EMPLOYMENT TRIBUNALS

Claimant: Selson Leonard Michael Fernandes

Respondent: Plaza Premium Lounge (UK) Limited

Heard at: Watford (by video) **On:** 4 and 6 January 2023

Before: Employment Judge Din

REPRESENTATION:

Claimant: Mikah Manalac, Duncan Ellis Solicitors
Respondent: Yemah Barlay, Peninsula

RESERVED JUDGMENT

The judgment of the Tribunal is that the complaint of unfair dismissal fails and is dismissed.

REASONS

Introduction

1. The Claimant is Selson Leonard Michael Fernandes (**Claimant**). The Claimant was represented by Mikah Manalac of Duncan Ellis Solicitors

2. The Respondent is Plaza Premium Lounge (UK) Limited (**Respondent**). The Respondent is an airport lounge and hotel provider based at Heathrow Airport. The Respondent was represented by Yemah Barlay of Peninsula.

Claims and issues

3. The Claimant claims that his dismissal was unfair within section 98 of the Employment Rights Act 1996 (**ERA 1996**). The Respondent contests the claim. If his claim is successful, the Claimant seeks a remedy.

4. The outstanding issues are as follows.

5. What was the reason or principal reason for the dismissal? The Respondent says the reason was redundancy or, if not, some other substantial reason.

6. If the reason was redundancy, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will decide, in particular, whether:

    a. The Respondent adequately warned and consulted the Claimant;
    b. The Respondent adopted a reasonable selection decision, including its approach to a selection pool;
    c. The Respondent took reasonable steps to find the Claimant suitable alternative employment;
    d. Dismissal was within the range of reasonable responses.

7. If the reason was not redundancy, what was the reason or principal reason for dismissal? The Respondent says the reason was a substantial reason of justifying dismissal, namely the Respondent's business situation at the time. Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?

Procedure, documents and evidence heard

8. The Claimant's claim form (ET1) and Statement of Claim (including a Schedule of Loss) (**SoC**) were received by the Employment Tribunals Service in Watford on 1 October 2021.

9. The Respondent's response form (ET3) and Particulars of Response (**PoR**) were provided on 1 December 2021.

10. A 241-page joint hearing bundle of documents (with index) was provided in advance of the hearing. This contained, pleadings, documents relating to the Claimant's employment, documents relating to liability and documents relating to remedy (including a witness statement by the Claimant dated 31 March 2021 dealing with the amounts the Claimant states that he lost as a result of the termination and the Claimant's schedule of loss as at 31 March 2022).

11. In addition to the materials in the bundle:

    a. On 20 December 2022, the Respondent made an application for an order for the Claimant to disclose certain documents under Rules 29 and 31 of the Employment Tribunals Rules of Procedure 2013. These relate to his employment following the termination of his employment with the Respondent.
    b. The Claimant provided a second witness statement dated 3 January 2023, and sent to the Tribunal on 4 January 2023.
    c. The Respondent provided written submissions on 3 and 6 January 2023.

12. On 3 January 2023, Employment Judge Hyams granted the application of the Respondent dated 30 December 2022 to convert the in-person hearing to a hearing via video (CVP).

13. Late on 3 January 2023, the Respondent's representatives sent an email to the Tribunal explain that they have not brought to the attention of the Tribunal that the Respondent's witnesses are abroad and would not be attending the hearing.

14. On 4 January 2022, the first day of the full merits hearing, the Claimant's representative informed the Tribunal that the Claimant was out of the country. Referring to an email sent earlier that day, the Claimant's representative directed the Tribunal to the Claimant's second witness statement dated 3 January 2023. In that statement, the Claimant explained that in October 2022 he had to go to India to attend to his mother's care as she is very sick. He stated that he was not able to contact his legal representatives until December 2022. He asked the Tribunal to allow his legal representatives to represent him at the hearing on his behalf, as they are fully aware of his instructions in the matter.

15. The Respondent's representative referred to their email of the previous day regarding the Respondent's witnesses.

16. Neither the Claimant nor the Respondent's witnesses would be able to appear before the Tribunal, or obtain the relevant permissions in order to appear from abroad, within a reasonable timeframe.

17. Both parties asked for an adjournment to allow the parties to consider settlement. Both stated that should they fail to reach settlement, the full merits hearing should continue by way of the substantial written evidence and submissions.

18. I agreed to a short adjournment of the full merits hearing to 6 January 2023. On 6 January 2023, with the agreement of both the parties, I continued with the hearing. This was on the basis that, although witness evidence (for both parties) would be useful, the key factual issues in the matter could be decided on the basis of the documents before the Tribunal and the parties' representatives' submissions. In light of this, and the overriding objective, the full merits hearing continued on 6 January 2022.

19. I will return to the Respondent's 20 December 2022 application in the event the Claimant succeeds in his claim and the Tribunal moves to remedy. Otherwise, the application falls away.

Facts

20. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point.

