EMPLOYMENT TRIBUNALS

Claimant: Mr C Thompson

Respondent: (1) Powys County Council
(2) The Governing Body of Brynllywarch School

HELD AT/BY: Wrexham by Video **on:** 19 and 20 June 2025

BEFORE: Employment Judge G Hughes

REPRESENTATION:

Claimant: Mrs Louise Mankau (Counsel)
Respondent: Mr Dominic Evans (Counsel)

RESERVED JUDGMENT

1. The Claimant's claim of unfair dismissal is well founded and succeeds.

2. The appropriate remedy for the unfair dismissal is to be determined at a separate remedy hearing, if not agreed between the parties.

REASONS

Background

1. By a claim form presented on the 16th January 2025 following a period of early conciliation with ACAS between the 25th November 2024 and 6th January 2025, the Claimant complained of unfair dismissal from his role as Teacher from Brynllywarch School on the 31st August 2024.

2. By a response form filed on the 17th March 2025 the respondents resisted the complaint. Their case was in essence that the dismissal was by reason of redundancy in that it was wholly or mainly attributable to the diminishing requirements of the school for staff to carry out work of a particular kind –

namely academic teaching in accordance with Section 139 (1) (b) of the Employment Rights Act 1996.

Issues

3. I agreed with the parties the issues for me to decide at the hearing. The issues to be determined were are follows: -

3.1 Was the Claimant Dismissed?

3.2 Can the Respondent show the reason for the dismissal and that it was for the potentially fair reason of redundancy?

3.3 If so, was the dismissal fair or unfair having regard to section 98(4) of the Employment Rights Act 1996? Meaning, did the Respondent act reasonably or unreasonably in all the circumstances, including the Respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the Claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. It will usually decide: -

3.4 In particular:

3.4.1 Whether the Respondent adequately warned and consulted the Claimant;

3.4.2 Whether the Respondent adopted a reasonable selection decision, including its approach to a selection pool;

3.4.3 Whether the Respondent took reasonable steps to find the Claimant suitable alternative employment.

3.5 In the alternative, was the dismissal for Some Other Substantial Reason (SOSR) pursuant to s.98(1)(b) of the Employment Rights Act 1996?

3.6 If so, was the dismissal fair or unfair having regard to section 98(4) of the Employment Rights Act 1996? Meaning, did the Respondent act reasonably or unreasonably in all the circumstances, including the Respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the Claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case.

3.7 If the Tribunal finds that the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed

had a fair and reasonable procedure been followed - *Polkey v AE Dayton Services Ltd (1987) ICR 142.*

Preliminary Matters

4. At the outset of the hearing, the relationship between the first and second named Respondent was clarified for the purposes of this hearing, the first named Respondent (Powys County Council) being the employer, and the second named Respondent (The Governing Body of Brynllywarch School) being the body responsible, as delegated, for staffing matters. The parties agreed that both named Respondents should remain as parties to the hearing.

Witnesses

5. I heard the claim on the 19th and 20th June 2025. The Claimant was represented by Mrs Louise Mankau of Counsel. The Respondent's representative was Mr Dominic Evans of Counsel. I heard evidence from the Claimant himself and Mr Gavin Randell (Headmaster), Mr Neil Jones (Deputy Headmaster) and Mrs Suzanne Williams (Business Manager) for the Respondent. I considered documents from an agreed 302-page electronic Bundle of Documents which the parties introduced in evidence.

Findings of Fact

6. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed Bundle of Documents, in electronic format.

7. The First Respondent is a Local authority. The Second Respondent is the Governing Body of Brynllywarch Hall School.

8. Brynllywarch Hall School is a special school that supports pupils aged 7 to 19 years old with complex emotional, social and behavioural special educational needs alongside specific learning difficulties and other additional learning needs.

9. Brynllywarch Hall School went through significant change in 2018 whereby the structure of the school was changed from a secondary model, with pupils transitioning to subject specialists throughout the day, to a primary model where pupils were taught within their class groups and the class teacher delivered most if not all of the curriculum.

10. The demand for places at the school has increased significantly, growing by 50%, with projections for future intakes remaining consistently high.

11. The Claimant was employed under a contract of employment initially as a Level 3 Teaching Assistant on 9th October 2017. The Claimant secured a teaching position and commenced his role on the 16th January 2018.

12. In September 2023, the School recruited two new individuals to teaching positions, with specialisms in Physical Education and Music respectively.

13. In December 2023, the School and Governing Body recognised that two new posts were needed to ensure that learners could access a full curriculum. In part it was raised by pupils through learner voice data that they wanted to see practical subjects in the school so that they could access and gain accredited qualification. The Respondents state that the school discussed at length the needs with the Governing Body and Human Resources in how the curriculum could accommodate more practical subjects and although pupil numbers were increasing, the numbers were taken into consideration when looking at the staffing structure.

14. The school decided that it did not require 10 general teaching posts, and the two new posts identified. They required 8 teaching posts and 2 new specialised roles. The proposal was that there be a reduction of 2 teaching roles, which were to be replaced with vocational roles. This proposal was sent to the Second Respondent for ratification on the 23rd January 2024. The Second Respondent approved the proposal.

