EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr T Hobson	**-v-**	Doncasters Limited

Heard at: Leeds by Cloud Video Platform

On: 23 February 2021 (3 hours reading in without the parties)
24 February 2021

Before: Employment Judge Evans (sitting alone)

Representation
For the Claimant: in person
For the Respondent: Ms Assunta del Priore (Counsel)

JUDGMENT

1. By consent the Respondent's name is amended to Doncasters Limited.

2. The Claimant was unfairly dismissed. However, if a fair procedure had been followed, there would have been an 80% chance that he would have been dismissed fairly.

3. The remedy hearing listed for three hours to begin at 10 a.m. on 4 May 2021 by Cloud Video Platform will go ahead unless the parties reach an agreement in relation to remedy before that date.

REASONS

Preamble

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was video. A face-to-face hearing was not held because all issues could be determined in a remote hearing.

2. The Claimant was dismissed by the Respondent with effect from 31 July 2020 by reason of redundancy. Following a period of early conciliation which began and ended on 6 October 2020, the Claimant presented a claim of unfair dismissal on 22 October 2020.

3. The parties had agreed a bundle for the final hearing running to 678 pages. All page references given below are to this bundle. The parties had also prepared written witness statements for the following witnesses, all of whom also gave oral evidence: Ms A Howard, an HR Manager of the Respondent at the relevant time, Mr M Watson, an Engineering Manager of the Respondent, Mr J Griffiths, a General Manager of the Respondent and Mr R Osborne, a staff representative. The Claimant also gave evidence.

4. The parties' submissions concluded at just after 4pm on 24 February 2021. Ms Del Priore had another commitment at 4.20pm and in any event there was insufficient time for me to reach a decision on the day. I therefore reserved my decision.

The discussion at the beginning of the Hearing and the issues

5. There had been no preliminary hearing for case management purposes in this case and, of course, the Claimant was unrepresented. We therefore spent some time at the beginning of the day clarifying the issues which would need to be determined. I also obtained the Claimant's confirmation that he was indeed only pursuing a claim of unfair dismissal and the consent of the parties to the name of the Respondent being amended as set out above to reflect the name given by the Respondent in its response.

The agreed issues

A. What was the reason or principal reason for dismissal? The Respondent said the reason was redundancy and that was not disputed by the Claimant.

B. 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. In particular:

B.1. Did the Respondent adequately **warn and consult** the Claimant?
B.2. Did Respondent adopt a reasonable **selection decision**, including its approach to a selection pool?
B.3. Was dismissal within the range of reasonable responses.

C. If the dismissal was unfair, was there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed or for some other reason?

Selection decision

D. The Claimant contends that the selection decision was not reasonable for the following reasons:

Scoring

D.1. Employees were given different opportunities to improve their scores, in particular the Claimant had to do a practical test to improve his welding score when matrix 1 was applied but Mr Dimbleby did not;

D.2. The Respondent was not consistent in the evidence it would accept from employees to improve their scores. The Claimant initially had to do a test to improve his welding score but Mr Dimbleby was allowed to rely on shift sheets. Then, when the Claimant was required to rely on shift sheets, he was only allowed to rely on records which showed him as being the only person allocated to a job;

D.3. The Respondent "unfairly added and removed a person's scores in the pool without justification", i.e. Mr Varley was given an extra three points for an electrical qualification when he should not have been.

Change to matrix

D.4. The Respondent unfairly changed the matrix part way through the redundancy exercise. If it had not done this, the Claimant would have been allowed to do a further welding test, would have been awarded an additional two points for vertical welding, and so would not have been selected for redundancy.

Warning and consultation

E. The Claimant contends he was not adequately warned and consulted for the following reasons:

E.1. The Claimant was not given any understanding of the process used to select people in the pool throughout the redundancy exercise;

E.2. The Respondent changed the matrix part-way through the redundancy exercise without informing the employees in the pool;

E.3. The Respondent acted unfairly in the way it conducted individual meetings by rushing the process through.

6. During the course of the discussion of the issues:

6.1. The Claimant confirmed that he did not argue that Respondent had failed to take reasonable steps to find him suitable alternative employment;

6.2. The Respondent confirmed that, if I concluded that the Claimant had been unfairly dismissed, it would not be argued that the Claimant caused or contributed to his dismissal by blameworthy conduct.

The Law

7. Section 94 of the Employment Rights Act 1996 ("the 1996 Act") gives an employee the right not to be unfairly dismissed.

