



EMPLOYMENT TRIBUNALS

Claimant: Mr P Downey

Respondent: Resource Management Solutions (North East) Limited

Heard at: Manchester (by CVP) **On:** 26 and 31 August 2022

Before: Judge Cowx (sitting alone)

REPRESENTATION:

Claimant: Mr Jonathan Heath Solicitor

Respondent: Mr Anthony Willis Solicitor

RESERVED LIABILITY JUDGMENT

1. The claimant's claim of unfair dismissal contrary to Section 98 of the Employment Rights Act 1996 is well founded and succeeds.

REASONS

2. This was a final hearing conducted remotely by CVP on 26 and 31 August 2022. The parties did not object to the case being heard remotely.

3. I indicated to the parties at the close of the hearing on 31 August 2022 that I would provide a written judgment.

4. The claimant brought a claim of unfair dismissal against the respondent on the basis the exercise conducted by the respondent, which resulted in the claimant's redundancy, was unfair.

5. A list of issues was produced by Mr Heath for the claimant which was agreed by Mr Willis for the respondent. The list of issues was as follows:

- (1). Why was the claimant dismissed? (It was agreed that there was a genuine redundancy situation, but the respondent was put to proof that redundancy was the reason for the claimant's dismissal.)
- (2). Did the respondent seek to agree with the union or the workers at risk the selection criteria to be employed?
- (3). Were the selection criteria within the range of choices open to a reasonable employer?
- (4). Were the criteria applied fairly?
- (5). If the claimant's dismissal was unfair, was the unfairness cured by the appeal process?
- (6). If the claimant's dismissal was unfair, what chance (if any) is there that he would have been dismissed in any event?

6. Prior to the hearing the Tribunal was provided with an electronic bundle running to 103 pages. Additional documents were served by the respondent in addition to the bundle before and during the hearing, without objection.

7. I heard oral evidence from the respondent's Managing Director (MD), Mrs Carole Martin, the respondent's HR Director, Mrs Nicky Tooke, and from the claimant.

8. The respondent's title was given by the claimant in his claim as "RMS Resource Management" when in fact the respondent is a registered company with the title "Resource Management Solutions (North East) Ltd". I have amended the respondent's title in this judgment to accurately reflect its legally correct title.

FACTS

9. The respondent provides outsourced human resources (HR) support and labour to clients, which include CAT UK Services Ltd (hereafter "CAT"), a company providing an automotive logistics service to companies which include Jaguar Land Rover.

10. The claimant was employed by the respondent as a Vehicle Handling Operative (VHO) working for CAT at the Jaguar Land Rover site at Halewood.

11. Because of a downturn in business resulting from the global Covid pandemic CAT and Jaguar Land Rover were required to reduce their workforces. This included reducing the number of VHOs at the Halewood site.

12. The respondent took steps to avoid compulsory redundancies by proposing employees roll over unworked hours from 2021 into 2022. This suggestion was rejected by those in scope for redundancy on the basis they felt they would be working additional hours for no additional pay.

13. The claimant accepts that the redundancy exercise embarked upon by the respondent was a genuine one because of the downturn in the client company's business and because no reasonable alternative to redundancies was found. Therefore, there was a genuine need for redundancies.

14. The claimant alleged that he was targeted for redundancy because he had previously made a complaint about employee facilities at the Halewood plant and because he spoke out against Mrs Martin's proposal that employees roll over unworked hours. Mrs Martin denied this, and the claimant produced no evidence to support the suggested reasons why he was targeted as he believed. There is insufficient evidence to satisfy me that the claimant was targeted for redundancy by the respondent because of the reasons he gave.

15. The respondent decided upon a set of five criteria for the eight Halewood based VHOs at risk of redundancy. The respondent had to make five of the eight VHOs redundant.