15. It is important to note that as part of the proposal, the two administrative posts were to be removed from the structure and replaced with one senior administrative/finance officer, and the caretaker position was to be removed with a site manager role introduced.

16. On the 26th January 2024, the school notified the Trade Union of the potential redundancy situation and provided them with the Business Case (which is at pages 129-142 of the Bundle). The Trade Union were also given the Management of Change & Redundancy Policy (pages 66-95 of the Bundle), and the proposed redundancy timeline (pages 163 and 164 of the Bundle).

17. The Trade Union were invited to a pre-consultation meeting to take place on the 2nd February 2024 at 8:30am which would mark the start of the 30-day consultation period.

18. On the same day (26th January 2024), the school held an informal meeting with staff members, and this was followed up with a letter of even date, notifying the Claimant of the potential redundancy situation. The Claimant was invited to attend a formal group redundancy consultation meeting on the 2nd February 2024, at 9:00am (pages 127 and 128 of the Bundle) and was also notified that he would be able to request an individual consultation meeting at any time during the consultation period.

19. It is not clear whether any minutes of the consultation meeting held on the 2nd February 2024 were taken pursuant to paragraph 3.3.5 of the Management of Change and Redundancy Policy (page 76 of the Bundle). No minutes of the consultation meeting held on the 2nd February 2024 were provided to the Tribunal, but there is no dispute that this meeting took place.

20. There was conflicting evidence as to whether Gavin Randell (the Headmaster) and the Claimant spoke immediately following the consultation meeting on the 2nd February 2024. Gavin Randell (the Headmaster) cannot recall any meeting or conversation, with the Claimant asserting that a conversation took place on the stairwell. I find it not beyond the realms of possibilities that a conversation took place between the two, and on balance, I prefer the evidence of the Claimant in this respect. However, I consider the alleged conversation to be informal in nature and not substantive in content, which is reflected by the fact that the alleged conversation was not included or referenced in the witness statements of Gavin Randell (the Headmaster) and the Claimant.

21. Following the consultation meeting on the 2nd February 2024, NASUWT provided a response to the staff restructuring consultation which can be seen at pages 182 and 183 of the Bundle. The concerns raised by NASUWT are set out in that document which I will not repeat here.

22. As part of the consultation process, a question-and-answer document was produced which is set out at pages 185 to 187 of the Bundle.

23. On the 29th February 2024, Suzanne Williams (Business Manager) via e-mail offered the Claimant a 1 to 1 meeting on either the 1st March 2024 or the 11th March 2024. Whilst the Claimant's recollection of this e-mail during cross-examination was scant, I accept that the Claimant was offered the opportunity to attend individual consultation but chose not to.

24. By letter dated the 13th March 2024, the Claimant was notified that the consultation period had come to an end. The Claimant was requested to complete the skills audit by no later than Friday the 12th April 2024. I find that it is clear from this letter that the completion of the skills audit, and the expression of interest for "Post 16 Outdoor Education Instructor/Teacher" were two separate processes, which is supported by differing deadline dates, the latter being 8th April 2024.

25. The Claimant submitted his expression of interest for the position of Outdoor Education Teacher on the 22nd March 2024 (pages 191 – 193 of the Bundle).

26. The Claimant completed the skills audit for Post 10 (Outdoor Education Instructor/Teacher) as his first preference from the available posts, and Post 4 (Key Stage 3 & 4) as his second preference from the available posts.

27. Prior to submission of the completed skills audit, the Claimant e-mailed Neil Jones (the Deputy Head) (page 196 of the Bundle) broadly requesting assistance with his skills audit. There is no response to this e-mail contained within the Bundle of documents. Neil Jones (the Deputy Head) when giving evidence stated that he did provide assistance and sat with the Claimant at the end of one of the school days, and that there were also whatsapp messages. I do not find the evidence of Neil Jones (Deputy Head) credible in this instance, as the Claimant submitted his skills audit the following day.

28. Whilst the letter dated 13th March 2024 mentioned above was clear in terms of process, the skills audit did cast confusion on the requirements. Post 10 (Outdoor Education Instructor/Teacher) formed part of the skills audit form. If the intention was always that the skills audit did not need to be completed for Post 10 (Outdoor Education Instructor/Teacher), then its inclusion was simply not necessary, and I find that it was perfectly reasonable for the Claimant, in the circumstances, to assume, that it needed to be completed.

29. On the 18th April, the Claimant received a letter from the school (page 219 of the Bundle) providing formal notice that he was at risk of redundancy from the 31st August 2024. The Claimant received a breakdown of his scores (pages 220 – 222 of the Bundle).

30. It is unclear from the Bundle of documents, or from evidence, who was on the panel for the Staff Disciplinary and Dismissals committee. It is however not disputed that the members of this committee were responsible for the scoring and consideration of the skills audit for redundancy purposes. None of the members of the Staff Disciplinary and Dismissals committee were witnesses for the purposes of this Tribunal hearing.