8. Section 98(1) of the 1996 Act provides that when a Tribunal has to determine whether a dismissal is fair or unfair it is for the employer to show the reason for the dismissal and that such reason is a potentially fair reason because it falls within section 98(1)(b) or section 98(2). The burden of proof to show the reason and that it was a potentially fair reason is on the employer. Redundancy is a potentially fair reason for dismissal.

9. A reason for dismissal is a set of facts known to or beliefs held by the employer which cause it to dismiss the employee.

10. If the Respondent persuades the Tribunal that the reason for dismissal was a potentially fair reason, the Tribunal must go on to consider whether the dismissal is fair or unfair within the meaning of section 98(4) of the 1996 Act. This requires the Tribunal to consider whether the decision to dismiss was within the band of reasonable responses.

11. Section 98(4) of the 1996 Act applies not only to the actual decision to dismiss but also to the procedure by which the decision is reached. The burden of proof is neutral under section 98(4).

12. In considering this question the Tribunal must not put itself in the position of the Respondent and consider what it would have done in the circumstances. That is to say it must not substitute its own judgment for that of the Respondent. Rather it must decide whether the decision to dismiss the Claimant fell within the band of reasonable responses which a reasonable employer might have adopted. A claim will not succeed just because the Tribunal takes the view that the decision to dismiss was harsh if it nonetheless fell within the range of reasonable responses.

13. When the reason for dismissal is redundancy, the Tribunal should have regard to the standards set out by the Employment Appeal Tribunal in Williams and ors v Compair Maxam Ltd 1982 ICR 156 in deciding whether the dismissal is fair under section 98(4):

    13.1. Employees should be warned and consulted about the redundancy;
    13.2. The selection criteria should be objectively chosen;
    13.3. The selection criteria should be fairly applied;
    13.4. If there is a union, its view should be sought;
    13.5. The employer should look to see if there is alternative work for the employees.

14. If the Tribunal concludes that the employee's dismissal was unfair, it will consider whether a compensatory award should be made. This should be calculated in accordance with section 123 of the 1996 Act. This requires the Tribunal to consider whether the compensation awarded should be reduced to reflect the chance that the Claimant might have been fairly dismissed at a later date or if a fair procedure had been used.

Submissions

15. The parties' submissions at the conclusion of the hearing were brief and may reasonably be summarised as follows.

16. Ms Del Priore for the Respondent graciously agreed to go first, because the Claimant was unrepresented. She summarised the relevant law and emphasised that I should not substitute my judgment for that of the Respondent. She cautioned me against an overly-minute investigation of the selection process. She noted that the Respondent would have done all that was required if it had set up a selection procedure that was fair and had then reasonably applied it.

17. Ms Del Priore said that the fact that the Respondent had changed the matrix used part-way through the redundancy selection exercise was a strength not a weakness in its process. Its redundancy policy did not prevent it from doing this and the change had been reasonable in light of difficulties that had arisen. It had reasonable reasons for the changes which were in themselves entirely reasonable.

18. So far as Mr Varley's score had been concerned, the awarding of two points for the electrical qualification had been entirely reasonable. Further, the Claimant was quite simply wrong to say that if the matrix had not been changed he would have been awarded two further points for welding and would not have been selected.

19. Turning to information and consultation, the Claimant had been given adequate information and, also, an understanding of the selection process. Further, the process had lasted 36 days. It had not been rushed.

20. Turning finally to the issue of whether if the dismissal were unfair compensation should be reduced to reflect the chance that the Claimant might have been fairly dismissed at a later date or if a fair procedure had been used, Ms Del Priore submitted that, even if there were some procedural flaw, the Claimant would not have achieved the extra points he needed to escape selection and so his compensation should be reduced by

100%. Further and alternatively, if more time were required for a fair process, then the compensation should only be awarded for a very short period.

21. The Claimant submitted that a fair procedure had not been followed. Different methods had been applied to score different employees in the pool for selection. He had been required to do a welding test, others had been scored on shift reports. Others had then been awarded points without certificates or hard proof, but his shift reports had been rejected as evidence. The matrix had actually been changed during an adjournment in one of his consultation meetings. He had then tried to explain why points had been given or not given unfairly but he had not got anywhere.

22. I asked the Claimant to confirm that his point in relation to Mr Varley was that his electrical qualification was more than three years old and so he should not have been allowed to rely on it. That is to say the Claimant was not saying that Mr Varley did not have an electrical qualification. The Claimant confirmed that that was indeed the case.

23. I asked the Claimant to confirm what he contended would have happened if a fair procedure had been followed. He said that if Mr Dimberley had taken and failed a welding test, he would have been selected for redundancy. Equally, if Mr Varley had not been allowed to rely on the electrical certificate, he would have been made redundant.

