EMPLOYMENT TRIBUNALS

Claimant: Mr Jeremy Collard

Respondent: Plaza Premium Lounge (UK) Limited

Heard at: Reading
On: 30 May and 1 June 2023
Before: Employment Judge Gumbiti-Zimuto

Appearances
For the Claimant: In Person
For the Respondent: Ms Y Barlay, consultant

REASONS FOR JUDGMENT

Sent to the parties on 6 June 2023 provided at the request of the respondent.

1. The claimant made a claim containing complaints of unfair dismissal, age discrimination, and redundancy payment in a claim form presented on 11 October 2021. The claimant subsequently withdrew his claim for age discrimination and a redundancy payment. The complaint for a redundancy payment was not well founded because the claimant had already received a redundancy payment from the respondent. The claimant chose to withdraw his age discrimination claim. The respondent denied all the claimant's complaints.

2. The respondent resists the claim based on the evidence given by Mr Mantelli. The claimant gave evidence in support of his own case. I was provided with witness statements from Mr Mantelli and the claimant, I was provided with a trial bundle which contained 108 pages of documents. From these sources I made the following findings of fact which I considered necessary to determine the issues arising in this case.

3. There was a late application to adduce further evidence relating to the claimant's appeal.

4. The claimant's case was presented to the employment tribunal on 30 November 2021. The respondent filed a response, and the case was listed for a preliminary hearing. At the time that the case was listed for a

preliminary hearing, there were complaints of age discrimination and a redundancy payment in addition to the claim before me, of unfair dismissal. As a result of discussions that took place at the preliminary hearing on 5 August 2022, the claimant withdrew the claim for redundancy payment. There was further discussion about the claimant's complaint of age discrimination and although at the end of the preliminary hearing the claimant's age discrimination claim was continuing, it was withdrawn shortly after the preliminary hearing.

5. The order made by the tribunal on 5 August 2022 required that, on or before 23 September 2022, the claimant and respondent will send each other a list of all the documents that they wish to refer to at the final hearing or which are relevant to any issue in the case, including the issue of remedy. They were send each other a copy of any of these documents if requested to do so.

6. On 22 September 2022, the claimant's then solicitor wrote a letter to the respondent requesting documents. The papers that I have before me are silent as to what transpired between the parties at that time. What is evident is that the claimant parted company with his solicitor and it may be that this break up contributed to the lack of action in the case because the next indication of action in this case is on 29 January 2023 when the claimant's solicitor, who at this point appears to have been briefly reengaged wrote to the respondent chasing them in respect of providing documents.

7. I note that the order that was made on 5 August 2022 by Employment Judge Anstis provided that, by 27 January 2023, the parties must agree which documents are going to be used at the final hearing.

8. Thereafter there was again inaction in this case and one of the observations made is that the claimant stopped pursuing the case actively, however I do not think that this was ever his intention but there was certainly inaction in relation to the prosecution of the case for some weeks.

9. The next document contained in the documents I have seen, was a letter that came from the claimant to the respondent requesting compliance with the order which was made on 5 August 2022, at that stage the claimant was again on the topic of documents.

10. The claimant wrote again on 9 March 2023 to the respondent and on that occasion the claimant provided the respondent with copies of his statements, which were his statement and statements of former work colleagues. That date is relevant because that was the claimant seeking to comply with the tribunal's order made on 5 August 2022, which required that witness statements be exchanged by the parties by 10 March 2023.

11. It would appear that the respondent did take some action following this document from the claimant in that the respondent provided the claimant with a first iteration of what became the trial bundle. It is not clear when that was provided but that appears to have been provided to the claimant by 12

April 2022 as on that date the claimant wrote to the respondent stating that the claimant hasn't yet received statements from the respondent and querying whether the documents received by the claimant had been agreed with the claimant's former solicitors. I should point out, at this stage, that by this date the claimant was no longer represented by a solicitor, he was now acting in person.

12. On 14 May 2023, the claimant wrote to the respondent requesting documents. That list of documents appears to be the one that was set out in the schedule to the statement provided by the claimant and refers back to that schedule because of earlier correspondence between the claimant's former representative and the respondent's representative.