31. During cross examination, it was confirmed that Gavin Randell (the Headmaster) was present during the meeting, but only as an observer. I note paragraph 3.5.5 of the Management of Change and Redundancy Policy (page 79 of the Bundle) which states that the headteacher will attend the meeting of the committee in an advisory capacity only and is not part of the decision-making process. I have no reason or evidence to believe that the Gavin Randell (the Headmaster) was present in any other capacity.

32. The Claimant was given until 3pm on Monday the 29th April 2024 to make written or oral representations to the committee, as the committee had a meeting scheduled on the 30th April 2024.

33. Paragraph 3.6 of the Management of Change and Redundancy Policy (page 79 and 80 of the Bundle) deals with Representations. In short, it states that staff provisionally selected for redundancy have the right to make representations to the Staff Discipline and Dismissal Committee, to reconsider the decision they have made. The submission “must” include the reason(s) for the representation, and to make representations the teacher may request a breakdown of their scoring and rationale why they received those scores.

34. On the 19th April 2024 (page 233 of the Bundle), the Claimant requested a copy of his skills matrix, the anonymous scores of others in the redundancy pool, and details as to how he was scored the lowest i.e. a copy of any minutes or details from the meeting, which would explain why he scored as he did and why he was selected. The Claimant also requested a copy of the selection criteria that he was scored against.

35. The Claimant received a number of documents via e-mail on the 22nd April 2024 (pages 229 and 230 of the Bundle) which included: -

    35.1 list of scores for each candidate;

35.2 the Claimant's scores; and

35.3 the Claimant's completed skills audit.

36. No minutes of the selection process by the Staff Discipline and Dismissal Committee were taken. I accept the Claimant's evidence that he believed there was no further information available to him, other than what had been provided.

37. On the 23rd April 2024 (page 223 of the Bundle), the Claimant was invited to attend an interview on Friday the 3rd May 2024 for Post 10 (Outdoor Education Instructor/Teacher). Neil Jones (Deputy Head) was to form part of the interview panel.

38. On the 24th April 2024 (pages 228 and 229 of the Bundle), the Claimant requested that the opportunity to make representations to the committee be delayed, to give him the opportunity to properly prepare for the interview and the representations meeting. The Claimant also made reference to the Trade Union representative being fully booked at present. Various e-mails then passed between the Claimant and Suzanne Williams (Business Manager) (pages 226 – 228 of the Bundle) before the Claimant was advised on the 25th April 2024 that the deadline to make representations would still stand. It must be noted that the Claimant was offered to postpone his interview for Post 10 (outdoor Education Instructor/Teacher), but he chose not to.

39. The Claimant did not make representations as evidenced in his e-mail dated the 29th April 2024 (page 224 of the Bundle). I accept the Claimant's evidence during cross examination that the main reason for not making representations was his desire to focus his efforts on his upcoming interview, in addition to not being in a position to be able to make any meaningful representations based on the information provided.

40. The Claimant attended the interview for Post 10 (Outdoor Education Instructor/Teacher) on the 3rd May 2024 but was not successful. Another individual was subsequently appointed to the post, and it is not disputed that the successful candidate was a friend of Neil Jones (Deputy Head).

41. By letter dated the 16th May 2024 (pages 245 and 246 of the Bundle) the Claimant received notice of the termination of his employment on the grounds of redundancy with effect from the 31st August 2024. The Claimant was informed that he was made aware of his right of appeal under the Management of Change and Redundancy Policy and there was no further internal right of review.

42. The Management of Change and Redundancy Policy sets out at section 4 (pages 80 and 81 of the Bundle) the right of appeal. I do not agree that section 4 of this policy is separate to section 3 (representations referenced at paragraph 33 above). The policy should be read as a whole. It is clear in accordance with the policy that an employee may appeal within 10 school days of the receipt of the outcome of representation. The Claimant did not make representations, meaning that his right of appeal in accordance with the policy itself were extinguished.

43. The Claimant requested, and received feedback from Neil Jones (Deputy Head) for the interview for Post 10 (Outdoor Education Instructor/Teacher) on the 4th June 2024 (page 264 of the Bundle). In relation to the feedback provided, I do not accept that the Claimant stated that it would take 2 years to obtain the necessary qualifications needed for the post, and that the reference to 2 years was mistakenly taken from the presentation prepared by the Claimant, where the self-sufficiency of the programme would be achieved within 2 years (page 297 of the Bundle). However, I do accept the evidence of Neil Jones (Deputy Head) during cross examination that the feedback provided was intended to be constructive and positive, whereas during the interview itself, the panel had concerns from a health and safety perspective and in essence, the ability of the Claimant to lead, based on his skill set. I accept the evidence of Neil Jones (Deputy Head) that the panel had a duty of care, and to appoint the Claimant, if they had concerns would not be appropriate. Whilst I heard extensive evidence as to the essential and desirable criteria for Post 10 (Outdoor Education Instructor/Teacher), and the non-qualified status of the successful applicant for the post, ultimately, I find that the main reason for not appointing the Claimant to the post was based on the panel's duty of care based on safety concerns.

42. On the 22nd May 2024, the Claimant applied for a Key Stage 2 post within the school. The role was essentially temporary, providing maternity cover. The role was advertised externally and was not ringfenced for those at risk of redundancy. The Claimant was not successful.

