Case No: 2415321/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr A V Timbrell

Respondent: 4th Utility Holdings Limited

Heard at: Manchester **On:** 2, 3, 5 May 2023 and 9 June 2023 (in chambers)

Before: Employment Judge Slater

Representation
Claimant: Mr J Jenkins, counsel
Respondent: Mr R Hignett, counsel

RESERVED JUDGMENT

1. The complaint of unfair dismissal is not well founded.

2. The complaint in relation to holiday pay is dismissed on withdrawal by the claimant.

3. The remedy hearing provisionally arranged for 13 October 2023 is cancelled.

REASONS

Name of the respondent

1. The respondent company changed its name from Liberatis Limited to 4th Utility Holdings Limited in January 2022.

Claims and issues

2. The parties had not been ordered to agree a list of issues prior to the hearing and had not done so. Whilst I was doing my reading, at my request, counsel for

both parties sought to agree a list of issues. This was largely agreed. However, there was a dispute as to whether the pleadings included the issue about the application of the criteria. I decided that the pleadings at 18.2.5 were not wide enough to cover this point so an amendment would be required. The respondent objected to an amendment of the claim. I allowed the claimant to amend his claim to include an allegation that the application of the selection criteria/scoring was not fair because criteria one and two discounted housebuilding sales. I considered that the balance of hardship and prejudice was in favour of allowing the amendment. It was unfortunate that the application was made so late and that the parties had not addressed the issues to be determined before this point, since they were both legally represented, even though no case management order had been made to agree a list. The claimant would be potentially deprived of an argument which might assist him if he could not explore this area. Fair application of selection criteria was something which would, but for the very specific pleading, have been expected to be dealt with in a redundancy unfair dismissal case. I considered there was an overlap of the issues about the application of the criteria with the claimant's "sham" redundancy argument. I considered that the prejudice to the respondent of allowing the amendment was small. Ms Beamish, who had applied the selection criteria, was not due to give evidence until the following day and there was time for the respondent's representative to obtain instructions. I said I would allow Mr Hignett to ask Ms Beamish some questions in evidence in chief to address this point if he wished to do so.

3. The agreed list of issues, following the amendment, was as follows:

3.1. Was there a redundancy state of affairs?

3.2. What was the operative reason for C's dismissal?

3.3. Was the dismissal of C broadly attributable to the redundancy state of affairs? or

3.4. Was redundancy a sham, a pretext for obtaining C's shares in the company?

3.5. If redundancy was the operative reason for dismissal, was the dismissal for that reason fair in all the circumstances?

3.6. Was there adequate consultation?

3.7. Were the selection criteria fair? (C accepts criteria 1-3 were fair but contends criteria 4 was unfair because no relevance to the proposed role and inherently disadvantaged C).

3.8. Was the application of the selection criteria/ scoring fair? (C says re criteria 1 and 2 discounted housebuilding sales)? [added by amendment]

3.9. Did R act fairly in considering C for suitable alternative vacancies? (C says he should have been offered Brand Ambassador role and Business Development Manager role which R recruited for in September 2021)?

3.10. If, and to the extent the dismissal of C was substantively or procedurally unfair, what are the chances that C would have been dismissed in any event absent the identified unfairness and when?

4. The complaint in respect of holiday pay was withdrawn by the claimant when the list of issues was being agreed.

5. The grounds of resistance had included an argument relating to contributory conduct, but Mr Hignett informed me that this was not pursued by the respondent.

Evidence

6. I heard evidence from the following witnesses. For the claimant: the claimant, Jeremy Gray and Gregory Freeman (who attended under witness order). For the respondent: Anthony Hughes (known as Tony), Nicola Beamish and Stuart Lees. There were written witness statements for all the witnesses and they all gave oral evidence.

7. I had a bundle of documents which was added to during the hearing by agreement. The bundle, after additions, included 666 pages. References in these reasons to page numbers are to pages in this bundle.

Facts

8. The parties had helpfully prepared a statement of agreed facts. I draw on this and make findings of fact on additional matters as follows.

9. The respondent company was incorporated in October 2017. Tony Hughes and the claimant were the initial statutory directors and majority shareholders. Tony Hughes was the Chief Executive Officer (CEO) and the claimant took the title of Chair.

10. The claimant is a qualified chartered surveyor and member of the Royal Institution of Chartered Surveyors. His experience is in the housebuilding business. The claimant also has his own planning and development consultancy business, DBA Estates Ltd, and a housebuilding business. He continued to run these businesses whilst working for the respondent. His role with the respondent was to grow and develop the housebuilder side of the business, this being where his contacts and experience lay.

11. In January 2020, Tony Hughes appointed Nicola Beamish and James Acton as directors in the company without the claimant's knowledge or consent. The claimant questioned the appointments but ultimately agreed to them. Nicola Beamish originally trained as an accountant and has worked as a finance officer, or in similar roles, in a number of PLC and private equity backed companies. She became involved in the respondent company in January 2018.

