



EMPLOYMENT TRIBUNALS

Claimant: Mr Craig Janney
Respondent: CWM Automation Ltd
Heard at: Midlands (East) Region in Nottingham
On: 23 September – 25 September 2024
Before: Employment Judge Hutchinson (sitting alone)

Representation

Claimant: Diarmuid Bunting, Counsel
Respondent: Hamed Zovidavi, Counsel

RESERVED JUDGMENT

The Employment Judge gave Judgment as follows:

1. The claim of unfair dismissal fails and is dismissed.
2. The remedy hearing set for 16 December 2024 is cancelled.

REASONS

Background to this hearing

1. The Claimant presented his claim to the Tribunal on 29 September 2023. He was employed by the Respondent as a Service Engineer.
2. The Respondent designs, manufactures, sells, and installs automated food and beverage machinery.
3. The Claimant was employed by the Respondent from 30 November 2020 until 30 June 2023 when the Respondent dismissed him. The Respondent says that the reason for the dismissal was redundancy.
4. The Claimant claims unfair dismissal only. He says:
 - 4.1 there was no genuine redundancy situation;
 - 4.2 the reason for his dismissal was not redundancy. He says that Mr Metcalfe did not want him in his team. The Claimant said that he had

objected to working excessive hours and the Respondent used criteria which were not objective and that his dismissal was predetermined:

- 4.3 the dismissal was not reasonable because the Respondent has not followed a fair process. In particular:
 - 4.3.1 the consultation was not reasonable.
 - 4.3.2 the way in which the Respondent dealt with selection and pooling was not reasonable;
 - 4.3.3 the Respondent did not consider alternatives, in particular alternative employment.
5. As Mr Bunting said in his Skeleton Argument it is the claimant's case that:
 - 5.1 the Claimant's dismissal was not solely or principally because of redundancy.
 - 5.2 the Respondent used the redundancy exercise as an opportunity to rid itself of the Claimant on the basis he was perceived as troublesome.
 - 5.3 the Respondent's criteria were not objective, and the Claimant's selection was predetermined.
 - 5.4 the Claimant's dismissal was therefore unreasonable.
6. It is the Respondent's contention that:
 - 6.1 there was a genuine redundancy situation.
 - 6.2 the reason for the dismissal was entirely because of his redundancy.
 - 6.3 there was no predetermination that the Claimant should be selected for redundancy and the process was fair and reasonable.

Evidence

7. I heard evidence from the following witnesses:
 - 7.1 Kevin Metcalfe, the Respondent's Service Manager and dismissing officer and the Claimant's Line Manager.
 - 7.2 Andrew Trippitt, the Respondent's Financial Director, and Appeal Office.
 - 7.3 Michael Williams, the Respondent's Managing Director.
 - 7.4 Paul Forrest, Service Engineer.
 - 7.5 The Claimant.
8. There was an agreed bundle of documents and where I refer to page numbers, it is from that bundle.

9. Where there was a conflict of evidence, I preferred the evidence of the Respondent's witnesses. The Claimant's evidence was inconsistent and, as will be seen from the findings of fact, he admitted that at the appeal hearing he had lied in respect of the covert recording of that hearing.

Facts

10. The Respondent is a small manufacturing business which designs, develops and manufactures automated machinery. It specialises in equipment for filling, sealing, lidding, and packaging primarily in the food and dairy industries.
11. The business was founded in 2006 by its Managing Director, Michael Williams, and he has been responsible for the day to day running of the business since then. The business was acquired by Hexadex Ltd in September 2018. At the time of the Claimant's employment, it had 42 employees but now has 26 employees.
12. The Claimant was employed by the Respondent as a Service Engineer. He commenced his employment on 30 November 2020. He received a salary of £45,235 per annum and was in receipt of a Company car and bonus. His contact of employment is at pages 56-65.
13. He has considerable experience as an engineer and qualified as a mechanical engineer whilst serving in the RAF between 1995 and 2003. His certificates of training and qualifications were at pages 49 – 55 and 79 – 105.
14. The Claimant's job description is at pages 69 – 71. It was part of his job that he should spend time at customers' sites carrying out installation and commissioning of the Respondent's equipment and undertake routine service visits to maintain the equipment, together with providing emergency breakdown cover and assistance.
15. He reported to Kevin Metcalfe, the Respondent's Service Manager.
16. His normal hours of work were between 8 am and 4:30 pm Mondays to Thursdays and 8 am until 3:30 pm on Fridays, inclusive of a half hour lunch break. In the contract he agreed that he could be required to work such additional hours as were necessary for the proper performance of his duties.
17. In clause 6.2 of his contract, it said:

