



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

AND

Mr C Millard

IBM UK Limited

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham (by video) **ON** 7th and 8th October 2021

EMPLOYMENT JUDGE A Richardson

Representation

For the Claimant: Mr M Islam-Choudhary, Counsel

For the Respondent: Mr M Lee, Counsel

JUDGMENT

The judgment of the Tribunal is

- (1) The claimant's claim of unfair dismissal under S111 Employment Rights Act 1996 is well founded.
- (2) Any compensatory award under S123 Employment Rights Act 1996 shall be reduced by 50% to take account of the chance that the claimant would have been dismissed had a fair dismissal procedure been followed in accordance with

Background and issues

1. That claimant brings a claim of unfair dismissal, unlawful

deduction from wages and breach of contract. The latter two claims have been resolved and only the unfair dismissal claim is live. At the time of his dismissal the claimant was on secondment to a distributor of the respondent. The claimant accepts that he was dismissed for a potentially fair reason, namely redundancy, but challenges the fairness of the dismissal on two grounds:

- (i) the scoring selection criteria were ill-defined and subjective; and /or
 - (ii) the application of the scores to the claimant were unreasonable and outside the band of reasonable responses because:
 - a. It was done in the absence of recent performance assessments
 - b. Adequate evidence in support of the scores were not obtained
 - c. R did not share that evidence when challenged
 - d. R failed to get sufficient evidence from Tech Data, where he had been seconded.
2. The parties agreed a list of issues. Namely:
- a. Did the respondent act reasonably in dismissing the claimant by reason of redundancy in all the circumstances within the meaning of section 98(2)(c) Employment Rights Act 1996 (ERA)?
 - b. Did the respondent act reasonably in dismissing the claimant by reason of redundancy in all the circumstances within the meaning of section 98(4) ERA? The claimant contends that the respondent did not because:
 - i. The scoring criteria were ill defined and subjective;
 - ii. The evidence obtained by the respondent in support of the scoring process was inadequate;

Proceedings and evidence

3. The hearing was listed for two days with standard directions being given by the Tribunal. The parties had made an application to extend the hearing to five days. The agreed bundle is nearly 1000 pages with a 22 page index; there were ten witnesses including the claimant and a proposed timetable extending over a proposed five

days. The Regional Judge had refused the application to extend the Hearing from two to five days. At the commencement of the hearing a discussion was held to decide how to proceed. The options were to adjourn and relist which could cause considerable delay – probably well into 2022; go part heard and relist for three further days in 2022, settle the case, or substantially reduce the scope of the evidence and agree a tight timetable. Counsel suggested and it was agreed that the number of witnesses could be reduced by two and the time for cross examination and submissions could be rationed. The decision would be on liability only and it was accepted that time would not allow an oral decision to be made at the end of the second day.

4. On that basis counsel provided a revised timetable and it was adhered to with the hearing ending on time on the second day.

5. I was also provided with written submissions from both parties and by the claimant, a copy of a Midlands West Tribunal judgment made by EJ Cookson, relating to the respondent's redundancy programme in the TSS conducted by Mr A Dawson in another unfair dismissal outcome.

6. Oral testimony was heard from the following witnesses including the claimant. Their titles as at the relevant time are given rather than their respective current title. Some of the witnesses no longer work for the respondent.

7. For the claimant:

- a. Mr N Gargaro, Business Partner Manager TSS;
- b. Mr A Joseph, former senior employee, then consultant to the respondent.

Mr B Erb Global TSS Business Partner Channel Sales Leader was unable to provide 'live' evidence to the hearing because it was discovered by the respondent that because Mr Erb was resident at the time of the hearing in Switzerland, giving evidence to a UK court, even remotely by video, would be a breach of Swiss law. The Tribunal therefore did not hear oral testimony from Mr Erb.

8. For the respondent:

- a. Ms E K Collins, Technology Support Services (TSS) Resource Manager;

- b. Ms J A Patel, UK & Ireland Multi Vendor – Business Leader TSS;
- c. Mr L Jones, TSS Sales Leader;
- d. Mr T Frisby, Technical advocate, TSS.

Findings of fact

9. Findings of fact are made on the basis of the evidence before the Tribunal taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. Conflicts of evidence have been resolved on the balance of probabilities. The credibility of witnesses and the consistency of their evidence with surrounding facts and documents has been taken into account.

10. What follows are the relevant factual findings in relation to the issues set out above.

Background structure/terms

10.1 The claimant was employed by the respondent from February 2000 until his employment was terminated on 21st September 2020, at the end of a two year secondment to Tech Data Advanced Solutions (Tech Data). Tech Data was the respondent's client and, under a joint venture agreement, a business partner.

10.2 At the time of termination of his employment the claimant was located in the Technology Support Service Division (TSS) as a representative. TSS was a division of the respondents Global Technology Services (GTS). The respondent is organised into discrete business units. Each business unit, such as TSS, operates independently of other units, each having its own management and team structure, budgets and HR support.

10.3 At the relevant time GTS was divided into separate divisions – Infrastructure Services (IS), Delivery and Non-Delivery and TSS. TSS ran the respondent's technology support services which included maintenance and servicing of IBM branded software and hardware

(Logo Services) and maintenance and servicing of non-IBM software and hardware (Multi-Vendor Services). Multi-vendor services were sold via the Business Partner channel (the Channel).

10.4 The claimant had been seconded to Tech Data from 1 October 2018 under the respondent's Champion for Growth (C4G) Secondment Programme. The C4G Secondment Programme was intended to enable the respondent's top performing employees to take their IBM knowledge and experience to help key players in IBM's partner organisation, such as Tech Data. The secondment enabled these secondees to expand their skills and develop their careers by working directly for IBM's business partners and clients for an agreed period of time.

10.5 The claimant was due to remain on secondment at Tech Data for two years ending on 30th September 2020. Prior to his secondment he had previously been manager of the TSS 'channel' sales team which was followed by a period when he developed TSS Multi-vendor maintenance initiatives that could be sold via the Channel.

10.6 Tech Data was a distributor for IBM products. The respondent entered into a joint venture named Project Maria with Tech Data. This was a new innovative arrangement of considerable importance to the respondent. The purpose of Project Maria was to enable IBM to provide a quick, competitive and agile service to Tech Data and its "downstream" partners. To further this arrangement, the claimant was seconded to Tech Data via the respondent's C4G programme.

10.7 The claimant had been involved in the concept of Project Maria since about 2017 and his primary focus prior to his secondment to Tech Data, had been to get the respondent's business sign-off to invest in Project Maria. The joint venture agreement between IBM and Tech Data was actually signed in December 2018.

10.8 During his secondment the claimant had an IBM manager, Mr Gargaro, who was responsible for the management of his

secondment and his eventual return to IBM at the end of the secondment period, assuming it was not extended or a permanent position offered by Tech Data. The claimant also had a line manager at Tech Data who was, for the most part, Mr Ian Jeffs. Mr Gargaro was absent from work because of illness shortly after the respondent announced its redundancy programme in early 2020. He left the respondent in about August 2020. Mr Jones became the claimant's substitute 'function' manager. They had worked in the past together and had had a good relationship.

10.9 The Project Maria joint venture agreement between IBM and Tech Data makes reference, inter alia, to secondee performance at paragraph 4. Written reports on the secondee's performance would be supplied by Tech Data within ten days of receipt of a request from IBM. The content of these reports would be used in accordance with IBM's annual employee appraisal 'Checkpoint' programme.

