EMPLOYMENT TRIBUNALS

Claimant: **Mr K Ogundiran**

Respondent : **Aeromet international Limited**

Heard at: **London South Employment Tribunal (fully remote hearing by CVP)**

On: **1 & 2 July 2021**

Before: Employment Judge Dyal, Mrs Louise Lindsay and Mr Colin Rogers

Representation:

Claimant: in person

Respondent : Mr Jones, Consultant

RESERVED JUDGMENT

1. The Claimant was unfairly dismissed.
2. The Respondent did breach the Claimant's contract of employment.
3. The complaint of race discrimination fails and is dismissed.

REASONS

Introduction

The issues

1. The issues were identified at the Preliminary Hearing of 3 March 2021.

- *Unfair dismissal*

2. What was the reason or principal reason for dismissal and was it a potentially fair one within the meaning of sections 98(1) and (2) employment rights act 1996? The Respondent says the reason was redundancy and the Claimant admits that it was.

3. If the dismissal was for a potentially fair reason was it fair or unfair in accordance with section 98 (ERA), and in particular was dismissal within the band of reasonable responses? The record of the Preliminary Hearing identifies the particular challenges to fairness the Claimant makes.

Direct race discrimination, Section 13 Equality Act 2010:

4. The Claimant identifies as Black British, Nigerian born.

5. Did the Respondent treat the Claimant less favourably than it would have treated a relevant comparator of a different race? The treatment complained of is:

    5.1. dismissal;
    5.2. breach of the Claimant's contract by failing to offer him the role of maintenance engineer.

6. The Claimant compares himself to the three members of the project management team (by which he means, as we established at the hearing, the NPI team).

Breach of contract

7. Did the Respondent fail to offer the Claimant the position of maintenance engineer? If so was that a breach of contract?

The hearing

8. *Documents before the tribunal*:

    8.1. An agreed bundle running to 134 pages including the index;
    8.2. a chronology from the Claimant;
    8.3. a chronology from the Respondent;
    8.4. a witness statement from each of the witnesses the tribunal heard from.

9. *Witnesses the tribunal heard from*:

    9.1. The Claimant
    9.2. Mr Paul Moses, Senior Engineering Manager
    9.3. Mr William Rogers, General Manager

10. *Submissions:*

    10.1. Both sides made short closing submissions. In broad terms:

        10.1.1. In the Claimant's closing submissions he summarised the evidence he had previously given;
        10.1.2. In the Respondent 's closing submissions Mr Jones emphasised that the Respondent had limited administrative resources available to it, that the Claimant had not been a member of the NPI team and that he had been selected for redundancy in good faith for non-racial reasons.

Findings of fact

11. The tribunal made the following finds of fact on the balance of probabilities.

12. The Respondent designs and manufactures investment castings and sand castings using aluminium and magnesium for the aerospace industry. It is a fairly small employer. At the time of the material events in this case it employed around 300 people across three sites: Worcester, Rochester and Sittingbourne. At the relevant times it had limited administrative resources. It no longer had any in-house HR function. It sought advice from Mr Jones an external HR Consultant (the same Mr Jones as now represents the

Respondent) in respect of the redundancy process that is described below. The advice sought and given was at a high level; Mr Jones was not closely involved when the redundancy process was actually executed.

13. The Claimant identifies as Black British, Nigerian born. He is a graduate with a bachelor's degree in Aeronautical Engineering. His employment with the Respondent began on 2 August 2016 when he was employed as a Maintenance Engineer at the Rochester site. In the course of this hearing the Respondent was at pains to emphasise that the Claimant was thought of as a hardworking, loyal and able employee.

14. In July 2017 the Claimant was promoted to Engineering Project Manager at the Sittingbourne site. The offer letter in respect of this role is dated 13 July 2017. Barbara Blackwell, HR officer, set out the main terms and conditions including salary, workplace and hours. The letter included the following passage "*should you decide, at any point, that you do not wish to continue in the role of engineering project manager and want to resume your previous role of maintenance engineer, the company will be agreeable to and supportive of this. Should it be necessary to make the role of engineering project manager redundant at any time, the company will allow you to resume your role of maintenance engineer if you are agreeable."* Also enclosed was a page of standard terms. The Claimant signed and returned the agreement on 13 July 2017.

15. On commencement in the new role the Claimant began reporting to Mr David Sibley, Senior Project Manager – Kent Operations at the Sittingbourne site. He was working on the Boeing project. This was the Respondent's main project at the time and many people worked on it. It was a highly problematic project.