"It is not the Company's intention that you will be required to work in excess of the provisions of the Working Time Regulations i.e work in excess of an average of 48 hours a week over a 17-week period. However, you agree to do this should the Company require you to do so. If you wish to terminate your agreement to opt out of the 48-hour average limit, you are required to give the Company three months' written notice of your intention to do so."
18. On 26 October 2021, Mr Janney contacted Mr Metcalfe about his health. The email is at page 111. He complained that he was physically and mentally

exhausted because of the hours he had had to work. He acknowledged that as Service Engineer, it involved him spending a lot of time away and said that this was putting a great strain on his personal life. He referred to the health scare that he had had earlier in the year and asked if there was anything that Mr Metcalfe could do. Mr Metcalfe responded immediately saying that he had wished that the Claimant has spoken to him about that yesterday and acknowledged that he was trying to improve everyone's work life balance, including his own. He said that he valued the Claimant for what he did and that he would do anything he could to help with any issues that they have and suggests that they should have a chat.

19. The Claimant did not respond and instead wrote another letter on 11 November 2021, pages 113 – 114. In that email he again complained about working excessive hours and travelling long distances and explained how this was causing stress at home since his wife had had her operation in June that year.
20. On 15 November 2021, the engineers held a meeting with Mr Metcalfe. The notes are at pages 115 – 116. In the meeting, Mr Metcalfe acknowledged that the Department was understaffed and referred to the expectation that engineers should work at weekends, which they had been refusing to do. The engineers jointly made clear that they were unable to agree to work weekends in addition to the hours that they were already working, which they complained was often in excess of 48 per week and had recently involved several consecutive weeks of working and living away from home. Mr Metcalfe responded by saying that if the engineers were unwilling to work weekends going forward, he would find other engineers willing to do so. He went on to express support for some of the concerns raised relating to the payment of expenses.
21. Mr Janney then wrote to Mr Metcalfe again on 16 January 2022. A copy of the email is at pages 117 – 118. He expressed a number of concerns and in particular;
 - 21.1 about the hours which he was expected to work.
 - 21.2 the failure of the Respondent to recruit and retain other service engineers.
 - 21.3 his health and safety concerns about the work environment.
 - 21.4 his view that he was undervalued.
22. His letter was referred by Mr Metcalfe to HR who contacted the Claimant and decided to treat his letter as a formal grievance, saying that this would be dealt with under the Grievance Policy. The letter is at page 119 – 120.
23. A grievance hearing was conducted on 11 February 2022 by Tim Dudley, General Manager.
24. Mr Janney prepared a grievance statement which he submitted at the hearing, and which is at page 121 – 124.