10.10 The terms of the claimant's secondment to Tech Data were set out in a letter from the respondent to the claimant dated 26th September 2018. The salient terms were:

- (i) That the claimant would continue to be an employee of IBM during the secondment although his employment status would be recorded as inactive on IBM's systems.
- (ii) Tech Data had day to day responsibility for the claimant's secondment.
- (iii) The respondent would continue to pay the claimant via their systems but Tech Data would be invoiced monthly for the claimant's salary, sales commission (based on Tech Data's sales plan), car allowance and expenses. The respondent would pay for the claimant's benefits such as welfare and pension.
- (iv) That the claimant would keep in contact with his IBM Manager during the secondment and schedule his 'Checkpoint' (appraisal) reviews. His performance would be discussed by the IBM Career Manager and the Tech Data manager.

10.11 In addition to the terms of engagement on secondment, the respondent provided the claimant with a Conflict of Interest Letter dated 11th September 2018 which was signed by the claimant on 26th September 2018. The letter explains that it was important for secondees under the C4G secondment programme to understand what conflicts of interest are and to know when to seek help and guidance. The letter refers the secondee to the IBM Business Conduct Guidelines. The secondee is advised to avoid putting him/herself in a position where the interests of the seconding organisation are improperly subordinated to the interest of IBM. Various examples are given but generally speaking secondees are advised that they should not in any circumstances conduct themselves in a manner which could potentially give IBM favourable treatment within Tech Data or give Tech Data favourable treatment within IBM, or any perception of the same. Any concerns about whether the interests of IBM or Tech Data had been compromised or there was a potential perception of a conflict of interest, the secondee was instructed to report the issue immediately with the IBM Manager and the Secondment Manager and to keep an appropriate record.

10.12 Importantly the letter reminds the secondee that his primary allegiance whilst fulfilling the secondment arrangements is with the organisation to which the employee is seconded except in a situation where the secondee has reason to believe that he was being asked to engage in any activity that contravened IBM's Business Conduct Guidelines and/or the law.

10.13 In the joint venture framework agreement between the respondent and Tech Data, there were two key metrics (in non-business jargon, key benchmarks). They were referred to in evidence as 'base lines'. They were: (i) Target Programme Charge which measures the multi vendor billed business in cases where Tech Data signed a contract with a customer on non-IBM products. If the Target Programme Charge was not met for the year, Tech Data had to pay a penalty to IBM under the framework agreement.

10.14 The second baseline was called Coverage Shift which measured IBM's direct customers being moved (transferred) to become customers of Tech Data. If the Coverage Shift target was not met for the year, IBM was required to pay a penalty to Tech Data.

10.15 The claimant's evidence was that his role whilst on secondment was not to 'own' Project Maria, but to fulfil Tech Data's obligations. He was tasked to set up a Tech Data Multi Vendor maintenance solution that would "feed the project requirements". Tech Data were responsible for determining the claimant's tasks on a day to day basis.

10.16 The respondent's case was that whilst on secondment the claimant worked exclusively on Project Maria. He was part of a small team of employees at Tech Data assigned to delivering the contract and his role as a TSS Sales Representative was focussed on achieving the sales targets for Project Maria.

10.17 Mr Joseph's evidence gave invaluable and more objective background evidence on the status of Project Maria in 2019 and what was the claimant's role in Tech Data. His evidence was not challenged in cross examination. Mr Joseph had held very senior management positions within the respondent. At the suggestion of the claimant, in early 2019 Mr Erb in GTS, had invited Mr Joseph to provide help with a problem which existed within the Channel of Project Maria. Mr Erb told Mr Joseph that Project Maria was a first programme and that the project could be ground breaking for IBM.

10.18 Mr Joseph as a highly experienced consultant, identified several factors in the difficulties that Project Maria was experiencing in achieving its target revenue. First, he noted that the IBM employees involved with the signing of Project Maria had already been rewarded when the contract was won, and were not rewarded on the revenue created by Project Maria. His opinion was that if the respondent's employees involved with TSS and Project Maria had been incentivised on the results of Project Maria, the situation may have been different to what it was in 2019 and 2020.

10.19 Second Mr Joseph recognised, and informed the stake holders in Project Maria that it was always going to be a challenging programme with the targets that had been set.

10.20 Mr Joseph believed that the 'pipeline' business could have been stronger. The pricing structure was in his opinion too high. This is also supported in the documentation in the bundle which shows the claimant was raising in August 2019 loss of business due to prices being unacceptably high and competitors undercutting IBM tenders. There was email evidence in the bundle which confirmed that IBM and Tech Data were aware of this issue.

10.21 Mr Joseph was of the view that Project Maria would never succeed if the costs were not capable or reduction. He also identified a conflict between Tech Data and IBM on pricing. 99% of the deals already made in Project Maria had been made by 'special bid' which involved obtaining senior authority for the sale to progress at a lower price than marketed and therefore Project Maria's pricing structure was never going to be enough to get a deal completed as it always needed senior review prior to being able to progress with the sale.

10.22 Despite this, at a meeting with Mr Jeffs, Mr Walsh, the Director of Technology TSS, Ms Patel and the claimant, it was decided to continue with the special bid requirement to progress sales.

10.23 Mr Joseph also identified another conflict - one within Tech Data for Tech Data staff because of an agreement Tech Data had with an IBM competitor, Cisco. This agreement was priced lower than IBM prices in Project Maria. This caused difficulties where Project Maria was attempting to gain entry to customers who already had Cisco software products.

10.24 Mr Joseph believed that the joint venture between the respondent and Tech Data needed to run a better marketing /sales programme to ensure business partners were aware why the

respondent's capability and proposals were superior to the competition. Mr Joseph encouraged Mr Walsh for IBM and Mr Jeffs for Tech Datta to meet monthly to discuss progress. A plan was put in place to which the claimant would contribute. Mr Joseph believed that Project Maria was not running an adequate marketing/sales programme to achieve the plan which required not just the claimant, but also others employed within the respondent and Tech Data to improve the programme and therefore Project Maria's chances of success.

10.25 There is evidence of discussion and planning in the bundle between IBM and Tech Data stake holders in Project Maria that shows they were aware that pricing was not the only reason why deals had been lost. The claimant was reported in November 2019 as stating that *"the symptom of the loss said 'pricing' but when looked into the root cause was an over-engineering solution and an inadvertently higher cost base that justified."*

10.26 The senior management decision appeared to be that the claimant was to carry on doing what he was doing and push harder to get the results needed. Mr Joseph however believed that the claimant could have done different things to create improved sales. He said *"pushing harder wouldn't be pushing hard on what you were already doing but pushing harder on other things. It could mean getting support from Tech Data and IBM to bring to bear to help [the claimant]."*

10.27 Mr Joseph confirmed that it had been Ms Corbett's role as Project Executive, to ensure that Project Maria delivered on target for each quarter. Ms Corbett had resigned in January 2020. Mr Joseph was never informed that Project Maria was "way off" target. In fact quite the opposite. Despite the figures being lower than expected, Project Maria continued on the instruction of senior IBM management on the basis that it was a new project and it was early days.

10.28 It appears that Mr Joseph's assessment was accurate, as by early June 2020 the documentary evidence records that the

respondent was *“looking at changing all the Tech Data Maria contracts across Europe as none of them are generating anywhere near the billed revenue commitment expected. The UK will take the lead.”* This included the possibility of changing the special bid requirement that Mr Joseph had identified as a problem, and Mr Lyon, Sales Leader for Tech Data & Ecosystems Partners in IBM described this as critical to the UK as it is an existing clause that other European countries do not have.

Claimant’s appraisals

10.29 Between 1st October 2019 and 20th September 2020 the claimant did not receive any annual or interim performance assessments (CheckPoint assessment). He had also not undergone an assessment for 2018 or 2019. His performance assessments in 2016 and 2017 had been carried out and had been positive, with the claimant described as having demonstrated dedication and passion for TSS in 2017 and, in 2016, having been assessed as providing excellent results and progress all round.