12. The aim of the business was and is to provide superfast full fibre broadband to a range of properties within the commercial and private housebuilding industry. There were three types of property, prior to the closure of the housebuilding

division, to which the respondent provided its services: new housebuild or Single Dwelling Units (SDUs), new build multiple domestic units (MDUs) i.e. flats, and retrofit MDUs.

13. With new housebuild, the respondent sought initially to get referral agreements with developers which would ultimately introduce them to the owner of the property, with a view to the owner of the property then entering into a Wayleave agreement with the respondent. A Wayleave agreement allows the respondent to put in place its infrastructure so that it can then seek to sign up individual householders to its broadband service. A referral agreement is not a guarantee that a Wayleave agreement will follow. With retrofit MDUs, Wayleave agreements can be signed immediately, enabling the respondent to seek to sign up clients to its broadband service. There is a longer process with the development of new houses to get the stage where the respondent can sign up clients, than with retrofits. With new MDUs, once the Wayleave agreement is in place, the potential number of clients in one building is significantly higher than with individual houses.

14. After an initial period of trading, the respondent looked to obtain investment from a private equity firm to expand its business.

15. On 18 August 2020, DIF CIF 2 UK Limited (DIF), a large private equity company, completed a £25 million investment in the respondent. A shareholder agreement was entered into between the respondent, the respondent shareholders, (which included the claimant and Tony Hughes), DIF and others. Following completion of the investment, the claimant and Tony Hughes each held 12.24% of the shares in the respondent. The claimant resigned as a statutory director of the respondent. The respondent adopted new Articles of Association which included provisions allowing the Board to serve a notice on a management shareholder who ceased to be an employee of the respondent, requiring that shareholder to sell their shares. The claimant opted to remain as a management shareholder, as did the other members of the senior management team at the time: Nicola Beamish, Jimmy Acton and Steve Ankers. The claimant raised some questions about the Articles of Association but then agreed to them.

16. Tony Hughes and Nicola Beamish remained as statutory directors, as CEO and Chief Financial Officer (CFO) respectively. The rest of the Board was completed by investor directors from DIF. Stuart Lees became the new non-executive chairman.

17. The claimant reduced his working time for the respondent to 3 days per week and his role became Business Development Director. The claimant wrote a job description for his role.

18. The first board meeting following DIF's investment was held on 29 September 2020. The claimant was not invited to attend. The only non-director invited to attend was Jan Davids, a representative of DIF. Matters reported included progress on the 100 day plan objectives. There was no specific discussion about the housebuilder division recorded in the minutes.

19. Jeremy Gray joined the respondent as Chief Technology Officer on 1 July 2020. Gregory Freeman joined the respondent in early September 2020 as Service Delivery Manager.

20. I find, contrary to the evidence of Tony Hughes, that he was unhappy about the claimant's performance by the end of September 2020. I base this finding on two contemporaneous emails.

21. Tony Hughes sent a message to Gregory Freeman on 29 September 2020 at 21.54 as follows:

> "Email just out from me is not aimed at you guys, just sick of complete lack of ownership and urgency on these housebuilder sites. They are out of control and take-up rates could be woeful and am not willing to accept an unwillingness of people to make this stuff happen. Appreciate you guys are fully committed to this and my job is to deal with non-team players and I will."

22. Tony Hughes accepted, when this message was put in evidence on the second day of the hearing, that he was referring to the claimant. The email referred to in this message was not produced in evidence.

23. Gregory Freeman wrote to Jeremy Gray later that same evening:

> "There's going to be a bit of a cull tomorrow from what Tony is just said to me. He's totally pissed off by Andy's lackadaisical and uncommitted attitude we got glowing praise from Neil, Jan and Stuart today the whole new build dev relationship and poor sales got slammed though - hence the email let's see what drops out tomorrow"

24. I find that this message reflected what Tony Hughes had said to Gregory Freeman about the claimant and the new build development part of the business.

25. Jeremy Gray replied the following day: "can we have his shares" with two grinning emojis. I am not satisfied on the balance of probabilities that, at this point, Tony Hughes had told Gregory Freeman that the claimant was leaving and that the claimant's shares would be potentially available for distribution in the Long Term Incentive Plan (LTIP) promised to Gregory Freeman. If this had been promised, I do not think that Jeremy Gray's message would have been in this form.

26. The respondent carried out a strategic review of its business, beginning in January 2021.

27. Nicola Beamish carried out payback modelling to which the claimant and others contributed. This showed that housebuilders delivered a smaller and lower return than MDU and retrofit. On 22 February 2021 (p.127), Nicola Beamish sent Tony Hughes an email attaching the workings for the payback calculations. She wrote that the housing developments had the longest payback - 75 months. She wrote that standard MDU, Retro and Retro clusters all showed much shorter payback periods.

28. The payback period analysis of the various different types of developments was presented at a board meeting on 5 March 2021. I saw reference to this meeting in the minutes of the board meeting held on 25 March 2021 but was not shown minutes of the meeting on 5 March 2021.

29. On 18 March 2021, Shoosmiths, the respondent's solicitors, provided Tony Hughes with advice, summarising the "good leaver" provisions in the Articles of Association. The summary referred specifically to the claimant ceasing to be an employee of the company.