43. The Claimant became aware of another role becoming vacant at the school, which he was not informed about. I do however accept the evidence of Gavin Randell (Headmaster) as to why the Claimant was not informed. The role was a music speciality which was outside the skillset of the Claimant.

44. It is noted that the Claimant was approached and requested to engage to consider alternative employment (pages 246, 276 and 277 of the Bundle), however, during cross examination, the Claimant conceded that he did not want to engage. The Claimant had accepted and secured an alternative position elsewhere.

45. As part of evidence, the Respondents raised issues with the Claimant's past performance which they contended were ongoing. These can be seen at pages 110 – 124 of the Bundle. It is notable however that at no point had the Claimant been subjected to formal action in respect of his performance and capability, and insufficient evidence was provided as to whether the Claimant would've been subjected to formal action.

Submissions

46. At the conclusion of the evidence, each party made oral submissions.

47. Mrs Mankau for the Claimant, by way of summary asked the Tribunal to find that: -

47.1 The Respondents wanted to dismiss the Claimant under the guise of Redundancy, the real reason being that they wanted to appoint another individual (a friend of the deputy head) to the role of Outdoor Education Instructor/Teacher.

47.2 No reasonable process was followed, and the process was tainted with flaws.

47.3 No rationale was provided as to the scoring matrix, and the process was not objective in any sense, displaying lack of transparency, which in itself takes the process outside the scope of reasonable responses.

47.4 The lack of transparency by the Respondents (in breach of their own policy) meant the Claimant could not make any meaningful representations.

47.5 It was unreasonable not to accommodate the Claimant's request to delay the timeframe to make representations in the circumstances.

47.6 It is a pre-requisite of a fair dismissal procedure that the right of appeal is afforded, and no internal policy outweighs this requirement.

47.7 The Claimant was the only applicant for Post 10 (Outdoor Education Instructor/Teacher) and was suitably qualified. The role should've been ringfenced for the Claimant as per the consultation documents, as should the other available roles which became available.

47.8 Inferences should be drawn from the lack of disclosure by the Respondents.

47.9 The Tribunal has not heard enough evidence to suggest that the Claimant would be dismissed due to capability.

47.10 The actions of the Respondent were not within the range of reasonable responses, and the Claimant was unfairly dismissed.

48. Mr Evans (in summary) on behalf of the Respondent, asked the Tribunal to find: -

48.1 The Respondents have been consistent throughout that the reason for dismissal was redundancy because of diminishing requirements to carry out work of a particular kind – academic teaching.

48.2 There was a full consultation process with staff and unions, with a consultation period and an opportunity for individual consultation, which the Claimant chose not to do.

48.3 Alternatives to redundancy were considered, but no positive alternatives were put forward.

48.4 The selection process was objective, as per the policy, and no issues were raised as to the process,

48.5 The Claimant received the lowest selection score by quite some distance and was fairly selected.

48.6 The Claimant made no effort to query or raise any concerns about the information provided to assist with making representations. His reasons at the time for not making representations were simply wanting to prioritise his upcoming interview.

48.7 Not engaging with the process was the Claimant's fault.

48.8 The Claimant did not meet the essential criteria for Post 10 (Outdoor Education Instructor/Teacher) and wasn't persuasive in evidence.

48.9 The school had a duty of care, and the Claimant was not suitable for Post 10 (Outdoor Education Instructor/Teacher).

48.10 The Claimant chose not to engage in the redeployment process.

Relevant Law

49. Under section 98(1) of the Employment Rights Act 1996 it is for the employer to show the reason for the dismissal and that it is either for a reason falling within section 98(2) or for some other substantial reason of such kind as to justify the dismissal of the employee holding the position held. Redundancy is a potentially fair reason falling within section 98(2) of the Employment Rights Act 1996.

50. Section 139(1)(b)(i) of the Employment Rights Act 1996 provides that an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that the requirements of the employer's business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish.

51. In *Safeway Stores plc v Burrell 1997 ICR 523, EAT*, His Honour Judge Peter Clark set out a simple three-stage test. A tribunal must decide (i) was the employee dismissed? (ii) if so, had the requirements of the employer's business to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish? (iii) if so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution? This test was subsequently endorsed by the House of Lords in *Murray v Foyle Meats*

Ltd 1999 ICR 827, HL, and for Lord Irvine, s.139 asks two questions of fact. The first is whether there exists one or other of the various states of economic affairs mentioned in the section, for example whether the requirements of the business for employees to carry out work of a particular kind have ceased or diminished. The second question, which is one of causation, is whether the dismissal is wholly or mainly attributable to that state of affairs.

52. *McCrea v Cullen and Davison Ltd (1988) IRLR 30* found that a redundancy situation will arise where an employer reorganises and redistributes the work so that it can be done by fewer employees. The fact that the work is constant, or even increasing, is irrelevant, if fewer employees are needed to do work of a particular kind, there is a redundancy situation. It is the requirement for employees to do work of a particular kind which is significant.

