EMPLOYMENT TRIBUNALS

Claimant: Mr P Mangan

Respondent: Leicester College

Heard at: Leicester

On: 6 February 2019

Before: Employment Judge Faulkner (sitting alone)

Representation

Claimant: In person
Respondent: Mr J Symons (Solicitor)

JUDGMENT

The Claimant was not unfairly dismissed. Accordingly, his complaint of unfair dismissal is not well-founded.

REASONS

Complaint

1. The Claimant complains of unfair dismissal only.

Issues

2. It was agreed with the parties that this hearing should deal with the question of liability only. The issues to be decided were therefore agreed to be:

2.1. Has the Respondent shown the reason for dismissal?

2.2. If so, was it a fair reason within section 98 Employment Rights Act 1996 ("ERA")? The Respondent relies on redundancy, alternatively some other substantial reason justifying dismissal of someone holding the position in which the Claimant was employed.

2.3. If there was a fair reason, was dismissal for that reason fair within section 98(4) ERA? In a redundancy case, as a minimum this involves looking at consultation, the selection pool, the choice and application of selection criteria if relevant, consideration of alternatives to dismissal and the process followed to effect dismissal, including the appeal process.

Procedural matters

3. Before hearing any evidence, I informed the parties that I had an historic professional connection with the Respondent, as it was a client of a law firm for whom I worked until January 2016. The Respondent confirmed that it is still a client of that firm, although that was previously unknown to me. That firm is in any event not involved in any way in this litigation.

4. My involvement with the Respondent was to advise on the employment issues associated with the merger of two colleges to form the Respondent. This was around the year 2000. I do not recall who it was who provided me with instructions – though I am confident it was not anyone involved in these proceedings – and I have no memory of continuing to work for the Respondent thereafter. I recall Rod Wood, who is the Respondent's HR director and was present at this Hearing. A colleague and I went to see him after the merger, and therefore in all likelihood in 2000 or 2001, to discuss further work that we might have opportunity to be involved in, but no further work materialised for me personally. I thus had no further dealings with the Respondent that I can recall.

5. I explained to the parties that I was happy to consider any objection to my hearing the case because of this historic connection and that if either party objected but I nevertheless decided to hear the case, their having objected would have no adverse consequence for them. I also made clear that if they did not object it would be difficult for them to raise any objection at a later stage. Both parties stated that they saw no reason why I should not proceed. I agreed, on the basis that my work for the Respondent was so long ago, I had no instructions from anyone involved in this case, I had no further dealings with the Respondent after my involvement with the merger, I now work for a different firm, and neither my previous or current firms are involved in the case. I was satisfied that objectively assessed there could be no suggestion or appearance that I could not deal with the matter in anything other than a completely impartial way.

6. I should also briefly deal with one other procedural matter. There is a document in the bundle at pages 90 to 92, being email exchanges between Mr Wood and Karen Lock, HR Manager, in which there is a redacted sentence. The Claimant asserted in cross-examination that this sentence indicated that the Respondent knew there was a reason he should not be dismissed. I asked several times whether he was making an application for disclosure of the unredacted document, but no such application was made. I therefore put the document out of account in reaching my decision.

Facts

7. Written statements were prepared for the Claimant, Rachel Hall (the Respondent's Director of Engineering) and Verity Hancock (the Respondent's Principal and CEO). The parties agreed a bundle of around 200 pages. It was agreed that, given the limited time available, I should read the statements but, apart from the Claim Form and Response, I would rely on the parties to take me to documents during the course of the oral evidence from the three witnesses. I made clear that it was incumbent on the parties to draw my attention to documents they regarded as important and not for me to look for what documents might be relevant to the issues. The parties also made closing submissions, in the Claimant's case by Ms Kirkman who assisted him throughout the proceedings. Based on all of this material, I make the following findings of fact. Page references are references to the bundle.

8. The Respondent is a further education college, offering a range of technical, vocational and higher education courses in various subjects. The Claimant was employed from 2003 as a Lecturer in the Motor Vehicle team, which was part of the Engineering Department. At the time of his dismissal, there were three other Lecturers (2.5 FTE) in the Motor Vehicle team, in addition to the Claimant plus a vacancy for a 0.4 FTE Lecturer. Two of the other Lecturers in the team, Stefan Burnside and Trevor Caulson, had specialist skills in "Body and Paint", whilst the 0.5 Lecturer, Graham Baty, is said by Ms Hall to have relevant qualifications and experience in Motorsport. Lee Saunders also provided some Motor Vehicle teaching, but unlike the others in the team, on a zero hours basis. In addition to the Lecturers, there were five Programme Leads in Motor Vehicle. I will return to a comparison of the roles of Lecturer and Programme Lead below. The Claimant had been acting up as a Programme Lead for academic year 2017-2018, in order to assist a group of students who had been recalled by the Respondent to complete their qualifications, as no existing Programme Lead was available to do the work. It is agreed that this was a temporary arrangement – see Ms Hall's email to her colleague Ibrar Raja, the Programme Area Manager for Motor Vehicle, at page 58.

9. At some point prior to the Claimant's dismissal the Respondent under took a skills audit, in which employees indicated what they had and could teach, what they could not teach and what they would like training in. The results for the Claimant and other Lecturers in the Engineering Department are at pages 38 to 46.23. The Claimant agreed that his audit indicated that he was not able to teach the majority of the courses listed for Body and Paint (as shown by the summary at pages 46.18 and 46.19).

10. The background to the decision to terminate the Claimant's employment was a challenging financial environment for the Respondent. This arose from reduced funding, leading to a budget deficit which the Respondent concluded needed to be addressed by cutting costs. Given that its employees were its most significant cost, this led to a decision to declare a need for redundancies. The Claimant accepts that the Respondent was in a difficult financial situation and needed to make cuts in spending, including by way of redundancies. There were in the end around thirty redundancies across the Respondent's workforce, mostly "Trainer Assessors" working in apprenticeships and commercial.