16. As the MD it was Mrs Martin who identified the selection criteria, drawing upon experience or knowledge of other redundancy exercises. I found Mrs Martin to be an unconvincing witness on this particular point because she was reluctant to admit that she personally identified the criteria to be used. She at first sought to explain that it was a group decision taken collectively by herself, Mrs Tooke, Laura Murdoch (also a HR director employed by the respondent) and managers from the Halewood site, but eventually accepted that she proposed the criteria which were then agreed with Mrs Tooke, Laura Murdoch and managers from Halewood.

17. Mrs Martin asserted that the respondent engaged with the VHOs' union and that the union agreed the criteria before the redundancy exercise which selected the claimant. But email correspondence produced to the Tribunal by Mr Willis on 31 August 2022 revealed that the redundancy selection criteria was not disclosed to the union until 27 October 2021, which was after the scoring exercise that selected those to be made redundant. This can be seen in the email from Steve Berry of CAT to the claimant's union representative, Joey Swift, at 17:31 on 27 October 2021. Mr Berry was forwarding information he had received earlier that day by email, at 13:47, from Rhianne Bertie, the respondent's HR representative at the Halewood plant.

18. The five selection criteria chosen by Mrs Martin and agreed by other stakeholders were absence (from January 2021), disciplinary, punctuality (from January 2021), "Stand Up" (i.e. acting as team leader) and training processes.

19. Mrs Martin decided that Stand Up experience and training processes were important criteria as the VHO role was varied, and she wanted to ensure the respondent and the client retained as many skills as possible at a time when the business was vulnerable.

20. The following points system was used by the respondent to score the VHOs against the criteria.
21. For absence, 10 points were awarded for no absences, 7 points for one absence, 5 points for two or three and 1 for four or more. Absences were not judged on the total number of days absent but on periods of absence.
22. For the purpose of the absence criterion, Covid infection or any form of Covid related absence was not counted but all other forms of sickness were.
23. For disciplinary, a clear record carried 10 points, a Written Warning carried 5 points and a Final Written Warning 1 point.
24. For punctuality, no late attendances was rewarded with 10 points, one lateness by 7 points, two or three by 5 points and four or more by 1 point.
25. The scoring mechanism for the training and Stand Up criteria were weighted quite differently to absence, disciplinary and punctuality. There was a significant inconsistency between the evidence of Mrs Martin and Mrs Tooke on how the Stand Up criterion was assessed.
26. Mrs Martin's evidence was that where a VHO had not stood up as team leader they received 2 points. Where they had stood up for a period of less than 6 months, they received 10 points and those who had stood up for more than 6 months received 20 points.
27. Mrs Tooke disagreed and said 10 points were awarded to those who had stood up for any number of days in the previous 6 months and 20 points for any number of days in the last 12 months. Mrs Tooke must have been mistaken. Her explanation was illogical because if it was accurate, it would have resulted in significantly more points being awarded to a VHO who had acted as team leader on fewer occasions over a 12-month period than one who had stepped up more often in a 6-month period.
28. Mrs Martin chose this particular criterion and used it in the selection exercise when Mrs Tooke did not use it as part of the appeal process. Mrs Martin was better placed to understand the criterion than Mrs Tooke and the way in which the criterion is described on the redundancy selection matrix at page 57 of the bundle better reflects Mrs Martin's description of the criterion than Mrs Tooke's.
29. The training processes criterion was similarly heavily weighted, with 2 points awarded for completing and being signed off on fifteen processes, 10 for sixteen and 20 for seventeen processes.
30. The respondent, and those employees involved in running the redundancy exercise, had ready access to all of the data required for the redundancy scoring exercise. Mrs Martin said she did not have the necessary data available to her when she decided on the criteria, yet she could not recall the date when she selected the criteria. Mrs Martin later accepted that she had the absence data as early as 20

October 2021 which was the day before the redundancy consultation meeting Mrs Martin, Mrs Tooke and Mrs Bertie had with the VHOs.

31. It is more likely than not that Mrs Martin had all of the data on absence, disciplinary, punctuality, Stand Up experience and training to hand at the time she decided on the criteria. It was accepted in evidence that the respondent had immediate access to absence, disciplinary and punctuality data and that Stand Up experience could be determined from the employee payroll records.