53. Further, there is no requirement for an employer to show an economic justification for the decision to make redundancies as per *Polyflor Ltd v Old EAT .482/02.*

54. Where the employer has shown the reason for dismissal and that it is for a potentially fair reason, section 98(4) of the Employment Rights Act 1996 states that the determination of the question whether the dismissal was fair or unfair 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 must be determined in accordance with equity and the substantial merits of the case.

55. In *Williams v Compare Maxam Ltd (1982) ICR 156* the Employment Appeal Tribunal laid down the matters which a reasonable employer might be expected to consider in making redundancy dismissals, being: -

    55.1 Whether the selection criteria were objectively chosen and fairly applied;

    55.2 Whether the employees were given as much warning as possible and consulted about the redundancy;

    55.3 Whether, if there was a union, the union's view was sought, and

    55.4 Whether any alternative work was available.

56. Procedural fairness is an integral part of the section 98(4) test. In line with the decision in *Polkey v AE Dayton Services Ltd (1988) ICR 142* failure to follow correct procedures is likely to make the ensuing dismissal unfair unless, in exceptional cases, the employer could reasonably conclude that doing so would be utterly useless or futile. A procedural failure renders a redundancy dismissal unfair under section 98(4), and the question of whether the employee would have been dismissed even if a fair procedure had been followed will be relevant only to the amount of compensation payable.

57. When defining a pool from which they will select employees for dismissal, employers have a great deal of flexibility. In *Thomas & Betts Manufacturing*

Ltd v Harding (1980) IRLR 255 it was held that Employers need only show that they have applied their minds to the problem and acted from genuine motives. *Capita Hartshead Ltd v Byard (2012) IRLR 814* provided that if the employer has genuinely applied its mind to who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it.

58. It should be noted that the Acas 'Code of Practice on Disciplinary and Grievance Procedures' does not apply to redundancies. Lady Smith in *Taskforce (Finishing & Handling) Ltd v Love EATS 0001/05* held that there is no rule that 'a dismissal for redundancy will automatically be regarded as unfair on account of the absence of an appeal procedure or, indeed, the type of appeal procedure provided in the event that there is one'. The absence of an appeal or review procedure was just one factor to be considered in determining fairness under s.98(4) of the Employment Rights Act 1996. This was qualified by the Court of Appeal in *Gwynedd Council v Barratt and anor 2021 IRLR 1028, CA* more recently, where the Court agreed with the proposition that in redundancy cases the absence of an appeal does not of itself make the dismissal unfair. It followed from this that it would be wrong to find that a dismissal on the ground of redundancy was unfair only because of the failure to provide an employee with an appeal hearing.

59. The question of redundancy may arise in the context of a business reorganisation. Such a reorganisation may meet the statutory definition of a redundancy dismissal, or it may not. If not, the dismissal of an employee within the context of the reorganisation may still be for a potentially fair reason within the meaning of section 98(1)(b), 'some other substantial reason' (SOSR). To establish SOSR as the reason for dismissal where there has been a business reorganisation, the employer does not have to show that a reorganisation or rearrangement of working patterns was essential. A 'sound, good business reason' for reorganisation is sufficient to establish SOSR for dismissing an employee. This reason is not one which the Tribunal considers sound but one 'which management thinks on reasonable grounds is sound' *(Scott and Co v Richardson EAT 0074/04 and Hollister v National Farmers' Union [1979] IRLR 542)*. It is not for the Tribunal to make its own assessment of the advantages of the employer's business decision to reorganise or to change employees' working patterns. However, the employer must do more than simply assert that there was a 'good business reason' for a reorganisation involving dismissals. A Tribunal must be satisfied that changes in terms and conditions were not imposed for arbitrary reasons. Employers will be expected to prove the reason for dismissal and, as a result, to submit evidence showing what the business reasons were and that they were substantial. A business reason behind a SOSR dismissal does not need to be particularly sophisticated or strategic so long as it is genuine and rational.

60. Under section 98(4) the Tribunal must consider the reasonableness of the dismissal in an SOSR case just as in a redundancy case. This involves considering whether, in all the circumstances, including the employer's size and administrative resources, the employer acted reasonably in treating the SOSR business reason as a sufficient reason to dismiss. The Tribunal must not substitute its own view of whether or not the employer acted reasonably in

the circumstances rather than properly applying the range of reasonable responses test.

61. If the selection pool is reasonable, the Tribunal will then consider the selection criteria applied by the employer to the employees in the pool. The criteria should not be unduly vague or ambiguous. In order to ensure fairness, the selection criteria must be objective; not merely reflecting the personal opinion of the selector but being verifiable by reference to data such as records of attendance, efficiency and length of service. The fact that certain selection criteria may require a degree of judgement on the employer's part does not necessarily mean that they cannot be assessed objectively or dispassionately. Just because the criteria used were 'matters of judgement', it did not mean that they could not be assessed in an objective or dispassionate way (*Mitchells of Lancaster (Brewers) Ltd v Tattersall EAT 0605/11*.) The chosen criteria would inevitably involve a degree of judgement, but that was true of almost all selection criteria other than the simplest criterion, such as length of service or absenteeism. The EAT concluded: *'The concept of a criterion only being valid if it can be "scored or assessed" causes us a little concern, as it could be invoked to limit selection procedures to box-ticking exercises.'*

