EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000181/2024

Final Hearing Held in Edinburgh on 17 – 19 June 2024

Employment Judge A Kemp

Mr B McGuigan	**Claimant** **In person**
Lookers Motor Group Ltd	**Respondent** **Represented by** **Mr M O'Carroll** **Advocate** **Instructed by** **Ms S Lewis** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant was unfairly dismissed by the respondent, and he is awarded a compensatory award of EIGHT HUNDRED AND NINETY ONE POUNDS EIGHTY FOUR PENCE (£891.84).

REASONS

Introduction

1. This Final Hearing was arranged to address a claim of unfair dismissal. The claimant was a party litigant and Mr O'Carroll represented the respondent. The claimant had produced a Schedule of Loss seeking a little over £18,000 in compensation. The respondent admitted that there

had been a dismissal, argued that it was for the potentially fair reason of redundancy, and that the dismissal had been fair.

Preliminary Matters

2. Prior to the hearing of evidence I proposed the issues as outlined below, and explained to the claimant how the Final Hearing would be conducted. I explained about giving evidence for all matters, and that I could assist the claimant to an extent under Rule 2, including to ask questions of witnesses to elicit facts under Rule 41, but not to the extent of acting as if his solicitor. I explained that the witnesses could be cross-examined, and that doing so covered firstly evidence that was challenged as to its accuracy and secondly where that would be referred to in his own evidence, and was understood to be within the knowledge of that witness but not covered in the evidence in chief. I explained that the Tribunal could ask questions, and that re-examination permitted further questioning on matters raised only in cross examination or by the Tribunal's questions. I explained that after the evidence was closed for both parties it was only in exceptional circumstances that further evidence was permitted, and therefore this was the opportunity to give evidence whether oral or written. I also explained that a document in the Bundle of Documents was evidence only once referred to by a witness in evidence. I further explained that following the closure of the evidence there would be an opportunity for each party to make submissions on the law, the facts, and the application of the law to the facts. The claimant was content to proceed, and there were no preliminary issues that either party wished to raise.

The evidence

3. The parties had prepared the documentation in the form of a Bundle of Documents, most but not all of which was spoken to in evidence. For the respondent evidence was given by Mr Robert Cornett and Mr Ian Struthers, Head of Business and Market Area Head of Business respectively. The claimant gave evidence himself and did not call any witness.

The Issues

4. At the commencement of the hearing I proposed the following as the issues in the case:

   (i) What was the reason or principal reason for the dismissal?

   (ii) Was that reason potentially a fair one under section 98(1) and (2) of the Employment Rights Act 1996?

   (iii) If so, was it fair or unfair under section 98(4) of that Act?

   (iv) In the event that the claim succeeds to what remedy is the claimant entitled?

5. The parties confirmed their understanding of and agreement to those issues.

The facts

Parties

6. The claimant is Mr Barry McGuigan.

7. The respondent is Lookers Motor Group Limited.

8. The respondent's business is the sale of new and used cars, repairs and the sale of parts and related services. It has sites in Scotland at Edinburgh, Glasgow, Ayr and Stirling for the Audi brand. It also has various sites in England.

9. The claimant was initially employed by Lomond Motors Ltd on 5 January 2016 as a Sales Executive. He worked at Edinburgh Audi, Sighthill, Edinburgh.

10. The respondent has around 400 employees in Scotland and about 70 at Sighthill.

11. On or around 1 May 2021 the claimant was appointed to the role of Business Manager. A contract of employment of that date was sent to him confirming the role. He had a basic salary of £35,000 per annum, and a commission arrangement based on the performance of the

business. At some point thereafter, on a date not given in evidence, the claimant's employment was transferred on the same terms and conditions to the respondent.

July 2023

12. In July 2023 there were three Business Managers employed at Edinburgh Audi. A new arrangement was introduced for how they would work by email of 10 July 2023, and was in operation. After about a week one of those managers' employment was terminated. The claimant and a colleague remained as the two Business Managers. When they were both on the same rota together one would be in the showroom and the other doing administrative work, alternating those roles between them. The claimant did not agree with that proposal, and emailed Mr Henderson with his views about it, to which Mr Henderson replied to the effect that the decision had been taken to apply it, or words to that effect. No disciplinary action was taken against the claimant in relation to that new arrangement or any other matter.

13. The other business manager was Mr Paul Bonini. He had over two years employment continuously with the respondent. Prior to working for the respondent he had worked as a General Sales Manager, at a higher level than Business Manager. He undertook roles including as to used cars, and key to key transactions when a customer's contract was coming towards an end.

