# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr M Hammond**

**Respondent:** **Kuehne + Nagel Limited**

**Heard at:** **East London Hearing Centre (by CVP)**

**On:** **18 May 2023**

**Before:** **Employment Judge J Farrall**

**Representation**

**Claimant:** **In person**
**Respondent:** **Mr Mellis (Counsel)**

# RESERVED JUDGMENT

**1. The complaint of unfair dismissal under Part X Employment Rights Act 1996 is not well-founded and is dismissed.**

# REASONS

## Introduction

2. By an ET1 claim form presented on 20 January 2023, after an ACAS early conciliation period between 2 December 2022 and 10 January 2023, the Claimant complained of unfair dismissal.
3. In its ET3, the Respondent contended that the dismissal was for redundancy, and denied unfairness.

## Preliminary Matters

4. At the outset I dealt with some preliminary matters, which are summarised below.

5. The parties had not complied with the Case Management Orders of the Tribunal, dated 3 February 2023. In particular, there had been no exchange of witness statements and an agreed bundle had not been filed in advance of the hearing.

6. The Respondent produced a bundle of 129 pages which the Respondent had served on the Claimant three weeks before the hearing.

7. The Respondent also produced two witness statements which had not been served on the Claimant:

   i. Steve Booth, dated 12 May 2023 (11 pages).

   ii. Richard Hay, dated 11 May 2023 (10 pages).

8. The Claimant produced four "screenshots" of exchanges via WhatsApp with his ex-partner between 9-11 November 2022 and an audio file which was a recording of a meeting on 10 November 2022 between the Claimant and Mr Thompson. These were added to the bundle by consent.

9. The Claimant also produced an image of the torn-up note of the "third consultation" meeting on 9 November 2022 which was already attached to the ET1.

10. The Claimant also produced images of a "Training Matrix" and two training certificates. It was agreed that these were not relevant to the issues in the case as set out below and so these were not added to the final hearing bundle.

11. At the outset the Respondent made an application for a postponement of the hearing to allow the Claimant more time to prepare, having only just received the Respondent's two witness statements.

12. I stood the matter down to consider the material and to allow the parties to do the same and provide their views on postponement.

13. The Claimant, having considered the new material, opposed a postponement. He stated that he had had sufficient time to consider the material, which did not say anything new. He knew the questions that he would like to put to the Respondent. The Claimant did not file a witness statement and adopted the contents of his ET1. In his view the issue was a simple one, and he wanted to "get it over with."

14. The Respondent indicated that for their part they were able to proceed with the hearing.

15. Having regard to the overriding objective I decided that it was possible to deal with the case justly and fairly by proceeding to a final hearing. The issues in the case were straightforward and could be given proper consideration in the remaining time. The Claimant, although he was representing himself, was on as equal a footing as possible with the Respondent having had time to read the two witness statements which did not disclose anything new. It was unlikely that a postponement would change Claimant's position as set out in the ET1. Taking all these factors into account a postponement leading to further delay was not in the interests of justice.

**Issues**

16. I agreed with the parties the issues for me to decide at the hearing.

17. The Claimant accepted that his dismissal related to redundancy, which is a potentially fair reason under sections 98 (1) and (2) of the Employment Rights Act 1996 (ERA).

18. He also accepted that it was a genuine redundancy situation within the meaning of s139 ERA.

19. The primary issue in this matter was whether the dismissal was fair or unfair within section 98(4) of the 1996 Act.

20. The Claimant's case is that the dismissal was procedurally unfair in one discreet respect. Specifically, the Claimant claims that on 9 November 2022, in a meeting with his line manager Mr Thompson, he was offered and accepted an alternative role of "Day Shift" Team Leader. This offer was then unfairly revoked later that day. The Claimant also alleges that there was an attempt to destroy the note of this meeting. When it was recovered it had been amended and was not a true reflection of the discussion at the meeting. The Claimant also challenged the findings of the appeal in relation to this issue as unfair.

21. The Respondent states that the Claimant was not offered an alternative role at the meeting on 9 November 2022 and that there was no attempt to doctor the note of the meeting after the event. Any misunderstanding which may have occurred at this meeting was rectified that same day. The redundancy process was conducted fairly, and the Claimant was offered suitable alternative deployment which he did not accept. The redundancy decision was subject to a thorough and fair appeal process.

