EMPLOYMENT TRIBUNALS

First Claimant: Mr. Jaspal Dub
Second Claimant: Mr. Bahadur Mann

Respondent: Menzies Aviation (UK) Limited

Heard at: **Bury St Edmunds (by Cloud Video Platform)** **On: 10, 11 and 12 August 2022**
(Full Merits Hearing)

Before: Employment Judge S.L.L. Boyes (Sitting Alone)

Representation
Claimant: Mr. A. Carter, counsel
Respondent: Mr. R. David, advocate

RESERVED JUDGMENT

The first Claimant was unfairly dismissed. There is no reduction to the compensatory award under the principles identified in *Polkey v A E Dayton Services Limited* 1988 ICR 142.

The second Claimant was unfairly dismissed. There is no reduction to the compensatory award under the principles identified in *Polkey v A E Dayton Services Limited* 1988 ICR 142.

There will be a further hearing (1 day) to determine remedy.

REASONS

1. Both Claimants were employed as Allocators by the Respondent. They were both dismissed by reason of redundancy.
2. The Claimants claim that they were unfairly dismissed. The Respondent denies all claims.

The Proceedings/Hearing

3. After a period of early conciliation through ACAS from 9 December 2020 to 20 January 2021, the first Claimant's claim form (ET1) was lodged with Tribunal on

the 11 May 2021. The Respondent filed a response to the claim (ET3) on the 30 June 2021.

4. After a period of early conciliation through ACAS from 11 December 2020 to 22 January 2021, the second Claimant's claim form (ET1) was lodged with Tribunal on the 4 March 2021. The Respondent filed a response to the claim (ET3) on the 6 April 2021.

5. The second Claimant had made a race discrimination claim but this was dismissed by Employment Judge Anstis in an Order dated 6 May 2021 on the basis that the claim had no reasonable prospects of success.

6. The Claimants gave evidence. The Claimants' union representative, Kevin Hall, Unite Regional Officer, gave evidence. Each adopted their witness statements. They were cross examined by the Respondent and asked questions by me.

7. The Respondent called three witnesses to give live evidence. These were Steven Harrison (Terminal 2 Ramp Manager), David Jenkins and Christopher Cookson. Each adopted their witness statements. Each was cross examined by the Claimants and asked questions by me.

8. The Respondent had intended to call John Henderson to give live evidence. At the time of the hearing he was based in Dubai,. As required by the Presidential Guidance *Taking oral evidence by video or telephone from persons located abroad,* the Respondent had written to HMCTS to seek permission for Mr Henderson to give evidence from abroad but had not received a response. I therefore made enquiries of HMCTS. I was informed that the State of Dubai has not yet told the Foreign and Commonwealth whether or not witness evidence may be given by video from its territory. Consequently, it was not possible for John Henderson to give live evidence by video from Dubai. Instead, John Henderson provided a written response to interrogatories sent to him by the Claimant.

9. Both parties made closing submissions.

10. I reserved Judgment.

Documents

11. As well as the documents held on the Tribunal file, the Tribunal had before it a bundle (prepared by the Respondent) of 292 pages and a bundle containing witness statements of 59 pages.

12. The Respondent also sought to rely upon additional evidence which was filed and served shortly prior to the hearing. This was a spreadsheet prepared by human resources identifying TUPE transferred employees who were on legacy terms and conditions, the supplementary witness statements of Steven Harrison and Christopher Cookson and counter schedules of loss. The Claimants objected to the admission of this late evidence. I admitted it because I considered that it was in the interests of justice and the overriding objective to do so given the matters that were in issue between the parties and because I did not consider that it was prejudicial to the Claimants to do so.

13. The Respondent filed and served written closing submissions. There was no written closing submissions from the Claimants

Issues to be determined

14. The issues in dispute in this matter were agreed at the beginning of the hearing.

15. These were:

    1) In the circumstances, were the Claimants' dismissals by reason of redundancy fair in terms of section 98(4) of the Employment Rights Act 1996? In particular:

        a. Did the Respondent genuinely apply its mind to the establishment of the pool of employees at risk of dismissal for redundancy?
        b. Was the pool that was selected within the range of reasonable responses open to a reasonable employer?
        c. Did the Respondent adequately consult the appropriate representatives of the employees at risk of redundancy with respect to:
            i. the establishment of the pool; and
            ii. the selection criteria to be used to select from that pool?
        d. Were the selection criteria adopted to choose from that pool within the range of reasonable responses open to a reasonable employer?
        e. Were the selection criteria fairly applied to all persons in the selection pool?
        f. Was the decision to dismiss within the range of reasonable responses open to a reasonable employer?

    2) If the Claimants' dismissals are found to be unfair, would they have been fairly dismissed in any event?

    3) If so, what reduction falls to be applied to any award for compensation in terms of *Polkey v AE Dayton Services Limited* [1988] ICR 142?

16. Although the *Polkey* issue concerns remedy and would only arise if the Claimants' complaints of unfair dismissal succeeded, I informed the parties that I wished to hear evidence and submissions regarding *Polkey* principles, but otherwise not on remedy.

Findings of Fact

17. Where there is no dispute between the parties as to a particular fact, my findings of fact are recorded below without any further explanation. Where the facts are not agreed by both parties, I have explained why I prefer one party's account over the other. Where the facts are not clear, I have explained why I have made the finding of fact concerned.

18. My findings of fact are as follows:

The Respondent

19. The Respondent, Menzies Aviation (UK) Limited, provides airport services including ground handling, fuelling, cargo, transportation and executive services at airports. They provide such services at London Heathrow Airport ("LHR"). The Company is part of the Menzies Aviation group which provides these services at various airports across the UK and 200 airports internationally. Menzies Aviation Group has around 23,000 employees globally.

