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EMPLOYMENT TRIBUNALS

Claimant: **Mr T Michael**

Respondent: **Freudenberg Oil & Gas Technologies Limited**

Heard at: **Port Talbot** **On:** **31 October 2022 and 1 and 2 November 2022**

Before: **Employment Judge R Havard**

Representation:
Claimant: Mr S Batcup, Solicitor
Respondent: Ms E Hodgetts, Counsel

RESERVED JUDGMENT

1. The judgment of the Tribunal is that the Claimant's claim of unfair dismissal is not well-founded and is dismissed.

REASONS

Introduction

1. By a claim form dated 16 November 2020, the Claimant indicated that he wished to pursue a claim of unfair dismissal. The Respondent lodged a response in which it disputed the claim pursued by the Claimant.

2. At a preliminary hearing conducted by telephone on 23 March 2021, the Tribunal gave directions to enable this claim to be pursued to a final hearing and the parties had complied with those directions.

Issues

3. At the beginning of this hearing, it was confirmed by Mr Batcup and Ms Hodgetts that there was no requirement for those issues agreed at the preliminary hearing on 23 March 2021 to be amended in any way.

4. The agreed issues are:

    1. Unfair dismissal

        1.1 Was the Claimant dismissed?

1.2 What was the reason or principal reason for dismissal? The Respondent says the reason was redundancy.

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

1.3.1 the Respondent adequately warned and consulted the Claimant;

1.3.2 the Respondent adopted a reasonable selection decision, including its approach to a selection pool;

1.3.3 the Respondent took reasonable steps to find the Claimant suitable alternative employment;

1.3.4 dismissal was within the range of reasonable responses.

5. Issues to be determined in respect of remedy were also included in the Case Management Order but they have not been included in this decision in respect of liability.

Evidence

6. The Claimant gave evidence on his own behalf.

7. The Respondent called:

(i) Mr Ian Jenkins who, at the material time, was Operations Engineering Manager;

(ii) Ms Rhiannon Davies, HR and Learning and Development Manager;

(iii) Mr Andrew Thomas, Vice President of HR.

8. Those who gave oral evidence had provided written witness statements.

9. An agreed bundle had been prepared by the Respondent and submitted with an index. The bundle ran to 250 pages. In the course of the hearing, a document from Sigma Recruitment was introduced which was effectively a CV for Mr Dewi Slyman (pages 251-253).

10. Unless otherwise stated, any page references in this Judgment refer to pages in the bundle.

Submissions

11. Both Mr Batcup and Ms Hodgetts provided written submissions which they supplemented with oral submissions at the conclusion of the evidence.

Findings of Fact

12. The Respondent produces technical bespoke products in the form of metal sealing connectors for the oil and gas industry. It has been at the site at Unit 4

Christchurch Road, Baglan Industrial Estate, Port Talbot for approximately nine years, having purchased a company called Vector International in 2013.

13. At the material time, there were approximately 200 employees on site.

14. As stated, in the course of the hearing, the Tribunal heard oral evidence from the Claimant. Whilst the Claimant gave his evidence in a straightforward manner, there were some inconsistencies between his oral evidence and the evidence contained within the documentation, particularly regarding the reaction of Mr Jenkins to his request for parental leave. This will be considered later in the Tribunal's findings.

15. It also heard evidence from Ian Jenkins, Rhiannon Davies, and Andrew Thomas who all gave evidence on behalf of the Respondent. The conclusion that the Tribunal reached was that all three witnesses endeavoured to answer questions fully with a genuine belief in the answers that they gave. The Tribunal found them to be credible and reliable witnesses, accepting when questions were asked which were outside their direct knowledge. Mr Jenkins in particular was very fair in his evidence relating to the Claimant and the Claimant's performance when employed at the Respondent.

16. In 1998, the Claimant had completed a modern apprenticeship and was a fully qualified toolmaker working for an engineering company called CSN Engineering. He then worked for a company called Datum Precision Engineering before joining INA Bearings in 1999, employed as a Toolmaker, taking voluntary redundancy in 2006.

17. By this time, the Claimant was married to his wife Hayley who was Nurse and their first son was born in 2006. At this stage, the Claimant worked on a self-employed basis.

18. In 2007, the Claimant's second son was born.

19. At that time, the Claimant was undertaking a lot of work for Tegfan Groundworks which involved repairing and servicing their plant machinery and trucks to include hydraulics.

20. By 2012, the Claimant's sons were of an age where it was possible for the Claimant to return to employed work and he was employed with BPM Precision Engineering as a Toolmaker.

21. In 2013, the Claimant applied successfully for a job with the Respondent as a Machinist/Turner, or, as described by Mr Jenkins and Mr Thomas, a CNC Operator/Machinist. He commenced his employment on 21 October 2013. Whilst his original contract of employment was not contained within the bundle, the Tribunal had been provided with the contract of employment signed by the Claimant on 19 February 2018 which was in force at the time of his dismissal (pages 53-58).

22. In production, the Respondent worked a three-shift system which suited both the Claimant and his wife who was continuing in her career as a Nurse.

