Case number: 2601780/2020 Reserved

EMPLOYMENT TRIBUNALS

BETWEEN:

Claimant		**Respondent**
	And	
Mr P Bennett		Balfour Beaty Group Employment Limited

AT A FINAL HEARING

Held at:	Nottingham	**On**:	17 & 18 May 2021 (in chambers 15 July 2021)
Before:	Employment Judge R Clark (sitting alone)		

REPRESENTATION
For the Claimant: Ms S Crawshay-Williams of Counsel.
For the Respondent: Mr J Boyd of Counsel.

JUDGMENT

1. The claim of unfair dismissal **succeeds**.

2. A hearing will be listed to determine remedy if not agreed between the parties.

REASONS

1. Introduction

1.1. By a claim presented on 1 June 2020, Mr Bennett brings a single claim of unfair dismissal arising from his dismissal on grounds of redundancy, effective on 3 March 2020.

2. Preliminary matters

2.1. This was an attended, in person hearing. Travel disruptions delayed the start of day one. Evidence and submissions were concluded in time but with insufficient time to deliver a judgment which was necessarily reserved.

3. Evidence

3.1. For the claimant I heard from Mr Bennett himself. For the respondent I have heard from Mr Peck and Mr Sheriden. Mr Peck was one of the two managers scoring the redundancy selection process. Mr Sheriden was head of on track plant and primarily involved in the collective consultation and the overview of the business need for the changes. His evidence was accepted unchallenged by the claimant.

3.2. I received a small bundle running to 172 pages once additional agreed disclosure was added.

3.3. Both parties made oral closing submissions.

4. The Issues

4.1. It is not in dispute that the reason for dismissal was redundancy. The live issues in the claim can be reduced to whether the circumstances were such that it was reasonable for the employer to rely on that reason as sufficient to justify dismissing the claimant in all the circumstances.

4.2. The particular issues advanced by the claimant as taking the decision to dismissal the claimant outside the range of reasonable responses were: -

a. The approach to collective consultation.

b. The application or approach to the “blue book” scheme and its modification.

c. The individual scoring process. In particular, (i) an apparent inconsistency in respect of the claimant leaving site at “eleclink”; (ii) a lack of evidence behind the decisions and (iii) the approach to the deduction of points for a disciplinary record.

d. The approach to individual consultation and how the respondent considered the challenges to the scoring matrix. In particular, (i) completing the initial scoring matrix in advance and sharing it with the claimant only at the first consultation meeting; (ii) acting obstructively in consultation about the claimant’s concerns; (iii) not minuting the meetings and (iv) refusing to revisit and review the claimant’s scoring.

e. The respondent’s approach to monitoring the scoring process through HR and/or TU’s.

f. The respondent’s handling of the claimant’s appeal.

g. The respondent’s approach to suitable alternative employment.

h. The respondent's approach to using contract labour.

5. Facts

5.1. It is not my role to resolve each and every last dispute of fact between the parties. My function is to make such findings of fact as are necessary to answer the issues in the claim and to put them in their proper context. On that basis, and on the balance of probabilities, I make the following findings of fact.

5.2. The respondent is a large company. The setting for this case is its specialist plant division which provides specialist machinery services for railway clients, typically Network Rail. It is a small division employing only 27 at the material time.

5.3. The claimant was employed as a Wiring Train Supervisor. I find in recent years, there had been a move towards multiskilling so that those employed in operations could use and work on any machinery. In the past, employees had been limited to leading the work done on one of three machines, as the claimant still was. The claimant had not become multiskilled although when he first applied for work with the respondent it was in respect of the "Drain Train" but had been offered the "Wiring Train" due to his electrical skills. Becoming multiskilled is not simply a question of choice. I find there are specific competencies for each of the rail-based machines being used. I accept Mr Bennett did sometimes work on the other machines and undertook both general basic maintenance as well as assisting others in their operation of that machinery, but I find he had not undertaken the necessary competency assessment to be signed off as competent to lead the operation if that other plant. His only competency assessment was in respect of the wiring train. The competencies are recorded in an online database which I find the managers undertaking the redundancy selection had access to and relied on. I accept Mr Peck's evidence this was the only relevant factor in assessing multi-skilled working. Others with competencies to operate additional plant necessarily scored more against that criteria.

5.4. It is not in dispute that there was a downturn in business and other changes to the market which led to the decision to reduce staff. Alternative measures were attempted in 2019 to try to avoid redundancies arising but without success. The decision was reached that 17 posts had to go.

5.5. The respondent operates a collective agreement covering various aspects of terms and conditions called the "Blue book". It has been in place in one form or another since 2001. It deals with redundancy selection and, save for the modifications that were agreed in the collective consultation process, remained in force and was sought to be applied in the selection process. So far as selection criteria is concerned, it sets out certain headline criteria for selection of qualification, attendance, skills/competencies, flexibility, quantity of work, quality of work cooperation and commitment. It does not define the actual scoring process to be used against that criteria and I find any redundancy programme would necessarily require some further consultation in respect of the detailed application.

5.6. On or around 15 October 2019 an announcement was made to the whole workforce of the specialist plant division. A document was prepared setting out the rationale and

timescales and other matters including what individuals needed to do themselves in respect of matters such as redeployment [69]. Various meetings were held around the country at the various depots and sites at which the staff were based. Although the workforce was relatively small, this is a nation-wide business and the staff come from, and are based in, all corners of the UK. Mr Bennett was based in Scotland.

5.7. The announcement made clear 17 jobs were at risk were and at that time it was anticipated 11 of those would be in operational roles such as that of the claimant. The others were in senior management, training, engineering, planning and maintenance and upgrades.

