EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106893/2020

Held on 16 and 17 December 2021
(By Cloud Video Platform)

Employment Judge: B Campbell

Mr K Barnstaple	**Claimant** **In Person**
City Plumbing Supplies Holdings Limited	**Respondent** **Represented by:** **Ms R Dawson – Employee**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:

1. the claimant was fairly dismissed by the respondent on 21 July 2020, and

2. his claim is therefore dismissed.

REASONS

Introduction

1. This claim arose out of the claimant's employment with the respondent. The claimant's dates of service were agreed to be from 6 July 1999 to 21 July 2020. He was dismissed on the latter date. The respondent maintains that he

was dismissed fairly by reason of redundancy. The claimant contests the fairness of his dismissal.

2. Evidence was heard from the claimant and, on behalf of the respondent, Mr Jonathan Muldoon, the respondent's Regional Sales Manager.

3. Although there was a degree of dispute over a number of details of the evidence, the witnesses were all found generally to be credible and reliable.

4. The parties had prepared a joint bundle of productions. References to documents within the bundle are made below by way of their page numbers in square brackets. A number of items were added in the course of the hearing and where relevant that is noted below.

5. The claimant provided a schedule of loss and the parties also helpfully provided an agreed chronology. The terms of the chronology are taken as being correct.

6. Oral submissions were made at the close of the hearing. Those were taken into account in reaching the decision below. The terms of the schedule of loss were largely agreed and findings in relation to the claimant's losses are discussed below.

Issues

7. The issues to be determined in the claim were as follows:

8. Was the reason for the claimant's dismissal on 21 July 2020 a potentially fair reason within the scope of section 98(1) and (2) of the Employment Rights Act 1996 ('ERA')?;

9. If so, did the respondent comply with section 98(4) ERA given its size and administrative resources, as well as equity and the substantial merits of the case?

10. If the answer to either 1 or 2 is no, and therefore the claimant's dismissal was unfair, what compensation should be granted?

Findings in fact

11. The following findings in fact were made as they are relevant to the issues.

Background

12. The claimant was employed by the respondent between 6 July 1999 and 21 July 2020. Those dates were agreed between the parties.

13. The respondent is a company which provides plumbing products throughout the UK. The claimant held the position of Senior Account Manager.

14. The claimant reported directly to Mr Jonathan Muldoon, a Regional Sales Manager. In early 2020 there were three Senior Account Managers in Scotland including the claimant and all reported to Mr Muldoon. There were a further number of Senior Account Managers elsewhere in the UK.

15. The role of Senior Account Manager involved liaising with customers in order to manage relationships and maximise the sales of the respondent's products. Those customers tended to be businesses rather than individuals and the respondent's group had a separate division which operated stores which were open to the public.

16. All of the Senior Account Managers were placed on furlough under the UK government's Coronavirus Job Retention Scheme in March 2020. The claimant did not return from furlough before his dismissal took effect.

Collective redundancy exercise

17. The respondent's group operates a redundancy policy which applied to the respondent [30-34]. Within the document itself it is not stated whether it is considered to be contractual, in the sense that the respondent binds itself to follow the policy, or non-contractual and therefore capable of being changed or departed from at the respondent's discretion.

18. Section 6 of the policy is entitled 'The consultation process' and describes the steps the respondent will follow during a redundancy exercise. In summary, the process involves:

    a. A **first consultation meeting**, where there will be a 'meaningful discussion' with the affected employee to allow them to understand why their position is at risk and the selection process to be followed, together with its potential implications. There will be discussion of any options to avoid redundancy and the employee will be encouraged to make their own suggestions. The employee will be told how they have been scored if a selection exercise has been used, and be able to challenge the score and make additional comments. Any points which cannot be dealt with at that meeting will be addressed within 48 hours, or as soon as practically possible. The manager will explain the timescale for the remainder of the process if the employee continues to be at risk;

    b. A **second consultation meeting**, to take place after any of the employee's proposals have been explored. This will normally happen within two weeks of the first meeting; and

    c. A **third and final meeting**, to confirm whether a redundancy situation exists or has been averted. The manager will explain the decision and if the employee is redundant, the date of termination and sums payable to the employee will be confirmed in writing, together with any right of appeal.