<u>The Claimant's employment</u>

21. The Claimant was employed by the Respondent from 17 October 2017 until 30 June 2021 as a Goods Receiving / Storekeeper. His employment continued until 30 June 2021, when his employment was terminated by the Respondent.

22. A Statement of the Main Terms of Employment, a job description, relevant extracts of the Employee Handbook and an agreement by the Claimant to terms

and conditions set out in an updated Handbook and policy dated 27 January 2021 were put before the Tribunal.

Coronavirus pandemic

23. Due to the nature of its business, the Respondent relies on air travel through Heathrow Airport. As a result of the Coronavirus pandemic and consequent global travel and social distancing restrictions, air travel drastically reduced. This led to a significant diminution of work and revenue for the Respondent.

24. Heathrow Airport initiated a terminal consolidation project as result of which it temporarily closed Terminal 3 and 4, moving all airlines into the remaining operational terminals. In December 2020, Heathrow Airport took the decision that Terminal 4 would not re-open in 2021. Terminal 3 reopened in June 2021.

25. As a result, in compliance with UK Government guidance, the Respondent was required to close all six of its lounges from 23 March 2020. The Respondent was able to open two of its lounges in August 2020. However, following subsequent national lockdowns, the Respondent closed them once more. The Respondent re-opened one lounge in January 2021.

26. The Respondent asserts (and the Claimant does not dispute) that this was a period of significant uncertainty for the Respondent. The Respondent placed the Claimant, in common with most of its other employees, on furlough in accordance with the Coronavirus Job Retention Scheme. The Claimant was placed on furlough from 1 April 2020 to 30 June 2021.

27. An undated document headed "Plaza Premium Lounge (UK) Ltd – Redundancy Business Case 2021" was put before the Tribunal. The document states that the Respondent was looking to reduce overall headcount by 80 FTEs (Full Time Equivalents) and gives a list of the positions that will be placed at risk. This list includes "Storekeeper", which the Respondent proposed to reduce from a current headcount of four to two. The reasons given were as follows: "Terminal 4 closed until 2022 at the earliest affecting 2 lounges"; "also the arrivals lounges at Terminal 2 and Terminal 3 either being permanently closed or placed on reduced opening hours"; "Not all the positions will still be required"; and "Reduction in business".

Risk of redundancy letter

28. The Respondent has provided a letter to the Claimant dated 10 February 2021 stating that the Claimant is potentially affected by proposed redundancy proposals and is at risk of redundancy. It goes on to state that the Claimant should regard receipt of the letter "…as forewarning of that potential redundancy". The Respondent has also provided an (undated) email to the Claimant's personal email address attaching the 10 February 2021 letter, which was also stated to have been sent by post.

29. The Claimant's representative stated that she was not aware of the 10 February 2021 letter. However, in the absence of a specific denial that the Claimant did not receive the 10 February 2021 letter (by email and / or by post), I find that the Claimant was notified of the risk of redundancy on or shortly after 10 February 2021.

Employee engagement

30. The 10 February 2021 letter stated that, as the potential redundancies affected 143 of the Respondent's existing employees, the Respondent was obliged to allow the opportunity to elect employee representatives. Further, the Claimant was invited to put forward any alternative proposals or suggestions to redundancy.

31. In a letter dated 5 March 2021, the Respondent set out the results of the election, with seven employees being elected as representatives (**Representatives**). This letter was addressed "Dear Collective", and I have not heard evidence that it was not received by the Claimant.

32. The Respondent has put forward evidence of subsequent meetings with the Representatives by way of a series of meeting notes:

    a. First meeting – stated by the Respondent to be on 17 March 2021;
    b. Second meeting – stated by the Respondent to be on 30 March 2021;
    c. Third meeting – stated by the Respondent to be on 8 April 2021;
    d. Fourth meeting – stated by the Respondent to be on 22 April 2021; and
    e. Fifth meeting – stated by the Respondent to be on 11 May 2021.

33. In addition, there were meetings with various departments described by the Respondent as "Q&A" meetings:

    a. Meeting with "Front of House" staff, meeting note dated 30 March 2021;
    b. Meeting with "Back of House" staff, meeting note dated 31 March 2021; and
    c. Meeting with "Front of House" staff, meeting note dated 8 April 2021.

34. According to the meeting notes, during the meetings, alternatives such as shared shifts, sabbatical leave, alternative vacancies and voluntary redundancy were considered.

35. It is unclear whether the Claimant attended any of the above meetings, if at all. It appears that Storekeepers were part of the group described as "Front of House". The Claimant has not disputed that the meetings took place, the dates of those meetings nor the accuracy of the notes of those meetings as put before the Tribunal.

Selection criteria

36. The Respondent states, and the Claimant does not dispute, that the Respondent and the Representatives agreed the selection criteria to be used for the purposes of any redundancy exercise.