Redundancy process

14. The respondent is part of the Lookers Motor Group. In or around October 2023 the group was acquired by a Canadian Company, the Alpha Auto Group. Thereafter there was consideration of the business by the management and of making changes to its structure and organisation. A number of redundancies were decided upon, including that there would be no role as Business Manager in Edinburgh, and that the functions would be subsumed by higher managers. The respondent decided that a role of Senior Sales Executive would be created, and that of the 14 Sales Executives there would be about 3 or 4 redundancies. At Edinburgh Audi there were to be about 11 or 12 redundancies in total.

15. The respondent does not recognise a trade union.

16. The respondent has a Human Resources (HR) function, which for Edinburgh Audi was based in Newcastle. A standard script was created to inform employees about the redundancies and the process for those at risk. HR advice was provided during the redundancy process involving the claimant.

17. On 11 December 2023 the claimant and his fellow Business Manager Mr Bonini were informed by Mr Robert Cornett the respondent's Head of Business at Edinburgh Audi that the role of Business Manager was at risk of redundancy. The decision to do so had already been taken by management above Mr Cornett's level. Mr Cornett had been told by HR that the decision had been taken to remove that post from the organisational structure across the Group in the UK which he passed on to them. He explained to the claimant and Mr Bonini that there would be one new role as Senior Sales Executive ("SSE") at Edinburgh Audi which they could apply for. It had a basic salary of £30,000 per annum and a different commission structure dependent on individual sales. It had the opportunity to earn higher commission than under the Business Manager scheme, but no guarantee of that.

18. On 12 December 2023 Mr Cornett wrote to the claimant to state that he was at risk of redundancy and to outline the process.

19. On 13 December 2023 Mr Cornett sent the claimant an email with the criteria to be used to score candidates for the post of SSE (the precise attachment to that email was not before the Tribunal but its contents were materially the same as those referred to in paragraph 23 below). Shortly thereafter that same day the claimant met Mr Cornett for the first consultation meeting as to the prospective redundancy. The claimant stated that he needed to know about the new role as SSE. He did not make any comment as to the removal of the Business Manager role.

20. There was no formal application form or other documentation for the application. Both the claimant and Mr Bonini applied for the role.

21. The claimant and Mr Bonini were both scored in relation to the SSE role independently by each of Mr David Henderson and Mr Stephen Inglis, Sales Managers of the respondent at Edinburgh Audi (the documents each had prepared were not before the Tribunal). Mr Cornett considered that they were the best managers to do so as they had the closest knowledge of the work of the two candidates.

22. The criteria that Mr Inglis and Mr Henderson scored the two candidates against were (i) disciplinary record (ii) quality of administration (iii) quantity of work (iv) brand knowledge (v) standards and compliance (vi) level of supervision required and (vii) customer outcomes. Each criterion had four possible scores, 20, 15, 10 or 5 with a narrative applicable in respect of each. They also carried out a similar exercise with different criteria in some respects to score Sales Executives at Edinburgh Audi, the numbers for which were being reduced from 14 to about 11.

23. On 19 December 2023 Mr Cornett wrote the claimant referring to the initial consultation meeting, and inviting him to a further meeting on 8 January 2024.

24. On 20 December 2023 Mr Cornett, Mr Henderson and Mr Inglis conducted a meeting on Teams. Mr Inglis had sustained a heart attack in late November 2023 and was not present in work at that time. They had a discussion over the scoring, with Mr Cornett challenging the scores each had attributed to the two candidates, the claimant and Mr Bonini. No notes or other written record of that discussion were kept.

25. The claimant scored 85 points and Mr Bonini 95 points.

26. The claimant and Mr Cornett had a second consultation meeting on 21 December 2023, notwithstanding the terms of the letter dated 19 December 2023. The claimant had no further questions but confirmed that he wished to apply for the SSE role. The claimant was informed at that meeting that scoring for it had been undertaken and that his score was 85, and that it was 10 lower than that for Mr Bonini. He was not provided with any document setting out the scoring for each of them, or the details of his own scoring and any reasons for that.

27. After that meeting, and on the same day, the claimant emailed 14 Sales Executives asking four questions as to his performance. 8 of them responded with their views. Shortly thereafter on the same day the claimant emailed Mr Cornett asking if he could approach Mr Henderson and Mr Inglis about how they made the scoring, a breakdown of the scores and the evidence for them.