Findings of Fact

24. I am bound to be selective in my references to the evidence when explaining the reasons for my decision. However, I wish to emphasise that I considered all the evidence in the round when reaching my conclusions.

General credibility findings

25. I begin by making the following general credibility findings. I found the evidence of all the witnesses to be generally internally consistent and plausible. In short, I found them all to be trying to recall honestly what had occurred. To the extent that I have preferred one witness's evidence to that of another, it is generally because of the support I could find for one or other witness' evidence in the documentary evidence provided.

The background to the redundancies and collective consultation

26. The Respondent announced a business restructuring which would entail redundancies on 22 June 2020 (page 83). This was a result of a change in business strategy and a reduction in core demand (it had lost its biggest single customer, which had accounted for 25% of its production). More than 60 redundancies were proposed.

27. The Claimant was employed on the shop floor as a maintenance fitter. The Respondent decided to reduce the number of maintenance fitters from eight to six. The pool for selection was "maintenance fitters" and the Claimant takes no issue with that. Rather this case is principally about how the Claimant was selected for redundancy from that pool.

28. The Respondent recognised the GMB trade union in respect of its shop floor employees. It held collective consultation meetings with workforce representatives on 22 June 2020, 29 June 2020, 1 July 2020, 6 July 2020 and 8 July 2020. Those attending varied over time but the attendance at the meeting on 29 June 2020 was typical: it was attended by the GMB's workplace representatives (Mr P Kennedy and Mr R Lacy) and two staff representatives (Mr R Osborne, previously a GMB workplace representative, and Mr Michie). The staff representatives were elected for the purpose of the collective consultation exercise required by section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992.

The agreement of the selection criteria

29. Selection criteria were discussed at the meeting on 1 July 2020 (page 118). In relation to the maintenance fitters, there was some discussion of how points would be awarded for qualifications. The notes record (page 123) "Training record 3 years – not applicable – Re training hydraulics". There was further discussion of the selection criteria at the meeting on 6 July 2020 and at that meeting the maintenance fitter selection criteria were agreed (page 125). The criteria initially agreed were at page 641 of the bundle. Again the Claimant takes no issue with the criteria themselves. Rather he takes issue with how they were applied and the fact that they were changed mid-way through the process.

30. I make the following finding about what was agreed at this point in relation to qualifications which would or would not "count" for the purposes of the scoring against the matrix. This is potentially of relevance because the Claimant says Mr Varley was incorrectly given points for an electrical qualification. The evidence of Ms Howard was that it was agreed that only training records showing that training had been completed within the last three years would count towards the scoring. However there would be an exception for any qualification classed as "skills for life". The evidence of Mr Watson was that a three-year time frame had been chosen because a new "training matrix" had been put in place three years ago. By contrast, the evidence of Mr Osborne was that "only qualifications gained or proved to have been used regularly within 3 years would be counted".

31. On balance I prefer the evidence of Ms Howard and Mr Watson in relation to this issue. This is because it is more consistent with the contemporaneous hand-written notes of Ms Howard recorded above which suggest that the 3-year limit would not be applicable to all forms of training and to all qualifications. I therefore find that it was agreed that any "skills for life" qualification was exempt from the three-year time limit.

The initial application of the selection criteria to the Claimant

32. The Respondent scored the maintenance fitters (page 641) and the Claimant came out, after the service tie breaker, as being one of the bottom two (page 642). Ms Howard wrote to him on 10 July 2020 informing him of this fact and a copy of his scoring sheet was enclosed (page 144). He was invited to a consultation meeting on 14 July.

33. The details of how his skills score of 44 was made up had not been included on the scoring sheet. This information was given to him at the meeting on 14 July (page 150).The Claimant thought that he could achieve a higher score for welding (he had been given 2, which according to the criteria meant "basic welding skills, MMA or MIG tack plates together") and for "Oxy fuel cutting" (he had been given 5, which according to the criteria meant "Basic Oxy Fuel Skills e.g. cut bolts off"). I have referred to Oxy Fuel Skills below as "burning", because this is how the witnesses referred to them. The Claimant asked if his skills in these categories could be tested so that he might have a chance to increase his scores. It was agreed that they could be. There was also some discussion of the welding test to which I shall return below. The handwritten notes (page 148) record Mr Watson as saying "welding full penetration, I would expect for welding test for burning cutting and score". The typed-up notes of the meeting (reflecting Ms Howard's recollection of it when she prepared them after the meeting) record the Claimant being asked what he would expect to score and him answering 5 for welding and 10 for burning (page 152). Those notes also record the Claimant saying that "… AR does it as he's better but I can do it". "AR" was Ashley Rhodes, another maintenance fitter.