11. Mr Wood accordingly wrote to the trade union representing academic staff, UCU, on 13 April 2018, following meetings with union representatives on 10 and 13 April 2018. That letter is at pages 66 to 70. It announced the need for potential redundancies in a number of curriculum areas. So far as relevant to the Engineering Department, it read: "It is proposed to: // Reduce Lecturer staffing in Motor Vehicle

by 2.0 FTE. There are 3.5 FTE lecturers in Motor Vehicle; all will be at risk of redundancy, other than a 0.5 FTE Lecturer whose specialist skills in Motorsport are essential to the continued and expanding Motorsport provision. //The reason for the change is the need to increase efficiency and improve the contribution rate (income less direct staff and non-staff costs) in Engineering. Whilst there is no planned reduction in student numbers, class sizes need to be 18-20 which will impact on the number of student groups and, hence, staff teaching hours available". The remainder of the letter dealt with other curriculum areas and provided the information required by legislation relating to collective redundancies. It included the statement that the Respondent would seek volunteers in the first instance to achieve the required staff reduction.

12. Mrs. Hancock's uncontested evidence was that in relation to the proposed redundancies generally UCU raised questions and put forward some proposals, but nothing substantially challenging what the Respondent had proposed, whilst in relation to Engineering specifically questions were raised about who was going to be in the redundancy selection pool and the mix of skills that would be needed for the future, but there seems to have been no challenge to the need to make changes.

13. Ms Hall was responsible for formulating proposals for staffing efficiencies in Engineering, she says with input from Mr Raja. The proposals can be seen at pages 59 to 62. She did not propose any redundancies in Engineering generally (some staff in Engineering were teaching too many hours), but did propose redundancies in Motor Vehicle. In essence, the proposal was that Mr Baty would not be put at risk because of the ongoing need for Motorsport provision and also because the Respondent wanted to develop a Higher National Diploma in that particular specialism for academic year 2019–2020, something for which Mr Baty is said to have had the relevant qualification. It was decided that the 0.4 Lecturer vacancy would not be filled. The other three Lecturers in Motor Vehicle, including the Claimant, were to be placed at risk because, Ms Hall says, there was overcapacity in the team. It was also proposed that the number of Programme Leads would be reduced by 1.6 FTE, a reduction which could be achieved by not filling existing vacancies. This meant that none of the existing Programme Leads was placed at risk. Ms Hall at some point decided – it is not entirely clear to me whether this was at the outset or a little later – that because the Respondent intended to continue to offer Body and Paint courses, there would be two redundancy pools within Motor Vehicle. The first would consist of the two Body and Paint specialists, Mr Burnside and Mr Caulson, ensuring that one of the two would be retained; the second would be the Claimant, in a pool all by himself.

14. The Respondent had a Redundancy Policy – pages 31 to 37. The Claimant drew attention in particular to the following:

14.1. Section 4.1, which reads, "The College will make every effort to avoid or reduce the number of compulsory redundancies and will give consideration to alternative arrangements which may include: //Opportunities for redeploying and retraining existing staff … //Reduction in the number of short term temporary or agency staff in areas where redundancies have been identified… //Considering volunteers for part time working or job sharing; //Seeking volunteers for redundancy; //Consideration of 'bumping'… //The above measures must be considered in the context of the need for the College to operate efficiently and effectively".

14.2. Section 5.1, which reads, "Where measures taken do not achieve the necessary staff reductions the College may offer voluntary redundancy to some staff. The scope of any offer of voluntary redundancy, i.e. which staff are eligible to apply,

will have regard to the particular circumstances. In addition to staff directly affected by staffing reductions, volunteers may be sought from areas of work where staff possess transferable experience and skills to enable possible redeployment for those who are affected".

14.3. Section 6.1.1, which reads, "Where more than one post is affected a pool of employees who are at risk of redundancy will be identified. Which employees are included within a pool will depend upon the type of work affected and whether any roles are interchangeable or overlap".

15. The Claimant says that there was no group consultation about the proposed redundancies. The first consultation with affected staff in Engineering took place however on 25 April 2018, at a group meeting led by Ms Hall. She was on leave the previous week when other affected teams were informed of redundancy proposals affecting them; it was decided to delay the announcement to Engineering so that she could deliver it. The proposals for Engineering were outlined as I have summarised them above. Ms Hall made clear that she would make herself available for individual consultation with those affected.

16. The meeting was followed by a letter to the Claimant of the same date. This is at pages 71 to 73 and attached a detailed proposal for Engineering (pages 74 to 76) in addition to a "Frequently Asked Questions" document (pages 73 to 73.4). In outline, the letter informed the Claimant that he was at risk of redundancy and announced a one-month consultation period which would include discussion of ways of avoiding dismissals. The letter outlined the consultation process and said that Ms Hall would be in touch to arrange an individual consultation meeting. The proposal document outlined what has been described above, emphasising in relation to Lecturers that the Respondent had planned for 1,359 Lecturer hours in Motor Vehicle for the following year but had a capacity for 2,996. The document did not say that Mr Burnside and Mr Caulson would be in one pool and the Claimant in another; rather it said, "Should there be a need for a redundancy selection process, the three Lecturers who are at risk of redundancy will be asked to complete an assessment form providing information against selection criteria."

17. On 27 April 2018, the Claimant emailed Karen Lock requesting a meeting – see page 78. This was held on 30 April 2018. The notes are at pages 79 to 81. Ms Lock explained that Ms Hall was better placed to answer detailed questions, but went ahead with the meeting in any event. The Claimant expressed the view that it was obvious that his job was going to go because he did not believe that Ms Hall could let two Body and Paint Lecturers leave and keep him. The Claimant questioned why he was being considered in a pool for Lecturers as opposed to Programme Leads, given that he was acting up. Ms Lock explained that the Claimant was due to revert to a Lecturer post on 1 August 2018 and that the redundancy proposals related to the staffing structure for the following academic year. The second issue raised by the Claimant was why Mr Baty had not been placed at risk. Ms Lock's response was that the Claimant had not taught Motorsport in recent years. She agreed to discuss these matters with Ms Hall and also to enquire as to whether there was a vacancy to teach Aeronautical Engineering which the Claimant expressed interest in.