16. The Claimant had a very good relationship with Mr Sibley. However, in July 2018, Mr Sibley left the business and was not directly replaced. This concerned the Claimant and he raised it with the Managing Director. In the event Mr Sibley's duties were taken over by Mr Neil Goddard (Commercial Director) and Mr Ian Ellis (Group Technical Director).

17. This is a good moment to introduce Mr Paul Moses. At this time, July 2018, his job title was Quality Manager. He was an experienced manager with nearly thirty years of service with the Respondent and an honours degree in Metallurgy. He was responsible for the technical/engineering department and for quality control. He reported directly to the General Manager for the site. Following Mr Sibley's departure he also became responsible for supporting the management of the Sittingbourne site's projects including the Boeing project.

18. Upon Mr Sibley's departure the Claimant began reporting to Mr Moses on day to day matters, such as leave, and to both Mr Moses and Mr Ellis on Boeing programme matters.

19. At this time the site General Manager was Mr SS.[1] The Claimant found Mr SS difficult. He gave two particular examples:

    19.1. On one occasion Mr SS said to him unkindly that he could not live five minutes in Mr SS' life;
    19.2. On 28 March 2019, the Claimant had put up a poster he had produced for a presentation to Mr Ellis. The poster included some scrap figures for the Boeing project. Mr SS took it off the wall, rolled it into a ball and left on the Claimant's chair.

[1]We have anonymised his name as there is some criticism of him but he played no part in, and may know nothing at all about, these proceedings.

This happened in front of another member of office staff. The Claimant felt embarrassed belittled and humiliated. Mr SS' explanation was that he did not want the customer, Boeing, who was on site, to see the information on the poster relating to the scrap figures. The figures put the Respondent in a bad light.

20. The Claimant reported the poster issue to Mr Moses. Mr Moses did not think that Mr SS had dealt with the matter very professionally but did not think that the matter was sufficiently serious to do anything about. Mr SS was senior to him in any event and it was therefore not open to him personally to discipline Mr SS. Mr Moses himself had experienced difficult behaviour from Mr SS so he did not find this to be out of character for Mr SS.

21. On 10 April 2019 a complaint was made by a client of the Respondent. The nature of the complaint is not in evidence. Mr SS decided to suspend the Claimant because of the complaint. The Claimant was suspended on full pay pending an investigation. He was escorted off the site, was not allowed to ask any questions and the entry code to the site was changed behind him. He found this extremely distressing and embarrassing. The Respondent sent the Claimant a letter of suspension which stated "*your suspension does not constitute disciplinary action and does not imply any assumption that you are guilty of any misconduct".*

22. Mr Moses had nothing at all to do with the complaint, did not (and does not) know what it was about and had no role in suspending the Claimant although he was present when it happened.

23. On 18 April 2019, the Claimant attended a meeting with Mr SS, Mr Kia Siavashi, Technical Manager, and Miss Brogan Drewett of HR. He was told that the investigation was completed and that no further action was required. He was not given any details of the complaint. The Respondent sent the Claimant a letter dated 18 April 2019 that indicated no further action would result from the suspension. The letter stated in terms "*For the avoidance of any doubt your record remains clear."*

24. The Claimant remained (and remains) deeply distressed by his suspension despite being exonerated. He referred to the suspension frequently during the proceedings and is clearly still wounded by it.

25. During the period of the Claimant's suspension Mr Siavashi had fought the Claimant's corner. He suggested that there be a change to the Claimant's duties so that he would spend more of his time supporting the Technical/Engineering team and less on the Boeing project. Thus his role would become a more technical role. His job title remained Engineering Project Manager.

26. This was put to the Claimant, who by now was on a period of sick-leave. The Claimant confirmed in an email of 26 April 2019 that he was happy to return to work in a new role.

27. On 1 May 2019 the Claimant indeed returned to work. At this time he reported principally to Mr Siavashi.

28. The change in emphasis of the Claimant's work duties brought him more squarely within Mr Moses' work stream and it therefore often fell to Mr Moses to assign the Claimant work and give him instructions. Mr Moses therefore remained in a managerial position over the Claimant.

29. The Claimant, in our view, misunderstood this to be Mr Moses carrying out some sort of underhand power grab and attempt to assert dominance over him. This was compounded by the Claimant, in error, believing that he and Mr Moses were at the same level of seniority. In fact Mr Moses was senior Claimant in the business. He reported directly to the site General Manager, was paid more and had vastly more experience.