13. The claimant wrote to the tribunal on 26 May 2023 stating that he hasn't received documents from the respondent and asking for some assistance in relation to that.

14. There is one further document that I haven't mentioned and that is a document which was written by J Tandypin, LLB Hons. LLM who was acting for the claimant at the time, who on 8 July 2022, wrote to the Legal Peninsula Group Ltd, Peninsula Business Services Ltd, Victoria Place requesting disclosure of documents relating to the claimant's appeal. That date and those documents are important.

15. There is nowhere in the documents that I have seen any response to the claimant's various requests for documents. I have heard the evidence in this case, during the course of which the claimant appeared to suggest that there had been no appeal, I will come back to that point as I do not think that when one considers what the claimant actually said, that he was in fact asserting that there had been no appeal, but I will come back to that.

16. In any event, at the close of the evidence on Tuesday 30 May 2023, after the mid-day adjournment the parties were expected to make their closing submissions at 2.00pm. At that stage, it appeared as though the claimant's evidence was that there had been no appeal, that had not been demurred by the respondent and that presented a significant difficulty for the respondent when considering the question of fairness.

17. At 2.00pm when the parties returned at that point to make their submissions, I was informed by the respondent's representative that an appeal did take place, contrary to what appeared to be the claimant's evidence and the respondent made an application for it be able to rely on the evidence of the appeal. I explained that, before I determined any such application, I would need the respondent to serve evidence on the claimant and the tribunal, and to produce a witness statement explaining why the respondent has failed to comply with the tribunal's directions in respect of disclosure.

18. I made an order that the respondent should immediately serve on the claimant the documents on which they will seek to rely, that the respondent must set out in a witness statement the reasons why they failed to comply

with the tribunal's directions on disclosure etc. and that the witness statement was to be provided to the claimant by 10.30am 31 May 2023.

19. I gave the claimant permission, if so advised, to serve a witness statement in reply to the respondent's evidence in support of the application and that such statement was to be served on the respondent by 6.00pm 31 May 2023. I ordered that 31 May 2023 would not be a sitting day in relation to this case. 31 May 2023 was a rail strike day, which would have made life very difficult for everybody trying to get to the tribunal at Reading, especially those people who travel to Reading from other towns. I ordered that the case was to resume 1 June 2023 at 10.00am.

20. When the case resumed, I began hearing submissions from the respondent's representative on the late evidence, during the course of those submissions I pointed out that there was an absence of any witness statement or evidence explaining the respondent's failure to comply with the tribunal's orders. During the course of submissions an application emerged which was essentially that I should allow the respondent additional time in order to obtain evidence from a representative for the respondent who could explain the procedural history of the case and, perhaps provide some explanation for why the respondent appeared to fail to comply with the tribunal's orders.

21. So, those are the facts of circumstances except I suppose I should say that when the claimant was asked to respond, he objected to additional evidence being adduced and also objected to the application to further postpone the hearing.

22. In determining this application, I have had regards to the overriding objective of the Employment Tribunal Rules of Procedure, which is to deal with cases fairly and justly. I note that the overriding procedure objectives provides that dealing with a case fairly and justly includes so far as is practicable, ensuring that the parties are on equal footing, dealing with cases in ways which are proportionate to the complexity and importance of the issues, avoiding unnecessary formality and seeking flexibility in the proceedings, avoiding delay so as far is compatible with proper consideration of the issues and finally saving expense.

23. The rule also provides that a tribunal shall seek to give effect to the overriding objective in interpreting or exercise any power given to it by these rules and the parties and their representatives will assist the tribunal to serve the overriding objective and, in particular, shall cooperate generally with each other and with the tribunal.

24. I also have had regard to Rule 5 of the Employment Tribunals Rules of Procedure which, provides that the tribunal may on its own initiative, or an application of a party, extend or shorten any time limits specified in the rules or in any decision whether or not in the case of an extension, it has expired.

