EMPLOYMENT TRIBUNALS

Claimant: **Mr M Ward**

Respondent: **Royal British Legion Industries**

Heard at: **London South (Croydon) (hybrid)** **On: 4 – 6 December 2023**
11 December 2023 in chambers

Before: **Employment Judge Feeney**

REPRESENTATION:

Claimant: **In person assisted by Ms S Fishenden**
Respondent: **Mr J Jupp, Counsel**

JUDGMENT

The judgment of the Tribunal is that:

The claimant's claim of unfair dismissal fails and is dismissed

REASONS

Preliminary Matters

1. The claimant had originally brought a claim of unfair dismissal and disability discrimination in relation to Dyslexia however the disability claim was withdrawn and was dismissed on withdrawal on 26 May 2023. T

2. Of relevance to proceedings on the first and subsequent days of the hearing is the fact that the claimant had applied for specific disclosure of various items on the 30 March 2023 and this was refused by the Tribunal on 15 August 2023. The claimant had been reminded that his case was about whether there was a genuine redundancy situation, whether that was the reason for dismissal and whether it was reasonable to dismiss . The judge commented "Events years

before the claimant's dismissal are unlikely to be relevant but if they were, to for example the real reason for the redundancy , the claimant can give evidence about it." The claimant did in fact in his witness statement refer to his belief that his whistleblowing about the breaches of the working time regulations was the reason for his dismissal although there was no free standing 'whistleblowing ' claim this would be relevant to the real reason for the dismissal.

3. The claimant had applied for the audio recording of his appeal to be listened to in tribunal and had been advised by a tribunal judge it would be extremely time consuming and the better course of action was to agree a transcript with the respondent however this never took place. The respondent produced minutes of the meeting which the claimant was unhappy with but he did not refer to anything specific which had been omitted which may have assisted his case.

4. In relation to the claimant's witness statement it did not address in detail the claimant's challenges to his scoring. In fact the respondent I was advised had on receiving it sent the claimant the relevant sections of the presidential guidance and suggested he resubmit his statement. The claimant told me he thought he would be able to produce his documents and rely on those, documents which had not been admitted and which were not referenced on his witness statement. I advised the claimant he could add matters to his statement which arose from the respondent's statements but he could not wholesale gave additional evidence.

5. The claimant mentioned on the first day that he had a thousand pages of documents however at that stage I was advised by the respondent that the relevant documents from that bundle had been put at the back of the joint bundle. The claimant also said he had not received this bundle and he had never agreed to it. It had been sent to him in May or June. I advised the claimant that the claimant should have applied to have his documents accepted by the Tribunal and he responded that he had telephoned the Tribunal recently and had been advised that in some cases if he brought along his bundles both bundles would be used. I said that was not the best procedure although it did sometimes happen however that would not be the case where a thousand documents were at issue. However, having been satisfied that relevant documents were included we took this issue no further that day and the claimant proceeded to give evidence and be cross examined.

6. On the second day the claimant raised this issue again and said that he was unable to put his case as he needed all these documents. The documents he said were relevant to showing that his scores when he was marked for the redundancy exercise were unfair and were deliberately understated. He also said one of his strongest points was that one of the reasons being made redundant was because he had complained about his and his colleagues' working hours as a breach of the Working Time Regulations . He had received documents under a DSAR request that showed the respondents were aware this was an issue and were anxious for it not to be exposed. The claimant said that within a few days of that incident and supporting a colleague he was on a PIP, (performance improvement plan) and then later was made redundant.

7. I advised the claimant that if he applied to admit a thousand pages of documents it would require probably most of the day to consider them and any disclosure request, as a result it was unlikely the case could be completed in the 3 days allocated which would mean the case would have to

be relisted next year .At this point Mrs Bull the appeal manager had completed her evidence and we had been advised that she was leaving the country for an extended holiday following her retirement. The claimant was to give evidence today and had two other short witnesses and the respondent had one other witness whose evidence was substantial I asked him `which of the additional documents in his bundle were the most important to his case. After argument it was agreed that these documents of around twelve pages could be added . I advised the claimant he would need to put the points in those documents to the respondent's witness.

8. At various times during the hearing I had to remind the claimant the basis of his case This had not been set out in a case management but we had discussed this on the first day,

- the claimant's case was that the selection criterion were insufficiently objective;
- that he had been under-scored deliberately by Mr Barrett who wanted to get rid of him because of inter alia the working time issues.
- That (following the evidence of Mrs Bull,) that Mrs Bull should have waited until he provided her with the documentation before making a conclusion on his appeal.

9. The claimant had, as will be seen below, not raised any issues during the consultation period save for suggesting that potentially if everyone reduced their hours all the Holistic Assessors would be able to carry on working, or that some might be able to be moved into the mental health field. He stated he was saving his points for an appeal but also that he was in difficulties because of his father's illness and subsequent death. The issues that he put forward at the appeal are not the same issues that are now pursued. At the appeal he did query the selection criteria as above but he also raised issues of communication and whether the redundancy was necessary in the first place.

10. We agreed the issues to be as above in paragraph 8 plus the usual tests the respondent has to meet in an unfair redundancy case.

11. I issued a Witness Order for Mr Barrett who had left the employment of the respondent however he did not appear to be a hostile witness and indeed on appearing on the third day at the Tribunal at no point did I have to declare him a hostile witness to the respondent.