30. It is unfortunate that the reporting lines were not more clearly explained to the Claimant because what the Claimant experienced as Mr Moses asserting dominance, in our view was in fact Mr Moses acting in an ordinary senior/managerial capacity towards him. The Claimant may have realised this if he had understood that Mr Moses had, properly and without any impropriety, managerial authority over him.

31. The Claimant says that Mr Moses would compliment and praise other members of staff for the work they performed but would talk down to the him and shoot him down in group discussions. We do not doubt that the Claimant experienced matters in this way, however we think that this was a misperception that arose because the Claimant had misunderstood Mr Moses's role and their relative seniority. This made him aggrieved when Mr Moses spoke to him like a manager – which is all that, we find, he actually did. Mr Moses was in fact happy with the Claimant's work and we do not think that he treated the Claimant differently to other reportees.

32. Over the course of 2019, the Respondent established a New Product Introduction (NPI) Team. It grew over time and ultimately consisted of two NPI engineers and a Programme Manager. The team reported to Mr Ellis. The Claimant was not a member of this team at any time. The work of the team in a broad sense involved project management but it was a project management of a new and different nature.

33. The NPI team was specifically recruited to bring new skills and techniques to the business that it did not previously have. In particular the idea was to use project management techniques that were typical in the automotive industry but were in their infancy in the aeronautical industry. It involved a completely different approach to project management than the one the Respondent previously had adopted: the NPI team focussed entirely on the pre-production design phase of projects. The essence of it was to use new tools and techniques to thoroughly anticipate production problems before they materialised. The usual approach at the Respondent was to spend little time on the pre-production design phase and instead reactively troubleshoot problems when they materialised in production. The NPI work involved applying some unique, specialist skills that we find the Claimant did not have. That is not a criticism of him – there was no reason for him to have those skills and the whole point of recruiting the NPI team was to bring new skills to the business.

34. On 3 September 2019, Mr Siavashi left the Respondent. Mr Moses was appointed as Senior Engineering Manager. On 1 November 2019, Mr SS also left the Respondent. Mr Rogers was appointed as the new General Manager for the Sittingbourne site.

35. Mr Moses managed the engineering/technical department which comprised the Claimant and two others.

36. On 22 January 2020 a redundancy situation was announced to the workforce in respect of the Sittingbourne site. The announcement indicated that this was the result of a current low order book level and a poor short-term order forecast. It anticipated up to 19 job losses across the site. The company was at the time losing hundreds of thousands of pounds. The announcement indicated that there would be collective and individual consultation and the Respondent would look at all opportunities to minimise job losses. It

invited volunteers for redundancy. In the absence of volunteers it indicated that the redundancy selection would be based on "*current job performance, the range of skills relevant to the future needs of the business and attendance/conduct history".*

37. Mr Rogers looked at all of the departments and roles at the Sittingbourne site and designed a new structure that saved as much cost as possible whilst retaining only the essential and flexible skills needed to take the business forward.

38. Mr Rogers split the workforce into a number of pools. He did this broadly along departmental lines, although in some cases (such as in the foundry) where he considered that there was a sufficient overlap of skills, he made bigger pools.

39. Mr Rogers decided which pools redundancies would be made from and how many. He made his decision based upon the dual objectives of saving cost and retaining the skills necessary for the business to move forwards. In the case of the engineering/technical department he decided that two redundancies would be made.

40. Mr Rogers decided that the selection criteria for each pool should be derived from the skills matrices that already existed for each respective work area. It was left to lower level managers to decide what the actual criteria were for their departments, ie, to decide which criteria to derive from the skills matrices.

41. Mr Rogers met with the works committee on 31 January 2020 and explained that the selection would be derived from the skills matrix for each department and showed the committee a blank employee selection form. The form shown therefore did not actually make clear what selection criteria would be applied in given cases.

42. The Claimant was a member of the engineering/technical departments and he was therefore pooled with the two other employees in that department who were beneath Mr Moses. They were Mr Harvey Watts and Mr Rafal Urbanek.

43. Mr Watts undertook a role comparable to the Claimant. We accept that in the recent past the Claimant had trained Mr Watts on a task, namely, how to use a particular excel spreadsheet. Mr Moses had sent the Claimant to Rochester to learn how to use the spreadsheet with a view to him then sharing that knowledge with others at Sittingbourne. Mr Watts had transferred from the foundry to the technical/engineering department following an injury. Mr Watts was not a graduate but he had a highly relevant NVQ level 3 related specifically to foundry work.