30. Also on 18 March 2021, Tony Hughes had an email exchange with UHY Hacker Young (UHY), with the subject "potential shareholder - employee exit". Tony Hughes agreed with UHY to engage their services at a cost of £12,500 plus VAT. A "kick-off" meeting by Zoom took place between UHY, Tony Hughes, Nicola Beamish, and Richard Lees on 22 March 2021.

31. UHY drafted a letter of engagement in the name of Tony Hughes, which was signed by Tony Hughes, dated 19 March 2021. This formed part of the valuation report subsequently produced, dated 16 April 2021 (p.221) which was part of the information put to the Board at its meeting on 22 April 2021. The engagement letter (p.245) begins: "you have instructed us to provide a valuation of Liberatis Limited ("the company") for the purposes of valuing the shareholding of an employee who is exiting the company".

32. At a board meeting on 25 March 2021, the minutes note that the Board discussed in detail the payback period analysis for the various different types of developments which had previously been presented at the meeting on 5 March 2021. The significantly longer payback period for housing developments was noted. Tony Hughes commented that housebuilder sites had proved to be more technically challenging and time-consuming for the operations team than had originally been envisaged. Nicola Beamish commented that housebuilder developments were forecast to be only 10% of the new build rollout in the FY22 budget (290 units total). The Board agreed that, given the lack of housebuilder contracts signed in the last 12 months and the significantly longer payback periods relative to other developments/opportunities, this was not a strategic division for the business. As a consequence, the housebuilder division would be closed down and the business focus would be new build MDU and retro opportunities. The Board instructed Tony Hughes to engage Shoosmiths to advise on the shareholder/employment implications of this decision.

33. Tony Hughes had already obtained advice from Shoosmiths and instructed UHY to produce a valuation report. Although he took these steps before any formal Board decision to do so, I accept his evidence that he did so to ensure that they had potentially relevant information available in the event it was needed. The Board might wish to have this information to assess the implications of closing the Housebuilder Division, before making the decision to close the Division. Tony Hughes thought, at the time of getting advice from Shoosmiths and instructing UHY, that the claimant, as the head of the division, would be the only person affected if that division was closed.

34. The strategic review final board paper (218) was part of the pack of documents provided to the board members for the board meeting held on 22 April 2021. The background section stated that, as they approached their financial year end 2021 and were in the budget process for financial year 2022, they undertook a review of the core areas of the business: new build MDU, retro MDU and new build SDU. The paper stated:

> "The focus of this review was to take a continue, change or stop decision. This review was completed and the outcome this is to continue with New Build MDU, Retro MDU and stop New Build SDU, with exception of modular homes. We have also decided to trial Retro Commercial Office buildings. The rationale for the stop decision on New Build SDU is below."

35. The paper set out reasons as to why the New Build SDU element of the business had become non-strategic. These included a significant payback period, low take-up rates and the small number of Wayleave agreements signed and a gap of two years in additional agreements. No new Wayleave agreements had been signed since April 2019. Only seven had been signed between February and April 2019.

36. Under the heading "Action and Next Steps", the paper stated:

> "As a result of discontinuing with the New Build SDU part of business, the Business Development role Housebuilders if [sic] effectively a redundant role. This area of the business is not strategic due to its scale and the issues raised within the summary above.
>
> "The role being made redundant under the agreements we signed at the time of the DIF investment lead to the leaver provisions being enacted. To this end I attach a separate valuation document from our auditors UHY.
>
> "The valuation report shows that the shares are valued at zero today and therefore no monies would change hands for shares as part of the redundancy. Andy Timbrell currently holds 12.24% ordinary shares, plus a small LTIP %. Our suggestion is that as Andy Timbrell is a founder of the Company, he is able to retain 2% of his shares, where he would receive value for these triggered by a future exit. The remaining shares being returned as detailed in the investment agreements come back to the original shareholders but we suggest a separate discussion on this point to finalise.
>
> "Under the terms of Andy Timbrell's service agreement, he will receive a redundancy payment of c.£3,000 and his notice period of three months of £15,682."

37. To the extent that the "Action and Next Steps" section suggests that a share sale will automatically follow the departure of the claimant, this is incorrect, since, as the advice from Shoosmiths set out (p.169), DIF would have an option (rather than this being automatic) to require the Board to serve a written notice on the claimant, which would then deem the claimant to have served a notice notifying his intent to transfer all of his shares.

38. The valuation report provided by UHY gave nil valuation to the company after the £25 million investment was taken into account. The purpose of the report stated: "this report was prepared on the specific instructions of Liberatis Limited and solely for the purpose of assisting with the proposed exit of a minority shareholder."

39. At a board meeting on 22 April 2021 (257) the Board confirmed its decision to close the Housebuilder Division and focus on New build MDU and Retro opportunities. Tony Hughes updated the Board on the shareholder/employment implications of this decision. Tony Hughes confirmed he would engage Shoosmiths to produce the necessary documentation and then Stuart Lees and Tony Hughes would have the discussion with the claimant to inform him of the closure of the new build SDU division and the implications for his employment and shareholding.