19. At some point between March and early June 2020 the respondent decided to reduce its workforce across the UK and implement redundancies.

20. Mr Muldoon was first notified of the plan on 15 June 2020. On that day he took part in a group call involving senior managers and colleagues from Human Resources. Maxine Frost, the National Sales Director, outlined the details of the process. Approximately 2,500 roles were at risk throughout the respondent's wider group, which trades under the name 'Travis Perkins'. 11

geographical pools were devised in which Senior Account Managers would be reduced in number.

21. There were to be redundancies in both areas under Mr Muldoon's responsibility as follows:

    a. Scotland – three Senior Account Managers reducing to two; and

    b. North-west England – three Senior Account Mangers reducing to one (later changed to two).

22. Later on 15 June 2020 Mr Muldoon sent an email or electronic message to each of his reports, asking them to join a call with him. The call took place later that day and Mr Muldoon explained that redundancies were planned, the proposed pools and number of reductions, and that each of his Managers was at risk. He said he was going to follow up the call by telephoning each Manager individually in the coming days to talk through the process.

23. Mr Muldoon sent the claimant a letter on 16 June 2020 to confirm details of the consultation and selection process which was now underway [52]. The claimant was invited to a virtual consultation meeting on 18 June 2020. It was stated that the aim of the process was to have a meaningful discussion over a period of 30 days.

24. The three Scottish-based Senior Account Managers were the claimant, Mr Peter Scullion and Mr Stephen Jenkinson.

25. Mr Muldoon had been told on the call hosted by Ms Frost that he would need to score his managers along with another individual as a means of selecting who would be retained in their role and who potentially would not.

26. It was decided that Ms Frost herself would be the second scorer for Mr Muldoon's managers, both in Scotland and in England. There was a manager at a level between Ms Frost and Mr Muldoon, but his role has also been put at risk and it was considered inappropriate therefore to ask him to score others.

27. The claimant suggested that another senior manager named Kevin Dermidy had influence over the Scottish scoring exercise. This he said would have worked to his disadvantage as Mr Dermidy was a friend of Mr Scullion. Mr Dermidy at the time was a Regional Director with responsibility for branches in Scotland. This was a separate division from the one where Mr Muldoon and the claimant were employed. There was no evidence that Mr Dermidy had any influence in the scoring exercise.

28. The scoring criteria were determined in two stages. First, Human Resources provided a template with criteria included. Those were generic. The template was then discussed among the Regional Manager group who agreed on additional criteria to add. The combined set of criteria was applied to all Senior Account Mangers throughout the UK.

29. The initial criteria were 'Productivity', 'Adaptability' and 'Job Related', and under each of those there was information to guide the scorer in applying a value out of 10. The additional criteria added by agreement among the Regional Managers were all in the area of 'Critical skills for role' and those were described as follows:

    a. 'Ability to create, develop and present relevant IT platforms such as google sheet, docs and slides';

    b. 'Skilled in the use of internal reporting systems such as customer hub, POS';

    c. 'Ability to create and implement appropriate business plans and strategies including customer rebate deals'; and

    d. 'Internal and external business relationships, i.e. customers, suppliers and colleagues'.

30. There was an element of forward planning in the focus of the criteria, in that they attempted to capture how the respondent would be operating in the future with fewer employees. Each of those additional criteria was also to be scored out of a possible 10.

31. Mr Muldoon and Ms Frost each separately decided on scores for each Manager and added them to the template. They used Google Sheets which were hosted on the respondent's server, meaning that they did not have to be attached to emails in order to be accessed by people other than the author. Anyone given viewing or editing rights could access the document. In doing so an electronic record would be created that can be checked at a later date.

32. Mr Muldoon completed his scores for each of his Managers on 17 June 2020 and Ms Frost decided on her scores later the same day. Neither changed the scores they had originally decided on at any later point.

