EMPLOYMENT TRIBUNALS

Claimant: **Mr W. Thomson**

Respondent: **LCM Administration Services Ltd**

Heard at: **East London Hearing Centre (remotely, by CVP)**

On: **14 and 15 October 2021; and**
25 October 2021 (in chambers)

Before: **Employment Judge Massarella**
Members: **Ms M. Daniels**
Ms S. Jeary

Representation
Claimant: Mr S. Butler (Counsel)
Respondent: Mr J. Rice (Company Secretary)

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. **the Claimant's claim of age discrimination is dismissed on withdrawal;**

2. **the Claimant was unfairly dismissed;**

3. **there was a 50% chance that he would have been fairly selected for redundancy, had a fair process been followed by the Respondent;**

4. **there will be a remedy hearing to determine what compensation the Tribunal should award to the Claimant.**

REASONS

This has been a remote hearing by video (CVP), which has not been objected to by the parties. A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.

Procedural history

1. After an ACAS early conciliation period between 23 August 2020 and 23 September 2020, the Claimant issued his claim on 26 September 2020. He was employed until 31 July 2020. The Claimant's case was that he was selected for redundancy and dismissed without any procedure being followed. He also contended that he was dismissed, in part, because of his age.

2. A preliminary hearing for case management took place before EJ Tobin on 18 January 2021. The Claimant was asked to clarify his age discrimination case, if he wished to pursue it. EJ Tobin estimated that the case should be listed for two days, if it proceeded as a case of unfair dismissal only. The parties were ordered to write to the Tribunal within fourteen days, if they considered that a longer listing would be needed.

3. By email dated 1 February 2021, the Claimant lodged further particulars of his age discrimination claim, clarifying that the alleged act of discrimination was his dismissal for redundancy on 31 July 2020. The Claimant relied on Mr Mike Roberts as his comparator.

The hearing

4. We had a bundle of around 180 pages. We heard evidence from the Claimant and from former colleagues on his behalf: Mr Paul Wilson, Mr Duncan McIntyre and Mr Hugh Baker. Mr John Rice (company secretary) was the only witness for the Respondent.

5. At the hearing, Mr Butler (Counsel for the Claimant) told the Tribunal that the Claimant wished to withdraw his age discrimination case. Consequently, it is dismissed.

6. At the beginning of the hearing, the Tribunal confirmed that the hearing would determine liability only, but that we would hear evidence and submissions on the *Polkey* issue. We reminded Mr Rice of this before he began cross-examining the Claimant.

Findings of fact

7. The Respondent processes scrap metal on a large scale. It operates from three sites across London: Colindeep, Edmonton and North Woolwich. There was a fragmentiser at the Edmonton site, which is a large piece of plant designed to break material up into small parts, separating them into ferrous material (steel and iron) and nonferrous/non-magnetic material (copper, aluminium etc.). However, the fragmentiser did not operate as well as had been anticipated, and was out of action for extended periods. In due course it was dismantled.

8. The Claimant commenced employment on 1 January 2017. He was employed as a nonferrous manager. His contract at paragraph 5 provided:

> 'Place of work

> You will be required to work at 31 Noble Road Edmonton N18 3BH or from any other LCM premises in the Southern Region as LCM may reasonably require from time to time.'[1]

9. We find that the Respondent had the ability, which it exercised frequently, to move employees from one site to another. In practice, managers were moved between sites from time to time. The managerial jobs were broadly similar from site to site; the skills involved were essentially the same.

10. The Claimant contended that the Respondent had a pattern of dismissing employees for redundancy when there was no redundancy situation. There was some evidence to support this. Mr Dave Wilson was employed from 4 February 2018 to 22 March 2018, when he was dismissed. The reason given was redundancy. He was replaced the following Monday by Mr Jason Hutt, who remains employed by the Respondent today. At the hearing Mr Rice explained that in fact Mr Wilson was dismissed because he was considered unsuitable and was still in his probationary period. Mr Rice said that 'the choice of words was incorrect'.