12. In addition, I should set out that the claimant was extremely upset at various times during the hearing and therefore I ensured that there were breaks so he could compose himself and think about the issues. I asked him on several questions whether he wished to have an adjournment on the basis that he was

not fit to effectively present his case but he declined this opportunity and said he wanted to carry on. He did have the assistance of Mrs Fishenden, an ex-colleague who also gave evidence for him at the hearing.

13. The claimant appeared in person at Croydon Employment Tribunal, everyone else including myself attended by CVP.

14. In addition there were problems over having the correct witness statements, for example it transpired that I did not have the correct witness statements for Sally Ward and I eventually received this.

15. Further, there were connectivity problems, I had a few on the first and third day and the claimant had difficulties using the bundle as the bundle was in four sections on Ms Fishenden's laptop, the claimant did not bring his laptop to the hearing. On the first day when we did not begin until midday the claimant had been advised by my clerk where he could get the bundle printed but the claimant advised me on the second day he was unable to find the printing shop as advised by the clerk and therefore had not had his bundle printed out.

16. There was also an issue about the selection criteria document, being slightly different between what was in the bundle and what the claimant had and again this was explained by Mr Barrett in evidence and said that it was revised as they went along and the one in the bundle was after the first consultation meeting.

17. Witnesses: for the claimant: himself ,Ms Fishenden a fellow employee in the coordination centre and Mrs Sally Ward, the claimant's ex-wife.

18. Mrs Fishenden gave evidence about her perception that claimant was picked on by various managers and disparaging comments made openly. She was only cross examined about any knowledge she had about the basis of the redundancy scoring - she had no direct knowledge. Mrs Ward gave some evidence about the stress the claimant was under when he worked for the respondent. She was cross examined in the same way with the same conclusion.

19. For the respondent: Mrs K Bull head of the respondent's manufacturing arm and Mr Barrett the claimant's manager at the time of the redundancies.

Claimant's opening submissions

20. The claimant as identified above and as a result of the hearing made the following points:

    (i) that he had been chosen for redundancy because of raising issues regarding the working time directive (although there was no protected disclosure it was still valid for the claimant to raise this matter).

    (ii) That he had been deliberately underscored and Mr Barrett had no evidence for his scoring.

(iii) That Mrs Bull should have waited until he was able to provide documentation to show that his scoring was wrong rather than making a decision before she received that documentation.

(iv) That the selection criteria was insufficiently objective.

Respondent's submissions

21. The respondent submitted that the selection criteria were sufficiently objective, that sufficient warning had been given of the redundancies, that there was a proper reason for the redundancies, that the claimant had been correctly marked and that in all the circumstances it was reasonable for Mrs Bull not to wait for the claimant to provide her with documentation before concluding the appeal.

22. The respondent also in relation to Polkey submitted that even if the claimant had received better marks in relation to the subjective criteria which was D, E, F and in relation to reworks he would still have not received more points than the next person in the scoring list. He had 18 and the next person 26. That person being made redundant as well.

Tribunals Findings

23. The claimant began working for the respondent in August 2017 as a Holistic Assessor, the respondents subcontracted for another organisation who provided assessments for DWP's Access to Work by speaking to an individual who had made an application to Access to Work and assessing what equipment they may require under the parameters set out in the handbook provided The claimant lived in Weymouth and had to do a lot of travelling, although during the pandemic interviews were conducted via the internet.

24. The claimant's witness statement was unfortunately quite short and raised many issues that had not been raised before which he said he had evidence of in his bundle but none of these issues were raised during the consultation period. Briefly, the claimant stated that part of the reasons for him underscoring was that he had never been given any training and that he had received more work than it was possible to do and therefore he had to work outside his hours to complete this although due to burnout he had reduced his working hours to four days. He also felt his Dyslexia disadvantaged him but no longer pursued a disability case, he stated he could not attend online training due to the number of actual work took up. He stated that Mr Barrett was not a supportive manager and what training was undertaken with him was ineffective. He said on his PIP that he was put on January 2020, the claimant believed this was because he had complained about the working hours, having decided to opt out as a condition of the job the claimant opined, he then wanted to opt back into the working time directive.

25. I did allow him to submit some additional documentation on the second day which evidenced that the respondents were uncomfortable with this issue. In addition, he supported a colleague at a grievance meeting in January 2020 and the claimant felt he was targeted after this. We heard nothing about what

happened to the colleague. The PIP began on 28 February 2020. The claimant was found to have not met his standards in respect of three of the matters on the PIP out of five and the matter was referred to a capability process and he received an oral warning in October 2020, that being the least possible sanction if a sanction was going to be applied and the oral warning was to be live for twelve months.

26. The claimant was placed on on a second PIP which he successfully completed and he returned to normal work monitoring on 15 December 2020. The claimant's father became seriously ill during this period. The claimant said he was travelling to Wiltshire from Dorset to assist in caring for his father during this time. Mr Barrett said he was unaware the claimant was travelling there everyday .There was evidence of the claimant arranging to work whilst in Wiltshire via Mr Barrett but I accept Mr Barrett did not know that up to the point the claimant stayed in Wiltshire he was travelling every day.