5.8. Although less than 20 employees were at risk, a formal collective consultation process was commenced. The purpose of this was to conduct a central process, to take time in the decision making and to be fair and transparent.

5.9. There are various references in the evidence to employee representatives being elected. I find they are not “employee representatives” in the statutory sense of non-trade union elected representatives. This is a unionised environment and even if there had been a proposal to dismiss more that 20 by reason of redundancy so as to engage the statutory duty to consult, it seems all the areas were covered by union recognition such that the formal obligation to facilitate election of employee representatives would not have arisen. The reason for these representatives in this particular context is because it was recognised that there would be benefits to the process if there was a local TU representative elected or appointed in each of the depots. Mr Bennett was elected for his area. I find the result is that he was in an advantageous position to be informed and to know the detail of the background and process, to raise matters of general importance and also those that are said now to arise in his own case. He was able to influence and comment on the proposals during the collective stage as well as his individual stages. He was also aware of other matters such as redeployment opportunities including the “individual redeployment actions” suggested for employees to put themselves in the best possible position to find suitable redeployment.

5.10. A first consultation meeting took place on 22 October 2019. The meeting was noted and I find the notes are a fair summary. The claimant attended. I find at this and all three collective consultation meetings the employer shared proposals for the scoring matrix that would be applied. Mr Bennett contributed to that discussion. I find various suggestions and comments were considered. Some were taken on board and some were rejected. This worked both ways and some management suggestions were rejected by the trade union such as the potential use of zero-hour contracts and alternative suggestions for how staff would be pooled. The process of sharing the internal group vacancy list was also discussed.

5.11. The second collective consultation meeting tool pace on 13 November 2019. It was again fairly noted. Mr Bennett attended. The meeting discussed various matters including whether a potential new tender could affect the timetable and even the need for redundancies at all. The timing of the client’s announcement was theoretically within a few months. The employer decided it could not rely on it as it had no control over the timing but would keep it under review. In the event, the announcement in respect of that tender did not happen for at least a further year afterwards. The meeting also discussed the current vacancy list for the

entirety of the group. At all material times there was something in the region of 400 jobs across the group. It was made clear that the respondent would seek to redeploy displaced staff and would take the matter up further during individual consultation.

5.12. The scoring matrix was shared. I find the scoring matrix that is now before me is the one proposed with the trade unions. I find it included a “behaviours” section. I find this must mean the concept of “behaviours” was sufficiently well understood amongst the workforce and the trade union for it not to be a point of major disagreement. Had it been otherwise, it seems on balance that that would have formed a basis of objection by the union.

5.13. In respect of the “behaviours”, they appear to be a relatively recent development. As with many employers, this employer’s approach to management theory and practice had developed the concept of competencies and “behaviours” as a means of defining how employees are expected to contribute in the performance of their roles. The age of the blue book means it may well not have kept up to date with these developments. Behaviours are necessarily more abstract concepts than qualification or length of service. This employer lists its behavioural expectations under four headings labelled “energy”, “execute”, “edge” and “excite”. They are not defined in the matrix of the associated documentation. However, I find they are part of the employer’s modern culture and it is to be expected that an employer which defines employee behaviours in this way would use them in all aspects of assessing employee performance. Redundancy selection is no different. One significance in this case is that although I find there was no objection to the principal of these behaviours being used, the usual opportunities to apply, review and demonstrate those behaviours through recruitment, development, training or appraisals had not happened with Mr Bennett for one reason or another. There was therefore no objective or agreed “evidence” of how he had previously demonstrated those behaviours.

5.14. Points raised in these consultation meetings were considered in the meeting and in exchanges of correspondence. There is evidence suggesting the employer genuinely took on board the issues raised by the staff side and even where proposals were rejected, it was considered and the reason for rejecting it explained.

5.15. The third consultation meeting took place on 9 December 2019 and was again fairly noted. Mr Bennett was in attendance. There is reference to amendments to the notes which supports my conclusion that the notes were a fair representation of discussion and that the trade union were in agreement with the scheme being developed.

5.16. At this meeting some concern was expressed about the subjective nature of some of the scoring and the lack of evidence available for some of the others, in particular qualifications for using plant. On the concerns about subjective scoring, the meeting was told managers were to receive guidance on the approach, not training as such. In respect of discussion about the source of the evidence and how it would be applied to the criteria, Mr Sheriden explained that an ability to use plant may be reflected in criteria such as technical understanding of multiple specialist plant assets, which, I find is a reference to what might happen if an individual did not have the official competency certificates to operate a particular

piece of plant. In other words, they would score low on "multiskilling" but their unaccredited use of other machinery could still be relevant to scoring other criteria.

5.17. On other matters, some representatives pressed for the issue of flexibility to be maintained in the matrix. The scoring was discussed and views taken, the employer settled on a scoring range of 0-3, not the longer scale of up to 5 that had been considered. A guide was prepared explaining the nature or degree of evidence needed for each score ranging through degrees of "none, limited, sufficient and excellent". The final scoring matrix agreed applied weightings to each criteria ranging from 2 to 8. I find this scoring scheme was explained in theory and examples given which sought to explain to the staff side how the employer envisaged the scoring would happen. The exercise would be undertaken by 2 appropriate managers whose individual and independent assessments would then be averaged to arrive at a final score. Their work would be under the supervision of an independent HR Adviser. In the event, Adrian Hancock was appointed to that role. The meeting did, however, confirm that "supporting evidence would be needed for the scores". I do not find it was in the mind of either side at the collective consultation meeting that once the individual scores had been undertaken, that there would be collective or other consultation with the Trade unions before engaging with individual consultation. The trade unions would, of course, be involved but only insofar as supporting their particular member at an individual level.