The Claimant's move from Colindeep to Edmonton

11. The Claimant started work at the Colindeep site. He was moved to Edmonton by the Respondent, which was opened in the autumn of 2018 as a new fragmentiser site: he was effectively on loan to Edmonton; he was not replaced as nonferrous manager at Colindeep.

12. The Claimant was assigned to Edmonton in part to help the site manager there, Mr Duncan McIntyre, to build the business up. Mr McIntyre had been working at the Edmonton depot for around two years. The site manager role included performing administrative tasks from the office and operating the weighbridge, a piece of plant for weighing large quantities of material before and after delivery. Materials were purchased by weight and lorries coming into the yard were placed onto the weighbridge, when the gross weight was recorded from the office. The lorry was then sent to the tipping area. The material was then inspected, weighed, valued and moved to its storage location. The lorry was then directed back to the weighbridge where its empty weight was recorded, thus producing the net weight of the load, which was recorded in a ticket produced from the office. Smaller quantities were weighed on the small scales.

Mr McIntyre's departure

13. Mr McIntyre left the Respondent's employment in August 2019. The termination was not amicable. The Claimant's evidence, which we accept, was that Mr McIntyre left in part because he considered that the site was undermanned, and the targets he was expected to meet were unrealistic. We found Mr McIntyre to be a credible and consistent witness. By contrast, we found Mr Rice to be an inconsistent and unreliable witnesses, for reasons which will become apparent.

14. Before Mr McIntyre left, the Claimant was responsible for buying nonferrous metal, grading and cleaning the metal, loading the lorry with a forklift, overseeing the small scales (as opposed to the weighbridge), and issuing the tickets which

[1] Original spelling, grammar and format retained in quotations from contemporaneous documents, except where correction is necessary for sense, when square brackets are used.

recorded weights and payments. He had one person working under him, Mr Paul Wilson.

15. Mr McIntyre was not immediately replaced. The Claimant carried on doing his nonferrous duties; he also took over operating the weighbridge. In addition, the Claimant assumed the great majority of Mr McIntyre's duties, including opening and locking the yard, filling in the site diary, and recording key information.

16. Although the Claimant did these additional duties for around eight months, we do not accept his evidence that he thought that the site manager job was now his permanently. We find that he was acting up, in the knowledge that a replacement for Mr McIntyre would be appointed in due course. He was not given any additional pay, and there was no amendment to his contract. However, he was more than capable of discharging the role. In a reference given during this period, Mr Griffiths wrote: 'his current job title is site manager and he is fulfilling his duties exceptionally well'.

17. Mr Rice initially asserted that this reference was 'fraudulent', until he was taken to an email under cover of which the reference was forwarded to the Claimant on 15 January 2020. Mr Griffiths still works for the Respondent but was not called to give evidence. Mr Rice's evidence as to whether the Claimant was performing the site manager role during this period was equally confused. He accepted in cross-examination that, between the time of Mr McIntyre's departure and Mr Roberts' arrival, the Claimant performed the role for eight months; immediately after this he denied that the Claimant was acting as site manager. He asserted that other managers, Mr Griffiths and Mr Willock, were the *de facto* site managers and visited the site regularly to oversee it. We reject that evidence; apart from anything else, it is incompatible with Mr Griffiths' contemporaneous reference. We accepted the Claimant's evidence that visits by other managers were occasional, to address a particular issue, such as the ongoing problems with the fragmentiser.

<u>The arrival of Mr Roberts in Edmonton</u>

18. As recorded above, Mr Paul Wilson had been working as a nonferrous operative, reporting to Claimant. On 6 March 2020, Mr Rice wrote to him dismissing him. He informed him that the Respondent had no alternative but to reduce its staffing levels at the Edmonton site 'to reflect the activity we anticipate at that site', and that he had been selected as one of the employees to be made redundant.

19. On 9 March 2020, Mr Mike Roberts started work at Edmonton. We accept the Respondent's evidence that Mr Roberts was appointed to replace Mr McIntyre as site manager. That is consistent with the fact that the Claimant was acting up. It is also consistent with the fact that, before the pandemic struck, the Edmonton site was busy; we can well believe that the Respondent would want to have two managers in place at the site.

