EMPLOYMENT TRIBUNALS

Claimant: Mr M Bailey

Respondent: Network Plus Services Limited

Heard at: Manchester (by video conference) **On:** 17-19 April 2024

Before: Employment Judge Slater (sitting alone)

REPRESENTATION:

Claimant: Mr D Mawdsley, Counsel
Respondent: Mr Z Malik, Solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The complaint of "ordinary" unfair dismissal is well founded.

2. The complaint of automatic unfair dismissal relying on section 100 Employment Rights Act 1996 is not well founded.

3. The complaint of failure to comply with requirements of sections 188 and 188A of the Trade Union and Labour Relations (Consolidation) Act 1992 is well founded.

4. There will be a remedy hearing on 10 July 2024.

REASONS

Introduction

1. The respondent had made a postponement application in correspondence but did not pursue this at the final hearing, agreeing that the respondent was able to deal with liability only at this hearing. I directed that this hearing would deal with liability only.

2. Due to judicial training in the morning, the hearing did not start until the afternoon of 17 April 2024. We were able to hear evidence and the representatives' submissions in the 2.5 days remaining of the original 3 days' listing, but I had to reserve my decision.

3. The case had been listed to be heard by a judge sitting alone. There was, however, a complaint about failure to consult under the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) which is a complaint which must be heard by a full panel, if contested, unless the parties consent in writing to it being heard by a judge sitting alone. The parties gave their written consent for the claim for the protective award complaint to be heard by me, sitting alone.

Claims and Issues

4. The claimant brought complaints of "ordinary" unfair dismissal, "automatic" unfair dismissal (section 100 Employment Rights Act 1996) and a protective award for failure to consult.

5. The issues were discussed at the start of the hearing and I asked the representatives to try to agree a List of Issues based on that discussion. Unfortunately, the representatives were unable to reach agreement so I produced an updated list which was agreed by the parties at the start of the second day of hearing.

6. At the beginning of the start of the third day of hearing I raised with the parties that I thought there was an amendment needed to the List of Issues to reflect the provisions of section 105 Employment Rights Act 1996 since it seemed to me, from the pleadings, that the claimant was claiming that, even if the reason or principal reason for dismissal was redundancy, he had been selected for one of the prohibited reasons in section 100. The parties agreed that I should amend the List of Issues in this way. The List of Issues as amended is annexed to these Reasons.

Evidence

7. I heard evidence from the claimant and, for the respondent, from Stephen Billson, Service Delivery Manager for the Northwest area, Mike Shaw, regional operations manager for the east side of the Northwest, and from Robert Sean Mccomb, regional operations manager for the west side of the Northwest. There were written witness statements for all the witnesses. I had an electronic bundle of documents of 371 pages.

Facts

8. The claimant began work for the respondent in August 2019. The respondent had been called T & K Gallagher Limited until 20 December 2019. The respondent became the construction management organisation for Cadent, the company responsible for gas mains replacement throughout the North West of England.

9. The claimant was a Gas Site Manager, also referred to as a Service Delivery Supervisor. The claimant managed local delivery partners' operational teams tasked with delivery of the Cadent mains replacement programme. This involved ensuring employees and subcontractors worked to the company's health, safety, environmental and quality procedures and associated procedures. Both parties agree that the claimant was a person designated by the respondent to carry out activities in connection with preventing or reducing risks to health and safety at work. This was, in fact, the essence of the claimant's work, as it was with other Service Delivery Supervisors.

10. Some years previously, the claimant had worked for Balfour Beatty. His manager at that time had been Sean Mccomb. The claimant left Balfour Beatty in circumstances where he claimed constructive dismissal. This claim was settled.

11. Sean Mccomb transferred to the employment of the respondent when the respondent became the construction management organisation for Cadent in place of Balfour Beatty in or around April 2021. The claimant set out in some detail in his witness statement issues he had had when working at Balfour Beatty. However, I do not consider that these were of any material relevance to the issues I need to decide in this case so make no findings of fact about them.

12. The claimant was agreed by the respondent's witnesses to be very skilled and experienced and very good at the technical side of his job. There was some dispute between them as to whether there were sometimes issues about timekeeping and communications. The claimant's last performance review, which was in September 2021, described him as outstanding.

13. In April 2022 the claimant was moved to work at sites in Manchester after a conversation with Sean Mccomb and another manager. The claimant had not requested this move, which took him further from his home base.

14. In the early part of 2023, there was a proposed reduction in income from Cadent. A document produced some time in this period shows that a reduction of 20 or 26 in the number of respondent employees engaged on supervising Cadent work in the North West was being considered (p.180). The respondent's witnesses say that the proposed number to be dismissed dropped to 13 by 2 May, following discussion with Cadent. If this was the case, I would expect there to have been a revised document showing that and for this to have been disclosed by the respondent. There is no documentary evidence in the bundle to this effect. The respondent has not satisfied me that, by the time the respondent informed employees of a proposal to make redundancies, the total number of proposed redundancies had dropped below 20.