5.18. I find the scoring matrix was agreed by the staff side on 10 December in a telephone meeting. It necessarily follows that I do not regard the blue book to be binding on the process or to override the matrix and process adopted. On the contrary, I find the process that was in fact adopted was arrived at by agreement with the staff side and in many respects the blue book itself contemplates a further stage of agreement of the final detail of any selection exercise. To the extent that it is necessary to say so in any respect, I find the agreement reached amounted to a variation to the blue book for the purpose of this specific redundancy exercise.

5.19. A "Q&A" document was prepared to further help those involved understand the process.

5.20. In January 2020 the process started to score the individual staff. In each area, two managers were appointed to score independently. That was the manager of the division, Mr Peck, plus an appropriate supervisor for the specific area in question. In the claimant's case that was Tom Cunningham. I find both were in an appropriate position to be able to undertake the assessment of the claimant.

5.21. The reference period from which that evidence should be drawn had been agreed as the previous 12 months. The maximum score available applying the weighting appears to me to be 111. The nature of the evidence was expected to be identified for each criteria in order to explain the score given, the two manager's scores were then reviewed by Adrian Hancock and the two scores averaged to produce a single composite score.

5.22. How it worked in practice was not quite the same as it was intended to operate. First, the guidance to the managers was provided by the same HR advisor undertaking the supervision. He provided guidance on how to go about the scoring process and proposed what I find amounts to a shortcut compared to the way it was discussed and illustrated in the collective consultation and on which the agreement was based. That was the limited extent of the “guidance” which I find had particular significance in this case as Mr Peck was undertaking a redundancy selection exercise for the first time. I suspect the same could be said of Mr Cunningham as he was relatively new to his supervisory role. This “shortcut” took out the process of finding and considering the evidence for each criteria and scoring against that and instead involved simply giving all employees an automatic score of 2. A score of 2 reflected a “good score” according to the agreed scale and assumed “sufficient experience/skills or evidence”. I find the scorers would then only adjust that score where they had personal knowledge, often subjective knowledge, to cause them to increase or decrease it. I find there was limited scope for truly objective scoring. I find the scorers did reference the official training and competency records, sickness records and disciplinary records and I am satisfied that the approach to scoring the three criteria to which they applied was an objective process which resulted in variations to the scoring. In Mr Cunningham’s scores of the claimant, this led him to reduce the “multi-skilled operator” criteria to 1, but led to “other skills” and “sickness” increasing to 3. Similarly for Mr Peck scores, it led to him also reducing the “multi-skilled operator” criteria to 1 and “sickness” increasing to 3. In his scoring, he kept “other skills” at 2.

5.23. I find all other criteria were based on personal and subjective assessments held about Mr Bennett. There was no single, complete picture against which to assess this and no past bank of evidence such as past appraisals. I find the process required there to be something to be brought to the mind of the scorer and if there was nothing known to them, the default score of 2 was retained. In those circumstances it meant that in most cases, nothing was entered in the column for “comments and justification” as was also expected. I find that is at odds with the agreement at the consultation collective stage and is contrary to the averment that “explanations and concrete examples were provided to justify each score”.

5.24. Leaving the scoring to those things that come mind in the scorers personal reflection of the individual will inevitably risk encouraging extremes of scoring in the sense one is likely only to think of examples pointing to either particularly good or particularly poor examples. Once such a view is in one’s mind, negative or positive, it is likely to influence a number of the criteria either directly or indirectly. In many cases I find the matters coming to Mr Peck’s mind were negative and the evidence he had to support this from third parties was itself superficial. I find he did not particularly test it, nor did he even necessarily understand the facts of what he was being told particularly well. Some of the issues identified in the scoring arose by serendipity because Mr Peck, and I assume Mr Cunningham also, just happened to have had some recent issues with Mr Bennett and discussions or complaints by others. This included concerns raised by other staff and colleagues about the manner in which Mr Bennett interacted with them and conducted himself. These complaints had not been taken further by those individuals and had not been raised with Mr Bennett. The reason why they were not taken further was described by Mr Peck as being “because they were hearsay only and

couldn't be used in any performance or disciplinary sense". Despite that self-imposed restriction, they were nonetheless used to mark the claimant down when selecting him for redundancy. Another issue affecting the scoring undertaken by both scorers was a belief that Mr Bennett had been a problem on the "eleclink site". This is another division of Balfour Beaty. That knowledge seems to have come from a discussion with the manager of that site, at least in Mr Peck's case. That knowledge seems to have arisen only because around this time there was a possibility of temporarily transferring staff to eleclink which, whilst it would not necessarily avoid redundancies in the long term, could have helped the current situation short-term. The eleclink manager told Mr Peck that he did not want Mr Bennett back on site because "he whinged and complained". I find Mr Peck did not explore that statement to understand anything more about that comment and did not go back to that manager. In fact, there were three potentially concerning aspects to this episode. First, Mr Bennett had raised a grievance about the health and safety conditions on that site which was not known to Mr Peck which, it seems to me is potentially capable of being captured within what the eleclink manager described as "whinging or complaining". Moreover, working to the rules and health and safety were things Mr Bennett was otherwise scored well for in this process. Secondly, this episode took place over a year before the agreed reference period said to be applied to the scoring. Thirdly, both Mr Peck and Mr Cunningham refer to this incident but describe the reasoning in fundamentally different terms. Mr Peck that he complained and asked to be moved, Mr Cunningham that eleclink itself requested he be removed from site.

5.25. Another subjective view held by both scoring managers drawn from their own experiences was that Mr Bennett did only that which was explicitly required of him and left his team to do the work and that he was not interested in developing himself or going the extra mile.