40. At this time, Tony Hughes, Nicola Beamish, Stuart Lees and other board members thought that the claimant alone was at risk of redundancy because of the closure of the Housebuilder Division.

41. Following the board meeting, Tony Hughes took employment law advice and, on the basis of that advice, he and Nicola Beamish decided that there should be a pool for selection for redundancy consisting of the three employees who carried out business development. These three individuals were the claimant, Mark Cueto (who carried out a business development role with MDU sites) and Ian Handy (who carried out a business development role with Retro sites). One of these was to be selected for redundancy.

42. On 13 May 2021, Nicola Beamish had a Teams call with, and then wrote to, these three individuals, informing them that the respondent had decided that it was no longer commercially viable to continue with the Housebuilder Division and, as a consequence of this, the company's requirements in terms of business development was expected to reduce. She informed them that it was proposed that the number of individuals who carry out business development as part of their role would be reduced from 3 to 2, making one role redundant. (287).

43. Nicola Beamish drew up the selection criteria and did the application of the criteria the three employees in the pool over 13-14 May 2021. (290).

44. The criteria used were as follows:

> Criterion 1: Business area of weighted pipeline (open opportunities) – no. of units
> Criterion 2: Business area of weighted pipeline (closed/won)
> Criterion 3: Management of field sales and internal sales team
> Criterion 4: Involvement in wider business areas.

45. I accept that the criteria adopted by Ms Beamish were intended to assess the skills and expertise required of the remaining roles moving forwards, which primarily involved business development but with an element of management of sales personnel. This would be in the context of MDU and retrofit work, housebuilder work not being continued other than completion of some legacy work.

46. In relation to criteria 1 and 2, Ms Beamish used hubspot weighted pipeline data to arrive at her scoring. Notes on the score sheet state: “Housing development and land units will score zero, all others will score 1 per unit.”

47. In relation to criterion 3, Ms Beamish used FTE management data to arrive at her scoring. Notes state: “No. of FTE managed.”

48. In relation to criterion 4, Ms Beamish used data about the number of internal meetings attended to arrive at her scoring. Ms Beamish did not explain specifically in her witness statement how attendance at internal meetings assessed skills and expertise required for the remaining roles. She provided detail during cross examination and I accept the evidence she gave in relation to this matter. The respondent had a small executive team. Ms Beamish looked at meetings which drive success. The purpose of the meetings was to improve key aspects of the business. If people did not attend, they were not aware of challenges and were not involved in actions to improve the business. Many of the meetings were held by Teams. The claimant attended meetings relating to his specific area of the business but not other meetings, whereas others attended meetings in areas not limited to their functional responsibilities. The claimant could have attended meetings not limited to his functional responsibilities.

49. In relation to criteria 1 and 2, Ms Beamish did not provide much detail in her witness statement about how the method of scoring assessed skills and expertise required for the remaining roles. She provided more detail during cross examination. I accept that the evidence she gave reflected her view at the time. Housing development and land units scored zero because these were referral agreements and not wayleaves and referral agreements were considered to be of little value. Referral agreements could turn into wayleaves but not for a long time. New housing was excluded because it was not strategic for the respondent’s future business.

50. The maximum score for criterion 1 was 10. Scoring was done out of 5 but double weighting given to this criterion. Notes on the scoring sheet state: “Criteria 1 has a double weighting as this will support the success of the future business plan.” All other criteria were scored out of 5 and had single weighting. The maximum total overall score was 25.

51. Ms Beamish scored the claimant 7 in total; 6 for criterion 1, 0 for criteria 2 and 3 and 1 for criterion 4. Mr Cueto scored 14 in total; 4 for each of criteria 1 and 2 and 3 for each of criteria 3 and 4. Mr Handy scored 18 in total; 10 for criterion 1, 1 for criterion 2, 3 for criterion 3 and 4 for criterion 4. The claimant scored lowest: 7 compared to 14 for Mr Cueto and 18 for Mr Handy.

52. On 14 May 2021, Nicola Beamish wrote to the claimant (p.314) informing him that he had been provisionally selected for redundancy following application of the selection criteria. She enclosed a copy of his scoresheet. She invited him to a consultation meeting on 21 May 2021.

53. The first consultation meeting did not, in fact, occur until 20 July 2021, due to several pauses, by agreement, for without prejudice discussions which did not result in agreement.

54. Since Nicola Beamish was not going to be available for the whole of the consultation period, Tony Hughes took over responsibility for having the consultation meetings.

55. The first consultation meeting took place on 20 July 2021 between the claimant and Tony Hughes. Nicola Beamish attended as notetaker. (p.397)

56. Tony Hughes explained the selection/scoring method. In relation to criterion 1, he said that weighted pipeline data of open opportunities as at 11 May 2021 was used, taken from Hubspot. He said that pipeline opportunities for land and housing scored zero as they did not support the strategic business areas of the company and all other areas scored 1 point per unit. He set out the number of units required to score each point. He said that this criterion had a double weighting due to the significance of supporting the future growth of the business.