28. On 4 January 2024 Mr Cornett wrote to the claimant inviting him to a third consultation meeting on 8 January 2024. The claimant emailed Mr Cornett and Mr Inglis on that day asking for the evidence used. Mr Cornett replied on the same day to state that Mr Inglis and Mr Henderson would put together the rationale behind the scoring and send that to him as soon as possible. The claimant responded asking about whether Mr Bonini had received a written warning.

29. Unknown to Mr Cornett the respondent had decided that there should be retained one role of Business Manager in Glasgow, as well as one in Ayr and certain other locations.

30. On 8 January 2024 prior to the consultation meeting Mr Cornett provided the claimant with a document with the criteria, the four standard scores that could be awarded, the scores for the claimant and comments on them from Mr Inglis and Mr Henderson. He also confirmed that Mr Bonini had not had a written warning in 2023, having checked that with HR first. Mr Cornett offered to defer the consultation meeting if the claimant wished to, but the claimant did not.

31. The document provided stated that the claimant had been awarded 20 points for the first criterion. For the second criterion the claimant was awarded 10 points and the comment was “Less focussed on diary updates and notes on enquiries, no follow up on enquiries. Too much focus on admin jobs, ie deliveries and payouts (previously discussed”. For the third criterion the claimant was awarded ten points and the comment was “High level of admin, low level of customer engagement”. For the fourth criterion the claimant was awarded 15 points and the comment was “Accurate score”. For the fifth criterion the claimant was awarded ten points and the comment was “diary updates and notes. QA

inconsistency and group focus site. CXM and Reputation". The score had been assessed on the basis of the team of which the claimant and Mr Bonini, Mr Inglis, Mr Henderson and Mr Cornett, were a part. For the sixth criterion the claimant was awarded 10 points and the comments were "No participation in David's actions to showroom management 10th July. No evidence of coaching with sales team at lead handout or structure. Nothing implemented to drive sales or customer satisfaction. No engagement management. Any deal attitude to avoid confrontation. Busy fixing not managing. Sales team feedback on coaching and preferred role model. No request to be involved in click and sell, key to key, appeals for CXM or renewals." For the seventh criterion the claimant was awarded 10 points and the comments were "Again, no participation in David's actions to showroom management 10th July. Limited customer engagement unless own previous customers. More office/admin work. Low OTDB on showroom. Email behaviour Sarah/David/ QA. Selective distribution of enquiries and negative opinions of customers or quality of enquiry. No reporting engagement." The claimant's total score was 85 points.

32. Mr Bonini was scored against the criteria respectively 20,10,10,15,10,15 and 15, a total of 95 points (no document providing comments to support those scores was spoken to in evidence).

33. The claimant, Mr Cornett and Mr Inglis met on 8 January 2024. The claimant argued that he should not have scored lower than Mr Bonini. He provided the 8 statements from Sales Executives, one from Sales Admin, and reports regarding quality assurance completions. Mr Inglis explained at the meeting how the scoring had been completed and the rationale where the claimant scored less than Mr Bonini, which was in relation to criteria (vi) and (vii), the two candidates having otherwise the same scores. The claimant was informed that he was to be made redundant. Mr Cornett suspended the meeting when the claimant intimated that he would raise a grievance against Mr Henderson. Mr Cornett then took HR advice. He was informed that the process of redundancy could continue, or words to that effect.

34. The consultation meeting was resumed on 9 January 2024. There was a discussion as to the claimant applying for a role as Senior Sales Executive in Hamilton but he did not wish to pursue that. Because of its location and lower base salary. There were no other alternative posts available for the claimant at SSE level. The claimant confirmed that he would intimate an appeal.

35. On 10 January 2024 the claimant emailed Mr Michael Scott, the Franchise Director of the respondent, raising issues in relation to his dismissal. By that time the respondent had decided that there would be one post as Business Manager retained at the Glasgow Audi premises, with a reduction from five such posts. The claimant referred to that in his message.

36. Mr Scott replied in a neutral manner on 12 January 2024.

Dismissal

37. On 12 January 2024 the claimant was sent a letter from the respondent confirming his redundancy with effect from 14 January 2024. He was provided with a statutory redundancy payment, and a payment in lieu of the notice to which he was entitled, being for a period of eight weeks. It confirmed a right of appeal.

Appeal

38. The claimant appealed by email of the same date, including when doing so reference to his email to Mr Scott.

39. Mr Ian Struthers, Market Area Head of Business at Glasgow Audi, was appointed to hear the appeal and wrote to the claimant in relation to the appeal on 30 January 2024. It was later rearranged for 6 February 2024.

40. On 5 February 2024 Mr Struthers met Mr Cornett and Mr Inglis. A note of that meeting is a reasonably accurate record of it. Mr Henderson was on holiday that day.