5.26. Whilst I find these were subjective beliefs, it does not necessarily mean that they are not views that could reasonably be held or, indeed that they are entirely without a factual basis to hold, subject always to the process giving the scored employee reasonable opportunity to understand, correct and influence the evidence being relied on in arriving at the final scores. Having said that, in one respect at least, Mr Peck accepted that one observation given in his witnesses evidence to justify a particular score (but not evidenced in the scoring matrix itself) was in fact not correct and the particular training course said to have been abandoned without completion had in fact been completed by the claimant and a certificate issued to prove it. That necessarily casts significant doubt on the other subjective and unevidenced scores.

5.27. The scores were passed to the same HR adviser who had provided the guidance on how to go about the scoring as part of the supervision/review of the process. I have absolutely no evidence of that process save for Mr Peck's assertion that it happened but as nothing was said to be commented on, or changed, by Mr Hancock, that is as far as this evidence goes.

5.28. A curious part of the evidence before me relates to the final adjustment to the scoring process. This is in respect of any live disciplinary warnings which would result in a deduction of 10 from the final score. Mr Peck's written evidence and the ET3 response <u>explicitly</u> allege

that Mr Bennett scored higher in both managers scores (i.e. 66 and 69 respectively) but lost 10 points from the final score he otherwise would have had received due to having a live disciplinary warning. Not only did he not have a disciplinary warning as alleged, but the contemporaneous evidence before me, and to be fair Mr Peck's eager concession in the witness box, show that there was no live disciplinary warning and no deduction made at all. The scores shown were therefore the scores achieved against each criteria. It reflects badly on the respondent and its solicitors in their preparation of this case. Where the balance of fault lies between the two does not need to be determined by me for present purposes. The result is that doubt is cast on the accuracy of the written witness evidence where it is not otherwise agreed.

5.29. Mr Cunningham and Mr Peck therefore scored the claimant 56 and 59 respectively, giving a combined average score of 57.5. Although there are some curious similarities in the issues identified to justify these scores, there is an absence of evidence to reach a conclusion of improper collusion between these two independent scorers. I prefer the alternative explanation that they each had a similar view of Mr Bennett based on having similar past experience of him and his work.

5.30. I have seen the total scoring for all workers. Mr Bennett's is the third lowest score. The lowest being 55 for a colleague who did suffer the 10 point deduction due to a live disciplinary warning. The highest was 106.5, only 4.5 points off the maximum. The 5 colleagues selected for compulsory dismissal scored 53.5, 55, 57.5, 58.5 and 71. The next lowest score to avoid selection related to two individuals each scoring 75. That is significant for understanding the likelihood that changes in the selection process would have meant Mr Bennett avoided selection. It follows he would have had to score 76 (or at least 75 and survive a length of service tie break) to avoid redundancy.

5.31. Mr Bennett had attended the individual consultation meetings of other selected staff as a result of his role as a regional elected trade union representative. He knew what to expect when he attended the meeting to which he was invited to discuss his selection. This took place on 23 January 2020. There are brief notes taken on a proforma. I find Mr Bennett or his representative asked for notes to be taken and this was refused, on balance because there was this proforma to use. Not only was there no refusal for him or his representative to take their own notes, but I find they were taken. There is nothing disclosed before me by Mr Bennett.

5.32. I find the claimant did not know his scoring results before entering the meeting. When he learned of them I find he opened with words to the effect of "all this is lies and personal, none is true and it's all utter rubbish". The meeting was tense from the start. Part of that is no doubt due to the shock and disappointment of not only being told he was in the scope for selection but exacerbated by reading the comments on which some of the scores were based.

5.33. I find Mr Bennett has a high view of his own skills. He may be justified in that to some degree but if, as he asserted in evidence, he should have scored 3 or "excellent" for every category I suspect the underlying basis for such a score would have been uppermost in the

subsequent challenges he made, which it was not. I found his self-assessment overall to be over inflated. Moreover, he put his case from the witness box in a curious way. It is not his case that he says the errors in scoring arise only in the criteria where he scored low, it is his case that all the criteria have been scored wrongly. There are some criteria where Mr Bennett has in fact been scored at the highest level of a 3 for "excellent", indeed in each scorer's matrix he actually scored almost as many good or excellent scores as he did poor or very poor. The illogicality of this position was put to Mr Bennett yet he maintained it was his case the scores of 3 were also wrong. One consequence must logically mean there is some scope for certain high scores to actually be inflated and that the true position might be a reduced score.

5.34. I found Mr Bennett has a particular view of the world around him and how things should be and is not slow in saying as much. I found aspects of Mr Peck's character to be similar. I suspect neither like to be told things they don't want to hear and particularly to be challenged or told they are wrong. During this meeting I find Mr Peck was being challenged about his first attempt at the difficult process of scoring and selecting people for dismissal. I find during all these meetings, both parties dug in to their entrenched positions and although I accept there was some attempt to explore the role, the training, the eleclink issue etc, I find the meetings were largely unproductive and accordingly cut short. The challenges to the scoring were invited in writing after the first meeting largely as a result of this lack of face-to-face progress.

5.35. On 29 January 2020 Mr Bennett sent in his email setting out his challenges [117]. It contains a long list of complaints expressed forcefully. Whilst there are some specific issues raised directly related to the scoring, the challenges are largely by way of general assertions such as that the process was "being manipulated to get rid of [personnel] that management have taken Umbridge (sic) with". It includes wide ranging and generalised allegations of discrimination due to age and even that it was "racist" (Mr Bennett is Scottish).