33. The scores assigned to each of the Scottish Senior Account Managers were as follows:

    a. Claimant – 57 [97, 53-59, 179]

    b. Peter Scullion – 67 [97, 208]

    c. Stephen Jenkinson 66 – [97, 209]

34. The scores represented the best attempt by each senior manager to assess each candidate according to the criteria. So, for example, Mr Muldoon considered that the claimant was less experienced or expert than his two counterparts in relation to some technical or presentational skills.

35. The consequence of the scoring exercise was that the claimant was provisionally selected as the Scottish Senior Account Manager to be made redundant.

First redundancy meeting – 18 June 2020

36. Mr Muldoon had a virtual meeting with the claimant on 18 June 2020. Susanna Powell, an HR Business Partner, also joined. The discussion was summarised in a template document which contained scripted sections and allowed for other points raised to be added in [60-64]. The claimant did not challenge the document and it is accepted as being a substantially accurate summary of the discussion.

37. Mr Muldoon recapped on the information which had already been provided. He told the claimant that the scoring exercise had been carried out, with the result that the claimant was at risk of redundancy.

38. The claimant was asked whether he had considered any alternative roles, but he said that his strengths were in his current role. He was asked if he would consider roles which were lower paid, which he did not rule out. He was reminded to consult the respondent's group intranet for any vacancies. Mr Muldoon also undertook to look for vacancies which might be suitable for the claimant himself.

39. An indicative redundancy payment calculation was provided to the claimant to consider. It was inaccurate in that it did not recognise the claimant's entitlement to six months' notice of termination by the respondent, and provided for only 12 weeks. At a later date the error was rectified and an updated calculation was provided [65]. This included a statutory redundancy payment plus and enhancement of 21% in line with the respondent's policy. It also provided for sums equivalent to the value of other benefits such as employer pension contributions and health care for the duration of the notice period.

40. Mr Muldoon proposed to hold a second consultation meeting on Tuesday 23 June 2020.

41. The claimant was asked whether he had any questions before the meeting closed. He asked how the selection criteria had been used. Mr Muldoon confirmed the same criteria, relating to the job role and skills, had been applied to all affected Managers. The claimant asked for a copy and Mr Muldoon agreed to provide one.

42. Mr Muldoon met virtually with the other Scottish Senior Account Managers the same day. He held a substantially identical conversation with each, save that he told them they were provisionally not selected for redundancy based on their scores. He said to each that that status could change in the remainder of the 30-day consultation period.

43. After the claimant's meeting but later that morning Ms Powell emailed a copy of the meeting note to the claimant. He responded to ask whether the selection was being based solely on the scoring exercise, whether the other Senior Account Managers were going through the same process as him and whether they were being asked any questions not asked of him. He repeated his request to see the scoring criteria [66].

44. The claimant did not receive a response by 12.10 the following afternoon – Friday 19 June 2020. He sent a further email to Mr Muldoon and Ms Powell asking for the scoring criteria. Mr Muldoon replied to say he would send them as soon as he was able to. The claimant sent a further email to point out that Mr Muldoon had said the criteria had already been applied, and that he needed them in good time to discuss them at the second meeting proposed for the following Tuesday [67].

45. Ms Powell followed up by email to say that there had been a large number of queries from affected employees, implying that the volume of matters to deal with had impacted on the speed with which she could respond to the claimant, and also that the respondent's preference was to provide scores in the context of a meeting rather than by email, so that those could be explained and discussed properly and to preserve confidentiality. She offered to move the proposed next meeting to the Monday of the following week, i.e. a day earlier, to allow the claimant to be given his scores sooner.

46. Additionally, Mr Muldoon decided he should go back to Ms Frost and discuss with her whether the claimant's scores should be presented as a figure representing the total of each of their scores, or an average of their totals. It was agreed the former approach would be used. This slightly delayed the finalising of the format which was to be provided to the claimant.

47. In the event the next formal consultation meeting date was put back to Friday 23 June 2020 and a separate meeting scheduled for Tuesday 23 June for discussion of the claimant's scores. The scores were emailed to him in the afternoon of 22 June.