25. I also note the contents of Rule 6, which provides that failure to comply with any provision of the rules, except 8(1), 16(1) 23 or 25 or any order of the tribunal except for an order under rules 38 or 39 does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance the tribunal may take such action as it considers just, which may include all or any of the following:

    a. Waving or varying the requirements.

    b. Striking out the claim or the response in whole or in part in accordance with rule 37.

    c. Barring or restricting the party's participation in the proceedings.

    d. Awarding costs in accordance with rules 74 to 84.

26. The employment tribunal has the power to make case management orders and the tribunal may at any stage of the proceedings on its own initiative or on an application make a case management order.

27. The case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made.

28. Rule 31 deals with disclosure and provides that the tribunal may order any person in Great Britain to disclose documents or information to a party by providing copies or otherwise or to allow a party to inspect such material as might be ordered by a County Court.

29. Reference to the County Court, means that there is some assistance with dealing with the issue before me if we need to consider the civil procedure rules. I have in mind and, in making my decision today, relied significantly on CPR 31.21 which provides that a party may not rely on any document, which he fails to disclose or in respect of which he fails to permit inspection unless the Court gives permission.

30. There are a number of cases which have been decided in relation to the application of CPR 31, there are two cases on that which are some assistance, bearing in mind what we are dealing with here. The first is case Vernon v Bosley [1996] EWCA Civ 121, where is was held that, where a document was disclosed to a party after he had closed his case or the evidence as a whole was concluded, he should apply to the Court to reopen the case in light of the disclosure. If the document was of real significance and there was otherwise a risk of injustice.

31. I stop there and seek to consider that in the context of this case. This is a case where a party had failed to disclose documents and that same party wishes to now disclose the document in breach of the order for disclosure

and rely upon that document after the evidence has been concluded. It is the opposite to the Vernon v Bosley situation.

32. In the case of McTear v Englehart [2016] EWCA Civ 487, it was stated that the ongoing duty to disclose, which is contained in CPR 31.11 was relevant in considering the extent to which documents found after the expiry of the disclosure order, could be used. However, the ongoing duty does not excuse a breach of the order and when considering the use of documents discovered after the expiry of disclosure order, the Court should consider subsequent applications for an extension of time and relief from sanction separately.

33. So, in the context of this case, it seems to me that the first thing I have to do is consider whether I should allow the respondent to be able to disclose the documents outside the time limit and then secondly, go on to consider if that disclosure order is amended, whether the respondent should be allowed to reopen the evidence in order to be able to rely on the documents disclosed. The problem for the respondent, however, at the moment is that they have no evidence to go with the documents, the evidence that they have are the documents themselves.

34. Because there was a failure to comply with the tribunal order, it seems to me that it is important for me to also have regard to the guidance which is to be found in the case of Denton and others v White and another [2014] EWCA Civ 906. This was a case where the Court of Appeal was considering a number of application for relief from sanctions, it provide guidance that judges should follow a three-stage approach.

35. Stage 1, involves assessing the significance and seriousness of the default which led to the application for relief. If the default is not significant and serious, then relief will usually be granted and the Court may not have to concern itself with stages 2 and 3.

36. In this case, the default is serious, there was a failure to disclosure documents that go to an essential aspect of the tribunal's consideration on whether there has been a fair procedure followed by the respondent in dealing with the claimant's redundancy. The disclosure in this case is made after the evidence is closed and the parties were to give their closing submissions to the tribunal. The fault in failing to disclose is entirely resting on the respondent who has not responded to the claimant's various requests for specific disclosure in relation to documents relating to the appeal. It is necessary, in relation to this serious default, to go on to consider stages 2 and 3 of the Denton guidance.

37. Stage 2, provides that if the breach is significant and serious, it is necessary to consider why the default occurred and whether there was a good reason for it.

38. So what explanation has been provided by the defendant in this case. There is no evidenced explanation provided by the respondent, the respondent

seeks to ask for a postponement in order for the evidence of the explanation for failing to comply with the order so that evidence can be called.

39. The question of adjournment is at the discretion of the tribunal hearing the case at this stage, but some guidance is to be found from the rules at Rule 30A (2) of the Employment Tribunal Rules of Procedure which provides that where a party makes an application for a postponement of a hearing less than 7 days before the date on which the hearing begins, the tribunal may only order the postponement where:

    (a) all other parties consent to the postponement.