10.30 In 2019 the claimant was informed by Mr Gargaro that HR had advised him that it was not necessary to complete any CheckPoint assessment for the claimant because of the claimant’s secondment to Tech Data. This was contradictory to the provision in the Second Agreement with the claimant. The respondent recorded the claimant’s goals for 2019 as “his performance will be reviewed by Tech Data”. Tech Data did not undertake any review during the two year secondment and none was asked of it by the respondent.

Redundancy programme

10.31 On 20th February 2020 the respondent announced that it was commencing a redundancy programme across the UK GTS TSS business unit. The UK GTS TSS was experiencing declining profit and revenue and was forecast to miss all of its 2020 profitability targets. The respondent identified the need to change the way that the TSS business worked and reduce the headcount of the TSS UK

workforce to focus on growth areas of the business. The reduction in headcount within GTS TSS was 112 employees. Voluntary redundancies subsequently reduced the number of proposed redundancies to 101.

10.32 It was the respondent's practice when conducting a redundancy programme, to establish an Employee Consultation Committee (ECC) to agree the programme and methodology for the redundancies and to meet regularly to monitor progress. The selection pools for redundancy were agreed by the ECC at its first meeting. The claimant was included in the TSS sales pool. He did not object to the logic of that decision. There were 44 employees in this pool with a proposed reduction of 9 members of staff out of the 44. There were altogether about 10 ECC meetings which were chaired by Mr Anthony Dawson, a director. The final meeting of the ECC was on 16th May 2020.

10.33 At the second ECC meeting on 11th March 2020 the proposed selection criteria were approved. They were:

- (i) Level vs PRG Band: maximum score of 10.
- (ii) Skill level: maximum score of 20.
- (iii) Potential: maximum score of 20.
- (iv) Approach to work: maximum score of 20.
- (v) Performance: maximum score of up to 30

10.34 Whilst the evidence before the Tribunal suggested that the selection criteria were created and drafted by the ECC, Mr Dawson, his deputy and an HR representative, Ms Collins, for this current redundancy exercise in TSS, they were in fact substantially standard criteria with which the managers heading up the ECC were familiar, as they had been used in previous redundancy exercises by the respondent.

Redundancy training for managers

10.35 The respondent arranged a detailed training programme to support and guide managers involved in the redundancy exercise.

Scoring managers attended virtual manager education training sessions which included training in 'ranking' and dealing with 'at-risk' employees and dismissal. Managers conducting the redundancy programme were sent training materials for each of the training sessions, and these materials were then re-sent at each stage of the process. The 'ranking' training included training on what an employee should demonstrate in order to reach a particular score by reference to 'ranking' criteria.

10.36 Mr Luke Jones was responsible for undertaking the scoring for the claimant because Mr Gargaro was absent on sick leave. Mr Jones was the UK TSS Sales Leader. He had attended the training provided by the respondent on 19th March 2020.

10.37 The training for managers conducting the redundancy programme, specified that the manager assigned to the task of scoring, or ranking, had to consider evidence in relation to each employee. There was no specific guidance to Mr Jones on how to deal with the claimant's secondment with Tech Data. Mr Jones was advised by Ms Collins that the claimant's situation was 'tricky'.

Mr Jones's 'ranking' training instructions were:

- Employees must be given a score by their manager/management team against a number of agreed criteria.
- The scores must be substantiated with **robust evidence** [my emphasis] in order for the employee to understand the reasons for these scores.
- The criteria must be applied by the manager in a **fair, reasonable, objective and logical manner** [my emphasis].
- The UK Line Manager is responsible for completing the assessment of each employee providing **detailed evidence to support the scores** [my emphasis]. **The evidence and score will be discussed with the employee during individual consultation** [my emphasis].
- Ranking will be reviewed by the relevant senior managers in a /several normalisation workshops.

10.38 The training also counsels the ranking manager as follows:

“We understand that this is a time consuming exercise, however, the importance of this ranking warrants your full care attention and focus. [the respondent’s emphasis]. Please keep in mind that selection ranking may be examined by parties outside your area or outside IBM. For example, an employee who is placed at risk of redundancy (or ultimately dismissed) may take legal advice (or appeal the decision to dismiss). The ranking score and the evidence that generated it may therefore be shared. Your goal is to make the ranking clear and self evidently fair, and to set it out in accessible plain language. Try to read it through the eyes of someone who does not work at IBM as part of your own review.”

10.39 Further guidance and instruction to the managers conducting the scoring included inter alia the following bullet points (not necessarily on the same slide):

- Ensure you understand the criteria before commencing
- Gather evidence from all relevant parties in order to assess the employee (e.g. **project manager, previous manager, team leader**) [my emphasis]
- Each of the scores **must be substantiated with evidence in order for the employee to understand the reason for their scores.** [my emphasis] This needs to be explained in simple clear terms
- There is no upper limit on evidence – be clear and concise but thorough
- Evidence should be sufficient and robust enough to explain the score without need for further clarification
- Be clear about the assessment period you are looking at (and potentially what that is the chosen period)
- **You MUST solicit input from task/functional managers, previous managers etc.,** [my emphasis] where appropriate to

provide an accurate view of the employee (for the time period being ranked)

- ***You MUST document all evidences that you intend to rely on and refer to on the ranking spread sheet [my emphasis]***

10.40 Examples of evidence to substantiate scores were given to illustrate the detail of information expected of the scoring manager. The training included information and advice on special considerations such as maternity leave absence and sick leave absence. It also included examples of where things had gone wrong in the past to illustrate previous errors made by managers.

10.41 There is nothing at all on dealing with employees on secondment except a bullet point under “Lessons learned” which states:

- Particular care in reaching a fair and sensible scoring, should be taken for employees whose headcount sits in one business unit but their work is undertaken in another.

10.42 The training of managers in how to conduct the redundancy was completed by the time the third ECC took place on 9th March 2020. Mr Jones had the completed the scores for the claimant by 8th April 2020.

Notice to terminate Project Maria

10.43 To divert from the redundancy chronology for a moment, Mr Jeffs , Business Unit Director at Tech Data served notice on the respondent in about mid May 2019 to withdraw from Project Maria and stated that they also wished to serve notice on the claimant to terminate his contract early, although they would prefer to keep him until the expiry of the original term date of 30th September 2020. The claimant was unaware of Tech Data’s intentions or the subsequent negotiations with the respondent.

10.44 Ms G Gray worked in the respondent's Partner Ecosystem business and she lead the Champions for Growth secondment programme for the UK. She became involved in the discussions regarding the claimant's secondment being possibly terminated early and initiated a proposal being put to Tech Data whether, with financial help, they would prefer to keep the claimant. Mr Jeff's responded that they did. Ms Gray's view expressed in an email to the relevant parties stated:

"We need to maintain a strong channel both through, and out of, this current crisis and this request is clearly within the flex that Diego Siegre (Partner Ecosystem VP, Europe) is supporting to keep secondees out in the Channel during these difficult times. Tech Data is a massive revenue for IBM and is key to maintaining IBM's Channel strength."

10.45 As a result of the feeler put out by Ms Gray, Tech Data proposed that the respondent provided some support to enable the claimant to remain in post until the end of the two year secondment. Tech Data suggested that the respondent fund 50% of the remaining four months of the claimant's secondment salary.

10.46 Mr Walsh, Director TSS UK & Ireland and Mr Dawson discussed the proposal as their acceptance of it was required. Mr Dawson confirmed in an email to Mr Walsh on 1st June 2020 that *"from the notes, it's clear that this is something that is channel-wide, not Craig specific, so we should not treat him any differently from the way that Systems are treating the C4G heads. Given that he is on the list to be put 'at risk' next week, if we refused this co-funding approach with [Tech Data] then he might infer that we are pulling the rug from under him in anticipation of his dismissal. Also it's the lowest expense option for us in the short term. I'll reserve what I think of TD using COVID as an excuse to renege on their commitments at exactly the same time as they should be selling harder....."*

10.47 Tech Data's proposal for the claimant was approved and the claimant remained in post on secondment, co-funded by the respondent and Tech Data, until his dismissal.