18. On 9 May 2018 the Claimant attended another meeting with Ms Lock, this time with Ms Hall also present. Ms Hall's script for that meeting is at pages 86 and 87; the notes of the meeting are at pages 88 and 89. The Claimant was informed that what he had suggested at the previous meeting was correct. If the announced proposal was implemented, the 1.0 FTE Lecturer post remaining would need to be filled by someone also able to teach Body and Paint courses. He was not therefore in a

selection pool with Mr Burnside and Mr Caulson, but in a pool of his own. As a result, he had been provisionally selected for redundancy. Ms Hall said that Mr Baty was not at risk as he was qualified to teach a higher education course which the Respondent was keen to continue. As for Programme Leads, Ms Hall said that the necessary savings would be achieved by not replacing a leaver. She also confirmed that no hours would be offered to Mr Saunders for the next year. The Claimant again raised the Aeronautical Engineering Lecturer position. Ms Hall's response was that this required an HND qualification which the Claimant did not have.

19. There were a number of subsequent email enquiries from the Claimant – see pages 93, 94, 103 and 104. The responses from Ms Hall are at pages 105 to 108. Broadly, the exchanges covered the positions of Mr Saunders and Mr Baty, how the Claimant's selection pool had been identified, the impact of the Claimant acting up as a Programme Lead, and the position in relation to volunteers.

20. A further meeting between the Claimant, Ms Lock and Ms Hall took place on 30 May 2018. The notes are at pages 126 to 127. The Claimant acknowledged that he understood the selection pool and said that all his questions had been answered and he did not have any outstanding issues. Ms Lock explained that as no alternative or changes to the Respondent's proposals had been suggested, the Claimant was formally selected for redundancy. Ms Lock also informed the Claimant that a meeting would be arranged to consider the termination of his employment on redundancy grounds, at which meeting he would have the opportunity to make such representations as he wished. The Claimant was also given a redeployment list.

21. The Claimant was accordingly invited to a further meeting by a letter dated 5 June 2018 (pages 128 to 129) which summarised the consultation process to date and gave details of the meeting at which consideration would be given to termination of the Claimant's employment. It also referred to the redeployment process and the payments the Claimant would receive in the event of termination. The meeting took place on 12 June 2018 and was chaired by Tina Thorpe, Vice Principal; Ms Hall was also present. The brief notes of the meeting are at page 139.1. Ms Hall again outlined the consultation process and what had led to the Claimant's selection for redundancy. The Claimant was given an opportunity to make representations. He referred to his many years' experience and his qualifications and said that he "thought this was a disgrace". Ms Thorpe informed the Claimant that as he had not provided any new information requiring a review of the situation, she had to confirm the decision to terminate his employment.

22. This was confirmed in a letter dated 12 June 2018 (see pages 140 to 141) sent by Ms Thorpe. It summarised the meeting, issued notice of termination of the Claimant's employment on the grounds of redundancy and set out the payments the Claimant was entitled to. It also informed him that during his notice period he had the opportunity to be considered for suitable alternative roles with the Respondent.

23. The Claimant appealed in very brief terms – page 142 – referring to earlier correspondence with Mr Wood. The appeal hearing took place on 5 July 2018, chaired by Mrs Hancock, with Mr Wood also present. The Claimant says Mr Wood should not have been present as he had been involved in the redundancy process to that point. Ms Hall was also in attendance. The notes of the hearing are at pages 150 to 160. Mrs Hancock informed the Claimant that the appeal would consider the whole case again. As to Mr Wood's involvement, Mrs Hancock said to the Claimant that whilst he was aware of the case, he had not been involved in the decision to dismiss.

24. In her statement, Mrs Hancock says that two key issues emerged for her to consider. The first was whether the decision not to place Programme Leads and Lecturers in the same selection pool was fair. The second was whether the Claimant's skills, qualifications, background and experience had properly been taken into account during the redundancy process. The Claimant also referred Mrs Hancock to what he described as an off the record conversation with Mr Raja, in which the Claimant said he had been told he would be utilised as a Programme Lead for the next academic year as well, in other words he would not be reverting to his position as a Lecturer. It was agreed that this would be investigated further. It was also agreed to explore the possibility of the Claimant being redeployed to teach maths. When Mr. Wood enquired of the relevant Programme Area Manager however, he was informed that there were no vacancies for which the Claimant could be considered – page 161.

25. Although Mr Wood assisted with a draft, there is no dispute that the appeal decision was that of Mrs Hancock and Mr Wood jointly – see pages 174 to 179 – with Mrs Hancock taking the lead. It is also clear that had there been any disagreement between Mrs Hancock and Mr Wood, Mrs Hancock's views would have prevailed. On the question of the redundancy pool, Mrs Hancock was satisfied that whilst there is overlap between the role of Lecturer and Programme Lead, in that both teach, Programme Leads have crucial additional responsibilities coordinating courses and programmes. In her view the differences between the two roles were emphasized by the separate pay structures and the fact that the Respondent had adopted a similar approach, separating Lecturers and Programme Leads, in redundancy exercises in the past.

26. The appeal decision letter dated 10 July 2018 was sent by Mr Wood – page 175 – confirming that the decision to dismiss the Claimant had been upheld. The "decision statement" enclosed with the letter outlined the consultation process; dealt with the question of why Programme Leads were not in a redundancy pool with Lecturers – see below; addressed the question of volunteers for redundancy; dealt with the position of Mr Baty and why the Claimant was in a selection pool on his own; and attached a response from Mr Raja to the suggestion that he had informed the Claimant he would be carrying out Programme Lead duties for the following year.

27. The Claimant challenges the fairness of his dismissal on a number of grounds, most of which were raised both during the redundancy consultation process and on appeal. At the heart of his case is his view that Lecturers and Programme Leads in Motor Vehicle should have been grouped in a single pool for redundancy selection. As already noted, the Respondent says that because the restructure was based on its needs for the next academic year, the Claimant was considered in his substantive role of Lecturer, which he would have reverted to had he remained employed, and not in the acting up role of Programme Lead.

28. As again already noted, the Respondent also says that the two roles are not interchangeable – both teach, but Programme Leads coordinate and oversee groups of courses and programmes which requires different skills to those required of Lecturers. Whilst in some colleges all lecturers carry programme leadership responsibilities as well, Mrs Hancock says that this was changed at the Respondent, at her instigation, about five years ago. By contrast the Claimant says that there is an 85% overlap between the roles because of the importance of teaching to both. He also says he has higher qualifications and better experience than most Programme Leads, some of whom he says have never worked in a garage. As this is such an important dispute between the parties, it is necessary for me to compare the roles in more detail.