20. As for the timing of his arrival, although in retrospect it might seem suspicious that Mr Roberts arrived shortly before the lockdown started, and shortly before the Claimant was obliged to self-isolate, it only seems so with the benefit of hindsight. We reminded ourselves that, in early March 2020, no one knew that a lockdown would even take place, let alone how long it would last or the impact

it would have on businesses. We accept that Mr Roberts had been offered, and had accepted, the role some time before, and that his arrival had been delayed, either by notice requirements or restrictive covenants.

21. The Claimant's evidence was that Mr Roberts was a personal friend of Mr Peter Curtis, one of the Respondent's directors. Mr McIntyre agreed. He (Mr McIntyre) used to work with Mr Roberts at a previous company, along with Mr Rice. Mr Curtis also worked there for a period and remained in touch with Mr Roberts after he left. Mr Roberts and Mr Curtis played golf together and were both involved in a local rugby team. Mr Rice denied this. We preferred Mr McIntyre's evidence. If it were not true, the Respondent could have called Mr Curtis to deny it. Moreover, it tallied with Mr Rice's own acknowledgment, later in his evidence, that this is an industry which works by contacts, networking and informal approaches.

<u>The response to the pandemic</u>

22. On 11 March 2020, the Claimant wrote to Mr Rice:

> 'John just to let you know I fall into the high-risk category. I have heart disease and I would like to take my three weeks leave now if possible. If not, I will be going into self-isolation as my GP has told me to. Please respond to my message.'

23. Mr Rice replied on 12 March 2020, saying that he did not know that the Claimant had heart disease. He agreed to the Claimant taking some, but not all, of his annual leave entitlement, but said that he would then have to take sick leave (on SSP) or unpaid leave. He offered to discuss the situation further with the Claimant.

24. On 13 March 2020 the Claimant wrote to Mr Rice saying that he felt a lot better and would be back at work on Monday. He said he thought he had had food poisoning.

25. On 17 March 2020 he contacted Mr Rice again and said he could not come to work because he was a guardian for his grandsons, whose school had closed because of Covid-19. Mr Rice wrote to him the same day asking him whether he thought he would be in the group which would have to self-isolate.

26. The Claimant was furloughed on 26 March 2020 on 80% of his salary, along with other employees. Mr Roberts continued to work throughout the lockdown.

<u>The meeting on 12 June 2020</u>

27. On 12 June 2020 a meeting took place between Mr Curtis and Mr Christian Pelosi, the other director of the Respondent company, to discuss the business's response to the pandemic. They were the only two members of the board. Mr Rice was not present at the meeting because he was unwell.

28. It was a substantial meeting and some brief notes were taken, but there were no formal minutes - at least none that were produced in these proceedings. Of the brief notes, only a part was disclosed: a single page on which someone (we were not told who) had written 'numbers of employees required to manage each site'.

29. Mr Rice's evidence (paragraph 29) was that:

> 'it was clear that the operations on all sides would need to be scaled down and future plans for expansion and investment would have to be cancelled'.

30. In relation to the Edmonton site the note was as follows:

> 'Noble Road
>
> Manager/machine op. x 1
>
> Current 3
>
> Machine operator x 1'

31. We note that it was not specified what machinery each individual would operate.

32. In his witness statement, Mr Rice wrote:

> 'In the case of the Claimant the result of the business review was that the role of dedicated nonferrous manager was no longer required and that therefore there was no selection process that could be adopted.'

33. Mr Rice's evidence at trial was that this decision was not, in fact, taken at this stage; that these were only preliminary discussions, and the final decision was taken shortly before the Claimant was informed that he was a risk of redundancy.

34. The decisions taken at the meeting of 12 June were taken by Mr Curtis and Mr Pelosi, not by Mr Rice; he was not even present. If Mr Rice was right that these were preliminary decisions only, either of them could have attended the Tribunal to say so. We reject Mr Rice's evidence that they postponed the decision while they explored other options; there was no evidence of any further discussion, 'or business review', let alone a date (supported by a note) of a later, definitive decision to put the Claimant at risk of redundancy.