34. The Claimant did a welding and burning test the next day. His work was "marked" by Richard George, the Technical Director, by comparison with the work of John Dawson. His comments were: "I would rate both person's jobs as very good, showing a high standard of welding/burning for these particular tasks" (page 158).

35. There was a further consultation meeting with the Claimant on 16 July 2020 (page 161). He is recorded as asking "did I pass" and Mr Watson as replying "score of a 5 & 10". It was confirmed that as a result of the increase in his scores he was no longer at risk of redundancy (page 165).

What was agreed about the welding test on 14 July

36. This is an appropriate point to make findings about exactly what was said on 14 July about the test that the Claimant would carry out. He denied in his evidence that he had said he was expecting a 5 or that it had been agreed that the test would be geared towards him showing that he could achieve such a score (rather than, potentially, a higher score of 7 or 10). The evidence of the Respondent's witnesses, however, was that he had said he was expecting a 5 and that that was reflected in the test set.

37. I prefer the evidence of the Respondent's witnesses in relation to this point and find that on 14 July 2020 the Claimant essentially said that he was capable of demonstrating the skills necessary to score 5 for welding and that the test was set to allow him to do this. I prefer the evidence of the Respondent's witnesses for the following reasons:

    37.1. The reference in the contemporaneous handwritten note at page 148 to "welding full penetration, I would expect for welding test…" with no reference to "vertical and overhead" suggests a discussion of the criterion associated with 5 points more than 7 points (although I accept it is not inconsistent with a discussion of the latter);

    37.2. Further and separately, the typed notes of Ms Howard suggest that there was discussion in which the Claimant said he expected to score 5;

    37.3. Further and separately, there is no suggestion that when he did the test (which involved horizontal but not vertical welding) the Claimant queried why he was not given the opportunity to do vertical welding (which would have been necessary if he had believed that he could score higher than a 5);

    37.4. Further and separately, the way the Claimant asked if he had "passed" suggests that he was aiming for a particular mark. Otherwise he would have asked what his score had been.

Mr Dimbleby's use of shift run reports to increase his score

38. Mr L Dimbleby, the maintenance fitter who had initially escaped being selected for redundancy by "winning" a tie break against the Claimant by virtue of his longer service, had his first individual consultation meeting on 21 July 2020 (page 165). He was told that he was now provisionally at risk (as a result of the increase in the Claimant's scores) (as shown at page 644). He was given the individual scores contributing to his skills score total of 44. He asked if his welding and burning skills could be reassessed against shift run reports. The possibility of a test was raised with him but he indicated that he preferred to be assessed against shift run reports and it was agreed that this was possible. When asked what scores he thought he should have achieved he said 7 for welding and 10 for burning.

39. When Mr Dimbleby was reassessed against the shift run reports he was given 7 for welding and 10 for burning. This meant that the Claimant was again one of the bottom

two fitters and so at risk of redundancy (the scores were at page 647). A letter to this effect was sent to the Claimant on 22 July 2020 inviting him to a further consultation meeting (page 203).

40. This is a convenient point to consider whether permitting Mr Dimblebly to introduce shift reports (also referred to as shift run reports) to increase his scores was in accordance with the Respondent's redundancy policy and with what had been agreed during the collective consultation process. The Respondent relied in this regard on some very general provisions in its redundancy policy at page 47 of the bundle which stated as follows:

> ***d. Employee Representations***
> *Once the organisation has scored employees, it will make a provisional selection for redundancy. Employees who have been provisionally selected for redundancy will be provided with a copy of their scores. Individuals should not have access to any other employee's selection scoring as this is personal information.*
>
> *Potentially affected employees will be invited to attend individual consultation meetings where* ***they will be able to raise any concerns, objections or challenges about their score and raise any other matters that they see fit regarding the redundancy situation.***

41. Essentially the position of the Respondent's witnesses was that the words in bold meant that employees could being a wide range of evidence along to support their appeals.

42. The evidence of Mr Osborne, however, was that this was not had been agreed. He said in his witness statement that "if anyone contested their scores they would be given the chance to perform a practical test to prove their skill level".