32. Mrs Martin accepted in evidence that she asked for a summary of the VHOs' absence records (produced by Mr Willis as document A1 on 31 August 2022) to be printed off on 20 October 2021 which was five days before the consultation process with the VHOs ended (on 25 October 2021 according to Rhianne Bertie's email to Steve Berry at 13:47 on 27 October 2021).

33. The training information had to be requested from the client company at Halewood and Mrs Martin's evidence was that this was requested by email on 25 October 2021 from Carl Woodward as Halewood. But it was not suggested by Mrs Martin or Mrs Tooke that there was any difficulty or delay in obtaining such data and the fact the respondent had a HR representative, Mrs Rhianne Bertie, on site will have made access to such records easier.

34. Mrs Martin could not recall the day on which she completed the scoring exercise, but it must have been completed before 13:47 on 27 October 2021 which is when Rhianne Bertie emailed the scores to email to Steve Berry. Mrs Martin returned to this question when recalled to give evidence on 31 August 2022, when she said all of the criteria, less training, were scored on or by 25 October 2021 and the training information was not received from Carl Woodward at Halewood until 25 October 2021.

35. In Mrs Martin's scoring exercise, Mr Downey was awarded the maximum of 10 points each for disciplinary and punctuality but only 1 point for absence. He was also awarded 10 points each for Stand Up experience and training processes completed, giving him a total score of 41 which placed him 5th out of 8 and therefore selected for redundancy.

36. On 1 November 2021, Mr Downey lodged an appeal against the redundancy decision. Mrs Tooke decided that appeal and upheld the decision to make Mr Downey redundant.

37. The basis of Mr Downey's appeal was that the redundancy selection process was unfair, specifically the scoring system, which was unexplained prior to it being carried out. Mr Downey raised a particular concern about the training criterion in that he felt he was at an unfair disadvantage. He did not have the opportunity to be signed off on the vehicle fuelling process because he was furloughed, when fellow VHO, Steven McCabe was not. Mr McCabe received the training, on what Mr Downey insisted was a simple process, which he had performed in practice but had not been formally trained on. As a result, Mr McCabe received 10 more points than Mr Downey for the training criterion, thus saving Mr McCabe from redundancy.

38. Mr Downey also raised a concern regarding the weighting given to completed training processes and the 10-point difference between sixteen and seventeen processes.

39. Mrs Tooke took about 6 weeks to consider the concerns raised by the several VHOs who appealed against the redundancy decisions. Mr Bennett complained that it was unfair to include Stand Up as a criterion because he had not been given the opportunity. Mrs Tooke therefore decided that it was unfair to include the Stand Up criteria and removed it from the appeal process when rescoring the VHOs at risk.

40. Mrs Tooke discovered that the training matrix provided by Carl Woodward to Mrs Martin on 25 October 2021 was inaccurate and training completed by some VHOs was not made known to and taken into account by Mrs Martin. Instead of investigating the matter further and obtaining the correct or most accurate data on training Mrs Tooke decided the training data was not sufficiently reliable and decided to discard it as a selection criterion.

41. Mrs Tooke said that she did not consult Mrs Martin about dropping the Stand Up and training criteria. She said Mrs Martin was on holiday at the time. Mrs Martin concurred with this and said she was not consulted by Mrs Tooke. I was not persuaded by Mrs Tooke or Mrs Martin that this was true because removing two of only five of the original redundancy criteria, selected by the respondent's MD and agreed with the client company, was a significant decision as it radically altered the redundancy selection exercise which Mrs Tooke repeated as the appeal body.

42. I find it more likely than not that Mrs Tooke did seek direction and approval before doing so. Repeatedly in her evidence on this point, Mrs Martin used the word "we" when referring to the decision to remove the training and Stand Up criteria. I am satisfied this reflects the fact Mrs Martin did play a part in the decision to drop the two criteria.