35. Because the only business review was the meeting of 12 June 2020, we are satisfied that the decision to dismiss the Claimant was taken on that date but not communicated to him until he announced his intention to return to work in July (see below).

36. The Claimant, in his supplementary witness statement, pointed out that the manuscript notes of the meeting of 12 June 2020 also recorded that, at the Factory Road HQ, a nonferrous manager and two nonferrous operatives would be retained. Two nonferrous operatives were also retained at Colindeep. There was no challenge by Mr Rice to that evidence. Mr Rice's evidence was that there were six other redundancies in July at the same time as the Claimant, which included two nonferrous operatives, but did not include another nonferrous manager. Consequently, there was no evidence that the other nonferrous manager was made redundant.

Notification of redundancy and consultation

37. On 17 July 2020 the Claimant wrote to Mr Rice [4/35]:

> 'Hi John first hope you and your family are all well. I would like to know when the company will be asking me to go back to work as my shielding is finishing on 1st of August so I would be grateful to know if the company are in a position to bring me back or will I be on furlough until October and start working again on 1st of November as I have had no correspondence from company to let me know what is going on yours faithfully Mr Wayne Thompson.'

38. On 20 July 2020, Mr Rice wrote to the Claimant as follows:

> 'This letter is to advise you that there has been a noticeable downturn in metal recycling sector during recent months with a period of effective closure and reduced activity resulting from the Covid-19 pandemic. This has significantly impacted our business and for commercial reasons and to safeguard the future of the company it is necessary for us to consider making some of our employees redundant. Such action is greatly regretted by the directors and will be avoided if at all possible. You have been included in a pool of employees with similar job roles from which a number of employees may be selected for redundancy. You must treat this letter as formal notification that you are a risk.
>
> The company is engaging in a consultation process and each person within the pool will receive a one-to-one consultation to discuss the procedure. Given the current position it may be necessary for such consultation to be by telephone. All employees within the pools will be the subject of a scored selection process to determine those who (if any) are to be selected. You will be given the opportunity to suggest ways in which redundancy could be avoided. Throughout the procedure the company will explore all avenues to try to avoid redundancies.
>
> You will have the right of appeal in respect of any action taken by the company at all following the meetings.'

39. This letter was misleading: the Claimant had already been selected for redundancy; he was not included in a pool and there was no selection exercise, against objective criteria, in relation to him. Mr Rice stated that this statement was corrected 'during subsequent telephone conversations.' We reject that evidence: there were only two phone calls to the Claimant, and Mr Rice was frank that he had little recollection of what was said in them. We make findings below as to what was said in them.

40. Mr Rice's evidence in his witness statement on the process adopted by the Respondent (para 24) was that:

> 'The Respondent did not make a selection and proceeded on the basis that it was the Claimant's position that was made redundant following an assessment and reorganisation of the site and the business as a whole.'

41. Mr Rice elaborated on this rather unclear statement in his oral evidence at Tribunal. He said that the Respondent decided to treat each site separately. Because the Claimant was the only nonferrous manager at Edmonton, he was not included in a pool.

42. Although we are satisfied that, because of the pandemic, there was a diminution in the volume of work overall which needed to be carried out, at the Edmonton site and across the business as a whole, there remained a need for the 'work of a particular kind' which the Claimant carried out. Mr Rice stated (para 36) that 'the volume of nonferrous had already significantly reduced prior to February and March [i.e. pre-pandemic] and was not expected to recover at the site where the Claimant was based'. There was no evidence whatsoever to support that assertion; it is difficult to reconcile it with the letter of 31 July 2020 (para 47 below), in which the Respondent expressed the hope that they might be able to re-employ the Claimant in due course. We regarded it as self-serving and we disbelieved it. We preferred the Claimant's evidence, which was supported by the evidence of Mr Baker: that his former customers told him that the Respondent continued to deal in nonferrous metals and that someone else (Mr Roberts) was doing that work.