44. The members of the NPI team were identified as another pool. No redundancies were made from this pool at this time because Mr Rogers was in discussion with Mr Ellis as to whether or not the NPI team was needed at all. However, in July 2020, all three members of the NPI team were given notice of redundancy dismissal.

45. It fell to Mr Moses to decide on the particular selection criteria that he would apply to those in the engineering/technical department pool. He derived the criteria from the departmental skills matrix. He applied the same criteria to Claimant and Mr Watts. Slightly different criteria were applied to Mr Urbanek because he had a job of a slightly different nature.

46. The selection criteria were primarily skills focussed and included matters such as *Foundry Tech. Preparation, Inspection Plan Development, Scrap & MRB Reporting, Spectrometer Calibration, Foundry Methoding, Project Management, Foundry Engineering, Moulding Coremaking, Light Alloy Metallurgy*. They also included more

general matters such as attitude, application, productivity, quality, attendance and conduct.

47. On 28 January 2020 Mr Moses scored members of that pool against an assessment matrix. The Claimant's total score was 31. Mr Watts and Mr Urbanek scored 39 and 36.5 respectively. The Claimant and Mr Urbanek therefore fell for selection for redundancy.

48. Under the criterion of 'conduct' the Claimant lost 1 mark on the basis that he had been suspended in 2019. Mr Moses thought, though he now candidly accepts this was an error, that the suspension was tantamount to an informal warning/concern.

49. Mr Moses went through the selection matrix in his evidence and explained how he had reached the scores that he did. The tribunal found his account impressive (with the exception of the deduction in respect of suspension which it found unimpressive). The Claimant scored more highly than Mr Watts in respect of several criteria. However, Mr Watts had the overall edge essentially because of his practical skills, experience and qualifications relating to foundry work. The Respondent had a particular need to retain those skills and that is why the sounded heavily in the assessment criteria.

50. On 4 February 2020, Mr Moses wrote to the Claimant notifying him that he had been selected for redundancy. The letter stated that it was not in itself formal notice of termination of employment. It notified the Claimant of the dates of future consultation meetings and of his right to appeal against the fact of his selection to Mr Rogers giving him 5 days to do so.

51. The Claimant met with Mr Moses on 4 February 2020. The Claimant was upset that he had been selected and interpreted it as Mr Moses saying that he had been performing poorly. Mr Moses assured him that his selection did not in any way suggest any unhappiness on his part with the Claimant's conduct, approach or enthusiasm to the job. On the contrary, he thought highly of the Claimant but Mr Watts had scored yet higher.

52. There was a further consultation meeting on 5 February between Mr Moses and the Claimant. The Claimant expressed concern that he was not pooled with the NPI team and that none of them were being made redundant. He found this galling because there had been significant conduct issues in respect of one of the members of that team. Mr Moses was candid that he was unhappy that he was losing two good people while NPI was not losing anyone.

53. There was a basic discussion of the selection process in which in very general terms Mr Moses told the Claimant that he had been selected based on the application of selection criteria and the future needs of the department. We are satisfied that the discussion must have been very broad brush because the actual employee assessment was not show to the Claimant, the detail of the criteria were unknown to him, as were his scores against the criteria, as was his overall score and as was his ranking compared to the other members of the pool.

54. On 10 February 2020 the Claimant appealed against his redundancy selection – at this time he still had not seen his employee assessment.

55. The Claimant met with Mr Rogers for his appeal meeting on 18 February 2020. The Claimant drew attention to the term of his contract regarding returning to Rochester as a maintenance engineer indicating that this was something he was interested in and entitled to. Mr Rogers told the Claimant that he had not been aware of the provision in the Claimant's contract of employment until the Claimant had brought it to the company's

attention. Mr Rogers told the Claimant that the letter had been written in good faith and three years ago that might have been the case. He told the Claimant that there was no maintenance engineering role available at that time at the Rochester site. However, he told the Claimant that he needed to take advice on the significance of the letter and would ensure that the Claimant was made aware of the outcome.

56. There was a further meeting between the Claimant and Mr Moses on 21 February 2020. The Claimant again complained that the NPI department had not been treated in the same way as the engineering and technical team. Mr Moses indicated that he sympathise with that view. The Claimant complained about his selection and explained that he could not understand how Mr Watts could have been preferred to him given that he was a graduate. He also raised the issue of his contract stating that he was entitled to transfer back to Rochester as a Maintenance Engineer.