5.36. He raises some specific issues specific to the application of the matrix scoring. They included the supervision on the scoring; that he had never been spoken to or reprimanded about the way he spoke to others; the circumstances of the eleclink issue and his associated grievance and the inconsistency of the notes made by the two scorers; that he had willingly worked on other duties when asked and never refused; that another with a poor work history had scored higher than him; and that the scoring on the matrix was based on hearsay.

5.37. The second consultation meeting on 12 February 2019 followed a similar format and outcome to the first. During this meeting, Mr Peck made clear that he would not be changing his scores. If the consultation was genuinely an opportunity to challenge and influence the scoring, it is curious that Mr Cunningham was not involved in this process. I question how the scores of Mr Cunningham could be influenced where Mr Bennett did not know which supervisor (or Machine Operator Manager/MOM to use the local language) had completed the second scoring matrix. The answer was indirectly given in this second meeting when Mr Peck confirmed that there was "not going to be a change to the scores of him *or the MOM"*. That displays a degree of control of the process which undermines the independence of the

two scorers. That statement led to Mr Bennett and his trade union representative Mr Skelly leaving the meeting stating that "they were wasting their time".

5.38. The third consultation meeting on 3 March 2020 is less of a consultation meeting and more a meeting simply to confirm the decision. I find it would be normal practice in this employer for an employee dismissed by reason of redundancy to work their notice. I find Mr Peck took the view that if Mr Bennett continued he would become disruptive and therefore took the decision to terminate the employment immediately and instead to make a payment in lieu of notice. It therefore deprived the claimant the opportunity of a further four weeks of employment during which the internal vacancy list would have been available to him to apply for suitable alternative employment as an internal "at risk" employee. However, on the balance of probabilities I find this would not have led to any alternative employment for the same reason as it had not done so during the previous month.

5.39. In that regard, and despite the tension at all of these meetings, I accept that there had been discussion of alternative work at the consultation meetings and also during informal opportunities when Mr Bennett and Mr Peck met at work. I accept that there were occasions in passing where Mr Peck checked Mr Bennett had received the most recent version of the internal vacancy list. That list was literally that, a long list with basic information. I find it was little more than a signpost to the nature, location and duties in the post. However, I also find there was support available to find out more information such as the detailed job description. Indeed, I find Mr Bennett had access via his company laptop to access this himself. At no point was the provision of that information in that format said to be inadequate.

5.40. I find he did apply for one post and was interviewed. I do not know if he was interviewed entirely on merit or as a result of the fact that he was guaranteed an interview as an at risk employee. Either way, it did not result in an offer of alternative employment. Mr Bennett says that the job was something different when he got there to that which he had understood at the time of applying. The respondent's position is that he would not take it because his current salary and terms could not be maintained. I don't have to resolve which is correct and both could well have played a part. However, I can see that the consultation notes in January referred to him having "*applied for role at Hillington, wouldn't transfer role*". There was some dispute about what this meant. Mr Bennett accepted he had suggested to the interviewer that he be TUPE'd over. This was rejected. That is consistent with Mr Peck's understanding that he declined further consideration of the alternative role due to the fact his current salary and terms would not be protected. Its only relevance is that it goes some way to confirm my conclusion that Mr Bennett was not likely to consider alternative work on different terms and lower salary or in a which would require a base elsewhere in the UK to his current base.

5.41. In a letter dated 10 March 2020, the decision was confirmed and further information provided again about the entitlements. Mr Bennett was reminded of his right of appeal. Indeed, at the final consultation meeting the prospect of an appeal had arisen and his trade union representative, Mr Skelly, specifically requested consideration be given to reimbursing the costs of any appeal process. This was considered but rejected. Indeed, the arrangements that followed provided options for an appeal close to Mr Bennett's home.

5.42. However, it is those arrangements for the appeal which form another basis of unfairness and require further findings of fact. Firstly. Mr Bennett sets out his appeal promptly and fully on 11 March 2020. As one might expect, there are a number of similarities between the matters raised in the letter of appeal as were raised in his earlier challenges to the scoring and understandably so as these were not previously answered to the claimant's satisfaction. Principally his challenges were then rejected because he had not produced clear evidence to upset the original score, a state of affairs I noted at the time seemed dismissive particularly as the two managers scoring for the employer had themselves failed to provide evidence for their scores in a number of criteria. He submitted grounds of appeal by email using his personal email address late at night on 11 March. That was acknowledged promptly by Mr Hancock first thing on 13 March, effectively one business day later. Two matters were raised by Mr Hancock. First, in respect of the arrangements for the appeal, Mr Bennett was asked to let them know of his and his representatives availability in the next four weeks to attend an appeal hearing. Secondly, Mr Hancock chased the return of various items of company property that Mr Bennett retained and in respect of which he had not responded to numerous calls and voicemails. This was sent to the same personal email address used by the claimant as a "reply" email and I therefore find it was received by the claimant. I find he did not respond to it.

5.43. In the absence of a reply, Mr Hancock and Mr Skelly, the claimant's trade union rep were in email correspondence on 17 and 18 March. Mr Skelly informed him that a Mick Hogg had agreed to conduct the meeting for the trade union. Mr Hancock then confirmed that an independent chair had been appointed for the appeal and again asked for availability dates. He did not get a response and he emailed again on 26 March providing dates and times and offering a choice. He also informed Mr Skelly that in the absence of a response about the company property, the matter would be referred to the police. Again he did not get a reply from Mr Bennett.