43. It is also right that there was an ongoing need for the work which Mr Roberts was doing (and which the Claimant had previously been doing) to be carried out: the site needed to be managed. The reality of the situation was that the Respondent decided that the work previously carried out by two managers could be carried out by one, and the two roles could be merged. To that extent, it was a reorganisation of the work, as well as a redundancy.

44. We are satisfied that the Respondent decided not to put the Claimant in a pool with Mr Roberts because, having decided that the Edmonton site could function with one manager, they preferred to keep Mr Roberts. Mr Roberts was a friend of Mr Curtis and the directors wanted to avoid a situation in which he might be selected for redundancy, rather than the Claimant. Further, we find that the Respondent gave no thought at all as to whether, given the movement of managers between sites, the Claimant ought to be in a pool with the other site managers, or with the nonferrous manager at the other site. There was simply no evidence of them doing so, beyond a bare assertion by Mr Rice.

<u>Consultation</u>

45. So far as consultation with the Claimant was concerned, Mr Rice accepted that he had two phone conversations with the Claimant. We accept the Claimant's evidence as to what was said; it was barely contested by Mr Rice, who kept no notes of the calls, and was frank that his recollection of them was poor. In the first call Mr Rice told the Claimant that he was being considered for redundancy; in the second call he told him that he had been selected for redundancy.

46. The consequence was that the Claimant was deprived of any opportunity to make representations to the effect that he should have been included in a pool with Mr Roberts, if the exercise was to be conducted on a depot by depot basis; or to make representations to the effect that the exercise should be conducted on a business-wide basis, and that he should be pooled with other managers at the other depots, including the nonferrous manager at Factory Road.

47. On 31 July 2020, Mr Rice wrote to the Claimant:

> 'I refer to my previous letter and subsequent telephone conversations when we discussed the need for the business to proceed with a number of redundancies. This letter is to confirm that you have been selected for

redundancy. The directors regret having to take this decision but it was unavoidable as there has been a noticeable downturn in the metal recycling sector during recent months with a period of effective closure and reduced activity resulting from the Covid-19 pandemic which has had a serious impact on our business

The decision to make you redundant is in no way a reflection of any failure on your part and you are considered to have been a loyal and hard-working member of the team. We hope that given enough time we may be in a position to recruit more staff and like to think that there may be a future opportunity to employ you again. We will be prepared to give you a reference upon request to assist in obtaining future employment.

The effective date for termination employment is 31st July and you will receive notice pay, redundancy pay (if applicable) and any holiday pay due in respect of untaken but accrued holiday. We will ask payroll to carry out a calculation of the amount due and pay this to you next week. We will arrange for your P45 to be issued as soon as possible.

You will have the right appeal and should you wish to exercise this right please let know and I will explain the procedure.'

48. The Claimant appealed against his dismissal. The appeal was not dealt with. Mr Rice initially told us that this was because he was in hospital when the appeal was sent to his email address. Asked why someone else in the organisation could not have dealt with it, he replied that 'no one else deals with HR matters and no one was picking up my emails in my absence'. Later in the hearing, however, we were taken to a document which showed that Mr Rice had received the appeal and had formally acknowledged it by letter. We concluded that Mr Rice's earlier evidence had again been misleading; this further undermined his credibility in the Tribunal's eyes.

Findings of fact on the *Polkey* issue

49. The only witness evidence adduced by the Respondent in relation to the Claimant's and Mr Roberts' respective skills and experience was given by Mr Rice. Mr Roberts was not called to give evidence, nor was any other manager (for example, Mr Griffiths) who could give direct evidence as to what happened on the ground. There was not even any documentary evidence relating to Mr Roberts' experience (for example, a CV). Mr Rice cross-examined the Claimant only briefly, and in very generalised terms, as to their respective skills and experience, despite being reminded several times by the Judge that he needed to address the *Polkey* issue and confirming that he would.