43. I prefer the evidence of Mr Osborne in this respect for the following reasons:

    43.1. The notes of the collective consultation meeting of 6 July 2020 (pages 128) record:

    > *RL - Questioned proposal of welding & complexity (MW) Objective criteria with ability to test if required –*
    > *RO – will all be tested (AH) No only those who contest their scores*

    43.2. The "Redundancy Selection Procedure – Maintenance" (page 208) states:

    > *Training records must also not be over three years old from 1 June 2020. If the scores are disputed by an individual, an assessment will take place to establish the correct scores to be awarded.*

    43.3. The Redundancy Policy states at page 47:

    > ***c. Application of Selection Criteria***
    >
    > *The organisation will score employees against the selection criteria in a reasonable, fair and consistent manner.*
    >
    > *The organisation may decide that it is appropriate to interview or test employees as part of the selection process.*

    43.4. These documents are consistent with the evidence of Mr Osborne in that they make no reference to individual employees being able to introduce whatever evidence they see fit in support of an argument that they have been scored

incorrectly. They point to disputes about scores being settled by a "test" or "assessment".

43.5. On the other hand, the document relied upon by the Respondent is only marginally relevant. The paragraph in the policy says nothing about the nature of evidence that could be introduced by employees in support of appeals against their scores and the suggestion that employees could adduce a wide range of evidence was surprising because such an approach would be likely to result in the Respondent struggling to compare like with like.

44. I therefore conclude that what was agreed with the representatives was that if an employee disagreed with the score they had been given in relation to welding (the point in issue and that specifically dealt with at page 128) or burning, the matter would be resolved by a test. Consequently the Respondent acted in breach of the procedure agreed during the collective consultation process by permitting Mr Dimblebly to rely on shift run reports. Further, this was not a situation where the Respondent was caught between what its own redundancy policy said and what had been agreed. There is nothing in the redundancy policy which requires the Respondent to review scores on the basis of whatever kind of evidence an employee chooses to put forward.

<u>The Claimant's consultation meeting on 24 July 2020</u>

45. At that consultation meeting on 24 July 2020 the Claimant stated that he had found evidence that he had done vertical welding and handed over the relevant shift run reports. The significance of that was that if he could have shown that he could do "vertical and overhead" welding, then he would have been given 7 points and not 5 for welding (page 641). Mr Watson replied, after an adjournment, that having cross-checked the shift run reports there had always been someone else present when the Claimant had done vertical welding (who could therefore have done it). He also said that in the first consultation meeting the Claimant had said that he should have been awarded a 5 not a 7 for welding. Mr Watson indicated that he did not believe that the Claimant's score should be increased to a 7. The Claimant went on to raise the issue of another individual's score being increased. Mr Watson said that it was because the individual had produced a certificate showing that he had a qualification in relation to electrical fault finding. At this point the consultation meeting was adjourned.

46. I make the following finding about the refusal of Mr Watson to allow the Claimant to rely on the shift run reports because they did not demonstrate that he personally had done the work because another employee had also been present. I find that this was an on the spot decision by Mr Watson, which reflected his view that the Claimant was not a confident welder and might well not have been the employee who had carried out the tasks that the shift run reports demonstrated. It did not, however, reflect any agreed approach to the use of shift run reports. An approach was only agreed at the consultation meeting which I deal with below which took place later in the day.

47. I also make the following finding in relation to whether at this point the Claimant asked to do a further welding test. He says that he did. Mr Watson and Ms Howard say that he did not. The Claimant pointed to the following words included in the handwritten notes at page 221: "A test, done another test" in this regard. I prefer the evidence of Mr Watson and Ms Howard in this regard for the following reasons:

47.1. The typed-up version of the notes at page 227 (which expands the handwritten version) shows that Ms Howard's recollection was that the Claimant had said:

You should have done a test with everyone, you've gone about it incorrectly, anyone can write in a computer what they've done, you made me do a test you should have made the next person and the next person"

47.2. The Claimant's own contemporaneous and quite detailed "time line" at pages 239 to 240 does not say that he asked for a further test of his welding skills to be carried out.

The further collective consultation meeting on 24 July 2020

48. There was then a further collective consultation meeting on 24 July 2020 between Mr Watson and Ms Howard on the one hand and Mr Kennedy and Mr Osborne on the other. The Claimant contended that people were missing from the employee side but I find that there were good reasons for those who were absent being absent: I accept Ms Howard's evidence which was not challenged that Mr Lacy (the other GMB representative of the shopfloor) had asked to no longer be a representative.

49. It is clear that the meeting was called because Ms Howard and Mr Watson were concerned that maintenance fitters were increasing their scores in the consultation meetings in way that was causing them to leap-frog one another. More specifically, the immediate cause of the meeting was clearly the Claimant trying to increase his welding score as described above relying on evidence (the shift run reports) which Mr Watson did not accept demonstrated in the case of the Claimant what he said it demonstrated (that is to say an ability to do vertical welding).