25. Mr Janney received the grievance outcome on 11 March 2022 from Mr Dudley, which is at page 125 – 132. Mr Dudley did not uphold any of the Claimant's grievances.
26. He pointed out that in the Claimant's contract of employment, he had opted out of the Working Time Directive maximum working weekly hours. He said that his timesheet showed that his actual working hours averaged over a 17-week period were only just above the 48 hours and that there were only a few occasions during the 12 month period between February 2021 and February 2022 when he had not achieved the recommended rest periods and he did not find this to be excessive hours worked.
27. On 20 March, Mr Janney presented his grievance appeal, which is at pages 133 – 142. In that letter, he requested to opt back into the Working Time Regulations because he felt that the excessive hours he had been expected to work over the last 12 months had had "*a catastrophic effect*" on his health and personal life.
28. The Respondent responded to that notification on 28 March when it was acknowledged that he had withdrawn his agreement to opt out from the Working Time Regulations and Miss Ling said that they would consider his request to reduce the notice period at his grievance appeal hearing.
29. The grievance appeal hearing took place on 8 February 2022 and was Chaired by Michael Pearson. The outcome letter is at page 144 – 147 and in it again his complaints were not upheld. Mr Pearson refused the Claimant's request to reduce the notice period to opt back into the Working Time Regulations. This concluded the grievance process.
30. Mr Metcalfe conducted an appraisal with Mr Janney on 28 June 2022. The appraisal is at pages 151 – 156. Mr Mitchell was very positive about the Claimant's contribution to the business and that whilst he had found some aspects of the Company challenging, he felt that they were getting through them now. He complemented Mr Janney that his installations were second to none, although he needed to continue to develop his knowledge of setting up the machines.
31. There is no hint in that appraisal that Mr Metcalfe felt in any way that the Claimant was a troublemaker, and this was immediately after the grievance process had been completed.
32. There were no further grievances raised, either formally or informally, after that. And I am satisfied that Mr Williams and Mr Metcalfe did not regard him in anyway as a nuisance and that they had all moved on from the grievance.
33. By early 2023, the Respondent had been making losses of £2.6m per annum. They had moved into a larger factory after they had been taken over by Hexadex and had been unable to cover the increased overheads.
34. Like many businesses they had suffered from the covid pandemic. Approximately half the equipment they built was sent to the USA and once the covid lockdown occurred, they were unable to send engineers out to the USA,

which greatly reduced their orders.

35. The straw that broke the camel's back was a project where they had to pay back some money to a client and in May 2023, the Hexadex Board instructed Mr Williams that they could not continue in their current format due to the losses being made. Closure of the business was seriously considered, and Mr Williams asked the Board to consider giving him the opportunity of coming up with a plan to restructure the business to try and turn things around financially. He was given a very short period to come up with proposals over a weekend and he decided to change the focus of the business to concentrate on providing "*off the shelf*" automation solutions for customers rather than bespoke solutions. This was because the bespoke solutions were costly to develop and had long payment lead times and severely affected their cash flow and profitability.
36. As a result of this restructure, it was proposed to reduce the headcount from 43 to 25. It included reductions in all departments and at Director level. In respect of the service engineers, there would be a reduction from 3 to 2 going forward.
37. After Mr Williams had taken advice from Hexadex's HR Department, he arranged a meeting to explain the position the business was in and the proposed redundancies in the workforce on 31 May 2023. He prepared a presentation to explain the situation, which is at pages 181 to 195 of the bundle.
38. Time was of the essence, but he wanted to ensure that there was a 30-day consultation period with the employees affected so he arranged a meeting at short notice with all the workforce on 31 May 2023.
39. Mr Williams was aware that some of the workforce would not be there on the day, including Mr Janney and Mr Metcalfe.
40. Mr Williams telephoned Mr Janney on 31 May and explained the business situation to him and the proposed redundancies and I am satisfied that he talked him through the presentation.
41. A letter was sent to Mr Janney by Mr Williams on 31 May to explain that he was at risk of redundancy – pages 199 – 200.
42. Mr Janney wrote to Mr Williams on 4 June 2023 with several queries about the process and Mr Williams responded to this email on 5 June 2023 (pages 205 – 206). As can be seen from the exchange, there was no suggestion that the date had been chosen because the Claimant would be out on that day. As Mr Williams explained, the announcement was time sensitive, and he had to choose a time when most people were available. He explained how the redundancy consultation would proceed and that he would be contacted by his line manager about the next stage of the process.
43. Mr Metcalfe then wrote to the Claimant on 6 June 2023 inviting him to attend a meeting, which would be a redundancy consultation meeting, on 12 June 2023. He was told that this would be an opportunity for him to put alternative solutions to redundancy to Mr Metcalfe and for them to discuss the potential changes in detail.