29. It is agreed that Programme Leads have between 684 and 756 contact hours per year, depending on their caseload. They thus have between 18.5 and 20.5 hours of contact per week, compared to a Lecturer's 23 hours of contact per week. The remainder of a Programme Lead's time is given to leadership responsibilities as well as normal preparation and marking. In her oral evidence, Ms Hall compared the job descriptions for Lecturers at pages 49 to 50 with that for Programme Leads at pages 53 to 54 in some detail. Both report to Programme Area Managers, but Ms Hall says that there are a number of responsibilities of Programme Leads which are not shared by Lecturers. Time did not permit examination and comparison of every line of the two job descriptions, but Ms Hall highlighted the following:

29.1. Ensuring that all students are enrolled and follow a designated programme of study is something all academic staff are involved with, but it is led by Programme Leads.

29.2. Regularly monitoring course data seems also to be a responsibility of Programme Leads and not Lecturers, as does appraising courses and preparing course reviews and working with the Programme Area Manager to plan programmes so as to maximize resources and funding. Ms Hall rejected the Claimant's assertion that appraisal of courses and preparing course reviews was equivalent to the requirement for a Lecturer to ensure the achievement and success of the units they deliver; Ms Hall emphasised the need for a Programme Lead to engage in course appraisal.

29.3. Ms Hall also rejected the Claimant's assertion that a Programme Lead's responsibility for developing, planning and implementing systems and processes that supports the management of learning was equivalent to a Lecturer's responsibility to assist with student interviews and course enrolments, open events, parents and carers evenings etc. Whilst she accepts that all staff develop schemes of work, Programme Leads are required to ensure that they are in place and effective, in other words they have a coordination responsibility.

29.4. Similarly, Ms Hall rejected the Claimant's assertion that a Programme Lead's dissemination of updated information and course regulations/specifications is equivalent to a Lecturer's responsibility to maintain knowledge of new developments in the curriculum, courses and teaching practices.

29.5. She also said that in Engineering, only Programme Leads write references for UCAS applications.

29.6. There is also a clear distinction between a Lecturer's responsibility for taking a student through the Respondent's disciplinary procedure, which is in effect limited to reporting an issue, and the responsibility of a Programme Lead who will actually take the student through stage one of the process.

29.7. It is accepted that Lecturers and Programme Leads have separate pay scales, with a difference of £3,500 at the top end.

30. The Respondent says that a permanent appointment to any Programme Lead role would be made following a recruitment process – see Ms Hall's statement at paragraph 11. One Programme Lead in Motor Vehicle, Lewis Kissoon, transferred to another role with the Respondent in the current academic year (2018-2019) and has not been replaced.

31. Another related way in which the Claimant challenges the fairness of his dismissal concerns why the Motor Vehicle team was left with a higher ratio of Programme Leads to Lecturers than other departments. Ms Hall says that some of the staff in question hold 0.5 FTE Programme Lead appointments; furthermore, some specialist areas, such as Body and Paint, need a specific Programme Lead of their own. Ms Hall rejected in her evidence the idea of reducing the number of Programme Leads in Motor Vehicle, so that fewer Programme Leads would have been doing more Programme Lead work, thus enabling the Respondent to retain more Lecturers. She said this would have placed a lot of pressure on the team. She described in unchallenged evidence a situation in which Motor Vehicle required lots of improvement when she arrived in Engineering in 2017 and said that significant improvement had been achieved in learner progress which she did not want to disturb. Mrs Hancock said in evidence that she accepted Ms Hall's view that she had the right mix of skills in respect of leadership and administration for the next academic year.

32. As to the alleged statement by Mr Raja that the Claimant would be allocated to Programme Lead responsibilities for a further year, Mrs Hancock says that she could not draw firm conclusions in the appeal decision, but did not think it likely any such commitment had been made, given that Mr Raja had assisted Ms Hall in formulating the Motor Vehicle restructuring proposal. In any case she did not consider it germane to her decision. The Claimant emphasised in his evidence the unreliability, as he sees it, of Mr Raja, drawing my attention to the fact that Mr Raja did not attend the Tribunal to give evidence; Ms Hall says that this was because she was attending to give evidence, the redundancies being her proposal.

33. Notwithstanding his comments to Ms Lock at the meeting on 30 April 2018, the Claimant also seeks to challenge the fairness of his dismissal on the basis that he should not have been separated for selection purposes from the two lecturers who specialized in Body and Paint teaching. He said in evidence that he had taught Body and Paint in theory and in a workshop, to an entry level group. He did accept however that he could not teach most of the Body and Paint units and confirmed that his staple teaching was focussed on the units shown in his skills audit at page 40, namely work concerned with electrical matters, maintenance, chassis units and components, transmission and driveline units and components, and the like. The Body and Paint unit he taught was thus one of a total of between ten and twelve that he taught each year; he accepted that Mr Burnside and Mr Caulson were the experts in this area and said that it would make sense for them to have been pooled together in order to retain that specialism. Mrs Hancock says in her statement at paragraph 20 that she was satisfied with the decision to put Messrs Burnside and Caulson in a separate pool, resulting in the Claimant being in a pool of his own, because of the ongoing requirement for the Body and Paint work. One of Messrs Burnside and Caulson was made redundant.

34. Another challenge to the fairness of the Claimant's dismissal concerns Mr Baty. Mrs Hancock was similarly satisfied with the decision to exclude Mr Baty from the redundancy process because of the ongoing need for specialist Motorsport provision and Mr Baty's qualification, which the Claimant did not share, to teach at higher education level, something the Respondent planned to offer in academic year 2019-2020. The Claimant said in evidence that he had taught level 2 Motorsport classes and that whilst he was not qualified to teach a higher education course, he could have studied for such a qualification whilst teaching. Mr Baty taught Motorsport in academic year 2017-2018, and continues to do so in 2018-2019, whilst developing the degree offering.