The Ramp Allocator Role

20. The key roles and responsibilities of a ramp allocator and skills required are specified in a document entitled 'Terms of Reference' [137] and are as follows:

"*Key Roles and Responsibilities:*

- *Ensure shift works together as one team with clear communication of objectives and goals*
- *Provide leadership and supervise all staff in the execution of their duties.*
- *Implementation of policies and procedures designed to increase the efficiency and effectiveness of the station, whilst promoting sound safety, security and people management practices.*
- *Establishing, maintaining and promoting effective working relationships with both internal and external customers.*
- *Safeguard the health, safety and welfare of staff, customers and other visitors as required in full compliance with the Company's health" and safety policy.*
- *Ensure effective communication is maintained at all times, including use of radio communication.*
- *Liaise with the Team Manager and communicate any staff shortfalls.*
- *To ensure that all hand held radios are signed in and out by Team leaders and that they are logged.*
- *You are required to be responsible for yourself and your staff to monitor the wearing of your company uniform ensuring no other items than that solely given by Menzies is to be worn or displayed outside other items of company clothing.*
- *Ensure that all defective GSE is reported correctly and logged onto the TCR system.*
- *Maximize utilization of staff through forward planning, allocation of duties and staff productivity.*
- *Ensure that all tows and air starts are logged.*
- *Full compliance and implementation at all times of the following:*
  - *-Airline Handling Manual*
  - *-Airports Disruption Management Policy*
  - *-Ground Handling Manual*
- *Any other duties as reasonably requested by your Line Manager.*

Key Skills:

You must be able to organise your team in order to meet our customers Safety and OTP requirements. You need to be pro-active and have the ability to react positively and effectively to the demands of working within a high pressured environment. You are able to show that you have the ability to develop, coach, and mentor your staff along with showing the leadership and motivational skills necessary in order to achieve the Company's targets. Computer Literate with Knowledge of Microsoft Office packages."

First Claimant's employment history

21. The first Claimant's continuous employment began on 8 September 1997. At that time, he was employed as a Ramp Service Agent with British Midland Airways. In about 1999, his employment transferred to Aviance Limited ("Aviance") under the TUPE Regulations ("TUPE"). After the transfer to Aviance, he continued to work as a Ramp Service Agent. In or around 2010, his employment transferred again under TUPE, this time to the Respondent.

22. The Claimant was promoted to the position of Ramp Allocator at Terminal 2 LHR in March 2017.

23. The first Claimant's employment with the Respondent ended on the 17 February 2021 by reason of redundancy.

Second Claimant's employment history

24. On or around 13 April 2009, the second Claimant commenced employment with Scandinavian Ground Services ('SGS') as a Ramp Agent at LHR. For about one year prior to his employment commencing, he had worked for SGS through an agency called Aviation Resources.

25. In around 2013 or 2014, his employment contract with SGS was transferred to Aircraft Services International Group (ASIG) under the TUPE Regulations. In about 2015, while working for ASIG, he was promoted to the position of Ramp Allocator.

26. In about 2016, his contract of employment with ASIG transferred to the Respondent under the TUPE Regulations.

27. He was employed by the Respondent until the 30 November 2020, when his employment was terminated by reason of redundancy.

Chronology of Events-Redundancy Process – Both Claimants

28. On the 16 June 2020, Frank Dobbelsteijn, vice president LHR, wrote to the employees of the company and informed them that the business was intending to make redundancies as a consequence of a reduction in operational activity because of the COVID 19 pandemic. He stated that they intended to reduce the headcount by 446 roles across their ground handling operation at Heathrow.

29. The Respondent wrote to the Claimants on the 18 June 2020 to inform them that their roles were at risk of redundancy.

30. Collective consultation meetings took place on the 30 June 2020, 7 July 2020, 10 July 2020. Kevin Hall attended all of these meetings. The first Claimant attended the first two meetings as a union representative.

31. The general proposed selection criteria across all roles was presented at the meeting on the 7 July 2020. At that stage there was no apparent reference to interviews being used as the sole method of selection. The criteria specified was: whether or not employee had a full airside pass; skills; absence record; disciplinary record; time keeping; and a tie breaker of length of service.

32. On behalf of Unite, Kevin Hall raised concerns about the use of skills criterion due to its subjectivity. He requested that the criteria adopted be objective. He also stated that managers should not be involved in the selection process as there would be favouritism and the process would then not be fair. He suggested that the selection should be undertaken by Frank Dobbelsteijn and Lesley McBride as neither knew the employees concerned.

33. Agreement was not reached between the unions and the Respondent regarding the redundancy selection pool and criteria for the Ramp Allocator role. The Respondent brought the collective consultation process to an end on or around the 24 August 2022.

34. All 13 allocators of the Terminal 2 were placed at risk of redundancy with the number to be reduced to 6 allocators. Three allocators opted to take voluntary

redundancy and therefore 10 allocators were subject to redundancy consultation.

35. No redundancies were proposed in respect of Allocator positions at Terminal 3. Terminal 3 had three Allocators and the Respondent decided that there was no need to reduce the number of Allocators at Terminal 3.

36. Employees to be assessed by interview were emailed on the 18 August 2020 and asked to confirmed whether they wanted to be assessed at a face to face interview or at a Teams interview.

37. The interviews took place on the 20 and 24 August 2020. Over those two days those interviewed included 10 Terminal 2 Ramp Allocators. Each interview was allocated a 45 minute slot. The interviews were conducted jointly by Steven Harrison and Angela Hibbert (Operations Manager). Angela Hibbert did not have any involvement in the day to day operation of Ramp Allocators at Terminal 2. She did not have any prior knowledge of their performance or any direct working relationship with them.

38. There is a communication from Frank Dobbelsteijn dated 21 August 2020 which explains the compulsory redundancy selection criteria. It states that the company had had 190 volunteers for redundancy. The document identifies the roles that are at risk of redundancy. This included Ramp Allocators at Terminal 2 but not Ramp Allocators at Terminal 3. The selection criteria for compulsory redundancy was explained as follows:

"*Except for the following two roles, Ramp Allocator and Operations Allocator where a selection interview will be used, the following criteria will be used to select for redundancy, where required:*

Full LHR Pass

Skills

Sickness Absence Record

Disciplinary Record

A score will be allocated for each criterion and the total score from all areas will be used to select

employees for redundancy. The lowest scoring employee will be selected for redundancy.

In the event of two or more individuals scoring the same total number of points, length of service will be used as a tiebreaker."