        (i) It is practicable and appropriate for the purposes of giving the parties the opportunity to resolve their dispute by agreement, or
        (ii) it is otherwise in accordance with the overriding objectives.

    (b) The application was necessitated by an act or omission of another party or the tribunal.

    (c) There are exceptional circumstances.

40. Whilst rule 30A (2) applies to the postponement of a hearing less than 7 days before the date of the hearing, it seems to me that it provides a framework in which to consider the application for a postponement in this case. It is not agreed by the claimant, the application is necessitated, not by the act or omission of the party who is not applying but is in fact necessitated by the act or omission of the party who is applying for a postponement.

41. The question arises whether there are exceptional circumstances in this case which would justify a postponement. It seems to me that this rule assists me in considering whether I should grant an adjournment here. Are there exceptional circumstances?

42. I return to the question of what the claimant's evidence was on the appeal. The claimant's evidence, at the time he gave it, appeared to me to be clear, in face, what was clear the question that he put to Mr Mantelli. Referring to page 96 of the trial bundle he said that "I didn't get a response to my appeal". The answer given by Mr Mantelli didn't challenge this. Mr Mantelli's position was that he couldn't say one way or the other.

43. In his own evidence the claimant was asked about the appeal, again referring to page 96 it was put to the claimant that "most of what you put in the appeal had been explained to you anyway" and then it was put to the claimant that he was aware of the performance review. The performance review being one of the issues that the claimant referred to in his appeal point. The note that I made of the claimant's answer is as follows, "that is why I wrote to Aneen Amin about the appeal, he never wrote back during

the grace period". The use of the words *grace period* passed me by at the time but those were the words used by the claimant and recorded by me.

44. What that evidence says it that there was no further challenge to the claimant's evidence on this issue. The claimant's response to the question from the respondent is one where the claimant is in fact cautious in respect of the appeal. It seems to me that his evidence is not that there was no appeal, but that Mr Aneen Amin never wrote back during the grace period. This subtlety was not explored further in the evidence. In the circumstances, I am not satisfied that there are exceptional circumstances arising from those facts arising such as the claimant seeking to knowingly put forward something that is demonstrably untrue. He was not doing th

45. Stage 3 of the Denton guidance requires us to evaluate all the circumstances to enable the application to be dealt with justly, namely the need for:

    (i) Litigation to be conducted efficiently and at a proportionate cost.
    (ii) To enforce compliance with court rules, practice [XXXX] and orders.

46. It is important that one doesn't spit in the face of justice and, say simply because they haven't complied with an order you cannot rely on the documents, there has to be a more nuanced approach than that. Looking at all the circumstances includes looking at the conduct of both parties. It is, in my view, important that this is a case where there were persistent past breaches which are relevant. I say persistent past breaches because there are at least three letters written by the claimant in which he seeks disclosure of documents from the respondent, none of which are responded to. It seems to me that this is a case where there has been a total disregard of the tribunal's orders by the respondent and or their representatives in respect of the obligations of disclosure. The tribunal's orders are not an optional extra, it is necessary for the parties to comply.

47. I notice that there is a assiduous determination on the part of the claimant to comply with the tribunal's orders, sending documents for disclosure one-sidedly, before the deadline in September, sending a copy of his witness statement to the respondent before the deadline for exchange, all of which happened in the face of the respondent's failure to comply with both of those deadlines. The respondent was required to provide a copy of the trial bundle and did not do so it would appear until sometime around 9 April 2023 as opposed to January 2023.

48. What the Denton case provided was that the parties should ensure that wherever possible they comply with the Court's orders and rules. The Denton case made clear that any culture of non-compliance was a thing of the past and ought not to be tolerated.

49. The order made by the tribunal does have some flexibility and where a party fails to comply with the tribunal deadline or is unable to comply with a tribunal rule, they should endeavour to agree an extension with the other side and that is anticipated in the order that was made by EJ Anstis on 5 August 2022 where he said that "the parties may by agreement vary the date specified in any order by up to 14 days without the tribunal's permission except that no variation may be agreed where that might affect the hearing date. The tribunal must be told about any agreed variation before it comes into effect." The order allows for the parties to be able to move the dates around. Where there is no agreement to an extension of time, under the direction at 5.3 the offending party should make a prompt application to the tribunal for variation before the deadline expiring or seek relief from sanctions. In this case, no application was made until after the evidence in the final hearing had concluded.