62. When selecting employees for redundancy, it is common practice for employers to decide upon a number of different criteria against which the employees in the pool for selection should be assessed and then to allocate marks for each employee under each of those criteria. Once the selection has been made, those selected might feel that the marking or grading was not carried out accurately and complain that the resulting dismissal was unfair. The question which then arises is whether, and to what extent, an Employment tribunal can lawfully scrutinise the employer's assessments of all those in the pool in order to discover any evidence that would substantiate the employees' claims. An employer need only demonstrate that it had established a good system of selection which had been administered fairly (*British Aerospace plc v Green and ors 1995 ICR 1006, Eaton Ltd v King and ors 1995 IRLR 75*) In the EAT's view in King, there was no reason why the managers who took the decision to dismiss should not have relied on the information supplied to them by the supervisors who carried out the assessments, and the managers could not be expected to be able to explain each marking. Furthermore, there was nothing in the Tribunal's findings to suggest that the assessments were not carried out honestly and reasonably. The EAT considered that, while there may be cases where an inference could be drawn from the markings that there was something unfair about the application of the selection process, this was not such a case. Lord Justice Waite in British Aerospace plc v Green and ors had observed: *'So in general the employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt sign of conduct which mars its fairness will have done all that the law requires of him.' The principle that Tribunals should not subject redundancy selection criteria or the employer's application of them to undue scrutiny applies even where two groups of employees are scored separately and no system of moderation is used. However, where there is clear evidence of unfair and inconsistent scoring, any subsequent dismissals are likely to be unfair. There may be cases where the absence of documentary evidence indicates a lack of objectivity. In E-Zec Medical Transport Service Ltd v Gregory EAT 0192/08 G worked for a private*

ambulance service. An important part of the firm's business was transporting injured and sick holidaymakers who had been repatriated to the UK. During 2006 the company faced a downturn in this aspect of its work. It decided to restructure the site where G worked and to make four employees redundant out of a pool of 14. The selection process was supervised by the senior HR manager, W, who allocated marks for service, absence, sickness days, sickness occasions and discipline. This was done by reference to employees' personnel files. The remaining selection criteria (performance, commitment and attitudes, skill base, and team working) were assessed by the regional manager, D. The company adopted a scoring matrix with definitions for the various criteria. However, D did not use any records or objective evidence in arriving at his scores but relied on his personal judgement as a line manager and his experience of working with the employees in the pool. G obtained one of the lowest scores and was made redundant. The Employment Tribunal accepted that it was not its task to subject the marking system to microscopic analysis or to check that the system had been properly operated. While the choice of criteria fell within the range of reasonable responses, key aspects of the marking had been left to D's personal judgement, some of the criteria were not capable of measurement by reference to personnel records, and there was no evidence as to how the scoring had been arrived at. According to the tribunal: 'The absence of evidence before us as to how the scoring had been arrived at made it impossible for us to decide that the selection criteria had been fairly applied and accordingly the claimant had been unfairly selected.' The EAT upheld the Tribunal's decision. The EAT said, *"Unlike the Eaton case there was no attempt to consult with the unions or the employees as to the method of selection, the criteria to be adopted and the marking process. We agree with the Tribunal's views that it was an unfair process that fell outside the band of reasonable decisions for the key criteria to be left to one individual who was not able to support his marking by reference to any company documents such as performance appraisals, who had not spoken to any other manager concerning those marks and who had made no notes or given any indication as to how he had made this individual choice. The Tribunal were careful in making it clear that their task was not to subject the marking system to microscopic analysis or to check that the system had been properly operated but they did have to satisfy themselves that a fair system was in operation. In our view were entitled to come to the conclusions that this was not a fair system and that the appeal process did not cure it."*

63. In *Pinewood Repro Ltd t/a County Print v Page 2011 ICR 508,* the employee was told that he was at risk of redundancy. He was placed in a pool with two other employees and they each received a copy of the scoring matrix together with the standards and qualities that each level represented. However, the employee did not receive his actual scores. He scored the lowest and was invited to a consultation meeting at which he was given his scores. He raised a number of queries in relation to these but was not provided with an explanation as to how they had been calculated. He brought an unfair dismissal claim. The EAT upheld the Tribunal's finding that his redundancy dismissal was unfair on the basis that he did not have an opportunity during the consultation process to challenge his scoring since the respondent had not explained how the scores had been arrived at. The EAT stressed that fair consultation involves the provision of adequate information on which an employee can respond and argue his or her case. The claimant should have

been given the opportunity to challenge his scoring in relation to flexibility, particularly since this was an entirely subjective area. Further explanation of scoring may not be necessary in every case, especially where the scores relate to issues such as attendance, timekeeping, conduct and productivity. It is for the Tribunal to decide whether an employee has been given sufficient information to challenge the scores given in a redundancy selection exercise.