57. Mr Rogers wrote to the Claimant by letter dated 21st of February 2020. He indicated that if he had prioritised telling the Claimant the outcome of the process and that he could give the Claimant reasons if he wanted them but that would take a little longer.

58. On 21st of February 2020 Claimant was also given written notice of dismissal upon six week's notice and therefore the termination date of third of April 2020.

59. Mr Rogers wrote the Claimant again on 26 February 2020 giving him reasons for dismissing his appeal with one caveat. The issue of the term of the Claimant's contract regarding a return to an engineering role in Rochester remained outstanding. The letter said this "*I have now made arrangements for our consultant Colin Jones to visit me on Friday this week at around 11:30 AM to let me have his findings on this matter and he has requested that he also has a meeting with yourself in order that his advice is transparent to both of us. I will arrange this with you on the day in order that we can further debate this while he is on site."* (p104)

60. The Claimant had a yet further meeting with Mr Moses on 28 February 2020. At this meeting the Claimant was given his employee assessment for the first time. This was the first time he saw the actual selection criteria and his scores. He complained that a mark had been deducted for his suspension. He asked for the scores or rank of the others in the pool but Mr Moses did not think he could share this. By this stage, of course, the decision to dismiss the Claimant had already been made and his appeal had already been determined.

61. On 6 March 2020, Mr Jones met with Mr Rogers. Mr Rogers advised him that the term of the Claimant's contract regarding returning to Rochester had been drafted in a very open-ended way which probably had not been intended. Nonetheless given its wording the Respondent should honour what was said and allow the Claimant to return to Rochester as a maintenance engineer if that is what he wanted. However, given that there was no vacancy there, and there was already an incumbent in the role of maintenance engineer, there would inevitably be a redundancy situation which the Claimant should be advised of. It was important for him to know that if he did return to Rochester as a maintenance engineer he was likely to find himself going through another redundancy process.

62. Mr Jones then met with the Claimant and related to him the advice that he had given to Mr Rogers (Mr Rogers was not at this meeting). At the end of the meeting, Mr Jones said to the Claimant words to the effect that it was for him to confirm to the company whether or not he wished to pursue a return to the Rochester site as maintenance engineer as an alternative to redundancy and that he could now do that with full knowledge of the advice

Mr Jones had given. The Claimant said it was for Mr Jones to advise the Respondent to do the right thing based on his contract and his position and that he did want to go forwards with a transfer back to Rochester notwithstanding the probability of a further redundancy situation.

63. Mr Rogers did not make any further contact with the Claimant about this matter (and neither did anyone else). The Claimant did not take the matter up any further either. The Claimant's employment ended on 3 April 2020.

64. Mr Rogers accepted in evidence that he did not actually offer the Claimant a return to Rochester as Maintenance Engineer. However, and we accept this is true, he would have followed Mr Jones' advice and offered the Claimant a return to Rochester as Maintenance Engineer if the Claimant had contacted him.

65. We also accept the Claimant's evidence that in light of the above history, and in particular what was said in the appeal outcome letter and what he said to Mr Jones, he was expecting Mr Rogers to contact him if Mr Rogers was willing to allow him to return to Rochester as Maintenance Engineer.

66. Finally, we accept Mr Rogers' evidence that throughout the redundancy process there were no alternative employment opportunities for the Claimant at any of the Respondent's sites. Indeed the Worcester and Rochester sites were also being reorganised and losing staff.

Law

Unfair dismissal

67. The Respondent has the burden of proving the reason for the dismissal and in particular that the reason was a potentially fair one within the meaning of s. 98(2) ERA. One such reason is redundancy.

68. Redundancy for present purposes is defined as:

> ***139****—(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—*
> *…*
> *(b) the fact that the requirements of that business—*
> *(i) for employees to carry out work of a particular kind, or*
> *(ii) for employees to carry out work of a particular kind in the place where the employee was so employed by the employer,*
> *have ceased or diminished or are expected to cease or diminish.*

69. The test for redundancy focuses, essentially, upon the number of employees that the employer requires to do work of a particular kind. It is not focussed upon issues such as whether or not there has been a reduction in the amount of work that the employee is contracted to undertake. See ***Safeway Stores v Burrell*** [1997] IRLR 2001 (approved by HL in ***Murray v Foyle Meats*** [1999] IRLR 562).