44. A note of that consultation meeting is at pages 212 – 213.
45. Mr Metcalfe had prepared the scoring matrix and criteria with Mr Williams and HR and is at page 234. These were shown to Mr Janney at his consultation meeting and to the other two engineers in the selection pool in their meeting and they were given an opportunity to comment on it.
46. It was explained to Mr Janney that there no alternative roles available.
47. In the meeting, Mr Janney raised various queries in respect of the business and its decision to make the redundancies and Mr Metcalfe directed him towards Mr Williams to answer those questions.
48. After the meeting, Mr Janney wrote on 14 June 2023 with certain written questions and sent a copy to Mr Williams – pages 214 – 217.
49. Mr Metcalfe responded to this on 16 June 2023.
50. In Mr Janney's letter, he had raised that he felt that the time that he had spent in the role ought to have been considered in the criteria, as well as his qualifications and experience. It was Mr Metcalfe's view that these were not relevant to the role and that last in first out was inappropriate to use for criteria of selection. The Respondent wanted selection to be on the basis of the best people for the role. Mr Metcalfe's view was that all three service engineers could do the job but one had to be chosen and they wanted the people with the best qualities going forward.
51. They did consider though that Mr Janney's point about removal of the criteria of quantity of work was a good point and they decided to remove that as one of the criterions.
52. Mr Metcalfe then went on to score the three employees and Mr Janney, as can be seen from the scoring document at page 235, scored the lowest.
53. Part of explanation for this was that Mr Janney's scoring was lower because of some client complaints that had been received. Mr Mitchell had spoken to Mr Janney about them at the time and he was aware of them. Neither of the other engineers had received complaints about them.
54. A further significant factor was the imperative for client fulfilment that the engineer travel internationally and, after the covid pandemic, they had resumed sending engineers to the US. Mr Janney had always refused to do so because the Company had not provided him with a credit card for incidental expenses. The other two engineers had both been prepared to carry out international travel.
55. Mr Metcalfe's scores were reviewed by Mr Williams to ensure fairness and were also reviewed by HR and a second consultation meeting was held with Mr Janney on 22 June 2024. The notes of that meeting are at pages 228 – 229. At the meeting he was given the scores that he had obtained, and they

discussed these with him and the reasons for them. He was told that if he had any issues with the scoring, he could let Mr Mitchell know. He did not raise any issues about the scoring and, as there were no alternative vacancies available, he was told that he had been selected for redundancy.

56. On 30 June 2024, Mr Metcalfe wrote to Mr Janney to confirm his redundancy – pages 237 – 238. He was told that he had a right of appeal, which he exercised on 10 July 2023 (pages 239 – 244). In that letter he said for the first time, and which he still says today, was that he believed that whether there was a genuine redundancy situation, his dismissal was deliberately engineered to ensure that he left the Company.
57. The appeal hearing took place on 24 July 2023 and was conducted by Andrew Trippett, the Finance Director. The notes of the meeting are at pages 269 – 277. At start of the meeting the Claimant asked for permission to be able to record it and, after an adjournment, the Claimant was told that the Respondent would not consent to him recording the meeting. He was asked to ensure that he had turned off the recording and he said that he had. In fact, he had not. He proceeded to covertly record the proceedings despite the instruction not to do so.
58. At the meeting, he raised the matter of the Company still advertising for a service engineer on 30 May. It was explained to him that the internal list of vacancies had been placed on hold and it was an oversight that it was still on the website. He was assured that the Company was not actively pursuing the recruitment of any engineers.
59. Mr Trippett then went through each point of the appeal, including the question of whether there was a genuine redundancy situation and whether the Company had followed a fair process. They also considered his question of whether he was right to believe that the redundancy had been engineered as a deliberate plan to get rid of him.
60. At the end of the meeting the matter was adjourned, and Mr Metcalfe joined the meeting and both Mr Janney and Mr Trippett put several questions to him about the scoring process and the selection criteria. The notes of the meeting are at pages 269 – 277.
61. After the meeting, the Claimant was written to by Sally from HR about the covert recording at pages 278 – 279.
62. After consideration of these matters, Mr Trippett decided to reject the Claimant's appeal. His letter is at pages 280 – 283. He upheld the decision to dismiss Mr Janney on grounds of his redundancy.
63. Paul Forrest was recruited as a Service Engineer after the Claimant left. The Claimant's evidence is that he was recruited in 2023 although he cannot say when. He relies on the Respondent's website from 2024 at page 303, which indicates that Mr Forrest joined the Company 2023. It is the Respondent's case that this is incorrect; that the website cannot be relied upon. Indeed, the same website refers to the Respondent having 50 employees in 2024 when in