41. On 6 February 2024 Mr Struthers met the claimant for the appeal hearing. A note of that meeting is a reasonably accurate record of it.

During the meeting the claimant tendered to Mr Struthers a file of documents including the said emails from the sales team, and information as to quality assurance reports. Mr Struthers stated that he had seen them and did not require to consider them, or words to that effect. Mr Struthers did not look at them. He was not aware of their contents.

42. On or around 12 February 2024 Mr Struthers telephoned Mr Henderson to discuss the scoring of the two candidates. He gave Mr Struthers a general explanation of the reasons for that, in line with the terms of the document that had been created. No written note of that discussion was kept.

43. On 24 February 2024 Mr Struthers wrote to the claimant rejecting his appeal.

Early Conciliation

44. The claimant commenced early conciliation on 9 January 2024 and received the Certificate for the same on 20 February 2024. The Claim Form in this claim was presented to the Tribunal on 22 February 2024.

Losses

45. The claimant was paid a statutory redundancy payment of £5,144, which was not subject to statutory deductions. The respondent paid the claimant in lieu of notice the sum of £5,348.61 subject to statutory deductions. With the final payment of sums due the claimant received taxable sums totaling £8,773.28 on which the deductions were £3,389.85.

46. The role of a Business Manager has a gross basic salary of £35,000 and a commission based on the level of profitability. His net weekly pay was £891.84 per week. Had the claimant been appointed to the post of Senior Sales Executive he would have received a gross basic salary of £35,000 and a commission based on his individual sales achieved. It is likely that the claimant would have had net earnings totaling £52,500 per

annum, together with employer pension contributions under an auto-enrolment scheme.

47. The claimant applied for a role with John Clark (Holdings) Ltd at Newbridge for which he was successful. His employment there commenced on 22 January 2024. He has gross basic earnings of £20,800 per annum and an ability to earn commission dependent on sales achieved. It is likely that he will earn net a total of £45,000 per annum from that employment, together with employer pension contributions under an auto-enrolment scheme.

48. The claimant cares for his mother in law, and for his son both of whom have health issues. He lives in Edinburgh.

49. The claimant did not receive any State Benefits.

The respondent's submission

50. The following is a brief summary of the submission made orally supplementing a detailed written submission. The reason for dismissal was redundancy, and there had been a genuine redundancy situation. There had been a fair redundancy procedure. There had not been any bias, and the system set out was a fair one, fairly applied. Decisions as to consultation on the pool as noted below were raised with Mr O'Carroll. He candidly accepted that in practice the pool had been the two Edinburgh Business Managers, and that there was a post retained in Glasgow at least, but it was argued that the outcome would have been the same. There was detailed reference to authority within the submission, part of which is referred to below. He argued that there had been three managers involved in the assessment for the SSE role, that Mr Inglis was accepted to be well disposed towards the claimant, and that there was no proper evidence of bias. Matters had been raised which were irrelevant to the issue. The statements in support were not evidence essentially as the question was for management against the criteria set out. He argued that if there was to be any question of remedy, no award should be made, firstly as there was no loss and secondly because of the ***Polkey*** principle. He sought the dismissal of the Claim.

The claimant's submission

51. The following is again a brief summary of the submission made. Reference was made to an Employment Tribunal case of Webb v Lookers plc. The scoring had been done unfairly. The criterion for standards and compliance had been scored on a team basis. There was evidence as to quality assurance where he had higher scores than Mr Bonini. The comment "accurate score" was referred to. There was no evidence of the individual scores of Mr Inglis and Mr Henderson. Reference was made to the ACAS website. It was not fair to mark him down for one incident in July 2023. The evidence of quantity was that his was far higher than Mr Bonini. He should have scored more highly than Mr Bonini, or at least the same when his longer length of service would have counted. There were statements in support for his appeal, which had not been considered. If the scoring had been carried out fairly he would have been appointed to the post as SSE. If he had been considered for the Business Manager post in Glasgow and offered it after scoring, he would highly likely have accepted it. The dismissal had been unfair.

The law

52. Section 98 of the Employment Rights Act 1996 provides, so far as material for this case, as follows:

> **"98 General**
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

……

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."……..

53. The definition of redundancy is found in section 139.

54. The basic position on the fairness in the context of redundancy was set out by the House of Lords in ***Polkey v AE Dayton Services Ltd [1987] IRLR 503***, in which the following was said:

"….an employer having prima facie grounds to dismiss for one of these [potentially fair] reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as 'procedural', which are necessary in the circumstances of the case to justify that course of action. Thus, in the case of……. in the case of redundancy the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a

fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation."