50. However I find that the underlying cause of the meeting was the failure of the Respondent to follow the procedure it had agreed at the outset by permitting Mr Dimbleby to rely on shift run reports rather than give him the opportunity of doing a practical test as the agreed process required. It was entirely unsurprising that, once Mr Dimbleby had been permitted to do this, whichever employee lost out (in this case the Claimant) would seek further evidence of his own to increase his score again.

51. At the meeting Ms Howard emphasised the need for the process to be objective. There was a difference of opinions in the meeting: the Respondent's representatives wished to avoid scoring employees by practical assessment and to rely on shift run reports. Mr Kenney was in favour of this approach but Mr Osborne was in favour of practical assessments.

52. I find that in the end those present went along with the Respondent's proposal that the criteria to be applied to the fitters would be amended as would the nature of the evidence that would be accepted in support or any argument by an employee that they had been scored incorrectly. The criteria of burning and "plc" would be removed altogether and welding would be scored by reference to evidence based on shift reports over a three-year period with employees having to demonstrate three occasions of skills being exercised at a particular level when they were working alone to gain the points attributable to that level. I find that although this was not Mr Osborne's preferred approach it was in the end agreed by all present that it would be followed. To the extent that this requires me to prefer the evidence of Ms Howard to that of Mr Osborne I do so because Mr Osborne signed the sheet showing the amended selection criteria for maintenance fitters (page 209).

The final scoring of the Claimant and Mr Varley's electrical qualification

53. Mr Watson rescored all the maintenance fitters over the weekend and the bottom two were Mr Varley and Mr Dunkerley (page 650), with the Claimant escaping selection by "winning" the tie-break with Mr Varley because he had longer service. However, before the Claimant was informed of this, Mr Varley had his consultation meeting at 7 a.m. on Monday 27 July 2020 (page 234). He was given his scores and told that he had been provisionally selected. He stated that he had been wrongly scored under the heading "Electrics" because he had a qualification. He said he should have been scored 7 ("Good level of electric skills, qualified to fault find on electric circuits and carry out

repairs"). After an adjournment to consider the point, Mr Watson increased Mr Varley's score for "Electrics" to 5 ("moderate level of electrical skills, qualified to fault find on electric circuits"). The basis for this conclusion was that Mr Watson had seen an electrical qualification held by Mr Varley which he had obtained in 2015. I find that this was a "skill for life" qualification which was exempted from the three-year limit applied to the relevance of internal training records. I find that giving Mr Varley these points was therefore in accordance with the procedure agreed during the collective consultation process.

54. I note at this point that the Claimant made much of the fact that Mr Varley had initially been awarded additional points for the electrical qualification outside the formal process. Ms Howard accepted that this was the case in her oral evidence, and explained that as a result of submissions by the Claimant those points had been removed and then restored at Mr Varley's individual consultation meeting early on 27 July 2020. It is perhaps unfortunate that the Respondent acted in this way, because of the impression it created in relation to the fairness of the process in the eyes of the Claimant, however Mr Varley was entitled to the additional points and the Respondent did not act unfairly or in breach of what had been agreed by awarding them to him.

55. Later in the day on 27 July 2020 the adjourned consultation meeting with the Claimant resumed (page 225). It was explained to the Claimant that the selection criteria had been reviewed with the GMB and changed as had the evidence to be taken into account if scores were challenged. A copy of the "revised scoring criteria" was provided. It was explained that the Claimant remained provisionally selected on the basis of his new scores. The meeting became heated. The Claimant suggested that Mr Watson had increased Mr Varley's score because he was "his pet". The meeting was adjourned briefly so that everyone could calm down. When the meeting was resumed the Claimant added little. I find that at this point the Claimant "gave up" because he was disheartened by what he regarded as the chopping and changing to the process and because he had concluded that the Respondent was determined to dismiss him.

56. The Claimant had a final consultation meeting on 30 July 2020. The Claimant did not raise further points at this meeting. His dismissal by reason of redundancy was confirmed by a letter dated 31 July 2020 (page 618). His employment ended on that date and he received a statutory redundancy payment and a payment in lieu of notice. The other maintenance fitter who was dismissed was Mr Dunkerley.

Conclusions

57. The reason for the Claimant's dismissal was redundancy and that is a potentially fair reason. The question for me is whether the Respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant. This in turn depends on my conclusions on the issues identified about in relation to the "selection decision" and "warning and consultation", given that the Claimant takes no issue with the pool for selection or, indeed, with the selection criteria themselves.