15. The respondent has not run an argument that the total number of redundancies was spread over a number of establishments, so that the number proposed at the

establishment where the claimant worked was under 20. I heard no evidence relevant to such an argument, so I proceed on the basis that all redundancies proposed were at the same establishment.

16. On 12 April 2023, the claimant emailed Victoria Grayson in the respondent's HR department asking for a relocation to closer to where he lived. The claimant was told at a meeting with Steve Billson and Mike Shaw on 21 April 2023 that he would be moved to sites in Oldham and Bury. Steve Billson's witness statement asserted that this was in response to the claimant's request to Victoria Grayson. However, Steve Billson agreed in evidence that this was not correct – the claimant had not asked to be moved to Oldham or Bury, which were not closer to his home.

17. In April 2023, the claimant was supervising NLU, a contractor doing Cadent mains replacement work. The claimant raised issues about outstanding work at Marland Hill Road and a non compliant mains test at Farm Walk. I find that raising such issues was entirely in keeping with the claimant's job responsibilities. I have heard no evidence to suggest that the claimant raised issues with the contractors he was supervising in any way different to the other site managers. Raising these issues was part and parcel of their job responsibilities. However, it does appear from an email from Mike Shaw dated 26 April 2023 (p.171) summarising a meeting between him, the claimant and Steve Billson on 21 April 2023 that concerns had been raised by "others" which resulted in the claimant being told that his progress at the new delivery unit would be closely monitored. I accept the claimant's evidence that he was told by the managers in the meeting on 21 April that he would have to be moved because his relationship with NLU had "soured" and that his future performance would be closely monitored due to complaints from others. This finding is consistent with the matters recorded in the email of 26 April 2023.

18. Based on the content of that email I find it more likely than not that the "others" were people from NLU. Two of the matters to be observed and evaluated were stated to be site communication (communication with new team leaders and scheme productivity) and time on site (the duration of time spent on site to ensure productivity, compliance and customer satisfaction). They also included "Relationships with new LDP". "LDP" stands for "Local Delivery Partner". The claimant did not challenge the content of the email sent on 26 April 2023. Although the email refers to the claimant's request for a change in his work location being approved and confirmed during the meeting, it does not appear that the claimant was informed of a move to a location closer to his home base, which was what he had requested.

19. I accept the evidence of Stephen Billson, which is consistent with the matters to be observed and evaluated, according to the email of 26 April 2023, that Stephen Billson had received complaints from NLU that the claimant was not often on site during site working times and visited on occasions when no one was on site to speak with him.

20. The claimant says he attended the new site in Manchester on 24 April 2023 but was not given any other work and that he covered for colleagues on other sites between 27 April and 5 May. The respondent gave no evidence as to what the claimant was doing at the end of April and early May. I do not consider it necessary to make any findings of fact as to what the claimant was doing in the period 24 April to 5 May.

21. On 2 May 2023, the claimant attended a meeting with other site managers conducted by Mr Mccomb. It is common ground that Mr Mccomb told them that, of the 25 site managers, four of them were likely to be made redundant. There is a dispute as to whether Mr Mccomb told them how many employees in any role in the North West were likely to be made redundant. I prefer the evidence of the claimant over that of Mr Mccomb in finding that Mr Mccomb told the site managers in that meeting that 27 employees were likely to be made redundant. The claimant's letter of 27 June 2023 (p.8) includes this assertion. By the time of the claimant's letter of 27 June, he had not seen any documents setting out the likely number of redundancies so I consider it more likely than not that he got this number from Mr Mccomb at that meeting. As noted previously (see paragraph 14), the respondent's witnesses asserted that, by 2 May 2023, the number of proposed redundancies had reduced to 13, following discussion with Cadent, but the respondent has not satisfied me that this was the case. I find, based on the only document setting out proposed total numbers (p.180) and the claimant's evidence, that, as at 2 May 2023, the respondent was proposing to dismiss as redundant between 20 and 26 employees.

22. The site managers were told at the meeting that the selection for redundancy would be done by means of a selection matrix. They were not told what the selection criteria were to be. There is a dispute as to whether they were told that the final selection of the four to be made redundant would be made from a pool of six or eight. The claimant says that nothing was said about six or eight. The respondent has not satisfied me that the site managers were told that, after application of the selection matrix, there would be a reduced "risk pool" of 6 or 8 from which the final selection would be made.

23. On 4 May 2023, Mr Mccomb wrote to the claimant confirming, following the meeting on 2 May, that the claimant's position was at risk of redundancy. I find this was a letter sent to all Service Delivery Supervisors prior to any scoring by Mr Mccomb and Mr Shaw. The letter included the following:

> "As discussed, we will be completing a selection matrix in the coming days and once this is complete, I would welcome the opportunity to discuss the matter with you if you are to proceed through the redundancy procedure. I will arrange a consultation meeting where HR will be in attendance and whereby you will be entitled to have a work colleagues or Trade Union Representative at the meeting."

