EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mark Bromilow	v	UK Mission Enterprise Ltd

Heard at: Bury St Edmunds ET Centre **On**: 16th December 2021

Before: Employment Judge Conley

Appearances
For the Claimant: Mr Mike Magee (Counsel)
For the Respondent: Mr Daniel Barnett (Counsel)

RESERVED JUDGMENT

The Claimant's claim that he was unfairly dismissed is not well founded and is therefore dismissed.

REASONS

BACKGROUND

1. By a claim form presented to the Employment Tribunals on 1st March 2021, following a period of early conciliation between 15th February 2021 and 1st March 2021, the Claimant sought to pursue a complaint of 'unfair dismissal' against the Respondent.

2. In a Schedule of Loss dated 13th August 2021, the Claimant claims compensation in the sum of £87,067.85, in addition to the Basic Award and payment in lieu of notice which he has already been paid.

3. The claim was resisted by the Respondent and they presented a Response (undated) which included comprehensive Grounds of Resistance to the Claim. In essence, the claim is resisted on the ground that the Claimant was

made redundant, and that the Respondent carried out a fair redundancy process. I will expand upon some of the more significant matters raised by the Respondent below.

OUTLINE

4. The background to this claim is that the Respondent team provided the security detail for prominent members of the Dubai Royal Family, who are one of the major clients of the Respondent, during their frequent visits to the United Kingdom.

5. In outline, the case is brought by the Claimant who was, for a little over 6 years, an employee of the Respondent, working as a Close Protection Officer and Team Leader. In particular, he was part of a small team of CPO's who provided protection for Princess Haya bint al Hussain and her two children.

6. As with so many businesses, from the early part of 2020, the need for the Respondent's services reduced considerably due to the reduction in foreign travel, and many of their employees were 'furloughed' in accordance with the government's Job Retention Scheme. However, as the uncertainty as to the future needs of the business deepened, the company underwent a period of consultation which led ultimately to a redundancy procedure which resulted in a total of 63 redundancies across the whole of the Respondent's business, including the Claimant.

7. The Claimant complains that, in his case, the redundancy procedure adopted by the Respondent was unfair in a number of respects, and accordingly he was unfairly dismissed.

8. The Claimant believes that the motivation for his unfair treatment in this process is that he was, through his close working relationship with the Princess, privy to knowledge of intimate personal matters relating to her and to the wider Royal family; and that as a consequence, he was targeted for redundancy.

THE EVIDENCE

9. The evidence in this case came from the following sources:

   a) The written and oral evidence of Mrs Sue Aslett (head of HR) and Mr Richard Hardaker (head of Protective Security Detail) on behalf of the Respondent;
   b) The written and oral evidence of the Claimant;
   c) An agreed Bundle of Documents amounting to 241 pages
   d) A Chronology, prepared by the Respondent, the dates being agreed as accurate by the Claimant but not the commentary, which was said to be putting something of a gloss (my word) on the events it set out. I have

disregarded any commentary in reaching my findings of fact and have treated the chronology as a neutral timeline of events.

10. I was provided with submissions from Counsel to whom I am grateful. I was also supplied with a list of issues provided by Counsel for the Claimant which I have considered in reaching this judgment.

THE CLAIMANT'S COMPLAINTS

11. The Claimant's complaints about the procedure, which were numerous, and the Respondent's replies, can be summarised as follows.

Gary Hurstwaite was removed from the Selection Pool

12. Gary Hurstwaite, who, like the Claimant, was a Team Leader and therefore in a role directly comparable to that of the Claimant, was elected as the Employees' Representative for the Security Team. However, at some stage during the course of the consultation process, he was removed from the Selection Pool. The precise timing and circumstances of this are unclear. Mrs Aslett was unable to assist the Tribunal with this.

13. The Claimant asserts that this led to unfairness in a number of ways. Firstly, that Mr Hurstwaite was in direct competition with the Claimant due to the similarity in their respective roles, and by removing him from the pool, the Claimant's chances of avoiding redundancy were adversely affected. Secondly, the Claimant believes that his qualities, and in particular his physical fitness, was superior to that of Mr Hurstwaite, and therefore had he remained in the pool, the Claimant believes that he would have scored more highly; and thirdly, that Mr Hurstwaite, who was elected as the Employee Representative prior to his removal from the pool, had no incentive to act as a proper representative once his job had been made safe and this undermined the fairness of the consultation process.