39. Details of the selection matrix to be used (other than for Ramp Allocators and Operations Allocators) is appended to the document [114-126]. This details what points will be awarded for certain skills, including relating to knowledge of certain airlines.

Chronology of Events - Redundancy Process - First Claimant

40. The first Claimant attended his interview-based assessment on the 20 August 2020.

41. He was scored 51 by Steven Harrison and 47 by Angela Hibbert making his overall score 49. This was the second lowest score.

42. The Respondent wrote to the first Claimant on the 9 September 2020 to invite him to a consultation meeting on the 15 September 2020. The meeting was chaired by Steven Harrison. Martin Evans attended to take notes. Kevin Hall accompanied the first Claimant as his union representative.

43. On the 15 September 2020, the first Claimant raised a grievance. This was on the basis that his interview based assessment was unfair because Steven Harrison was not impartial. This was for two reasons. Firstly, he had previously raised grievances against Steven Harrison. Secondly, he believed that Steven Harrison bore a grudge as a consequence of a misunderstanding relating to whether or not the union had agreed to the compulsory redundancy matrix. Thirdly there was no one from human resources at his first consultation meeting.

44. The first Claimant's grievance hearing took place on the 2 October 2020. It was chaired by David Jenkins, Vice President Operation UK and Ireland South. Laura Hoy, human resources, attended to take notes. The first Claimant attended. He was accompanied by Kevin Hall.

45. The Claimant raised two issues. Firstly, he had been treated unfairly by Steven Harrison. This was because of past issues that have arisen between him and Steven Harrison, namely:

    i. There were emails that suggested Steven Harrison treated him differently because of his role as a union shop steward;

    ii. Steven Harrison acted aggressively towards him in an individual consultation meeting that Jaspal was attending as a union representative for a colleague;

    iii. Steven Harrison acted unfairly when he was suspended pending investigation for an incident in January 2018;

    iv. There was an additional Allocator on his line who he alleged was stepping up into his role.

46. Secondly, the redundancy selection process was unfair.

47. Subsequent to the grievance hearing, David Jenkins carried out investigatory meetings with Steven Harrison on the 20 October 2020, Mark Light, Ramp Supervisor, on the 9 November 2020, and Mark Evans, Ramp Duty Manager, on the 9 November 2020.

48. David Jenkins wrote to the first Claimant on the 16 November 2020, to inform him that he had not upheld his grievance. His letter provides his reasons for reaching that conclusion.

49. The first Claimant's follow up consultation meeting took place on the 23 November 2020. Christpher Cookson, Terminal 3 Ramp Manager, chaired the meeting. Sana Ansari took notes. Kevin Hall accompanied the first Claimant.

50. On 25 November 2020, the Respondent wrote to the first Claimant to inform him he is to be made redundant. He was informed that he had a right of appeal against the decision to terminate his employment.

51. On 30 November 2020, the first Claimant informed the Respondent that he wished to appeal against the decision to terminate his employment on the

grounds that he received unfair treatment from Steven Harrison and because the selection process was unfair.

52. The Respondent wrote to the first Claimant on the 10 December 2020 to invite him to an appeal hearing to be held on the 18 December 2020 by MS Teams.

53. The first Claimant's appeal hearing took place on the 18 December 2020. The meeting was chaired by John Henderson, Senior Vice President UK and Ireland, Rebecca Kable, Head of Human Resources, attended as note taker. The first Claimant attended and was represented by Tony Doran. The first Claimant's appeal was not upheld.

Chronology of Events-Redundancy Process –Second Claimant

54. The Respondent wrote to the second Claimant on the 18 June 2020 to inform him that his role was at risk of redundancy

55. The second Claimant attended his interview assessment on the 20 August 2020.

56. He was scored 51 by Steven Harrison and 44 by Angela Hibbert making his overall score 48. This was the lowest score.

57. Between questions two and three the Teams link broke down. Steven Harrison's evidence was that the second claimant was nervous and hesitant but that the that he had said that he wanted to continue his interview on the telephone. In live evidence Steven Harrison accepted that this breakdown in the Teams link would have put the second claimant at a disadvantage that it would have increased his stress. He stated that he did not adjust the scoring to take into account the disruption.

58. The second claimant asserts that he was not offered the opportunity to postpone his interview. His evidence is that Teams kept crashing. His live evidence was that Steven Harrison asked him if they could carry on by telephone. There was no suggestion of an adjournment or postponement.

59. There is no reference in either Stephen Harrison's or Angela Hibbert's record of the interview to the opportunity of a postponement of the interview being provided. All that is noted is "*teams failure continued on phone*" and "*teams crashed – phone conference*" In view of the lack of reference to the offer of a postponement, which it seems to me would be a crucial point to record, and weighing the evidence before me, including the second Claimant's assertion that no such opportunity was provided, I think it more likely that the second claimant was either not given a proper opportunity to postpone the interview or, even if that was what was intended, it was insufficiently clear to the Claimant that that was what was being offered.

60. The second claimant scored 6/6 on question 1 and 7/8 on question 2. His scores then dropped after the interruption to 4/6 at question 3 and 5/6 at question 4. Taking into account also Steven Harrison's evidence that the second Claimant was nervous and hesitant during the interview, I consider that there is a significant possibility that the interruption in the interview and continuation by telephone adversely affected his performance subsequent to that disruption. As there was no adjustment in the scoring to take in to account this disruption, I consider that it is more likely than not that the second Claimant scored lower than otherwise may have been the case had there not been such a disruption.

61. The Respondent wrote to the second Claimant on the 28 August 2020 to invite him to a consultation meeting on the 3 September 2020. The meeting was chaired by Steven Harrison and Barry Treadaway attended to take notes. The second Claimant was accompanied by a gentleman called David.

62. The second Claimant's follow up consultation meeting took place on the 8 September 2020. Steven Harrison chaired the meeting. Barry Treadaway took notes. Adele Wills accompanied the second Claimant.

63. On 10 September 2020, the Respondent wrote to the second Claimant to inform him he is to be made redundant. He was informed that he had a right of appeal against the decision to terminate his employment.

64. On 14 September 2020, the second Claimant informed the Respondent that he wished to appeal against the decision to terminate his employment on the grounds that the selection process was unfair because he was discriminated against by being pooled in with super allocators yet had no formal training as a super allocator and because Terminal 3 allocators were not included in the selection pool.