Gathering of evidence for scoring/ranking the claimant

10.48 Mr Jones obtained feedback from two IBM managers and one Tech Data manager. Although having managed about eight redundancy programmes before but never with a member of staff on secondment, Mr Jones did not seek any support or guidance from HR in relation to the claimant being in the redundancy pool whilst on secondment, despite being informed in the training that he could use HR as a resource. Instead Mr Jones consulted with Mr Dawson, the lead manager in the redundancy exercise, "*every step of the way*" and sought advice from him. It became clear during the evidence that Mr Dawson had received a complaint about the claimant from a Ms Corbett which he did not disclose to Mr Jones or Mr Frisby.

10.49 Although Mr Jones knew the claimant personally and they had had a good working relationship previously, he had not line managed the claimant. He knew little of his work in TSS and even less in Tech Data. He outsourced the collection of data from Tech Data to Ms Patel to find out about the claimant's performance at Tech Data. He also discussed the claimant with John Breslin IBM UKI Business Leader – TSS Logo Services, a entirely separate division in TSS.

10.50 Because of his lack of familiarity with Project Maria, Mr Jones believed that the claimant was accountable to Ms Patel and Mr Breslin and therefore he thought it was important to get their feedback on the claimant. That was a grave mistake as under the secondment arrangement (which Mr Jones did not check); the claimant was accountable to neither. Mr Jones and for that matter Ms Patel and Mr Breslin did not appreciate the requirement of the secondment agreement that the claimant place his allegiance to Tech Data not IBM. Nor did Mr Jones exercise paragraph 4.1 of the

secondment agreement to obtain a formal report from Tech Data about the claimant's performance over the Project Maria 2018/2019 or 2019/2020.

10.51 On 8th April 2020 Mr Jones contacted Mr Breslin, Ms Patel and Ms C Roche to discuss the scoring for each of the employees for whom Mr Jones was the scorer in the redundancy exercise.

10.52 In order for Mr Breslin to provide his feedback on the claimant to Mr Jones, Mr Jones had already sent him the blank scoring form. Mr Breslin completed the scores for the claimant although it was not his role to do so and he had not been asked to do so. When he received the scores from Mr Breslin, Mr Jones agreed with Mr Breslin's scores and did not amend them. On discussing the claimant's scores, Mr Breslin told Mr Jones that the claimant had been rude to him at a meeting in 2019 between IBM and Tech Data and that the claimant's behaviour had been inappropriate.

10.53 Mr Jones then gathered further information to enable him to complete the summary section on the scoring form. Mr Jones had conversations with Mr Gargaro and another IBM employee who had been on secondment to Tech Data, Ms Corbett the Project Executive for Project Maria. Ms Corbett was no longer employed by the respondent having resigned in about January 2020.

10.54 Ms Corbett had complained in 2019 to Mr Jones about the claimant, effectively raising a grievance about bullying. The grievance was not taken any further. The claimant had no knowledge of Ms Corbett's allegation of bullying and was not given an opportunity to respond to the allegation prior to it being taken into account in the selection criteria scoring.

10.56 Ms Patel provided Mr Breslin and Mr Jones information about the Tech Data Multi- vendor programme and that it had only achieved 21% of one of its yearly baseline targets. This information had a significant material effect on the claimant's redundancy scores. Ms Patel provided additional information on the claimant's

achievements in the first year of the Project Maria which included some positive information although not “overwhelmingly numerically”. Ms Patel described the claimant’s efforts in setting up the contract with Tech Data and commented that it “*might sound small but all take a huge amount of effort*” and informed Mr Jones that the claimant had also designed and implemented a Tech Data and IBM customer incentive.

10.57 At this point Mr Jones felt he still needed more information. Tech Data had confirmed that it had no appraisal data available for the claimant. Mr Jones therefore delegated Ms Patel to telephone Mr Jared Cary, IBM & Red Hat Business Unit Manager for Tech Data on 9th April 2020.

10.58 In breach of the respondent’s training and guidance Ms Patel did not prepare structured questions intended to elicit information to enable appropriate application of the selection criteria and assessment of the correct level of mark per selection criteria; she did not take and keep notes of answers or get evidence to support the answers from Mr Cary. Ms Patel did not ask for solid information such as whether the claimant had been asked to meet any metrics or targets by Tech Data. Ms Patel had no memory of what questions she had asked Mr Cary. She had not looked at the secondment agreement and therefore was unaware that she (or Mr Jones) could have asked formally for a report on the claimant’s performance from Tech Data or that Tech Data had an obligation to provide such a report.

10.59 After Ms Patel had spoken to Mr Cary and sent him an email summarising their conversation, Mr Cary confirmed the summary was accurate and that he had confirmed as much with Mr Jeffs. In the email Ms Patel summarised the conversation with Mr Cary as follows:

“Hi Jared, thank you so much for having a quick call with me. I appreciate it is a sensitive situation. Below is a synopsis of what we discussed

Highly skilled, very knowledgeable but not see him 'selling'.

Hard for you to say whether a different person would have got different results.

Don't want to confuse the person with the viability of the business. Most expensive person that Jared has

... if TD have to take cost saving actions they will need to end secondment early with 3 months' notice.

Operationally the channel has been set up but not getting sufficient return on investment as of yet to justify potential continued investment. This is not a reflection on Craig's capability, however testament of the challenging business environment.

Round tables set up took a lot of coaxing to get Craig to do them. Will not run another ski trip, will only be successful with Cisco team being on board & the investment is being diverted to them getting additional incentives.

Self isolation rather than collaboration. Set up excellent but not seeing the benefit.”

10.60 On receipt of this information from Ms Patel, Mr Jones did not regard the feed back in any way as “*glowing*”. He assessed it as indicative of an employee whose performance was fairly mediocre and who needed to be pushed to strive. Mr Jones therefore did not consider the scores already awarded to the claimant by Mr Breslin without any evidence, needed any adjustment with the evidence and he made none.

10.61 Mr Jones telephoned Mr Gargaro whilst he was on sick leave. Mr Jones claimed that he had asked Mr Gargaro for feedback on the claimant’s redundancy scores. Mr Gargaro’s evidence is that

10.62 Mr Jones telephoned him as a welfare matter and that there was no discussion on the claimant’s ranking. Mr Gargaro’s evidence is preferred. If Mr Jones had arranged a telephone interview Mr Gargaro’s and invited his views on the redundancy ranking of the claimant, it would be reasonable to expect a diligent manager training in conducting the scoring exercise, to have retained some

documentary evidence of his inquiries. At the very least Mr Jones should have taken notes and summarised his conversation by email to Mr Gargaro. If Mr Jones had wished to question Mr Gargaro for information on the claimant's performance on Project Maria, on a serious matter such as the claimant's interaction with other IBM staff, for example Mr Breslin, he should have prepared questions and taken notes of Mr Gargaro's answers. There was no such evidence before the Tribunal. In the circumstances Mr Gargaro's evidence is preferred. Mr Jones had no input into the claimant's redundancy ranking from Mr Gargaro although he falsely claimed that he had.

10.63 Mr Jones attended further training as a manager dealing with "at risk" employees. Again he was provided with guidance, a script for the meetings to be conducted with the at risk employees he was dealing with, including the claimant; he was provided with a list of common FAQs from employees at risk of redundancy and the invitation letter which was to be sent to each at risk employee.

10.64 Mr Jones's final settled the claimant's final scores as:

Level vs PRG Band 5 out of 10

Skill Level 14 out of 20

Potential 7 out of 20

Approach to Work 5 out of 20

Performance 10 out of 30

TOTAL 41

10.64 For the skill level, the claimant was not merited with a higher score because Mr Jones had no evidence that the claimant was eminent in his field or that he was continuing to develop his skill through education and training. 14 out of 20 was still however a good score.