37. Following the redundancy consultation meetings, the Respondent determined it was necessary to continue with redundancies. The Respondent states that this was to ensure the economic viability of the business and to reduce costs.

38. The Respondent states that the selection criteria were based on the following factors:

    a. Length of service;

b. Attendance / timekeeping; and
c. Previous performance review scores considering capability, conduct and skills. This contained 15 individual criteria: Grooming, Attitude, Sense of Responsibility, Reliability, Initiative, Communication Skills, Team Spirit, Compliance with company policies & work instructions, Work Relationship, Work Knowledge and Efficiency. There were other factors on the list that were not applicable to Storekeepers, for example Customer Service.

39. Those at risk were scored from 1-5, with 5 meaning the employee was consistently exceeding expectations and 1 meaning the employee was not meeting expectations. 3 meant that the employee was meeting expectations.

Letter – 13 May 2021

40. Carla Ball, Human Resources Manager, sent a letter to the Claimant on behalf of the Respondent on 13 May 2021.

41. The 13 May 2021 letter stated that it was further to the consultation meetings with the Representatives on 30 March 2021, 8 April 2021, 22 April 2021 and 11 May 2021 in relation to the current redundancy situation. The 13 May 2021 letter said that the reasons for the redundancy situation were discussed at those meetings and it was "agreed that a fair and equitable method of identifying employees at risk of redundancy was for the [Respondent] to apply selection criteria within the structure". It went on: "We discussed the selection criteria, which the [Respondent] proposed to adopt, and after consideration these criteria were finalised and agreed on 22nd April 2021".

42. In respect of the application of the selection criteria, the 13 May 2021 letter said: "A selection assessment was then carried out and the criteria were applied to you and other employees in the pool". The letter then said "I have enclosed your scores with this letter for consideration. With regret I have to inform you that you scored lower than most other employees in the pool".

43. The 13 May 2021 letter acknowledged that the Claimant would be very disappointed with this news, with the expectation that the Claimant may well have questions. To this end, the Respondent arranged a "further formal consultation meeting" to be held on 18 May 2021. The letter stated that the Claimant was entitled, if they so wished, to be accompanied by "a fellow employee". The Respondent did not say that a representative from his union could accompany him.

44. The 13 May 2021 letter stressed that it did not constitute formal notice of redundancy, nor did it mean that the Respondent had made a final decision in relation to the Claimant's continued employment. However, it stated that the Claimant would need to bear in mind that if the Respondent was unable to find any alternative to redundancy at this point, then the Claimant's employment may be terminated.

45. The letter referred to the earlier letter of 10 February 2021 and the first consultation meeting held on 17 March 2021, at which it is stated Ms Ball informed all employees that "we would be meeting on at least three occasions and the purpose of this third meeting is to allow you the opportunity to discuss on an individual and personal basis any views and suggestions that you feel

the company ought to take into account which may avoid the need to make compulsory redundancies". It added "If you have queries regarding your selection scores then the appropriate forum for you to raise questions is during this meeting".

46. The 13 May 2021 letter was accompanied by a table headed "Selection Matrix – Scores". It set out the Claimant's scores alongside the scores of two other (anonymised) employees. The Claimants total score was 44. The other two employees' total scores were 54 and 47.5 respectively.

Selection criteria as applied to the Claimant

47. The Respondent states (and the Claimant does not deny) that the Claimant scored the lowest with a score of 44 out of a possible 75. This was on the basis of an assessment purportedly dated 19 April 2019. I discuss the date of this appraisal further below.

48. It is agreed that the only period to which the selection criteria was applied was the then current year.

49. According to the Respondent, when scoring employees, the Respondent considered performance reviews on file for all storekeepers (including the Claimant) placed at risk. The Respondent goes on to stay that due to a difference in when reviews were carried out, on 10 May 2021, the Respondent asked Mr Elvis D'Mello, Senior Procurement and Logistics Officer, who had been the Claimant's manager since April 2018, to carry out updated reviews on all storekeepers to ensure a fair and objective selection criteria was adopted.

50. As part of this, the Respondent states that attendance and punctuality were assessed based on the clock in / out records.

Meetings and other contact with the Claimant

51. A consultation meeting with the Claimant took place on 18 May 2021 and was chaired by Mr Mario Mantelli, General Manager at the Respondent, with Ms Ball present in the capacity of a note taker.

52. At the 18 May 2021 meeting, Mr Mantelli referenced voluntary redundancy, which was no longer available, and (unpaid) sabbatical leave which was still available. None of these alternatives had previously been pursued by the Claimant. At the meeting, the Claimant asked about voluntary redundancy and whether shared hours would be considered. Mr Mantelli explained what the redundancy package would now include and that if his colleagues would be willing to share hours, the Respondent would consider this.

53. Mr Mantelli also stated "The criteria is what we are following now which was agreed with the committee and we copied in all the staff. The criteria was chosen to try to find a fair way for all the staff. Every colleague would sit with their manager for the review. You did good, one person in your group took voluntary redundancy but we still only need 2 people and have 3".