57. In relation to criterion 2, Tony Hughes said that weighted pipeline data of closed/won opportunities as at 11 May 2021 was used, taken from Hubspot. He said that pipeline closed/won for land and housing scored zero as they did not support the strategic business areas of the company and all other areas scored 1 point per unit. He set out the number of units required to score each point.

58. Since criterion 3 and its application is not challenged by the claimant, I do not set out the explanation given in relation to this criterion.

59. In relation to criterion 4, Tony Hughes said that those in the selection pool were reviewed in terms of contribution to wider business areas on the basis of the standard daily, weekly and monthly calls and meetings that existed within the business and which ones each of the selection pool attended and contributed to. He explained the allocation of points according to the percentage of meetings attended.

60. The claimant questioned whether it had been factored into the scoring process that he worked part time. Tony Hughes responded that the claimant's scoring was still the lowest when factoring in that he worked a 3 day week.

61. The claimant alleged that the whole process was a sham and had been engineered to get rid of him and make a claim on his shares.

62. Tony Hughes referred to two current vacancies in the business but the claimant agreed that the roles were too junior. The claimant did not identify any other roles in the business which he thought he should be offered.

63. Tony Hughes wrote to the claimant on 22 July 2021, responding to points raised in the meeting. This included denying that the redundancy process was a "sham" and engineered to claim the claimant's shares from him. Tony Hughes wrote that the process was undertaken because they considered it in the business' interests to close the housebuilder division and this led to a reduced requirement

for the number of employees carrying out business development activities. He recognised that if the claimant was made redundant, this would have a consequence in respect of the claimant's shares, but said that the redundancy proposal arose due to the business' requirements in the future and not because of anything relating to the claimant's shares.

64. The claimant wrote, on receipt of the notes, challenging certain points. Nicola Beamish made some changes to the minutes but rejected other suggested changes (p.414). She explained that she had rejected some suggested changes because they appeared to reflect the claimant's views now, rather than what was actually discussed at the meeting.

65. A further consultation meeting took place on 28 July 2021 between Tony Hughes and the claimant. Mike Piggott attended as notetaker (p.425). Points raised by the claimant included that the did not consider that the housebuilding sector had been given the chance it deserved. Tony Hughes said a review had taken place and there were only a few live sites and they had to focus on where was best for the company. The claimant said he felt this was an orchestrated plan.

66. By letter dated 30 July 2021, the claimant was given notice of termination of his employment (p.441).

67. The claimant appealed against his dismissal by letter dated 5 August 2021 (p.448). He wrote that the grounds of his appeal were that there was not a genuine reason for his redundancy and the situation had been contrived as a pretext for getting rid of him. He also alleged that the procedure adopted had been unreasonable and unfair with no attempt to listen to anything he said. He argued that there was not a fair selection process or any material assessment of other options for alternative employment. He challenged that Stuart Lees was an appropriate person to conduct the appeal given his involvement in earlier discussions with Tony Hughes which showed a bias in his view in siding with Tony Hughes and the desire to obtain the claimant's shares.

68. The claimant's appeal was heard by Stuart Lees, despite the claimant's objections. The claimant sought postponement of the meeting until his solicitor had returned from leave and until after his own holiday. Stuart Lees went ahead with the meeting in the claimant's absence.

69. The claimant's appeal was rejected by letter dated 20 August 2021 (p.460). Stuart Lees wrote that the Board had taken the decision to withdraw from the Housebuilder sector and he was satisfied this decision was taken for purely commercial, strategic reasons. He recognised that, at the time the Board made its decision, it was considered that this would solely affect the claimant's role and might result in his redundancy. However, after further consideration and taking advice, a decision was taken to consider all three employees in business development roles for redundancy. He wrote that he concluded that a genuine redundancy situation did arise as a result of the Board's decision to withdraw from the Housebuilder division. He did not agree that the redundancy situation was contrived as a pretext for getting rid of the claimant.

70. In relation to the grounds of appeal about the process followed, Stuart Lees wrote that he had seen nothing which led him to believe the procedure was unfair or unreasonable. He referred to the two consultation meetings and that there was evidence Tony Hughes listened to the comments raised by the claimant. Stuart Lees wrote that he was satisfied that the score card approach adopted for the redundancy selection was fair and thorough, fairly assessing the contribution of the at-risk employees as well as the skills/contributions required by the business moving forwards.

71. In relation to alternative employment, Stuart Lees wrote that there was no evidence that there were any alternative roles within the business which would have been suitable for the claimant.

72. The claimant referred in his witness statement to a number of appointments which were made after his dismissal, some within 2 months of his employment ending. I accept the evidence of Tony Hughes that these were roles with a salary of £23,000 to £30,000 for a full time role. The claimant had been earning £60,000 per annum for 3 days' work a week. I find, based on the claimant's evidence in cross examination, that he would not have accepted a job with the respondent on such a reduced level of pay. The claimant thought that the respondent should have adapted a brand ambassador role to suit him, with a suitably increased salary. The claimant would not have accepted a purely sales role.

73. I find that the respondent did close the Housebuilder Division, save for continuing with legacy work. No one was employed to carry out the role previously carried out by the claimant.