5.44. Mr Bennett is critical of Mr Hancock for not copying him into these emails. In hindsight, one might say it would have been no hardship to do so. On the other hand, Mr Bennett had ignored the first email and Mr Skelly, his trade union rep, had also not copied Mr Bennett into the emails he sent either. Nothing therefore happened with the appeal until the ET1 claim was lodged containing the allegation that the respondent had failed to arrange an appeal. In response, Mr Hancock wrote a letter which was posted to Mr Bennett's home address on 8 July 2020. It set out the response at the time and extended the opportunity to have an appeal. Mr Bennett did not respond to that invitation either.

5.45. Finally, I find the exercise that led to Mr Bennett's dismissal was sadly not the end of this division's troubles in the market place. I find further substantial redundancies in rail related divisions have followed. There were 20 more redundancies in the plant division as a whole which will have essentially finished it. There were a further 30 redundancies in rail related work. I find the specific work done by the claimant on the wiring train has not won any further contracts and the reality is that had he not been made redundant when he was, his employment would have come to an end by the time this claim was heard.

6. <u>Unfair dismissal</u>

Law

6.1. The law of unfair dismissal in the context of redundancy is well settled. As there is no dispute that redundancy was the reason for dismissal, I am concerned only with the application of section 98(4) of the Employment Rights Act 1996 ("the Act") which provides: -

> ***"(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer)—***
>
> ***(a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and***
>
> ***(b)shall be determined in accordance with equity and the substantial merits of the case."***

6.2. This is a neutral test. Both Counsel acknowledged the settled law and general principals. Where an employee is dismissed relying on redundancy the authorities point to general factors such as notice, consultation, process and application of the means of pooling and selection and measures to avoid redundancy as typically informing the assessment of reasonableness posed by s.98(4). Those factors are not fixed. A case can raise its own issues of fairness but in all cases, all questions lead back to the test of whether the particular step, action or decision leading to dismissal fell within the range of reasonable responses of a reasonable employer.

6.3. Miss Crawshay-Williams referred to one specific case that of ***Pinewood Repro Ltd T/A County Print v Page UKEAT/0028/10/SM*** for the proposition that the individual consultation in a redundancy process must provide opportunity for the employee to understand how and why they have been selected and to make meaningful comment and contribution to the process to influence the decision.

7. Discussion

7.1. The first matter to state is that a claim of unfair dismissal is not a rehearing of the evidence of selection. It is not an opportunity to set aside judgments which are properly that of the employer to make within a reasonable process. As with all claims of unfair dismissal, the issues raised must be assessed through the prism of s.98(4) and, in particular, whether what happened fell within the range of reasonable responses or not. Only if the particular issue takes the employer's reliance on the reason as sufficient to dismiss outside that range, will the dismissal be unfair.

7.2. Within that single test, I have considered each of the areas of challenge raised by the claimant. The first is whether the approach to collective consultation took the fairness of his dismissal outside the range of reasonable responses. I do not accept that it did. This is a unionised environment and I am satisfied the staff side were fully involved within the existing collective consultation processes. There were further steps taken for the election of additional local representatives and the claimant was himself made such a representative. Bringing the focus back to the effect it has on his individual dismissal, I can see nothing which causes it to fall outside the range of reasonable responses. Indeed, the fact he was a representative only

meant he was better placed to be involved in, to influence and to understand the process than he otherwise would have been.

7.3. For similar reasons I reject the contention that the respondent's approach to the application of the "blue book" and modification of the criteria fell outside the range of reasonable responses. I have found that the process was fully debated during the consultation process and I am satisfied that the approach taken, so far as it affects the fairness of the individual dismissal, means it did not fall outside the range of reasonable responses.

7.4. Turning to the scoring, the first consideration is whether the individual scoring process itself fell outside the range of reasonable responses. I make clear in my approach that there is a difference between the process itself and the application or execution of that process. As far as what was discussed during collective consultation and the approach taken generally, there is nothing in the scoring process itself that can be said to fall outside the range of reasonable responses. Its foundation is the long-standing selection policy. It has been updated through that collective consultation to include the more recent concept of "behaviours" which is something I am satisfied a reasonable employer could do. The notion of two-person scoring and weighting are both reasonable steps and clearly provide a mechanism to take out the extremes of scoring. Although not explicitly engaged in the claimant's case, the prospect of disciplinary deductions and relegating length of service to a "tie break" are also steps a reasonable employer might adopt. Even including the use of criteria which necessarily moves away from the purely objective and towards more subjective assessment is, in itself, something which can form part of a reasonable employer's approach, subject always to that subjectivity being executed in a reasonable manner and how it unfolds in reality being reasonable in the circumstances.

7.5. However, it is when the focus shifts from the theory of the process to its specific execution that I have come to the conclusion that there is unfairness in this case and certain aspects take the decision to dismiss outside the range of reasonable responses. Key amongst those are the confused picture concerning the circumstances of Mr Bennett leaving site at "eleclink"; the lack of clear evidence behind the alleged "reports of staff" which was necessarily accepted as hearsay and neither tested nor put to the claimant; and the clear error in accurately understanding his training record.

7.6. In my judgment, whilst subjective assessments may form part of a reasonable process, the fact they are subjective requires other safeguards in the process for the approach to remain within the range of reasonable responses. In this case, the use of subjective criteria seems to have been to Mr Bennett's disadvantage on two levels. Not only was he scored without any clear evidence of the basis of scoring, but his challenges to those scores were then knocked back due to the fact he himself had not produced clear evidence to upset the original score.