54. A further consultation meeting with the Claimant took place on 3 June 2021. Again, the meeting was chaired by Mr Mantelli, with Ms Ball present in the capacity of a note taker.

55. Ms Ball sent an email dated 23 June 2021 to the Claimant attaching meeting notes of the two meetings with the Claimant.

56. During the course of the meetings, correspondence and in his claim, the Claimant raised various issues concerning the application of the selection criteria. In particular, there appear to be different scores, with the Respondent finally using a set of scores derived from a performance review in respect of the Claimant from November 2018, a review that the Claimant acknowledged by signing, and which took place prior to the redundancy exercise (**Final Score**). The factual elements of these matters are dealt with below.

Length of service

57. There is no dispute over the Claimant's score for length of service, which was fixed in light of the number of years that the Claimant was employed by the Respondent.

Attendance

58. The Claimant states that his attendance record in certain of the scores was not properly taken into account. In particular, he points to the Claimant's "perfect" attendance being recognised for the year 2018 / 2019 with a certificate of achievement.

59. The Respondent has accepted that the Claimant was awarded a certificate for his perfect attendance for the year 2018 / 2019 and this was reflected in the Final Score for punctuality, with the Claimant scoring the maximum '5' for attendance.

Punctuality

60. At the 18 May 2021 meeting, the Claimant raised concerns about his score for punctuality. The score that he had been given in this regard was '1'. The Claimant said that he would only have been late "maybe once or twice". The Claimant stated that unreliable data was being used by the Respondent and the Claimant explained that the clock-in system was not working properly. In particular, missed punches, early starts or late starts were not taken into account.

61. However, the Respondent states that the report demonstrated that the Claimant arrived to work late on 15 occasions during the relevant period.

62. In the absence of any further evidence that the clock-in system was not working properly at the relevant time, and the Claimant not raising any concerns about the clock in / out system not working prior to the redundancy process, I find that the score correctly reflects the punctuality data that was produced. Across the various different sets of scores, this score always remained (as it did in the Final Score) at '1'.

Previous performance review scores considering capability, conduct and skills

63. The scores applied to the selection criteria were from performance reviews of the Claimant.

The relevant performance review

64. At the 18 May 2021 meeting, Mr Mantelli went through the skills and scores. He stated that an assessment (in other words, performance review) was done with Mr D'Mello, which shows a performance review date of 16 April 2019 and was signed. As such, Mr Mantelli said that the Claimant would have discussed the scores with Mr D'Mello two years ago.

65. In fact, the Claimant did not sign that performance review and stated this at the 18 May 2021 meeting. Following further pressing by the Claimant, Mr Mantelli and Ms Ball acknowledged that the 16 April 2019 review had actually taken place on 10 May 2021, without the Claimant being present and without his signing it.

66. There is an "N.B." section at the end of the note of the 18 May 2021 meeting stating "[The Claimant] has now disagreed with the assessment as it was not signed by him – he has been offered to sit with his manager at the time to go through scores or use the signed appraisal from 2018".

67. The Respondent states that, in consideration of the Claimant's comments, and to ensure that all employees were scored objectively and fairly, the Respondent re-scored all employees placed at risk based on the performance reviews that they had signed. In the Claimant's case, this was the performance review which took place in 2018.

68. At the 3 June 2021 meeting, the Claimant continued to indicate his unhappiness at the use of a performance review undertaken without him being present. Mr Mantelli acknowledged the confusion and said that they had agreed with the committee (by which I understand he means the Representatives) to take the appraisal that was the latest to be signed off, or if there was nothing signed, then an assessment would be done by the manager of that person. If there was a disagreement about the scores, then the Claimant could sit down with the manager to discuss the scores. As the Claimant had not responded, the Respondent used the, signed, November 2018 review.

69. The Claimant continued to state his disagreement with the performance review dated April 2019, and accused the Respondent of trying to get rid of him. Mr Mantelli denied this. It was then that he revealed that the performance review dated April 2019, had only just taken place. This further upset the Claimant, who stated that the scores had been manipulated. Mr Mantelli further confirmed that there was no performance review from 2019 and stated that he would ask Mr D'Mello to explain the reason for the date written on the performance review.

70. Mr D'Mello subsequently said that he picked April 2019 as that was the usual time for assessment, and he had found completed assessments for the other team members in April 2019. He claimed not to realise he should have put a date of May 2021, which is when he had actually completed the performance review.

71. The Claimant did not offer to review his scores with Mr D'Mello, as, according to the Claimant, he did not want to proceed with inconsistent and inaccurate data used against him. Further, the Claimant said it was difficult to rely on the

accuracy of the performance review as it was done some months after the date at which the Claimant was supposed to be assessed (i.e. April 2019).