65. The Respondent wrote to the second Claimant on the 22 September 2020 to invite him to an appeal hearing to be held on the 24 September 2020 by MS Teams.

66. The second Claimant's appeal hearing took place on the 7 October 2020. The meeting was chaired by Lisa Hemmingsley, Human Resources Advisor and Suzanne Rankin, Human Resources Coordinator, attended as note taker. The second Claimant attended and was represented by Kevin Hall. The Respondent wrote to the second Claimant on the 30 October 2020 to inform him that his appeal had not been upheld.

Selection Pool

67. All thirteen Terminal 2 Ramp Allocators, including the Claimants, were placed in the selection pool. Terminal 3 had three Allocators. Three Allocators were not placed in the selection pool concerned and no redundancies were proposed in respect of Terminal 3 Allocators. This was because the Respondent decided not to reduce Ramp Allocator numbers at Terminal 3.

68. Steven Harrison's evidence was that it would have been Frank Dobbelsteijn who decided that the selection pool should not include Terminals 3 as well as Terminal 2 Allocators. He stated that Terminals 2 and 3 operated at different capacities and required different skill sets. For example, the Allocators at Terminal 3 performed their roles across the baggage, pushback and teams operations during a shift, whereas Allocators at Terminal 2 would only ever work and be trained on a specific line. The first Claimant, was only trained as a pushback Allocator for example. It would therefore not have been appropriate to include the Terminal 3 Allocators within the pool for Terminal 2 Allocators. In live evidence, he said that pools were identified by department not pay grades. Further, Terminal 3 Allocators needed to have knowledge of the American Airlines product.

69. Steven Harrison accepted in live evidence that both of the Claimants had, from time to time, worked on American Airline flights. He accepted that they both had the generic skill sets to at least provide cover at Terminal 3 and that, with proper

training, could undertake an Allocator role at Terminal 3. Christopher Cookson's live evidence was that the Claimants could work as Allocators at Terminal 3 with proper training.

70. The first Claimant accepted in live evidence that he would need re-training to undertake work as an Allocator at Terminal 3, that this would take time and money and that he would not be able to undertake the role whilst being upskilled in this respect.

71. Having heard evidence from both the Claimants and witnesses for the Respondent, I formed the view that additional training would be required to enable either of the Claimants to work at Terminal 3 as Allocators.

72. There is reference in the second Claimant's evidence to 'super allocators'. I accept Steven Harrison's evidence the term 'super allocators' is a legacy term and not material to the make up of the selection pool.

The selection criteria

73. Human Resources made the final decision to select Ramp Allocators for redundancy by interview, although Steven Harrison discussed it with them and agreed that interview was the best method.

74. Steven Harrison prepared the interview questions with Barry Treadaway (Ramp Manager, Terminal 2). He states that they put together a number of scenario-based questions to assess the Ramp Allocators' skills and technical ability. This was to ensure that the Allocators with the skills required were retained as part of the operation going forward. They felt that the questions settled on would give the candidates an opportunity to demonstrate their problem solving abilities and communication skills.

75. Steven Harrison's evidence was that the role of Ramp Allocator is very skills-based role and requires the individual to make the right decisions regarding allocating resources correctly in each given situation. He stated that the selection matrix which had been developed for the other operational staff was not suited to the office-based Ramp Allocator role. This was because the matrix used for the operational staff was of no relevance to the skills used by an Allocator and considered only the functions that an agent would perform on an aircraft. The Allocator is required to analyse the available workforce and their skill sets in order to assign the correct number of staff to the required tasks and needs separate skills and experience.

76. At the selection interviews, each interviewer completed a form entitled *Internal Allocator Interview Assessment.* The form included the following introduction:

Interview Structure:

- *Introduce yourself and state that the interview will last between 45-60 minutes*
- *State that this is a behavioural/competency interview; the candidate can use examples from their work experience, education or interests*
- *During the interview ensure you note the key points from the candidate's answers, recording if the answer is brief or if the question is not being answered at all.*

- *At the end of the interview thank the candidate for their time, state that you will review their answers and CV and revert with a decision*
- *After the interview, review the candidate's answers and use the scoring grid below to allocate a score per competency.*
- *Finally, add the scores together to create a total score out of 100*

0	No answer given or answer completely irrelevant. No examples given	3-4	Some points covered, not all relevant. Some examples given	7-8	Good answer. Relevant information. All or most points covered. Good examples
1-2	A few good points but main issues missing. No examples/irrelevant examples given	5-6	Some points covered. Relevant information given. Some examples given	9-10	Perfect answer. All points addressed. All points relevant. Excellent examples

77. The following ten questions were then asked of each interviewee:

1. *Introduce yourself, explain your interests and out of work interests.*
2. *Describe the responsibilities of a Ramp Allocator.*
3. *What processes do you think we should employ to better control the administration of the radios used by the ramp staff.*
4. *If you have the following staff on shift, 9 Supervisors, 8 Lifter Drivers, 4 Push-backs, 3 agents & 3 Belt Drivers, during a one hour period, you have 2 wide bodied arrivals, 3 narrow bodied & 1 A221 arrivals, plus an E90 and 32N departure. How would you attempt to cover the 8 activities with the staff shown, given:*
   a. *77W & A221 arrive at 08:00*
   b. *32N & 32Q arrive at 08:30*
   c. *789 & 73H arrive at 08:50*
   d. *E90 departs at08:30*
   e. *32N departs at 09:00*
5. *Looking at the example LDM tell us the following:*
   a. *The flight number*
   b. *The day of the month the flight occurred*
   c. *The Total weight of the combined holds-without counting up the individual weights*
   d. *The total number of bags*
   e. *The total number of Business Class bags*
6. *Where can you normally find the LDM or CPM of an arriving flight?*
7. *Tell me the time when your communication skills improved a situation.*
8. *How do you cope during a schedule disruption due to adverse weather.*
9. *Tell me about a time when you showed integrity and professionalism.*
10. *What in your opinion can Menzies Aviation do post lock down that will ensure our customers continue to receive the level of service afford* [sic] *pre-COVID 19?*

78. Steven Harrison stated in live evidence that it was explained to candidates that the questions would be competency based relating to activities in the workplace. He was not able to recall how this information was conveyed to candidates. Interviewees were not told in advance what competencies would be tested in the interview. Candidates were not told which competencies each question related to.