14. The Respondent's position was that Mr Hurstwaite was an employee of considerable experience and length of service who had a particularly pivotal role in the service that the Respondent provided. He had a long-established relationship with his 'Subject', and as such he was irreplaceable. Because Mr Hurstwaite was in a separate pool, whether or not the Claimant might have scored higher than him was irrelevant to the fairness of the procedure adopted by the Respondent.

Respondent didn't consider 'bumping' or alternative employment

15. The Claimant complains that the Respondent did not consider 'bumping' him; that he could have been considered for the role given to Gary Hurstwaite; or that he could have been given any other CPO role within the company. In reply the Respondent states that there was no obligation to consider bumping and for sound management reasons it decided not to do so; and that because of the reduction in roles across the company, and the

desire to ensure continuity for each of the 'Subjects', offering alternative employment within the team was not viable.

Selection Criteria were not fair or objectively measurable

16. The Claimant objected to what he considered to be subjective criteria which could not be measured accurately or objectively, and which were not readily comparable with the other members of the pool. Additionally, he felt aggrieved by the failure to include a fitness test, which he considered to be an essential attribute of a Close Protection Officer and therefore should have been included; it is a criterion that can easily and accurately be measured and compared with other team members; and as a very physically fit man, he believes that he would have performed very well in such a test, and in particular he would have outperformed Gary Hurstwaite.

17. The Respondent (through Richard Hardaker) accepted that to a degree some of the criteria were subjective but were nevertheless capable of being fairly assessed and compared across the selection pools. They point to the fact that the criteria that were adopted had been agreed during the consultation by the elected representative and asserts that they were fair and reasonable. As far as the fitness test was concerned, whilst this could have been included as one of the criteria, its omission did not make the process unfair.

Errors in scoring procedure

18. The Claimant alleges that he was not scored fairly against the criteria, and feels that he should have been scored significantly higher than his colleagues in the selection pool, by reason of his seniority as a team leader and by reason of his own particular skills and experience, which he felt were given insufficient weight. He raised objections to the scorers, Richard Hardaker and Dave Price, both of whom he says had insufficient knowledge and experience of him to be able to accurately score his abilities against the selection criteria.

19. The Claimant also complained about not having been given his colleagues' scores and as a result was prevented from being able to accurately compare his scores against the other members of the selection pool, which he says made the process unfair and lacking in transparency; and prevented him from being able to participate properly in the redundancy consultation.

20. He also raised an issue concerning the use of 'weighting' in favour of certain criteria, which he considered unfairly disadvantaged him in the scoring process. He originally alleged that criteria on which he expected to score highly, such as length of service, were given less weight then what he considered to be the more subjective criteria. He later asserted that those objective criteria ought to have been given *greater* weight.

21. The Respondent asserts that the scoring was fair, and the two scorers were well qualified to conduct the exercise. Mr Hardaker in particular, it was said, had had the benefit of observing the Claimant's performance during the

course of a number of training exercises. Its case was that the Claimant had an unrealistic and inflated view of his own abilities when compared to those of his colleagues. They considered that the scoring of the Claimant confirmed that he performed at the level that would be expected of someone in his position, but that he was simply, yet fairly, outscored by others in his team and accordingly he came bottom of his pool.

22. The Claimant was given a breakdown of his redundancy score, as well as the anonymized scores of the other employees in the selection pool. I ought to say at this point that this is correct, but whilst the total anonymized schools of the other members of the pool were provided, their scores were not broken down for direct comparison with those of the Claimant.

Inadequate consultation and appeal procedures

23. His final complaint is that the Respondent did not undertake a genuine consultation with him and failed to follow its own redundancy procedure. He alleges that he was not given a consultation meeting regarding the issues that he had raised with the Respondent, and that following the decision to make him redundant, he was offered a right of appeal but that appeal was ignored. He also complains that his interests were not properly being represented by Gary Hurstwaite, in that although his position was at risk when he was first selected as an employees' representative, once his position was made safe by the company (in circumstances which, for reasons already stated, the Claimant believes to have been unfair) Mr Hurstwaite was no longer motivated to represent his interests and those of his colleagues as he was no longer at risk of redundancy.