35. The Claimant also questions why the Respondent did not call for volunteers for redundancy generally, outside of those identified as being at risk, particularly given the reference to calls for volunteers in its Redundancy Policy. This was something the Claimant raised at his meeting with Ms Hall on 9 May 2018. Ms Hall says in her statement at paragraph 27, "The reason we decided not to offer voluntary redundancy more widely was that we did not want to disrupt the PL structure as they are all performing well and it was important to retain key skills to ensure that following the restructure there remained a strong PL team". Specifically, the Claimant refers to Craig Visram, a Programme Lead in Motor Vehicle whose enquiry about voluntary redundancy the Respondent did not pursue. This was something the Claimant enquired about prior to his appeal hearing. Mrs Hancock says in her statement at paragraph 7 that having undertaken enquiries following the appeal hearing, it became clear that Mr Visram's enquiry was no more than a question as to what would be the position should he apply for voluntary redundancy. He was informed by Ms Lock that voluntary redundancy calculations are only provided to staff actually at risk. Mrs Hancock's summary is borne out by the e-mail exchanges between Ms Lock and Mr Visram at page 70.1. In any event Ms Hall had made clear in the appeal process that any application would not have been agreed because it was essential to retain Mr Visram's skills as someone qualified to teach higher education. Mrs Hancock also says in her statement at paragraph 19 that she was satisfied with the decision not to offer voluntary redundancy to Programme Leads because Ms Hall considered them to be a settled team and redundancies would have the potential to cause disruption for students as well as risking losing Programme Leads with specialist skills and qualifications.

36. Another challenge raised by the Claimant is the position of Mr Saunders. Ms Hall agrees that in the original plan for the academic year 2018 to 2019, the hours allocated for Mr Saunders were included, notwithstanding her assurance to the Claimant during the redundancy consultation – referred to above – that Mr. Saunders was not going to be offered any such work; she says that this was an oversight. She says that the hours were removed from the plan once the point was raised during the redundancy consultation, but they were not corrected on timetables until July when Mr Saunders' hours were allocated to other staff. Ms Hall says, and the Claimant could not dispute, that Mr Saunders was informed that there would be no work for him for academic year 2018 to 2019. She says in her statement that he, "decided not to take a redundancy package and remain on the books until such time that this may change". In her oral evidence, she slightly adjusted this statement and said that Mr Saunders was offered the opportunity to be put in the redundancy pool and it was this that he declined. At page 187 is what appears to have been Mr Saunders' final timetable for 2018-2019; it is blank. The Claimant accepted that he could not dispute that Mr Saunders did not carry out any teaching for the Respondent until late in calendar year 2018 in the circumstances indicated below.

37. The Claimant says that he would have been happy to be placed in Mr Saunders position, though this was not something he put to the Respondent before this Hearing. His case was that he would have welcomed the opportunity to see how things went for a few months, in case new work opportunities arose, being paid his redundancy money if they did not. The Respondent says that this was not what Mr Saunders was offered. It says he was simply offered the option to be in a redundancy pool; he preferred to continue on a zero-hours arrangement. As result of two serious staff illnesses during the Autumn 2018 term, the Respondent had a vacancy which Mr Saunders applied for in December 2018, being appointed to a permanent Lecturer role at 0.5 FTE.

38. The final material point raised by the Claimant is that he says he had a poor relationship with Ms Hall, who was new to her role in 2017, intimating that this was influential in his dismissal. Ms Hall's evidence was that it is part of her role to manage people which will not always be popular, though she pointed out that she had asked the Claimant the year before to act up temporarily as a Programme Lead.

Law

39. Section 98 ERA says:

"*(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) [which includes that the employee was redundant] or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(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".

As far as relevant to this case, section 139(1) ERA says, "*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 [the employer's] business – (i) for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish*".

40. As Section 98(1) ERA puts it, it is for the employer to show the reason, or if more than one, the principal reason for the dismissal. The question to be considered is what reason the Respondent relied upon. The case of **Abernethy v Mott, Hay and Anderson [1974] IRLR 2013** is long-established authority to the effect that the reason for dismissal is "a set of facts known to the employer or as it may be of beliefs held by him, which cause him to dismiss the employee". That case also made clear that the reason given by an employer does not necessarily constitute the real reason for dismissal. The reason or principal reason is to be determined by assessing the facts and beliefs which operated on the minds of the decision-makers, leading them to act as they did in effecting the Claimant's dismissal. If and when the employer shows the reason for dismissal as above, it must then be established by the employer that it falls within one of the fair categories of dismissal set out by section 98(2) ERA (here the Respondent relies on redundancy, alternatively "some other substantial reason").

41. If the Respondent shows the reason and establishes that it was a reason

falling within section 98, the Tribunal must then go on to consider section 98(4) ERA in order to determine whether the dismissal was fair. The burden is no longer on the Respondent at this point. Rather, having regard to the reason or principal reason for dismissal, whether the dismissal is fair or unfair requires an overall assessment by the Tribunal, and depends on whether in the circumstances, including the size and administrative resources of the business, the Respondent acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the Claimant. This is something which is to be determined in accordance with equity and the substantial merits of the case. This overall assessment is in part concerned with the steps taken by the Respondent to effect dismissal and certainly requires an assessment of the reasonableness of the decision to dismiss. In all respects, the question is whether what the employer did was within the band of reasonable responses of a reasonable employer.

42. In a redundancy situation, that will entail a number of issues being considered. The decisions of the House of Lords in **Polkey v AE Dayton Services Ltd [1988] ICR 142** and the Employment Appeal Tribunal in **Williams v Compair Maxam Ltd [1982] IRLR 83** identified some of the key issues as objective selection criteria fairly applied; whether employees were warned and consulted; whether the trade union was consulted; and whether any alternative work was available. The EAT in **Williams** confirmed that in relation to each issue the focus should not be what the Employment Tribunal would have done but what the Respondent did, asking whether this was within the range of conduct a reasonable employer could have adopted. An assessment of fairness may also involve looking at whether the Respondent followed its own redundancy procedure. It is also well known, since **Polkey**, that in most cases it is not open to a Tribunal to say that failing to act reasonably in a particular respect would have made no difference to whether the Claimant would have been dismissed; that will normally go to the question of remedy only.