The letter did not say that the scoring would be used to produce a smaller "risk pool" from which the four to be made redundant would then be selected.

24. Sean Mccomb and Mike Shaw carried out a scoring of the 25 Service Delivery Supervisors on the basis of computer data under the headings of:

- D8 performance
- Right first time data
- DR4 raised by back office
- DR4 approval first time

- P & R bookings on time
- Safety and compliance.

25. According to their exercise, the claimant came out as number 9 of those most likely to be made redundant based on those scores. Four were to be made redundant.

26. During the oral evidence of Mike Shaw, it became apparent that errors were made in, at least, the scoring of D8 performance. The scores of one supervisor were attributed to another supervisor. I consider it more likely than not that this was due to human error rather than a deliberate manipulation of this particular score. It appeared to me from the way Mr Shaw responded to questions in cross examination in the scoring, that this was the first time Mr Shaw had been made aware of the error in the scoring. The claimant came out, on the basis of this incorrect scoring, as worst performing on D8 performance. He should have had a better score if the exercise had been done correctly, which would have taken him out of the eight or nine who the respondent says were then considered further for redundancy.

27. The respondent says that a group of the eight worst performing (according to this selection matrix) were then considered further for redundancy. Tommy Chadwick had been at number 8 but was (according to the respondent) excluded from further consideration because he was a trainee.

28. I find, based on the evidence of the claimant and the documents, which do not describe Tommy Chadwick as a trainee, that Tommy Chadwick was no longer technically a trainee. Tommy Chadwick felt it was unfair that he was not classed as a trainee since he was inexperienced. I consider it more likely than not that the respondent took him out of consideration and treated him as a trainee although he was no longer technically a trainee.

29. On 10 May 2023 Mr Mccomb rang the claimant. The claimant took the call handsfree while he was driving. It is common ground that the claimant was asked to attend a meeting on 15 May. I find that the claimant understood from the phone call that he was one of the four site supervisors selected for redundancy. The claimant believes he was told this in this call. The claimant's understanding is consistent with the terms of the letter he was sent on 4 May, which did not mention a further reduced "risk pool" being arrived at by application of the selection matrix. Mr Mccomb's evidence is that the claimant was told he was at risk of redundancy. Mr Mccomb was uncertain as to exactly what he said. His evidence was that it was along the lines that the claimant was at risk and was in the risk pool, they would go through the scoring matrix at the meeting on 15 May and, at that point, the claimant would know whether he was being made redundant. Mr Mccomb did not recall whether he had told the claimant the size of the risk pool. I find that Mr Mccomb did not tell the claimant that he was one of a number in a risk pool, larger than the 4 to be selected, who could be made redundant, subject to what happened at the meeting on 15 May. I consider it possible that Mr Mccomb's intention was that selection should take place from a reduced "risk pool" but this was not conveyed clearly to the claimant. Whatever Mr Mccomb's intention, I find the claimant reasonably understood from the phone call, following what had been said on 2 May and in the letter of 4 May 2023, that he was one of the four identified to be made redundant, subject to anything that might arise in the meeting on 15 May. This understanding is consistent with what he wrote to Eve McGovern on 10 May and how he conducted himself in the meeting on 15 May.

30. After the telephone call on 10 May 2023 the claimant emailed Eve McGovern in HR. He wrote:

> "Following a phone call I have received today from Sean Mccomb saying I am facing redundancy. Could you please send me a copy of the selection matrix for me to look at."

31. Eve McGovern replied the same day, saying this could be shared with the claimant during the consultation meeting. She wrote:

> "We avoid sending this out prior to the consultation meeting to avoid any confusion and so it can be properly discussed in the meeting."

32. Voluntary redundancy was not part of the redundancy process. Mr Mccomb and Mr Shaw, who were tasked with, amongst other things, selecting the Service Delivery Supervisors who were to be made redundant, were told by HR at the start of the process that voluntary redundancy was not on offer. In a previous round of redundancies several years before, there had been the possibility of requesting voluntary redundancy.

33. Mr Mccomb gave evidence that, on or around 11 May 2023, the claimant approached him and said he would like to take voluntary redundancy as he had another job lined up. Mr Mccomb said he called Eve McGovern in HR to see if this was possible. He said she returned his call after checking to say that it was, and Mr Mccomb informed the claimant then that voluntary redundancy was a possibility. Mr Mccomb says he then informed Mike Shaw about this since Mike Shaw was to conduct the individual consultation meeting. The claimant disputes that any such conversation between him and Mr Mccomb took place. The respondent has produced no notes recorded by HR or otherwise of the conversations between Mr McComb and Ms McGovern. The grounds of resistance to the claim makes no mention of the claimant having requested, and been accepted, for voluntary redundancy. The respondent has not satisfied me, on a balance of probabilities, that the claimant said he wished to take voluntary redundancy and that the alleged telephone calls with Eve McGovern of HR took place. I consider that, if such a request had been made, there would be a record of this, which would have been disclosed. Also, the meeting on 15 May would have referred to a request for voluntary redundancy rather than Mr Shaw saying "I heard on the grapevine that you have found other employment".