74. The ACAS early conciliation period was 26 October 2021 to 7 December 2021.

75. The respondent served the claimant with a leaver notice in respect of his shareholding on 7 December 2021 (470). The letter stated that the respondent had been required by DIF to serve this notice.

76. The claimant presented his claim on 22 December 2021.

77. The claimant is involved in separate High Court proceedings relating to his shareholding.

Submissions

78. Mr Jenkins made oral submissions only on behalf of the claimant. Mr Hignett provided some submissions in writing and also made oral submissions.

79. There was no dispute between the representatives on the applicable law.

80. In summary, the submissions on behalf the claimant were as follows. The tribunal could not be satisfied there was a genuine redundancy situation. It was not clear why the housebuilding division had to be abandoned. Points relied on were historic and well-known and nothing had happened to change the respondent's position in the few months from when the diligent investors apparently had no issue with this area of the business.

81. Mr Jenkins submitted that the respondent had not proved that redundancy was the operative reason for dismissal. Tony Hughes had been critical of the claimant from September 2020. Why was Shoosmiths' report obtained? The valuation of the shares was not relevant to whether the Housebuilding Division should be closed and whether or not the claimant made redundant. Why were the steps taken in relation to the claimant (valuation of shares and calculation of redundancy) not done for Mr Cueto and Mr Handy? The instruction letter to UHY explicitly said this was being done in relation to an employee leaving the company; the reality was this was in the letter because this was what UHY had been told. The respondent has no answer to the existence of the valuation report and what the letter says.

82. Mr Jenkins submitted that the selection criteria disadvantaged the claimant in every conceivable way. Nicola Beamish's evidence on this was unconvincing. That the selection criteria clearly disadvantaged the claimant brought its own conclusion. It was an unusual scoring matrix, giving rise to suspicion as to why it was put in the way it was. It was more likely it was done this way because there was a desire from the start to make sure the claimant came out bottom.

83. Mr Jenkins submitted that Mr Lees was not impartial. He was at the kick-off meeting and chaired the meetings where the decision was made.

84. In summary, the submissions on behalf of the respondent were as follows.

85. The decision to close the housebuilding division led to a redundancy state of affairs. The dismissal of the claimant was broadly attributable to that state of affairs, because he was functional head of that side of the business. There was nothing to suggest the Board intended to carry on the housebuilding work. Applying the logic in the **ASLEF** case, the fact the dismissal of the claimant may have had consequences for his shareholding does not mean that was the reason he was dismissed.

86. Mr Hignett submitted that valuing the shares was a prudent step, seeking to quantify costs before going through a process. It was to make sure the Board understood the implications of the decision they were to make. In legal terms, Mr Jenkins was right that the valuation was not relevant to the decision to dismiss but in commercial terms Mr Jenkins was wrong. The reason the claimant was mentioned at the time of the instructions to UHY but not others was that there was no pool at the time. The claimant was divested of his shareholding because of the shareholders agreement and articles of association the claimant had signed. It was not the operative reason for his dismissal.

87. Mr Hignett invited the tribunal to find the process of consultation was adequate. The claimant was given an opportunity to comment on the criteria and scoring. There was no requirement to consult him on the criteria in advance. The claimant accepted that three out of four criteria were fair.

88. In relation to criterion four, Mr Hignett submitted that the employer had a fair amount of leeway. The tribunal would have to find the criterion to be outside the range of reasonable responses to find it was unfair. This was a small company with big growth plans. They wanted people involving themselves in wider subjects. This

criterion was not outside the reasonable range of responses. The claimant could have got involved with other things but chose not to.

89. In relation to the scoring, Mr Hignett submitted the scoring on criteria one and two was not outside the reasonable range of responses. In relation to criterion two, Mr Hignett accepted this disadvantaged the claimant but this was reasonable. There was no point in taking account of closed opportunities which would not lead to anything further. If he should have scored higher, he would still have been selected for redundancy.

90. In relation to alternative employment, the claimant had agreed that the two roles offered were not suitable. He had spoken of two further roles but accepted these were not suitable in terms of skills, experience and salary. The claimant said they should have found him another role. The authorities were plain that the respondent was not required to invent a new role for him.

Law

91. The law in relation to unfair dismissal and redundancy is contained in the Employment Rights Act 1996 (ERA).

92. Section 139(1) Employment Rights Act 1996 sets out when an employee shall be taken to have been dismissed by reason of redundancy. The relevant parts of this section for this case are:

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

93. Section 94(1) ERA provides that an employee has the right not to be unfairly dismissed by his employer.

94. Fairness or unfairness of the dismissal is determined by application of section 98 ERA. Section 98(1) ERA provides that in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and if more than one, the principal one and that it is a reason falling within section 98(2) ERA or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Redundancy is one of the potentially fair reasons for dismissal.