The selection decision

58. Turning to the specific issues raised by the Claimant in relation to the selection decision, I conclude in light of my findings of fact above that the Respondent acted reasonably in giving Mr Varley extra points for his electrical qualification – that was in accordance with what had been agreed during the collective consultation process. In fact, in light of my reasoning below, the issue of Mr Varley is not relevant.

59. I conclude, however, that the Respondent acted in a way that was outside the band of reasonable responses in the way that it selected the Claimant for redundancy by giving employees "different opportunities" to increase their scores, by not being "consistent"

in the evidence that it would accept and by changing the matrix (including how scores could be challenged) part way through the redundancy exercise. I so conclude in light of my finding that the Respondent departed from what had been agreed in the collective consultation when it permitted Mr Dimbleby to rely on the shift run sheets to challenge his scores for welding and burning. Having agreed to deal with any challenges to score by tests or assessments the Respondent acted in a way that no reasonable employer would have done by then departing from this agreed process without any good reason and without first agreeing that change with the workforce's representatives.

60. The Respondent contends that difficulties arose as a result of what Ms Howard referred to in her witness statement as "variations in the scoring criteria" and so it acted reasonably by changing the criteria and the evidence that could be relied upon just a few days before the end of the redundancy process. However, factually, the problem was quite simply that different employees were being allowed to use different kinds of evidence to increase their scores: the Claimant had used a practical test (as required by the agreement reached in collective consultation) to increase his score and leapfrog Mr Dimbleby, then Mr Dimbleby had relied on shift run sheets to increase his score and leapfrog the Claimant, then the Claimant had sought to rely on shift run reports in an attempt to increase his score and so leapfrog Mr Dimbleby again. The problem was not "variations in the scoring criteria" (which had remained fixed as set out in the bottom half of page 641 of the bundle up to and including the beginning of the collective consultation meeting on 24 July 2020) but rather the fact that the Respondent had accepted different kinds of evidence from different employees in support of their appeals *in breach of* what had been agreed. This inevitably meant that it was difficult to compare like with like and score employees fairly and consistently.

61. If this (or a similar) difficulty had arisen during the course of the Respondent correctly applying the procedure that had been agreed during collective consultation then there would have been considerable force in Ms Del Priore's submission that the changes agreed by the Respondent during the collective consultation meeting on 24 July 2020 were both fair and reasonable not least because they were agreed. Indeed, if that had been what had happened, I would not have found the dismissal to be unfair. However the difficulty did not arise during the course of the Respondent correctly applying the procedure that had been agreed. Rather the difficulty arose precisely because the Respondent had *failed* to follow the agreed procedure by permitting Mr Dimblebly to rely on the shift run reports. If the Respondent had required Mr Dimbelby to undertake a practical assessment there would have been no difficulty. If he had failed to increase his score, he would have remained selected. If he had increased his score to a score which was higher than that of the Claimant, then the Claimant would have again been selected. However neither Mr Dimbelby nor the Claimant would have had any cause for complaint in these circumstances: the Respondent would have been following the procedure agreed in the collective consultation process. Further, it would not have been acting in breach of its own redundancy policy because this did not require it to accept whatever evidence an employee chose to put forward as evidence that a particular score should be increased. Indeed the Redundancy Policy quite specifically envisages testing as part of the selection process.

62. Equally, if the Respondent had had some good reason to depart from what had been agreed, and had then sought to renegotiate the selection criteria and how they were applied, I would not have found the dismissal to be unfair. However I conclude that the Respondent had no good reason to depart from the agreed procedure for scoring employees and so did not act within the band of reasonable responses when it did so, even if those changes were *subsequently* agreed (along with others). At the hearing the Respondent sought to argue that relying on practical assessments of the welding abilities of individuals was unfair: some of the maintenance fitters were on furlough and so their skills would have deteriorated. I find that this is a *post facto* justification for the Respondent's change to the agreed procedure. I so find for two reasons. First,

this was clearly not the view of the Respondent in late June/early July (by which time employees were already furloughed) as it was precisely by testing practical skills in relation to welding and burning that the Respondent had agreed to deal with challenges to scores. Secondly, the evidence of the Claimant and Mr Osborne was to the effect that not welding for a couple of months would not cause any significant deterioration in welding skills provided that a brief opportunity to practice was given. I preferred their evidence to that of Mr Watson in relation to this issue given that the Respondent had initially agreed to deal with scoring disputes by practical tests.

63. The Respondent also sought to argue that it had to act as it did because otherwise it would have had to re-test all the maintenance fitters and this would have caused anxiety amongst them. However this is plainly wrong: it had been agreed that only those who challenged their scores would be tested and in fact all that was required to follow the agreed procedure was for Mr Dimbleby to be given the option of doing a welding and burning test.