24. The Respondent asserts that a fair redundancy process was followed, and that there was consultation with both the Claimant and his elected representative. A fair consultation took place between the 21st July 2020 and 26th August 2020, and two individual consultation meetings took place on 10th September 2020 and 23rd September 2020. At the second individual consultation meeting, there was a discussion about the Claimant's redundancy score and he was encouraged to appeal but the Claimant did not participate in the appeal procedure.

25. Instead, the Claimant instructed solicitors to challenge the redundancy decision on his behalf, which in turn led to correspondence between solicitors acting on both sides. By pursuing matters through solicitors, they were dealt with in correspondence rather than through the company's own less formal appeal procedure.

FINDINGS OF FACT

26. I am able to take many of my findings of fact from the chronology. I have only reproduced those matters which I consider to be material to this claim.

27. The Claimant was offered the position of Personal Security Detail (Close Protection Officer) from the Respondent by letter and the Contract of Employment commenced on the 8 October 2013.

28. 31st July 2014: The Claimant's job title was changed to PSD (CPO) Team Leader; and the CP Team structure was changed in that the group was to be split into four teams.

29. 12th December 2016: the Claimant was promoted to Dubai Global Close Protection Team (DGCPT) Leader.

30. Early March 2019: The Claimant was put in charge of the DGCPT. This position did not carry any additional salary nor did it represent a formal promotion. It appears to me to have been essentially an honorary position, conferred on the member of the team with length of service seniority.

31. 7th April 2020: The Respondent wrote to the Claimant to advise him that he would be placed on furlough as from the 8th April 2020. This period of furlough was extended on several occasions, until 30th June 2020; and on 26th June 2020, the Claimant signed a variation to his Contract of Employment which allowed for him to be placed on furlough leave from the 1st July 2020 up until what was at that time intended to be the conclusion of the furlough scheme on the 31st October 2020.

32. 2nd July 2020: The Respondent announced that, due to changes to the business brought about by a reduction in the number of clients requiring their services due to the Covid pandemic. a 30-day consultation period would be commencing. Staff were invited to volunteer to be representatives. The Claimant asked to be considered as the Representative for the Security team. However, Gary Hurstwaite was successful in the ballot and was appointed.

33. 21st July 2020: Mr Hurstwaite, as Representative for Security, emailed Consultation Group 5 (of which the Claimant was a member) indicating that 66 redundancies were anticipated, with the proposed reason for redundancy being a reduction in client numbers. The selection criteria were identified to include skills, experience, qualifications, attendance/timekeeping, disciplinary record and job specific requirements.

34. In response, the Claimant emailed the Respondent on the 4th August 2020, attaching some certificates as evidence of his suitability for the role. These certificates did not directly relate to the skills required to perform his role and accordingly had no real influence on the scoring procedure.

35. 6th August 2020: Mr Hurstwaite emailed the whole Newmarket team, informing them that the number of possible redundancies in Security had been reduced to 6, and that there were to be two selection pools: one consisting of 7 PSD (CPOs), to be reduced down to 3; and the other would be 4 x DGCP (CPOs and TL) to be reduced down to 2. The scoring matrix framework would be scored between 1 and 5 with 13 different categories. It was first proposed that the scoring would be done by Richard Hardaker and Dave Price.

36. 11th August 2020: Mr Hurstwaite emailed Consultation Group 5 (CG5) explaining the scoring scale and there would be 11 different criteria that would be scored: technical skills, quality of work, initiative/proactivity, time management, adaptability and flexibility, interpersonal and communication skills, team player, qualifications and training, length of service, attendance and disciplinary record.

37. 18th August 2020: Group consultation meeting for the redundancy process, attended by all reps and most of the senior managers.

38. 19th August 2020: Mr Hurstwaite emailed CG5 explaining the criteria for each selection pool had almost been completed. A member of the group, Ian Miller, emailed, querying why fitness tests were not forming part of the criteria given the importance of fitness in the role. Mr Hurstwaite agreed to forward this concern to Sue Aslett. There were further exchanges of emails between Mr Hurstwaite and other members of the team that raised queries about the process.

39. 26th August 2020: Gary Hurstwaite emailed CG5, confirming the roles that were at risk in Newmarket Close Protection. There were to be two redundancies from the Claimant's group.

40. 10th September 2020: Sue Aslett chaired a consultation meeting with whole Newmarket team. One of the matters discussed was that the scoring exercise would be carried out by Richard Hardaker and Dave Price. This decision was not challenged by any member of the team, despite various other matters of concern being aired. Likewise, Gary Hurstwaite's suitability as the employees' representative was not challenged. The Claimant made no verbal contribution to that meeting save for a question about the availability of voluntary redundancy.