55. Three recent cases have commented on the issue of fairness in the context of redundancy. The first is ***de Bank Haycocks v ADP Pro Ltd [2023] EAT 129,*** which contains a summary of the law as follows, with the full case citations in the decision:

"a. The employer will normally warn and consult either the employees affected or their representative; ***Polkey***.

b. A fair consultation occurs when proposals are at a formative stage and where adequate information and adequate time in which to respond is given along with conscientious consideration being given to the response; ***British Coal***.

c. Whether in collective or individual consultation, the purpose is to avoid dismissal or ameliorate the impact; ***Freud***.

d. A redundancy process must be viewed as a whole and an appeal may correct an earlier failing making the process as a whole reasonable; ***Lloyd v Taylor Woodrow***.

e. The ET's consideration should be of the whole process, also considering the reason for dismissal, in deciding whether it is reasonable to dismiss; ***Taylor v OCS***.

f. It is a question of fact and degree as to whether consultation is adequate and it is not automatically unfair that there is a lack of consultation in a particular respect; ***Mugford.***

g. Any particular aspect of consultation, such as the provision of scoring, is not essential to a fair process; ***Camelot***.

h. The use of a scoring system does not make a process fair automatically; ***British Aerospace***.

i. The relevance or otherwise of individual scores will relate to the specific complaints raised in the case; ***British Aerospace***."

56. The second is ***Mogane v Bradford Teaching Hospitals NHS Foundation Trust [2023] IRLR 44*****,** in which the EAT held that the requirement for consultation is particularly important in a case where the employer has used a pool of one when making that particular employee redundant; it was further stressed that, not only can it not be assumed that consultation would have no effect, but also that in such a case it is important that the consultation takes place at a formative stage, before the decision is taken to operate that pool.

57. The third is ***Valimulla v The Al-Khair Foundation [2023] EAT 131***, a similar decision as to consultation over the pool for redundancy, with the following comments

> "Meaningful consultation does not mean simply informing staff about a decision or proposal, giving them opportunity to make representations, and then putting into effect the proposal or decision which had, in truth, already been made. Meaningful consultation means setting out a provisional proposal, along with the rationale, and providing an opportunity for feedback, comments or observations. A decision maker should consider the responses elicited through consultation with an open mind, considering whether they alter the initial proposal and why that is, if not, why not, but only then making a decision."

58. Where the question is the application of selection criteria there ought not to be too close an examination. In ***Eaton Ltd v King [1995] IRLR 75*** the EAT stated that it was sufficient for the employer to have set up a good system for selection and to have administered it fairly. This was expressly endorsed by the Court of Appeal in ***British Aerospace plc v Green [1995] IRLR 437,*** which also referred to the comments from the Inner House case of ***Buchanan v Tilcom Ltd [1983] IRLR 417*****.** The principle was applied in ***First Scottish Searching Services Ltd v McDine UKEATS/0051/10,*** where it was stated the examination that the Tribunal may undertake should not be "microscopic"**.**

59. In the event of a finding of unfair dismissal, the tribunal requires to consider a basic and compensatory award if no order of re-instatement

or re-engagement is made (here the claimant confirmed that he did not seek either order), which may be made under sections 119 and 122 of the Employment Rights Act 1996, the latter reflecting the losses sustained by the claimant as a result of the dismissal. The basic award is here subsumed within the statutory redundancy payment, such that no basic award would be payable. The amount of the compensatory award is determined under section 123 and is "such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

Observations on the evidence

60. **Mr Cornett and Mr Struthers** were both I considered credible witnesses. They gave evidence in a straightforward manner. The real difficulty is in relation to reliability, particularly that the scoring for the SSE role was undertaken by Mr Inglis and Mr Henderson, neither of whom gave evidence. The minute of the meeting of 8 January 2024 referred to the fact that Mr Inglis, who was present, explained the scoring and rationale for those where the claimant was lower than Mr Bonini. But it did not say what the explanation was, and Mr Cornett could not remember it. There had earlier been a discussion on 20 December 2023, prior to which Mr Inglis and Mr Henderson had prepared their own independent scores. Those documents were not before the Tribunal. Nor was any written note or record of that meeting.

61. Mr Cornett did however give evidence as to what he understood the rationale for the scoring was, which included that he had been involved in the discussion and challenged the reasons for the scores but was satisfied with the outcome of that discussion, and there was a document showing the scores that each candidate for the role had been allocated. From the latter it was clear that the claimant had scored 5 points less than Mr Bonini in the last two criteria, but otherwise they had each had the same scores. He did also candidly accept that the decision to remove the posts of Business Manager had been taken by the time of the first announcement, and that as he then understood matters that

applied to the Group as a whole, but that the position in Glasgow, and elsewhere, was that the post was retained for one person.