27. In relation to the PIP the claimant did not bring a grievance or appeal the outcome of the first PIP. He did not appeal the verbal warning he was given, accordingly the claimant sought many times to raise the fact that the PIP was illegitimate and that the warning was illegitimate. However, I gave the claimant the view this was not relevant to his unfair redundancy claim, whilst the verbal warning did result in him being marked down on his scoring as he did not appeal it, it was not appropriate to open this matter again. Neither did he raise it during the consultation process as will be seen below.

28. In February 2021 the respondent was advised that it had not been granted a contract extension as a sub-contractor for another assessment provider People Plus and that this would be effective from 4 June 2021. As a result of this, the number of referrals for Access to Work assessments would be reduced by 30% from 4 June 2021. This also meant the respondent WOULD experience a significant reduction in income and as a result of this the respondent proposed to reduce the number of its Holistic Assessors by five full time equivalent roles (FTE). The claimant suggested that the redundancy exercise was a way of "getting rid of the claimant as Mr Barrett did not like him" however towards the end of the Tribunal the claimant agreed that it was illogical to suggest the respondent would devise a redundancy process affecting twenty-three people in order to get rid of the claimant but he still maintained that it provided the respondent with an ideal opportunity to achieve that. He accepted there was a genuine reason for the redundancy exercise.

29. On 1 June Mr Barrett met with the claimant along with a HR representative as the claimant had missed the group meeting due to being on holiday, to warn of the potential redundancy. This was followed up by a letter of 1 June which explained the process saying that he would be placed in a pool with 22 other Holistic Assessors and that from this complete pool of 23, 5 FTE Holistic Assessor roles were proposed to be made redundant. A selection criteria was drawn up Mr Barrett and individuals from HR. The period considered was November 2020 to April 2021.

30. The criteria were:-

a. KPI 1 :report turnaround times and a matrix set out a description of how this would be 'marked' would get, the claimant got 4 points for this as he returned his reports within the relevant target date of eight days .

b. Quality Performance and this relied heavily on the number of reworks the lower the number of reworks the higher the points. This proved contentious and will be examined further below. Four or more reworks in that six-month period meant no points.

c. Qualifications and all relevant experience so the claimant's experience was counted for this purpose although he did not have a degree.

d. Knowledge and experience of provider guidance and customer needs. That was the first of the more subjective criteria.

e. Performance driven tenacity and taking the initiative.

f. Adaptability.

For those three subjective criteria d, e and f criteria the claimant scored two out of potential four marks.

g. Disciplinary record.

h. Bradford factor attendance.

31. The claimant was marked down on g and h also due to his verbal warning and previous sickness absence. This information was taken from the respondents data system MARS and was correct.

32. The claimant in the Tribunal challenged the reworks (b). On Mr Barrett's matrix recording his comments on the claimant and his scoring of the claimant in relation to reworks he said in the relevant period there were seven. Again this was objective information from MARS The claimant when he gave evidence without Mr Barrett being present had stated that Mr Barrett had the ability to downgrade reworks to queries and he had chosen not to do this in the claimant's case in order to ensure the claimant received a low score in the redundancy process. The reworks were 2 in November 2020, 1 in December 2020, 3 in February 2021 and 1 in March 2021. Mr Barrett when he was cross examined agreed that it was possible to query reworks, the initiative for the reworks would come from the DWP when they saw the reports and not from him. He had to have a good case to challenge them and ultimately it was in the DWP's hands whether if challenged they would still regard it is a rework rather than a query. It was in his interests to reduce the number of reworks as much as possible as reworks put the respondents meeting of their KPI targets in danger, therefore he had no interest at all in not challenging any reworks that he thought were better described as queries and therefore would not count against their KPIs. He did not believe this was the case with the claimant's reworks so he did not challenge them..

33. In relation to the claimant's reworks the claimant specifically challenged a rework in December 2020, he said that this report had come back with a query which a colleague had dealt with and therefore he believed the colleague should have had the rework not himself however Mr Barrett explained that once it was a rework it was a rework and there would not be two reworks if the colleague got something wrong as well. Accordingly, in his view that was still the rework for the claimant, even if it was not the claimant still had six reworks in the relevant period which meant he would still get no points for B. I accepted Mr Barrett's evidence on this as he had not heard the claimant's evidence but answered the question fluently and plausibly.

34. In relation to C the claimant obtained a 3, although he did not have relevant qualifications, on the basis of his experience working with the respondent.

35. In relation to D the claimant scored a 2, the description was over a six-month period. Mr Barrett commented on the matrix 'MW showcased a working knowledge of the provider guidance however continually required development and coaching, this is evidenced through weekly support coaching and counselling sessions between 4 November to 9 December. In this period the quality of works and managing customer expectations were amongst topics discussed, MW understands report writing fundamentals though there is no evidence to suggest that MW has supported other colleagues during the last six months.' These comments were aimed at meeting the requirements that made up D overall.

36. The claimant wished to challenge that there was no evidence he supported other colleagues during his last six months, some of this evidence he stated was in the bundle that I did not . However, he was able to put questions to Mr Barrett, Mr Barrett said that he would get feedback from Holistic Assessors regarding who was helpful or not and it was not dependent necessarily on email trails. At the time he had had no feedback that the claimant had been particularly helpful to colleagues. He also felt that the claimant did not retain enough knowledge of the provider guidance and hence would ask numerous questions which other people did not , those people were more likely to get a four.