41. The same day, Mrs Aslett emailed the Claimant regarding his options: whether to express an interest in another role in the company or to put himself forward to be considered for voluntary redundancy. The Claimant responded and opted for the former.

42. Richard Hardaker had direct knowledge of the Claimant's performance on training exercises in Poland, both from his own observations and from the scores that he had registered on a training assessment sheet; and was therefore able to provide an objective and dispassionate judgement, by reference to recorded information, on what were, it was accepted, subjective criteria. In evidence the Claimant alleged that Mr Hardaker had not been present throughout the Poland exercises. This was never put to Mr Hardaker in cross-examination and so I invited him to be recalled to deal with the matter. His evidence, which I prefer, was that although he had only had direct contact with the Claimant at the beginning of the training exercise, he had in fact been present throughout and was observing the team from behind the scenes and was fully apprised of their progress and performance.

43. Dave Price was less familiar with all of the members of the pool. He did not give evidence before me, and therefore I am unable to determine the extent of his knowledge and ability to assess the employees within the pool. I accept from the Claimant that Mr Price had only limited direct knowledge of the Claimant. However, it was accepted that this was equally true of all of the members of the Claimant's pool.

44. 18 September 2020: Claimant was assessed by Dave Price and Richard Hardaker and they scored him against selection criteria. The selection criteria included technical skills, quality of work, initiative/productivity, time management, adaptability and flexibility, interpersonal and communication skills, team player, qualifications and training, length of employment, attendance and disciplinary record. The Claimant's overall score was 39. The other scores in the pool were 43 and 45.

45. 23 September 2020: Sue Aslett held a second Consultation Meeting with the Claimant, accompanied by Mr Hurstwaite. It was then confirmed that the Claimant would be made redundant from the 30th September 2020.

46. 26 September 2020: The Claimant's solicitors wrote to the Respondent 'challenging' the decision to make the Claimant redundant and stated they had made observations which undermined the integrity of the consultation process. They argued the selection criteria were subjective, there was evidence of a pre-determined outcome and they also wanted an explanation as to why a fitness test was not part of the criteria. It was asserted that the Claimant should have received maximum scores for all of the selection criteria.

47. 8 October 2020: The Respondent's solicitor responds to the 26 September letter from the Claimant's representative, rebutting claim of unfair selection.

48. 13 October 2020: Claimant's solicitors write to the Respondent's solicitor, repeating that the Claimant should have scored higher than other employees' and that Gary Hurstwaite should have scored lower.

49. 11 November 2020: The Claimant's Representatives sent a letter entitled 'Letter Before Action' to the Respondent, reiterating the issues addressed in their letter from the 26th of September and added Mr Hurstwaite should not have been involved in the selection process as the Claimant provided evidence against him.

THE LAW AND CONCLUSIONS

Legislation

50. Subject to any relevant qualifying period of employment (two years in this case) an employee has the right not to be unfairly dismissed by his employer (s94 of the Employment Rights Act 1996). The Claimant plainly has served the relevant period and therefore has acquired that statutory right.

51. The legislative basis for redundancy being a potential fair reason for dismissal is found in ss98 and 139 of the Employment Rights Act 1996:

s.98 General
(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show
a. the reason (or, if more than one, the principal reason) for the dismissal, and
b. that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it—
a. …
b. …
c. is that the employee was redundant, or
(3) ….
(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 issue

s.139 Redundancy
(1) 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, or
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
have ceased or diminished or are expected to cease or diminish.

52. It is not specifically alleged in this claim that a genuine redundancy situation had not arisen. That fact is perhaps self-evident given the imposition of global restrictions on the movement of people during the Covid pandemic and its effect on businesses of all kinds, the Respondent being no exception. Indeed, given the nature of the work that the Respondent does and in particular the branch of the Respondent's business in which the Claimant was employed, I find that this business was perhaps more adversely affected than many. During the course of the redundancy exercise, 63 redundancies were made across the whole of their business, none of which were challenged save this one. However, for the avoidance of doubt, I find that the Respondent has satisfied s139(1) Employment Rights Act 1996 in that it has shown that the requirements of the business for an employee to carry out work of a particular kind had ceased or diminished.