95. In relation to proving the reason for dismissal, the respondent must prove a redundancy state of affairs and that the dismissal of the claimant was broadly attributable to that state of affairs: **Murray v Foyle Meats [1999] UKHL 30**. The Tribunal may enquire whether the redundancy was genuine but may not query the

business decisions of the employer: **Hollister v National Farmers Union [1979] 238 CA.**

96. In **ASLEF v Brady [2006] IRLR 576**, (a misconduct case, rather than a redundancy case), the EAT considered whether the employer had established a fair reason for dismissal, writing:

> "78. We would agree that in principle there is indeed a difference between a reason for the dismissal and the enthusiasm with which the employer adopts that reason. (Mr Hendy in fact drew a distinction between reason and motive, but we do not think that the analysis in this case is assisted by referring to the elusive concept of motive.) An employer may have a good reason for dismissing whilst welcoming the opportunity to dismiss which that reason affords. For example, it may be that someone perceived by management to be a difficult union official is perfectly properly dismissed for drunkenness. The fact that the employers are glad to see the back of him does not render the dismissal unfair. What causes the dismissal is still the misconduct; but for that, the employee would not have been dismissed.
>
> "79. It does not follow, however, that whenever there is misconduct which could justify the dismissal a tribunal is bound to find that this is indeed the operative reason. The *Thomson* case shows that even a potentially fair reason may be the pretext for a dismissal for other reasons. To take an obvious example, if the employer makes the misconduct an excuse to dismiss an employee in circumstances where he would not have treated others in a similar way, then in our view the reason for dismissal- the operative cause – will not be the misconduct at all. On this analysis, that is not what has brought about the dismissal. The reason why the employer then dismisses is not the misconduct itself. Even if that in fact merited dismissal, if the employee is treated differently to the way others would have been treated, being dismissed when they would not have been, then in our judgment a tribunal would be fully entitled to conclude that the misconduct is not the true reason or cause of the dismissal. The true reason is then the antipathy which the employer displays towards the employee.
>
> "80. But it is not only where there is evidence that the employee has been treated differently to the way others would be treated that a finding of unfairness can be made. As we have said, once the employee has put in issue with proper evidence a basis for contending that the employer has dismissed out of pique or antagonism, it is for the employer to rebut this by showing that the principal reason is a statutory reason. If the tribunal is left in doubt, he will not have done so. Evidence that others would not have been dismissed in similar circumstances would be powerful evidence against the employer, but it is open to the tribunal to find the dismissal unfair even in the absence of such strong evidence. In a case of mixed motives such as malice and misconduct, the principal reason may be malice even although the misconduct would have justified the dismissal had it been the principal reason."

97. In the **ASLEF** case, the EAT referred to the EAT decision in **Timex Corporation v Thomson [1981] IRLR 522**, quoting a passage from the judgment of Browne-Wilkinson J which included the following, relating to the possibility of redundancy being a pretext for dismissal:

> "Even where there is a redundancy situation, it is possible for an employer to use such situation as a pretext for getting rid of an employer he wishes to dismiss. In such circumstances the reason for the dismissal will not necessarily be redundancy. It is for the industrial tribunal in each case to see whether, on all the evidence, the employer has shown them what the reason for the dismissal, that being the burden cast on the employer by s.57(1) of the Act." [The reference being to the predecessor legislation to ERA].

98. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 this shall be determined in accordance with equity and the substantial merits of the case. In considering the reasonableness or unreasonableness of a dismissal, the tribunal must consider whether the decision to dismiss was within the band or range of reasonable responses.

99. The EAT in **Williams v Compair Maxam Ltd [1982] IRLR 83 EAT** set out various factors to be considered in determining whether a dismissal for reason of redundancy was fair or unfair. These factors included establishing criteria for selection which, so far as possible, can be objectively checked against such things as attendance records, efficiency at the job, experience, or length of service; and the fair selection in accordance with these criteria. The Court of Appeal in **British Aerospace v Green [1995] IRLR 433** said that, for a respondent to be held to have acted reasonably, it was sufficient for the employer to show that he had set up a good system of selection, that it was fairly administered and that ordinarily there was no need for the employer to justify all the assessments on which the selection for redundancy was based.

100. An employer should investigate alternative employment opportunities but is not required to create a job: **Quinton Hazell Ltd v WC Earl [1976] IRLR 296**.

Conclusions

101. The only complaint to be considered was of unfair dismissal.

102. I conclude that there was a redundancy state of affairs. The respondent decided to close the Housebuilder Division. As a result of this decision, the respondent needed one fewer person carrying out business development. There is no evidence that anyone was engaged by the respondent in a comparable role to that of the claimant after his departure. New appointments were at a more junior level with a much lower salary than that of the claimant.

103. I have found that Tony Hughes was unhappy about the claimant's performance by the end of September 2020 (see paragraph 19). Tony Hughes' denial of this in his evidence gave me concern about his reliability as a witness. However, this concern is not sufficient to lead me to conclude, as the claimant asserted in evidence, that Tony Hughes had "hoodwinked" the Board into closing an area of the business, with the implication that this was so that Tony Hughes and others could get hold of the claimant's shares before they became valuable. The decision to close the Housebuilder part of the business was not that of Tony Hughes alone. It was the decision of the Board, of which Tony Hughes was a member, but on which representatives of the investor DIF, amongst others, sat. I am satisfied that the Board, based on evidence in the strategic review, formed a view that Housebuilder part of the business was one they did not wish to continue. The paper set out reasons as to why the New Build SDU element of the business had become non-strategic. These included a significant payback period, low take-up rates and the small number of Wayleave agreements signed and a gap of two years in additional agreements. (See paragraph 35). I have no reason to conclude that the members of the Board did not reach their decision based on these reasons. It was contemplated by Tony Hughes and other members of the Board at the time they took the decision that this was likely to result in the dismissal for redundancy of the claimant, as the person most affected by the decision, and that this would have implications for his shareholding. The evidence before me does not suggest, however, that a desire to dismiss the claimant and obtain his shareholding was the reason for the decision to close the Housebuilder division, rather than the dismissal of the claimant and implications for his shareholding being a likely consequence of the decision to close the Housebuilder division.