23. In September 2017, the Claimant's wife contacted him to say that she was unwell. On returning home, the Claimant did all that he could to make his wife comfortable but she deteriorated rapidly and tragically died later that afternoon.

24. The Tribunal did not underestimate the scale of the tragedy for the Claimant and his family. The Claimant confirmed that the Respondent was very supportive during the months that followed and he was given paid compassionate leave until Christmas 2017.

25. On 5 December 2017, the Operations Engineering Manager, Ian Jenkins, had written to the Claimant regarding his phased return to work (pages 163-164). This followed an earlier meeting that he had held with the Claimant. It confirmed that there was an understanding that the Claimant may not be able to work shifts in the way that he had before, as a result of his changed circumstances regarding childcare.

26. Mr Jenkins also made reference to the conversation they had held with regard to the vacancy for a Maintenance Engineer, indicating that if the Claimant wished to be considered for the role, he should send a letter confirming as much, together with a CV. Indeed, there were two vacancies at that time, a Facilities Coordinator and a Maintenance Engineer, and the Claimant ultimately decided on applying for the job as Maintenance Engineer.

27. On 14 December 2017, the Claimant lodged an application (page 165). In support of his application, he also provided a CV (pages 166-170).

28. The Claimant was interviewed for the role by: Ian Jenkins, Operations Engineering Manager; Rhiannon Davies, HR Manager, David Makinson, who at that time was Maintenance Manager, and an electrician, Paul Watkins. Notes of the interview were made (pages 172-181).

29. Mr Jenkins said, and the Tribunal found, that the Respondent was looking primarily for an *"electrically biased"* Maintenance Engineer. This was supported by the job description for the role (pages 160-161). Although the job description was dated May 2016, it had been signed by the Claimant on 19 February 2018. In that job description, it stipulated that the skills required included "Electrical Competency".

30. Even though Mr Jenkins considered the Claimant to be *'mechanically biased'*, he checked with Rhiannon Davies's Line Manager in HR, Natalie Evans, whether it was appropriate to offer an interview to the Claimant. When it was confirmed that he could do so, he also included in the interview panel David Makinson and Paul Jenkins as, if the Claimant was appointed, both would have a role in training the Claimant in his new position.

31. Having performed well at the interview, the Claimant was offered the role with certain elements of the job description having been modified to accommodate him. Mr Jenkins considered the Claimant to be a valuable employee and, with suitable training, was satisfied that the Claimant would be able to fulfil the role.

32. The Claimant signed a new contract of employment on 19 February 2018 and his job title was Mechanical Maintenance Engineer (pages 53-58). It meant that the Claimant was working shifts from Mondays to Fridays between 8 a.m. and 4.30 p.m. daily which meant that, together with assistance from his parents, he could look after his children.

33. At this time, the Maintenance Department was managed by David Makinson who would report to Ian Jenkins. Other members of the team were Paul Watkins, Callum Lee, and Barry Williams. Mr Makinson was a Mechanical Electrical Maintenance Engineer, Paul Watkins was an Electrical Maintenance Engineer as was Mr Lee.

34. Shortly after the Claimant commenced his new role on 12 February 2018, he became aware of his entitlement to parental leave under the Maternity and Parental Leave Regulations 1999.

35. The Claimant was entitled to four weeks' unpaid leave a year in respect of each of his children. He raised his entitlement with Mr Jenkins and stated that it would be ideal if he could take six weeks' parental leave during the school summer holidays and a week each at Easter and Christmas.

36. The Claimant described Mr Jenkins's reaction as *"hostile"* or that Mr Jenkins was *"miffed".* Indeed, in the Claimant's claim form, he suggested that Mr Jenkins initially declined the Claimant's application for parental leave.

37. Mr Jenkins denied that he had been hostile or that he had refused the Claimant's request. He stated that he was not aware of such an entitlement and was surprised to learn of it. However, he confirmed that, once he had liaised with HR who confirmed that the Claimant was entitled to parental leave amounting to four weeks per year per child, he was fully prepared to accept that the Claimant was so entitled. Once resolved, the Claimant's entitlement was accommodated but Mr Jenkins accepted that this was not the easiest situation to manage. The fact that the Claimant took his parental leave during school holidays had a knock-on effect because this meant that the department was one down which led to some managerial complexity and also that it made it more difficult for other members of the team to take leave at that time.

38. On balance, the Tribunal preferred the evidence of Mr Jenkins. In reaching its conclusion, the Tribunal had taken account of the way in which Mr Jenkins had provided support to the Claimant on his phased return to work, the fact that he was centrally involved in recruiting and appointing the Claimant to his position as Maintenance Engineer, and also the tone of the correspondence between Mr Jenkins and the Claimant when his parental leave was being organised. The Tribunal also noted the positive reviews expressed by Mr Jenkins regarding the Claimant's performance which post-dated the Claimant's application for parental leave (for example at pages 186 -189).

39. It was also suggested by the Claimant in his witness statement that it was HR who approved his parental leave but it was evident from the correspondence, and the Tribunal found, that it was Mr Jenkins who approved it.

40. On 13 March 2018, the HR Manager, Natalie Evans, sent an email to Mr Jenkins, copied to Rhiannon Davies, confirming the Claimant's entitlement (page 184).