7.7. I then turn to whether the respondent's approach to individual consultation and considering challenges to the scoring matrix fell within the range of reasonable responses. I note that there is no dispute that the initial scoring was concluded before, and shared at, the

first consultation meeting. I also accept that any process has to start somewhere. A reasonable process will allow an employee to a reasonable opportunity to reflect on what is being said, digest it and prepare any response. Whilst I am satisfied a reasonable employer would take the view that there is nothing inherently wrong in sharing the information for the first time at that first meeting, it may then necessitate more meetings to ensure that process of engagement can happen in a reasonable way. In this case there were further meetings, over a longer period, with representation and opportunity for further discussion. The fact it became futile was largely a combination of both Mr Bennett's and Mr Peck's approach to the issues. I can find no ground for concern with the issue with the note taking at the individual consultation meetings. I agree the records are brief. The main issue is that not only could Mr Bennett have taken his own notes of the meeting if he wished but he was represented at each by TU reps who could, and on balance did, take notes. There is nothing in this that takes the decision to dismiss outside the range of reasonable responses.

7.8. However, I do reach the conclusion that the respondent did act obstructively in consultation about the claimant's concerns. It does not appear to be the case that the challenges to the scoring were considered reasonably or at all on the basis of the evidence. It was close to a refusal to look into these matters. A large part of that arises because of Mr Bennett's own confrontational manner in the meetings which I have no doubt made them difficult. But even if I accept the dynamics at the individual meetings was such that the issues could not be explored further in a face-to-face setting, it does not explain why the issues could not be explored further in writing. Simply failing to address them is not part of the consultation process of any reasonable employer. Indeed, the process had explicitly invited the claimant to set out his challenges in writing. To be fair, Mr Peck accepted in hindsight that he probably should have looked into certain matters further. All this tension culminated in the decision to dismiss without notice. Although I have found on balance that would not have made any difference to the prospects of Mr Bennett finding alternative employment, it has to contribute to the concept of unfairness and do not consider any reasonable employer would have taken that approach to a redundancy dismissal based not on reasons related to the need to reduce the workforce, but on a fear Mr Bennett would be disruptive during his notice.

7.9. I then turn to the respondent's approach to monitoring the scoring process through HR supervision and/or Trade unions and whether this meant the dismissal fell within the range of reasonable responses. I am satisfied there was no breach of what was expected by the trade union as a result of its collective process. However, the HR supervision has clearly taken an approach which is outside the scope of what was agreed and outside the scope of the process envisaged by Mr Sheriden in his unchallenged evidence. It cannot be within the range of reasonable responses for any reasonable employer to say it will take one approach, and then apply another. Particularly where the approach was agreed as a result of collective consultation. I cannot see that the approach advocated by HR of simply applying a default score of 2 unless there were reasons to deviate from it has any basis in the process agreed. In itself, this deviation attacks the concept of fairness and it is no answer to simply say that "2" (or "good") is an acceptable score that should not prompt complaint from the employee concerned. If the evidence for the criteria was known, the individual consultation may have legitimately justified increasing that score to 3. Similarly, such an approach can create

unfairness in the opposite direction where an employee against whom an individual is effectively competing to avoid selection for redundancy may actually have justified a lower score of 0 or 1 but has maintained a "2" by default simply because of the scorer's lack of active consideration of the evidence in that particular case.

7.10. Moreover, this reliance on what evidence happened to be known to the scoring is apt to invite bias. What comes to mind in respect of someone who is well regarded may be positive matters. Someone less well regarded is likely to prompt negative matters. Both may be accurate but not necessarily balanced or fairly evidenced. Worse still, once an issue, good or bad, is in the mind of the assessor, it is apt to be drawn on as an artificial basis of evidence for other criteria. To some degree, there is such a repetition of justification for certain scores for Mr Bennett.

7.11. I then turn to whether the respondent's approach to suitable alternative employment fell within the range of reasonable responses. I am satisfied it was. There was a comment in the collective consultation to the effect that help to find suitable will be discussed at individual consultation. There was discussion but it was neither meant to remove any input from the employee and place it all on the manager nor in this case did the manager ignore alternatives. There were issues of possibilities raised and noted which if nothing else would have prompted Mr Bennett the opportunity to discuss any other issues about help needed. I do not accept the claimant was disadvantaged from this approach or that it was outside the range of reasonable responses of a reasonable employer. It is clear Me Bennett did apply for other posts but, I found, his limited appetite to accept change was his main barrier.

7.12. I then turn to whether the respondent's approach to using contract labour at the time took the decision to dismissal the claimant outside the range of reasonable responses. I am not satisfied that there is evidence of this in any meaningful way. It is possible, that redundancies can create demand for contract labour. Indeed, contracting out the work could be the basis on which the statutory test of redundancy is made out. The nature of this case is that there is nothing to show anything that was happening with contract labour had any bearing on the continuation of the claimant's employment or the need to make the savings.

7.13. Finally, I have to consider whether the respondent's handling of the claimant's appeal affected the fairness of his individual dismissal. On this point I am not satisfied the respondent has acted in any way inappropriately. I am satisfied steps were taken promptly to set up the appeal. Mr Bennett was contacted along with his representative, Mr Skelly. It is clear there was no obstacle to convening a hearing other than them providing dates of availability. They did not do so. It may be said the respondent could have chased them and didn't, but I am satisfied that at the stage of appeal, a reasonable employer is entitled to offer the mechanism for the appeal and in this case this employer did. The failure of any further progress of the appeal squarely lies with the claimant and his representatives. There is nothing in this that takes the decision to dismiss outside the range of reasonable responses.

7.14. In short, therefore, it is in respect of those aspects of the application of the scoring, the evidence, and the engagement with Mr Bennett's challenges that the unfairness arises.

8. Remedy

8.1. It is incumbent on me to consider any basis for just and equitable adjustments to any losses that flow from the dismissal. They arise under s.123(1) of the Act generally and in respect if the conduct of the employee prior to dismissal under section 122(2) and (6) of the Act.