72. In an email of 23 June 2021, Ms Ball said "As discussed with you, we have gone away to verify the scores that you have been given to make sure they are a true reflection of your performance. The reviews were agreed to be used with the committee during our ongoing consultation process and as such everyone has had the same criteria applied to make sure that there is a fair and consistent process for everyone" She went on "Previously it was mentioned to you during our consultations that you can sit down with your manager and go through the scores that you have been given and we can look to make sure these scores are all up to date, which you declined. Therefore we used the performance review that was signed by you in November 2018. We ensured that to be fair all scores used were signed by the stores team. After rechecking the scores your final score is still lower than your colleagues and therefore you remain at risk of redundancy".

73. The Tribunal has seen a further table setting the Claimant's revised scores alongside the revised scores of two other (anonymised) employees. The Claimant's total score was 52.5. The other two employees' total scores were 54 and 55 respectively. One of the other employees' scores moved from 47.5 to 55 because rather than a "new" review being used, an April 2019 review was used. This was consistent with the employee that has scored 54 in both iterations.

Individual scores

74. As well as the performance review from which the Respondent had taken the scores, the Claimant has issues with certain of the individual scores.

75. The Claimant has said that his scores did not accurately reflect his performance. In particular he:
    a. Continuously covered for employees who called in sick.
    b. Worked in a different terminal from where he was meant to work and also covered weekend shifts that were outside of his contract.
    c. Received a letter of recognition dated 9 April 2018 to recognise his work.
    d. Was recognised for his "continuous efforts in his work and contribution to the smooth operations" of the Respondent in a letter dated 4 December 2018 notifying the Claimant of a salary increase.
    e. Was, again, recognised in a further salary increase letter dated 11 September 2019 for his work and contributions to the smooth operations of the Respondent.

76. The Claimant commented at the 18 May 2021 meeting that he "order[ed] stock on time" and when it was "delivered to the wrong lounge [he] would call the supplier to sort it out". This is not disputed by the Respondent. The Respondent accepts that Mr Mantelli said that this was the Claimant's job. The Respondent explains that Mr Mantelli simply intended to point out that the comments made by the Claimant were duties expected from anyone carrying out his role.

The relevant period

77. The Claimant states that the Respondent only took into consideration reviews from the years between 2018-2019 and gave no acknowledgement to the year 2020-2021, where (according to the Claimant) there might have been an opportunity for the Claimant to improve and where his fellow employees may not have performed as well. Further, in considering the data for risk of redundancy, the one year period of a review was taken into consideration and not the length of time for which the Claimant was working with the Respondent. This is not in dispute.

Letter – 24 June 2021

78. Mr Mantelli sent a letter to the Claimant dated 24 June 2021. In that letter, the Claimant was informed that his employment was being terminated by reason of redundancy.

79. The Claimant was told that his contract entitled him to one month's notice, which would commence on 24 June 2021. He was further informed that he was not required to work his notice and that his last day of employment would be 30 June 2021. The letter explained that a payment would be made to the Claimant in compensation for the remainder of the notice not being given in accordance with the terms of his contract.

80. With respect to a redundancy payment, the letter said that as the Claimant's continuous service with the Respondent was more than the two years necessary to attract a statutory redundancy payment, the Claimant would be entitled to a redundancy payment on termination. A schedule setting out the Claimant's entitlement, including outstanding holiday pay, was attached to the letter. The total due was GBP 2851.12.

81. The letter stated that the Claimant had the right to appeal against Mr Mantelli's decision. Should the Claimant with to appeal, he should write to Amin Amin, Business Development Manager – Europe within 5 days setting out the Claimant's grounds for appeal against the redundancy dismissal.

Appeal

Grounds of appeal

82. By an email dated 28 June 2021, the Claimant appealed the decision to dismiss him, stating that he "…did not agree with the redundancy decision and would like to appeal against it. There are a lot of flaws in the process. On the same day, Mr Amin acknowledged receipt. On 6 July 2021, Mr Amin invited the Claimant to an appeal hearing on 8 July 2021. Mr Amin asked the Claimant to share the detail of the grounds for his appeal ahead of that meeting.

83. In an email to Mr Amin dated 8 July 2021, the Claimant stated that a "fake appraisal" was done without his presence and signature to "…kick me out of the company". The score did not merit his performance and he referred specifically to being given a score of 4 for communication skills when it "…may be Elvis [Mr D'Mello] and the 'Entire Management' needs more practice in conducting 'Fake Appraisals'".

84. The Claimant stated that he was always flexible, no matter which Terminal he was asked to work, and asked that Mr Amin find out who has worked the most

in Terminal 2 or "…who was there running from one terminal to another when others would call in sick, or who as saved the most money…". He stated that he would also like to know why Mr D'Mello would "…always call me and not others when he needed some help on checkscm [*sic.*] or on some product information".

85. The Claimant highlighted that, since he had joined the Respondent, four people had resigned within a short period of time.