62. Mr Struthers conducted the appeal, and spoke to a discussion between Mr Cornett, Mr Inglis and himself on 5 February 2024, the day before the appeal hearing, at which Mr Inglis had given some detail as to the reasons for the scoring in part, but not for all the criteria. Mr Struthers thought that the fifth criterion on standards and compliance had been scored individually, which was not the evidence Mr Cornett had given that it had been scored as a team. Mr Struthers also spoke after the appeal hearing with Mr Henderson, but again not to discuss the full rationale for all of the scores.

63. The **claimant** was also I considered a credible witness. He explained why he considered that the process had been unfair. He said that had he been able to be scored with the other Business Managers in Glasgow, where one post remained, he would have considered whether or not to accept it if successful. Initially he said that he would not accept it as he cared for his mother in law, and his son, but latterly said that he would have discussed that with his wife and probably would have moved to do so. His argument in effect was that he should have been in a wider pool of the Business Managers when it became clear that not all of the posts were being removed. So far as the SSE position is concerned his evidence was that he should have scored higher than Mr Bonini. He accepted that he had asked colleagues for an opinion when emailing them, and that the issue was not for them but more senior managers, but he maintained his position that Mr Henderson had significantly influenced the outcome against him in an unfair manner, and that the scoring had not been fair in general terms.

Discussion

64. The first issue is what the sole or principal reason for dismissal was. That is for the respondent to prove. I was satisfied that the sole reason for dismissal was redundancy. The claimant accepted that there was a redundancy situation. His position as Business Manager at Edinburgh was removed. There was a remaining post as that in Glasgow, but five

occupied it reduced to one. I was satisfied that there had been a reduction in the need for Business Managers to meet the statutory test. I was also satisfied that the SSE role was a materially different one to that of Business Manager, indeed the claimant did not argue to the contrary.

65. Redundancy is potentially a fair reason in respect of the second issue.

66. The third issue is therefore whether or not the dismissal was fair, applying the test in section 98(4) of the 1996 Act. There is no onus on the respondent to prove a fair dismissal, or the claimant to prove that it is unfair. It is neutral.

67. To assess that, I take account of all the evidence before me, including that as to the appeal, and also that there is evidence that is not before me from Mr Henderson and Mr Inglis, and documents not produced such as their initial scores. I require to consider whether the case is within the range of reasonable responses available to the respondent, or not. I do so in the context of the context that there was not to be a Business Manager role at Edinburgh Audi, one of five existing roles as Business Manager was after the initial discussion decided to be retained in Glasgow, and with two candidates for the SSE role in Edinburgh. This is therefore an issue firstly as to pooling and secondly as to whether there was a reasonable alternative to the redundancy. There are arguments both ways as to the fairness of what happened, as that is determined by the statutory provision.

68. I consider that there was not the meaningful consultation on the issue of pooling that the authorities above indicate should have happened. At the start of the process Mr Cornett understood that no Business Manager posts would remain. But at the least one post was to remain, in Glasgow, and the claimant was aware of that by the time of his email to Mr Scott on 10 January 2024. I infer from that and the evidence of Mr Struthers who was aware of that post being retained in Glasgow that the respondent was aware that one Business Manager post was to remain in Glasgow by the time of the meeting on 8 January 2024. It is possible that Mr Cornett was not told of that, but he did confer regularly with HR, who were in a position to tell him. I consider, having regard to the terms of the

authorities above, that was a matter that all reasonable employers would have consulted the claimant about in a meaningful manner, both prior to dismissal and also during the appeal. There was no consultation on that point, whether meaningful or otherwise, either at the point of dismissal or at the appeal. It appears to me that on that basis the dismissal was unfair. I deal separately with the effect below.

69. The second issue is whether the process of undertaking the scoring, and consultation on the scores, was within the range of reasonable responses. It appears to me that the criteria themselves are not seriously challenged, and in any event are those that a reasonable employer could choose. It is with the scoring process that the claimant takes issue. It is true that the claimant saw the document both with his own scores against the selection criteria, and the comments on that document which are not all that they might be, but that was not the sole part of the process. I keep in mind that there is a need not to be microscopic in the analysis, and no necessary requirement to consult on scores, but simply having such a process does not a fair dismissal make. There is a judgment to be made as to whether in all the circumstances the process was within the range of reasonable responses.