Second redundancy meeting – 23 June 2020

48. Mr Muldoon and the claimant met virtually again on 23 June 2020. A different person from Human Resources, Lindsey Deas, was also present. Again there was a template populated with scripted sections and allowing for further points of discussion to be noted [69-72]. Again this is accepted as a suitably accurate summary of the discussion.

49. Mr Muldoon first dealt with the claimant's questions as emailed following the first meeting. He said that selection had been based only on the outcome of the scoring exercise, that all Senior Account Managers were being put through exactly the same process, and none of them had been asked questions different from the claimant.

50. The claimant was then asked if he had any questions about the selection criteria or his score. He replied that he was still considering them. He had no additional questions to raise.

51. Mr Muldoon explained that the claimant's score in each category was an average of the individual scores decided by both scorers, Ms Frost and himself. He said that the criteria were considered to be related to the critical skills as recognised by the business, specific to the Senior Account Manager role.

52. The claimant raised that length of service did not seem to be recognised in the scoring. Mr Muldoon said that this was not deemed to be a relevant aspect.

53. A further meeting was agreed for Friday 26 June 2020 and the discussion ended by agreement.

54. The claimant received a letter from Mr Muldoon dated 23 June 2020 which reiterated the details of the next meeting and confirmed that the claimant had been provisionally, but not finally, selected for redundancy [73].

Third redundancy meeting – 26 June 2020

55. On Friday 26 June 2020 the claimant again met with Mr Muldoon. Again Ms Deas attended and prepared a note [74-78] which is taken to be accurate. The meeting was brief, lasting only some five minutes or so. This was the second formal consultation meeting in terms of the redundancy policy. The meeting on 23 June had been additional to the requirements of the policy.

56. Following the script, Mr Muldoon set out that this was deemed to be the second formal meeting out of a minimum of three in the 30-day consultation period. Its purpose was to allow the claimant to ask questions and to discuss any alternative measures to dismissal.

57. The claimant was asked if he had any questions about the scoring exercise and replied that he did not. He was asked whether he was aware of any alternative options to consider. He replied that he was not. He had no other observations to make and was not aware of any other roles within the organisation which he wished to pursue. Mr Muldoon confirmed that he was also unaware of any suitable vacancies.

58. It was confirmed that a further and final meeting would be held, and the discussion was brought to an end.

59. Mr Muldoon next wrote to the claimant on 8 July 2020. He proposed a further meeting on 14 July 2020. He stated that whilst efforts were still being made to mitigate the effects of his provisional selection, it was possible that the claimant's dismissal by reason of redundancy could be confirmed.

60. Some time in early July 2020 Mr Muldoon found out that in another area of the business a Spares Manager had left, potentially creating a vacancy. He emailed the Managing Director for Spares, a Mr Griggs, on 9 July 2020 to provide details of the claimant and suggest that he would be suitable to fill the role. Mr Griggs emailed back to say that he had decided not to replace the departing employee, and had no other vacancies suitable for the claimant [146].

4th redundancy meeting – 14 July 2020

61. The meeting on 14 July 2020 took place as planned. This was the third formal consultation meeting in the process. Ms Deas again prepared a note [80-83].

62. It was explained that this would be the final consultation meeting. The claimant was asked whether he had identified any alternative options. He replied 'no'. He confirmed he had not applied for any alternative roles within the group, and had no other observations to make.

63. Mr Muldoon confirmed that the claimant's role would be redundant from 21 July 2020. That would be his last date of service with the respondent. He would receive his final pay at the end of August and the details would be confirmed in writing, including the process for appealing.

64. There was some discussion about the claimant's car and other benefits before the meeting ended.

65. Mr Muldoon wrote to the claimant on 21 July 2020 to confirm the outcome of that day's meeting and to provide details in relation to the claimant's notice entitlement, pension, return of company property and the appeal process should he wish to challenge the decision [86-87].

66. The claimant did not use his option to appeal his dismissal and the termination of his employment became permanent on 21 July 2020.