50. It seems to me that it is an aggravating feature in this case that the claimant had written to the respondent as long ago as 30 July 2022 requesting documents relating to the appeal.

51. My conclusion on the application is that the application for a postponement is refused.

52. The respondent began with an application to admit documents not disclosed in time into the evidence. That would require first that I extend time for the disclosure to take place and then go on to reopen the evidence to allow evidence to be adduced by the parties. However, there is no evidential basis for me to do that as I at present have no explanation for the respondent's failures. Hence the application to postpone to allow the respondent to call that further evidence, I have already postponed this case once in order to allow the respondent to put forward material relating to the appeal and required them to provide statements in support of the application to admit the documents and to explain why there was a failure to comply. The appeal documents have now been disclosed, but there is no evidence to explain the respondent's failure. All we have, is what appears to be an egregious failure to comply with the disclosure requirements.

53. In the circumstances, I do not consider that it is in the interests of justice to allow further postponement and I do not admit the documents into the evidence. Parties should proceed with the evidence as it has been presented.

54. This judgment is made in the knowledge that there was an appeal, but I have not been provided with evidence relating to the appeal. The respondent has not put forward any evidence from anyone who was involved in the claimant's appeal.

55. The respondent is a company that provides airport hospitality lounges to travellers at Heathrow Airport and other airport sites. The claimant commenced employment with the respondent on 2 January 2018. The

claimant was promoted to the position of Senior Supervisor from about November 2019.

56. Mr Mario Binelli Mantelli is General Manager for the UK, he describes his role as "*responsible for the whole UK 6 Units business performance, quality standards, health and safety, as well as staff and customer satisfaction-managing a headcount of approximately 250 employees. It is my overall responsibility*…" Elsewhere the respondent states that it employed over 100 employees, there is no contradiction between the two statements one is more precise than the other.

57. The respondent saw a downturn in business as a result of the pandemic beginning in Spring 2020.

58. The respondent went through a redundancy process in 2021. The evidence given for the respondent about the redundancy is set out in Mr Mantelli's witness statement in 85 words. These are:

> **Redundancy process**
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> 13. We completed a thorough and impartial redundancy process. We carefully followed the Polkey guidelines during the process, took advice from our HR partners Peninsula Business Services as well as being experienced practitioners ourselves.
>
> 14. When working through the redundancy process we took care that i) an appropriate pool of candidates was selected. Then we ii) consulted with the individuals in the pool, including the claimant then iii) objective selection criterion was applied to the individuals in the pool and when iv) suitable alternative employment was considered.

59. During cross examination by the claimant Mr Mantelli betrayed some further information about the redundancy process. Employee representatives were elected to liaise with the staff on the redundancy process. Mr Mantelli also stated that he had individual meetings with staff, including the claimant, although he could not recall when that meeting was. A record of the meeting was made, and this was included in the trial bundle.

60. Mr Mantelli in answer to questions from the Tribunal pointed out p81-89 of the trial bundle which contained details of a consultation meeting between himself and the claimant on 18 May 2021. Also, in answer to questions from the Tribunal, he referred to his decision to dismiss the claimant as redundant p94-95. Mr Mantelli was asked about the claimant's appeal; his evidence was that he did not know what happened to the appeal. Mr Mantelli accepted that the claimant did appeal against his dismissal.

61. The Tribunal explored with Mr Mantelli the effort made to avoid redundancy, Mr Mantelli pointed out that the claimant applied for 2 roles in the period he was at risk of redundancy but was unsuccessful. Mr Mantelli stated that

there were other roles available that the claimant could have applied for, but he did not do so. Mr Mantelli also mentioned that all staff were offered the possibility of a sabbatical for a year as an alternative to redundancy and that this sabbatical offer was available to those interested during the period they were at risk of redundancy and also after they had been notified of the decision to dismiss.