70. Where there is a potentially fair reason for dismissal, the test for fairness is that at s.98(4) ERA. Fairness *"(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 substantial merits of the case".

71. The classical guidance on fairness in a redundancy situation is that of the EAT in ***Williams v Compare Maxam Limited*** *[1982] IRLR 83*:

> 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.*

72. We remind ourselves that the above principles are guidance rather than the words of a statute and it is the statutory test which must be applied. It is vital to remember, in applying s.98(4) ERA, that the range of reasonable responses test applied. The EAT said in ***Hachette Flipacchi UK Limited v. Johnson*** EAT/0452/05 (HHJ Richardson):

> *We then turn to consider the questions raised by s.98(4). Again, the law is well-established. The question at all stages is whether the employer acted reasonably having regard to equity and the substantial merits of the case. Therefore, a Tribunal must not find a dismissal to be unfair if the course taken was within the range of courses open to a reasonable employer. This applies to procedural questions as much as to substantive questions: see* ***Sainsbury's Supermarkets v Hitt*** *[2003] IRLR 23 at paragraph 29 where Mummery LJ emphasised that the objective standard of the reasonable employer applies to all aspects of the question whether the employee has been fairly and reasonably dismissed.*
>
> *As regards redundancy it has long been established that the objective standards of a good employer will generally require the employer to give as much warning as possible to consult about selection criteria, and to ensure that selection is made fairly in accordance with those criteria and to seek to see whether instead of dismissing the employee he can offer alternative employment. Not all those factors will be present in every case.*

73. In ***Capita Hartshead Ltd v Byard*** [2012] ICR 1256, the EAT gave guidance on the applicable law in relation to pools:

> *31. Pulling the threads together, the applicable principles where the issue in an unfair dismissal claim is whether an employer has selected a correct pool of candidates who are candidates for redundancy are that:*
>
> *(a) "It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted" (per Browne-Wilkinson J in Williams v Compair Maxam Limited [1982] IRLR 83 [18];*
> *(b) "[9] … the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn" (per Judge Reid QC in Hendy Banks City Print Limited v Fairbrother and Others (UKEAT/0691/04/TM) ;*
> *(c) "There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem" (per Mummery J in Taymech v Ryan [1994] EAT/663/94);*
> *(d) The Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has "genuinely applied" his mind to the issue of who should be in the pool for consideration for redundancy; and that*
> *(e) Even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it.*

74. In ***Pinewood Repro Ltd (trading as County Print) v Page*** [2011] ICR 508, the EAT held that fair consultation during a redundancy selection exercise included the provision of adequate information on which an employee could respond and argue his case. That is the general principle and it is for the tribunal to assess in any given case whether the employee was given such information.

Race discrimination

75. The applicable statutory provisions are as follows (the tribunal reminded itself of the precise wording of each section but for economy that wording is not set out here):

    75.1. s.4: definition of protected characteristics which includes race;
    75.2. s.13: definition of direct discrimination;
    75.3. s.23: comparison by reference to circumstances;
    75.4. s.39: unlawful conduct in the employment context, which includes dismissal;
    75.5. s.136: the burden of proof.

76. ***Igen v Wong*** [2005] IRLR 258 and ***Madarassy v Nomura International PLC*** [2007] ICR 867 are the leading cases on the burden of proof. These cases, the tribunal accepts and directs itself, authoritatively explain how the burden of proof operates. The tribunal considered in particular the annexe to the judgment in ***Igen*** which spells the matter out and was endorsed by the Court of Appeal again in ***Madarassy***. In ***Madarassy*** the Court of Appeal emphasised that a difference of treatment and a difference of protected characteristic status is not enough to shift burden of proof of itself. It gives rise to a mere possibility of discrimination.

77. However, in ***Deman v Commission for Equality and Human Rights Commission & others*** [2010] EWCA Civ 1279, Sedley LJ (giving the judgment of the court) said this:

> *We agree with both counsel that the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.*

78. Thus where there is a difference of treatment and a difference of status it does not take much more to shift the burden of proof.

79. However, discrimination cases do not always turn on the burden of proof provisions. In ***Hewage v Grampian*** [2012] IRLR 870, Lord Hope said this:

> "*It is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other*".

80. The tribunal reminds itself that direct evidence of discrimination is rare and that discrimination is often sub-conscious. For this and other reasons establishing discrimination is usually difficult and tribunals should be prepared, where appropriate, to draw inferences of discrimination from the surrounding circumstances or any other appropriate matter. These points are made, in among other places, ***Amnesty International v Ahmed*** [2009] ICR 1450.