34. I consider it more likely than not that the claimant, understanding from the phone call on 10 May 2023 that he was going to be made redundant, started thinking about and looking for other job opportunities. I consider it more likely than not that the claimant had a conversation with either Mr McComb or someone else about taking a job outside the gas industry, possibly in landscaping, which came to the attention of Mr Shaw before the meeting on 15 May 2023. This is consistent with the conversation recorded in the notes of the meeting of 15 May 2023. This conversation was not, however, the claimant asking to take voluntary redundancy.

35. On 11 May 2023, Mr Mccomb wrote to the claimant to invite him to a consultation meeting with him on 15 May 2023 at 8.30am. He wrote that Eve McGovern (HR adviser) would also be in attendance. He wrote to confirm that the claimant's role was at risk of redundancy and wrote that, if there were no alternatives, then a possible outcome may be the termination of the claimant's employment on

grounds of redundancy. He advised the claimant of his right to be accompanied. He enclosed a list of current vacancies. He wrote:

> "I would welcome the opportunity to discuss the matter with you and any alternatives there may be to redundancy."

This letter is more consistent with the claimant having already been selected according to the matrix then being in a "risk pool", as asserted by the respondent's witnesses.

36. I was not shown letters sent to any other employees but was told by the respondent's witnesses that the claimant was one of eight Service Delivery Supervisors who were sent such a letter. I do not consider it necessary to make a finding of fact as to whether or not this was the case.

37. Based on the respondent's evidence, from the scoring which they used for selection for redundancy, the claimant was 8th in line to be made redundant. Since only 4 were to be dismissed, unless those more at risk of redundancy successfully challenged their scoring, and the claimant did not, the claimant would not have been selected for redundancy.

38. On 12 May 2023, Mr Mccomb and Mr Shaw carried out a further scoring exercise completing handwritten forms for the claimant and the others in the group of 25 Service Delivery Supervisors. On the evidence of Mr Mccomb and Mr Shaw, this had no bearing on their selection of those to be made redundant but was done at the request of HR. Mr Mccomb described it, in evidence, as "internal paperwork. The scores of some of the candidates have been adjusted, to give a different total score. The highest scores indicated those most at risk of redundancy. Of the 25, the claimant got the highest, so worst, score. This contrasts with the scoring on which the respondent's witnesses say they relied, which put the claimant 8th at risk of redundancy, once Tommy Chadwick had been excluded from consideration. The notes of the meeting on 15 May 2023 are more consistent with the claimant having been selected for redundancy, rather than being 8th in line for redundancy. This leads me to find that the further scoring on 12 May 2023 did, contrary to the evidence given by Mr Shaw and Mr Mccomb, have relevance to the selection for redundancy of the claimant.

39. On 15 May 2023, the claimant met with Mike Shaw, with Eve McGovern in attendance to take notes. The notes of this meeting (beginning at p.230) indicate that the meeting started at 7:36. I prefer the evidence of the claimant over the start time recorded on these notes, finding that the meeting did start at around 8:30. This was consistent with the start time given on the invitation letter.

40. Contrary to the invitation letter, the meeting was not with Mr Mccomb but with Mr Shaw, although the claimant says that Mr Mccomb showed him into the meeting and was there briefly at the start. The claimant disputes the accuracy of the notes as to what was said. He disputes that he said that he had got other employment and that he was offered an opportunity to see the scoring but refused to look at this, saying it did not matter now. In the notes Mr Shaw is recorded as saying "I heard on the grapevine that you have found other employment". He does not say that the claimant has volunteered for redundancy and his request has been accepted. I find it more likely than not that the notes do record a reasonably accurate description of what was said, although not verbatim. I find, therefore, that the claimant was offered an

opportunity to see the scores but refused this offer. Given the claimant had asked in the email of 10 May for a copy of the matrix, I consider that he would have asked for this if it had not been offered, as he asserted in evidence. I also find that the claimant told the respondent he was due to start work the following day. I make no finding at this stage as to whether or not the claimant did, in fact, start work on 16 May.

41. The claimant was not told that he was 8th in line for selection for redundancy. The discussion proceeded on the basis that the claimant was leaving although not, as I have found, because the claimant had volunteered for redundancy.