79. It can be seen from the Interview Assessment Form that the Claimants were informed at the beginning of the interview that it was a behavioural/competency

based interview. However, I find that they were not told anything about the selection criteria prior to the interview itself.

80. There was no standard answer/suggested marking sheet for each individual question. The only guidance given to the interviewers was the general marking system laid out above.

81. Steve Harrison's oral evidence was that what was written by the interviewers on each candidate's form was a précis of what was said rather than a verbatim record. He accepted that the only people who knew exactly what was said was he and Angela Hibbert and that an outsider would probably not be able to tell if all of the necessary points had been addressed. He was asked if the Claimants were told at any point in the individual consultations, grievance process or appeal of the points that they were expected to cover in the interview in relation to individual questions. He stated that he was struggling to recall what was said; some of the individual questions such as those relating to load and allocation were discussed but not every question was discussed nor was a breakdown given.

82. In live evidence, Steven Harrison accepted that question 1 was a broad ranging question, to enable candidates to share with them who they are and their ability to communicate. He accepted that it was not competency based. It was intended to relax candidates and to share with them what

83. In live evidence, the second Claimant stated that he was awarded 4 and 6 points for his answer at question 6 whereas other candidates that gave the same answer were awarded 10 points. One interviewer recorded his answer as "*Citrix, Sita, call operations or alternative printer*" and gave him a score of 4. The other interviewer recorded his answer as "*Telex print, Citrix, Operations or other allocator*" and scored him 6 points. Numerous employees were awarded 9 or 10 marks with the same or similar answers [for example, these include those at 128J, 128O, 128W, 128AA, 128AE, 128AM] although there was reference to RSMS rather that Citrix in some of these other candidates' answers. The second Claimant explained that both Citrix and RSMS are messaging services but individuals who have been employed longer may call it RSMS. I have no reason to doubt that this is correct.

84. It is not possible to understand, from the information recorded in the Interview Assessment Forms, or in any of the other evidence before me, why the second Claimant scored so much lower than many of the other interviewees in relation to question 6. It can also be seen from the above example that the answers recorded by each interviewer were different. On that basis, and also taking in to account Steven Harrison's evidence that only a précis was noted, I find that what is recorded in the Interview Assessment Forms is not a reliable or complete record of the answers given by interviewees.

85. Various other questions were explored in oral evidence but I do not record all of that evidence here.

86. It is asserted by the first Claimant that Steven Harrison influenced Angela Hibbert in relation to the scoring of his answers. Steven Harrison's evidence was that he and Angela Hibbert did not discuss scores given to candidates before awarding those scores. Angela Hibbert did not give evidence and there

is no witness statement from her. However, whilst the first Claimant may believe that there was collusion when the scoring was undertaken, there no evidence before me to demonstrate that this occurred.

87. The second Claimant states that he did not see a breakdown of his scores until he received the bundle in these proceedings. He was told in his consultation meeting what his overall score was but was not given the forms completed by Steven Harrison and Angela Hibbert. On the evidence before me, I have no reason to doubt the second Claimant's evidence in this respect.

88. In respect of the first Claimant, Steven Harrison stated that he did not feel that he came across very well in the interview from a technical perspective and this was reflected in the scoring. In their discussions afterwards, Angela Hibbert said that she felt that he was poor in comparison to the others that they had already interviewed. He provided little depth to his answers and he was very vague in his responses to each question. He did not feel that he demonstrated the same level of understanding and experience as the others and he did not perform well enough to keep his role.

89. In respect of the second Claimant, Steven Harrison stated that he was very hesitant and extremely nervous in the interview. He could tell that he wanted to answer questions but stalled at points in his answers. As a result, he lacked sufficient depth in his answers and did not score highly enough to safeguard his role.

90. When conducting the grievance process, David Jenkins only had a copy of Steven Harrison's marking sheet for the first Claimant. He did not have copies of the other candidates marking sheets.

Other findings of fact – First Claimant only

91. Aviance's redundancy policy and procedure dated June 2009 includes the following:

"6.0 COMPULSORY SELECTION […] In the event of compulsory redundancies, selection at the affected station will be made giving due consideration to the essential skills base required at the station.

Any appropriate and agreed selection criteria and all other things being equal, 'Last In, First Out (LIFO)' will apply. Any selection criteria other than LIFO will only be applied where fair, specific and objective measurement is available.

7.0 SELECTION CRITERIA

In the event that consideration is given to criteria other than LIFO then the combined management / union team should consider criteria such as:

Mandatory training requirements
Essential skills which are required for the business to continue at this location
Attendance records
Any current disciplinary warnings
Length of Service

Management will prepare a matrix of the pre agreed skills/selection criteria essential to the ongoing business for sign off with the union(s) prior to applying

this to 'at risk' employees. It is appropriate to communicate this matrix to affected employees.

In all situations the company in consultation with the union reserves the right to challenge any selection which prevents the delivery of customer engagement standards."

92. I have not been provided with the contract of employment between the first Claimant and Aviance.

93. There is an email from Steven Harrison to Vipal Pandya dated 7 December 2017 asking for a performance review with the first Claimant. This followed an email from Kevin Cooper in which he stated that the first Claimant had not coped well during a busy shift. There is then an email from Steven Harrison to Lynda Alabaster, Vipul Pandya and Barry Treadaway dated 11 January 2018. This is headed '*Inappropriate control of the Push-Back and Towing morning shift on 11th January 2018 between the hours of 11.30 -14.00".* In it Steven Harrison directed that the first Claimant be suspended from allocating pending the investigation of various issues but that he could continue to carry out ramp activities.

94. When David Jenkins interviewed Steven Harrison regarding the first Claimant's grievance, Steven Harrison told David Jenkins that he did remember the incident which resulted in the first Claimant being suspended but it was not him who suspended the first Claimant, it was his DM. In live evidence, Steven Harrison agreed that he did not mention this to David Jenkins when he was interviewed.