22. The parties agreed that the issues for me to resolve at the hearing were:

i. Whether the redundancy exercise was procedurally unfair.

ii. Whether the Respondent had offered the Claimant suitable alternative work.

**The Hearing**

1. The hearing took place by CVP.

2. During the hearing I heard evidence from:

i. Richard Hay, General Manager for Domestic Operations at Kuehne and Nagel Limited. He gave evidence in relation to the redundancy process and the reasons for dismissal.

ii. Steve Booth, General Manager for Domestic Networks and Compliance at Kuehne and Nagel Limited. He gave evidence in relation to the Claimant's appeal against dismissal.

iii. The Claimant who gave evidence on his own behalf.

3. At the conclusion of hearing evidence, each party made oral closing submissions.

**Relevant Findings of Fact**

4. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed bundle of documents.

5. At the time of his dismissal on 16 November 2022 the Claimant was employed by the Respondent as a Warehouse Team Leader at the "Dagenham Site", having worked there since 28 October 2013.

6. The Claimant worked in the main warehouse team on a mixed rota of early shifts (6am to 2:30pm) and late shifts (2pm to 10pm).

7. The Claimant was well liked by colleagues and known for being a capable and hard worker.

8. After Brexit there was a significant reduction in work. The company forecasts showed that there was insufficient work to maintain the whole warehouse team. The Respondent decided to retain the Dagenham site only for collection and deliveries in the south of England and the warehouse team was to be reduced by 25 operatives.

9. In addition to the "business as usual" work, the Dagenham Site was used to service two contracts: Ford and Colorcon. Staff working on these contracts were treated as separate from the rest of the team as their work was dedicated to these contracts and were excluded from the redundancy process.

10. There were four Team Supervisors in Dagenham working outside the Ford and Colorcon contracts and the new proposed structure only required two. This put the Claimant at risk of redundancy.

11. On 18 October 2022, the Respondent made an announcement to affected employees, explaining that redundancies were proposed and the reasons for this.

12. As part of the announcement the Respondent asked those at risk if they were interested in voluntary redundancy in the hope that roles might be made available for those individuals who did not want to leave.

13. The Respondent devised redundancy criteria based on training records, skills, disciplinary history and absences. The affected employees were scored applying these criteria. The Respondent shared the results with the affected employees, including the Claimant, for consultation.

14. On 19 October 2022 Mr Hay had an initial meeting with the Claimant to discuss the business case for redundancies and to explain the consultation process. Also present were Caroline Revell from Human Resources ("HR") and the Claimant's Line Manager, Chris Thompson.

15. On 2 November 2022 Mr Hay had a further consultation meeting with the Claimant. Also present were Caroline Revell, Chris Thompson and note taker Patrick Gregson. At this meeting Mr Hay confirmed that the Claimant had scored 7 out of a possible 19 points and unfortunately this meant that the next meeting could be a dismissal hearing. Mr Hay added that the number of redundancies was not yet fixed as he did not yet know how many people were volunteering for redundancy.

16. After this meeting, the Respondent discussed his scores with Mr Thompson, raising the fact that he had completed two certifications ("Rise" and "Launch"). These were considered, and his overall score was raised to 9.

17. The final scores were such that the Claimant and one other Team Leader had both scored 9 out of 17. The other two Team Leaders with higher scores were retained, and the Claimant and one other remained at risk of redundancy.

18. During the consultation, two new Team Leader positions became available at the Dagenham Site. A Team Leader on the Ford Contract had volunteered for redundancy and the Colorcon contract needed two more operatives.

19. One of the newly available roles involved working an early shift "Day Shift Team Leader" (Ford) and the other a later shift "Late Shift Team Leader" (Colorcon).

20. Mr Hay decided to consult the Claimant and his colleague whether they would like to be considered for these roles to avoid redundancy. As their scores were "tied" the "last in, first out" principle would be applied. Mr Hay decided that the Claimant's colleague would be offered first choice in relation to these roles as he had worked for the Respondent for longer than the Claimant.