41. In relation to parental leave in 2019, the Claimant sent an email to Natalie Evans, Rhiannon Davies and Ian Jenkins requesting parental leave of one week at the end of February 2019, two weeks from 15 April 2019 and five weeks from 22 July 2019. On the same day, Mr Jenkins replies as follows:

    "Hi Arron,

    Thanks for the information, I will book these on my calendar.

    Can we please discuss any holidays that you want to book as I need to be as fair as I possibly can be with the other associates in the Maintenance Department.

    Cheers,

    Ian Jenkins".

42. Mr Jenkins then exchanged emails with Natalie Evans on 7 January 2019. Natalie Evans had seen Mr Jenkins's email to the Claimant and asked Mr Jenkins to confirm that he approved the dates. Mr Jenkins replies on the same day saying:

    "Yes I don't have any clashes at the moment, that's why I asked Arron to be aware of what the other guys in the Department are going to book in terms of holidays and book his holidays around these if possible."

43. On 9 January 2019, Rhiannon Davies sent a letter to the Claimant confirming that the dates for his parental leave, as requested, had been approved.

44. In the following year, the Claimant sent an email to Rhiannon Davies, copied to Mr Jenkins, setting out his requests for parental leave during that year (page 196).

45. On 25 February 2020, a letter was sent to the Claimant (page 198) confirming the dates that he had requested had been approved.

46. Mr Jenkins also confirmed that, at one stage, he had made a request to the Claimant to split up his parental leave in order to assist in the management of the department.

47. However, the Tribunal found that Mr Jenkins was neither hostile towards the Claimant in relation to his request for parental leave nor had he ever declined such a request.

48. The Tribunal also accepted the evidence of Rhiannon Davies and found that, in relation to her involvement with the Claimant's request for parental leave, she did not experience any resistance from Ian Jenkins to the Claimant's request and that such requests were granted promptly. Ms Davies also said that Mr Jenkins encouraged open dialogue amongst the Team to ensure that, when booking annual leave, there were no clashes.

49. Nevertheless, the Tribunal found that the Claimant taking parental leave did lead to discontent within the Maintenance Team that was managed by Mr Jenkins even though this did not extend to Mr Jenkins himself. The Tribunal had considered the exchanges of texts between Paul Watkins and others and also Callum Lee and the Claimant in September 2019 and April 2020 respectively (pages 115-121).

50. In the course of 2018, the Maintenance Manager, David Makinson, left the Respondent. Whilst no-one was appointed to replace Mr Makinson in the managerial role, another maintenance engineer, Dewi Slyman, commenced employment with the Respondent in the Maintenance Team in September 2018.

51. On 23 March 2020, the country went into lockdown as a result of the pandemic. Mr Thomas described the impact of the pandemic as, "*catastrophic"* and that oil prices were in *"negative equity"* for the first time.

52. On 31 March 2020, Chris Lee, VP – Connectors, of the Respondent wrote to the Claimant (pages 199-200) regarding the impact of Coronavirus on the business and the industry sector generally. The letter informed the Claimant that he had been identified as someone who should be furloughed, confirming that the Respondent would make up the 20% difference between the Government scheme and the Claimant's salary. The furlough commenced on 6 April 2020 for a period of three weeks although the Claimant was warned that this may be extended. The Claimant subsequently signed the necessary documentation to confirm his agreement to being placed on furlough. In subsequent correspondence in April, May and June 2020, the

Respondent wrote to the Claimant confirming that his furlough was being extended (pages 199-210).

53. On 20 May 2020, Chris Lee wrote to all staff at Port Talbot (pages 71-72) notifying them of a restructuring plan called "Project Horizon Phase III" which followed a "Town Hall Meeting" the same day. The Town Hall Meeting was effectively the name given to a meeting of all staff.

54. The reason for the restructure was as a result of reductions in drilling activity and capital expenditures worldwide starting in the first quarter of 2020. There had already been Phases I and II of Project Horizon which were focused on the Respondent's activities in the United States and Phase III related to the proposed reduction in head count in Norway and Port Talbot. Mr Lee informed the workforce that the proposed reduction of head count was 24 and he outlined those departments which were at risk. It was confirmed that the first step would be to appoint an Employee Representative to represent two groups of at-risk employees, namely *"the hourly paid associates, and another to represent salaried associates."*

55. Mr Lee invited nominations for those roles but, in respect of those working on the shop floor, no nominations were received and therefore the Union Representative was appointed as one of the Employee Representatives.

56. Mr Thomas confirmed that the process that was followed regarding the redundancy exercise was constructed by him and Gary Morgan, the Projects and Internal Sales Director. This was following attempts to mitigate the need for the number of redundancies by a reduction in the use of subcontractors, renegotiation of supply contracts, and a 10% salary reduction for the Senior Management Team.

57. The Master Redundancy Selection Assessment Form was prepared by Mr Thomas and Mr Morgan. It was a precedent that had been used in the past with advice from legal support and ACAS.

58. The selection criteria and the pools were discussed between Mr Thomas and the Employee Representatives. It was not disputed, and the Tribunal found, that the selection criteria and the pools were agreed by the Employment Representatives.