104. I conclude that the dismissal of the claimant was broadly attributable to the redundancy state of affairs; redundancy was not a sham, or a pretext, for obtaining the claimant's shares in the respondent company.

105. I conclude that the respondent has satisfied the burden on them and shown that the claimant was dismissed for the potentially fair reason of redundancy.

106. I turn next to the fairness of the dismissal. The claimant was selected for redundancy from a pool of three employees. The claimant does not take issue with the identification of the pool for selection. His challenge in relation to the fairness of the dismissal is predominantly in relation to the selection criteria used and to their application.

107. The claimant challenges the use of criterion 4 because he asserts this had no relevance to the proposed role and inherently disadvantaged him. Criterion 4 was "Involvement in wider business areas" and was assessed by attendance at meetings. I accepted the evidence of Ms Beamish as to why she considered this criterion relevant to the assessment of skills and experience needed for the remaining roles (see paragraph 48). The respondent had a small executive team. Ms Beamish looked at meetings which drive success. The purpose of the meetings was to improve key aspects of the business. If people did not attend, they were not aware of challenges and were not involved in actions to improve the business. The claimant could have, but did not, attend meetings which did not just relate to his functional responsibilities, unlike others. I conclude that use of this criterion as one

of the four criteria for scoring for redundancy fell within the range of reasonable responses.

108. The claimant did not challenge the use of the other three criteria but did challenge the application of criteria 1 and 2 because of the discounting of housebuilding sales. Criterion 1 was "Business area of weighted pipeline (open opportunities) – no. of units". Criterion 2 was "Business area of weighted pipeline (closed/won)".

109. I accepted the evidence of Ms Beamish as to why she discounted housebuilding sales (see paragraph 49). This was because the housebuilding figures related to referral agreements and not wayleaves (which had no guarantee of business) and because new housebuilds did not form part of the respondent's future strategy.

110. Employers have, in accordance with authority, a wide scope, within the range of reasonable responses, in the choosing of the selection criteria and how to score against these criteria. I have considered carefully whether the application of selection criteria 1 and 2 fell outside the range of reasonable responses. The method chosen to score against criteria 1 and 2 was going to disadvantage the claimant since it largely excluded credit for the type of work in which the claimant was involved. However, I note that the claimant was still able to score higher than Mark Cueto on criterion 1, so the method of scoring for criterion 1 did not disadvantage the claimant to the same extent as the scoring for criterion 2, on which the claimant scored zero. Ms Beamish used data to assist her scoring, which suggests an attempt to do the scoring in an objective manner. There was a rationale for Ms Beamish scoring as she did, in that the focus of future business excluded the housebuilder work (other than legacy work). Another employer might have chosen different selection criteria and/or a way of scoring against these, which might have given the claimant more credit for transferrable skills acquired within his specialist area, and potential to succeed in a role outside the Housebuilding area. However, I have to assess whether the process chosen by the respondent fell within the band of reasonable responses, not whether, under a different process, the claimant would have had a better chance of not being selected for redundancy. I have concluded that the method of scoring adopted by the respondent did not take the selection process outside the band of a reasonable process.

111. I conclude that the process followed in relation to the claimant's selection for redundancy overall fell within the band of a reasonable process. The respondent was not required to consult the claimant in advance of scoring on the criteria it chose to use. There were two consultation meetings before the claimant was given notice of redundancy, at which the claimant had an opportunity to make comments, which I accept were considered by the respondent, although not resulting in a change of view.

112. I conclude that the respondent acted reasonably in all the circumstances in dismissing the claimant for redundancy when Mr Hughes took the decision to dismiss the claimant.

113. The claimant has suggested that Mr Lees was too closely involved in matters prior to the appeal, to be an impartial appeal officer. He did chair the board meetings at which the decision to close the housebuilder division was taken. This is distinct from the decision to select the claimant for redundancy although, at the time of the board meetings, it was contemplated by the Board that their decision was likely to result in the claimant being made redundant. There is no evidence that Mr Lees was involved in the claimant's selection for redundancy, once Tony Hughes and Nicola Beamish decided to use a pool of three for selection. I do not consider that Mr Lees hearing the appeal causes the dismissal to become unfair.

114. I conclude for these reasons that the complaint of unfair dismissal is not well founded.

Employment Judge Slater
Date: 14 June 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
22 June 2023

FOR EMPLOYMENT TRIBUNALS