53. The nature of the Respondent's business was such that the fact that the clients ('Subjects') were no longer in a position to travel meant that the need for round-the-clock security was considerably reduced. The Respondent had maintained their staffing levels for some time despite the reduction in demand, and then availed itself of the government's Coronavirus job retention scheme by placing staff, including the Claimant, on furlough, but given the uncertainty at that time (and indeed, to this day) as to when normality would return, it is abundantly clear to me that the Respondent justifiably sought to reduce its costs by making redundancies.

54. For the same reasons I find that, insofar as the Claimant was concerned, he was dismissed by reason of redundancy.

55. The far more complex question is in relation to the fairness of the procedure, which the Claimant alleges to have been unfair in a number of respects.

56. I remind myself that in considering matters of procedural fairness, the correct approach is for me to consider whether the actions of the Respondent were ones that a reasonable employer *could* have adopted in the circumstances, not simply to decide whether, substituting my own view for that of the Respondent, I *would* have adopted; in other words, whether the Respondent's actions fell within the range of reasonable responses.

Case law

General Principles

57. In *Williams v Compair Maxam Ltd* [1982] ICR 156 the Employment Appeal Tribunal laid down the matters which a reasonable employer might be expected to consider in making redundancy dismissals:

    i. The employer will seek to give as much warning as possible of impending redundancies so as to enable those who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment.

    ii. The employer will consult…as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree…the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider…whether the selection has been made in accordance with those criteria.

    iii. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

iv. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

v. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

58. *Polkey v A E Dayton Services Ltd* [1987] IRLR 503 HL: "… in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representatives, adopts a fair decision which to select for redundancy and takes such steps as may be reasonable to minimise a redundancy by redeployment within his own organisation'.

59. *Langston v Cranfield University* [1998] IRLR 172 EAT: so fundamental are the requirements of selection, consultation and seeking alternative employment in a redundancy case, they will be treated as being in issue in every redundancy unfair dismissal case. Moreover, the employer will be expected to lead evidence on each of these issues.

Pool Selection

60. The principles to be applied to the question of the fairness of pool selection are set out in *Capita Hartshead Ltd v Byard [2012] IRLR 814* as follows:

    i. It is not the function of the Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted;

    ii. The “reasonable response test” was applicable to the selection of the pool from which the redundancies were to be drawn;

    iii. There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem”

    iv. The Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has “*genuinely applied*” his mind to the issue of who should be in the pool for consideration for redundancy

    v. Even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it.''

61. The Claimant complained in his evidence about the fact that the pooling arrangements were changed several times in the course of the consultation period. However, I have not seen any evidence that this was raised during the

course of the consultation. There is no email from the Claimant during the group consultation, nor was there any reference to this issue in the individual consultation meetings of 10th September or 23rd September 2020. I note that there was email correspondence from other members of the team raising their own concerns about the process with their representative.

62. In closing submissions, argued that the division of the Newmarket teams was 'unusual', that 'there was no reason why they should not have been pooled' and that 'no rationale' had been suggested for the division of the two teams. I respectfully disagree with all three of these contentions. The reason for the decision to split the teams into two separate pools was to reflect the fact that each pool worked with a different subject. The rationale for the decision was to ensure a degree of continuity for each of the subjects, given the personal nature of the work the Close Protection Officers undertook, particularly with children, whose lives might otherwise have been disrupted. This decision was not unusual in my judgment. The Respondent could have pooled the two groups collectively, or separately. Either approach would have been within the reasonable range of responses.

63. The decision to pool the London team separately was clearly explained by Mr Hardaker in evidence. The London team were engaged in a specialist and particularly sensitive operation, the precise details of which could not be disclosed for reasons of operational security, and were ring-fenced for this purpose. I accept this explanation and, once again, I do not consider the decision to pool the London team separately was unreasonable. It was clearly a decision taken with a view to the Respondent being in a position to maintain the necessary staffing levels in relation to ongoing operations which were to continue despite the effects of the pandemic.

64. In summary, I find that the Respondent genuinely applied its mind to the composition of the redundancy pools and reached conclusions which were open to it. I therefore find no unfairness in this aspect of the process.