37. E, which was performance drive, tenacity and taking the initiative. Mr Barrett commented in the matrix ' Over the six- month period MW completed occasional additional tasks such as organising personal strategy coaching (when requested) and would require support in managing time to accommodate this despite authorisation to proceed in organising and scheduling to suit (meeting date 25 November as an example). There is no evidence to suggest that MW supported with the input of new ideas or processes, for example all assessors were asked for their suggestions and input on technical improvements to the delivery and MW provided no comments or suggestions that can be evidenced. During the six- month period MW has shown willingness to consider alternative ways of working however does not propose ideas and waits for instructions. '

38. In relation to this the claimant wished to provide an example of a suggestion he had made about a fortnightly working period however that was from 2019 and therefore clearly outside the period in question.

39. In relation to criteria G – adaptability - Mr Barrett commented 'MW has shown he can adapt to new processes and tasks in the six-month period, for example adopting the new report writing platform. However there is no evidence of learning or CPD being undertaken or requested in the six months period in question despite being asked to submit quarterly CPD logs. These were requested in December 2020 and March 2021 during the period.' The claimant's position was that because he was overworked there was simply no time to complete any training (which appeared to be mainly webinar online training). The claimant received a 2 for this when a 4 was the highest mark.

40. H was disciplinary record. The claimant received a 2 because he had the verbal warning on file and it had been issued within the last twelve months and was still live In this case.

41. I was for attendance based on the Bradford factor a method of calculating absence. Again this was the previous twelve months not just the assessment period. The claimant received a 3 for this because of absence during the relevant period.

42. The claimant's first individual consultation meeting was held on 7 June via video conference with Mr Barrett and Michelle Edmonds from HR present. The claimant confirmed that he had received the at-risk letter and that he understood the reasons behind the proposed redundancy proposal. He raised some potential ideas for lessening the impact of proposed redundancies such as taking on mental health work. Mr Barrett stated that he did consider these but mental health work was not a viable option as they were not in the position to undertake this work and they had no contracts at the time. In addition the claimant suggested that everyone could reduce their hours as an alternative to redundancy. The respondent had asked for volunteers for redundancy and one person had left on this basis.

43. The claimant was asked if he wished to delay his consultation as his father had been seriously ill and had recently died but he confirmed he wanted to go ahead.

44. The second individual consultation meeting took place on 10 June 2021, the criteria did change during this period as one consideration had been customer focus, which appeared to concern how the assessor dealt with the problem where feedback had been received that was negative. This was removed because during the consultation individuals who had had no negative feedback or queries raised on their reports said it was not fair as they would not be able to evidence how they had sorted out such issues as due to high performance they had not had issues of that nature. Mr Barrett in consultation with HR agreed that was legitimate concern and therefore removed this criteria. The claimant believed the criteria had been removed because he would score well on this although it appears the claimant misunderstood as I did myself that what this originally entailed in any event as it was not concerned with customer feedback, but with how people dealt with matters raised. Accordingly I find this was changed for completely legitimate reasons.

45. In the second consultation meeting on 10 June the claimant's suggestion of reducing everyone's hours was discussed but as that was not financially viable for everybody this was not a suggestion the respondents took up. The claimant did not make any comments on the proposed selection criteria but he was advised of the changes in relation to customer focus and the double weighting of KPI 1 quality performance. This double weighting was removed. It was also clarified that disciplinaries would be looked at in a twelve-month period. This had always been intended but had not been made clear. This could have made any difference to the claimant as he had a live warning which he had only received just before the period began. However it did cover the period in question and it appeared from the criteria description it would

have counted under either period.. The claimant did ask at this meeting did he have an opportunity to influence his scoring but it was explained that because it was based on this six-month period it was based on how the work had been undertaken in that six months and therefore could not be influenced retrospectively. The claimant at this juncture did not ask for his difficulties with his father's situation to be taken into account, he did not suggest that he may score badly because he had been under a lot of stress with his father's situation.

46. The claimant was sent his scoring on 17 June 2021 and given the opportunity to comment. He rang Michelle Edmonds that day and she gave him an extension to comment to 21 June due to his father's funeral being on 18 June.

47. The claimant advised he did not raise detailed questions to challenge his scoring when advised of it by Mr Barrett as he decided he would wait for an appeal. The claimant received 18 out of 33 potential marks. The next person up from him received 26 marks. The next one 27 and then there were numerous 28's with the top two people receiving 32.

48. Of relevance was the fact that the marks were evenly spread. It was the only top two people who received full marks for every criteria and there were people that were not made redundant who received quite low marks for D as the claimant did, for example receiving a 2 but they were not made redundant as they had slightly higher scores elsewhere. Looking at everyone who scored 28 there were a number that received 2's, in fact someone who received 29 had received a number of 3's.

49. The claimant met with Mr Barrett for an outcome meeting on 22 June and at this meeting raised his dyslexia, which was undiagnosed and he had been given support for this which included dragon software. He did not say this had caused his low scores or that they were due to lack of management support from Mr Barrett. His redundancy was confirmed on 24 June 2021. The claimant as paid in lieu of notice and a statutory redundancy payment.