42. The parties agree that there was an amicable discussion about the redundancy figures and the claimant was allowed to keep the car beyond the end date of his employment until 30 June because he was going on holiday and needed a car. The claimant said he had sent his CV to someone in multi utility. Mr Shaw offered to look at the claimant's CV, an offer which the claimant accepted. I accept Mr Shaw's evidence that, even though he understood the claimant had a job, he thought the claimant might need this for the future. Mr Shaw had experience in the past of being a recruitment consultant and thought he could help in this way. Mr Shaw also offered details of a Project Manager role. The claimant was not required to work until the end of his employment, which was 31 May 2023.

43. The claimant's dismissal for redundancy was confirmed by a letter dated 19 May 2023 (p.232).

44. Four Service Delivery Supervisors, including the claimant, were dismissed for redundancy. The respondent says one other of the four volunteered for redundancy and two others were compulsorily made redundant.

45. The claimant sent Mr Shaw his CV on 15 May 2023 (p.227).

46. It is common ground that there was no trade union recognised in respect of the group of employees of which the claimant was a part and that no steps were taken to elect employee representatives for consultation. The respondent says this is because the number of redundancies proposed was fewer than 20.

47. On 27 June 2023, the claimant wrote to the respondent about his intention to issue Tribunal proceedings. The claimant had not appealed against his dismissal but says that, after reflecting on matters, he thought about why he had been selected for redundancy and could not see how this could be fair. He says he thought that this was connected to issues he had raised. He took legal advice before writing this letter.

48. The letter, to a large extent, sets out what later became the claimant's claim form and then part of his witness statement. The letter includes an assertion that, on 10 May 2023 in the phone call from Sean Mccomb, the claimant was told that he was one of the four site supervisors selected for redundancy. The claimant asserts that he was told at the meeting on 2 May 2023 that 27 staff were to be made redundant.

49. ACAS early conciliation took place between 27 June 2023 and 3 August 2023. The claim was presented to the Tribunal on 15 August 2023.

50. In the claim form, the claimant said he would start work on 12 June 2023. Schedules of Loss provided by the claimant subsequently have stated that he started work for Connect Utilities on a self-employed basis on 22 or 23 May 2023.

Submissions

51. Mr Malik, for the respondent, made written and oral submissions. Mr Mawdsley, for the claimant, made oral submissions only.

52. Mr Mawdsley, for the claimant, made submissions which I summarise as follows. Mr Mawdsley suggested that the question was not whether the dismissal was unfair but why it was unfair. Mike Shaw could not explain what had happened with the scoring for D8; the claimant had been given a fictional score. If the scoring had been accurate, the claimant would not have been anywhere near the final 8. Mr Mawdsley submitted that Mr Shaw had manipulated the data. The only person to finish worse off in the handwritten assessment was the claimant. Whether or not the handwritten assessment was used in the final calculation, this showed intent, to ensure clear water between the claimant and those around him. Mr Mawdsley submitted that the respondent had an intention to be rid of the claimant because of what had happened a couple of weeks before with NLU relating to Marland Hill Road and Farm Walk. The claimant had made himself unpopular with NLU.

53. Mr Mawdsley submitted that the respondent had not proved that the reason or principal reason for dismissal was redundancy.

54. Mr Mawdsley submitted that the proposal was to make at least 20 people redundant. The only document produced (p.180) showed at least 20. Mr Mccomb and Mr Shaw said there was a later proposal but neither could produce that document. The claimant's evidence that he was told that it was 27 should be accepted.

55. Mr Mawdsley submitted that it was a fiction that the claimant had requested voluntary redundancy. This was not mentioned anywhere in the pleadings. There is no record of a request being made.

56. Mr Mawdsley submitted that, whether or not the proposal was to dismiss 20 or more, there was still a duty to consult. This obligation was not fulfilled even if the respondent, at the meeting on 15 May, offered the criteria. If they had been shown to the claimant, he would still have been made redundant. Mr Mccomb made it clear that those to be made redundant would be told they were redundant.

57. Mr Mawdsley submitted that the notes of the meeting on 15 May contained inconsistencies and the first page was fiction.

58. Mr Mawdsley referred to **Kuzel v Roche Products Ltd** [2008] IRLR 530 CA. Where the Tribunal did not accept the reason given by the respondent, it could find that dismissal was for the reason asserted by the claimant but was not obliged to do so.

59. Mr Malik made submissions on behalf of the respondent which I summarise as follows.

60. The reason for dismissal was redundancy or a business reorganisation, being "some other substantial reason". The requirements by the respondent's client, Cadent, to carry out work had diminished, necessitating the redundancies.

61. The claimant's selection for redundancy was on his own invitation, not something arising from health and safety matters. The claimant was offered the selection criteria at the meeting on 15 May 2023. Had he wanted to challenge his redundancy and remain employed by the respondent, he could have done so at the time. If he had engaged with the process, the calculation errors could have been identified at the proper time, rather than during the Tribunal hearing. It was clear from Mr Shaw's reaction when giving evidence that he only realised then that there had been errors in the calculation. The errors were due to human error. The claimant did not appeal against his dismissal.