43. Mr Downey asserts that favouritism was shown to Steven McCabe because his wife is a good friend of Rhianne Bertie. Mr Downey explained what he knows of that friendship, and I was persuaded by his detailed knowledge that there exists such a friendship. Mrs Martin and Mrs Tooke insisted that they were unaware of that friendship and there is no direct evidence to say that they did know of it. Mrs Martin insisted that Rhianne Bertie played no part in the redundancy selection exercise, specifically the selection of the criteria or the scoring process. As the respondent's HR representative at Halewood, she must have played an active role in the redundancy process but there is no direct evidence to support Mr Downey's suspicion that Rhianne Bertie was involved in the selection of the criteria or the scoring exercise.

44. However, there is evidence that Mr McCabe did benefit from the choice of criteria and the manner in which the scoring exercises were conducted. Mr McCabe was allowed to keep his job despite placing joint bottom when the revised criteria were scored by Mrs Tooke. I find the circumstances suggest that Mr McCabe was in some way favoured over other candidates, which I will expand upon below.

45. The absence criterion was incorrectly scored by Mrs Martin which led to more points than deserved being awarded to some and fewer than deserved to others.

46. Mrs Martin accepted in her evidence that document A1 was the absence summary she used to score the absence criterion. An inspection of that document alongside Mrs Martin's scoring matrix shows that she made mistakes.

47. In the first instance, Mrs Martin incorrectly attributed four periods of sickness absence to Mr Downey. I assume this is because the period of absence starting on Fri 22 January 2021 to Fri 29 January 2021 spanned two working weeks. This was corrected at the appeal when it was accepted Mr Downey was absent for only three periods from January to October 2021. This means that the claimant should have scored 45 points and not 41 points in the redundancy exercise.

48. Mrs Martin found that Mr McCabe was absent for only one period when document A1 shows that he was absent due to sickness for two separate periods: 11-15 January 2021 and on 28 March 2021. Therefore, Mr McCabe should have been awarded 5 points not 7 for absence which would have reduced his score to 44.

49. There is an inconsistency between the absence dates for Mr McCabe in the absence summary for all VHOs (document A1) and the absence printout for Mr McCabe. The number of days and periods are the same, but the dates differ by about one week. This inconsistency does not affect the score that should have been awarded for absence.

50. No absences were attributed to Mr Laidlaw yet document A1 shows that he was absent with non-Covid sickness on 11 January 2021 which should have reduced his score by 3 points, taking his final score to 39. No oral evidence was led during the hearing about that single day of sick absence but I rely upon the absence record produced by the respondent which speaks for itself in that Mr Laidlaw should have scored 7 points for absence not 10.

51. A further anomaly came to light during the course of the hearing. Document A1 shows that Mr Bennett had only a single day's sickness absence, on 21 March 2021. However, on 28 August 2022, Mr Willis produced a screenshot from the respondent's HR system, "Access People", which shows three further sickness absence entries for Mr Bennett which do not appear on the absence summary printed off on 20 October 2021 (document A1). The screenshot indicates that Mr Bennett was off sick for one day each on 9 and 15 February 2021 and for 1½ days on 18 and 19 February 2021. When asked to explain this, Mrs Martin said Mr Bennett's line manager had allowed Mr Bennett to take unpaid leave for those days in lieu of sickness absence. While I accept that to be the truth, an employer acting reasonably would consider that such a practice seriously undermines the use of sickness absence as an appropriate criterion for this particular redundancy selection exercise. The purpose of considering an employee's absence record when deciding who is to be made redundant must be to determine the reliability and productivity of those employees in scope for redundancy. Allowing an individual to retrospectively convert sickness absence into unpaid leave merely masks the truth and produces an inaccurate set of data which is prejudicial to those who elected not to take leave in lieu of sickness absence. If the additional absences were taken into account, Mr

Bennett's total score would have been reduced by 6 points to 33. However, this would not have altered Mr Bennett's final placing close to the bottom of the redundancy table and did not adversely affect Mr Downey.