The Appeal

50. Following the claimant being advised that he had been selected for redundancy he advised Victoria Abbot from HR on 2 July 2021 that he wished to appeal. He referred to the fact that more than five days had expired since he had been told of his redundancy and therefore he wished to submit his official appeal by

Friday 9 July in view of the fact that his father had recently passed away so he was indicating an intention to appeal but not providing any grounds.

51. It was agreed that the claimant would be allowed to proceed outside of the five days in the circumstances but also that they would arrange a hearing and ask him to explain his grounds in the hearing. This was arranged for 8 July with Kate Bull who was head of the manufacturing side of the respondents business. Obviously until all the appeals had been heard people who had not been made redundant would not know whether they were definitely "saved", therefore there was a need to act expeditiously with the appeals.

52. The claimant was then advised that they had arranged a hearing for the 8 July and he was asked to confirm his attendance. It was by video conference. He was advised he could be accompanied. The claimant replied saying he would like to confirm he was attending although he referenced the fact that he would have preferred 9 July and he stated that he had Dyslexia, was struggling with making notes and therefore he asked for the meeting to be recorded which the respondents agreed to. The audio recording was somewhat contentious because the claimant wished it to be part of the disclosure in the case and the claimant did make an application to the Tribunal referenced where he was advised to provide his own transcript which he did not, and the respondent had provided minutes of that meeting that appear to be a transcript but they did say they were a minute template and the meeting lasted around an hour and 43 minutes and the minutes were 10 pages long. Nevertheless the claimant said that there were many things missing out of the minutes and also the tone needs to be listened to where he was talked over and interrupted.

53. Having said it was ten pages long it was very closely typed so it was a very detailed record of what was said at the meeting. One of the difficulties was the claimant had not stated any grounds and when Mrs Bull was trying to pin him down as to the grounds the meeting seemed to veer off into other issues. Accordingly, after the meeting Mr Stickells from HR wrote to the claimant in order obtain his confirmation of the grounds of his appeal.

54. This first email was on 9 July where Mr Stickells said that he understood that the following were the headlining topics:-

(i) The criteria included within the selection criteria were subjective and should not have been included.

(ii) RBLI states a loss of 30% of work due to loss of people plus subcontract. What was the rationale around reducing hours so greatly, in your opinion it doesn't add up.

(iii) Communication. In or around the process felt disengaged from colleagues as was told not to tell colleagues anything and keeping all information confidential, understanding the decision of your colleague could have influenced your decisions.

The claimant replied saying "so far yes but that doesn't mention how my disability and harassment, I believe has led to my achieving my extremely low

scores, or the fact I spent many hours with Ian ironing out any issues which had been missed out completely in the scoring matrix. We spent nearly two hours on my appeal so the three points mentioned here only touch the surface I am afraid, I need all the points I raised investigated with evidence. The most relevant point I think is how did making two people redundant end up three equal teams and a complete restructure. 'Despite this comment this issue was not something the claimant's claim or evidence in the tribunal ever addressed.

55. The claimant was sent the minutes on 13 July and Kate Bull wrote to him on 16 July following a phone call where she l stated "I appreciate you have submitted a Data Subject Access and asked for copies of your emails in which you believe there is further evidence to support your appeal. As you are

aware the company has 30 days in which to respond to your Data Subject Access request and due to the large amount of information that needs to be gathered they will be unable to produce the information for you by the end of this week. You mentioned you were aware of prolonging the basis and that this would be having a negative impact on your colleagues, if you could therefore please submit your comments where you are able to against the narrative on the scoring matrix applied by Ian Barrett this would help me and maintain the momentum of the process, where you are aware that there is specific email evidence to support your comments it may be helpful if you include this within your narrative and are able to give a rough estimate of when these actions evidence may have occurred, for example in the month of February. '

56. The claimant responded to that, he stated that on 20 January "sorry for the delay I am still dealing with my dad's estate and just got home. The second and last criterion and scoring matrix are on the surface simply official figures. I spoke to IB on many occasions (see PIP and Ian's own comments on me "having to speak often to him to support") and discussed how most "reworks have simply software issues, lots of evidence across the whole team or a customer query which is easily resolved. I dispute seven real reworks in this period. The Bradford sickness score is simply time off through illness though any sickness caused through work should be discounted in my view and seems to be shaky on legal grounds through discrimination. I have no evidence I had previously, the matrix itself seems full of contradictions and lack of any test or processes to come by the results. Some even state no evidence found rather than no evidence, I would refer you to my monthly target emails especially my customer emails sent to the coordination team which will invalidate these scores especially anything where customers are involved. IB has used a few occasions where his communication was as usual lacking and led to more confusion. His coaching and counselling are at best inaccurate. When I did manage to pin him down we talked very little about work and more about life, sport and other irrelevant subjects, his emails back of his conversations are extremely inaccurate and I disagreed every time but was afraid to go higher as I have no support from HR other than to "take out my own grievance. I cannot give times or dates, I have been harassed, victimised and treated extremely unfairly since my first day nearly four years ago. I have spoken to three people in HR about this with no support whatsoever. I will need to wait until I have all

of my data before I can give all of my evidence which I am certain will be a lot, I am so sorry for the delay but I do need this information to proceed".

57. Mrs Bull took the view that she needed to make a decision and she accordingly sent him a letter on 27 July rejecting his appeal., She advised in cross examination that she had spoken to Mr Barrett about what had led to his scoring although Mr Barrett had no recollection of that and she believed she took notes but these would have been handed over to HR, there were no notes in the bundle and nobody from HR gave evidence. Nevertheless I accept Mrs Bulls evidence she was a calm and convincing witness.