70. There are various arguments for the claimant. Firstly, on the face of the document, the rationale was in one respect entirely self-serving. For brand knowledge what was written against a score of 15 was “accurate score”, which could be said about any score if that was the view of the scorers. The evidence of Mr Cornett was that the claimant had not completed all manufacturer training, although that was a comment in each of the four boxes, and although the claimant accepted that he had not done one element of training the evidence for the score was at best limited.

71. Secondly, Mr Cornett accepted that the fifth criterion was marked on a team basis, not individually. It appears to me that there is no point in such a criterion if not marked individually. Individual marks are the key to a fair selection process. However, there was also evidence on the quality assurance performance of the two candidates, and although the claimant was slightly higher than Mr Bonini they were very close. The judgment

was into which of four scoring categories each candidate should be put, not who was slightly higher.

72. Thirdly the explanations for some criteria did not always obviously match the criteria. That for quality of administration for example stated too much focus on admin jobs, but the wording for the 20 and 15 point scores were not for such a matter. The criterion for quantity of work was one where a more objective assessment was possible at least in part. The comment was "high level of admin, low level of customer engagement" but again that did not appear to me obviously to relate to quantity of work. In both respects the fact that neither Mr Inglis nor Mr Henderson who made these comments, either individually or collectively, gave evidence did not assist the respondent. I had the claimant's evidence, which I accepted, on these points. It was supported at least to a small extent by evidence of his better performance on quality assurance matters, as set out in a document, and a far higher volume of recording of the last step in transactions. Whilst that is far from conclusive as I accept, it is at least evidence that can be considered. The absence of Mr Inglis and Mr Henderson means that the respondent relies on Mr Cornett.

73. For the last two criteria more detailed commentary was given. It appears to me that that evidence in writing supported by that of Mr Cornett and an email of 10 July 2023 did provide an evidential basis for the score of 10 given. The claimant's argument that one incident should not affect the score does not really address the question in the case, which is whether what was done was fair overall.

74. Whilst there was some evidence of Mr Henderson and Mr Bonini having a friendship outside work it was limited. It did not appear to me that there was a great deal in that concern. I accepted that Mr Inglis had been materially involved in the scoring, such that it was not Mr Henderson's sole view that mattered, and that Mr Cornett had also been involved in the meeting held remotely on 20 December 2023 to discuss the scores. But Mr Inglis had been involved, he was not suggested to be biased against the claimant, and Mr Cornett was later involved in effect to check the process as a form of moderation of it. That three managers were

therefore involved is I consider important. They knew the work of the candidates. I cannot substitute my views for theirs.

75. It was of some concern that the claimant was not told of that meeting and discussion on 21 December 2023, and more significantly that the Tribunal did not have produced to it the individual scores of each of Mr Henderson and Mr Inglis, and that neither of them gave evidence. But the authorities make clear that calling a manager of reasonable seniority can suffice, if the evidence is both sufficient and accepted.

76. Whilst I had some concerns over the detail of the scoring, I must have regard to the authorities set out above. I also considered the Employment Tribunal case to which the claimant referred me, being Webb v Lookers plc. It was a claim heard in Manchester. The circumstances however were very different, the arguments made appear to have been very different, and it is not a case that is binding on me in any way, unlike Employment Appeal authorities, and those of the Inner House. Court of Appeal authorities are not fully binding, but are of highly persuasive authority particularly on the interpretation of a statutory provision applying across the UK. They are consistent in their comments as to the limits of the enquiry that a Tribunal can properly make.

77. I considered the size and resources of the respondent. Here the employer was a large one, engaged in a major restructuring exercise, involving a number of reasonable senior managers. Looking at matters in the round, and having regard to the terms of the statute as explained in authority, it appeared to me that the respondent set up criteria for selection for the SSE role that were within the range of permissible options, that they were considered primarily by two managers with the assistance of a third, and that the process of scoring had been done fairly, even if there were criticisms of it that meant that it was not perfect.

78. I can understand the claimant's criticisms, but the law does not require exact objectivity for all criteria. It does not require the employer to prove each and every element underlying the scoring, or to have the kind of supportive objective evidence that the claimant argued for. The last two criteria for example were not scored purely on the basis of the July 2023

email and his reaction to it, but for a number of other factors set out in the document and referred to by Mr Cornett in his evidence. Whilst the claimant had some support from many colleagues in emails he produced they were not the people making the judgment. He was entitled to obtain that evidence and argue that it was relevant, but for the reasons Mr O'Carroll gave in his submission it was not germane to the outcome.