95. David Jenkins stated that whilst he was not aware that Steven Harrison had prompted the investigation in to the first Claimant's suspension, on reviewing the documents it would not have changed his view on the outcome and he believes that the process was robust, although he accepted that Steven Harrison's involvement was relevant.

The Relevant Law

Unfair Dismissal

96. The question of whether a dismissal was fair or unfair is a two stage process. The first stage is that it is for the Respondent to show a potentially fair reason for dismissal, and secondly, if that is done, the question then arises as to whether the dismissal is fair or unfair.

97. The reason for the dismissal and the reasonableness of the dismissal is based on the facts or beliefs known to the employer at the time of the dismissal (as per *W Devis and Sons Ltd v Atkins* 1977 ICR 662, HL). However, a Tribunal should consider facts that came to light during the appeal in considering whether the employer's decision to dismiss was reasonable (as per *West Midlands Co-operative Society Ltd v Tipton* 1986 ICR 192, HL).

98. In an unfair dismissal case in which the employee had been employed for two years and no automatically unfair reason is asserted, the burden lies on the employer to show what the reason or principal reason was, and that it was a potentially fair reason under section 98(2) of the Employment Rights Act 1996 ("the ERA"). Once that is done there is no burden on either party to prove fairness/unfairness.

Reason for dismissal

99. Section 98(2) identifies a number of potentially fair reasons for dismissal which includes redundancy.

Reasonableness of Dismissal

100. Section 98(4) of the ERA specifies the test to be applied by the Tribunal in order to determine whether a dismissal is fair or unfair. It reads as follows:

> *"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."*

101. The Tribunal is required to apply a band of reasonable responses test as laid down in *Iceland Frozen Foods Limited v Jones* [1983] ICR 17. This can be summarised as follows:

i. the starting point should always be the words of Section 98 itself;

ii. in applying section 98, the Tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair;

iii. in judging the reasonableness of the employer's conduct, the Tribunal must not substitute its own view as to what the right course of action was for that of the employer;

iv. in many (though not all) cases, there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

v. the function of the Tribunal, is to determine whether, in the particular circumstances of each case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, if a dismissal falls outside the band, it is unfair.

102. In *Williams v Compair Maxam Ltd* [1982] IRLR 83, the Employment Appeal Tribunal ("EAT") gave guidance regarding the key factors to be taken in to account when deciding whether a dismissal for redundancy is fair or not under section 98(4) of the ERA. The EAT stated that employers are obliged to consider taking steps to consult with employees regarding their proposals and to mitigate the hardship caused by redundancies including to:

i. give as much warning as possible of impending redundancies in order to enable the employees who may be affected to consider possible alternative solutions and, if necessary, find alternative employment within the business or elsewhere;

ii. seek to agree objective selection criteria to be applied to the pool of employees at risk of redundancy;

iii. seek to ensure that the selection is made fairly in accordance with these criteria and to consider any representations regarding such selection (having first provided employees with sufficient information about the selection process, for example details of their scores against the criteria);

iv. consider suitable alternative employment as an alternative to redundancy dismissals; and

v. provide a right of appeal against dismissal.

103. The guidelines in *Compair Maxam* are not principles of law but rather standards of behaviour that can inform the section 98(4) reasonableness test. A departure from these guidelines on the part of the employer does not lead to the automatic conclusion that a dismissal is unfair. The overriding test is whether the actions of an employer at each stage of the redundancy process was within the band of reasonable responses.

Selection Pool

104. If there is a customary arrangement or pre-agreed procedure that specifies a particular selection pool, the employer will normally be expected to adhere to this unless the employer can show that it was reasonable to depart from it (*Russell v London Borough of Haringey,* unreported, 12.6.00, CA). If there is no customary arrangement or agreed procedure to be considered, employers have flexibility in defining the pool from which they select employees for redundancy (*Thomas and Betts Manufacturing Co v Harding 1980 IRLR 255, CA*). The employer needs only to demonstrate that it has applied its mind to the issue and acted from genuine motives.

Selection criteria

105. In terms of the selection criteria applied, the criteria should be precise, clear and transparent (*Watkins v Crouch t/a Temple Bird Solicitors* 2011 IRLR 382, EAT*, Odhams-Sun Printers Ltd v Hampton and ors* EAT 776/86).

106. Generally, in order to ensure fairness, the selection criteria applied to the chosen pool must be objective (*Compair Maxam*); not merely reflecting the personal opinion of the selector but being verifiable by reference to data such as records of attendance, efficiency and length of service.

107. However, the fact that certain selection criteria may require a degree of judgement on the employer's part does not necessarily mean that they cannot be assessed objectively or dispassionately. In *Swinburne and Jackson LLP v Simpson* EAT 0551/12, the EAT stated that "*in an ideal world all criteria adopted by an employer in a redundancy context would be expressed in a way capable of objective assessment and verification. But our law recognises that in the real-world employers making tough decisions need sometimes to deploy criteria which call for the application of personal judgement and a degree of subjectivity. It is well settled law that an employment tribunal reviewing such criteria does not go wrong so long as it recognises that fact in its determination of fairness*."

108. In *Mental Health Care (UK) Ltd v Biluan and anor* EAT 0248/12, Mr Justice Underhill observed "*The goal of avoiding subjectivity and bias is of course desirable but it can come at too high a price; and if the fear is that employment tribunals will find a procedure unfair only because there is an element of "subjectivity" involved, that fear is misplaced.*"

109. In *Eaton Ltd v King and ors* 1995 IRLR 75, the EAT held that all the employer had to show was that it had set up a good system of selection which had been reasonably applied. Providing an employer's selection criteria are reasonable, the Tribunal should not subject them, or their application, to minute scrutiny (*British Aerospace plc v Green and ors 1995 ICR 1006, CA)*.

110. It would rarely be appropriate for a Tribunal to embark upon a detailed critique of individual items of scoring for the purpose of determining whether it was reasonable to dismiss the claimant as redundant unless this is to determine whether there has been an obvious error or there has been bad faith.