Removal of GH from the pool

65. I can understand why the Claimant feels aggrieved that Mr Hurstwaite was removed from the selection pool; and it is unfortunate that the Respondent was not able to produce any document to assist me on the question of when, how and why this decision was taken. Mrs Aslett, when cross-examined about this, could only answer that she 'genuinely can't remember how that happened. All I remember is that the situation changed and we weren't going to lose the whole team'. She was referring to the fact that at the outset of the redundancy process, it was anticipated that the entire Newmarket team would be made redundant, such was the reduction in need, and that at some point the decision was taken to retain a reduced number of staff from each subject's team to ensure continuity – one of whom was Mr Hurstwaite.

66. I have some sympathy with Mrs Aslett in that she left the Respondent some time ago and was doing her best to remember events without necessarily

having access to all of the material that she required. However, it is unfortunate that the Respondent was not able to be more helpful in relation to this question, which lay at the heart of the claim; such lacunae can have the undesirable effect of creating an air of suspicion even where such suspicion is not merited.

67. The explanation given was that Mr Hurstwaite was deemed too important to lose, given his considerable seniority, his unparalleled experience, and his long-established relationship with his subject.

68. I am not particularly impressed by this explanation. If this was correct (as I find it to be) then the scoring system if correctly applied would surely have resulted in Mr Hurstwaite retaining his job on merit.

69. However, I must remind myself that I am considering the fairness of the Claimant's dismissal, and not the fairness of the process as a whole to every employee. It may well be that the decision to remove Mr Hurstwaite from the pool was to his advantage, and perhaps to the disadvantage of the other members of his pool. But for the reasons I have already given, the decision to divide the Newmarket team and pool them separately by subject was a fair one, and as such the decision to remove Mr Hurstwaite from his pool and make his job safe did not adversely affect this Claimant.

Selection criteria

70. *Earl of Bradford v Jowett (No 2)* [1978] IRLR 16: The Tribunal can interfere only if the criteria adopted are such that no reasonable employer could have adopted them or applied them in the way in which the employer did.

71. In *Williams v Compair Maxam* it was stressed that it was important that the criteria chosen for determining the selection should not depend solely upon the subjective opinion of a particular manager but should be capable of at least some objective assessment.

72. However, in *Mitchells of Lancaster (Brewers) Ltd v Tattershall* UKEAT/0605/11 (29 May 2012, unreported), the Master of the Rolls said this:

> "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."

73. Mr Hardaker, under cross-examination, readily accept that 8 of the 11 selection criteria selected were subjective, and only length of service, attendance and disciplinary record were strictly objective. However, he was able to provide a rationale for his approach to marking each of the criteria by reference, primarily, to the individuals' performance on training exercises, and by an objective and dispassionate assessment of their qualities and abilities.

74. For this reason, I do not find anything objectionable in the selection criteria that were adopted. It should also be remembered that the criteria were chosen during consultation with the employees' representative, were circulated to the consultation groups in advance and were open to discussion at the consultation meeting of the 11th August 2020. The Claimant raised no objection. The only objection that was ever raised was by another employee, Ian Miller, in relation to the failure of Mr Hardaker to implement a proposed fitness test

75. The Claimant argues that, as fitness was a key part of the role, it was surprising (and unfair) that it was not included as one of the criteria, given its importance. He raised two arguments based upon this omission:

    i. He infers that the only obvious reason for its omission is that it was known that Mr Hurstwaite would perform poorly when compared to him on this criterion; and
    ii. Because it is a criterion on which he would be likely to score highly, he was unfairly disadvantaged by its omission.

76. I don't accept the Claimant's case on these matters. Primarily, the staff were consulted about the selection criteria through their representative, and the criteria were agreed in advance of the scoring process. I appreciate that the Claimant complains about the standard of representation that he received from Mr Hurstwaite and alleges that he was conflicted. I will deal with this topic in greater detail below.

77. However, in relation to this aspect of the consultation, I note that the criteria and scoring matrix were identified in an email dated 11th August 2020. This would have given the Claimant ample opportunity to submit his objections, if he had any, during the course of the consultation period. However, I have not seen any evidence that he did so. Even in the consultation meeting on the 10th September, although one of the Claimant's colleagues, Jonathan Shepherd, raised a query about the lack of a fitness test, the Claimant did not.

78. I find that the criteria were selected fairly; but I would also observe that, even had the fitness criterion been included, I find that it would have had no effect on the fairness of his redundancy when compared to Mr Hurstwaite. For reasons given above, the Claimant was fairly pooled separately from Mr Hurstwaite and so was not in direct competition with him in this process; and, for reasons I will set out below, the inclusion of the fitness test would not have materially affected the overall scoring in his own pool.