10.65 Critically for the 'Potential' section of the scoring form, Mr Jones commented “ *feedback on attitude and approach makes it very difficult to see a route to progress further within TSS currently. Has managed teams in the past and could do that again, but difficult to [as little [to] no support to do [so] within management team due to examples given in Approach.*”

10.66 Mr Jones interpreted the feedback from the IBM managers, Mr Breslin and Ms Patel, Ms Corbett, and Mr Cary at Tech Data, as suggesting the claimant was not easy to work with and could be disruptive. He believed he had come to a “rounded” judgment. There was in fact no example given by Tech Data of the claimant working in isolation or not being collaborative. Mr Jones had not asked for examples or context for the comments. Mr Jones could have asked Tech Data for a formal report on the claimant’s performance in Project Maria. Tech Data had a duty to respond within ten days. There was time for such an important report to have been requested and received before the normalisation committee approved the scoring/ranking results prepared by Mr Jones on 20th May and before the consultation meetings started in early June 2020.

10.67 The reference to the claimant being rude related to Mr Breslin’s personal opinion arising out of one occasion at one meeting in 2019. Mr Gargaro who had been at the same meeting with the claimant and Mr Breslin in 2019 gave evidence in cross examination that the claimant had been very professional in his language and had raised a legitimate business concern on behalf of Tech Data. Mr Gargaro’s evidence that the allegation that the claimant had behaved inappropriately at the meeting as alleged by Mr Breslin was simply not true. Mr Gargaro’s evidence was not challenged during cross examination.

10.68 Mr Jones however accepted Mr Breslin’s personal opinion about the claimant and gave it considerable weight. It did not occur to Mr Jones that Mr Breslin’s input to the redundancy scores might have been tainted by a personal bias against the claimant and

failed to either fact check what had happened at the meeting with someone who had attended, such as Mr Gargaro or a senior Tech Data manager, or to consider whether Mr Breslin had a conflict and should not have been invited at all to provide input into the scoring exercise for the claimant. Nevertheless Mr Jones relied significantly upon Mr Breslin's evidence although he never subjected Mr Breslin to a formal interview with structured questions. Had he done so it might have put the negative comment about the claimant being rude into context.

10.69 On 20th May 2020 the Normalisation Committee's undertook a final review of Mr Jones redundancy scores and evidence. It was signed off as consistent and fair and that the evidence provided was sufficient to back up the scoring despite, despite there being an absence of the "robust evidence" required by the manager's training. The only written evidence was Ms Patel's email to Mr Cary. There were comments in the scoring summary which were objectively untrue.

Consultation meetings

10.70 The corrected break point for the scores in TSS sales pool was 56. On 10th June 2020 the claimant was asked to attend the first consultation meeting with Mr Jones to discuss his ongoing employment with the respondent which may be identified as at risk of redundancy.

10.71 At the meeting the claimant challenged the scoring and wanted to see the supporting evidence for the scores. Although the claimant did not know at the time, he was entitled to see this according to the manager's training. Mr Jones provided none contrary to the training he had received.

10.72 Following that meeting the claimant emailed Mr Jones to confirm that he wished to see what evidence was gathered to back up the brief statements made in support of each element of ranking and

he asked for the managers' ranking criteria document used containing the descriptions for each element and score.

10.73 Mr Jones turned to Mr Dawson for advice and responded to the claimant on the same day with a refusal to the first question asking for the evidence used to support the scores, but offering to send the power point criteria used containing the descriptions for each element of the selection criteria. Mr Jones said he would discuss the claimant's summary comments at the next meeting scheduled for 17th June 2020.

10.74 The claimant did not let the matter drop and insisted on his legal right to see what information (evidence) the respondent had to reach the scores attributed to him, so that he could challenge the ranking score.

10.75 At a meeting on 18th June 2020 it can be seen from the notes of the meeting taken by the claimant's companion, that Mr Jones confirmed to the claimant the persons to whom he had spoken to obtain evidence for the scoring. He said that he had obtained feedback from Mr Breslin, Mr Gargaro, Ms Patel, Mr Cary and Ms Corbett. He confirmed that he had scored the claimant and had then passed his scoring to his senior management and HR to ratify his approach and to ensure that he had correctly used the process provided. Mr Jones confirmed that all five people approached for feedback on the claimant had all said the same thing to say about the claimant's "approach" and "attitude" to work and people". This was not only untrue, but also a distortion at least of what Mr Cary had said in his comments to Ms Patel. Mr Jones refused to provide the evidence to support his assertions, again in contradiction to the management training he had received, and deferred the responsibility for doing so to the appeals process when it was initiated. In fact Mr Jones had very little evidence to support the ranking scores – none from Mr Breslin, Mr Gargaro and Ms Corbett. The claimant understandably alleged that the scoring had been subjective and influenced by emotion without any factual evidence.

10.76 With regard to approach to work, for which the claimant scored 5 out of 20. Mr Jones told the claimant that Mr Cary's assessment had not been glowing, referring to the claimant being *'self isolating and not very collaborative partly assessed via a roundtable initiative [which the claimant] was asked to set up with downstream partners'*. He took no account of the positive comments made by Mr Cary.

10.77 On 24th June 2020 Mr Jones invited the claimant to a final consultation meeting on 26th June. In the email Mr Jones confirmed in response to the claimant's challenge about Ms Corbett's feedback being included in the scoring was that it was based on conversations Mr Jones had had with Ms Corbett in the past and it was therefore valid information to include as part of the overall scoring.

10.78 On 26th June 2020 the respondent sent the claimant a letter which confirmed that he had been informed about the reasons why he was placed at risk of redundancy and that the opportunities for redeployment had not be successful. The letter confirmed that the respondent had not been able to identify any practicable alternatives to the claimant's redundancy and notice was served terminating his employment by reason of redundancy on 21st September 2020 unless suitable employment was found before that date. The letter also set out the financial aspects of redundancy severance. The question of whether the respondent made sufficient efforts to redeploy the claimant is not in issue.

Redundancy Appeal

10.79 On receipt of the dismissal notice the claimant emailed the HR department to say that he wished to appeal his dismissal on the basis that he had been personally targeted because of Project Maria not delivering the annual revenue target. He claimed that other reasons for the Project Maria's failure unrelated to the claimant had been taken into account. He set out the problems that Project Maria had had, including the IBM / TSS cost model was far too expensive and had not been amended; difficulties with Tech Data's

Cisco business unit in which the claimant had no involvement being entirely a matter between the Senior TSS sales team and senior Tech Data management; and failure in resources made available by IBM.

10.80 The claimant appealed his scores in Performance, Approach to Work and Potential. He complained that the scoring was unfair not only because it was based on Project Maria's outcome but also because of the lack of evidence provided by Mr Jones. He alleged that the summary was very brief, lacked detail and was not corroborated. The summary had apparently been based on conversations that Mr Jones had had, but no notes or minutes had been provided. There was no context provided as to what questions had been asked, how they had been asked and when. It was all very subjective in the claimant's opinion.

10.81 The claimant submitted that it appeared that no one in IBM had any idea what his role was in Tech Data or had ascertained what he had achieved. It is to be noted that in January 2020, the claimant had emailed Mr Gargaro to say how isolated and unsupported he felt.

10.82 The claimant wanted to know who had made comments to Mr Jones about the claimant, what interaction the claimant had had with these people and the evidence to support the comments. The claimant alleged that the low score for 'Potential' was solely based on the comments in 'Approach to Work'.