111. A failure to disclose to an employee selected for redundancy the details of his or her individual assessments may give rise to a finding that the employer failed in its duty to consult with the employee. In *John Brown Engineering Ltd v Brown and ors* 1997 IRLR 90 EAT, the EAT held that the employer's refusal, as a matter of policy, to disclose the marks of those selected for redundancy rendered its internal appeal process a sham. The employees' subsequent dismissals were accordingly unfair for lack of proper consultation. The EAT pointed out that a fair redundancy selection process requires that employees have the opportunity to contest their selection, either individually or through their union. However, employees are not entitled to compare their own scores with those of employees who have been retained.

Reduction of any Compensation

112. Section 123(1) of the ERA provides that:

> *"Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal so far as that loss is attributable to action taken by the employer."*

113. As per *Polkey v AE Dayton Services Ltd*, if a Tribunal finds an unfair dismissal claim to be well founded, it must consider whether the compensatory award should be reduced to reflect the chance that the employee might have been fairly dismissed in any event at a later date if a fair procedure had been used.

114. Section 123(6) of the 1996 Act requires a Tribunal to reduce the amount of the compensatory award by such amount as it considers just and equitable if it concludes that an employee caused or contributed to their dismissal. In addition, section 122(2) requires a Tribunal to reduce the basic award if it considers that it would be just and equitable to do so in light of the employee's conduct prior to dismissal.

MY CONCLUSIONS

Reason for the Dismissal

115. The parties agree that the potentially fair reason for dismissal was redundancy. I therefore need say nothing further about this.

Fairness

Selection Pool

116. There is no customary arrangement or pre-agreed procedure that specifies a particular selection pool in this case.

117. The Claimants assert that the three Allocators working at Terminal 3 should have been included in the selection pool.

118. The Respondent's position is that Terminal 3 operated at different capacities and required a different skillset from Allocators at Terminal 2. They need to be trained on the American Airlines product and as there are a smaller number of Allocators they have to undertake a wider range of tasks during an individual shift than Terminal 2 Allocators.

119. Having considered all of the evidence before me in the round, I am satisfied that Terminal 3 Allocators have an additional knowledge base not held by Terminal 2 Allocators. In addition, they are required to run all three lines at one (baggage, pushback and teams operations) during a shift whereas Terminal 2 Allocators only run one line at once. Both witnesses for the Claimants and for the Respondent accepted that the Claimants could have acquired this additional knowledge with training but that there would need to be a period of training before which they could not undertake the role.

120. The Respondent has given comprehensive reasons for defining the selection pool in the manner that it did. The redundancies were being made in a challenging economic environment and so the employer was entitled to take into account the future smooth running of operations at Terminal 3 in defining the appropriate selection pool.

121. I am satisfied on the evidence before me that the Respondent fully applied its mind to the nature of the selection pool and its reasons for identifying the selection pool concerned. I find that there was nothing unfair about the procedure followed by the Respondent to identify the selection pool or in the nature of the selection pool itself.

Selection Criteria / Selection Interview and related issues

Both Claimants

122. Whilst evidence was being heard, the Respondent questioned the appropriateness of the Tribunal considering the details of the scoring for individual questions. I explained to the parties that I did not intend to make findings on whether or not the scoring was correct. However, the nature of the criteria and the fairness of the application of that criteria was material to findings that I had to make.

123. In considering the fairness of selection criteria and its application, I have borne in mind that the Tribunal must not substitute its own view as to the right course of action. In particular, when considering the selection criteria it is not the Tribunal's role to undertake a re-evaluation of the scoring or a detailed critique of individual items of scoring. The Tribunal must not step into the arena.

124. There was consultation regarding selection criteria during the collective consultation process, although the focus was on the matrix system to be used in respect of other roles rather than those roles being selected by interview alone. There is nothing in the evidence before me to suggest that the union was consulted specifically regarding the criteria to be used if selection was to be by interview. No agreement was reached between the union and the Respondent regarding the selection criteria.

125. At the collective consultation meeting on 7 July 2020, the union did raise the potential difficulties with ensuring objectivity and fairness when using skills as a basis for selection. The union also stated that, to ensure fairness, any assessment of skills should be undertaken by individuals who did not know the employees rather than their managers.

126. There is no requirement that redundancy selection criteria be agreed with the trade union. However, what is of relevance in this case is that the Respondent was aware of the union's concern that skills based selection may cause difficulties relating to objectivity and fairness, and of the potential issues with applying criteria objectively if the employer had previously been managed by an assessor. The Respondent was therefore aware, prior to developing the interview questions and undertaking the selection interviews, of the need to ensure that any criteria used was objective and measurable and was also applied in a fair manner.

127. There is nothing in the evidence before me to demonstrate that the Claimants were provided with any written information or guidance about the nature of the selection interviews prior to the interviews taking place. The only document that makes any reference to the interviews at all is the communication from Frank Dobbelsteijn dated 21 August 2020, dated the day after the Claimants' interviews took place. No information whatsoever is provided in that document as to how the interview selection process will work or what criteria will be applied. The Claimants were not informed in advance of the competencies that would be tested in interview. As such information was not provided in advance, it was not possible for the Claimants to know, in relation to some of the questions, what sort of answers would attract maximum marks. By way of example, in relation to question 1, would maximum marks be achieved by communicating well or by giving examples of a wide range of outside activities or hobbies.

128. The lack of standard answers/ marking sheet identifying model answers caused a range of potential consequences in this case, particularly as there is an element of subjectivity needed in the scoring of several of the questions. These are as follows:

    i. It allowed for a great degree of subjectivity when scoring individual questions;

    ii. The Claimants would have been unable to identify the basis for their scores, even if provided with the completed Interview Assessment Form;

    iii. It made it very difficult for the Claimants to challenge their scores to individual questions at consultation, grievance and appeal stage because they did not know what the correct/model answer(s) to each question.

129. As a consequence of the way in which several of the interview questions are designed, the scoring requires varying degrees of subjectivity in terms of the potential answers. The answers are not objectively measurable.

130. From the live evidence that I heard it, and various interview assessments for each of the candidates, including the Claimants, there are several questions for which candidates gave very similar answers but received significantly different scores.