fact they only had 26. I am satisfied from hearing Mr Forrest that he was contacted by his friend, Mr Metcalfe, shortly after Christmas 2023 and that he was offered employment on 12 January 2024 as per his offer letter, which is at page 338 – 339. This is also confirmed in the statutory statement of particulars of employment dated 17 January 2024 at pages 284 – 293. I am satisfied that Mr Forrest did not join the Company until 6 February 2024, which was more than 7 months after the Claimant was made redundant. Mr Forrest was engaged in a more junior position than the Claimant and was paid a much lower salary at £35,000 per annum. I am satisfied that he was not a replacement for the Claimant as alleged by him.

The law

64. The claim of unfair dismissal is made under Section 94 Employment Rights Act 1996 (ERA). Section 98 ERA provides:

“98 General.

- (1) *In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
- (a) *the reason (or, if more than one, the principal reason) for the dismissal, and*
 - (b) *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
- (2) *A reason falls within this subsection if it—*
- ... *the employer to do,*
 - (c) *is that the employee was redundant, or*
 - ...
- (4) *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
- (a) *depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
 - (b) *shall be determined in accordance with equity and the substantial merits of the case.”*

65. Section 139 ERA provides:

- “(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—*

...

- (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.*

...”

66. Mr Bunting referred me to several cases. In particular.

- ***Langston v Cranfield University [1998] IRLR 172***
- ***Barot v London Borough of Brent [UKEAT/0539/11***
- ***Associated Society of Locomotive Engineers & Firemen v Brady [2006] IRLR 576***
- ***Maund v Penwith District Council [1984] IRLR 24***
- ***King v Eaton Ltd [1996] IRLR 199***
- ***Capita Hartshead Ltd Byard [2012] IRLR 814***
- ***Williams v Compair Maxam Ltd [1982] IRLR 83***

67. Mr Zovidavi referred me to the case of ***Nicholls v Rockwell Automation Ltd [2012] UKEAT/0540/11***.

68. That case has several similarities to the current case in that a field service engineer succeeded at the Employment Tribunal in a claim for ordinary unfair dismissal. The Tribunal in that case found that while there had been a genuine redundancy and the process had been reasonable and fair, the scores awarded to the claimant for flexibility and administration and product skills had not accurately affected his capabilities.

69. The EAT overturned the Tribunal’s decision finding that it had effectively substituted its own assessment of the Claimant’s abilities for that of the employer.

70. The case reminded me of the old maxim that it is not for the Tribunal to substitute its view for that of the employer and it should not fall into the trap of investigating and substituting its own conclusions for that of the employer. The task for the Tribunal is to review whether the process and decision was reasonable and not conduct a detailed critique of individual scoring elements unless there are overt signs of unfairness.

My conclusions

71. I ask myself the questions that was asked of me by the Claimant with his case as follows.

Was there a genuine redundancy situation?

