluded that doing so would have been 'utterly useless' or 'futile'. With regard to redundancy dismissals, this meant, in the words of Lord Bridge, that:

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

31. An employer cannot avoid a finding of unfair dismissal simply by arguing that 'although our procedure was defective, we would have dismissed him/her anyway'. Rather, a procedural failure renders a redundancy dismissal unfair under S.98(4), and the question of whether the employee would have been dismissed even if a fair procedure had been followed will be relevant only to the amount of compensation payable.

32. In carrying out a redundancy exercise, an employer should begin by identifying the group of employees from which those who are to be made redundant will be drawn. This is the 'pool for selection' and it is to these employees that an employer will apply the chosen selection criteria to determine who will be made redundant. In assessing the fairness of dismissals, tribunals will first look to the pool from which the selection was made, since the application of otherwise fair selection criteria to the wrong group of employees is likely to result in an unfair dismissal.

33. If the selection pool is reasonable, the tribunal will then consider the selection criteria applied by the employer to employees in the pool.

34. It may well be unfair to score employees on a range of pre-advised selection criteria and then take into account additional factors of which the employees are unaware in deciding who to select for redundancy.

35. It is also important to ensure that criteria are not unduly vague or ambiguous. In **Odhams-Sun Printers Ltd v Hampton and ors EAT 776/86** the employer's criterion was 'last in, first out' (LIFO), subject to the retention of a 'balance of skills' in each department. The EAT agreed with the employment tribunal that this was vague and imprecise and therefore flawed. Similarly, selection on the basis of a nebulous criterion — such as 'attitude to the work' — will usually be unreasonable. However, in **Graham v ABF Ltd 1986 IRLR 90, EAT**, the employer's criteria of 'quality of work, efficiency in carrying it out and the attitude of the persons evaluated to their work' narrowly passed the reasonableness test. G was selected for redundancy largely because of his attitude to the work allocated him — including obscene language and hostility — which had been the subject of complaint by colleagues and his manager. Although the EAT thought 'attitude to work' was 'dangerously ambiguous', it upheld the employment tribunal's finding that it was reasonable on the facts.

36. In order to ensure fairness, the selection criteria must be objective; not merely reflecting the personal opinion of the selector but being verifiable by reference to data such as records of attendance, efficiency, and length of service.

37. In **Swinburne and Jackson LLP v Simpson EAT 0551/12** the EAT rejected the employer's submission that the EAT's comments in Tattersall on the validity of criteria that are 'matters of judgement' had changed the law in this area by removing or reducing the requirement for objectivity. The EAT stated that 'in an ideal world all criteria adopted by an employer in a redundancy context would be expressed in a way capable of objective assessment and verification. But our law recognises that in the real-world employers making tough decisions sometimes need to deploy criteria which call for the application of personal judgement and a degree of subjectivity. It is well settled law that an employment tribunal reviewing such criteria does not go wrong so long as it recognises that fact in its determination of fairness.'

38. Provided an employer's selection criteria are objective, a tribunal should not subject them or their application to over-minute scrutiny — **British Aerospace plc v Green and ors 1995 ICR 1006, CA**. Essentially, the task is for the tribunal to satisfy itself that the method of selection was not inherently unfair and that it was applied in the particular case in a reasonable fashion. Thus, employers are given a wide discretion in their choice of selection criteria and the manner in which they apply them, and tribunals will only be entitled to interfere in those cases which fall at the extreme edges of the reasonableness band.

39. It is very common for employers to select employees for redundancy on the basis of their performance at work. The potential stumbling block relates to how that performance is measured. For example, an organisation that sets employees targets and regularly reviews staff performance against those targets should have to hand objective and verifiable documentation on which to rank employees' performance. However, an employer that does not regularly monitor performance, and instead relies on the subjective opinion of the employee's manager at the time redundancy is considered, will be leaving itself open to the allegation that the criterion is either not objective or is not being applied in a fair manner.

40. Employers are naturally inclined to take into account matters such as an employee's disciplinary record when selecting for redundancy. Provided the record is objective and similar offences are given the same weight, the use of such a criterion is likely to be fair.

41. It is generally unwise to make attendance the sole criterion for redundancy selection. But where it is used as a criterion, there are conflicting authorities as to whether employers are required to look into the reasons behind employees' absences. In **Paine and Moore v Grundy (Teddington) Ltd 1981 IRLR 267, EAT,** the EAT found a dismissal unfair because of the employer's failure to investigate the reasons for an employee's absence. In **Dooley v Leyland Vehicles Ltd 1986 SC 272, Ct Sess (Inner House),** on the other hand, the Court of Session held that it was reasonable for employers to ignore the reasons behind absences because it was often impracticable for employers to discover them.

42. Dismissals are more likely to be unfair for lack of individual rather than collective consultation. The importance of following proper procedures was made resoundingly clear by the House of Lords in **Polkey**. The only escape available to an employer was where it could reasonably have concluded that a proper procedure would be 'utterly useless' or 'futile'. Whether or not this was the case was for the employment tribunal to answer in the light of the circumstances known to the employer at the time of the dismissal. In **Polkey**, Lord Bridge expressed the view that such cases would be 'exceptional'. In practice, such 'exceptional' cases have generally (but not always) been those where, for various reasons, the employer has been bound to operate under some measure of secrecy.

43. If individual consultation is generally expected of an employer, the inevitable question arises: consultation about what? To some extent, the subject matter will depend upon the specific circumstances, but best practice suggests that it should normally include:

    a. an indication (i.e. warning) that the individual has been provisionally selected for redundancy;

    b. confirmation of the basis for selection;

    c. an opportunity for the employee to comment on his or her redundancy selection assessment;

    d. consideration as to what, if any, alternative positions of employment may exist, and

    e. an opportunity for the employee to address any other matters he or she may wish to raise.

44. The purpose of consultation is not only to allow consideration of alternative employment or to see if there is any other way that redundancies can be avoided, but it also helps employees to protect themselves against the consequences of being made redundant.

45. While the question of what constitutes fair and proper consultation in each individual case is a question of fact for the tribunal, the EAT provided some general guidance in **Rowell v Hubbard Group Services Ltd 1995 IRLR 195, EAT**. In that case, R was warned in a memorandum from her employer that redundancies would have to be made and it set out the selection criteria to be used. She then received a letter informing her that she had been selected and offering her the opportunity 'to discuss any matters arising from [the] letter'. When R claimed unfair dismissal, the employment tribunal held that the invitation to discuss the contents of the letter provided sufficient opportunity for consultation. On appeal, however, the EAT said that the letter could not be read as anything approaching consultation. In the EAT's view, there was no real consultation with R, nor any invitation to consult at any stage in the process. Since this was contrary to the procedural requirements laid down in **Polkey**, it overturned the tribunal's decision and held that R's dismissal was unfair. The EAT referred to the comments in **R v British Coal Corporation, ex parte Price (No.3) 1994 IRLR 72, Div Ct** including the comment on consultation:

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

46. The Court of Session in **King and ors v Eaton Ltd 1996 IRLR 199, Ct Sess (Inner House)**, similarly adopted Glidewell LJ's definition. It was also quoted with approval by the EAT in **John Brown Engineering Ltd v Brown and ors 1997 IRLR 90, EAT**. In that case, the EAT stated that what is required in each case is a fair process which gives each individual employee the opportunity to contest his or her selection, either directly or through consultation with employee representatives. It suggested that this involved allowing employees selected for redundancy to see the details of their individual redundancy selection assessments.

47. Choosing, without prior consultation, selection criteria that immediately determined which employee was to be dismissed rendered a redundancy dismissal unfair in **Mogane v Bradford Teaching Hospitals NHS Foundation Trust and anor 2022 EAT 139**. M, who worked for the Trust on a series of fixed-term contracts, was invited to a meeting and told that the Trust faced financial difficulties. Shortly after, the Trust decided that M should be made redundant as her contract was due to be renewed soonest. The remainder of the redundancy process related to an attempt to find alternative employment for M but, when that was unsuccessful, her contract was terminated. The EAT overturned the decision of an employment tribunal that M's dismissal was fair. For consultation to be genuine and meaningful, a fair procedure requires it to take place at a stage when an employee can still potentially influence the outcome. Where the choice of criteria adopted to select individuals for redundancy has the practical result that the selection is made by that decision itself, consultation should take place prior to that decision being made. It is not within the band of reasonable responses for the purposes of S.98(4) ERA, in the absence of consultation, to adopt one criterion which simultaneously decides the pool of employees and which employee is to be dismissed. The implied term of trust and confidence requires that employers do not act arbitrarily towards employees in the methods of selection for redundancy. In this case, the Trust's decision to dismiss the employee whose contract was up for renewal immediately identified M as a pool of one and as the person to be

dismissed, before any level of consultation took place with her. In the absence of any explanation as to why it was reasonable to make that decision without consultation, M's dismissal was unfair.

Discussion and conclusions

48. In my opinion the respondent did not act reasonably in all the circumstances in treating redundancy as a sufficient reason to dismiss the claimant for the following reasons:

    a. The respondent did not adequately warn and failed to consult the claimant. The decision to dismiss the claimant was made in December 2021. In their written submissions, the respondent suggested that they informed the claimant that she was at risk of redundancy when they wrote to her on 14 February 2022. The evidence does not support that. When the respondent met with the claimant on 14 February 2022 and wrote to her on the same day, the claimant was presented with a fait accompli rather than being told that she was at risk of redundancy. The claimant and her colleagues were simply told that their positions were redundant, that they were being dismissed and the amount of money they would receive on termination of employment and how that had been calculated. That was just information. It was not consultation.

    b. The respondent adopted an unreasonable selection decision, including its approach to the selection pool. Whilst I accept that the selection pool reasonably identified that people working on labelling and in the warehouse were at risk and that the numbers needed to be reduced, the selection criteria they used were not objective. This was fatal to the selection process. The criteria were not based on appraisals for the simple reason that the respondent did not conduct appraisals. The respondent used criteria such as "understanding", "aptitude" and "performance" which are nebulous and heavily dependent upon the subjective opinion of the person(s) undertaking the scoring exercise. Criteria such as "performance" and "productivity" can only be meaningfully deployed if they have an objective basis such as the outcome of an appraisal where the individual employee is required to meet certain competences and is scored accordingly (e.g. from 1 to 5, where 1 is the lowest score and 5 the highest score) and/or targets (e.g. producing X number of labels in Y time). Furthermore, the claimant and her colleagues were not consulted about the selection criteria in advance. They were simply presented with the outcome of the selection process. Matters were made worse by the fact that the letter notifying the claimant of the outcome of the selection exercise failed to identify all of the criteria that were used by management when they selected her for redundancy in December 2021. It is also troubling that the claimant was not given her selection scores until they were included in the hearing bundle for this case. I cannot see how she could meaningfully challenge the decision if she did not have her scores available to her back in February 2022. Consultation requires dialogue and discussion to be meaningful and genuine. This selection exercise lacked that with the limited exception of discussing the redundancy calculation. The exercise was predominantly one of imparting information about a

decision that had already been made concerning the claimant's future and which would not be reversed.

c. The respondent did not take reasonable steps to find the claimant suitable alternative employment. There was simply no discussion about this. No vacancies were advertised, and her opinion was not asked for about how she might avoid being dismissed. She says that reduced hours were suggested but this appears to have fallen upon stony ground.

d. Given these deficiencies, it follows that dismissal was not within the range of reasonable responses.

The claim for unfair dismissal is well-founded.

REMEDY

49. Where a Tribunal has found a dismissal to be unfair the remedies available are reinstatement, re-engagement, and compensation (ERA, sections112 to 126). The claimant has indicated that she wants compensation. She has prepared a schedule of loss and the respondent has responded with a counter schedule of loss.

50. The award of compensation is under ERA sections 118 and 126 and consists of a basic award and compensatory award. The basic award is calculated on the basis of (capped) gross weekly pay and the number of years' continuous service (the longer the service the higher the award). The claimant has already received a statutory redundancy payment which is calculated in the same way as the basic award. She will not, therefore, be given a basic award by the Tribunal as she has already been compensated.

51. The compensatory award compensates the claimant for the financial losses suffered as a result of the dismissal and is based on actual net weekly pay. Except where the dismissal is for one of a limited number of protected reasons, the compensatory award is capped at the lesser of one year's gross pay and is currently £93,878. Awards of compensation for unfair dismissal may be adjusted for failure to comply with a relevant code of practice.

52. ERA 1996, section 123 provides that the compensatory award shall be:

> *…such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer.*

53. Compensation for unfair dismissal should be awarded to 'compensate and compensate fully, but not to award a bonus' according to Sir John Donaldson in **Norton Tool Co Ltd v Tewson [1973] All ER 183**. The object of the compensatory award is to compensate the employee for their financial losses as if they had not been unfairly dismissed; it is not designed to punish the employer for their wrongdoing.

54. The calculation falls under two headings:

a. Immediate loss of earnings

This is the loss suffered between the EDT to the date of the remedies hearing.

Loss of earnings will be calculated on the basis of net take home pay (that is, after deduction of tax and national insurance). The compensatory award can take into account any pay increase which would have been awarded in the previous employment up to the date of the hearing, including a back-dated pay rise. Conversely, if the claimant would probably have been paid less than their net earnings at the EDT in this period if they had not been dismissed (for example because of the financial constraints on the respondent at the time), the amount of loss of earnings can be correspondingly reduced. The employer's liability will normally cease before the date of the remedies hearing if the employee has (or ought to have) got a new permanent job paying at least as much as the old job as there will no longer be a loss arising from the dismissal. For claims relating solely to unfair dismissal the period of immediate loss is the number of weeks between the EDT and the remedies hearing, or the date of a new equivalent job, or the date by which the claimant should have found a new job, whichever is the soonest.

b. Future loss of earnings

An employee may have on-going future losses if by the date of the remedies hearing they have not secured a new job or have obtained a job but with salary and benefits that are less valuable than their previous employment.

55. In this case, the claimant secured a new job which she started on 8 August 2022. It is a better paid job. Consequently, the compensatory award that she will receive is limited to her immediate loss of earnings. The claimant's EDT was 28 February 2022. She received payment in lieu of notice for the period 1 February 2022 until 9 May 2022. Consequently her period of loss is 10 May 2022 until 7 August 2022. This is 90 days.

56. The claimant's losses will be calculated on a basis net of tax and NIC. There is no limit on a week's pay; the award is based on the actual net value of pay and benefits. The parties have not provided me with details of net earnings. I cannot meaningfully calculate net earnings. The figure for loss of earnings is gross and will required statutory deductions to be applied prior to payment.

57. Deductions are also made to the compensatory award, where appropriate. In this case, the following are relevant and need to be considered:

a. Any ex-gratia payments made or early payment of compensation.

b. Enhanced redundancy.

c. Payment in lieu of notice.

d. Recoupment of certain state benefits paid to the claimant.

e. A 'Polkey' deduction is the phrase used in unfair dismissal cases to describe the reduction in any award for future loss to reflect the chance that the individual would have been dismissed fairly in any event. This may take the form of a percentage reduction, or it may take the form of a tribunal making a finding that the individual would have been dismissed fairly after a further period of employment (for example a period in which a fair procedure would have been completed). Alternatively, a combination of the two approaches could be used, but not in the same period of loss (as confirmed in **Zebrowski v Concentric Birmingham Ltd UKEAT/0245/16/DA**). The question for the Tribunal is whether the particular employer (as opposed to a hypothetical reasonable employer) would have dismissed the claimant in any event had the unfairness not occurred. The tribunal must assess any Polkey deduction in two respects:

i. If a fair process had occurred, would it have affected when the claimant would have been dismissed? and

ii. What is the percentage chance that a fair process would still have resulted in the claimant's dismissal?

58. The claimant was paid an hourly rate of £8.91. This was the National Minimum Wage up to 1 April 2022. The parties disagree about what the claimant's weekly pay was. It was variable. The respondent says that the claimant was employed on a flexible basis and paid at the end of the month based on the number of hours that she had worked during the month. The respondent has produced a spreadsheet setting out its calculations. It says that the claimant's average working hours over 12 weeks (adjusted for approved holiday) was 16.64 hours. This was calculated on the basis of hours worked between 1 November 2021 and 31 January 2022. On this basis, the claimant's average weekly pay over 12 weeks (adjusted for an approved holiday) was £148.26.

59. The claimant says that she worked reduced hours from 9 AM to 4 PM with a half-hour lunch break. She says that the hours that she worked daily were 6.5 or 32.20 hours per week. Her November 2021 payslip was produced and shows that as of 4 December 2021 and is the closest representation of the claimant's working hours before she was dismissed. However due to accumulated holidays taken from mid December 2021 to January 2022, the initial average of 16.64 hours used by the respondent to calculate her basic pay did not reflect her usual working average. Consequently, this is why the claimant refers to her payslip accurate representation.

60. This leads to the question "what is a week's pay?". In essence, a week's pay is the gross contractual remuneration an employee is entitled to be paid when working their normal hours each week. Difficulties emerge in the calculation where an individual typically receives pay in addition to their contractual salary (such as voluntary overtime), or where they do not have normal working hours each week, such as when working irregular shift patterns.

61. An employee's normal working hours will often be identified in their written particulars (ERA, section221(1)) or other contractual documentation. Failing this, it may be clear from the hours actually worked. Matters are complicated where a contract specifies a minimum number of hours to be worked each week and also provides for an increased overtime wage to be paid beyond a certain number of hours. By section 234, in that situation the normal working hours will be the minimum number of hours specified, even if overtime is paid for a smaller number of hours, and even if the minimum number of hours can be reduced in certain circumstances.

62. Clause 6 of the claimant's contract of employment [173] provides that her working hours were flexible. The contract says that the respondent will determine the maximum as that can be worked and the claimant can decide whether she wishes to work during those hours. Salary is paid monthly and is based on the number of hours the claimant has worked. The contract also provides that her hours may be reduced at short notice if the business' needs change. The claimant was required to take a minimum of 30 minutes' break if working more than 6 hours in any one day and could take additional breaks, if required.

63. Given what is stipulated in the claimant's contract of employment and what actually in fact happened, a week's pay is calculated by reference to average weekly remuneration over a 12 week period (ERA, section 224). The 12-week period is based on the complete weeks worked (ERA, sections 221 (3) & (4) and 235 (1). Any week in which the individual was not working or was not paid remuneration will not count, and an earlier week will be brought in to make up the 12 weeks (ERA, section 223 (2) and

224 (3).

64. I prefer the respondent's calculation of average weekly pay and average weekly hours to the claimant's calculation. They have applied the 12-week calculation.

65. Where an individual has been paid less than the minimum wage, the calculation of a week's pay should be based on the pay the individual ought to have received, but at the rate applicable at the date of the hearing. On 1 April 2022, the National Minimum Wage increased from £8.91 to £9.50. The payment in lieu of notice ("PILON") does not reflect this change and requires an uplift. I have factored this into my calculation below.

66. The claimant has already received the following payments:

    a. A statutory redundancy payment of £8607.

    b. PILON of £2869.

    This gives a total payment of £11,476.

67. Having considered the evidence of loss, I make a compensatory award of **£2616.71** comprising the following elements:

    a. Past loss of earnings from 1 April to 9 May 2022 (to take account of the increase in the National Minimum Wage) (39 days) £23.01.

    b. Past loss of earnings from 10 May 2022 to 7 August 2022 (90 days or 12.86 weeks) (£9.50 x 16.64 x 12.86) £2,032.90

    c. Loss of pension payments (3% of annual salary). I have used the 12-week average to calculate annual salary to give £8,220.16 (£9.50 x 16.64 x 52). The annual contribution is £246.60. This equates to a daily contribution of £0.67. Pension contributions over the period of loss are £60.80.

    d. Loss of statutory rights £500. One of the heads of loss for which a tribunal may award compensation is the value of accrued statutory rights that have been lost: where an employee begins a new job following the termination of their employment, they will need to accrue 2 years' continuous service before they will have acquired the right to claim unfair dismissal or a statutory redundancy payment, and may have lost the right to a lengthy statutory notice period if they have been employed for several years. The sum awarded is usually between £250 and £500, and is not generally governed by the personal circumstances of the employee such as would increase or decrease the actual value of the loss.

68. I have not made a Polkey deduction. I believe that if a fair process had been followed, it is likely that the claimant would not have been dismissed. Typically fair criteria include attendance record, disciplinary record and length of service which if applied to the claimant could have resulted in her keeping her job. There was still a need for the work that the claimant performed to be done in the area where she worked.

69. The claimant received Job Seekers' Allowance during her period of unemployment. Job Seekers' Allowance is subject to recoupment under the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 (SI 1996/2349). The Regulations provide that, where a monetary award is made by the Tribunal, it must identify any part of that award that constitutes the prescribed element (past loss of earnings) and the period to which it relates. The respondent is required to not pay the claimant the sum, but to wait until the DWP recoups from them any benefits paid, with the remainder then being paid to the claimant by the respondent.

The prescribed element is that part of the award which is held back from the claimant until the value of any state benefits subject to the recoupment procedures is known is that part of the monetary award attributable to loss of wages or arrears of pay or losses due to the claimant for the period before the conclusion of the tribunal proceedings. The prescribed element does not include the figure that may have been awarded for loss of statutory rights. The prescribed period is the period between the EDT and the date of the hearing.

70. The claimant seeks legal fees. I have not made an award. The respondent must have a reasonable opportunity to make representations. If she seeks costs, she should formally apply to the Tribunal and copy in the respondent within 28 days of the date this judgment was sent to the parties. I note that she was not represented by lawyers at the hearing. If she was not legally represented prior to the hearing, she may be able to apply for a preparation of time order as an unrepresented party. A costs order or a preparation of time order is made at the discretion and is the exception rather than the rule.

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Employment Judge A.M.S.Green

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Date 5 April 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

12 April 2023

FOR EMPLOYMENT TRIBUNALS