59. The selection criteria included: performance; skills; disciplinary action; length of service and current role, and attendance.

60. This was applied to those who were in the pool. Initially, and unbeknownst to Mr Jenkins, a scoring exercise was undertaken in respect of the five members of the Maintenance Department (page 226). Mr Thomas stated in his oral evidence that the Redundancy Selection Assessment Form would have been developed between 1 and 20 May 2020 when it was known by senior management that a restructuring was necessary but before any announcements had been made to the workforce. The Tribunal accepted Mr Thomas's evidence and found that it was most likely that Wayne Thomas carried out that exercise but this was prior to the decision that the pool should in fact be made up of the two Mechanical Maintenance Engineers, namely the Claimant and Dewi Slyman. The Tribunal accepted Mr Jenkins's evidence and found that he was not aware of that exercise being carried out.

61. The Respondent concluded that the roles of the Electrical Maintenance Engineers and the Facilities Engineer, who formed part of the original list before the pool was finalised (page 226), were not at risk of redundancy as there was an ongoing requirement for

those with experience, qualifications and expertise in undertaking electrical work. Therefore, it was the two Mechanical Maintenance Engineers, namely the Claimant and Dewi Slyman, who were at risk of being made redundant as one of those two roles was redundant. Furthermore, as stated, the pool was agreed by the Employee Representatives.

62. The Tribunal was satisfied that Mr Jenkins confirmed that he was presented with a template by senior management which he then prepared on 17 May 2020 and carried out his assessment and scoring on 29 May 2020. In conducting his assessment, Mr Jenkins confirmed that he used the most recent appraisal document in respect of both the Claimant and Mr Slyman. When Mr Jenkins had carried out the assessment and scoring, this was reviewed by his Line Manager, Mr Wayne Thomas.

63. Despite the fact that the appraisal was overwhelmingly positive (pages 65-70), the Claimant stated in his evidence that the only reason that he signed the appraisal form was on the basis he was told by Mr Jenkins that his appraisal was comparable with other members of the Team. Indeed, the Claimant relied on the clause, *"my signature below does not indicate my agreement or disagreement with the contents of the appraisal."* It was suggested by the Claimant that he had only agreed to sign the document on being told by Mr Jenkins that everyone in the department had been graded the same. Mr Jenkins denied ever having given the Claimant this assurance. On the balance of probabilities, the Tribunal preferred the evidence of Mr Jenkins. Based on its overall findings, and its assessment of Mr Jenkins's credibility, the Tribunal found that it was highly improbable that Mr Jenkins would have told one member of the team that all members of the team had been appraised and graded in exactly the same way.

64. The date of the evaluation leading to the appraisal was in June 2019. In the section, *"Functional/Technical Skills",* the Claimant was graded as *"Meets Expectations"* (page 65).

65. The appraisal of Dewi Slyman was also undertaken at the same time (pages 237-241). In the section, *"Functional/Technical Skills",* Mr Slyman was graded as *"Meets Expectations – Upper"* (page 238).

66. In the Redundancy Selection Assessment Form (pages 73-74), the criteria on which those in the pool for selection were assessed were: performance; skills; disciplinary action; length of service and current role / experience, and attendance.

67. Drawing from the appraisals, the criterion indicating a difference between the Claimant and Mr Slyman was, "Skills".

68. The Claimant maintained that the assessment carried out by Mr Jenkins was unfair. In doing so, he stated as follows:

    (i) Mr Jenkins was influenced by other members of the Maintenance Team. He said that there was an occasion when Mr Jenkins's phone accidentally rang when in his pocket and the Claimant overheard a conversation between Mr Jenkins and Mr Slyman. Mr Slyman allegedly said that the Claimant should be the person selected as, *"Arron is always off with the kids; he's brought himself a digger; he's working for himself and he's working for BPM on the side. Arron should be the one to go as he's always off with the kids".* It was suggested by the Claimant Mr Jenkins appeared to be agreeing with him and said, *"Yes I know"*. This was disputed by Mr Jenkins. Whilst he would have had no recollection of the phone

going off accidentally in his pocket, he maintained that he had not agreed in any way with what was said by Mr Slyman. The Claimant conceded in his evidence that at no stage had Mr Jenkins said anything derogatory about the Claimant. Indeed, the Tribunal did not find the Claimant's evidence regarding the phone call to be entirely consistent and in his oral evidence, the Claimant was not able to recall with precision what was said. In the appeal hearing (page 107), the Claimant said, *"In IJ defence, he didn't say anything"*;

(ii) Mr Jenkins was intimidated by Paul Watkins and also suggested that Callum Lee, who was the son of the Vice President, Chris Lee, would receive preferential treatment;

(iii) Mr Jenkins was not the correct person to carry out the assessment of the Claimant as he was not familiar with the Claimant's work and skills;

(iv) the Claimant simply did not accept the assessment that Mr Jenkins had made compared to that of Mr Slyman and had produced references and testimonials to support the quality of his work.