58. In this letter she stated that she believed his points related to four issues, the criteria included within the selection criteria were subjective and should have not been included:

(i) The scoring was unfair.

(ii) RBLI stated a loss of 30% of work due to loss of people plus subcontracts, what was the rationale around reducing the hours so greatly.

(iii) Communication in and around the process, you felt disengaged from your colleagues and were told not to tell colleagues anything and keep all information confidential and that understanding the decisions of your colleagues could have influenced your decisions.

59. Relating to point one she said "having reviewed the selection criteria with you during the appeal hearing and subsequently on an independent basis I confer from my review that criteria A and B were reviewed and scored via quantifiable data from the Mars database. Criteria C, H and 9 were scored from data from records held by the HR department. Criteria D, E and F were reviewed and scored based on the information from your manager in relation to your performance over the designated six-month period. Every employee involved in the consultation process was given the opportunity to provide their comments for a consideration in relation to the selection criteria. This was stated to you in the at-risk letter provided on 1 June 2021. You were further asked for comments or considerations regarding the selection criteria in your first consultation meeting on 7 June. You were asked during the appeal hearing whether you raised that you felt some of the selection criteria was subjective and by your own admission you stated that you did not challenge the content of the selection criteria because, as you state in your opinion "there is no point" but that you were just "make some of the right noises" instead. You stated that due to your personal circumstances at the time you just agreed and felt you would deal with it during the appeal process instead. From my review I would argue that you were given opportunities to provide comments on the proposed selection criteria issued with the at-risk letter and during this you could have raised that you felt some of the criteria was too subjective and should not be included. Whilst I understand your personal circumstances at the time you were offered the opportunity to defer your consultation meetings in order to give you more time to process the information in relation to the consultation process but

you decided that you did not want to defer any of your consultation meetings. From your own admission you decided not to provide any comments in relation to the criteria and therefore not to engage effectively with the consultation process. I feel it is important to note that the opportunity to provide comments on the selection criteria is an important aspect of the consultation process. In this case the comments provided by individuals and the consultation process did result in several changes to the criteria, to ensure it was fair and reflective the role and the pool of employees being assessed.

60. Point two. During the appeal hearing you raised concerns over the scores you were given in relation to selection criteria provided. You confirmed in the hearing you had not raised these concerns during the consultation meeting as part of the proposed redundancy process and you also stated in the hearing

that you felt the application of the criteria had been done very well and very professionally from your perspective…. As explained during the hearing the role of the appeal process and my role as Appeal Manager to look at all of the available evidence objectively and review whether the redundancy process has been administered correctly and whether any decisions that had been made may need to be altered. In order to assist me in doing this effectively relating specifically to the scores given I provided you with written clarification regarding your scores and invited you to submit any comments or evidence in response to this by 9 am on 19 July 2021 explaining why you felt you should have received a different score in relation to the information provided. I would like to thank you for the comments you sent me by email on 20 July 2021. I reviewed the comments in that email along with other information provided and have objectively reviewed the scoring given in line with the selection criteria. In the information sent to you on 14 July it is the applicable reworks were listed as provided by the MARS database. In your email you state you dispute seven real reworks in this period, I confirm that this information has been taken from the MARS database and the same method of scoring has been applied to all individuals within the pool. While I acknowledge that at times as with all roles there may be minor system errors which have an impact. I am satisfied that the information used to undertake this scoring has been applied consistently across the pool of employees affected, you further state in your email you feel the Bradford factor in this score should be lower and should exclude work-related sickness. In general the RBLI does not and is not obliged to exclude work related sickness from the Bradford factor calculation, again this is not something that you questioned or raised during the consultation process. From the HR records I can confirm that you had one period of sickness related absence in the applicable twelve-month period from 5 August 2020 to 3 September 2020 totalling 20.20 days. This gives you BFI score of 20.20 meaning you were a marked score of three. I am satisfied from the information used to undertake the scoring has been applied consistently across the pool of employees affected.

61. You further stated in the appeal that looking at your monthly statistics which from your explanation is done in percentages that sometimes you have a slightly lower numbers that your colleagues and sometimes slightly higher than your colleagues. I confirm that the metric-based criteria has been scored on

data from MARS database and HR records and I am content that these have been applied consistently and fairly across all affected employees within the pool at risk. In your reply you did not provide any evidence or examples in relation to the scoring criteria to highlight where you should have scored higher on certain criteria. For example, stating that you had requested additional training on X in the six months period that has being reviewed. As stated above it is my responsibility as the Appeal Manager to assess whether redundancy consultation process may not have been administered correctly. Whilst I acknowledge you feel you may have been treated unfairly during your employment as you have stated you have not provided any dates or times pertaining to evidence where you feel this is the case and, how this pertains to the scoring that has been given during the process. I have consulted with the HR department who have stated you have been provided with ongoing support during your employment and that you have been advised that it is

your right as per the company's grievance procedure to submit a grievance where you feel you are unable to resolve an issue informally to a satisfactory level which is advised as the first stage resolution. As you have stated this is something you have chosen not to do, due to the merit-based criteria included within this selection criteria I criteria assessed with your line manager and can see no evidence to suggest you have been scored unfairly or that the scoring of the matrix provided is based on anything that is not related to the six-month period from 1 November 2020 to 30 April 2021.'