52. Mr Downey also argued that it was unfair not to count absence for Covid related reasons, be they Covid sickness or Covid isolation. Mrs Martin told the Tribunal that a decision had been taken not to count Covid absence as part of the respondent's absence management or disciplinary protocols. To disregard Covid absence but to count other sickness absence might be viewed by some as unfair, but the respondent gave its reasons for doing so and I accept this approach was within the band of reasonable responses open to an employer.

53. Having examined the final scores and placings in the initial redundancy scoring exercise, Mr Downey should have been awarded 45 points, Mr McCabe 44 points and Mr Laidlaw 39 points. Therefore, Mr Downey should have been placed 3rd out of 8 and above the redundancy line.

54. Turning to the appeal process conducted by Mrs Tooke. Because of the decision to discard training processes and Stand Up experience, only the three remaining criteria were scored, which altered the final placings of the VHOs.

55. Using the revised methodology, Mr Downey dropped from 5th to joint bottom place with Mr McCabe. Mr Laidlaw went from 4th (below the redundancy line) to joint 1st place with Mr Kenny and Mr Moran.

56. Mr McCabe's second period of absence was identified, and he was deducted a further 2 points, but a points deduction for punctuality was reversed by Mrs Tooke. The computer printout for Mr McCabe shows that he was late clocking in to work on at 06:06 on 11 March 2021. Mrs Tooke in evidence gave her reasons for not penalising Mr McCabe which was that because there was no evidence of a wages deduction or a note on the system from the compound manager, Mrs Tooke decided to ignore the clocking in record and to assume the compound manager had authorised the late attendance. However, Mrs Tooke accepted that she did not confirm this was the case by speaking to the compound manager. If Mrs Tooke had not reversed Mrs Martin's original score for punctuality, Mr McCabe would have scored 22 points; the lowest score of any of the VHOs. To ignore the computer clock-in data and assume the lateness was authorised without investigating the matter with the compound manager was not a reasonable course of action or a reasonable basis for reversing Mrs Martin's penalty for lateness, however that decision does not materially alter Mr Downey's case because he would still have been well below the redundancy line at the appeal stage because of the score awarded to him by Mrs Tooke .

57. Despite placing joint bottom in the appeal scoring round, Mr McCabe kept his job with the respondent. Mrs Tooke was asked to explain why this was the case. She told the tribunal that Mr McCabe kept his job because he had been told after the original redundancy decision that he was not being made redundant and he had been working throughout the 6 weeks between the original decision and the outcome of the appeal process.

THE LAW

58. The relevant law is to be found in the Employment Rights Act 1996 (*“the ERA”*) at:

Section 94

(1) An employee has the right not to be unfairly dismissed by his employer.

Section 98

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

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

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

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

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

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

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

59. The proper application of the general test of fairness in section 98(4) ERA has been considered by the Appeal Tribunal and higher courts. The Employment Tribunal must not substitute its own decision for that of the employer: the question is rather whether the employer's conduct fell within the "band of reasonable responses": **Iceland Frozen Foods Limited v Jones [1982] IRLR 439 (EAT)** as approved by the Court of Appeal in **Post Office v Foley; HSBC Bank PLC v Madden [2000] IRLR 827**.

APPLYING THE FACTS TO THE LAW

60. In determining whether the claimant's dismissal was fair it is for the respondent to show the reason and that such reason falls within subsection 98(2) of the ERA or was for some other substantial reason. The respondent asserts that the reason was redundancy.

61. The reason the claimant was dismissed was redundancy. The pool of those at risk of redundancy was fairly selected based on length of service.

62. The respondent did not seek to agree with the union or the workers at risk the selection criteria to be used in the redundancy selection exercise, but that failure did not make the exercise unfair because the criteria selected were reasonable.

63. Although the claimant considered the absence criterion to be unfair (and some would agree that discounting Covid related absence was unfair to those who had been off sick for non-Covid reasons), the selection criteria chosen for the redundancy exercise were within the range of reasonable choices open to an employer.