86. The Claimant further said that Mr Mantelli had told the Claimant that the scores were copied from the Claimant's 2019 appraisal, but that no appraisal was done in 2019. The Claimant then said that "…during the 2nd meeting [Mr Mantelli] made a U-TURN and said that the appraisal was done in 2021 and backdated (2019)". He went on "I mean how a company of [the Respondent's] stature can be so incompetent". He concluded by saying "when I went to handover my uniform and blue Id (Airport pass) everyone was smiling and laughing even when I was feeling so emotional. The management won't feel any emotions as you get emotional only when you give your heart and soul for the company". He then attached what he described as the 'Fake Appraisal" copy (i.e., the 2021 performance review dated April 2019).

87. The Claimant further stated that the appraisals were completed "without his presence and signature", resulting in "…improper conduct done by the management of the [Respondent] and reconfirms that the 'Selection Criteria' and 'Performance Reviews' were insufficient documentation to be used as material to determine the Claimant's risk of redundancy amongst the other employees". Further, the Claimant refers to the "…inconsistent and faulty ranking that was made by the assessor, in which the numerical scores contradict that of the assessor's comments (qualitative record)".

Appeal meeting

88. The appeal meeting took place on 8 July 2021 and was conducted by Mr Amin. It is unclear who took the notes of this meeting. However, notes have been provided to the Tribunal.

89. As part of the meeting, Mr Amin specifically asked the Claimant whether and why he thought that there had been some kind of deliberate act with respect to the dating of the 2021 appraisal as 2019.

90. The Claimant said that first it was said that there was an appraisal in 2019 then Mr Mantelli said that it was only done in 2021. When challenged, Mr Mantelli said that it was just an assessment. Mr Amin and the Claimant then discussed the chain of events that had led to the appeal. The Claimant made clear that he did not have an appraisal in 2019, it was not that there was a 2019 appraisal that was unsigned.

91. Mr Amin asked the Claimant whether he had had sufficient meetings with, or did he ever discuss, the consultation process and the possible redundancy with the Respondent's committee members (who I take to be the Representatives). The Claimant said that he did not. The Claimant knew who the committee members were and received the minutes of the committee meeting that were shared through Human Resources. The Claimant further confirmed that he did

not raise questions or concerns about the process before the individual consultation meetings.

92. The Claimant confirmed that overall he believed that the bases of his dismissal were not correct because of the scoring in the performance reviews, which he disagreed with. He further agreed that he was offered to meet with the person who provided the review, but that he did not do this. Mr Amin asked whether the Claimant had been given a copy of his 2018 appraisal. The Claimant stated that he had not. He had however seen it and signed it.

93. The Claimant's appeal was dismissed and the Claimant was informed of the same in a letter from Mr Amin dated 23 July 2021. In that letter, Mr Amin said:

    a. He had looked at the matter of the skill assessment scores and can find no evidence of a deliberate attempt to mislead or "fake" the scores to influence the Claimant's position or that of his colleagues on the matrix. With regard to the points regarding the date on the latest assessment, Mr Amin was satisfied with the answer that was given by the Respondent.
    b. He had noted the statements made by the Claimant regarding flexibility, work performance and support that he had given to his line manager. Mr Amin stated that the Respondent was happy with the Claimant's overall performance, as it was with the performance of his colleagues, but "…unfortunately in [the Claimant's] case [his] ranking on the matrix was not high enough to ensure [the Claimant's] job was saved".

94. Mr Amin stated that, in summary, the Respondent followed a structured consultation process and the staff (and their elected representatives) had discussed and considered alternatives. Mr Amin said that it is not found that management has been biased and has used favouritism to choose staff. Mr Amin pointed out that the redundancy was part of a larger redundancy process. There is justification in the business case to restructure and the Claimant's role was therefore placed at risk. Mr Amin concluded by stating that the Claimant had exercised his right of appeal under the Respondent's appeals procedure and the decision was final.

<u>Vacancies</u>

95. The Claimant states that no alternative means of employment was offered by the Respondent. He agrees that he was made aware of vacancies, but none that were suitable. Although the Claimant may not have been offered employment, I find that he was offered the opportunity to apply for roles.

96. The Claimant further states that he has been given information from staff that still work for the Respondent that there have been a large number of new employees and management after the redundancy process was completed. The Respondent does not deny this.

97. The Respondent states that it was required to replace leavers. The Respondent states that vacancies that became available after the redundancy process were different to the role carried out by the Claimant. The Respondent states that no vacancies have been available for the storekeeper role. In any event, the Respondent emailed the Claimant, along with other former employees, and made him aware of the vacancies. The Respondent states

that the Claimant, like any other candidate was at liberty to apply for any such roles.

Law

98. Section 94 of the Employment Rights Act 1996 (ERA 1996) confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111 ERA 1996. The employee must show that he was dismissed by the Respondent under section 95. In this case the Respondent admits that it dismissed the Claimant (within section 95(1)(a) of ERA 1996) on 30 June 2021.