Scoring

79. *Eaton Ltd v King [1995] IRLR 75*: it was sufficient for the employer to have set up a good system for selection and to have administered it fairly. This approach was expressly endorsed by both Waite and Millett LJJ, in the Court of Appeal decision.

80. *Bascetta v Santander [2010] EWCA Civ 351*: "The tribunal is not entitled to embark on a reassessment exercise. I would endorse the observations of the

appeal tribunal in *Eaton Ltd v King* … that it is sufficient for the employer to show that he set up a good system of selection and that it was fairly administered, that ordinarily there will be no need for the employer to justify the assessments on which the selection for redundancy was based."

81. For the reasons set out above, I do find that the system of selection was fairly administered. Of course, there is always the possibility of disagreement over individual scores; but this was an evidence-based scoring exercise that was carried out by Mr Hardaker and Mr Price with oversight from Mrs Aslett who, as an experience Head of Human Resources, was there to ensure consistency and fairness.

82. It is not for the Tribunal to put the scoring process under the microscope, but it may be useful to look at some of the available evidence upon which the scoring was based. The assessment scores from the Poland exercise in 2017 were in the bundle, and they showed that, out of the 12 members of the Newmarket team at that time, the Claimant was ranked 7th of 12 in firearms; joint 8th of 12 in close quarter combat/unarmed combat; and 8th of 12 in driving.

83. Although the fitness test was not included in the scoring process, a fitness test was in fact belatedly carried out on the 28th September 2020. The Claimant has referred to the fact that Gary Hurstwaite failed the test – which is correct. However, the Claimant came 4th out of the 7 members of the team that took the test on that occasion, and therefore I do not accept that the omission of the fitness test from the redundancy exercise was unfair to the Claimant, or that it would have made any difference to the outcome.

84. It would have been useful if similar reports from other training exercises had been provided. However I am afraid that such evidence as I do have before me in relation to the Claimant tends to support the evidence of Mr Hardaker that the Claimant adequately met the standard required of him, but that he was not in any way exceptional and that others in the team outscored him.

85. It appears to me that the Claimant has, unfortunately, over-estimated his own abilities. He has fallen into error by assuming that his position as the team leader automatically meant that he was more capable than his colleagues. This is evident from the correspondence from his solicitors which suggests that, not only should he have scored more highly than he did, but that in fact he should have scored maximum points on each of the criteria.

86. This is, on any view, unrealistic and has the effect of undermining his credibility in respect of his complaints of unfairness generally; as do his claims that the scorers were biased towards Gary Hurstwaite. I found no evidence to support that allegation, but even if I had, it would not have amounted to unfairness to the Claimant for the reasons I have already stated.

87. A further example of how the Claimant's complaints about the process were confused is in relation to the issue of 'weighting'. The Claimant initially argued that the truly objective criteria such as long service and attendance records were reduced in their importance by the use of a weighting system. In fact, all of the criteria were weighted equally. When this was pointed out to the Claimant he asserted that that they should have been given *greater* weight.

88. I do accept that it would have been desirable for there to have been a greater degree of explanation given as to the scores attributed to the Claimant and a full (anonymized) breakdown of the raw scores of his colleagues, rather than simply the total scores. This would have been more transparent and might have allayed some of the Claimant's misgivings. But I am satisfied that neither of these matters made the process unfair.

Consultation

89. Most of the complaints that the Claimant makes about the consultation process have already been addressed above and I do not propose to repeat them here. In virtually every respect, the consultation process was exemplary.

90. The only matter that I will address is the complaint that Mr Hurstwaite failed to adequately represent the interests of the team once his position had been made safe.

91. I find no evidence to support that. From the emails and minutes I have read in the bundle, it seems to me that Mr Hurstwaite was a diligent representative. It should be remembered that he was not only the representative for the Claimant but for the entire Newmarket team, and on the material before me I have no reason to believe that he did not respond appropriately to all of their concerns, and communicated with the Respondent on their behalf throughout.

92. Of course, the fact that his job was made safe in the way it was, may have given rise to the suspicion that he might not have been as engaged in the process as when his own position was at risk. However, if he HAD been at risk, it might just as easily be argued that he had a conflict of interests because he was trying to save his own job. I must not get drawn into speculation but must consider the evidence, which is that his representation of the team was of a good standard.