69. Mr Jenkins refuted any suggestion that he would have been influenced in any way by comments such as those made by Mr Slyman. He also maintained that at no stage was he intimidated by Paul Watkins who had exchanged the wholly inappropriate text messages which had been brought to Mr Jenkins's attention in the course of these proceedings (pages 115-120).

70. Mr Jenkins insisted that he was entirely the correct person to carry out the assessment of both the Claimant and Mr Slyman. This was supported by Rhiannon Davies. The Tribunal noted that Rhiannon Davies gave her evidence acknowledging that she had always been a close friend to the Claimant during the time that they were both employed by the Respondent and also through the redundancy process.

71. As for the references and testimonials, some time was taken in considering those documents during the course of the hearing (pages 122-126) when Mr Jenkins was giving evidence. Mr Jenkins accepted without reservation the comments that had been made by others who had worked with the Claimant at the Respondent. The references were clearly highly supportive and, when asked whether he accepted what was said, Mr Jenkins said, *"That sounds like Arron"*.

72. As stated, having listened carefully to Mr Jenkins give his evidence, the Tribunal was satisfied that he was a credible witness. He had given his evidence in a fair and balanced way. The Tribunal found that, based on the evidence of Mr Jenkins and Ms Davies, Mr Jenkins was the appropriate person to carry out the assessment in the redundancy process and that he did so in an objective way by adopting the process that had been prescribed by senior management.

73. Mr Jenkins had never disputed the fact that there was tension within the team regarding the Claimant taking parental leave. Indeed, he had endeavoured to resolve those tensions, even though the Claimant had not agreed with the way Mr Jenkins had tried to do so.

74. Each Monday at lunchtime there was a team meeting. Whilst the Claimant did not suggest that Mr Jenkins participated, he confirmed that the other team members would regularly tease the Claimant about the fact that he was taking parental leave. Indeed, the Tribunal found that, whilst there may have been tension between the Claimant and

the rest of the Team as illustrated in the text messages, Mr Jenkins, *"had no problems with the Claimant."* Mr Jenkins adopted the approach that he always wished to be open with the Team. This was supported by Rhiannon Davies. He did not wish to hide anything and wanted to get it all out in the open and try and resolve problems. The Claimant had spoken with Mr Jenkins about the difficulties he was experiencing and therefore, although the Claimant was not aware that he was going to do so, Mr Jenkins raised this particular issue in one of the team meetings. Whilst the Claimant was upset with Mr Jenkins for doing so, the Tribunal accepted that Mr Jenkins did so with good intentions and both he and Ms Davies considered that the situation improved. Indeed, the Claimant confirmed that he would spend more time with the team trying to build relationships. His exchanges of texts with Mr Lee would suggest that he was attempting to adopt a constructive approach.

75. Whilst the Tribunal did not doubt that the Claimant was well-regarded by those who had provided references in support, and that the Claimant firmly believed that he had greater skills and experience than Mr Slyman, that was an opinion he was entitled to hold but which was not shared by those responsible for managing the team. Furthermore, the same process had not been followed with regard to Mr Slyman and, as was said by Mr Thomas, he may also have been able to produce references and testimonials as to his performance.

76. Having carried out the redundancy selection, of the two employees with in the pool, the Claimant had been provisionally selected for redundancy.

77. On 29 May 2020, Mr Jenkins wrote to the Claimant informing him of the outcome, stating that the Claimant had been provisionally selected for redundancy. It was stressed that it was a provisional decision and that a period of consultation would ensue. With the letter, Mr Jenkins enclosed details of the Claimant's score and how it had been calculated. The letter also outlined those topics which could be discussed at the consultation meeting (pages 78-79).

78. At the first consultation meeting on 3 June 2020 (page 80), the Claimant raised several points that were discussed, to include, for example, the conversation that he had overheard between Mr Jenkins and Mr Slyman and also the fact that Mr Jenkins was not the appropriate person to carry out the assessment and the fact that he did not agree with his appraisal.

79. The date and time of the second consultation meeting was agreed.

80. Following the first consultation, a telephone conversation was held between the Claimant and Ms Davies (page 85). The Claimant stated that he did not wish Ms Davies to feel awkward because of their friendship and that he knew that Ms Davies would be straight. He then requested his appraisal document to be checked as he questioned whether the document had been, *"tampered with"* but Ms Davies reassured the Claimant this was not possible.

81. Prior to the second consultation meeting, Mr Jenkins wrote to the Claimant on 3 June 2020 to confirm the points raised at the first consultation meeting (pages 87-88). In a conversation prior to the second consultation, the Claimant called Ms Davies to object to Mr Jenkins being present at the meeting as he disagreed with what Mr Jenkins was saying about him but Ms Davies confirmed that Mr Jenkins needed to be there as his manager.

82. At the second consultation meeting on 9 June 2020, the Claimant attended with Mr Mark Bevan as his companion and the Claimant was given an opportunity to express his views once more, also suggesting that Paul Watkins had threatened him (pages 90-91). Mr Jenkins and Ms Davies responded to each of the issues raised.

83. Prior to the third consultation meeting on 11 June 2020, the Claimant had indicated a series of questions that he wished to have answered. Those questions were set out clearly in the notes to the third consultation meeting together with answers to each of those questions (pages 92-95).