81. In ***Anya v University of Oxford*** [2001] ICR 847 the Court of Appeal emphasised that, in a discrimination case, the employee is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of the causative link between the protected characteristics on which he relies and the discriminatory acts of which he complains. The Tribunal must avoid adopting a 'fragmentary approach' and must consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts. The Tribunal should consider indicators from a time before or after the particular decision which may demonstrate that an ostensibly fair-minded decision was, or equally was not, affected by unlawful factors.

82. In ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] ICR 337 at [11-12], Lord Nicholls:

> *'[…] employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others.*
>
> *The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment Tribunals may find it helpful to consider*

whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant […]'

83. Since ***Shamoon***, the appellate courts have broadly encouraged Tribunals to address both stages of the statutory test by considering the single 'reason why' question: was it on the proscribed ground, or was it for some other reason? Underhill J summarised this line of authority in ***Martin v Devonshire's Solicitors*** [2011] ICR 352 at [30]:

'Elias J (President) in Islington London Borough Council v Ladele (Liberty intervening) [2009] ICR 387 developed this point, describing the purpose of considering the hypothetical or actual treatment of comparators as essentially evidential, and indeed doubting the value of the exercise for that purpose in most cases-see at paras 35–37. Other cases in this Tribunal have repeated these messages- see, eg, D'Silva v NATFHE [2008] IRLR 412, para 30 and City of Edinburgh v Dickson (unreported), 2 December 2009 , para 37; though there seems so far to have been little impact on the hold that "the hypothetical comparator" appears to have on the imaginations of practitioners and Tribunals.'

Breach of contract

84. When construing a written contract regard should be had to the following (per Lord Neuberger in *Arnold (Respondent) v Britton* [2015] UKSC 36 at paragraph 15):

the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the [agreement], (iii) the overall purpose of the clause and the [agreement], (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.

Discussion and conclusions

Breach of contract: did the Respondent fail to offer the Claimant the position of maintenance engineer? If so was that a breach of contract?

85. The Respondent did not dispute that the following were terms of the Claimant's contract of employment:

"*should you decide, at any point that you do not wish to continue in the role of engineering project manager and want to resume your previous role of maintenance engineer, the company will be agreeable to and supportive of this. Should it be necessary to make the role of engineering project manager redundant at any time, the company will allow you to resume your role of maintenance engineer if you are agreeable."*

86. The Respondent accept that this gave the Claimant the right to return to a maintenance engineering role (in Rochester) in the event of the project manager role being made redundant. We agree that this is the correct interpretation of the clause.

87. It is true that one would ordinarily expect a clause of this kind to be time limited (perhaps to a trial period) either expressly or by implication. However, in this case the words "*at any time*" in our view mean that no such limitation should be implied. We deal with that briefly because the Respondent did not argue that there was any implied limitation of the right to return to Rochester.

88. The Respondent defended the case only on the basis that *it did offer* the Claimant this role but that the Claimant did not pursue the offer. On balance we do not accept that case.

89. The starting point is that the Claimant made clear in the consultation meeting with Mr Moses and in the appeal meeting with Mr Rogers that he wanted to exercise the clause and return to Rochester as a maintenance engineer. This is unsurprising given that he was about to be made redundant and had no job to go to.

90. At the meeting with Mr Rogers on 18 February 2020, Mr Rogers' primary position was that there was no maintenance engineer position available. He did also state that he would take advice and ensure that the Claimant was made aware of the advice.

91. In the appeal outcome letter dated 26 February 2020, Mr Rogers gave the impression that both he and the Claimant would receive advice from Mr Jones *and* thereafter that there would be further discussion between him and the Claimant whilst Mr Jones was on the site, presumably so that Mr Jones could give any further advice that was needed.

92. In the event, all that actually happened was that Mr Jones gave Mr Rogers advice on 6 March 2020 and told the Claimant what advice he had given Mr Rogers. He did not say one way or the other whether or not the Respondent would take his advice. His role was simply to relay to the Claimant the advice he had given to the Respondent. Importantly, he was not, at that meeting, speaking on behalf of the Respondent and notifying the Claimant of the Respondent's position. Again, he was simply telling the Respondent what advice he had given the Respondent.

93. Mr Rogers did not then arrange a discussion with the Claimant on 6 March 2020 or at all. Nor did he write to the Claimant telling him that he could, after all, return to Rochester in a maintenance engineer role.