62. Mr Malik submitted that there was no obligation to collectively consult because the respondent did not propose to dismiss 20 or more employees.

63. The claimant gave inconsistent evidence about when he started work after leaving the respondent. The select pieces of evidence the claimant provided, including his response to an application for specific disclosure, point to the fact that the claimant had work lined up or was already working elsewhere. In the meeting on 15 May 2023, he said he was starting work the next day. The claimant has not explained what employment/work he had secured starting on 16 May. The claimant was misleading the Tribunal. Mr Malik submitted that the claimant started landscaping work on 16 May. Mr Shaw knew this would not sustain the claimant long enough so offered him help with his CV.

64. Mr Malik submitted that the claimant had falsely engineered his claim of unfair dismissal, not appealing at the time and only challenging this more than a month later. Mr Malik submitted that the claim of automatic unfair dismissal was also falsely engineered. Reasons for this submission included that the calculation errors in the scoring mechanism appeared to affect several employees and it had not been put to Mr Shaw that the reason he allegedly miscalculated the selection matrix was because of matters relating to s.100 ERA.

65. Mr Malik submitted that the claimant could have raised the arguments appearing in this litigation during the consultation process and failure to do so was contributory conduct, with the contribution being 100%.

The Law

<u>"Ordinary" unfair dismissal</u>

66. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996 (ERA). Section 94(1) ERA provides that an employee has the right not to be unfairly dismissed by his employer.

67. Fairness or unfairness of the dismissal is determined by application of section 98 of the 1996 Act. Section 98(1) ERA provides that in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and if more than one, the principal one and that it is a reason falling within section 98(2) ERA or some other substantial reason of a kind such as to justify the

dismissal of an employee holding the position which the employee held. Redundancy is one of the potentially fair reasons for dismissal.

68. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and this shall be determined in accordance with equity and the substantial merits of the case. In considering the reasonableness or unreasonableness of a dismissal, the tribunal must consider whether the decision to dismiss was within the band or range of reasonable responses.

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

<u>"Automatic" unfair dismissal s.100 ERA</u>

70. The relevant parts of section 100 ERA provide:

> "(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that –
>
> (a) Having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,
>
> (b) ……"

71. The relevant parts of section 105 ERA provide:

> "(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if –
>
> (a) The reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant,
>
> (b) It is shown that the circumstances constituting the redundancy applied equally to one or more other employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer, and
>
> (c) It is shown that any of subsections (2A) to 7N) applies.

…….

(3) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one of those specified in subsection (1) of section 100 (read with subsections (2) and (3) of that section)."

Protective award – s.188 TULRCA

72. The relevant parts of sections 188 and 189 TULRC provide:

188 Duty of employer to consult . . . representatives

(1) Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals.

(1A) The consultation shall begin in good time and in any event—

(a) where the employer is proposing to dismiss 100 or more employees as mentioned in subsection (1), at least 45 days, and

(b) otherwise, at least 30 days,

before the first of the dismissals takes effect.

(1B) For the purposes of this section the appropriate representatives of any affected employees are—

(a) if the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade union, or

(b) in any other case, whichever of the following employee representatives the employer chooses:—

(i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this section, who (having regard to the purposes for and the method by which they were appointed or elected) have authority from those employees to receive information and to be consulted about the proposed dismissals on their behalf;

(ii) employee representatives elected by the affected employees, for the purposes of this section, in an election satisfying the requirements of section 188A(1).

189 Complaint . . . and protective award

(1) Where an employer has failed to comply with a requirement of section 188 or section 188A, a complaint may be presented to an employment tribunal on that ground—

(a) in the case of a failure relating to the election of employee representatives, by any of the affected employees or by any of the employees who have been dismissed as redundant;

(b) in the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related,

(c) in the case of failure relating to representatives of a trade union, by the trade union, and

(d) in any other case, by any of the affected employees or by any of the employees who have been dismissed as redundant.

……..

(2) If the tribunal finds the complaint well-founded it shall make a declaration to that effect and may also make a protective award.

(3) A protective award is an award in respect of one or more descriptions of employees—

(a) who have been dismissed as redundant, or whom it is proposed to dismiss as redundant, and

(b) in respect of whose dismissal or proposed dismissal the employer has failed to comply with a requirement of section 188,

ordering the employer to pay remuneration for the protected period.

(4) The protected period—

(a) begins with the date on which the first of the dismissals to which the complaint relates takes effect, or the date of the award, whichever is the earlier, and

(b) is of such length as the tribunal determines to be just and equitable in all the circumstances having regard to the seriousness of the employer's default in complying with any requirement of section 188;

but shall not exceed 90 days . . ..”