21. Due to busy schedules Mr Hay and Ms Revell asked Mr Thompson to hold a third consultation meeting on their behalf with the Claimant to inform him of the two roles. Before the meeting Mr Hay and Ms Revell met with Mr Thompson and Matthew Hall (who was to attend as note taker) to set out what should happen at the meeting.

22. They asked Mr Thompson to explain that there were two roles available and that he should ask both the Claimant and his colleague whether they wanted to be considered. If they both indicated that they would like to put themselves forward, the Respondent would use the scoring process to decide who got first choice.

23. On 8 November 2022 Ms Revell sent a detailed email to Mr Thompson following up on this conversation (p120&121). The email states:

> "*Please see the bullet points you need to follow carefully in order, it is crucial that this is done exactly as outlined below…..*
>
> - *As per the selection Matrix the following are the ones to be consulted on first: Martin Hammond on the Ford contract and Steve Hinton on the new shift (or vice versa if both are happy to swap) … The FLT Operators (to decide who goes on which shift due to them being the ones with the next highest scores on the matrix, not fussed which one does what but they both get preferential treatment, if they both want the same then it's longest serving gets priority"*

**9 November 2022**

**Third Consultation Meeting**

24. On 9 November at around 2pm Mr Thompson met with the Claimant in what the parties refer to as the "third consultation". Also present was Matthew Hall, acting as a note taker.

25. The Claimant understood that he had been offered and accepted the role of "Day Shift" Team Leader at this meeting. I found the Claimant to be an honest and credible

witness. His account of this genuinely held belief was supported by contemporaneous WhatsApp messages to his ex-partner telling her that he had been offered the role and later expressing his disappointment that it had been retracted. He has consistently maintained that he was offered and accepted the role. This has clearly caused him distress and has led to his decision to bring this claim for unfair dismissal.

26. The Respondent did not call Mr Thompson or Mr Hall as witnesses in relation to this factual dispute, relying instead on their accounts to Mr Booth during the appeal investigation and the contemporaneous notes taken by Mr Hall.

27. The notes are consistent with the accounts of both Mr Thompson and Mr Hall to Mr Booth in interview: that the Claimant told by Mr Thompson that two further Team Leader positions had become available and that the employee with highest score would be given first choice.

28. It is not clear what happened at the meeting and it is not necessary for me to make a finding on this in order to resolve the issues in this claim.

29. Mr Thompson had instructions from Mr Hay and Ms Revell to consult the Claimant and his colleague in relation to the two new roles. He had no discretion to depart from these instructions and make an offer of alternative employment to the Claimant.

30. Shortly after the meeting Mr Hall and the Claimant had a conversation. The Claimant's understanding that he had been offered and accepted the Day Shift Team Leader role became clear. Mr Hall reported this to Mr Thompson.

**Second Meeting on 9 November**

31. On 9 November at around 4pm Mr Thompson held a second meeting with the Claimant. Mr Hall was also in attendance to take a note.

32. Mr Thompson told the Claimant that there were two jobs subject to consultation and that his colleague would be given first choice in light of their scores.

33. The Claimant stated that this was contrary to what had been agreed at the earlier meeting and refused to sign the notes.

**10 November Meeting**

34. On 10 November the Claimant attended a further consultation meeting, which was attended by Mr Thompson and Mr Hall. Mr Thompson told the Claimant that the Day Shift Team Leader position had been filled but the Late Shift Team Leader position was available. The working hours for this role were 4pm-10pm. The Claimant stated that he did not want to take this role as the hours meant that he would not see enough of his young son.

**Ripped Up Note of Meeting on 9 November "the third consultation"**

35. Before the meeting on 10 November the Claimant asked to see the notes of the first meeting on 9 November.

36. The notes were retrieved from the confidential waste as they had been ripped up and disposed of by Mr Thompson. Mr Thompson were taped these back together and showed them to the Claimant.

37. The explanation provided by Mr Thompson to the appeal investigation was that this note was ripped up and disposed of in the mistaken belief that he was required to hold another meeting and "re-take" the notes (p.91).

38. Claimant had signed the notes of this meeting but alleges that they were subsequently altered to include reference to the two roles and the points system being applied by the Respondent to offer first choice.