64. When a question of alternative employment arises in the context of an unfair dismissal claim, the reasonableness test under section 98(4) requires a tribunal to consider whether the employer's actions lay within the range of responses of a reasonable employer. An employer should do what it can so far as is reasonable to seek alternative work. This does not mean that an employer is obliged by law to enquire about job opportunities elsewhere and a failure to do so will not necessarily render a dismissal unfair as a general rule. An employer with sufficient resources will be expected to take reasonable steps to ameliorate the effects of redundancy, including giving detailed consideration to whether suitable alternative employment is available. This may include allowing an at-risk employee the opportunity to demonstrate his or her suitability for a vacant position, even if the employer is doubtful about this because the employee lacks prior relevant experience. When informing an employee of an available alternative position, the employer should be clear about any eligibility criteria for the role, and the terms on which the role might be offered. Even if an employer considers that an employee would not accept an alternative post, it may be unreasonable to exclude him or her from consideration for it without consulting him or her first. It will not necessarily be unreasonable for an employer to assume that an employee would not wish to accept an inferior position. In *Barratt Construction Ltd v Dalrymple 1984 IRLR 385* the EAT stated that '*without laying down any hard and fast rule*' a senior manager who was prepared to accept a subordinate post rather than being dismissed should make this known to his or her employer as soon as possible. Whether an employer's failure to offer an at-risk employee an inferior position will render a dismissal unfair will depend on the circumstances of the case. The appearance of an alternative job after the employee has been dismissed cannot make the dismissal unfair.

65. In relation to considering a so called 'Polkey reduction' to take account of the chances of a fair dismissal if procedural flaws had not been present in *Software 2000 Ltd v Andrews [2007] IRLR 568* it was said that, *"there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made. (4) Whether that is the position is a matter of impression and judgment for the tribunal. But in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence…."*

Conclusions

66. Was the Claimant Dismissed?

66.1 There is no doubt, and neither was it contested. The Claimant was dismissed on the 31st August 2024.

67. Can the Respondent show the reason for the dismissal and that it was for the potentially fair reason of redundancy?

67.1 "Redundancy" for s.139 purposes includes the situation where the requirements of the business for employees to carry out 'work of a particular kind' has ceased or diminished (or is expected to do so). There was, of course, a diminution in the work as the school required 8 teaching posts as opposed to 10 general teaching posts, and 2 new specialised roles. The diminution in work being the reduced requirements for academic teaching, and a specific skillset required for the new specialised roles which fell outside the scope of a general teaching post. Despite the pupil numbers at the school increasing, as per *McCrea v Cullen and Davison Ltd (1988) IRLR 30*, the fact that the work is constant, or ever increasing, is irrelevant, if fewer employees are needed to do work of a particular kind, there is a redundancy situation. The proposals were rational, and business orientated.

67.2 The definition of a redundancy situation concentrates on whether there has been a diminution in the employer's requirements 'for employees to carry out work of a particular kind'. This means that a change in the type of work being undertaken by employees may constitute a redundancy situation even though the amount of work being done remains the same. However, this will only happen if the difference between the old and the new work are such that they do not amount to work of the same 'particular kind'. As detailed in cross examination and on the papers provided, the new specialised roles required different expertise to those of general teaching posts.

67.3 If I am incorrect, and the requirement of 8 teaching posts and 2 new specialised roles as opposed to 10 general teaching posts did not amount to diminution in 'work of a particular kind', I am satisfied that dismissal was for Some Other Substantial Reason (SOSR within the meaning of section 98(1)(b) ERA 1996), namely a business reorganisation in the context of a restructuring of staffing requirements to meet the academic needs, expectations and requirements of the school and pupils, to meet evolving demands. It is not for the Tribunal to make its own assessment of the advantages of the school's business decision to reorganise, however, in saying that, I am satisfied that the business reasons were genuine and rational.

68.4 I reject the Claimant's theory that he was dismissed under the guise of Redundancy, the real reason being that the Respondents wanted to appoint another individual (a friend of the deputy head) to the role of

Outdoor Education Instructor/Teacher. The Claimant attended the interview for the Outdoor Education Instructor/Teacher post, and whilst there may have been some misunderstanding as to the period of time it would take for the Claimant to be sufficiently qualified in certain required aspects of the role, the real reason why the Claimant was not successful with his application stemmed from genuine, and understandable safety concerns the Respondents had, in compliance with their own duty of care requirements and expectations.

69. Was the dismissal fair or unfair having regard to section 98(4) of the Employment Rights Act 1996? Meaning, did the Respondent act reasonably or unreasonably in all the circumstances, including the Respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the Claimant?

69.1 In considering whether the dismissal is fair, I have reminded myself that I should not substitute my view for that of the employer but simply consider whether the respondent's actions fell within the range of reasonable responses open to an employer.

69.2 Factors that are relevant to a redundancy dismissal apply equally to a reorganisation when assessing the reasonableness or otherwise of the dismissal. I have considered whether the Respondent adequately warned and consulted the Claimant, whether the Respondent adopted a reasonable selection decision, including its approach to a selection pool, and whether the Respondent took reasonable steps to find the Claimant suitable alternative employment.

69.3 Consultation is one of the basic tenets of good industrial relations practice. Where unions are recognised, consultation will generally be with the trade unions, although this does not normally eliminate the obligation to consult in addition with individual employees. Usually, the former will be over ways of avoiding redundancy and over redundancy selection criteria. Consultation with individuals will generally arise once they have been at least provisionally selected and will be for the purpose of explaining their own personal situations, or to give them enough opportunity to comment on their assessments. It must also be emphasised that although for analytical purposes the application of the assessment criteria and consultation with individual employees are treated separately, there is often a significant link between them in practice.