84. On 16 June 2020, Mr Jenkins wrote to the Claimant (pages 96-97) confirming that he had been selected for redundancy, informing him of the terms on which he would be made redundant. The letter stated that alternative roles had been explored but that no such roles existed at that time. The letter confirmed the Claimant's right to appeal.

85. By an email of 22 June 2020 (page 102) the Claimant indicated his intention to appeal.

86. The appeal was heard by Mr Andrew Thomas, Vice President of HR. Along with Gary Morgan, Mr Thomas had been responsible for creating the template Redundancy Selection Assessment Form which had been shared with the Employee Representatives. He had then held discussions with the Employee Representatives and agreed the selection criteria and also the selection pools but he was not involved in any subsequent selection processes or consultations that led to 24 employees being made redundant, of which the Claimant was one.

87. At the appeal meeting, which was chaired by Mr Thomas, the Claimant attended with a companion, Jason Lewis. Ian Jenkins and Wayne Thomas were also present (pages 104-113).

88. The Claimant was given every opportunity to raise all the points he wished to make in support of his appeal, to include:

    (i) the tension and clash of relationships within the Maintenance Team;

    (ii) the approach of Mr Jenkins to attempt to resolve those tensions in a meeting;

    (iii) rumours of a personal nature that had been spread about the Claimant;

    (iv) disagreement with regard to the appraisal;

    (v) the selection process;

    (vi) the suggestion that Mr Jenkins was unduly influenced by other members of the Team, and reference was again made to the telephone conversation that was overheard;

    (vii) the fact that Mr Slyman had not been sent a letter indicating that he was at risk of redundancy;

    (viii) the scoring process and the objectivity of that process;

    (ix) whether Mr Jenkins was the right person to carry out that assessment.

89. At the conclusion of the meeting, it was indicated by Mr Thomas that certain of the matters raised should be pursued by the Claimant in the form of a grievance but the Claimant stated that this was not a recourse he wished to pursue.

90. Prior to the appeal, Wayne Thomas had prepared for Allan Thomas a document which referred to his qualifications and work history. To ensure that the assessment undertaken by Mr Jenkins had been objective and to ensure that the process was properly reviewed and that there was a main focus on skills, Mr Thomas carried out what he described as a *"deep dive"* to make sure they had reached the right conclusion and therefore looked at the respective CVs of the Claimant and Mr Slyman.

91. Whilst the rating was assessed at 2.3 in respect of the Appellant, it still led to a lesser score than that of Mr Slyman as illustrated by the document setting out the comparison (pages 221-225). By a letter of 5 June 2020 (page 114) Mr Thomas wrote to the Claimant confirming that he concluded the process had been followed diligently and that the scoring had been applied fairly and consistently to both the Claimant and Mr Slyman. On the basis the Claimant's score was the lower of the two, Mr Thomas upheld the original decision to dismiss the Claimant by way of redundancy.

92. In the course of the proceedings, it had been suggested by the Claimant that certain documents had been produced at a later date to the data to which the content of the document pertained (for example page 230). An explanation had been provided by the Respondent's IT Department in an email dated 10 November 2021 (page 235). In any event, the Claimant had not produced any evidence, whether expert or otherwise, to suggest that anything improper or inappropriate had taken place to establish that the documents were not genuine. Therefore the Tribunal did not find that any improper manipulation of the documentation had taken place. Mr Thomas also confirmed that out of the entire redundancy process, the Claimant's selection was the only one of the 24 redundancies which had been challenged. Further, he confirmed that the 'head count' in Maintenance remained exactly the same as when the Claimant left, taking account of Callum Lee also having taken voluntary redundancy.

The Law

93. In the Skeleton Argument settled by Ms Hodgetts on behalf of the Respondent dated 22 February 2022, the legal framework is set out. On behalf of the Claimant, Mr Batcup confirmed that he agreed with the legal framework outlined by Ms Hodgetts.

94. The Tribunal intends to set out certain fundamental aspects of the legal framework which it considers to be consistent with the outline provided by Ms Hodgetts.

95. In relation to the allegation that the Claimant was automatically unfairly dismissed on the basis that the real reason for dismissal was due to the Claimant exercising his right to parental leave, it was agreed between the parties that the relevant guidance was contained in Kuzel v Roche Products Limited [2008] EWCA Civ 380, in particular paragraphs 52 to 60 of that judgment.

96. The law relating to unfair dismissal is set out in section 98 of ERA.

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
> (a) The reason (or, if more than one, the principal reason) for the dismissal; and

(b) That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it –
…….
(c) is that the employee was redundant;"

97. The definition of redundancy is set out in s.139 Employment Rights Act 1996 ("ERA"):

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to…

b. the fact that the requirements of that business –

i. for employees to carry out work of a particular kind, or

ii. *for employees to carry out work of a particular kind in the place where the employee was employed by the employer have ceased or diminished or are expected to cease or diminish.*

98. The leading case on establishing whether an employee has been dismissed by reason of redundancy is *Safeway Stores plc v Burrell* [1997] IRLR 200 (EAT) (approved by the House of Lords in *Murray and another v Foyle Meats Ltd (Northern Ireland)* [1999] IRLR 562). The EAT formulated a 3-stage test for applying s.139 ERA:

a. Was the employee dismissed? If so,

b. Had the requirements of the business for employees to carry out work of a particular kind ceased or diminished (or did one of the other economic states of affairs in s.139(1) exist)? If so,

c. Was the dismissal of the employee caused wholly or mainly by the state of affairs identified at stage 2?