39. I find that the Claimant's belief that these notes were altered to be honestly held. This is supported by the consistency of his account throughout this process and the contemporaneous messages to both his ex-partner and Mr Hay.

40. It is not clear from the evidence before me what happened with the note. It is not necessary for me to resolve this conflict to determine the issues in this claim.

41. As Mr Booth observed in his evidence at the hearing it is not best practice to tear up notes of meetings in a redundancy exercise.

42. The circumstances surrounding this note of this meeting have compounded the Claimant's suspicions and feelings of unfairness.

**Subsequent Meetings and Dismissal**

43. On 14 November 2022 Mr Hay wrote to the Claimant. He confirmed his understanding that the Claimant would not be applying for the Late Shift vacancy and stated that he was unable to identify suitable alternatives.

44. Mr Hay did not consider that alternating shifts were possible in the circumstances as the freight on the relevant contract arrived at 5pm and so there was a business need for the Team Leader in this role to work the hours of 4pm to 10pm.

45. The Respondent invited the Claimant to a final consultation meeting.

46. On 16 November 2022 Mr Hay and the Claimant had a final consultation meeting. Mr Hay stated that if the Claimant did not want the afternoon shift he was at risk of redundancy. He also apologised to the Claimant if there had been any confusion during the consultation.

47. In a second meeting later that day the Respondent dismissed the Claimant by reason of redundancy. An outcome letter followed, dated 18 November 2022.

**Appeal against Dismissal**

48. On 27 November 2022 the Claimant appealed against his dismissal.

49. On 8 December 2022 the appeal hearing took place in person at the Dagenham site. The hearing was chaired by Mr Booth in the presence of Mr Dutta as a representative of Human Resources. The Claimant attended alone. Mr Booth discussed

the appeal points with the Claimant and informed him that he would investigate the allegations.

50. Mr Booth conducted a thorough investigation. On 19 December 2022 he interviewed Mr Thompson and Mr Hay. On 20 December 2022 he interviewed Mr Hall. He also viewed the CCTV from Dagenham on 9 November.

51. On 22 November 2022 Mr Booth wrote to Claimant dismissing his appeal with full reasons including that the Claimant was offered a suitable alternative role and that the process had been fair.

**Law**

***Redundancy***

52. S.94 of the Employment Right Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by their employer.

53. S.98 ERA provides so far as relevant:

> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
>
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it –**
>
> **…**
>
> **(c) is that the employee is redundant …**
>
> **…**
>
> **(4) 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) –**
>
> **(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.**

54. A redundancy situation is defined in s.139 ERA:

> **(1) 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) the fact that his employer has ceased or intends to cease –**
> >
> > > **(i) to carry on the business for the purposes of which the employee was employed by him, or**
> >
> > > **(ii) to carry on that business in the place where the employee was so employed, or**
> >
> > **(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.**

55. An employee may argue that a dismissal for redundancy was unfair because, although a redundancy situation existed (and the employee was not selected for an automatically unfair reason), the dismissal was nevertheless unreasonable under S.98(4) ERA.

56. It is not for Tribunals to investigate the commercial reasons behind a redundancy situation (*Hollister v National Farmers' Union* [1979] ICR 542).

57. In many redundancy dismissals, the starting point will be the familiar guidance in *Williams v Compair Maxam Ltd* [1982] IRLR 83 EAT (at para 18 onwards).

> **'18. For the purposes of the present case there are only two relevant principles of law arising from that subsection. First, that it is not the function of the Industrial 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. The second point of law, particularly relevant in the field of dismissal for redundancy, is that the Tribunal must be satisfied that it was reasonable to dismiss each of the applicants on the grounds of redundancy. It is not enough to show simply that it was reasonable to dismiss an employee; it must be shown that the employer acted reasonably in treating redundancy 'as a sufficient reason for dismissing the employee', i.e. the employee complaining of dismissal. Therefore, if the circumstances of the employer make it inevitable that some employee must be dismissed, it is still necessary to consider the means whereby the applicant was**

**selected to be the employee to be dismissed and the reasonableness of the steps taken by the employer to choose the applicant, rather than some other employee, for dismissal.**