43. In a little more detail:

43.1. First, in relation to the pool for selection, an employer has considerable flexibility. The question is whether the employer applied its mind to it and determined a pool that was reasonable in the circumstances. As the EAT said in **Taymech Limited v Ryan [1994] EAT/663/94**, the question of how the pool should be defined is primarily a matter for the employer to determine. It added, "It would be difficult for the employee to challenge it where the employer has genuinely applied his mind to the problem". Of course, interchangeability of roles may be relevant in this regard, as would the fact that other employees not placed in the pool were doing similar work to the dismissed employee.

43.2. Secondly, where a union is recognised as in this case, both individual and collective consultation will be relevant to fairness. It is well-established that consultation in both respects means the employer being open to hear the views of the union and affected employee and giving them time to make their views known before final decisions are taken. In particular, there should be opportunity for such consultation regarding the employee's selection for redundancy (before it is confirmed) and ways in which redundancy might be avoided such as by redeployment, as well as an opportunity to address other matters which may be of concern to the employee.

43.3. Thirdly, an employer should give consideration to alternatives to dismissal. The search for alternative employment in particular should be such as is

reasonable in all the circumstances and should continue until the termination of the employee's employment. An employer is not generally obliged to consider bumping, in other words the dismissal of an employee not at risk in order to retain one who is, though it may be a requirement of fairness to do so in some circumstances, in which case relevant considerations might include whether there is a vacancy, the similarity of the jobs involved, the qualifications of the employee who would otherwise be dismissed, and their length of service

43.4. Finally, the Tribunal should consider the process followed by the employer generally, including the appeal. **West Midlands Co-Operative Society Ltd v Tipton [1986] ICR 192** is well-known authority for the principle that unfairness in connection with an appeal against dismissal can of itself render that dismissal unfair. An appeal can also "cure" any unfairness at the dismissal stage.

44. In summary, what is important is to answer the question posed by section 98(4), as summarised above, and in doing so to make an overall assessment of the facts as I have found them to be.

Analysis

45. The first question I have to consider is the reason for the Claimant's dismissal. It is clear that the factual context for his dismissal was the Respondent's need to make financial savings – the Claimant does not dispute that the Respondent faced a challenging financial situation and therefore needed to reduce costs. Accordingly, although the Claimant's starting position was that he did not accept that the Respondent dismissed him for the reason of redundancy, he did during the course of his evidence accept that he was dismissed because of the restructuring of the Motor Vehicle team.

46. The Claimant might well say, and indeed in a number of respects very much does, that someone else should have been dismissed instead of him, something I will come to, but I heard nothing to suggest that there was any other context or reason for his dismissal apart from the Respondent's financial situation. More specifically, focusing on what was in the mind of the relevant decision-makers, I am satisfied having heard Ms Hall – and indeed Mrs Hancock – that their decisions were indeed made on the basis of the need to restructure the Motor Vehicle team. The only suggestions to the contrary were the differences between Ms Hall and the Claimant, but as Ms Hall contended, she had been willing to grant the Claimant a temporary promotion within the same academic year. What Ms Hall was undoubtedly doing therefore in restructuring the Motor Vehicle team was seeking to arrange things to address her part in the Respondent's broader cost-saving programme. I also note that neither the Claimant, nor as far as I know the trade union, contended that Mr Wood's letter to UCU set out anything other than a genuine explanation of the circumstances both for the Respondent generally and for the Motor Vehicle team specifically. I also take account of the fact that several other employees were dismissed at or around the same time for the same reasons, including one of the Claimant's Motor Vehicle colleagues. For all of these reasons, I am satisfied that the restructuring of that team was beyond question the factual reason for the Claimant's dismissal.

47. The next question is whether that factual reason fell within one of the fair categories of dismissal within section 98 ERA. Entirely understandably, the Respondent principally relies on redundancy. As noted, section 139 ERA says that there will be a redundancy situation where an employer has a reduced need for

employees to carry out work of a particular kind. This sometimes arises when an employer can do things better with fewer employees, perhaps because of improved technology. The definition of redundancy will also be satisfied when an employer reluctantly concludes, as was the case here, that it will have to do with fewer employees to make ends meet and makes arrangements accordingly. In this case, where the number of Lecturers in the Motor Vehicle team reduced from three to one, the correct analysis is either that the Respondent had over-capacity in the team or it concluded that it would have to make do with fewer employees meaning that the remaining Lecturer and the Programme Leads were thereby left to pick up the work that had previously been done by their dismissed colleagues. Either way, in my judgment this falls squarely within the definition of redundancy. The Respondent has established a fair reason for dismissal. It is not necessary for me to go on to consider whether there was also some other substantial reason for dismissal, though in the circumstances I have described, had it been necessary to consider the matter, it seems clear that this would have been made out.

48. The heart of the Claimant's case therefore is, as he seemed to recognise, whether his dismissal for redundancy was fair in accordance with section 98(4) ERA. As I have identified, he contends that in a number of respects it was not. I will consider those matters in turn, and in addition the general matters which the case law firmly indicates are relevant to any assessment of fairness in a redundancy situation. Whilst the burden of proof is neutral, the correct approach is to scrutinise what the Respondent did in each respect and answer the question of whether it fell within the range of reasonable responses. I remind myself that I am not to substitute my view for that of the Respondent in doing so.

49. The main area of challenge concerns the selection pool, which is therefore the main focus of my analysis. I am to afford the Respondent a fair degree of latitude in this regard, noting that the crucial question is whether the Respondent genuinely applied its mind to the identification of the pool, though it does seem to me that where an employer identifies a pool consisting solely of the employee who is dismissed, a tribunal is entitled to a subject that decision to somewhat greater scrutiny than might otherwise be the case. It is clearly relevant for me to consider therefore the interchangeability of the Claimant's skills, abilities and experience with those of his colleagues, though what I must principally be concerned with is what he and his colleagues were actually employed to do – and doing – at the time the selection pool was identified.

50. I start by noting that the pool was discussed both with UCU and with the Claimant himself, which means that during both the dismissal and appeal processes, the Respondent's decision was subjected to proper scrutiny. That is an important element of fairness. The Respondent gave explanations to the Claimant as to why it rejected his various challenges to the identification of the pool. What I must decide is whether its explanations demonstrate that it acted reasonably in the circumstances.