50. We accept Mr McIntyre's evidence, who was well-placed to judge, that the Claimant was capable of performing both the nonferrous manager and site manager roles and had been performing both roles for eight months before the arrival of Mr Roberts. We accept the Claimant's evidence that he had more experience than Mr Roberts, in terms of the operation of the Edmonton depot, and as much experience in terms of the industry more generally. The Claimant had worked in sites such as these for 25 years. Insofar as management experience was necessary, on the evidence available to us, both had management experience. Mr Rice, in his few questions on that topic, did not

persuade us that Mr Roberts' experience was any more substantial than the Claimant's.

51. We accept the Claimant's evidence that Mr Roberts had little experience of nonferrous metals: he was not familiar with the relevant grades of metal, or the associated terminology. We note that there is some support for that in the statement of Mr Glynn, a customer of the Respondent, who submitted a statement that 'Wayne's replacement was not nearly as efficient as Wayne, often appearing confused and unable to grade the material correctly, appearing that he had little previous experience in the role.' We bore in mind that Mr Glynn did not attend the hearing to be cross-examined, but nonetheless his evidence is consistent with that of the Claimant.

52. We accept Mr McIntrye's evidence that Mr Roberts did not know how to operate the weighbridge at Edmonton, which was different from the system at Mr Robert's previous employer. By contrast, Mr McIntyre had trained the Claimant in this system himself. On the other hand, from what we heard it appeared to us that this was a skill that could probably be mastered relatively quickly.

53. On the evidence before us, we were satisfied that Mr Roberts' experience/qualifications exceeded the Claimant's in one respect: he was qualified to operate a crane, whereas the Claimant was not. Mr Rice sought to persuade us that this was determinative: there was one crane at the Edmonton site; there would be one crane operator; the manager (whoever it was) would have to be able to cover the operator's absence, because they would no longer be able to 'borrow' crane operators from other depots. We disbelieved that evidence. If the crane operator was off work, whether on leave or sickness absence, we found it implausible that Mr Roberts would be able to replace him as the crane operator, as well as carrying out all his other duties, running the whole operation single-handedly. We accept the Claimant's evidence that there are too many duties, involving different equipment, and different processes, in different locations. We find, if the crane operator was off, the Respondent would have had no alternative other than to borrow crane operator from another site, as had previously been its practice.

Subsequent developments

54. We were taken to a letter of 4 November 2020, which described the Claimant as someone who had been identified as 'clinically extremely vulnerable'. It informed him that the advice was that from 5 November until 2 December 2020, he was advised to stay at home except for specific purposes. The Claimant's evidence was that the medical advice subsequently changed again, and he was advised to shield until 1 April 2021.

The law

Unfair dismissal: redundancy

55. S.94 of the Employment Right Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by his employer.

56. S.98 ERA provides so far as relevant:

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

57. A redundancy situation is defined by s.139 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—**
>
> **(a) the fact that his employer has ceased or intends to cease—**
>
> **(i) to carry on the business for the purposes of which the employee was employed by him, or**
>
> **(ii) to carry on that business in the place where the employee was so employed, or**
>
> **(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.**

58. An employee may argue that a dismissal for redundancy was unfair either because redundancy was not the real reason; or because, although a redundancy situation existed (and the employee was not selected for an automatically unfair reason), the dismissal was nevertheless unreasonable under S.98(4) ERA.

59. It is the requirement for employees to do work of a particular kind which is significant. The fact that the work is constant, or even increasing, is irrelevant; if fewer employees are needed to do work of a particular kind, there is a redundancy situation (*McCrea v Cullen and Davison Ltd* [1988] IRLR 30). Thus, a redundancy situation will arise where an employer reorganises and redistributes the work so that it can be done by fewer employees.

60. It is not for Tribunals to investigate the commercial reasons behind a redundancy situation (*Hollister v National Farmers' Union* [1979] ICR 542).

61. In many redundancy dismissals, the starting-point will be the familiar guidance in *Williams v Compair Maxam Ltd* [1982] IRLR 83 EAT (at para 18 onwards).