10.83 The HR department requested more information from the claimant to flesh out his appeal grounds.

10.84 On 29th June 2020 the claimant in an email to HR provided further information on his challenges to Mr Jones's comments supporting the ranking scores. He set out the information which he claimed should have been taken into account had a thorough inquiry and a fair assessment been made on Project Maria, not just attributing its financial failure to the claimant.

10.85 The claimant listed his many achievements at Tech Data. He did not believe that Mr Jones or anyone else in IBM had taken time to understand the challenges the claimant had faced and overcome, or how hard he had worked. He did not accept that a summary of 'general conversation' about Project Maria between Jane Patel and Mr Cary should be relied upon.

10.86 With regard to the criticisms of the claimant's business style and the allegations that he had been rude, derogatory and at times which Mr Jones had said had verged on breaking the respondent's Business Conduct Guidelines, and that he had acted as a Tech Data employee and not an IBM employee, the claimant had a lot to say. The claimant reminded the respondent that under the C4G secondment programme his primary allegiance was to Tech Data. He had limited ability to engage with internal IBM departments. He denied that he had ever been rude or disrespectful whether in public or private and that if a more coercive style had to be adopted from time to time to get the job, then so be it.

10.87 With regard to the comments made by Ms Corbett, the claimant confirmed that he had no knowledge of what the issue was and no steps had been taken to his knowledge with regard to a complaint from Ms Corbett. The claimant described an occasion when Ms Corbett had come off the phone from speaking to Mr Jones and the claimant had had to comfort her before allowing her to drive herself home. The claimant was aware that Ms Corbett had some personal issues in the previous year and without documentation as to what was said and when, relying on Ms Corbett's comments was too subjective.

10.88 With regard to Mr Breslin's comments, the claimant submitted that Mr Breslin had had zero involvement with Project Maria. The claimant had one interaction only with Mr Breslin since being on secondment in the last 18 months which was when the claimant was asked to stand in for another Tech Data colleague. The claimant had challenged some of the Key Performance Indicator metrics that the IBM team had presented to the Tech Data team at

the meeting. The claimant said that he had done so in a professional and courteous manner and he was certain none of the other people, about 15 or so, had been asked for an opinion on whether the claimant had been disrespectful to Mr Breslin. As mentioned previously, Mr Gargaro had been present at that meeting and witnesses the incident Mr Breslin referred to. Mr Jones had not checked out Mr Breslin's comments with Mr Gargaro.

10.89 Mr Jones's comment under the selection criterion 'Potential' with a score of 7 out of 20 was:

"Feedback on attitude and approach makes it very difficult to see a route to progress further within TSS currently. Has managed teams in the past and could do that again, but difficult with little to no support to do within management team due to examples given in approach. Potential that TD will cease the secondment early"

10.90 The claimant alleged that Mr Jones had based the score for Potential on the score for Attitude and Approach to Work. It felt to the claimant as if someone had taken a dislike to him in management and were using the redundancy process to get rid of the claimant.

10.91 The claimant queried why his secondment to Tech Data under the C4G secondment programme had not been taken into account. The claimant had gained valuable insight and had grown his skills and understanding of the services in the 'Channel'. He queried why having taken the challenge under the C4G secondment programme, he had not been ranked higher for potential over other TSS sellers who had not taken the challenge of secondment to experience something new.

10.92 The claimant challenged why no inquiries had been made of three other IBM employees and business partners in the TSS channel, with the TSS worldwide channel leader and the Tech Data Legal and Services teams, or a number of downstream partners. No feedback had been obtained from any of the people who had worked

with him and could make informed comment on his performance, skills and commitment.

10.93 The claimant had already put most of these comments to Mr Jones during the consultation process but Mr Jones had not responded to them, claiming that the consultation meetings were not for debating the ranking/scores, but were only for queries on the process and to help with redeployment within IBM. This was clearly wrong and as stated above, a contradiction of the training he had received.

10.94 Mr Frisby was asked by HR to hear the claimant's appeal. Mr Frisby was a Technical advocate in TSS providing guidance to the TSS senior leadership team. He was experienced in conducting redundancy programmes and redundancy appeal hearings.

10.95 Mr Frisby was sent guidance and instruction on conducting an appeal including a report template which he had to use to summarise his findings and conclusions. He was instructed to send his draft report through to HR before sending it to the claimant for the HR case manager to review. The documents included the meeting notes completed by Mr Jones personally at the end of each meeting with the claimant. These notes confirm that the claimant repeatedly asked Mr Jones for the written evidence relied upon by Mr Jones in scoring the claimant. Mr Jones' reply was that he had provided a summary based on the interviews with various people.

Mr Jones's documents for the appeal also included the business' separation ranking criteria, summary score sheet and the various letters to the claimant sent such as the at risk and dismissal letters.

10.96 Mr Frisby made contact with the claimant on 30th June 2020. The claimant prepared his case for the appeal and sent it to Mr Frisby. The two areas on which the claimant focussed his attention was 'Potential' where he was scored by Mr Jones at 7/20 and 'Approach to Work' where he was scored at 5/20.

10.97 The appeal meeting took place on 3rd July 2020. The claimant pointed out to Mr Frisby that Mr Jones had not spoken to appropriate people who could have given informed feedback on the claimant. Ms Patel had only been with the project one year; the claimant had had one interaction with Mr Breslin over the last 18 months; he had been told by Mr Cary at Tech Data that he had never been asked for personal feedback; Ms Corbett had been so disgruntled with IBM that she had resigned in January 2020 and the claimant's line manager, Mr Gargaro, had not been approached. The claimant listed 8 IBM and Tech Data managers with whom he had worked closely in the last 18 months who should have been contacted by Mr Jones and six 'downstream' client contacts with whom he had also worked closely within the last 18 months. None had been contacted by Mr Jones. He commented that it was now probably too late to get accurate feedback from Tech Data who were on notice of the claimant's appeal and were now concerned that the matter might become litigious.

10.98 Following the appeal meeting Mr Frisby contacted Mr Gargaro but was informed by him that he had not been involved in the redundancy process.

10.99 Mr Frisby contacted Mr Jones for written evidence for the comments in the scoring under potential and approach to work. Mr Frisby was rightly concerned that the claimant had never been given the opportunity to defend himself against the allegations of Mr Breslin and Ms Corbett.

10.100 Mr Frisby was concerned whether the score could be considered safe without documentation to support it. Mr Frisby particularly wanted evidence of the statement made by Mr Jones that the claimant's conduct had bordered on a breach of the Business Conduct Guidelines. He also wanted evidence of the claimant being rude. He wanted to know whether the claimant had ever been made aware of the alleged issues about his conduct by Mr Breslin or by his then manager, Mr Gargaro.

10.101 Mr Jones provided Mr Frisby with the email exchange between Ms Patel and Mr Cary and some “key financials” from the claimant’s secondment to Tech Data. Mr Jones confirmed that it was the only written evidence he had but he had also had feedback from John Breslin and Ms Patel. He asked Mr Frisby “*How do we get round this....?*”

10.102 Mr Frisby had no intention of getting round Mr Jones’s predicament. He intended to conduct an objective appeal.

10.103 Mr Frisby spoke to Mr Breslin about the meeting on which Mr Breslin had based his negative comments about the claimant. Mr Frisby discounted Mr Breslin’s comments although he said he had reason to disbelieve Mr Breslin.

10.104 Mr Frisby spoke to Ms Patel. She forwarded Mr Frisby evidence of having had to rebuke the claimant for the tone of his emails involving a negotiation between the respondent and Tech Data. She provided Mr Frisby with data relating to the failure of Tech Data to meet its baseline goals along with her email containing the feedback from Mr Cary which Mr Frisby already had.

10.105 Ms Patel also described two further issues with the claimant of which she was aware which supported an earlier complaint by Mr Breslin about the claimant accessing the respondent’s pricing information. Mr Frisby also discounted this issue for lack of evidence.