99. If the answer at all 3 stages is "yes", there will be a redundancy dismissal.

100. When considering a "diminished requirements" redundancy, the starting point is the requirements of the business. This is a commercial judgment on the part of those running the business about the priorities of the business and about which kind of work (or employee) has become surplus to requirements. The law does not interfere with an employer's freedom to make such business decisions, and an employer is not required to justify its reason for making the redundancies. Provided that a tribunal is satisfied that redundancy is the genuine reason for a dismissal, it will not look behind the facts to see how the redundancy situation arose: *Moon v Homeworthy Furniture* [1976] IRLR 298.

101. If the employer shows that the reason for the dismissal is a potentially fair reason under section 98(1), the tribunal must then consider the question of fairness, by reference to the matters set out in section 98(4) ERA which states:

"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case."

102. Procedural fairness is an integral part of the reasonableness test in section 98(4) of ERA. In redundancy dismissals "the employer will not normally act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by deployment within his own organisation" (Polkey v AE Dayton Services Ltd 1988 ICR 142, HL).

103. In deciding whether the adopted procedure was fair or unfair the tribunal must not fall into the error of substitution. The question is not whether the tribunal or another reasonable employer would have adopted a different and, what the tribunal might consider a fairer procedure, but whether the procedure adopted by the respondent "lay within the range of conduct which a reasonable employer could have adopted" (Williams v Compair Maxam Ltd [1982] ICR 156).

104. It is generally for the employer to decide on an appropriate pool for selection. If the employer genuinely applied its mind to the question of setting an appropriate pool, the tribunal should be slow to interfere with the employer's choice of the pool. However, the tribunal should still examine the question whether the choice of the pool was within the range of reasonable responses available to a reasonable employer in the circumstances. (Capita Hartshead v Byard [2012] IRLR 814)

105. A fair consultation would normally require the employer to give the employee "a fair and proper opportunity to understand fully the matters about which [he/she] is being consulted, and to express [his/her] views on those subjects, with the consultor thereafter considering those views properly and genuinely." (per Glidewell LJ in R v British Coal Corporation and Secretary of State for Trade & Industry ex parte Price and others [1994] IRLR 72) cited with approval and as applicable to individual consultation by EAT in Rowell v Hubbard Group Services Ltd 1995 IRLR 195, EAT "when the need for consultation exists, it must be fair and genuine, and should… be conducted so far as possible as the passage from Glidewell LJ's judgment suggests". A fair consultation process must give the employee an opportunity to contest his selection for redundancy (John Brown Engineering Ltd v Brown and ors 1997 IRLR 90, EAT).

Analysis and Conclusions

106. Addressing the agreed issues in turn, the Tribunal has carried out an analysis of the facts and, applying the legal framework, both as set out above and as described in Ms Hodgetts' skeleton, has reached the following conclusions.

107. The primary contention of the Claimant was that the reason for his dismissal was that he exercised his right to parental leave which, if so, would mean that he was automatically unfairly dismissed. He disputed that the real reason for his dismissal was that he was redundant.

108. The need for the Respondent to carry out a restructure of its operations at Port Talbot and the need for 24 members of staff to be made redundant had not been challenged. This was not surprising taking account of the global challenges generally in respect of demand in the oil and gas sector for the product manufactured by the Respondent, together with the effect of the pandemic.

109. Applying the test in *Kuzel*, the Tribunal was satisfied, on the balance of probabilities, that the Claimant asserting his right to parental leave in 2018 and thereafter was not the real reason for the Claimant being dismissed in 2020. In reaching this conclusion, the Tribunal had considered its findings of fact, in particular based on the evidence of Mr Jenkins and Ms Davies, who had both been integrally involved in implementing the Claimant's request for parental leave in 2018 and subsequently.

110. The Tribunal concluded that the Claimant simply could not accept that, based on his performance and expertise, he would have been selected for redundancy instead of Mr Slyman. As a consequence, the only possible conclusion he was able to accept was that this was a decision which was expedient for the Respondent to take to solve the managerial issues which had arisen due to him taking parental leave.

111. However, the Tribunal had found that, once he understood the Claimant's entitlement to parental leave, Mr Jenkins co-operated with its implementation and accommodated the Claimant in relation to the weeks that he wished to take during the year. Mr Jenkins was fully prepared to accept that accommodating the Claimant's parental leave gave rise to an unexpected need for organisational management within the Maintenance Department and that he had also requested the Claimant to take his parental leave in stages. However, the Tribunal did not consider such a reaction to be in any way unreasonable and certainly did not consider that it was sufficient to establish that this was the real reason for the dismissal.