72. I agree with Mr Zovidavi that the facts in this case speak for themselves. At the time of the redundancy, the Respondent was suffering substantial losses and its parent company had given Mr Williams (the Respondent's Managing Director) very short notice of the need to put together a proposal, failing which the parent company would take away its funding.
73. I am satisfied that there was a decline in work, including for the service engineers, and although service contracts may have been in the pipeline, it did not alter the need to make a substantial restructuring of the business. The restructure did not just affect the Claimant; the workforce was reduced from 42 employees to 25 employees as at the end of June. It included redundancies across all departments and at director level, including Mr Trippett, the Finance Director. It included a reduction in service engineers from 3 to 2 at the time.
74. In the circumstances, I am satisfied that there was a genuine redundancy situation at the time.

Was the reason for the dismissal something other than redundancy?

75. In this respect, Mr Janney relies upon the appointment of Mr Forrest. As can be noted from my findings of fact, Mr Forrest was not appointed until February 2024 and I am satisfied that he was not a replacement for the Claimant.
76. When considering the redundancy situation, I must look at the circumstances at the time of the dismissal. I am satisfied that the Company was not recruiting any service engineers at the time of the dismissal and did not do so. Mr Forrest, who was a friend of Mr Metcalfe, was only recruited at a much later stage and in a more junior position than the Claimant held.
77. In the circumstances of this case I am satisfied that the only reason for the Claimant's dismissal was redundancy.

Was dismissal unfair because of the process?

78. The Claimant's case is that there was no genuine consultation; that the selection criteria were not objective and that his scores were not reasonably marked.
79. I remind myself that my job is to consider whether the process was reasonable, and I am satisfied that it was.
80. The Respondent announced the process on 31 May 2023 and the Claimant who was not in the meeting was contacted immediately after it by Mr Williams who talked with him about the restructure and how he would be at risk of redundancy,

along with all the other staff.

81. There were two consultation meetings and at the first of these on 12 June 2023 the selection criteria were discussed with the Claimant and the selection criteria was changed following representation from him and other engineers. I am satisfied that this shows that there was a genuine consultation with the Claimant.
82. There was other correspondence concerning the redundancy selection by the Claimant with both Mr Metcalfe and Mr Williams and they both engaged with the Claimant about this.
83. I have heard what Mr Metcalfe has said about how he marked the scores, and I am satisfied that his scores were reasonable.
84. Although many of the criteria could be described as subjective, I am satisfied that that does not mean that it was unreasonable.
85. At the Claimant's second consultation meeting, he did not engage and instead chose to appeal against the decision. I am satisfied that in the appeal Mr Trippett considered all the circumstances and decided that the decision to make the Claimant redundant was reasonable. I agree with that conclusion.

Was the decision to dismiss the Claimant predetermined?

86. The Claimant in this case genuinely believes that his dismissal was predetermined because he was either a nuisance or a troublemaker. I am not satisfied that there is any evidence to support this contention.
87. In 2021/2022, the Claimant did have concerns over his work life balance. His wife had had an operation, and he was concerned about spending so much time away from her. As a service engineer, he was expected to work long hours and he was often away from home. He raised concerns with Mr Metcalfe who agreed with him and, when the Claimant complained about his working hours, his complaints were taken seriously and investigated, and he was able to serve notice that he would no longer be prepared to opt out of the Working Time Regulations in respect of working hours. The evidence shows that after he made his complaints, the Respondent accepted the position in respect of all the service engineers who were no longer required to work in excess of the 48-hour period over a 17-week rolling period.
88. At the Claimant's review shortly after, everyone had moved on from the issue and that Mr Metcalfe complemented the Claimant on his work as an engineer.
89. There were no further complaints raised by the Claimant in the next 12 months and I am satisfied that his complaints in early 2022 had nothing at all to do with his dismissal in 2023. His dismissal was not predetermined, and he was dismissed fairly and that the reason was redundancy.
90. For these reasons, his claim of unfair dismissal fails and is dismissed.
91. The hearing on 16 December 2024 is no longer necessary and is cancelled.

Employment Judge Hutchinson

Date: 29 October 2024

JUDGMENT SENT TO THE PARTIES ON

.....07 November 2024.....

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FOR THE TRIBUNAL OFFICE

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Reasons

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

"Recordings and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>