99. Section 98 of ERA 1996 deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2) ERA 1996. Second, if the Respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason.

100. Redundancy is a potentially fair reason for dismissal under section 98(2) ERA 1996. Redundancy here has the meaning assigned to it by section 139 ERA 1996.

101. Section 98(4) ERA 1996 then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.

102. The exercise required depends on what the employer reasonably believes, on the basis of what it reasonably knows, about the relevant matters. It requires a broad assessment of all the relevant circumstances. The correct approach is for the Tribunal to consider whether dismissal was an option that a reasonable employer could have adopted in the circumstances. The Tribunal cannot substitute its own opinion for that of the employer as to whether certain conduct is reasonable or not. See *British Home Stores Ltd v Burchell* [1978] IRLR 379 and *Tayeh v Barchester Healthcare Ltd* [2013] EWCA Civ 29.

103. Specific guidance in redundancy situations is found in *Williams v Compair Maxam Ltd* [1982] IRLR 83. The Employment Appeal Tribunal (Browne-Wilkinson J) said as follows:

"…there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:

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

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

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

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

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

The lay members stress that not all these factors are present in every case since circumstances may prevent one or more of them being given effect to. But the lay members would expect these principles to be departed from only where some good reason is shown to justify such departure. The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not the basis of personal whim".

104. These are not principles of law, but standards of behaviour. As such, in *Williams* it was said "..in future cases before this Appeal Tribunal there should be no attempt to say that an [employment] tribunal which did not have regard to or give effect to one of these factors has misdirected itself in law. Only in cases…where a genuine case for perversity on the grounds that the decision flies in the face of commonly accepted standards of fairness can be made out, are these factors directly relevant. They are relevant only as showing the knowledge of industrial relations which the industrial jury is to be assumed as having brought to bear on the case they had to decide".

105. It is well established that Tribunals cannot substitute their own principles of selection for those of the employer. They can only interfere if the criteria adopted are such that no reasonable employer could have adopted them or applied them in the way in which the employer did (see *Earl of Bradford v Jowett (No 2)* [1978]IRLR 16).

106. There is considerable caselaw regarding the use of subjective, rather than objective, criteria in a redundancy exercise. However, the fundamental issue remains that set out in the statutory wording of section 98(4) ERA 1996, namely that of overall fairness.

107. In considering the application of any selection criteria, the Tribunal will not carry out a detailed re-examination of the way in which the employer applied the selection criteria – it will be sufficient for the employer to have set up a good system for selection and to have administered it fairly (see *Eaton Ltd v King* [1995] IRLR 75).

108. If the reason for dismissal was not redundancy, The Tribunal would need to consider whether the dismissal was "for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held" under section 98(1)(b) ERA 1996. If so, the question, again, becomes one of reasonableness in accordance with section 98(4) ERA 1996.

Conclusions

109. There is no dispute that the reason for the dismissal was redundancy. In light of this, and all the circumstances, I find that the Respondent has shown that there is a potentially fair reason for the dismissal – that potentially fair reason being redundancy under section 139 ERA 1996.

110. There is no allegation that the dismissal was automatically unfair under ERA 1996.

111. The question then becomes whether the Respondent acted reasonably in all the circumstances in treating redundancy as a sufficient reason to dismiss the Claimant. I find that it was and set out my supporting points below.

<u>The redundancy process</u>

112. The Claimant does not argue that his dismissal was unfair because the employer acted unreasonably in choosing to make workers redundant. It is the way in which the redundancy process was run in respect of the Claimant that the Claimant objects to.

113. As part of the redundancy process, and as outlined above, the Respondent engaged in a number of communications and meetings with employees and representatives of those employees. It was with this group that the Respondent agreed the selection criteria that would be applied in the event that redundancies were necessary.

114. With respect to the Claimant himself, I consider that the Respondent adequately warned and consulted the Claimant. In particular:

a. The Claimant was sent a letter on 10 February 2021 notifying him of the risk of redundancy.
b. The Claimant was aware of the Representatives relevant to his area, and had the opportunity to engage with them.
c. The Respondent engaged with the Representatives and various departments, including "Front of House" staff, including the Claimant's team, across a number of meetings.
d. The Respondent engaged in considerable contact with the Claimant, including writing to the Claimant regarding his potential redundancy on 13 May 2021 and meeting with the Claimant on 18 May 2021 and 3 June 2021, before notifying him of the redundancy decision on 24 June 2021.
e. The Respondent offered an appeal process, which the Claimant was able to, and did, engage with.

115. In light of the above, even if the Claimant did not receive a letter regarding redundancy until 13 May 2021, I find that the Claimant was adequately warned and consulted in relation to the redundancy.

Selection criteria

116. The legislation and the caselaw focus on fairness. The Claimant is correct to point out the importance of the selection criteria for the redundancy process and, as such, for the Claimant. The selection criteria must be fair, must be genuinely applied and the information received must be reliable.