62. The claimant was first informed about the risk of redundancy in a letter dated 10 February 2021. The respondent had identified the need to make "major organisational changes because of the effects of the Global Pandemic". The claimant was informed that employee representatives were to be elected, who the respondent "would consult with on matters including whether there is any way of avoiding redundancies, reducing the numbers affected or lessening the impact of the redundancies." The letter invited employees to "put forward any alternative proposals or suggestions" such as "reduced working hours, taking a year's sabbatical leave", "voluntary redundancy" and "alternative employment". The letter set out the selection criteria for selecting people for redundancy. The employees were also told that, "should it regrettably prove necessary to issue formal notice of redundancy then any affected employee or employees will obviously be allowed a reasonable paid time off as is necessary to attend interviews or look for alternative employment."

63. Staff representatives were elected: the claimant put himself forward for election as a staff representative but was not elected.

64. There were consultation meetings between the respondent and the employee representatives. The claimant's position, in his oral evidence, was that there was no consultation with him during the redundancy process by either the staff representatives or by his managers.

65. A selection process was agreed with the employee representatives. In a letter dated 12 May 2021 the claimant was informed that he "scored lower than most other employees in the pool". The claimant was invited to a formal consultation meeting to take place using "Teams". The claimant was told that this letter was forewarning of the possibility that his employment would be terminated.

66. At the consultation meeting the selection criteria used was discussed. The selection criteria used involved considering the claimant's appraisal review from 11 May 2019. The claimant expressed the view that it was unfair because the assessment used had been completed while he was a Supervisor, but the claimant had been promoted to Senior Supervisor since that assessment.

67. Following the meeting the claimant was informed that his review had been redone. The resulting assessment left the claimant with a score lower than other employees. The claimant complains about that review because he was not involved in it as would be the normal procedure and it was carried out by a manager who no longer worked with the claimant.

68. The claimant's witness statement at paragraphs 11 and 12 bears some repating what the claimant says is as follows:

> "11. My assessment was conducted by Carla Ball, HR Manager on 5 May 2021 and I was notified that I had scored lower than most other employees. My assessment was based on a Performance review of May 2019. I could not identify the assessment score to the Individual "Selection Criteria". I have no recollection agreeing or signing the mentioned Performance Review. However, on the 18 May 2021 1 had the opportunity to air my grief . However, the Chairman would not explain the basis and weighting associated with scoring and only articulated that "other employees scored better". I proposed to the Chairman that in view of my grievances that the Performance review ''be reconsidered " or "re-done". I had the distinct impression that the Chairman displayed that he too, was not confident of the adopted process of selection as practised. I made reference to the added effort to assist the Company since the Outbreak restrictions of Covid- and my "extra mile effort "should have at the very least stand to my enhanced performance assessment. The Chairman refused to so acknowledge. I offered my 'extra efforts with good diligence. After much discussion, the Chairman agreed that a 'New Performance review" would be written.
>
> 12. By email on 23rd June 2021, I was informed that the new assessment scoring still retains my lower score than other employees. I made representation to the effect that that there had been an "improper procedure in the conduct by the manager of the Defendant company, (i) the Manager who signed the review assessment was on Overseas work when he conducted the assessment and the record would indicate that he was under several Promotion appointments. I entertain that the manager had not or could not have received the updated review information of myself to reconsider properly my assessment, I deemed the process and procedure caused my detriment. I record that within 21 hours *of* the new assessment decision, I was informed that my termination of the contract would be confirmed in Redundancy and I was given 5 days to appeal the decision."

69. On 24 June 2021 the claimant was informed that he had been selected for dismissal. He was informed that his last day of employment would be 30 June 2021. The claimant was informed that he had a right to appeal the dismissal. The claimant appealed the decision to dismiss him in an email dated 25 June 2021. No evidence has been adduced about the appeal.

70. An employee has the right not to be unfairly dismissed: section 94 Employment Rights Act 1996.

71. Section 98 of the Employment Rights Act ("ERA") provides that in determining whether the dismissal of an employee was fair or unfair, it shall be for the employer to show (a) the reason (or, if there was more than one,

the principal reason) for the dismissal, and (b) that it is a reason falling within subsection (2). The redundancy of an employee is a reason falling within the subsection.