51. The principal issue in this regard is whether Lecturers and Programme Leads should have been placed in one pool and selections made accordingly. I note again that it is not for me to substitute my view for that of the Respondent. Taking that approach, I am satisfied that the Respondent clearly applied its mind, and genuinely so, to this question and reached a reasonable conclusion that the two groups of employees should be considered separately. I note in passing that it did not thereby avoid a reduction in the number of Programme Leads altogether, in that one vacancy for a Programme Lead was not filled and another who left the Motor Vehicle team some time later was not replaced.

52. I am satisfied that the two roles can be properly distinguished for a number of reasons, none of which are determinative in isolation but which taken collectively establish that it was fair to treat them as such. The first is that the two roles have different pay scales. Secondly, the Respondent has differentiated the roles in redundancy processes in the past, seemingly without material challenge from UCU. Thirdly, there are separate job descriptions. It is this last point which I need to analyse in a little more detail, not least because in some colleges the two roles are virtually synonymous.

53. It is clear that Programme Leads carry out less teaching than Lecturers, although I accept that teaching remains the most significant aspect of both roles in terms of the time devoted to it. There is thus a substantial similarity between them. Nevertheless, I find Ms Hall's explanation of the differences, and the importance of those differences, between the two roles considerably more convincing than the Claimant's attempts to equate the roles in every material respect. Taking in turn the various elements of the roles covered during oral evidence:

53.1. It is clear that Programme Leads had oversight of student enrolment; Lecturers are involved in enrolment as well, but the responsibility on Programme Leads was evidently greater.

53.2. Programme Leads carry the responsibility for appraising and reviewing a group of courses. It is plain in my judgment that this is not the same as a Lecturer's responsibility to ensure the achievement and success of the units he delivers. The former entails oversight of a number of different courses; the latter is about ensuring that one properly teaches the courses to which one is assigned.

53.3. Similarly, developing, planning and implementing systems and processes that support the management of learning is plainly qualitatively different to a Lecturer's responsibility to assist with student interviews and course enrolments, open events, and parents' and carers' evenings. One is a managerial responsibility, the other a participative responsibility.

53.4. Dissemination of updated information and course regulations/specifications is also plainly not equivalent to a Lecturer's responsibility to maintain knowledge of new developments in the curriculum, courses and teaching practices. The former is a responsibility for the development of a group of staff, whilst the latter a responsibility for one's own professional expertise and personal development.

53.5. There is also a difference between the roles in respect of the level of involvement in student discipline.

54. All of this leads to the conclusion that whilst teaching is the foremost duty of both groups of employees in terms of time spent, the differences in responsibilities and pay and the fact of past practice are more than sufficient to establish that the Respondent acted reasonably in applying its mind to the situation before it and deciding to separate out Lecturers and Programme Leads in its redundancy proposals and process. In turn, this makes the question about the ratio of the two roles left within Motor Vehicle no more than a side issue, though the Respondent clearly applied its mind to that too, particularly at the appeal stage, fairly concluding that there was a positive case in the best interests of students for not departing from its decision to keep the two roles separate in the redundancy considerations. Similarly, the Claimant's assertion that he possessed greater experience and qualifications than some Programme Leads is also very much subsidiary to the core question of what the two roles entailed in practice. The evidence of the discussions

between the parties shows that the Respondent plainly and genuinely applied its mind to the question of which role the Claimant should be considered to be occupying for the purposes of redundancy selection and reasonably concluded that he should not be considered as a Programme Lead given that this was for him a temporary position. Being fully entitled to base its decisions on its requirements for the following academic year so as to enable it to function as best as it could with a reduced staff complement, that was plainly within the range of reasonable responses of a reasonable employer.

55. More briefly, I am satisfied that the Respondent also genuinely applied its mind to the separation of the Lecturers in Body and Paint into one pool and the Claimant into another. It is correct that in both Mr Wood's letter to UCU and in Ms Hall's proposal document for restructuring within Motor Vehicle, it was simply stated that the number of Lecturers needed to be reduced by two, without reference to there being two separate pools. The Claimant challenged the Respondent's decision to manage the redundancy process in this way particularly on appeal, but it is plain from his skills audit, which indicated that by his own assessment he could not teach most of the necessary units in Body and Paint, and from the fact that in practice he had taught only one such unit, that it was perfectly reasonable to establish two pools in this way. The Claimant himself, both during the redundancy process – at least in its early stages – and in his evidence before the Tribunal recognised that this was the case.

56. There is then the question of the Respondent insulating Mr Baty from the risk of redundancy altogether. Although the Claimant had taught some Motorsport classes in the past, this was Mr Baty's specialist and current focus. The Respondent applied its mind to the need to retain that specialism, in the interests of existing students, and to Mr Baty's mandate to develop higher education provision in this area and rationally concluded that it would not be appropriate to lose his expertise. The Claimant might well have been willing to study for the relevant qualifications, but that plainly would not have met the Respondent's immediate needs for the next academic year and indeed would have involved the Respondent being willing to risk losing Mr Baty in the hope that the Claimant would prove able to provide the relevant teaching and develop higher education provision. A reasonable employer could reasonably decide that it was not prepared to take that risk.

57. Finally on the question of the selection pool, though only tangentially related to it, it is correct to say that the documentation which existed during the redundancy process regarding Mr Saunders' future teaching opportunities was misleading. Ultimately however it is agreed that he did not carry out any teaching until the unforeseen circumstances of serious staff illness led to his taking up a part-time post.

58. The question of the identification of the redundancy pool was plainly at the heart of the Claimant's contention that his dismissal was unfair. As I have made clear, in my judgment the Respondent acted in all respects within the range of reasonable responses. The Claimant, myself or indeed another employer might have decided to arrange things differently, in a way that left the Claimant being retained in employment, but that is nothing to the point. The Respondent did not act unreasonably in this regard; as deserving of detailed scrutiny as it is, for the reasons I have given it was reasonably entitled to place the Claimant in a selection pool of one.