Conclusions

<u>“Ordinary” unfair dismissal</u>

73. I conclude that there was a redundancy situation; the respondent needed to reduce the number of employees, including the number of Service Delivery Supervisors, because of a reduction in income from its client, Cadent. I conclude that the claimant's dismissal was because of this redundancy situation. Whilst the claimant disputed that the reason or principal reason for dismissal was redundancy, I did not understand the claimant to be submitting that the whole redundancy programme was a sham, devised to result in the dismissal of the claimant. Three other Service Delivery Supervisors were also dismissed and there were proposals to dismiss employees in other categories, although I heard no evidence on the basis of which I could find how many other employees were ultimately dismissed. If the claimant was, contrary to my understanding, suggesting that the whole exercise was a sham, I reject that argument. I conclude that the respondent has shown that the reason for the claimant's dismissal was the potentially fair reason of redundancy. The reason for dismissal is distinct from the issue of the reason for the claimant's selection for redundancy.

74. I now consider the fairness of the decision to dismiss the claimant by reason of redundancy.

75. I found that the claimant had not volunteered for redundancy. He was, one of four out of 25 Service Delivery Supervisors made redundant and he was selected for redundancy. Whether one of three others made redundant had, in fact, volunteered for redundancy, it is not necessary for me to decide.

76. I conclude that the selection of the claimant for redundancy was flawed by the errors in the first scoring exercise against, at the least, the D8 performance criterion. Only the scoring for the D8 performance criterion was examined in detail. Mr Mawdsley, with justification, said that it was not possible for the claimant to understand, from the material disclosed, how scores had been arrived at for other criteria. Mr Shaw realised, during cross examination, that the claimant had been given the wrong score. Had the claimant been given the correct score for this criterion alone, he would have fallen outside the group of Service Delivery Supervisors at risk of redundancy. I have accepted that the miscalculation was an error. However, I do not consider that reliance on such an error in selection can make the selection fair. The error demonstrates, at best, a lack of care on the part of those responsible for the scoring and selection. This first scoring would not, however, have inevitably resulted in the selection of the claimant for redundancy. It put him 8th in line for selection, after taking Tommy Chadwick out of the selection pool. It appears that the second scoring, which the respondent's witnesses say had no relevance to the claimant's selection for redundancy, manipulated scores to put the claimant first in line for redundancy.

77. I have found that the meeting on 15 May 2023 proceeded on the basis that the claimant was being made redundant, rather than that he was 8th in line for selection. If, as the respondent's witnesses assert, the second scoring exercise had no relevance, there is no explanation as to why the claimant was selected for redundancy. The second scoring exercise put the claimant first in line to be made redundant.

78. The failure to explain the selection of the claimant for redundancy against objective criteria leads me to conclude that the selection against fell outside the band of a reasonable selection process.

79. I conclude also that the process of consultation fell outside the band of reasonable responses. The claimant was not informed, prior to the meeting on 15 May

2023, what selection criteria were used, even though the claimant asked to see these before the meeting. Once in the meeting, I have found that the claimant no longer wanted to see the criteria. However, I do not consider that this can rectify the unfairness of the claimant having been given no idea of the criteria to be used, prior to the meeting when his scores against those criteria would have been discussed.

80. Given that, once in the meeting on 15 May 2023, the claimant said he had got another job, I consider that the failure to discuss alternative employment with the claimant in that meeting was not something which was unreasonable in the circumstances.

81. I conclude, for these reasons, that the respondent did not act reasonably in all the circumstances in treating redundancy as a sufficient reason to dismiss the claimant. The complaint of "ordinary" unfair dismissal succeeds.

82. I have decided not to make a decision at this stage on the "Polkey" and contributory conduct arguments, relevant to remedy. I consider it appropriate to allow the parties, at the remedy hearing, to make further submissions on these arguments, if pursued, informed by my findings of fact.

<u>s.100 "automatic" unfair dismissal – health and safety</u>

83. It is agreed that the claimant was designated by the respondent to carry out activities in connection with preventing or reducing risks to health and safety at work. Indeed, this was the essence of the claimant's job and the jobs of the other Service Delivery Supervisors.

84. For the reasons I gave in considering "ordinary" unfair dismissal, I have concluded that the reason or principal reason for dismissal was redundancy. I reject the argument that the reason or principal reason for dismissal was because the claimant was designated to carry out activities in connection with preventing or reducing risks to health and safety at work and because he carried out or proposed to carry out such activities.

85. I turn then to the issue of whether the reason or principal reason the claimant was selected for redundancy was for such a health and safety reason. If it was, the dismissal will be unfair.

86. There were other Service Delivery Supervisors who were not dismissed by reason of redundancy.

87. I found that, prior to the selection exercise, the claimant was told by the managers in a meeting on 21 April 2023 that he would have to be moved because his relationship with NLU had "soured" and that his future performance would be closely monitored due to complaints from others (see para 17). I found that NLU had raised complaints about the claimant with Stephen Billson about the times the claimant was on site (see para 19).