8.2. What the parties referred to in shorthand as the "Polkey" principles derive from the case of Polkey v A E Dayton Services Ltd [1988] ICR 142 which itself is based on the just and equitable principles of compensation in section 123(1). That provides: -

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

8.3. There can be various applications of the just and equitable principal in different circumstances. The narrow approach considers the prospects of whether this employer, acting fairly, could have fairly dismissed. In Hill v Governing Body of Great Tey Primary School [2013] IRLR 274, EAT the EAT explained the features of a 'Polkey' reduction as: -

> ***"First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have been dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between the two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer would have done) … The Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand."***

8.4. A wider approach derived from s.123(1) requires consideration of the employment relationship and whether it would have continued in any event during the period for which losses are being considered or whether other factors may have independently brought the relationship to an end. The various elements of the test under 123(1) were brought together by the EAT in Software 2000 Ltd v Andrews [2007] IRLR 568. Although arising from the consequences of the then applicable dispute resolution procedures, it remains applicable to the general approach to assessing compensatory loss and explicitly requires consideration of how long the employee would have been employed but for the dismissal.

8.5. Both aspects are engaged here on the basis that the subsequent reductions to the workforce mean that I am satisfied Mr Bennett's employment would have fairly come to an end by the time of this hearing as a result of the subsequent events.

8.6. Before then, however, I have to consider the prospect that a fair procedure would have had the same result. The key to this analysis is that the result of the scoring exercise was such that Mr Bennett had to score 75 or more to take him out of the scope for selection for redundancy. That is, he had to increase his score by another 18.5 (or 17.5 and win the tie break). Both Counsel invited me to analyse the scores of each criteria and where the changes might occur in order to support their respective submissions that, had a fair process

been adopted the outcome definitely would, or definitely would not, have resulted in him being selected. It is not unusual to be faced with competing contentions of 0% and 100% but it leaves the task of assessing the relevant factors to me. On that basis I had regard to the following factors as informative of whether a fair process would have made any difference to the outcome.

a. The aspects of unfairness that infected the individual score achieved by Mr Bennett have potential also to affect the relative score of his colleagues. It is not, therefore, a process of comparing where he might be scored under a fair process against a fixed measure of where everyone else actually scored under the process. In broad terms, however, the claimant clearly had some considerable ground to make up to avoid selection under a fair process.

b. There is force in the contention that multi-skilling was one of the more objective criteria and that Mr Bennett did not hold the competency for operating the other train machinery. As this was a highly weighted factor, it may mean he would not achieve much of the additional scoring contended for and necessary to achieve the shortfall in total scores.

c. There are enough marginal adjustments theoretically open to argument within a fair process to at least make it theoretically possible that he could increase his score to above the necessary threshold. However, Mr Bennett seems to believe his high scoring criteria are also wrong. It is possible that he may have been scored over generously on some other matters.

d. Even then, there remains room for reasonable disagreement within in a fair process meaning Mr Bennett's contentions and challenges for what he should have scored may not have persuaded the assessor. In those circumstances. the assessor's lower score may have remained a fair one and Mr Bennett may not, therefore, have reached the level that he contends for today.

e. There are aspects of the underlying concerns within the actual scores in each criteria which, if fairly evidenced and applied, could well have resulted in a similarly low score below the threshold.

f. There are equally aspects of the criteria and Mr Bennett's challenges which the respondent accepts should have been given more attention. There certainly is scope for some criteria to be scored higher than they in fact were.

g. My assessment has to be based on the chance of the actual employer fairly dismissing. The areas of unfairness arose out of the application of what might otherwise have been a fair process by Mr Peck and the HR supervision of both scorers. There are, however, aspects of the approach of this employer which were fairly engaging with a perfectly reasonable process and I am satisfied this actual employer could have approached this fairly.

h. The nature of Mr Bennett's own high self-assessment is such that even in a wholly fair system, he is likely to have disagreed and the manifestation of that disagreement was likely to take a similar form to that which it did in fact take. The prospect that he would disengage from the appeal process as happened here remains a real probability in any case.

8.7. For my part, engaging with what each party says Mr Bennett should have scored is not about me rescoring the criteria in absolute terms, but about me gaining a feel for the weight each contention carries in an overall assessment of chance. There are reasons why it can be said Mr Bennett might have retained his employment, meaning I reject the absolute contention that my finding should lead to a 100% reduction in compensation. Similarly, there are clear reasons why it may have ultimately made no difference such that I also reject the absolute contention there should not be any reduction at all. Doing what I can to arrive at a reasoned quantification of that chance, the totality of the picture leads me to the conclusion that it is more likely than not that the outcome would have been the same and is therefore somewhere in the range of 50% -100% but whilst more likely, I do not this that outcome is overwhelming. I assess it at 70% chance that a fair process would have made no difference to the outcome. Mr Bennett is therefore entitled to 30% of his financial losses to be assessed if not agreed.

8.8. Finally, I record that I did explore with Counsel whether the particular facts of this case were such that the question of contributory conduct could be engaged. That was posed against a recognition that it would have to be a most exceptional case for the question of contributory conduct to engage in a redundancy dismissal. I have decided not to make any adjustment under s.122 of the Act. It is right that there is some conduct on the part of Mr Bennett which might be said to have had some relationship to how the process unfolded but the statutory reason for dismissal remains redundancy and his conduct did not contribute to that state of affairs. To the extent that there was some questionable conduct within the process itself, even if it could be said that that conduct was culpable and contributory, I do not regard it as just and equitable to make any adjustment.

EMPLOYMENT JUDGE R Clark

DATE: 26 July 2021
FOR SECRETARY OF THE TRIBUNALS