67. Mr Muldoon had occasion to write to the claimant again on 28 July 2020, seeking to remind him of obligations of confidentiality he owed to the respondent and certain post-termination restrictions he had agreed to as part of his contractual terms [88]. Those obligations and restrictions were set out in a schedule to the claimant's written terms and conditions of employment which he signed on 21 February 2014 [42-44]. They included a duty not to carry on or be engaged on a 'Competing Business' for a period of nine months from the date of his employment with the respondent terminating. 'Competing Business' was defined as *'the business of any firm, company or organisation which is competitive with the Business of the [respondent].'*

68. That letter was sent because Mr Dermidy had found out from a customer that the claimant was in discussions with another business named Graham's Plumbing and Heating Merchants about commencing a role there, and that business was considered to be a competitor of the respondent. There was a concern that the claimant would share customer-sensitive information with his prospective employer.

69. The claimant had attended an interview with Graham's and agreed to begin working for them on 3 August 2020. That date was provisionally put back until the end of August when it became known to him that the respondent may have an issue with the claimant taking the role. He accepted in evidence that they were a competitor of the respondent, that the post-termination restrictions set out in his contract were valid, and that those restrictions would have been breached by taking up the role in August 2020. He took issue with the respondent's insistence on his abiding by the restrictions because he was aware of occasions where similar restrictions had been relaxed or waived for colleagues leaving during the redundancy process. There was no evidence before the tribunal of the specifics of those other occasions and the degree to which such individuals may have posed commercial risk to the respondent by joining a competitor earlier than their contracts formally allowed.

70. On receipt of Mr Muldoon's letter the claimant notified Grahams that he would be unable to take up a role with them whilst the nine-month restriction period ran. They said that they could not keep the opportunity open that long, and nor were they comfortable employing the claimant whilst the restrictions were in place, and so it was withdrawn.

71. The claimant provisionally secured a role with a second new employer, but taking it up would again have been in breach of his covenants and he did not go through with it.

72. A number of emails passed between Mr Scullion, Mr Muldoon and Mr Dermidy between 26 and 28 August 2020. Their subject matter was the claimant's potential new role with a competitor and steps being taken to protect customer relationships. Mr Scullion made a number of derogatory references to the

claimant which were unfortunate and unprofessional. They did not however affect the fairness of the process followed with the claimant. They came after that process had effectively been concluded and Mr Scullion had not had any influence in it. Mr Muldoon, the only decision maker, was the recipient of those emails and not the sender of any which disparaged the claimant.

73. Around the end of August 2020 the claimant received the payments outlined in his redundancy computation, subject to tax and national insurance deductions. In summary, those comprised in gross terms:

    a. A statutory redundancy payment of £20,578.50;

    b. An enhancement to his redundancy pay of a further £4,321.49;

    c. Pay in lieu of six months of notice, equalling £23,762.96; and

    d. Compensation for six months of employer pension contributions, healthcare and company car benefits, totalling £3,439.96.

74. At no point in the process did the other two Scottish Senior Account Managers request a copy of their scores, and they were not provided with them.

The claimant's losses and subsequent employment

75. The claimant provided a schedule of loss which was incorporated in the hearing bundle [24a-d].

76. He was unemployed until securing a role which began on 2 November 2020. This was as a Business Development Manager with a business named UKPS The Plumb Store. He is still in that role and expects to be for the foreseeable future.

77. According to the claimant's evidence before the tribunal, his schedule of loss and his claim form, his net earnings with the role were slightly more than they were with the respondent.

78. The claimant is a member of the new employer's occupational pension scheme. The value is equivalent to the same benefit received from the

respondent. He has the use of a company car and is provided with medical health insurance in his new role.

79. The claimant sought a sum of £2,500 to reflect a bonus for the calendar year 2020 as part of his losses. That would have been payable in March 2021 had it been awarded. It was Mr Muldoon's evidence that owing to the performance of the respondent in 2020, no employee received a bonus for that year. The claimant would not have received a bonus even had he remained in employment until the end of 2020, or successfully argued that he should have been in that position but for the respondent acting unreasonably in some way.

80. The claimant incurred expenses following his dismissal which he wished to claim as losses. He lodged caveats with two sheriff courts in order to be alerted to any applications for interim interdict made against him based on alleged breach of his post-termination restrictions. He also paid to gain a taxi driver licence, before securing the role he is now in. He sought a total of £1,200 for those items.