79. In ***Eaton*** the EAT referred to "a good system of selection, reasonably administered." In ***Buchanan*** the Inner House said that where there were criticisms of dislike "all that the respondents had to do was to prove that their method of section was fair in general terms and that it had been applied reasonably in the case of the appellant by the senior official responsible for taking the decision……it was not necessary to dot every 'i' and cross every 't' or to anticipate every possible complaint which might be made."

80. The Court of Appeal in ***British Aerospace*** followed those comments, and said that "an over-minute investigation of the selection process by the tribunal members may run the risk of defeating the purpose which the tribunals were called into being to discharge – namely a swift, informal disposal of disputes arising from redundancy in the workplace. So in general the employer who sets up a system of selection which can reasonably be described as fair and applied it without any over sign of conduct which mars its fairness will have done all that the law requires of him."

81. Taking all of the evidence I heard into account, I considered that the system that the respondent had set up as to the SSE selection, which was a part of the redundancy process as an issue as to an alternative to redundancy, was a fair one in the sense of one that a reasonable employer could choose, and that it was applied reasonably given the involvement of three managers as has been described. It could certainly have been carried out better, for example by letters that were specific to the claimant's circumstances rather than generic as was done, with minutes of meetings both full and accurate, with the claimant and Mr Bonini each being sent their own proposed scores for comment then their remarks considered before the matter was decided, and doing so

would have accorded with best practice. But best practice is not the test I can apply, nor is how I would have advised the process to be carried out the test I can apply. I must apply the test as above.

82. I therefore do not find that the dismissal was unfair in relation to the selection process for the SSE role. As that was the only role that the claimant wished to be considered for, then subject to the issue of the pool his employment was to terminate for the reason of redundancy.

83. The next question was whether or not the issue as to the pool was remedied by the appeal. I did not consider that it was. Firstly it did not specifically consider the issue of the pool. Secondly Mr Struthers was aware of the position of the Glasgow Business Managers, and that one was being retained. Thirdly the claimant raised that issue with him, but it was not addressed in the letter of decision.

84. I then considered all of the evidence in the round. I concluded that the dismissal was not fair applying the words of section 98(4). That is because the claimant was not consulted about the pool, which the respondent restricted to Edinburgh Audi but which he challenged, as set out more fully above.

85. I then considered remedy. Firstly it was accepted that no basic award could be sought as a statutory redundancy payment had been made. As to the compensatory award, the claimant's argument was that he may have remained as a Business Manager. I did not consider that that was so. There was no post remaining as Business Manager at Edinburgh. There were five Business Managers in Glasgow being considered for one post. They were aware of the staff in Glasgow, and the customers there. It appeared to me from the evidence I heard that there was no real prospect of the claimant being the one person who was the highest scorer if the pool was of at least 7 people.

86. But more fundamentally it appears to me that the respondent would (in the sense of to all practical purposes certainly) have chosen the pool at Edinburgh. That is how the respondent treated the process at Edinburgh. It treated the sites at Edinburgh and Glasgow separately. Even if the claimant had been consulted about that, the practical consequences of

acceding to his argument were considerable. I do not consider that there is any prospect that the respondent would have agreed to do so. They would have retained the pools for Business Managers separately for Glasgow and Edinburgh and doing so would have been within the range of reasonable responses available to them. I therefore find that the consultation, if held, would not have affected the overall outcome save as to the period of that consultation.

87. In any event his initial evidence was that his home circumstances meant that he would not work in Glasgow and that he sought a role closer to his home. Whilst that later changed, and changed again in his submission, I considered that in reality there was no real prospect of his accepting such a role even were he to have been offered it, and the prospects of that offer were in my view likely to have been low. He did not consider seriously a move to Hamilton, albeit he said for financial reasons largely, and the role he did accept was in Newbridge. I infer from the evidence I heard that he would not have worked in Glasgow.

88. There should however have been adequate consultation on this issue before a decision was taken on the basis of the authorities above. I consider that that would have deferred the dismissal for a period of one week. I therefore consider that the level of loss is his net earnings for one week, which was a period until just before his new role started. The dismissal for redundancy would have taken place on that date. He would then have received the same payment in lieu of notice and for a statutory redundancy payment. No deduction from the figure of one week's pay is therefore appropriate.

89. That produces a net award of £891.84

Conclusion

90. I find that the claimant was unfairly dismissed and make the award set out above.

Employment Judge: **A Kemp**
Date of Judgment: **26 June 2024**
Entered in register: **27 June 2024**
and copied to parties 27/06/2024

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