131. As those conducting individual consultations and appeals against dismissal did not have marking guide, and as the answers were summaries of what was said by the interviewees, it was not possible for the individuals concerned to assess if the marks given were appropriate and were fair. Further, the lack of a marking guide meant that it was not possible for the Claimants to mount a challenge to their scores in their individual consultation meetings and appeal.

132. In addition, the answers recorded in the interview assessment reports were summaries of what was said. They were not a full contemporaneous note of the answers given by the Claimants and other employees.

133. Whilst there were two interviewers, and one of those interviewers had not previously worked with the Claimants, this did not rectify the deficiencies in the selection criteria used that I have identified above.

134. Taking in to account the above, I find that the selection criteria applied to the pool was not objective and measurable. It was not precise, clear and transparent. It was not possible for an effective consultation process to take place after the interviews because of the lack of standard answers/marking sheet and because only a summary of what was said was recorded.

135. There is a recognition in caselaw that in certain circumstances, in the real world, it would not be unreasonable for there to be a subjective element to the selection criteria applied by an employer. However, in this case, the Respondent was well aware that the union had concerns about using an assessment of skills and nothing else as a means of selection and the union explained why this was the case. It can be seen from the questions that were asked in interview that it would have been entirely possible to design questions whose answers were objective and measurable. This in turn would have enabled a marking sheet to be provided which would have enabled effective individual consultations to have taken place after the interviews. On the facts of this case, which relates to a practical skills based role, there was nothing to prevent the Respondent from developing a process and selection criteria which was precise, clear, transparent and measurable.

136. Taking my findings above into account regarding the selection criteria and selection process, on the facts of this case I find that the dismissal of the First Claimant and the second Claimant was not within the range of reasonable responses and, as such, was unfair.

137. I have found that both Claimants dismissals were unfair for the reasons provided above. I deal with additional issues relevant only to the individual Claimants below. For the avoidance of doubt, even without the factors identified below in respect of the individual Claimants, I would have found that the Claimants were unfairly dismissed.

<u>First Claimant only</u>

138. The first Claimant asserts that a contractual redundancy selection criteria applied in his case as a consequence of his previous employment with Aviance.

139. Whilst I have been provided with the Aviance's Redundancy Policy and Procedure, I have not been provided with the first Claimant's contract of employment with Aviance. There is nothing in either the Redundancy Policy and Procedure itself, or in any of the other documents before me, to demonstrate that the policy was incorporated in the first Claimant's contract of employment

with Aviance. I am not therefore satisfied, on the evidence before me, that the policy was incorporated in to the first Claimant's contract of employment.

140. I therefore find that the Respondent was not contractually obliged to apply the Aviance's Redundancy Policy and Procedure when undertaking this redundancy selection exercise.

141. Further, and in any event, the Aviance policy provides the employer with an element of discretion in that it talks of management and the union needing to consider the criteria to be applied. It also states that the employer reserves the right to challenge any selection which prevents the delivery of customer engagement standards.

142. David Jenkins states in live evidence that he did not understand the technical aspects of the interview and it was not his role to decide whether the scores were right or wrong. As David Jenkins did not have marking guide and as the interview answers were summaries of what was said, it was not possible for him to assess if the marks given were correct and fair when considering the first Claimant's grievance.

143. The first Claimant asserts that his selection for redundancy was unfair because of Steven Harrison's involvement in the process. At the date of dismissal, the first Claimant had worked with Steven Harrison for several years. During this time, the first Claimant was a trade union representative, had raised various grievances, had been suspended from the Allocator role on one occasion and had been subject to performance reviews.

144. Having considered the evidence before me in the round, including the oral evidence and historical documentary evidence, I am not persuaded that the history between the first Claimant and Steven Harrison resulted in Steven Harrison intentionally marking down the first Claimant during his interview.

145. However, the history between the first Claimant and Steven Harrison does demonstrate the need for any selection criteria to be objective and measurable, particularly where the selection is carried out by someone who has worked with the individual being considered for redundancy.

Second Claimant only

146. The difficulties that arose with the Teams connection during the second Claimant's Teams interview was likely to have impaired the second Claimant's performance in interview. It was not made clear to him that the interview could be postponed. Those conducting the interview should have been alert to the potential impact that this would have on his performance, particularly given their observations that he appeared nervous. This is a further factor that caused the redundancy selection process to be procedurally unfair in the case of the second Claimant.

Outcome

147. The first Claimant was unfairly dismissed.

148. The second Claimant was unfairly dismissed.

Compensation

149. The Respondent submits that the appropriate Polkey reduction should be 100% because the Claimants would have been dismissed in any event. This is because they scored significantly lower in their interviews than most of their

colleagues and it is clear, for the reasons given at paragraphs 76 and 77 of the Respondent's closing submissions, that they would have been dismissed fairly in any event.

150. I do not consider that it can be said that the Claimants would have been dismissed anyway had a fair selection process been followed and fair selection criteria been used. Both are longstanding employees who have carried out the Ramp Allocator role for several years.

151. In respect of the first Claimant, the Respondent submits that there was a longstanding history of performance concerns and that he had previously been placed on a performance improvement plan. However, that information is historical and relates to a period not long after he was promoted to the Ramp Allocator role. It does not demonstrate that he would have been dismissed in any event.

152. The Respondent also asserts that the Claimants now raises many issues that were not brought to the attention of the Respondent prior to dismissal. However, the core reason why I have found the dismissals to be unfair is due to the unfairness of selection criteria and procedure used and issues stemming from that. Concerns were raised by the union prior to the interview process taking place and during the individual consultation meetings. The Claimants were hampered in mounting a challenge to their selection for redundancy during individual consultation meetings ond at appeal because the criteria used was not objective and measurable and there was no model answer or marking schedule.

153. I therefore do not consider that it would be just and equitable to make any reduction on the basis of *Polkey* in this case.

154. I apologise to the parties for the length of time that it has taken to produce my Judgment and Reasons in this case, which is, in part, because of illness.

_____

Employment Judge S.L.L. Boyes

_____

Date: 10 January 2023

Reserved Judgment and Reasons Sent to The Parties On 11 January 2023

FOR EMPLOYMENT TRIBUNALS

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