81. The claimant sought a separate amount of compensation to cover 'psychological distress' which he says was caused to him by the process. He now accepts that this type of compensation cannot be awarded in the kind of unfair dismissal claim he is making.

82. Finally, he seeks £500 to recognise his loss of acquired employment rights.

Discussion and decision - the claim of unfair dismissal under section 94 ERA
The reason for dismissal

83. It is necessary to consider whether the claimant was unfairly dismissed under section 94 and, in particular, section 98 ERA.

84. First it is necessary to establish the reason for dismissal and consider whether this is a permitted reason within section 98(1) and (2) ERA. The onus is on the dismissing employer to do so.

85. The respondent contends that the claimant was dismissed by reason of redundancy within section 98(2)(c), which would therefore be a fair reason.

This is not challenged by the claimant. The focus of his claim was the rationale and method used by the respondent which resulted in his selection rather than whether a redundancy situation genuinely existed, or whether redundancies in general were justified.

86. There was a volume of evidence in support of redundancy being the reason for the claimant's dismissal, both documentary and oral. It was clear that in light of the Covid-19 pandemic the respondent concluded that it would need to cut costs and reduce or remove roles throughout the wider group.

87. The respondent was entitled to conclude that it needed fewer employees and reduce its overall team of Senior Account Managers throughout the UK. There was no evidence of any significance to suggest a different reason for the claimant's dismissal.

88. The requirements of section 139 ERA, which reads as follows, were therefore met:

> ***139 Redundancy.***
>
> *(1) 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) the fact that his employer has ceased or intends to cease—*
>
> *(i) to carry on the business for the purposes of which the employee was employed by him, or*
>
> *(ii) to carry on that business in the place where the employee was so employed, or*
>
> *(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.

89. The requirement for employees to carry out work throughout the UK diminished from June 2020 onwards.

The test of whether the claimant's dismissal was reasonable

90. Next the requirements of section 98(4) ERA must be considered, namely whether, given its size and resources, the respondent acted reasonably in implementing the claimant's dismissal for the reason it held. This assessment should be made *'in accordance with equity and the substantial merits of the case'*. The onus is neutral in establishing whether this requirement has been met – i.e. neither party has the burden of proving their side of the issue.

91. It is found that the respondent satisfied this statutory requirement in these claims. That conclusion is supported in particular by the following elements:

a. The respondent took a consistent approach to deciding which roles would be removed. All Senior Account Managers throughout the UK were affected;

b. The pooling approach and decision to use a scoring method were reasonable;

c. The selection criteria for Senior Account Managers were tailored to their circumstances, comprising generic skills and attributes and more situation-specific criteria decided upon by the Regional Director group;

d. Those criteria are sufficiently relevant and objective;

e. The criteria could not have been set or manipulated by any one person, such as for example Mr Muldoon, and they were applied to all Senior Account Managers alike;

f. Via a series of individual consultation meetings the claimant was given fair notice of the process over an adequate period. He was able to understand the respondent's position, ask questions and make suggestions if he wished. The process was properly documented;

g. The claimant was given the opportunity to apply for any suitable internal vacancies, and Mr Muldoon actively pursued a potential opportunity on his behalf, which regrettably did not result in a vacancy being secured;

h. There were no suitable alternative vacancies to offer the claimant once the process resulted in his being provisionally selected. He did not suggest that there were;

i. The claimant was offered the right of appeal against his dismissal;

j. Employees were paid in lieu of notice, allowing them to pursue and commence external roles sooner without loss of remuneration, and the redundancy payment was enhanced.

Pooling and scoring

92. The question of how to pool potential redundancy candidates is largely one for the employer in question and the scope for an employment tribunal to interfere in that is limited.

93. As In ***Capita Hartshead Ltd v Byard [2012] IRLR 814*** Silber J described the role of the tribunal as follows:

> *'It is not the function of the [Employment] 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' (per Browne-Wilkinson J in* ***Williams v Compair Maxam Ltd [1982] IRLR 83*** *[18]);*
>
> *…*

'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' (per Mummery J in ***Taymech Ltd v Ryan [1994] EAT/663/94****, 15 November 1994, unreported);*

'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; and that

'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.'