59. Although not a mainstay of the Claimant's case and albeit more briefly, it is incumbent on me to consider (particularly given that he was not legally represented) the question of whether the Respondent fairly consulted with the Claimant, both directly on an individual basis and through the academic trade union. As already

noted, this means considering whether the Respondent was open to hear challenges to its proposals and whether it gave time for discussion of any such challenges, particularly on the two key questions of the basis for the Claimant's selection for redundancy and ways to avoid dismissal.

60. I am satisfied that it did. There were two meetings with the trade union before Mr Wood sent his letter. There then followed four meetings with the Claimant between 30 April and 12 June 2018, followed by the Claimant's appeal which was a full reconsideration of the case. More than adequate information was provided to the Claimant in writing after the initial group meeting on 25 April 2018, in relation to which I should add for completeness that I see no unfairness in the short delay to allow Ms Hall to conduct that meeting – it was quite proper that she did, and there was still scope for an almost seven-week consultation. There were also the several emails sent by the Claimant between the meetings on 30 April and 30 May 2018, in which he raised a number of questions particularly about his likely selection for redundancy. These questions were considered and answered in detail; the answers may not have been to the Claimant's liking and the Respondent did not change its position, but it is clear that it gave rational and considered answers to the points the Claimant had raised.

61. The Claimant himself accepted in evidence that he was able to put forward points for consideration by the Respondent. That was a sensible concession in my view, given the above analysis of what actually took place. The one shortcoming in the consultation process is that it does seem that at the meeting with Ms Thorpe on 12 June 2018, which was of course the critical meeting at which the Claimant had his final say and at which his redundancy dismissal was confirmed, there seems to have been little engagement with the Claimant's arguments. Rather, it seems from the brief minutes of the meeting that Ms Thorpe proceeded to dismissal on the basis that the Claimant had raised nothing which had not already been considered and responded to. It was arguably unfair for the person who decided to dismiss the Claimant not to materially engage, and be seen to materially engage, with his case as to why he should be retained. I am satisfied however that any unfairness to the Claimant at that point was cured by the full reconsideration of his arguments on appeal. As to the appeal, the Claimant accepted that Mrs Hancock approached the matter impartially. Whilst he objected to Mr Wood's involvement, I am more than satisfied that the appeal was conducted fairly, given that Mrs Hancock plainly took the lead in the conduct of the hearing and in the decision-making process and given that it would have been very difficult to say the least for Mr Wood to be entirely isolated from the earlier process considering his role as HR director.

62. In addition to considering the consultation process and the important issue of the selection pool, the case law requires me to consider the other fundamental aspect of fairness in a redundancy situation, namely consideration of alternatives to dismissal. As far as redeployment was concerned, the Respondent plainly gave consideration to whether the Claimant could be assigned to work in Maths or in Aeronautical Engineering. As to the former, there was no vacancy and in respect of the latter the Claimant was not qualified, a point he contested on appeal but did not pursue before the Tribunal. Indeed, he confirmed in his evidence that there were no posts he believed were available that he could have been and was not considered for.

63. He did raise the further alternative to dismissal of remaining employed to see if circumstances changed and then being paid his redundancy payment a few months into the new academic year should things have stayed the same. This is not something he raised at the time however, and it was not in fact what was offered to Mr Saunders. Moreover, it would not have given the Respondent the certainty it

reasonably needed in restructuring (and reducing its costs accordingly) for the start of the new academic year. I am satisfied that the Respondent reasonably considered alternatives to dismissal and reasonably concluded that there were none in the Claimant's case.

64. Finally, there were four further matters which the Claimant says rendered his dismissal unfair. Each can be considered briefly in turn:

64.1. First, the Respondent did not entertain the possibility of voluntary redundancy of individuals who had not been identified as being at risk. The short answer to that contention is that an employer is not obliged to do so and can reasonably decide that it should not issue a general invitation. Particularly given the changes which Ms Hall had introduced within Motor Vehicle not too long beforehand, it was reasonable for the Respondent to adopt its standard policy in this particular case. As to Mr Visram's enquiry about redundancy, it was no more than that, and given its understandable wish to retain his specific skills, it was reasonable for the Respondent not to pursue his tentative enquiry any further.

64.2. Secondly, it is said that the Respondent did not follow its own Redundancy Policy. That too can be answered very shortly. The steps described in sections 4.1 and 5.1 of the Policy are not mandatory. In any event, the Respondent did consider redeployment of the Claimant, did remove Mr Saunders as a casual worker at that point, and did make available the option of volunteering for redundancy, albeit confined to those at risk. It can even be said to have applied its mind to "bumping", for example in deciding not to put Mr Baty at risk for the reasons I have explored. It therefore complied with its Policy and did not act outside of the range of reasonable responses to the redundancy situation in its exercise of the discretions which that Policy affords.

64.3. Thirdly and even more briefly, I agree with Mrs Hancock that the question of what Mr Raja is alleged to have said to the Claimant about continuing with Programme Lead duties was not an issue which goes to the question of the fairness of the Claimant's dismissal. As I have already indicated, the Respondent was entitled to treat the Claimant on the basis of the formally agreed position that he would be returning to the Lecturer role for the relevant academic year. It is accordingly entirely unsurprising that the Respondent did not call Mr Raja to give evidence before the Tribunal.

64.4. Finally, I reject the Claimant's case that Ms Hall was somehow determined to get rid of him and structured her redundancy proposals accordingly. There was, both in the notes of the appeal meeting and in their exchanges at this Hearing, evidence of some tension between them but that is not surprising in the context. The only concrete and specific evidence relating to the history between the two is that referred to by Ms Hall, namely that she had given the Claimant the opportunity to act up as Programme Lead which certainly indicates that she was able to act impartially in the restructuring process.

Conclusion

65. As I made clear during the Hearing, and as the Respondent plainly recognises, it is a serious matter to select an employee for redundancy and a very difficult experience for the employee so selected. I do not in any sense therefore question or seek to diminish the Claimant's sense of grievance or his belief that he was treated unfairly. For the reasons I have given however, when objectively assessed it is clear that the dismissal, and the way in which the Respondent effected it, fell within the

range of reasonable responses of a reasonable employer. Accordingly, the Claimant's complaint of unfair dismissal is not well-founded and is dismissed.

Employment Judge Faulkner

Date: 5th March 2019
JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE