EMPLOYMENT TRIBUNALS

Claimant: **Mr G Ellis**

Respondent: **Marshalls Group Limited**

HELD at: Newcastle CFCTC by hybrid **ON: 1, 2 and 3 February 2023**
1 March 2023

BEFORE: **Employment Judge Loy (sitting alone)**

REPRESENTATION:

Claimant: **In person**
Respondent: **Mr Grundy of Counsel**

JUDGMENT

The Judgment of the Tribunal is that:

1. The complaint of unfair dismissal contrary to section 103A Employment Rights Act 1996 is dismissed upon withdrawal by the claimant.
2. The complaint of unfair dismissal contrary to sections 94 and 98 of the Employment Rights Act 1996 is not well-founded and is dismissed.

REASONS

1. This Judgment was given orally on 1 March 2023 the final day of the hearing. The claimant requested written reasons for the oral judgment at the hearing. This Judgment and Reasons are that written record.
2. All references in parenthesis to page numbers are references to page numbers in the File of Documents that was prepared by the parties for this hearing.

The claimant's claims

3. The claimant commenced early conciliation on 18 March 2022. The Acas certificate was issued on 29 March 2022 (1). By a claim form presented on 15 April 2022 (2-7), the claimant brought the following complaints:

   3.1. that his dismissal was automatically unfair contrary to section 103A Employment Rights Act 1996 ("ERA") on the basis that the reason or principal reason for his dismissal was that he made a protected disclosure as defined in section 43B of the Employment Rights Act 1996; and/or

   3.2. that his dismissal was ordinarily unfair contrary to sections 94 and 98 ERA.

4. The claimant made no complaint of being subjected to a detriment (other than dismissal) contrary to section 47B on the grounds that he made a protected disclosure.

5. At a case management preliminary hearing on 24 June 2022 before Employment Judge Morris (34-42), the claimant was ordered to provide further information about his whistleblowing claim. The claimant did so in an undated (at least on the copy in the File) document entitled "Whistle Blowing – Further Information" (43-45). The respondent filed an amended grounds of resistance on 19 August 2022 (53-58) in response to the claimant's claim including the further information about his alleged protected disclosures supplied by the claimant.

The final hearing

6. The final hearing considered liability only and was conducted by hybrid on 1, 2, 3 February 2023 and 1 March 2023 at the Newcastle Employment Tribunal.

7. The claimant attended in person and gave evidence on his own behalf. He called Mr Haigh, his trade union officer, as a witness in support of his case. Mr Hague appeared by CVP.

8. The respondent, whose evidence was heard first, called the following witnesses:

   8.1. Mr Roger Knight – Head of New Product Development and Engineering

   8.2. Mr Brian Tait – Site Operations Manager.

9. Both witnesses were based at the respondent's premises at North Shields where the claimant was also based.

10. Mr Knight was the manager who undertook the scoring exercise that led to the claimant's dismissal and who conducted the individual consultation meetings with the claimant. Mr Tait conducted the claimant's appeal against dismissal.

11. The parties had prepared an extensive file of documents running to 1162 pages to which the claimant wanted to add a an additional file of papers on the morning of the first day of the hearing. The respondent initially objected to the inclusion of the claimant's additional file in the papers to be placed before the tribunal. However, the respondent then waived that objection on the basis of what Mr Grundy described as pragmatism.

12. The basis for the respondent's initial objection to the inclusion of the additional documents was (amongst other things) that the documents contained in the additional file appeared to go behind Orders made by Employment Judge Johnson at a preliminary hearing on 4 January 2023. The claimant had made an application for specific disclosure of certain documents from the respondent. At the hearing on 4 January 2023, the respondent objected to the introduction of

new documents on the grounds of relevance. Employment Judge Johnson refused the claimant's application for specific disclosure on the basis that they were not reasonably necessary for the determination of any of the issues between the parties that the tribunal would have to decide.

13. At this hearing, Mr Grundy said on behalf of the respondent that the documents in the claimant's additional file were documents that the claimant wished to rely upon to prove the same or very similar issues to those that Judge Johnson had already determined at the preliminary hearing on 4 January 2023 to be not reasonably necessary to the disposal of the issues actually before the tribunal.

14. An example is the claimant's determination to introduce, by whatever means he could, evidence of the respondent's use of the PDM case management system ("the PDM System"). Judge Johnson had already refused an application for specific disclosure of documents relating to the PDM System. However, the claimant then obtained screenshots of the PDM System, presumably taken by a former colleague who still works for the respondent, and put copies of those screenshots in his additional file. The claimant did not make any application to Judge Johnson to reconsider his decision to refuse his application for specific disclosure and nor did the claimant appeal the Judge's decision. Instead, the claimant included alternative documents to prove essentially the same point in his additional file.

15. I decided to admit the claimant's additional documents into evidence in the light of the change in the respondent's position, while both noting that Mr Grundy did not accept that they were relevant to any matter properly in issue in these proceedings and that Judge Johnson had already come to the same conclusion. I also pointed out very clearly to the claimant that the tribunal has no jurisdiction either to re-mark scores given by the respondent's managers in the workplace or to add/substitute other criteria for the criteria adopted by the respondent unless (in each case) it could be shown that the marking of the criteria adopted by the respondent or the criteria themselves were such that no reasonable employer could have arrived at that scoring or included/excluded a particular criterion.

16. The morning of the first day of the hearing was set aside for reading. That time had to be extended to all of the first day because the documents and witness statements had been delivered to the wrong building, an error which only became apparent on the morning of the first hearing day. No fault attaches to the parties since the bundles were properly addressed but delivered to the wrong part of the building where the Employment Tribunal is located but as one of several occupants. In any event, the documents were located and provided to the tribunal.

17. The evidence was heard on days 2 and 3. Submissions were made at the end of the evidence. The claimant handed up written submissions which he developed orally. Given that the claimant was acting in person and had no experience presenting cases in the Employment Tribunal, the claimant made his submissions after hearing those of Mr Grundy and the claimant was given a short break after Mr Grundy's submissions to collect his thoughts.

18. The claimant's witness statement ran to 242 pages, the vast majority of which consisted of highly detailed analysis of technical matters relating to the respondent's workplace and the claimant's own operational skills and experience. As had already been explained to the claimant at both of the preliminary hearings in this matter, the tribunal's jurisdiction is one of a review of

management action assessed against a standard of reasonableness at all stages. The claimant had been told at least twice before this final hearing that it is not the function of this tribunal to second guess or remark a workplace skills assessment undertaken by appropriate managers with reasonable knowledge of the employees' skills and attributes. This was explained again to the claimant at the start of and on several other occasions during the course of this final hearing.

19. Nevertheless, a very substantial amount of the claimant's witness statement and of his cross-examination of both Mr Knight and Mr Tait consisted precisely of inviting each witness to accept that the claimant should have been scored more highly than any of his colleagues and/or been assessed against additional or alternative criteria the result of which in all cases would have been the claimant's retention at the expense of a colleague who was in the same selection pool as the respondent but who was not selected for redundancy. In short, the claimant was effectively attempting to re-run a pre-dismissal consultation exercise in the context of a post dismissal legal challenge under sections 94-98 Employment Rights Act 1996.

20. As I have already said, I reminded the claimant at several points during the hearing of the irrelevance of the vast majority of his 242 page witness statement and of the vast majority of his cross-examination of Mr Knight and Mr Tait. I also provided guidance to the claimant (as a litigant in person) on the broad approach that a tribunal normally adopts when assessing the fairness of a dismissal in the context of a redundancy exercise. The claimant accepted that redundancy was the reason for his dismissal and based his claim on what he saw as the unfairness of his dismissal for that potentially fair reason. I did this in the hope that it would mean that the claimant would concentrate on the points that were most likely to assist him in establishing his case that his dismissal was unfair on its legal merit. However, despite being a person of conspicuously high intelligence, the claimant would not be deterred from making and challenging the points he clearly felt very strongly about even if by conducting the hearing in that way meant he was less likely to advance the prospects of his claim succeeding. `

21. In these circumstances, I have not dealt with each and every point that the claimant made in his witness statement, cross-examination or submissions on the grounds of irrelevance, lack of jurisdiction and proportionality.

Withdrawal of the "whistleblowing" claim under section 103A ERA

22. In the claimant's written submissions and then orally to the tribunal on 3 February 2023, he withdrew his claim for automatically unfair dismissal contrary to section 103A ERA. The claimant explained that having reconsidered the matter in the light the previous two days hearing he recognised that this claim was unlikely to succeed. That claim is dismissed by the tribunal on withdrawal.

23. The tribunal had therefore to reach a decision only on the claimant's claim for ordinary unfair dismissal contrary to sections 94 & 98 ERA and on no other matter.

The issues for the Tribunal's determination

24. A list of issues was agreed between the parties with the tribunal's assistance at the preliminary hearing on 24 June 2022. That list of issues is at pages 40 to 42 of the File.

25. Removing from that list the claimant's claim under section 103A ERA which has now been withdrawn by the claimant, the list of issues is as follows:

26. **Ordinary unfair dismissal**:

    26.1. what was the reason or principal reason for dismissal. The respondent says the reason was redundancy.

    26.2. If the reason was redundancy, did the respondent act reasonably in all the circumstances including its size and administrative resources in treating that as a sufficient reason to dismiss the claimant. The tribunal will usually decide in particular whether:

    26.3. the respondent adequately warned and consulted the claimant;

    26.4. the respondent adopted a reasonable selection decision including its approach to a selection pool;

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

    26.6. the dismissal was in the band of reasonable responses.

27. The tribunal heard only liability issues at this hearing with remedy to be considered at a later stage if appropriate. For that reason the tribunal has not set out in this list of issues matters relating to remedy.

Findings of fact

28. The respondent is a manufacturer and supplier of external landscaping, interior design, paving and flooring products. The claimant was employed by the respondent as a Lead Design Engineer at its North Shields site from 1 December 2009 until his dismissal by reason of redundancy on 19 January 2022.

29. On or around September 2021 a strategic review of the respondent's Landscape Protection business was undertaken by Ian Dean who had recently been appointed to the role of Managing Director of the respondent's Landscape Protection business unit.

30. Put simply, Mr Dean decided to simplify the Landscape Protection business unit by focusing on more profitable standard core products and reducing the emphasis on customised and bespoke landscape products. The customised and bespoke products required more skilled design engineering hours with the effect that some such products were in fact loss-making. Mr Dean, presumably in an effort to improve profitability, refocused the business unit on the more highly profitable core product range. The landscape business unit forecasts were also showing reduced levels of activity for 2022. The combined affect of these changes was that the respondent required fewer Design Engineers in this business unit, a pool into which the claimant fell.

31. The respondent's initial proposal was to reduce the Design Engineering Team from five down to two. The Engineering Manager was placed in a pool of one. The claimant, along with the other three Design Engineers was placed in a pool of four. The claimant was in fact in a role entitled Lead Design Engineer, but he did not suggest that the definition of the pool for selection was unfair either because he held a lead role or otherwise.

32. On 1 December 2021, Mr Knight (Head of New Product Development and Engineering) presented the proposed restructure and its rationale to the whole

Engineering Team and the New Product Development Team (NPD). This meeting was done on the Microsoft Teams, due to the covert restrictions in place at the time. These two departments worked alongside one another. The presentation included an outline the consultation process; the redundancy selection criteria to be adopted and the indicative timescales for the process. The presentation slides are at pages 428 to 436 of the file of documents.

33. Mr Knight then conducted the selection and consultation process for the Engineering Team. Mr Knight had assisted Mr Jefferson (Production Development Manager) in a similar redundancy exercise affecting the engineering team in May 2020, an experience he said he found useful when carrying out the exercise in 2021/2022 himself. Mr Knight had by the end of 2021 already taken over leadership of the Engineering Team at North Shields and had joined in daily Teams calls with the team when they were working from home.

34. As a result, Mr Knight had a good working knowledge of the team he was assessing and certainly enough experience to safely undertake a reasonable and reasonably well-informed approach to the selection assessment. It was common ground that at the outset of the consultation process the relationships between Mr Knight and the members of the Engineering Team were positive.

35. During November 2021 and following, Mr Knight worked with Miss Charlotte Simpson in the respondent's HR team to prepare the selection matrix to be used to assess the Design Engineers. As a starting point, Mr Knight adopted the selection matrix that had been used in a redundancy exercise also affecting the Engineering Team in 2020. That matrix had received support from the HR Department and the Engineering Team in the previous redundancy exercise in 2020. None of the engineers, including the claimant, had raised any objections to it.

36. Mr Knight made one significant change. He decided to remove attendance as a criterion in the matrix. Mr Knight's reasons for so doing, which the tribunal accepted, were twofold. First, the respondent had got into legal difficulty in a previous exercise due to the interaction between attendance levels and disability discrimination under the Equality Act 2010; and, secondly, because the 2021/2022 programme was taking place amidst the Covid pandemic which Mr Knight felt would have had the effect of skewing the attendance figures on a somewhat arbitrary basis. Mr Knight also updated the matrix so it better aligned with Mr Dean's strategic direction and this led to changes to the weighting of a number of criteria when compared to the matrix used in the 2020 redundancy exercise. The final matrix populated by the scores given by Mr Knight to the four engineers is at page 561 of the file.

37. The selection matrix by reference to which the Design Engineers were assessed had four key categories. Those categories were product category; design skills; software/systems and disciplinary. The first three of these categories were then divided into subcategories against which each Design Engineer was given a score between 0 to 3. To that score a weighting of either 1, 2 or 3 was applied. The scores were then multiplied by the weighting and the disciplinary points added to produce the overall totals in respect of each Design Engineer.

38. The scores reflected Mr Knight's view of the experience/knowledge of the individual engineers in respect of each subcategory as follows:

    38.1. 0 represented no knowledge/experience;

38.2. 1 represented basic knowledge/experience;

38.3. 2 represented good knowledge/experience; and

38.4. 3 represented excellent knowledge/experience.

39. The weighting from 1 to 3 reflected Mr Knight's view of the relative importance of each subcategory to the revised Landscape Production strategy identified by Mr Dean for the future direction of the business.

40. As is set out at page 561 of the file, the claimant was given the following scores in the matrix. Those scores are followed by the weighting (in parenthesis) given by Mr Knight to each of the subcategories and then a total is produced.

41. **Product category**

Product	Score	Weighting	Total
Ferrocast	1	2	2
Rhino	2	2	4
Rhino guard	2	3	6
Ollerton	3	2	6
Monoscope/concrete	1	3	3
Structures	3	1	3
Post & rail	2	2	4
Natural Stone	2	3	6
Geo	2	2	4
TOTAL Product Category			38

42. **Design Skills**

Design Skills	Score	Weighting	Total
New Product Development	3	2	6
Sales Support	2	3	6
Costing	2	3	6
Production Support	2	3	6
Site Survey	0	2	0
TOTAL Design Skills			24

43. **Software/Systems**

Software/Systems	Score	Weighting	Total
AutoCAD	3	2	6
Axapata	3	3	9
Microsoft Excel	3	2	6
Solidworks	3	3	9
Solidworks Simulation	0	2	0
TOTAL Software/Systems			30

44. **Disciplinary**

Disciplinary	No disciplinary record	25

45. **Overall totals**

46. The claimants scores were product category 38; design skills 24; software systems 30; and disciplinary record 25. The overall total scored by the claimant was therefore 117. His other three colleagues in the same pool scored: 119, 120 and 120. The claimant was accordingly at the bottom of what was a narrow range of overall totals. The narrow range may well reflect the fact that all four engineers had avoided redundancy selection in 2020. The claimant was therefore identified as the individual within the engineering department who was at risk of redundancy since he was the lowest scoring engineer in the context of redundancy exercise where it was (ultimately) proposed to make one out of the four Design Engineers redundant.

47. On 6 December 2021, the claimant attended a first individual consultation meeting with Mr Knight (455-457). This meeting again took place over Teams and Miss Simpson also attended. The claimant himself elected not to be accompanied. Shortly before this consultation meeting, the claimant emailed Mr Knight. Mr Knight described that email as the claimant expressing his confusion and disagreement with the new strategy and posing some 47 questions over an email which runs to 9 sides of A4 when printed (446 – 454).

48. During the consultation meeting, Mr Knight told the claimant that he would endeavour to respond to the claimant's email by the end of the week. Mr Knight also confirmed to the claimant that he (Mr Knight) would be conducting the assessment process based on what had been said on the announcement call on 1 December 2021. The claimant was aware of that announcement since she had attended the call. The claimant asked what would happen "if he did not agree with the selection". He was told by Mr Knight that he would have the opportunity to appeal. After the meeting, the claimant sent a further email to Mr Knight with some further thoughts (486-488).

49. By a letter dated 7 December 2021 (484-485), the claimant was informed by Mr Knight that he was at risk of redundancy.

50. On 8 December 2021, all affected employees were invited to attend a group presentation also on Teams and again undertaken by Mr Dean. As a result of this meeting, Mr Dean and Mr Knight decided to reduce the number of Design Engineers to be made redundant by one. This meant that only one rather than two Design Engineers would be made redundant.

51. This reduction was in direct response to the feedback from the design engineers (including the claimant) who attended the meeting on 8 December 2021 to the effect that a reduction of the engineering team by two would leave the team with insufficient resource to successfully deliver the new strategy. Mr Dean personally responded to the claimant's email of 8 December 2021 (510-511) in his own email of the same date (510). Mr Dean told the claimant that in the light of the feedback he had received, he would discuss with the management team the level of engineering resource required moving forward.

52. On 10 December 2021, Mr Dean sent an email to the Engineering and NPD team in which he says,

> "… We are in a consultation process and part of this is to hear what you have to say about any proposals put forward…
>
> "… I have listened to your concerns and reasons as to why you don't believe two engineers would be able to support the strategy going forward, and I thank you for this….
>
> "… I have now met with the management team and we believe, by making savings elsewhere, we can support a third engineer in the plan." (531-532).

53. On 15 December 2022 (544-557), the respondent provided a spreadsheet in response to the outstanding questions raised by the claimant and other members of the Engineering and NPD Team during the consultation process. The respondent's responses were put together by a combination of managers depending on the nature of the question. The responses were compiled by a combination of Mr Knight, Ms Burden (HR) and Charlotte Simpson (HR).

54. The tribunal accepts Mr Knight's evidence that thorough consideration was given to the questions raised, not least because of the level of detail that is apparent from the spreadsheet which provides responses to some 75 separate questions/issues 554 – 557.

55. The tribunal also accepts Mr Knight's evidence that he first became aware of a proposal to restructure the business unit in October 2021 during a meeting with Mr Dean and that he produced a first draft selection matrix in late November 2021. However, it was Mr Knight's further evidence – which we also accepted – that he took no further steps with either the content of the matrix or applying scores to it until after the consultation with each engineer (including the claimant) had taken place.

56. Mr Knight also gave evidence which we accepted to explain how and why he had given the claimant the scores that appear on the final matrix at 561. The adjustments to weighting when compared to the 2020 redundancy exercise reflected Mr Knight's interpretation of the new strategy for the business unit. For example, "Ollerton" was a product which would be important moving forward so

its weight was increased. In contrast Ferrocast and Post & Rail were downgraded and Signage and Lighting were removed completely from the matrix.

57. The claimant occasionally benefited from Mr Knight's review. An example is Ferrocast where the claimant increased his score from zero in the 2020 redundancy exercise to one in this exercise. This was because Mr Knight could see that the claimant had processed an order with a value of £2000 and was therefore given credit for that in the matrix. The claimant was also given the maximum scores for Ollerton and Structures because the data showed that the claimant had processed 107 entries with a value of £237,000 In respect of the Ollerton product and only the claimant had particular knowledge of Structures.

58. In overall terms, the claimant scored better in the product category in the current redundancy exercise than he had done in the previous exercise in 2020. The claimant was the second highest scorer in this category out of the four engineers being assessed.

59. In the Design Skills category, Mr Knight also gave coherent and entirely rational explanations for his scoring. The claimant felt most aggrieved with his scoring of 2 for Sales Support. Mr Knight approached the Sales Team to get feedback. In particular, he spoke to Ms Powell and Mr Sier. Mr Knight did this in respect of all four engineers being assessed. Both of the sales team managers considered that the claimant deserved only a mark of 1 equating to basic. Nevertheless, Mr Knight's considered his own experience of the claimant's interaction with the Sales Team which he had observed could be negative and argumentative and Mr Knight accepted that the Sales Team could find it difficult to get commitment from the claimant. Mr Knight refers to examples of pages 1076-1077 and 1078 of the file. Mr Knight decided ultimately upon a score of 2 which was one less than the claimant had received on the 2020 redundancy exercise, but by the same token one more than either of the managers in the Sales Team thought appropriate. The tribunal accepts this is a fair and balanced approach based on a combination of feedback from the team in question, evidence of some difficulties in the claimant's relationship with the Sales Team and Mr Knight's own direct observations.

60. In the third category of Software/Systems, Mr Knight scored the claimant at the maximum of three for all but one of the subcategories. In that last category the claimant scored zero. Mr Knight explained that although the claimant had attended a Solidworks Simulation training course for which he had received a certificate (134), Mr Knight could not see any evidence that the claimant had actually used it. For that reason, Mr Knight kept the claimant score at zero as it had been in the 2020 redundancy exercise. All four of the Design Engineers, including the claimant, scored the maximum of 25 for the disciplinary category, since none of the engineers being assessed had any disciplinary records.

61. On 16 December 2021, the claimant attended a second individual consultation meeting, again by Teams and again with Mr Knight (569-570). At that meeting the claimant was shown his scores on Mr Knight's computer screen and was told that unfortunately as the lowest scoring engineer, he was (subjected to the remainder of the consultation process) at risk of dismissal by reason of redundancy. The claimant asked for a copy of his scores at the meeting which were sent to him by Mr Knight along with a copy of the notes of the second individual consultation meeting (1032-1037).

62. Also on 16 December 2021, the claimant was sent a letter (571) confirming that he had been unsuccessful in the assessment process and therefore provisionally selected for redundancy. The claimant was told that he remained at risk of redundancy while a search for any suitable alternative was undertaken.

63. On 22 December 2021, the claimant sent an email (681-682) to Charlotte Simpson in HR. In this letter, the claimant made a formal appeal against his selection for redundancy and asked for "minimal further dealings" with Mr Knight pending that appeal. The claimant also told Charlotte Simpson that once he had overturned the decision to dismiss him by reason of redundancy he would "like us to come to an amicable agreement so that we can both part ways." The claimant identified the following grounds of appeal: scored wrongly; unfairly selected; victimised and discriminated against; breach of policy.

64. On 19 January 2022, Mr Dean gave a further presentation to the Engineering Team. The claimant was invited to that meeting but chose not to attend.

65. On 7 January 2022, the claimant's appeal against redundancy was heard by Mr Tait. It was again held by Teams. The claimant was accompanied by Mr Chris Haigh his trade union representative. The claimant produced a comprehensive appeal in the form of a presentation in which the claimant included dictionary definitions of a number of words to be found in the respondent's redundancy policy such as "objective", "transparent" and "fair". The claimant's presentation is at 721 to 786 and the notes of the appeal meeting are at 787 to 789. The appeal meeting lasted a total of around 5 ½ hours.

66. Mr Tait gave evidence that he felt that the claimant was trying to "scrutinise the justification for every small detail of the business strategy" which he considered to be an excessive level of scrutiny. The claimant also alleged that he had been victimised and discriminated against. The claimant considered that he was being bypassed by the Sales Team. However upon investigation by Mr Tait, he discovered that the Sales Team had discussed the work with the claimant and, when Ms Powell did not accept his initial pushback, the claimant accepted the work (536-541). Mr Tait said he could not find any evidence that the claimant had been treated either unfairly or in breach of any of the respondent's policies.

67. Mr Tait came to the conclusion that there was no unfairness or discrimination towards the claimant in the process and that he was satisfied that the claimant had been assessed fairly by Mr Knight against an objective selection matrix which was aligned to the priorities of the respondent's new business strategy. Mr Tait drafted a detailed appeal report (858-862) explaining his reasons for not upholding the claimant's appeal which he sent to HR.

68. By a letter dated 14 January 2022 (863 – 867), the claimant was informed by Mr Tait that his appeal had not been successful. Later that day, the claimant responded to Mr Tait's letter dismissing his appeal telling Mr Tait that his decision was in the claimant's eyes," not a total surprise and highly comical in parts".

69. The claimant was invited to a final consultation meeting on 19 January 2022, but he chose not to attend (882-883). By a letter dated 19 January 2022 (884-885), Mr Knight confirmed the claimant's dismissal by reason of redundancy which was to take place on that date. The letter also confirmed housekeeping issues such as the date the claimant would receive his final payments.

The relevant law

Unfair dismissal – section 94/98 ERA

Definition of redundancy

70. Section 139(1)(b) ERA provides for the meaning of redundancy for the purposes of, amongst other things, unfair dismissal. It is in the following terms:

> "*An employee shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to - … the fact that the requirements of the business –*
>
> *(i) for employees to carry out work of a particular kind, or*
>
> *(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish".*

71. In case Murray v Foyle Meats [1999] ICR 827, the Employment Appeal Tribunal identified the two questions that section 139 requires the Tribunal to address:

71.1. Does one of the various states of economic affairs in the section exist;

71.2. Is the dismissal attributable wholly or mainly to that state of affairs?

Unfair dismissal in redundancy cases

72. The leading case is Williams v Compair Maxam Ltd [1982] ICL 156, in which the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. At 162 the EAT identified the following matters that typically fall to be considered by the Tribunal:

72.1. Whether the selection criteria were objectively chosen and fairly applied;

72.2. Whether employees were warned and consulted about the redundancies;

72.3. Whether any alternative work was available.

73. At 161E-F, the EAT said that :

> *"It is not the function of the … tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted."*

74. Taymech Limited v Ryan [1994] UK EAT/663/94/1551, Mummery P said:

> *"There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined as primarily a matter for the employer to determine. It will be difficult for the employee to challenge it where the employer has genuinely applied his mind to the problem."*

75. The band of reasonable responses and rule against substitution apply.

76. Mugford v Midland Bank [1997] IRLR 208, the EAT said:

> *"It will be a question of fact and degree for the … tribunal to consider whether consultation with the individual … was so inadequate as to render the dismissal unfair. … The overall picture must be viewed by the tribunal up to the date of termination."*

The tribunal should also take into account the collective consultation undertaken by an employer where that obligation applies when deciding whether consultation in the round is fair or unfair.

77. Lloyd v Taylor Woodrow Construction [199] IRLR 782 the EAT confirmed that a failure in consultation can be cured at the appellate stage.

Selection criteria

78. The following general principles can be discerned from the authorities regarding the requirement of fair selection criteria:

78.1. Selection criteria should as far as possible be objective and not depend solely on the opinion of the person making the selection – Compair Maxam.

78.2. Objectivity in criteria is important but Underhill J in Mental Health Care (UK) Ltd v Biluan [2013] UK EAT/0248/12/SM:

"*The goal of avoiding subjectivity in bias is of course desirable but it can come at too higher price; and if the fear is that employment tribunals will find a procedure unfair only because there is an element of "subjectivity" involved that fear is misplaced*."

79. In British Airways plc v Green [1995] ICR 1006 the EAT said:

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

… documents relating to retained employees are not likely to be relevant in any but the most exceptional circumstances … the tribunal is not entitled to embark upon a reassessment exercise … it is sufficient for the employer to show that he set up a good system of selection and that it was fairly administered, and that ordinarily there is no need for the employer to justify all the assessments on which the selection for redundancy was based."

80. In Dabson v David Cover and Sons LLTD [2011] UKEAT/0374/10/SM the EAT indicated that the tribunal should not examine actual scoring unless there has been bad faith or obvious error.

Conclusions

81. ***Protected disclosure and automatically unfair whistleblowing dismissal****.*

82. During cross-examination the claimant accepted that the email he sent on 15 December 2021 (536 to 537) was the sole disclosure he was relying upon and which he had originally contended was the reason or principal reason for his dismissal. That was so because the email of 15 December 2021 was the only protected disclosure referred to by the claimant in the further information he provided in response to the order of Employment Judge Morris at the Preliminary Hearing on 27 June 2022.

83. It was going to be very difficult for the claimant to demonstrate that it was this disclosure that was the principal reason for his dismissal. That email related to an order for galvanised sockets from a customer. Once the Sales Team had put the order into the respondent's internal systems, it was assigned to the claimant to complete the order. On 13 December 2021 (538-539), the claimant emailed Ms

Powell stating that the order should be cancelled or amended. Specifically the claimant said, “in light of planned redundancies I do not feel it is right to ask us to process this and therefore you should go back to the customer and offer what we have already previously supplied”. The claimant also commented that the “finish itself is not something we recommend…due to durability and high chance of failure.” (538-539). In response, Ms Powell said that she would be happy to let the customer know about the claimant’s concerns but that he should proceed with the order (538). The claimant responded to Ms Powell that to the effect that he was being bypassed by the Sales Team when the answer that the claimant had given was not what Ms Powell wanted (536-537).

84. It was Mr Knight’s evidence, which was not contested, that the nature of the potential problem that the claimant was flagging up related to a purely cosmetic issue because the paint on galvanised sockets was likely to wear off more quickly than other finishes. Mr Knight said that there was no danger involved in any way and if there had been the company would not have agreed to proceed with the order. As I say, that explanation was not contested by the claimant. Mr Knight also gave evidence that he paid no particular regard to the claimants email which the claimant said in these proceedings (at least initially) was a protected disclosure which was the principal reason for his dismissal. The tribunal accepted Mr Knight’s evidence that he paid no significant regard to this matter either operationally or at the time of the redundancy assessment.

85. Looked at objectively, the 15 December 2021 “disclosure” (536) was not the sort of information that would be likely to motivate the respondent’s management into taking reprisals against him. Indeed, looked at subjectively, the claimant’s own email does not attach particular significance to itself, as evidenced by the two smiley face emoji the claimant included in that email, together with the noticeably transparent nature of Ms Powell’s response in which was she said she would, *“put our performance concerns in writing to the customer in terms of the possibility of the paint flaking in the future.”* Such openness is much more consistent with Ms Powell considering that the claimant was being unnecessarily fussy than it is with the respondent considering it to be a matter of any particular moment.

86. The claimant recognised the reality of the situation and withdrew his claim under section 103A of the Employment Rights Act 1996 (ERA) accordingly. The claimant’s withdrawal is recorded in the final paragraph of his written submissions. However, the point is still relevant to the claimant’s remaining claim since this was this type of concern that the claimant said was the ulterior reason for his dismissal rendering his dismissal a matter of bad faith and unfair as a matter of law under section 98 ERA.

87. Indeed, by giving this as his only example of an alleged protected disclosure in response to Employment Judge Morris’s orders, it is reasonable to assume that this example was the high watermark of what the claimant believed was the real reason for his dismissal. The tribunal rejects that contention. The tribunal concludes that the claimant might very well have been a fastidious colleague working to high standards that he designed for himself and expected others to comply with, but there was nothing even approaching any meaningful evidence that could reasonably be said to support the very serious contention of ulterior motive/bad faith on the part of the respondent. The claimant has simply given the matter a disproportionate significance in the context of his selection for redundancy by the respondent which he deeply resents. The ”disclosure” was in

reality a minor cosmetic matter. The tribunal concludes that this reflects a more general lack of objectivity that the claimant has developed towards his selection for redundancy.

88. **Ordinary unfair dismissal.**

89. The tribunal does not even attempt to address the detail of the claimant's contentions where he invites the tribunal to second guess the respondent's decision-making. That is not a permissible line of criticism as the claimant was told on very many occasions. To do otherwise would have taken many days of additional time and would not have advanced the merit of the claimant's case. This was already a three day hearing to consider a single application of unfair selection for redundancy.

90. The focus of the claimant's case and cross examination of the respondent's witnesses was on attempting to prove that his scores should have been higher; that different criteria should have been used; that the new strategy would have been better served by a different approach to selection; and so on. In answer to a question from the tribunal, the claimant at one stage confirmed that it was his position that there was no valid set of selection criteria that could have reasonably led to the conclusion that he should be the one selected out of the pool of Design Engineers.

91. The tribunal found the claimant's case to be a highly forensic and detailed attempt to invite the tribunal to redefine and rescore the selection matrix. There was no real attempt to demonstrate that the respondent's approach was unreasonable. The claimant's case was that his dismissal was in bad faith and that the respondent wanted to get him out because he had become thorn in the side of management. For the reasons already set out at paragraphs 82 to 87 above, it is simply not credible that the respondent was ulteriorly motivated and determined to remove the claimant, The claimant had of course been retained in the 2020 redundancy exercise and it was unclear what, if anything, had happened in the succeeding 12 months for the respondent to resolve to remove the claimant when that had plainly not been its intention in the earlier redundancy exercise.

92. The tribunal acknowledges that the claimant feels very strongly indeed about his selection, but it of course does not follow that Mr Knight or Mr Tait have acted either dishonestly or unreasonably. Indeed, the claimant's arguments about why he should have faired better in the scoring process in both absolute and relative terms were arguments that he was given the opportunity to advance and in many respects did advance during the management phase including both with Mr Knight at the stage of the original decision to dismiss and more particularly in his highly detailed appeal to Mr Tait.

93. The tribunal has accepted that all of the changes made by Mr Knight, including the omission of attendance, were for the reasons given by Mr Knight in his evidence. The tribunal expressly finds that there was no presence of bad faith generally or any manipulation of scores to arrive at a desired outcome. Mr Knight did not either desire the claimant's dismissal or use the selection matrix in a way to procure it. In short, the tribunal finds that the outcome of the scoring matrix which placed the claimant at risk of redundancy was the consequence of a genuine and reasonably designed and implemented scoring matrix. It follows from this finding that a tribunal rejects the claimant's allegations of dishonesty, bad faith and/or manipulation by Mr Knight.

94. In relation to the central (but not all) contentions of the claimant, the tribunal concludes as follows.

95. ***PDM case management system***

96. The claimant contended that any reasonable selection matrix to be adopted by the respondent must include assessment of the employees in the pool against proficiency with the respondent's PDM case management system.

97. The tribunal accepts as reasonable the reason given by Mr Knight for not including PDM in the selection matrix. In particular, we accept Mr Knight's evidence that at the time he reasonably believed not all engineers had sufficient practical experience of PDM for the criterion to be applied reliably. That was Mr Knight's decision to make and the tribunal finds that he had a genuine and sound basis for excluding it.

98. This is not to say that it would have been unreasonable to have included PDM in the assessment. There is of course more than one reasonable way in which an approach to the complex and sensitive task of redundancy selection can be approached. This is not a distinction that the claimant appeared to appreciate, notwithstanding that it was explained to him on a number of occasions by the tribunal. The tribunal was satisfied that the approach taken by Mr Knight and the respondent on PDM fell plainly within the bad of reasonable options open to it acting lawfully under section 98 ERA.

Downgrading of the "Post & Rail" criterion.

99. The claimant says that the retention of this product line in the assessment criteria was unfair because it directly contradicted the strategic objectives that Mr Dean, the Landscape Production Managing Director, had mandated in terms of focusing on core products. It was common ground that it was this strategic review that had instigated the 2021/2022 redundancy process in the first place.

100. The tribunal accepts Mr Knight's evidence that he saw commercial value in retaining this income stream moving forward and therefore retaining this as a product category in the selection matrix. The tribunal also accepts that this is what led Mr Knight to retain it as a criterion in the 2021/2022 matrix. It had also originally been in the 2020 selection matrix.

101. The tribunal considers that the claimant is taking a far too literal approach to Mr Dean's strategic review. The tribunal rejects the claimant's contention that Mr Knight was going behind Mr Dean's back such was his desire to remove the claimant from the workplace. The claimant's contention that he was seen as a problem is simply not supported by the evidence. The high watermark of his case in this regard is the email of 15 December 2021 in which he raises issues to do with flaking on paint on galvanised sockets. As the tribunal has already noted, the claimant does this with two smiley face emoji in his email which the tribunal do not consider to be consistent with any rancour or antipathy between the claimant and his work colleagues in the Sales Team. The tribunal also rejects the idea that Mr Knight had any reason to risk the wrath of Mr Dean by (on the claimant's case) blatantly ignoring Mr Dean's strategic review just to bring an end to the claimant's employment. As Mr Knight confirmed, Mr Dean receives the monthly management accounts which will continue to show income and expenditure against the Post & Rail product category. Mr Dean's ongoing visibility of this product's income would have been clear to Mr Knight at the time he devised the selection matrix. The notion that Mr Knight would so blatantly go

behind Mr Dean's back and expose himself to management sanction when there was no evidence of any reason for him to have an ulterior motive is simply not capable of being sustained.

102. ***Attendance***

103. The tribunal has accepted Mr Knight's reasons for excluding attendance at paragraph 33 above. Those reasons are plainly cogent and reasonable. The claimant is of course right: there are other ways in which to manage disability-related absences and Covid-related absences other than by excluding the criterion altogether.

104. But the question for the tribunal is whether the approach actually adopted by Mr Knight was reasonably open to him and consulted upon. The tribunal finds that it was. Attendance was not included on the slide setting out the proposed criteria during the respondent's presentation on 1 December 2021. That would have been noteworthy given its inclusion in the recent 2020 redundancy exercise. The opportunity to make counter-proposals was open to the claimant and his colleagues at that meeting and thereafter as well as during his one-to-one consultation meetings with Mr Knight. In coming to this conclusion I have taken into account that the claimant originally did actively engage in making counter-proposals, including the proposal that the led to the reduction to the overall headcount in the Engineering Team from two down to one Design Engineer. The claimant plainly had a reasonable opportunity to challenge the removal of absence as a criterion during the management phase.

105. ***Subjectivity***

106. The tribunal again finds that the claimant's contentions to be overly literal and impractical. The tribunal, no more than the respondent's management, are likely to be assisted by dictionary definitions of "objective", "fair", "transparent" and so on when looking at the reasonableness of the respondent's decision-making.

107. The case law plainly allows for skills based assessments to be reasonably conducted where they are based on reasonable data or experience of those undertaking the assessment. The tribunal finds that it in this case those requirements are plainly met in the form of Mr Knight who had reasonable knowledge and access to reliable data.

108. One very important word under section 98 is the word "reasonable", a word which is capable of describing more than one approach to management of redundancy selection - hence the frequently quoted phrase "the band of reasonable responses" test.

109. The tribunal also rejects for similar reasons the claimant's contentions that his relationship with Sales Support Team is much better than Mr Knight gives him credit for. This was once again an invitation for the tribunal to enter into impermissible remarking of the redundancy scores. The tribunal has no knowledge whatsoever of the other candidates and has none of the expertise and experience of Mr Knight and Mr Tait. It is simply not open to the tribunal to identify more reliable criteria or award more reliable scores than Mr Knight. The tribunal is satisfied that both the criteria and the scoring process were reasonable and that there was a reasonable opportunity for consultation upon both before the claimant was dismissed.

110. The claimant accepted that the reason for his dismissal was redundancy. The tribunal is also satisfied that the respondent has met the standard of reasonableness required under section 98 ERA in the context of unfair selection for redundancy in treating redundancy as a sufficient reason to dismiss the claimant in this case. The claimant was reasonably warned, reasonably consulted, reasonably selected, reasonably considered for alternative for employment and given access to a reasonable appeal process.

111. In these circumstances, the claimant's claim to have been unfairly dismissed is not well-founded and fails.

Employment Judge Loy

Date: 4 May 2023