Lack of an Appeal

93. Both Counsel referred me in closing submissions to the case of Gwynedd Council v Barratt [2021] EWCA Civ 1322 in which the Court of Appeal decided that there is no rule that a redundancy dismissal without an appeal can only be fair in 'truly exceptional circumstances'.

94. In this case, the situation is slightly more complicated, in that there was an appeal procedure, and indeed the Claimant was encouraged by Mrs Aslett to avail himself of the procedure at his individual consultation.

95. I have considered the correspondence in relation to the appeal with care. In her letter to the Claimant of the 23rd September 2020, Mrs Aslett informed the

Claimant of his right to appeal, and that it he wished to do so, he should 'write to [her] within 5 working days of receipt' of the letter, stating his reasons. He did not do so.

96. Instead, the Claimant decided to instruct solicitors, Messrs Serjeant & Son. Their letter of the 26th September 2020 talks of a wish to 'challenge' the decision, rather than indicating that the Claimant wished to participate in the appeal procedure. I do not know whether they had been shown Mrs Aslett's letter of the 23rd September but it would be surprising if they had not.

97. Whether intentional or not, the letter has a litigious tone and clearly Mrs Aslett took the view that as such the matter should be referred to the Respondent's own solicitor; and that she no longer felt it would be appropriate for her scheduled meeting with the Claimant given that matters were now in the hands of solicitors.

98. Despite the fact that the designated procedure was not followed, the matters that the Claimant wished to raise, and answers to them, were provided in correspondence. Essentially, the designated appeal procedure was substituted for a review of the procedure conducted and communicated through solicitors. I do not consider it outside the band of reasonable responses to have dealt with matters in this way in those circumstances.

99. The only item that was not fully addressed was the request for a full breakdown of the scores of the other members of the pool, which as I indicated above, would have been desirable but not essential in carrying out a fair procedure.

100. It would be wrong to speculate as to what might have happened at the appeal had it taken place, but it did not. The Claimant decided at this point to instruct solicitors, as was his right. However, this was interpreted by Mrs Aslett on behalf of the Respondent as a waiver by the Claimant of his right to appeal under the designated procedure.

101. It is unfortunate that matters escalated in this way so rapidly. However, the decision for the Tribunal is whether this made the process unfair. I do not find that it does.

Offer of Alternative Employment

102. I accept, for reasons I have already set out in detail above, that the reality of the situation was that there was no suitable alternative employment outside of the Newmarket team available at the time of this redundancy exercise. This was not an argument that the Claimant pursued with any great vigour in the hearing and I do not consider it to be his strongest point.

Motive and final conclusions

103. Underpinning this claim is the belief on the part of the Claimant that the entire redundancy process, as far as he was concerned, was a sham, and that his redundancy was predetermined. The alleged motive was that due to his knowledge of private matters relating to the Princess and her family, he was targeted for dismissal by the Respondent at the behest of their client in Dubai.

104. I did not find any evidence of 'targeting' of this sort. This was quite obviously a genuine redundancy situation in which 63 employees lost their jobs for reasons directly connected to the pandemic. 62 of them accepted generous settlements. Had the Respondent wanted rid of the Claimant as urgently as he appears to believe, I do not believe they would have retained him as long as they did, paying him his full salary for some considerable time after the controversial matters of which he claimed to have knowledge came to light, and sought to make him redundant as part of a large scale redundancy exercise. I find, with regret, that this is another area in which the Claimant's credibility was undermined.

105. He sought through cross-examination of the Respondent's witnesses to allege that Dubai were a controlling force in the business and were dictating their will to the Respondent. Even if this were the case, I struggle to see how this could be said to be a factor affecting the fairness of the redundancy procedure. I would not consider it unusual for the needs of an important client to be a major consideration for a business in determining their staffing requirements. I was not persuaded that there was anything sinister about this.

106. The Claimant has sought to challenge his redundancy on numerous grounds. In doing so, I accept that he has highlighted some imperfections in the process. I accept that in a couple of respects, for example, the decision to remove Mr Hurstwaite from the selection pool, and the failure to supply a full breakdown of the raw scores of the other members of the Claimant's pool, the process could have been more transparent.

107. But I am required to look at the process in the round and consider whether it was fair. In my judgment it was.

_____

Employment Judge Conley

Date: 26 January 2022

Sent to the parties on:

28 January 2022

For the Tribunal Office