64. Although the criteria selected were fair and reasonable in themselves the scoring system selected for training and Stand Up experience was so obviously unfair and likely to produce a perverse outcome that it was not within the range of reasonable options open to an employer.

65. A hypothetical scenario illustrates the point. If VHO A had an exemplary absence, punctuality and disciplinary record, had no acting team leader (Stand Up) experience and completed sixteen of twenty training processes, he would have received a total of 42 points. If VHO B had a perfect absence and punctuality record, but a poor disciplinary record and was on a Final Written Warning, had no Step Up experience but had completed one more training process than VHO A, he would achieve a score of 43 and perhaps keep his job when VHO A was dismissed. The employee with the poor discipline record would keep his job over the one with an exemplary discipline record simply because the former had completed an additional simple training session.

66. While the above scenario is a hypothetical one it demonstrates that the weighting given to the training processes criterion was not within the band of reasonable responses as it was bound to unfairly skew the final results.

67. At the appeal stage, Mrs Tooke believed the decision to abandon the training and Stand Up criteria was fair overall to all VHOs, but it was not. Mrs Martin as the MD carefully selected these two criteria on the basis that the business was vulnerable at that time, and she wanted to retain as many skills as possible. By abandoning the training and Stand Up criteria, Mr Downey was unfairly penalised. His strengths, which were training and team leader experience, were denied to him at the appeal stage and he scored even lower than he did in the original exercise.

68. Mrs Tooke became aware that training data was missing from the original spreadsheet provided to Mrs Martin. She was aware that some completed training had not been recorded which means that some VHOs may have been underscored. Mrs Tooke could and should have investigated the matter further and I am satisfied she could have obtained an accurate training record if she had tried. She did not do so. Those who were more highly trained and had the skills Mrs Martin sought to retain lost valuable points at the appeal stage when those who had completed less training benefitted from Mrs Tooke's decision. To abandon such a carefully chosen criterion, which measured an employee's knowledge and skills, without first attempting to obtain the most accurate information, was not within the band of responses open to a reasonable employer who would have exercised persistence in an effort to obtain accurate data.

69. Mrs Tooke abandoned the Stand Up criterion because she said it was unfair to those who had no such experience. As a result, Mr Downey had more points deducted from his total. I find it was unfair and unreasonable for Mrs Tooke to do so. Again, this criterion was chosen by Mrs Martin with the intention of retaining skills and experience, which was a reasonable response by the respondent. Mrs Tooke reacted in favour of those VHOs who complained they had not had the opportunity to Stand Up. Mr Downey challenged this in evidence and said that those who complained did have the opportunity but had refused it. No attempt was made to rebut what Mr Downey had to say on this point. Before abandoning the criteria, the reasonable employer would have investigated further to establish whether an equal opportunity to Stand Up existed and if such opportunity had been rejected, but no evidence was adduced by the respondent on this point and I draw the inference that no such effort was undertaken.

70. Instead of identifying and correcting the mistakes made in the redundancy selection exercise, Mrs Tooke radically altered the criteria framework which resulted in another unfair outcome.

71. Turning to the application of the criteria. In the original scoring exercise conducted by Mrs Martin, the chosen criteria were not applied fairly for several reasons. The most obvious reason is the error made in scoring the absence criterion which by itself, if carried out correctly, would have put Mr Downey in 3rd place and above the redundancy line.

72. Mr Downey's selection for redundancy was unfair because the absence criterion chosen by the respondent was carelessly and mistakenly applied. The scoring system chosen was simple and the respondent had the VHOs' absence data in a clear and unambiguous format in an absence summary document (A1). A microscopic analysis of the scores is not necessary in this case when the data the

respondent had in its possession and used to score the absence criterion was so clear and unequivocal. The wrong scores for absence were awarded to Mr Downey, Mr McCabe and Mr Laidlaw, which resulted in Mr Downey receiving fewer marks than he deserved, and which incorrectly put him in 5th and not 3rd place.