62. Point 3. Mrs Bull then went on to explain why the redundancy situation was necessary following the losing of the contract and the claimant does not challenge that any further so I do not quote any further from her letter in relation to point three.

63. Point 4 was about communication. She agreed that people were asked to refrain from discussing their individual scoring until the process was completed in order not to cause distress to other individuals but she goes on to say "you stated during the appeal hearing that knowing what others in the team had decided may have swayed your decisions, for example regarding voluntary redundancy or applying for the Lead Assessor role, the point of the individual consultation is to ensure that all individuals in the team have the opportunity to discuss their own personal circumstances relating to the proposed structural change and potential effects of this and that they can make personal decisions which they are entitled to share with others or keep private depending on their own wishes'. As she saw no evidence of individuals within the pool being told they must not speak to each other regarding the process apart from during the outcome meetings as explained above. There was also the opportunity to be accompanied to the meetings. She then concluded she did not uphold the appeal and that was the end of the process.

64. The claimant then wrote to her on 22 July asking her to review his evidence before she made a final decision, but Mrs Bull replied that in her opinion the appeal process had ended. He wrote to her again on 23 July saying he had not agreed to end his appeal and she replied saying she felt that she had

considered all his points and that it was necessary to conclude the process within a reasonable timescale.

65. In cross examination Mrs Bull revealed that she had dealt with another appeal from one of the Holistic Assessors and she had decided in that on discussing the scoring with Mr Barrett that he had scored that individual too harshly in at least one respect and therefore the appeal succeeded. We do not know what the outcome of that was as there was some information that of one appeal somebody signed a non-disclosure agreement and did not go back to work and in relation to another appeal somebody went back to work, however, there was no further information available. I asked Mr Barrett about this, could he recall what he had marked too harshly but he could no longer recall that, it not being addressed in Mrs Bull's witness statement or his own.

66. In addition as referred to above Mr Barrett could not recall a conversation with Mrs Bull but by this time as it was a number of years ago he said it would be unlikely he would be able to recall.

The Law

67. Guidance in relation to end a redundancy might be unfair was set out in Williams -v- Compair Maxam Limited (1982) EAT. The relevant points are:

- Was sufficient notice of the redundancy given;
- Was the consultation reasonable;
- Was the criteria adopted not depending solely on the opinion of the person making the selection and containing objective matters;
- Was this selection made in accordance with the criteria. Was alternative employment considered;
- More generally was the appeal conducted and conducted fairly.

In addition, the respondent made submissions on Polkey vs AE Dayton Services Ltd (1987) HL i.e. that if the claimant had been unfairly dismissed for redundancy then it would have made no difference given that had his scorings increased he still would have been selected for redundancy. The respondents submitted that the dismissal was fair, that the claimant did not complain about the notice period, that there was reasonable consultation and that the criteria was reasonable and that where it was subjective Mr Barrett had considered what evidence was available.

68. The claimant asserted that Mr Barrett had chosen him deliberately for redundancy, potentially on the basis of the working time issue. However, the respondent submitted this did not stand up as the PIP for example would have been a better opportunity to have ensured the claimant left the business by failing him sufficiently badly that he would be at risk of being dismissed or continue with the process until the claimant gave up, instead the process was concluded with positive reports in December 2020

69. In addition the redundancy exercise was a considerable time after the hours issue and it was implausible to suggest that Mr Barrett would have been plotting against the claimant before any redundancy was on the horizon. In addition, there was no evidence the criteria was changed in order to make the claimant's situation more difficult. It had been the claimant's choice not to challenge the scores during the consultation period which would have been the correct time to undertake this when he had access to all the evidence as well. There was no reason to challenge the MARS reporting system and the evidence regarding reworks.

70. Regarding subjective elements Mr Barrett had produced reasons for why he had marked the claimant down on the three subjective matters and he has stood up to cross examination in relation to this.

71. In relation to Polkey more specifically if the claimant had received maximum scores on D, E and F he would still have been selected for redundancy scoring 24 instead of 18. If that criteria (i.e.DEF)should not have been included the claimant would have scored 12 and the claimant still would have

been selected. If D, E and F had been removed and he had scored the maximum on B (reworks) he would still have been selected for redundancy.

72. If the Tribunal found the redundancy was unfair because Mrs Bull should have waited for the claimant to produce his documentation then the respondent would argue nothing would have been produced that would have changed the scoring.

The claimant's submissions

73. The claimant submitted that it could be seen from the tone of the emails between HR and Mr Barrett that there was a degree of upset regarding him raising matters regarding hours and separately attending a grievance with his colleague regarding the same matter. The PIP was started in February and the email traffic was in January . Therefore there was a time nexus.

74. The claimant raised a number of things in submissions that unfortunately he had not put to Mr Barrett so I had to advise the claimant that I could not consider these matters. Evidence from Mrs Ward and Ms Fishenden showed that he was targeted and that he was constantly rung up by Ian Barrett and given work that meant he had unreasonable amounts of travelling to do which left him no time for anything else. Nevertheless, he always got his reports in on time. The claimant also complained that the audio recording would have shown that the appeal was unfair and that the appeal was also unfair because Mrs Bull did not wait for him to provide his documents.