10.106 Mr Frisby then spoke to Mr Dawson. Mr Dawson told him that Ms Corbett had also told him about the claimant bullying her but she had asked for the matter not to be taken any further. He had regretted not taking any further step formally. Mr Dawson retired shortly after this conversation.

10.107 Mr Frisby held a rescore meeting with Mr Dawson’s replacement, with Ms Patel, Mr Jones and two HR business partners.

10.108 With regard to the 'Potential' criterion, Mr Frisby had asked the claimant for evidence of new skills that he had developed during his secondment. Mr Frisby was not satisfied with the claimant's responses and as a result the Potential score was not increased but the summary was amended to state: *The poor results associated with Project Maria, do not indicate Craig has immediate potential to perform a larger client valued role. Craig has held management and professional positions within IBM/TSS but with the TSS business declining and the size of the business contracting, there are no open opportunities now or in the foreseeable future where Craig could realign to the business. Tech Data have advised IBM that it is their intention to end the secondment, as they consider that the investment of funds in Craig's secondment has provided inadequate return and they seek to invest in higher growth. Little or no evidence of formal skill growth or investment in skill enhancement aligned to the growth areas of IBM has been identified.*"

10.109 Mr Frisby decided not to rescore the claimant's 'Performance' as despite the claimant's evidence of the effort he had made in his job at Tech Data , it had not been reflected in the sales performance of Project Maria which had been 21% of the target.

10.110 Mr Frisby shared his concerns with the 're-score committee' about the anecdotal allegations against the claimant including the comment that he had acted as a Tech Data and not an IBM employee. This review resulted in an increase the claimant's score to 10 out of 20 for Approach to Work. The claimant was not awarded 15 under this section because of the comments made by Mr Cary such as "*round tables set up took a lot of coaxing to get Craig to do them*" and "*self isolation rather than collaboration*". Mr Frisby and the rescoring meeting participants felt that this was persuasive as it had come from individuals in Tech Data. The summary comments for Approach to Work were also amended.

10.111 Although the moderation of Mr Jones' scores increased the claimant's overall score by 5 to a total of 46, he still did not reach

the breakpoint score of 56. Mr Frisby prepared his appeal outcome and sent it to the claimant on 7th September.

10.112 During the appeal exercise Mr Frisby kept no notes of his conversations with the people with whom he spoke about the claimant. There were no structured questions. Mr Frisby did not ask Tech Data for further feedback on the claimant's performance. He relied on the metrics provided by Ms Patel and did not check any underlying cause for poor financial performance of Project Maria with Tech Data, believing that at that point Tech Data would not be willing to provide any information. Nor did he take into account the failure of IBM to meet its baseline target in Project Maria. It was the case that both the respondent and Tech Data had failed to meet their respective targets under the joint venture agreement.

10.113 Mr Frisby took the simplistic view that the claimant was sales based and sales are measured in profit and the quality of that profit. He did not investigate whether the claimant had personal responsibility for the poor performance of Project Maria or indeed, Tech Data.

10.114 It was also the case that Tech Data did not wish to terminate the claimant's secondment 4 months prematurely. It ended just before the expiry of the contractual term.

10.115 The claimant completed early conciliation through ACAS on 12th November 2020 and filed his claim form on 4th January 2021.

Submissions

11. I am grateful to both Counsel for their written submissions. I also heard oral submissions. I have taken submissions into account in my deliberations and conclusions.

The law

12. Section 139(1) of the Employment Rights Act 1996 (ERA) is as

follows:

“For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a)

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind... have ceased or diminished or are expected to cease or diminish.”

13. S98 ERA includes:

“(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 dismissal; (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 is... that the employee is redundant.”

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

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

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

14. The definition of redundancy is defined in Section 139 of the Employment Rights Act 1996 and the definition applies both to claims for redundancy payments and for unfair dismissal claims.

S139(1) For the purposes of this Act, an employee who is dismissed shall be taken to be dismissed by reason of redundancy if that dismissal is wholly or mainly attributable to:

a) ...

b) the fact that the requirements of that business

- i. for employees to carry out work of a particular kind;
- or
- ii. for employees to carry out work of a particular kind in the place where the employee was employed by the employer, has ceased or diminished or are expected to cease or diminish.

15. There is a considerable amount of case law which illustrates these statutory principles. **Safeway Stores-v- Burrell**, affirmed in **Murray-v-Foyle Meats** which explains how, if there was (a) a dismissal and (b) a “redundancy situation” (shorthand for one of the sets of facts in s 139), the only remaining question under s 98(1) is whether (b) was the reason of if more than one the principal reason for the happening of (a).

16. Dismissal by reason of redundancy may be unfair if there was (a) inadequate warning and consultation (b) unfair selection (c) insufficient effort to find alternatives to avoid or minimise redundancy. In this case the procedure in terms of warning and consultation meetings is not challenged. Nor is the selection pool challenged. The challenge by the claimant relates to alleged ill-defined scoring criteria and an unfair scoring exercise.

17. The main case on fair selection is **British Aerospace-v-Green** [1995] ICR 1006 which held that provided an employer sets up a selection method which can reasonably be described as fair and applies it without any overt sign of bias which would mar its fairness, it will have done what the law requires.

18. Selection criteria which are objective are preferable to those which are subjective, but in **Samsung Electronics U K Ltd-v-Monte De Cruz EAT/0039/11/DM** Underhill P held:

“Subjectivity” is often used in this and similar contexts as a dirty word. But the fact is not all aspects of the performance or value of an employee lend themselves to objective measurement, and there is no obligation on an employer always to use criteria which are capable of such measurement”.

19. In **Lancaster (Brewers) Ltd v Tattersall** it was held: Just because criteria of this sort are matters of judgment, it does not mean that they cannot be assessed in a dispassionate or objective way, although inevitably such criteria involve a degree of judgment, in the sense that opinions can differ, possibly sometimes quite markedly, as to precisely how the criteria are to be applied, and the extent of which they are satisfied, in any particular case. However, that is true of virtually any criterion, other than the most simple criterion, such as length of service or absenteeism record. 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.

20. Applying the principles in **British Aerospace** (above), in **Nicholls v Rockwell Automation Ltd UKEAT/0541/11/SM HHJ David Richardson** held that as in other areas of unfair dismissal, the Tribunal must not investigate the facts underlying the dismissal and reach its own conclusions on them. Instead, it must start with the reasoning of the employer and consider whether the employer acted within the range of reasonable responses: see [21]-[24]. The Tribunal will therefore err if it embarks upon a detailed critique of certain individual items of scoring in a case where a fair system of selection was applied without overt signs of unfairness: see [28]. It is, moreover, crucial that the Tribunal does not substitute its view of the scores that ought to have been given for those given by the Respondent: see [29]-[30].

20. The information an employer is required to provide the employee about his/her scores is also to be assessed against the standard of what is reasonable in all the circumstances. The central point is that the employee knows enough to challenge the scores and provide further information about them should s/he decide to do so: see **Camelot Group Plc v Hogg UKEATS/0019/10/BA** per Lady Smith at [45]-[46] and [71], applying **Pinewood Repro Ltd v Page [2011] ICR 508**; and the observations made by Burton J in **Davies v Farnborough College of Technology [2008] IRLR 14** at [9] (in the context of the former-statutory dismissal procedures).

Conclusions

21. Applying the law to the facts, was the selection criteria of Potential and Approach to Work inherently so subjective that they could never be capable of being a fair selection criterion?

22. The respondent went to considerable lengths to ensure that its managers who had conduct of the redundancy procedures were fully trained to implement a fair and transparent redundancy process. The success of the redundancy programme in terms of transparency and fairness, and subsequent lack of litigation arising from redundancies, depended on each manager taking his responsibilities extremely seriously and applying diligence, care, an inquiring and open mind and fairness to the task of applying and marking the selection criteria.