> **'19. In law therefore the question we have to decide is whether a reasonable Tribunal could have reached the conclusion that the dismissal of the applicants in this case lay within the range of conduct which a reasonable employer could have adopted. It is accordingly necessary to try to set down in very general terms what a properly instructed Industrial Tribunal would know to be the principles which, in current industrial practice, a reasonable employer would be expected to adopt […] there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:**
>
> **1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.**
>
> **2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.**
>
> **3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.**
>
> **4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.**
>
> **5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.**
>
> **The lay members stress that not all these factors are present in every case since circumstances may prevent one or more of them being given effect to. But the lay members would expect these principles to be departed from only where some good reason is shown to justify such departure. The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim.'**

62. In carrying out a redundancy exercise, an employer should begin by identifying the group of employees from which those who are to be made redundant will be drawn. This is the 'pool for selection' and it is to these employees that an employer will apply the chosen selection criteria to determine who will be made redundant.

63. However, an employer who omits to consider the question of pooling will not necessarily be acting unreasonably. In *Wrexham Golf Co Ltd v Ingham* EAT 0190/12 the Claimant worked as club steward. The Respondent decided that,

to save money, it would combine its bar and catering functions, and the club steward's duties could be divided among other staff, so the Claimant would be redundant. The Tribunal concluded that the dismissal was unfair because the Respondent had failed to consider the issue of a pool, and whether other bar staff should also have been placed at risk. On appeal the EAT noted that the word 'pool' is not found in s.98(4) ERA and held:

> **'there is no rule that there must be a pool: an employer, if he has good reason for doing so, may consider a single employee for redundancy … there will be cases where it is reasonable to focus upon a single employee without developing a pool or even considering the development of a pool.'**

The question which the Tribunal ought to have considered was whether, given the nature of the job, it was reasonable for the Respondent not to consider developing a wider pool of employees.

64. In *R v British Coal Corporation [*1994] IRLR 72, the Divisional Court endorsed the test proposed by Hodgson J in *Gwent County Council ex parte Bryant* [1988] Crown Office Digest 19 HC, namely that fair consultation means (a) consultation when the proposals are still at a formative stage (b) adequate information on which to respond (c) adequate time in which to respond (d) conscientious consideration by an authority of the response to consultation.

65. The Tribunal must judge the question of redundancy selection objectively by asking whether the system and its application fell within the range of fairness and reason, regardless of whether the Tribunal would have chosen such a system or applied it in that way themselves; see *British Aerospace v Green* [1995] IRLR 433.

Polkey

66. Where a Tribunal finds that a dismissal was unfair, it must go on to consider the chance that the employment would have terminated in any event, had there been no unfairness (the *Polkey* issue).

67. In *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274 the EAT (Langstaff P presiding) noted that a *Polkey* reduction has the following features:

> **'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 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.'**

Conclusions

What was the sole or principal reason for the dismissal? Was it a potentially fair reason?

68. We are satisfied that the principal reason for the dismissal was redundancy. We accept Mr Rice's evidence that the Covid-19 pandemic had a detrimental effect on the sector as a whole, and on the Respondent business. We accept that

there was a diminution in the need for employees to do work of the kind carried out both at the Edmonton depot and across the business more generally.

Did the Respondent act reasonably in treating redundancy as a sufficient reason for dismissing the Claimant?

69. We have concluded that the Respondent's decision not to include the Claimant in a pool with Mr Roberts fell outside the band of reasonable responses. Any reasonable employer would have concluded that, in circumstances where the roles of site manager and nonferrous manager were to be combined, fairness required that an employee who was currently performing one of those roles, and had recently performed both of them together for a period of eight months, should be considered in a pool with the other potential candidate for the combined role.

70. Furthermore, the decision not to pool the Claimant with Mr Roberts was unreasonable because it was motivated, in part at least, by a desire to retain an employee (Mr Roberts) who was a personal friend of one of the directors.