69.4 The Respondent consulted with the recognised trade union, and the Respondent had, as I have already established, a clear Management of Change and Redundancy Policy. A Business Case was presented and there is evidence of correspondence offering dialogue on a one-to-one basis. A separate Q & A document was produced, as well as providing for collective consultation,

69.5 However, there are concerns with the procedure followed despite there being a clear policy, and this is where the Respondent's defence fails.

69.6 The Respondent did not comply with its own Management of Change and Redundancy Policy, in particular, paragraph 3.6.1 (pages 79 and 80 of the Bundle), which states: -

"In order to make representations the teacher may request a breakdown of their scoring and rationale why they received those scores and were selected."

The Claimant, as I have already established made the appropriate request, but did not receive the information requested in its entirety, particularly the rationale behind his scores.

69.7 As a result, the Claimant had no real means of challenging his selection for redundancy during the course of the consultation process. Whilst he knew his personal score, and the anonymised scores of others, he could not see whether rescoring him against the criteria would realistically have meant that he avoided dismissal. The Claimant was entitled to examine whether his own scoring had been carried out fairly and to challenge it with appropriate evidence, if not. He was not able to put forward evidence to suggest that his scores for any particular criteria should be increased in the absence of adequate information from the Respondent.

69.8 I have considered the fairness of the selection criteria. It is evident that they are geared towards ensuring that the most appropriately skilled and able employees were retained given the future plans for the school. Case law has shown that the Respondent is not precluded from relying on criteria which imports an element of 'judgment' into the scoring process, however, if less objective criteria are deployed it is even more important that the fair application of the criteria to the individual in the pool can be assessed.

69.9 Just as the Claimant struggled to make representations because of the lack of information about how his scores had been chosen, so too the Tribunal struggles to apply any meaningful scrutiny to the fairness of the scoring process in this case. Whilst I am aware that the Tribunal is not entitled to carry out a re-scoring exercise or to challenge why the Claimant got a particular score and another employee scored differently, there does need to be some basis for the Tribunal to assess whether the scoring criteria was fairly applied in this case. This is particularly important if the chosen criteria was more subjective than objective, which Gavin Randell (the Headmaster) suggested whilst giving evidence. The Tribunal needs, as a minimum, to be able to assess whether the scoring process has been genuinely and conscientiously undertaken by the Respondent and to be satisfied that scores are not the result of the whim of a particular decision maker or a capricious or unjustifiable assessment of an employee's abilities and experience etc.

69.10 In some cases it is possible for a respondent not to call the individuals who implemented the scoring system as witnesses. If there is other

evidence available (including in the documents) from which the Tribunal can understand how the scores were arrived at then it may be possible not to call the scorers themselves. The Respondent does need to explain how the scores were arrived at and how fairness was maintained, whether that be by oral witness evidence or contemporaneous documentary evidence. The difficulty in this case is that the Tribunal did not have either of these sources of information. Although I was presented with the employees' scores, the criteria and the weighting to be applied to the categories, I was given no information about how the scores had been arrived at, save for the evidence of Gavin Randell (Headmaster) who suggested that it was a matter of judgment. What were the sources of evidence which the scorers relied upon to apply the scores to the individuals? How did the respondent decide the Claimant's scores? Was it a matter of impression or was it based on any documentation or assessments? Did the scorers know the employees? These unanswered questions are illustrative of what the Tribunal needs to be able to assess how fairness was maintained.

69.11 In light of the above, I accept that the Claimant did not have the information required to make representations, which stemmed from the Respondent's breach of their own policy, in failing to provide the necessary information. This led to the Claimant not being entitled to raise an appeal. Whilst the absence of an appeal does not of itself make the dismissal unfair, it is a contributory factor in my finding of unfairness, as the lack of right to appeal arose as a consequence of the Respondent's breach of their own policy.

69.12 I am satisfied that the Respondent took reasonable steps to find the Claimant suitable alternative employment. The Claimant was given the opportunity to demonstrate his suitability for a vacant position, and to apply for the available roles. I note the Claimant's evidence during cross examination that he did not wish to engage with the Respondent's redeployment and re-engagement policies.

70. For the reasons set out above, I consider the dismissal was unfair for the purposes of s.98(4) of the Employment Rights Act 1996.

71. For completeness, if the Claimant's dismissal was not for redundancy, then his dismissal was for a business re-organisation under SOSR and for the reasons set out above, I determine that the dismissal was unfair for the purposes of s.98(4) of the Employment Rights Act 1996.

72. I must now consider whether a fair procedure would have made a difference and if so to what extent, applying the principle established in *Polkey v A E Dayton Services Ltd (1988) ICR 142.* I am unable to say based on the evidence provided and this matter will be referred to a further Remedy Hearing.

G Hughes

Employment Judge

Authorised for issue on

3 July 2025

DECISION SENT TO THE PARTIES ON

19 July 2025

Helen Taylor

FOR THE TRIBUNAL OFFICE