23. Above all the managers had to follow their training. They were spoon fed with scripts and guidance on how to deal with the at risk employees. They had the support of HR. The managers were warned to take give the whole exercise sufficient time, care, attention and focus. Had Mr Jones followed the training instructions he had received, particularly in respect of supporting his summary finding with robust evidence, as he had been required to do, the criteria of Performance, Potential and Approach to Work were potentially capable of being applied fairly provided that the scoring manager adopted an independent, objective and analytical approach to what is inevitably subjective assessments or opinions he received about the claimant.

24. In the case of the claimant selection criteria were not completed with an independent, objective and analytical approach by Mr Jones. Mr Jones conducted a lazy and superficial fact finding inquiry into the claimant's performance on Project Maria. He failed to recognise the need to pay particular attention to the claimant's situation on secondment. He adopted Mr Breslin's scoring of the claimant despite the claimant having met Mr Breslin once in the previous 18 months. He accepted a personal negative comment by Mr Breslin about the claimant's conduct without fact checking. He relied on a complaint from Ms Corbett about which the claimant had no knowledge. Each of the complaints were historic and had instigated no formal procedure to enable the claimant to put his case in his defence. This was grossly unfair.

25. With regard to Mr Cary's comments, as relayed by Ms Patel, Mr Jones also relied on the more negative aspects of Mr Cary's comments and ignored the more positive aspects, such as:

“Highly skilled, very knowledgeable but not see him 'selling'. Hard for you to say whether a different person would have got different results.”

And

“Don't want to confuse the person with the viability of the business.”

And

“Operationally the channel has been set up but not getting sufficient return on investment as of yet to justify potential continued investment. This is not a reflection on Craig's capability, however testament of the challenging business environment.”

And

“Set up excellent but not seeing the benefit.”

These comments along with the negative comments required further investigation to place them in context.

26. It was known within senior management that Project Maria had structural problems which was holding back sales. Project Maria was not performing well in the UK and across Europe. This should have prompted Mr Jones to conduct a much more in-depth inquiry into the correlation between the claimant's sales effort and the structural difficulties in the joint venture which were preventing higher sales for Project Maria. He needed to speak to the right people in IBM and Tech Data. He should have prepared a list of relevant and probing questions to elicit the information from relevant stakeholders in BM and Tech Data for him to make an accurate assessment of the claimant's performance. Instead he relied on personal anecdotal

evidence about alleged misconduct by the claimant which the claimant was completely unaware, and Ms Patel's short conversation with Mr Cary. Ms Patel could not recall in cross examination what questions she had asked Tech Data. It is not known whether Mr Cary's comments were in response to questions or volunteered without prompting, or whether Mr Cary knew he comments would be used in the redundancy selection of the claimant. Ms Patel's preparation for the interview appeared to be non-existent. In any event, Mr Cary's comments were insufficient and needed following up with searching questions and requests for explanation of the comments both negative and positive.

27. I do not attempt to re-score the claimant. I am clear however that the scoring /ranking exercise undertaken by Mr Jones was biased, superficial and wholly inadequate. The claimant and the respondent were let down by the inadequate scoring /ranking process conducted by Mr Jones and the subsequent failure of Mr Jones to justify his scoring of the claimant. The claimant's redundancy dismissal was unfair and not within the band of reasonable responses of a reasonable employer conducting such an exercise.

28. I then turn to Mr Frisby's appeal process. Mr Frisby rightly identified immediately that the comments by Mr Breslin and Ms Corbett could not be taken into account and that they rendered the score for Approach to Work as unsafe.

29. Mr Frisby did make a limited attempt to investigate further. He spoke to Mr Dawson who knew that there were channel wide problems with Project Maria which were not specific to the claimant.

30. However, Mr Dawson told Mr Frisby that he too had had comments made to him by Ms Corbett about bullying by the claimant which were never followed up and put to the claimant. Sensibly Mr Frisby also ignored this further personal anecdotal evidence concerning Ms Corbett's complaints.

30. Ms Patel and Mr Dawson provided Mr Frisby with information which they said showed that the claimant had accessed IBM sales information on behalf of Tech Data. He sensibly ignored those negative comments too, because they were unsupported by adequate evidence or inquiry with the claimant.

31. However Mr Frisby relied on the fact that Project Maria had not met its sales metrics. He, like Mr Jones took a simplistic view that poor sales were attributable to the claimant. He took no steps to speak to those who had worked with the claimant in the Channel to establish whether the claimant had made real, proper commitment and effort, and whether having made proper effort he, or any other sales representative could have made Project Maria succeed given the recognised structural problems with the project. The evidence strongly suggests that there were serious issues within the project itself which were out of the claimant's power and control.

32. Mr Frisby was more diligent than Mr Jones, but not diligent enough to get to the truth of the matter on Project Maria and the degree to which the claimant could reasonably be held personally responsible for the failure of Project Maria. Mr Frisby could only have done this by interviewing other managers including Tech Data managers who worked with the claimant and could make an honest assessment of his work and commitment to Project Maria. The claimant was an employee of 20 years standing with a good career history up to the point of Project Maria and he was entitled a redundancy process which had integrity.

33. Mr Frisby was however, fixed with the brief comments from Mr Cary in response to unknown questions from Ms Patel and in an unknown context of why questions were being asked, because after the claimant's dismissal, Tech Data managers did not want to cooperate with IBM in providing further information about the claimant. The opportunity to conduct a proper assessment of the claimant's performance in Project Maria had been missed by Mr Jones who had not asked for a formal report under the terms of the secondment agreement with Tech Data. That missed opportunity could not be corrected by Mr Frisby without significant inquiry of other IBM managers who had an interest in Project Maria and had worked with the claimant.

34. With regard to Performance, it was not fair to pin the poor results and failure of Project Maria onto the claimant without more concrete information and then rely on that unfair finding of Mr Jones

to conclude that the claimant had no immediate potential to perform another management role in the respondent's organisation.

35. With regard to increasing the score under Potential, Mr Frisby had the claimant's evidence as to his formal skill growth and his investment in skill enhancement aligned to the growth areas of IBM. The claimant had been recognised as a high performer in his annual appraisals prior to Project Maria. The purpose of the C4G secondment programme was itself to develop IBM employees' skills. Entering the secondment programme was in itself a challenge that the claimant took in a project which was of significant importance to the respondent. Again, Mr Frisby might have come to a different view if he had spoken to other managers with whom the claimant had worked in the previous 18 months on Project Maria which might have enabled him to come to an informed view on whether Mr Jones's Potential score could have been increased from 7/20, but he did not. This was a failure to complete a full and thorough appeal investigation.

36. The appeal started on the right lines but was not followed through with sufficient scope and inquiry to correct the inadequacies in the evidence relied upon by Mr Jones. The appeal conducted by Mr Frisby did not 'cure' the unreliability and unfairness of the dismissal decision.

37. In conclusion I find that the redundancy selection process resulting in the claimant's dismissal was unfair. If a balanced, thorough and untainted selection process had been followed which included a realistic assessment of Project Maria and the claimant's work to contribute to its success, it is a possibility that the claimant would have had a score which increased sufficiently to reach the breakpoint threshold of 56. It is not inevitable that he would have been retained. Mr Joseph identified areas in which the claimant could have worked not harder, but smarter. The redundancy programme failed to identify that possibility. Taking an overall view of the evidence, the potential for the scores in Performance, Potential and Approach to Work to be increased, if a fair selection criteria assessment been carried out, is sufficient for me to find that under Polkey principles, the claimant had a 50 percent chance of being

retained in the respondent's employment, alternatively a 50% chance of being dismissed.

Signed by
Employment A Judge Richardson
Signed on 14th December 2021

Judgment sent to Parties on
15/12/2021