Did the Respondent act reasonably in its approach to consultation

71. A reasonable employer will seek to give as much warning as possible of impending redundancies, so as to enable those affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

72. We have already found that, on 12 June 2020, Mr Curtis and Mr Pelosi reviewed the workforce and identified where reductions in the number of employees would be made. Their decision in relation to the Edmonton site was final: the Claimant was to be dismissed for redundancy.

73. There was no meaningful consultation with the Claimant. He had no opportunity to make representations that he should be put in a pool with other employees performing similar roles and with similar skills, whether within the Edmonton depot or across all the sites.

The failure to deal with the appeal

74. In our judgment, the failure to deal with the Claimant's appeal was also, in itself, outside the band of reasonable responses. The Respondent was aware of the appeal, acknowledged it but did not action it. The ill-health of one member of the management team cannot justify that failure.

Polkey

75. We went on to consider what would have happened, had a fair procedure been followed. We concluded that, in these circumstances, no reasonable employer would have placed the Claimant in a pool of one. In the circumstances, the only reasonable way to proceed was to put him in a pool with Mr Roberts and to assess them both against objective criteria.

76. On the evidence we have heard, we have concluded that, overall, they would have been fairly evenly matched. Both had experience in the industry; both had experience of managing a yard. The Claimant had greater length of service with the Respondent, had been working at the Edmonton site since its inception and

had been instrumental in developing it; he also had more knowledge and experience of nonferrous metals and the operation of the weighbridge system. On the other hand, Mr Roberts was a qualified crane operator, which the Claimant was not, and although we have rejected any suggestion that this was determinative, it was nonetheless an additional, and useful, qualification from the Respondent's point of view. Doing the best we can on the evidence available to us, we have concluded that there was a 50% chance that the Respondent would have fairly dismissed the Claimant.

77. If we are wrong about that, we have concluded that there was a good chance that, had the Claimant been consulted, he would have been able to persuade the Respondent that fairness demanded that he be included in a pool which was not confined to the Edmonton depot. We note that the letter of 20 July 2020, which presumably was sent to all employees, made no reference to the depots being treated as silos; it merely referred to their being 'included in a pool of employees with similar job roles from which a number of employees may be selected for redundancy'. All the evidence suggested that there was a great of exchange between the three sites. The Claimant himself had originally been based at another site and had been effectively on long-term loan to Edmonton. The skills across the sites were interchangeable. In circumstances where there was another nonferrous manager within the organisation, we have concluded that, in order to act fairly, the Respondent should have considered them together in a pool. The Respondent led no evidence as to the skills, experience and qualification of the nonferrous manager, despite the fact that they were on notice that the *Polkey* issue would be determined at this hearing. We think the safest conclusion is that there was no more than a 50% chance that the Respondent would have been able fairly to dismiss the Claimant, rather than the other nonferrous manager.

Remedy

78. There will be a remedy hearing to determine the amount of compensation to which the Claimant is entitled. In the light of the information the Claimant gave us about his evolving health situation, that is potentially a complex question, because there are a number of permutations as to what would have happened to the Claimant in the light of his health difficulties. This will involve further consideration of the *Polkey* issue. The Tribunal will need to consider issues including the following.

    78.1. If the Claimant had been retained, when would he have returned to work?

    78.2. What would have happened had the Claimant not been able to return to work, for health reasons?

    78.3. What effect, if any, would the changes to the Claimant's underlying health conditions in 2021 have had on his continuing employment? Would his employment have continued, and if so for how long?

    78.4. Did the Claimant fail unreasonably to mitigate his losses?

79. By no later than 28 days from the date on which this judgment is sent to the parties, they shall provide their dates to avoid for a one-day remedy hearing (by CVP) in the six months from March 2022 onwards, which is realistically the

earliest it might be listed. At the same time, they shall submit proposed directions, agreed if possible, for the remedy hearing. If the parties consider that one day is not sufficient, they must explain why when providing their dates to avoid. The hearing will then be listed, and orders made.

80. If the parties can resolve the question of compensation by agreement, they must notify the Tribunal as soon as possible.

Employment Judge Massarella
Date: 21 January 2022