94. Therefore it may be the case, and often is, that employees could be pooled in more than one way, each justifiable on its own merits. Provided the employer adopts one of those reasonable approaches, the fact that an affected employee would prefer a different pooling approach does not in itself render the employer's actions unreasonable or unfair - ***Kvaerner Oil and Gas Ltd v Parker and ors EAT 0444/02***.

95. A similar approach must be taken to the employer's chosen process for assessing and ranking affected employees. An employment tribunal is only able to interfere with that choice when the criteria used are ones which no reasonable employer would have used in the way that particular employer did – ***Earl of Bradford v Jowett (No 2) [1978] IRLR 16.*** In other words, as long as a reasonable employer could have adopted the scoring criteria which the respondent did, it does not matter whether a given employee or the tribunal itself would have chosen different factors.

96. Selection criteria and the basis for scoring should be clear and unambiguous. They should be objective as far as reasonably possible, with reference to supporting evidence rather than subjective opinion.

97. The key criteria chosen by the respondent were adequate to meet those requirements. They were sufficiently evidence based. They appear relevant given the needs of the respondent's business at the time and going forward.

98. The scoring process was adopted across all geographical areas where Senior Account Managers were employed at that time. As such the scoring method was formulated without specific reference to the claimant. It could not realistically have been devised with the purpose of putting him at a disadvantage.

99. There is no indication of bias in the scores which were attributed to the claimant, either in themselves or by comparison to any other person within his pool. The claimant did not point to any particular score he received under a given criterion and argue why it was too low. He did not criticise in any way the scores which had been given to the other two managers in his pool. According to his evidence the claimant clearly genuinely believed that the scoring exercise was distorted in some way to reach a predetermined outcome, namely his selection. However he could not support that with any evidence, whether documentary or in terms of the oral evidence given by Mr Muldoon in the hearing.

The claimant's complaints about the process

100. The claimant argued that Ms Frost was not well enough informed about the Scottish Senior Account Managers to be able to score them. She stepped in as the second scorer as the natural candidate was Mr Muldoon's line manager, who was himself at risk of redundancy. The respondent was entitled to take the view that it was preferable not to ask Mr Muldoon's manager to score others. Ms Frost did have some degree of visibility over Mr Muldoon's team. They were within her business area. Even if Mr Muldoon had scored

his pool alone (or indeed Ms Frost had done the same) the claimant would still have been the lowest scoring candidate.

101. The claimant believed that criteria such as length of service and sales performance should have counted in the scoring process. Had they been considered, the claimant would have scored more favourably compared to his two immediate colleagues. Those were not reflected in the criteria which were chosen.

102. As discussed above the law is clear that, provided the selection criteria adopted are objective and contain no obvious bias, and that they have been applied in a reasonable fashion, an employment tribunal should not excessively scrutinise them – ***British Aerospace plc v Green 1995 ICR 1006 CA.*** By and large, an employer is both entitled and best placed to recognise which balance of skills it requires and across which number of employees.

103. As stated above, there could not realistically be bias in the choice of criteria given that they were agreed and applied throughout the UK. Therefore whilst from the claimant's perspective he felt that he was losing out, the respondent was entitled to decide on the set of qualities and skills it included in the assessment in this case.

104. At the end of the day, the claimant's perspective on his overall skillset may be objectively correct, but at the same time the respondent's alternative view of its priorities and requirements may still also be sustainable, as is the case here.

105. The claimant argued that the Google Sheets containing his scores could have been manipulated by being created or changed after 17 June 2020, the date when Mr Muldoon said he and Ms Frost had decided on their scores. In doing so the system of time-stamping the points of access of the document could be circumvented. Whilst this is technically possible with sufficient IT expertise, there is no evidence that it happened in this case and the evidence suggesting that the scores were finalised on that date, and not subsequently changed, is accepted.