**19. In law therefore the question we have to decide is whether a reasonable Tribunal could have reached the conclusion that the dismissal of the applicants in this case lay within the range of conduct which a reasonable employer could have adopted. It is accordingly necessary to try to set down in very general terms what a properly instructed Industrial Tribunal would know to be the principles which, in current industrial practice, a reasonable employer would be expected to adopt. This is not a matter on which the chairman of this Appeal Tribunal feels that he can contribute much, since it depends on what industrial practices are currently accepted as being normal and proper. The two lay members of this Appeal Tribunal hold the view that it would be impossible to lay down detailed procedures which all reasonable employers would follow in all circumstances: the fair conduct of dismissals for redundancy must depend on the circumstances of each case. But in their experience, there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:**

**1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.**

**2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.**

**3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.**

**4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.**

**5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.**

**The lay members stress that not all these factors are present in every case since circumstances may prevent one or more of them being given effect to. But the lay members would expect these principles to be departed from only where some good reason is shown to justify such departure. The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim.'**

58. In applying section 98(4) ERA, the correct test is whether the employer acted reasonably, not whether the tribunal would have come to the same decision itself. In many cases there will be a 'range of reasonable responses', so that, provided that the employer acted as a reasonable employer could have acted, the dismissal will be fair: ***Iceland Frozen Foods Ltd v Jones*** **[1982] IRLR 439**. That test recognises that two employers faced with the same circumstances may arrive at different decisions, but both of those decisions might be reasonable.

59. In relation to the latter point, an employer should take such steps as are reasonable to secure alternative employment for an employee displaced because of redundancy. As a general rule it would be reasonable to provide the employee with such information about the terms and conditions applicable including the financial prospects see ***Fisher v Hoopoe Finance Ltd*** **EAT0043/05.**

60. The House of Lords case of ***Polkey v AE Dayton Services Ltd 1988 ICR 142, HL*** established that procedural fairness is an integral part of the reasonableness test now found in s98(4) ERA. Failure to follow correct procedures was likely to mean the dismissal was unfair. In relation to redundancy dismissals, Lord Bridge, stated that meant 'the employer will not normally act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by deployment within his own organisation'.

## Conclusions

61. It is not in dispute that the reason for the Claimant's dismissal was redundancy or that this was a genuine redundancy situation.

## Procedural Fairness

62. The Respondent conducted the redundancy process in a manner that was fair and reasonable having regard to the circumstances. There was a period of consultation and objective criteria were applied. The Respondent considered the Claimant's representations in relation to his score which was then raised. The Respondent offered

the Claimant objectively suitable alternative work. The Claimant exercised his right of appeal. The appeal resulted in a thorough investigation and the conclusions of Mr Booth were reasonably open to him based on the evidence.

**Suitable Alternative Work**

63. The Respondent offered the Claimant suitable alternative employment in the form of Late Shift Team Leader role.

64. The decision that it was not possible to offer alternating shift work considering the business need was objectively reasonable, even though it understandably came as a huge disappointment to the Claimant.

65. The conflict in the evidence at the about the third consultation on 9 November and the note of this meeting is not relevant to this issue.

66. As a matter of substance Mr Hay had decided that the Claimant's colleague would be given first choice of the alternative roles using the scoring matrix. Even if Mr Thompson had delivered the wrong message at the third consultation, it was quickly corrected by him within two hours and would not have rendered the process unfair.

67. The Respondent acted reasonably in ensuring the genuine offer was made to the right person in the circumstances. To have done otherwise would have been unfair to the Claimant's colleague who was entitled to their first choice of alternative employment.

68. I therefore find that the complaint of unfair dismissal is not well-founded and the claim is dismissed.

**Breach of Contract**

69. There was no pleaded breach of contract claim in this case.

70. For the avoidance of doubt, even if Mr Thompson had offered the Claimant the Day Shift Team Leader role at the third consultation meeting, he was not entitled to do so. The Respondent would have been entitled to correct this error and so any claim for breach of contract would also have been dismissed.

71. I understand that the Claimant will be disappointed by this result. In this case I found the Claimant to be an honest and credible witness and his concerns about the process are understandable and genuine. In stressful circumstances he remained dignified and courteous throughout the hearing and made his arguments well.

**Employment Judge J Farrall**
**Date: 16 August 2023**