117. The Respondent states that it undertook a meaningful consultation with employee representatives in relation to the selection criteria. I have not seen evidence to the contrary, and it is clear that the Respondent did consult with Representatives on a number of occasions.

118. With respect to the selection criteria, the Claimant states that the selection criteria ignored the fact that the Claimant was employed for a period of over three years and the record of his work for previous years were dismissed. The approach taken by the Respondent is not unreasonable in this regard. Further, I have not seen evidence that the selection criteria was applied differently to different people. As such, I find it was applied consistently and there is no evidence that the Claimant was singled out in any way.

119. Following the Respondent's refusal (understandably) to not sign the 2021 performance review (which was initially dated 2019) or to engage with his manager in relation to the scores given, the Respondent decided to use a performance review from 2018 to input into the selection criteria.

120. Given the circumstances, I find this as reasonable. The confusion about the date of the 2021 performance review should have been avoided by the Respondent and gave rise to a number of issues during the Claimant's redundancy process. However, this did not make the overall process unreasonable. The 2018 performance review was the most recent performance review available to the Respondent. Further, it was conducted before the redundancy exercise and, as such, could not have been tainted by it. The alternative would have been to use a more recent set of scores that the Claimant did not agree with. The 2018 performance review had been signed and acknowledged by the Claimant. As such, in the absence of a more recent agreed review, it was reasonable for the Respondent to use the 2018 performance review for the Final Scores.

121. The Claimant asserts a number of matters regarding the 2021 performance review, including with respect to internal inconsistencies. However, as it was the 2018 performance review that was used, such points fall away.

122. The Claimant makes further points regarding the scores in the selection criteria, including that the scores were arrived at without proper evidence, the selection criteria form was done carelessly and the Respondent did not take into account other documentation, such as other performance reviews. The Claimant then describes a number of areas where he feels that the scores should have been higher, including as a result of him covering for those employees who called in sick, working in a different terminal from where he was meant to work, covering weekend shifts that were outside his contract and the recognition of his contributions in various letters from the Respondent.

123. The Claimant states that the Respondent failed to set out what the Claimant needed in order to score higher and "exceed expectations". When the Claimant addressed the areas which he had fulfilled in his job at the 18 May 2021 consultation meeting, Mr Mantelli stated "This is your job" and further stated that others had scored higher. However, according to the Claimant, Mr Mantelli failed to explain what could have been done better.

124. The Claimant further states that the failures in the selection criteria and performance review confirm that the Respondent did not conduct elements of their employee review procedures correctly.

125. The Claimant has not, however, been able to point out how any specific failure had given rise to a specific impact on the Claimant's scores or the overall outcome.

126. It is well established that Tribunals cannot substitute their own views regarding the selection criteria over those of an employer. A Tribunal can only interfere if the criteria adopted are such that no reasonable employer could have adopted them or applied them in the way in which the employer did. Further, in considering the application of any selection criteria, the Tribunal will not carry out a detailed re-examination of the way in which the employer applied the selection criteria – it will be sufficient for the employer to have set up a good system for selection and to have administered it fairly.

127. In this case, for the reasons stated, I find that the use of the 2018 performance review was reasonable. The Claimant signed and acknowledged this at the time, and I have not heard cogent evidence that that performance review was conducted in an unfair or unreasonable manner. I have not heard evidence that the selection criteria, as applied to the other employees that the Claimant was being compared with, was unreasonable. Although there were flaws in the process (most notably, the dating of the 2021 performance review), these did not result in the overall process becoming fatally flawed. Accordingly, no point raised by the Claimant individually or collectively means the Tribunal can interfere with the Respondent's decision.

128. In terms of the process, the Claimant states the Respondent failed to make the Claimant aware of his rights to have a representative of the union accompany him at the redundancy meeting and failed to act fairly on this point. There is no requirement for an employer to state that a union representative can accompany him. The Claimant was told that he could be accompanied by a fellow employee, and that was sufficient.

129. Further, the engagement process with the Claimant, including the appeal, was reasonable. The Claimant had ample opportunity to make his points and those points were considered as part of the process.

<u>Vacancies</u>

130. The Respondent states that it considered alternative roles for the Claimant (and others), however, that the Claimant did not apply for any such roles. The Claimant agrees that none of the available roles were suitable.

131. I find that the Claimant was made aware of vacancies, but chose not to apply. Further, there were no storekeeper roles and the Claimant has not been able to demonstrate that there was a suitable storekeeper role within a reasonable period of time.

Redundancy pay

132. The Respondent states that the Claimant was paid a sum of GBP 1,069.20 on 5 July 2021 in respect of redundancy pay. I find that it has not been demonstrated that the Claimant is owed any additional sums.

Application for further information

133. The Respondent's application of 20 December 2022 falls away in light of the above findings.

Employment Judge Din

Date: 3 February 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

9 February 2023

NG

FOR EMPLOYMENT TRIBUNALS