72. Section 98(4) provides that where an employer has shown a potentially fair reason the determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer, (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case.

73. Case law shows that in considering whether a dismissal for redundancy is fair or unfair the Tribunal has to consider what evidence there is about the claimant being warned about redundancy. Whether or not there was consultation both collective and individual, whether the respondent has looked for ways to avoid redundancy of the employee; what efforts were made to find alternative employment for the employee, whether or not the respondent carried out a fair selection process and procedure for redundancy.

74. In this case the evidence given by the respondent about the procedure that was followed was laconic. It's brief nature does present the respondent with difficulties that may otherwise not have existed had the respondent's evidence been more fulsome in its details.

75. For example, Mr Mantelli refers to the respondent working through a redundancy process where an appropriate pool of candidates was selected, what he does not tell us is what that pool was who the other candidates for selection were, it may be that it was a pool of 1 or it may be a wider pool of more persons. The simple fact of the matter is that we are not told what happened. Mr Mantelli continues "*then we consulted with individuals in the pool including the claimant*" and in respect of that although there is that assertion, what took place in the consultation meeting is simply not explained in the evidence adduced by the respondent. It could not have a difficulty to produce that evidence but for whatever reason it was not set out. Mr Mantelli continues that "*there was objective selection criteria applied to the individuals in the pool*" but again we do not know who the individuals in the pool were, we do not how the criteria applied to the claimant compared to others in the pool. It is said that suitable alternative employment was considered but the evidence given by Mr Mantelli does not explain how suitable alternative employment was considered for the claimant. What Mr Mantelli says in his oral evidence is that the claimant applied for two roles, that was not said in his evidence in chief but was said in response to questions from the claimant. The evidence given by Mr Mantelli does not properly explain how the respondent went about dealing with the decision to make the claimant redundant.

76. The claimant attacks the assessment used to select him for redundancy, I have referred to the claimant's witness statement at paragraphs 11 and 12. What the claimant says about that is that the respondent eventually accepted that the claimant should have had his review or appraisal re assessed and that appears to have happened. The claimant then complains that this was done without giving him the opportunity to have the input he would have when the review is prepared in normal circumstances, and he says that is not fair in that regard. The claimant says that it leaves him with a sense of grievance in that he would not have been properly assessed. Indeed the claimant may well not have been properly assessed by the respondent this is not a mere conjecture there is a real risk he may not have been properly assessed because in a normal appraisal process there would be a dialogue between the appraiser and appraisee during which a view originally held is after discussions altered. So where the claimant is assessed in a manner which deprives him of the opportunity of being engaged in the normal way I am satisfied that in relation to that specific appraisal there is not a fair process.

77. The claimant is not to know, and Mr Mantelli is not to know before the decision to dismiss was made whether that appraisal is an appropriate one to use. We know on the face of matters that a different process was applied to the claimant in contrast to his colleagues in that he was not assessed in the same was as others, his appraisal was done without any consultation or involvement of the claimant. The claimant was dismissed on the back of a process that in the ordinary scheme of things the claimant was entitled to make some form of contribution but in this instance was denied to him makes the dismissal unfair. The fact that the claimant was dismissed on the back of a process in which he is entitled to make some contribution but has not in my view is not a fair dismissal.

78. The claimant's evidence concentrated on the question of the appeal however there has been no evidence produced by the respondent on the appeal. The claimant criticise the appeal on the grounds that there was a failure to respond with the "grace period", I am unclear what this means or whether it is a matter that is fair or unfair. If the what claimant means that the respondent took too long to consider his appeal that may be unfair. The absence of evidence on appeal means that to the extent that the respondent has been shown to have acted improperly in the decision to dismiss the claimant it has failed to show that any unfairness was cured on appeal.

79. The claimant in my view has been unfairly dismissed and the claim succeeds.

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Employment Judge Gumbiti-Zimuto

Date: 27 July 2023

Sent to the parties on: ...2 August 2023..
For the Tribunal Office

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