88. I have rejected the respondent's evidence that the claimant volunteered for redundancy.

89. The two scoring exercises put the claimant, in the first scoring, 8th at risk of redundancy (the scoring the respondent says they relied on) and, in the second scoring, highest at risk of redundancy (the scoring the respondent says they did not rely on). The first scoring exercise only put the claimant into the 8 most liable for redundancy because of at least one error in the scoring process, which I have accepted was due to human error.

90. I have found that the meeting on 15 May 2023 proceeded on the basis that the claimant was being made redundant, rather than that he was 8th in line for selection. If, as the respondent's witnesses assert, the second scoring exercise had no relevance, there is no explanation as to why the claimant was selected for redundancy.

91. The claimant asserts that his selection for redundancy was because of his raising of health and safety matters.

92. Despite my rejection of the respondent's assertion that the claimant was made redundant because he volunteered for redundancy and the lack of any other proper explanation from the respondent for the claimant's selection for redundancy, I am unable to conclude that the claimant's selection was because of his activities in connection with preventing or reducing risks to health and safety at work, being a person designated to carry out activities in connection with preventing or reducing risks to health and safety at work. There is no evidence that the claimant raised health and safety concerns more than other Service Delivery Supervisors. Raising such concerns was the essence of the job of Service Delivery Supervisor. I conclude that it is more likely that the respondent manipulated the selection process to ensure the selection of the claimant because of the difficult relationship the claimant had with NLU and might have with other contractors, because of the times at which the claimant attended at the site, rather than because the claimant carried out activities in connection with preventing or reducing risks to health and safety at work.

93. I conclude that the complaint of automatic unfair dismissal relying on section 100 ERA is not well founded.

Protective award

94. I have found that the respondent was proposing to dismiss as redundant twenty or more employees. There has been no argument from the respondent that these were not all at one establishment or that the dismissals were to be over a longer period than 90 days. I conclude that the duty to consult under section 188 TULRCA was triggered.

95. The parties agreed that, if the duty to consult was triggered, there was no trade union recognised in respect of employees of a description including the claimant, so the claimant has standing to bring a complaint. There was also agreement, that, if the duty was triggered, the respondent did not comply with its obligations under sections 188 and 188A to arrange for the election of representatives and to consult with the elected representatives as required by s.188.

96. I conclude that the complaint brought under section 189 of failure to comply with requirements of sections 188 and 188A TULRCA is well founded.

_____

Employment Judge Slater

Date: 4 June 2024

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

13 June 2024

FOR THE TRIBUNAL OFFICE

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

Annex
List of Issues

Introduction

By a claim form presented on 15 August 2023 the claimant, Mr Martin Bailey, brought complaints of ordinary unfair dismissal, automatic unfair dismissal, and protective award for failure to consult. The respondent resists the claims.

The Issues

Unfair dismissal, s. 95 ERA

1. The Tribunal will decide:

    (a) Has the respondent shown the reason or principal reason for dismissal was a potentially fair reason under section 98 Employment Rights Act 1996?

    The respondent asserts that it was (i) redundancy or in the alternative (ii) 'some other substantial reason', being a business reorganisation.

2. If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

    (a) The respondent adequately warned and consulted the claimant;

    (b) The respondent adopted a reasonable selection decision, including its approach to a selection pool and any scoring within the pool;

    (c) The respondent took reasonable steps to find the claimant suitable alternative employment;

    (d) Dismissal was within the range of reasonable responses.

Automatic unfair dismissal, s. 100 and s.105 ERA

3. The parties agree that the claimant was designated by the respondent to carry out activities in connection with preventing or reducing risks to health and safety at work.

4. Was the reason or principal reason for the claimant's dismissal because he was so designated and that he carried out, or proposed to carry out, any such activities?

5. If the reason or principal reason for dismissal was redundancy, was the reason or principal reason that the claimant was selected for redundancy one of those specified in s.100(1) read with ss.100(2) and 100(3) i.e. that he was designated by the respondent to carry out activities in connection with preventing or reducing risks to health and safety at work and that he carried out, or proposed to carry out, any such activities?

Issues of principle relevant to remedy which the EJ will, if she considers it appropriate, decide on, at the same time as liability, if the claimant is found to have been unfairly dismissed.

6. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? If so, should any compensatory award be reduced? By how much?

7. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

8. Did the claimant cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

Protective award, s. 188 TULRCA

9. Was the respondent proposing to dismiss as redundant twenty employees or more within a ninety-day period or less at one establishment? If so, the duty to consult under s.188 TULRCA was triggered. The respondent asserts that it was not proposing to dismiss as redundant twenty or more employees in total, so no argument about whether those proposed to be dismissed all worked at the same establishment will be relevant.

10. If the duty to consult was triggered, the parties agree that there was no trade union recognised in respect of the employees of a description including the claimant, there was a breach of the obligations in s.188 and s.188A and the claimant has standing to bring a complaint in respect of a breach of s.188A TULRCA 1992 under s.189(1)(d).