73. I have also referred to the excessive weighting given to the training and Stand Up criteria which gave an unreasonable advantage to those who placed above Mr Downey.

74. Mr Downey's dismissal was unfair because he was not correctly marked against the chosen criteria. Notwithstanding the excess weight given to training and Stand Up, incorrect scores were awarded for absence, and it was this which prompted his dismissal. Mr Downey should have been safe from redundancy in 3rd place.

75. The unfairness was not cured by the appeal process which was in itself unfair because removal of two of five criteria was a significant shifting of the goalposts which caused further disadvantage to Mr Downey. He ended up in joint last place for the sole reason he had more sickness absences in the preceding 10 months than his colleagues.

76. I have considered whether the claimant would have been dismissed in any event and I find he would not. There is no reason why he would have been dismissed if the original redundancy scoring exercise had been conducted correctly and without the errors identified.

77. I turn finally to the questions of whether Mr Downey was targeted and whether Mr McCabe was actively treated more favourably. Although these are not issues identified by the parties for the Tribunal to decide I address them as follows. I have found no evidence to support the suggestion by Mr Downey that he was targeted by his employer for being outspoken about facilities at Halewood or the suggestion of working unpaid rolled over hours to avoid redundancy.

78. There is no direct evidence that Mr McCabe was favoured by the respondent in some way or that bias was shown in his favour. However, having considered the circumstantial evidence I conclude that it is more likely than not that Mr McCabe benefitted from some form of favouritism, whether conscious or unconscious.

79. In the original redundancy exercise, Mr McCabe was placed higher than he deserved because a second period of absence was ignored. I can find no reasonable explanation why that would be so when his two periods of absence are clear from the absence summary printout used by the respondent to score the criterion.

80. I find the scoring system used for the training and Step Up criteria to be highly unusual and one which would cause suspicion in the mind of a reasonably informed, impartial observer. In a process where only a maximum of 10 points were available for exemplary absence, discipline and punctuality records, awarding a full 10 points for completing training on a single, very simple process such as vehicle refuelling is peculiar. Mr McCabe stands out as the VHO who benefitted most from the scoring

system used for training processes. The fact he had been trained simply to fuel a vehicle gave him a full 10-point advantage over every other VHO at risk, except Mr Jennings, over whom he was granted an extra 18 points.

81. To reward an individual with 2 points for not meeting the Stand Up leadership criterion at all is also unusual and again benefitted Mr McCabe, although he was not alone as Mr Warren, Mr Bennett and Mr Jennings also benefitted.

82. I was not satisfied by Mrs Tooke's explanation for ignoring Mr McCabe's punctuality penalty and I find the fact Mr McCabe kept his job after coming bottom in Mrs Tooke's rescoring exercise is evidence to suggest he was for some reason favoured by the respondent.

83. The claimant was unfairly dismissed contrary to Section 94(1) of the ERA because the absence criterion used by the respondent was incorrectly scored. .

84. I therefore uphold the claimant's claims of ordinary unfair dismissal and I dismiss the claimant's claim of automatic unfair dismissal.

CASE MANAGEMENT ORDER

85. Remedy will be determined at a one-day final hearing before Judge Cowx sitting alone on **Monday 31 October 2022** starting at 10am or as soon as possible afterwards. The parties and their representatives, but not necessarily any other witnesses, must attend by 9.30am that day. The hearing will be at **Alexandra House, 14-22 The Parsonage, Manchester M3 2JA** but the parties may attend by CVP.

86. By 4pm **5 October 2022** the respondent is to produce an up-to-date Schedule of Loss to the claimant and to the Tribunal. With that Schedule of Loss, the claimant must confirm whether or not they seek reinstatement.

87. By 4pm on **19 October 2022** the claimant is to provide a written response to the Schedule of Loss to the claimant and to the Tribunal indicating points that are agreed or disagreed. The respondent is also to explain its position on reinstatement if that is pursued by the claimant.

Judge C J Cowx

9 September 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON

13 September 2022

FOR THE TRIBUNAL OFFICE