64. Overall, I conclude that the Respondent had no good reason to depart from what had been agreed. Its actions resulted from muddled thinking. Consequently, by departing from what had been agreed it acted as no reasonable employer would have done.

65. Finally, the Respondent argued that the simple fact that the change to the matrix (including how scores could be challenged) was agreed at the meeting on 24 July 2020 meant that the dismissal of the Claimant was not unfair because the Respondent had acted reasonably. I do not accept that that is the case. The failure to follow the agreed procedure *without any good reason* when dealing with Mr Dimbleby was the source of the unfairness. That could not be undone by presenting a *fait accompli* to the representatives (i.e. the breach of procedure) and then persuading them to agree changes as the Respondent did. Again I conclude that no reasonable employer would have acted as the Respondent did, in effect beginning the whole redundancy scoring exercise again without good reason just a week before the Claimant's ultimate dismissal.

Warning and consultation

66. So far as the Claimant's warning and consultation points are concerned, in light of my findings of fact above I conclude that the Claimant was given a reasonable understanding of the process used to select people in the pool throughout the redundancy exercise. When the written communications and what was said to him in meetings are taken together, the Respondent acted reasonably in this regard. Further, the Respondent did not act unfairly in the way it conducted individual meetings by "rushing the process through".

67. I have carefully considered in particular whether the fact that the Claimant was only told about the revision to the criteria on 27 July 2020 at the beginning of the resumed consultation meeting meant that he had not been warned and individually consulted to the extent that he should have been. If the Respondent had acted reasonably by changing the matrix (including how scores could be challenged) then, in light of the collective consultation meeting on 24 July 2020, and the fact that the Claimant was given an opportunity to comment on and challenge his revised scores at the meeting on 27 July 2020 and at the meeting on 30 July 2020, I would not have found that these were matters which made the dismissal unfair.

68. However the fact that the Respondent warned and consulted with the Claimant adequately does not remove or reduce the unfairness identified above in relation to the selection decision.

69. I therefore find that the Claimant's dismissal was unfair.

Polkey – what would have happened if a fair procedure had been followed?

70. If the Respondent had followed a fair procedure it would have told Mr Dimbleby that the agreed procedure meant that he would have to take a test if he wished to improve his welding and burning scores. He would have presumably agreed to take a test. There would then have been two possibilities: he would have increased his score so that the Claimant would have been selected for redundancy; or he would not have increased his score and so he would have remained selected. In light of my findings above in relation to what was agreed on 14 July 2020 about the test the Claimant was to do, a fair procedure would not have required the Respondent to arrange a second test to see if he could increase his welding score further.

71. Initially both Mr Dimbleby and the Claimant scored a two for welding and a five for burning (page 641). After being tested, the Claimant scored a five for welding and a ten for burning (page 64). There would have been two ways in which Mr Dimbleby could have pushed the Claimant into last place. First, he could have scored in total more than the Claimant on welding and burning. Secondly, he could have scored the same: if he had done that then the Claimant would have lost out on the basis of the LIFO tie breaker (the Claimant's employment had begun on 13 August 2015 and that of Mr Dimbleby on 17 March 2015).

72. Taking matters in the round, I find that there is an 80% chance that Mr Dimbleby would have scored at least as well as the Claimant if he had done a welding and burning test and that therefore the Claimant would have been fairly dismissed for redundancy. I so find for the following reasons:

    72.1. At his consultation meeting on 21 July 2020 Mr Dimbleby argued that he had the skills necessary to get a seven in welding and a ten in burning;

    72.2. He produced evidence in the form of shift reports which Mr Watson was satisfied demonstrated the welding score claimed (i.e. which showed examples of vertical welding when he had been working alone);

    72.3. Further, I accept Mr Watson's oral evidence that he was satisfied that Mr Dimbleby had burning skills necessary to score ten.

73. I therefore find that it was highly likely that Mr Dimbleby would have done at least as well as the Claimant in a practical test and so would not have been dismissed. However I have set the figure at 80% to reflect the fact that there would nevertheless have been a significant possibility that Mr Dimbleby would not have performed as well as required to score at least a five and a ten in the practical tests. Examinees do not always perform as well as they might hope to under "exam" conditions.

74. The fact that I have concluded that there would have been an 80% chance that the Claimant would have been dismissed if a fair procedure had been followed of course means that his compensatory award will in principle be reduced by 80%. He will not be entitled to a basic award because he received a statutory redundancy payment and the reason for his dismissal was redundancy.

Employment Judge Evans

Date: 4 March 2021