112. The Tribunal had considered carefully the tone of the email exchanges between Mr Jenkins and the Claimant. The Tribunal had also relied on the evidence of Ms Davies, who was a good friend of the Claimant, who also confirmed that, once the Claimant's entitlement to parental leave had been explained to Mr Jenkins, he fully cooperated in the implementation of that entitlement.

113. In reaching these conclusions, the Tribunal had taken full account of the tensions between the Claimant and the other members of the Maintenance Team managed by Mr Jenkins. The Tribunal had found that Mr Jenkins had not been intimidated into adopting a course leading to the Claimant's dismissal on the basis of the Claimant exercising his right to parental leave.

114. Turning to the redundancy process, it had been submitted on behalf of the Claimant that there was some doubt as to the integrity of the selection of the pool which comprised of the Claimant and Mr Slyman. It was suggested that the pool was initially five but it ended up just being the two Maintenance Engineers.

115. The Tribunal had noted that it had not been challenged that the selection process, the selection criteria and the selection pools had been agreed by the Employee Representatives following discussion between them and senior management, primarily Mr Thomas.

116. The Tribunal had also found that the Respondent had concluded that the roles of those who had electrical qualifications and experience were not redundant as there would be a demand for such expertise in the future. It was as a consequence of this decision that the pool was restricted to the Claimant and Mr Slyman.

117. It had been suggested that, having concluded that the pool should contain the Claimant and Mr Slyman, it should have been Mr Slyman who was selected as a result of his length of service. Indeed, it was stated at paragraph 30 of the Claimant's witness statement that the obvious choice was Mr Slyman who had only been employed for 18

months and therefore, had he been chosen, he would not have been entitled to any redundancy payment. The Tribunal did not consider that the Respondent was obliged to approach its decision on this basis nor would it have been appropriate to do so, relying on the guidance to be found in BL Cars v Lewis [1983] IRLR 59.

118. It was then suggested that the consultation process should have taken place prior to the scoring exercise and the redundancy selection assessment taking place. Again, the Tribunal disagreed. The Tribunal was satisfied that the Respondent had adopted the correct approach to the process in carrying out the assessment and scoring before notifying the Claimant that he was at risk and inviting him to participate in the consultation process.

119. There were three consultation meetings. The claimant was accompanied and the Tribunal was satisfied the Claimant was given every opportunity to ask questions and challenge the process and the decisions that had been made. The Tribunal noted that Ms Davies was present and confirmed that the Claimant's arguments were properly considered by Mr Jenkins. Furthermore, the questions asked by the Claimant had all been addressed and answered in a fair and comprehensive way.

120. The Tribunal concluded that Mr Jenkins had approached his task of scoring the Claimant and Mr Slyman against the agreed criteria in an objective manner. He had very fairly stated that there was no suggestion that the Claimant was anything other than a competent Maintenance Engineer. The Tribunal had accepted his evidence and found that on an objective basis, the Respondent had found that the difference, and the only difference, between the Claimant and Mr Slyman was in its assessment of their respective skills. Whilst the Tribunal noted that the Claimant strongly disagreed with this assessment, the Tribunal nevertheless found that Mr Jenkins had approached this assessment objectively. It was also noted that the assessment was carried out by reference to the last appraisals carried out in respect of the Claimant and Mr Slyman which had taken place well before the prospect of a restructure, and redundancy process, were contemplated. As the scoring criteria and pools had been agreed between Mr Thomas and the Employee Representatives, and as it found that Mr Jenkins had approached his assessment in an objective manner, the Tribunal was careful not to carry out its own assessment and ensured it avoided the risk of substituting its own view for that of the Respondent.

121. Once the Claimant had been notified of Mr Jenkins's decision, he exercised his right to appeal.

122. The Tribunal was satisfied that Mr Thomas carried out an appropriate level of preparation before the appeal meeting. Indeed, in order to satisfy himself of the objectivity and fairness of Mr Jenkins's assessment, Mr Thomas considered the CVs of the Claimant and Mr Slyman. He then provided the Claimant with the findings of that comparison prior to the appeal meeting in order that the Claimant could respond.

123. The Tribunal found that the Respondent had genuinely applied its mind in reaching a reasonable decision regarding the selection criteria and the selection pool, noting that, as stated, the selection criteria and the selection pool had been agreed with the Employee Representatives prior to the commencement of the process. The Tribunal was satisfied that both selection criteria and selection pool were within the range of reasonable responses available to a reasonable employer in the circumstances.

124. The Tribunal was satisfied that the Respondent had taken reasonable steps to find the Claimant suitable alternative employment. However, no such alternative employment

was available and Mr Thomas had confirmed that the structure of the Maintenance Department remained the same as it did at the time that the Claimant was made redundant.

125. For all these reasons, the Tribunal concluded that the reason for dismissal of the Claimant was redundancy, that the Respondent had adopted a fair process in reaching that decision and that the decision to dismiss the Claimant fell within the range of reasonable responses.

126. The Claimant's claim of unfair dismissal is therefore dismissed.

Employment Judge R Havard
Dated: 1 December 2022

JUDGMENT SENT TO THE PARTIES ON 5 December 2022

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

Mr N Roche