Conclusion

75. I find that the claimant's dismissal for redundancy was fair.

Selection Criteria

76. There were three criteria which were subjective and unfortunately due to the flat hierarchical structure at the respondent the only person available to assess the claimant was Mr Barrett. Potentially in the future with Lead Assessors this might be different. Each criteria was broken down into different areas and Mr Barrett made comments in relation to each area. It was not possible now to produce documentation supporting that as in many cases it was a lack of documentation. Under cross examination Mr Barrett did not appear to be not credible. There were thin areas I would say such as supporting colleagues where the evidence was very anecdotal.

77. I was satisfied with the explanations given for why the selection criteria changed and nothing was put to Mr Barrett by the claimant regarding anything being changed to make his scores lower. I put this to Mr Barrett in relation to one issue however I was satisfied with his answer on customer focus. I am satisfied that the other criteria were objectively and correctly measured using databases and the most contentious issue the reworks there was nothing to suggest this was incorrect and Mr Barrett gave a credible explanation of why the reworks stood up as reworks and were not converted into queries.

78. I felt there was the potential that the claimant was underscored in relation to D, E and F as described above in relation to the supporting of colleagues and that he may have acquired at least one additional point through this issue.

79. There was no compelling evidence in my view that the querying of the working time regulations had anything to do with the claimant being selected for redundancy. There was some evidence in that the PIP started fairly close to the issues being raised and the email traffic showing discomfort with the issue amongst the respondent managers. Further had the colleague who had actually taken out a grievance about this been made redundant again that would have supported the possibility of a connection but the claimant never suggested this was the case. Neither was it suggested this colleague had been performance managed or otherwise targeted.

80. I accept the submissions of the respondent that the PIP would have been the opportunity to potentially dismiss the claimant however the redundancy process was on the way by the time the PIP was successfully concluded .Even so the claimant did not raise in terms that this was the reason for the PIP ending. I also took into account that there was the potential for the objective criteria to outweigh subjective criteria and that given that the claimant had had a PIP it is likely there would be some performance issues with the claimant. The claimant had not challenged the PIP or the disciplinary outcome which caused his score to be lower than others. Had he done so there would have been accessible evidence to suggest the PIP was unfair and unjustified which is what he needed to raise an inference that there was a connection with the working hours issues.

81. In addition there was a spread of scores throughout those who were not made redundant which suggested also that the assessments were fair.

82. In addition Ms Fishenden suggested a number of managers were 'down' on the claimant which detracts from an argument that Mr Barrett unreasonably marked the claimant or that it was done in retaliation for the working time issue, as the other managers cited did not know about this.

The Appeal

83. I did have some concern around the appeal given that we had no minutes whatsoever of any discussions between Mrs Bull and Mr Barrett. She simply stated she was satisfied after speaking to him that he had good reasons for why he had marked the claimant on the subjective criteria and she doublechecked all the objective criteria and confirmed that those scores were accurate on the basis of the database. Clearly Mrs Bull had thought that the Mr Barrett had marked a colleague harshly but that suggests she was prepared to challenge Mr Barrett if necessary.

84. The main issue was whether she should have waited for the claimant's DSAR material in order to conclude her appeal. The difficulty with this is that the claimant had failed to take his opportunity to challenge his scoring during the consultation process, this was what was expected and is a normal process.

He would then have captured all the relevant material while he was still employed and before he lost access to his computer. Mr Barrett would then have been in a position to capture his own information to support his own case. By the time of the appeal this was no longer the situation. Having heard myself from Mr Barrett his reasoning appeared credible and it is understandable that Mrs Bull accepted what he said. The fact that she allowed an appeal in another circumstance shows that she had an open mind.

85. Accordingly, because the claimant did not challenge numerous matters during the consultation the appeal was always going to be a narrow one as is in accordance with the spirit of an appeal which is not a rerun of the consultation process. I find this approach was reasonable and therefore I do not find Mrs Bull's failure to wait for the further material to mean that the dismissal was unfair.

86. In addition, Mrs Bull was entirely reasonable in offering the claimant an opportunity to provide as much detail as he possibly could without the documents so that she would be able to examine the process more forensically. However, whilst he threw in a few points at this stage there was not a response to this which enabled Mrs Bull to take a more forensic approach.

Polkey

87. If I am wrong on this and there was an unfair dismissal because of an overly subjective criteria and the failure to wait for the claimant's documents I find that the claimant would still have been made redundant as he would have had to gain eight points. I do not accept that the scores on B relate to the reworks were wrong and so would only be the scores on D, E and F. If the claimant had

scored maximum on these then he would have scored 24 and would still been selected for redundancy. If D , E and F had been removed he would have scored 12 and still been selected for redundancy as everybody else's scores would have been reduced.

88. The only other issue was whether he should have been able to challenge his disciplinary score on the basis the PIP was trumped up in the first place The claimant never emphasised this even when he was given an opportunity by Mrs Bull following the meeting. In considering whether the process was fair I have taken into account that a respondent cannot address something during the process if it is not clearly raised with them .In fact the claimant raised the sick absence score (which Mrs Bull dealt with) but not the disciplinary.

89. Accordingly the claimant's claim for unfair dismissal fails and is dismissed.

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Employment Judge Feeney
19 December 2023

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There

is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practicedirections/