106. The claimant alleged that the delay in providing him with a copy of his scores was inconsistent with the redundancy policy. In particular, he argued that at the first consultation meeting he was not informed how he had been scored according to the selection criteria, or allowed to challenge his scores or meaningfully comment on them - all requirements under paragraph 6.2.1 - because he had not yet been given a copy. Mr Muldoon's position on that was that the policy had been complied with by way of the claimant being told in the meeting that he scored lowest out of the three candidates in the pool and was therefore at risk, even though a document containing the criteria and his scores had not been provided.

107. It is found that on a common sense reading of paragraph 6.2.1 the intention of the policy was that a candidate would have a copy of both the scoring criteria and their individual scores in advance of the first consultation meeting. It is difficult to see how there could be a 'meaningful conversation' otherwise. As such, the respondent did not follow its own policy in that regard. However, that oversight was not material enough to render the respondent's conduct of the process unreasonable, or the claimant's dismissal unfair. In making this finding it is noted in particular that an additional meeting was convened between the first and second formal meetings just to discuss the claimant's scores and he was given a copy of them the day before. Furthermore, the claimant did not, either in that meeting or the two which followed, challenge the criteria chosen or his individual scores within them. He had adequate opportunity to do so had he felt that there was any unfairness with those aspects of the process.

108. The claimant believed that the fact that Mr Scullion was asked to return from furlough before him, in May 2020, was evidence of preferential treatment being given, and pointed to the selection decision being predetermined. The evidence of Mr Muldoon was that it was necessary to bring back one of the three Scottish managers to deal with specific client-based tasks which needed undertaken, and Mr Scullion had the best skills and experience to deal with those. This evidence is accepted and there was no reason to read into this

decision a presence of bias or predetermination. In May 2020 Mr Muldoon was not aware that redundancies were going to be made.

109. Another criticism made by the claimant was that there was an apparent absence of emails between Mr Muldoon, Ms Frost and others around the time the selection criteria were drawn up and the scoring exercises were carried out. He had made a data subject access request and the response provided by the respondent returned no emails in which these issues were discussed.

110. It should be remembered that the purpose and parameters of a data subject access request under Data Protection legislation are not the same as for disclosure of documents in an employment tribunal. For example, emails containing generic discussion about the process but without specific mention of the claimant's name or other identifying details might not be disclosable as part of the subject access response. Furthermore, Mr Muldoon explained how a number of the key decisions were made verbally by a group and were not documented. This included the finalising of the selection criteria. Mr Muldoon and Ms Frost completed their scores independently by adding information into a document hosted on the respondent's system. It is very possible that there would not be any further emails referring to the process in a way which specifically referred to the claimant. It is not realistically possible to infer any unfairness in the process by deducing that other relevant documents existed but were not disclosed.

111. When considering if an employer has acted reasonably under section 98(4) ERA it can be relevant to look at how the affected employee acted. In this context it is noted that the claimant did not raise any allegations of bias or unfair procedure during the consultation process itself. He did not, as stated, challenge the decision to reduce the Scottish pool by one role, or the scoring criteria or his scores, or those of others. Whilst that alone would not determine the issue, the respondent was denied the opportunity to reply to a number of the complaints now being made.

112. In brief therefore, the respondent acted reasonably in the way in which the claimant's dismissal by reason of redundancy was implemented and none of

the claimant's concerns about the process were sufficiently well founded to change that finding.

Conclusions

113. For the reasons above, it is found that the claimant was dismissed by reason of redundancy and that the respondent conducted itself reasonably in all of the circumstances, given its size and administrative resources, in dismissing the claimant for that reason. The claimant was not unfairly dismissed and his claim is refused.

114. In any event it is clear that by a combination of the claimant's successful efforts in seeking a new role and the respondent paying the claimant an enhanced redundancy payment plus six months' worth of his salary and other benefits in lieu of notice, the claimant's losses and expenses, including any basic award, have been completely extinguished. Therefore, had he been unfairly dismissed no compensation would have been awarded to him.

Employment Judge: **B Campbell**
Date of Judgment: **20 January 2022**
Entered in register: **24 January 2022**
and copied to parties