94. It is true that Mr Jones told the Claimant if he wanted to take the matter forwards then he should notify the Respondent. But it is equally true that the Claimant notified Mr Jones that he did want to take the matter forward and that he had previously made that point to both Mr Moses and Mr Rogers.

95. Obviously it is unfortunate and regrettable that neither side approached the other after meeting with Mr Jones. However, all in all we consider that the Claimant made it reasonably clear that he was, to use the language of the clause, "agreeable" to returning to a maintenance engineer role in Rochester. On the other hand the Respondent never made clear that it would (to use the language of the clause) "allow" him to. Nor did it follow the mechanism which it had

indicated it would use to complete the discussion of the issue, namely, to have a further discussion with the Claimant. Further it gave no actual indication that it accepted and/or would follow Mr Jones's advice, which after all was simply advice.

96. Given what had passed between the parties, one would certainly have expected the Respondent to communicate to the Claimant that he could return to the maintenance engineer role, when and on what terms. In the absence of that, and in light of the history recited above, the objectively reasonable interpretation of the Respondent's position was that the Claimant was not being allowed to return to Rochester.

97. Overall, then, we think that the correct interpretation of this unfortunate situation is that the Respondent did not "allow" the Claimant to return to the role of maintenance engineer and it therefore was in breach of his contract.

98. We note for completeness that we agree with the Respondent that in the event of this clause being exercised the Claimant would have no guarantee of ongoing employment in the role of maintenance engineer and that his employment in that role could immediately be subject to a further redundancy procedure in the event of their being a genuine redundancy situation.

Unfair dismissal

99. We accept that the reason for dismissal was redundancy. There is no dispute about this and in any event all of the evidence points to that.

100. We consider that adequate warning of impending redundancies was given. The possibility of redundancies was announced on 22 of January 2020 and the Claimant was dismissed on 3 April 2020. The business reorganisation that led to the redundancies, was conceived of by Mr Rogers who had only commenced in post in November 2019.

101. We do not consider that the consultation was adequate in the sense that it was outside of the range of reasonable responses.

102. The primary problem was that the Claimant was not given sufficient information about the basis upon which he had been selected for redundancy in order to have a fair opportunity to properly put his case to Mr Moses and/or Mr Rogers.

103. The Claimant was not given his employee assessment until 28 February 2020. Until that moment in time he did not have a clear idea of what the precise selection criteria were nor how he had been scored against each criterion. By 28 February 2020 the Claimant had already been given notice of dismissal which he was given on 21 February 2020 and his appeal had already been heard and the outcome had already been promulgated by letter dated 26 February 2020. He

was prevent from being able to argue his case properly since he had no way of properly understanding the basis of his selection.

104. Further the Claimant was not any time told where he ranked in the pool of three and we thinks that was outside the band of reasonable responses. It prevented the Claimant from being able to argue his case properly.

105. Turning to the pool itself, we are satisfied that the pooling arrangements were within the range of reasonable responses. Mr Rogers turned his mind to what the pools should be and he made a rational and reasonable selection of pools that were based essentially around job types. Where he considered that there was sufficient overlap between jobs he created bigger pools.

106. The Claimant's primary complaint about pooling is that he was not placed in the pool with the project management team. When asked what he meant by project management team he explained that he meant the NPI team. We consider it was within the range of reasonable responses for the Claimant not to be in that pool. Firstly, he was not in the NPI team. Secondly, we accept that he did not have the specialist skills and experience that characterised that team. Thirdly we think Mr Rogers did turn his mind to the pooling arrangement and made reasonable and rationale decisions.

107. Turning to the selection criteria themselves, we accept that they are within the range of reasonable responses. They are, in the main, attempts to measure the employee's abilities and the skills. Beyond criteria of those sorts they included matters such as attendance and conduct which it was reasonable to take into account.

108. Turning to the application of the selection criteria, the first complaint the Claimant has is that he does not believe that Mr Moses was an appropriate person to score him. We disagree. Mr Moses was his manager and was not only the appropriate person to score him he was probably the only appropriate person to score him. He had detailed knowledge of the Claimant's work as well as detailed knowledge of the work of the other members of the pool.

109. We are satisfied that Mr Moses did his best to score the members of the pool against the selection criteria fairly and to the best of his ability. We are also satisfied that the assessment that he did make against all of the criteria, bar one, was reasonable and open to him. He went through each criterion in his oral evidence and gave a sound explanation for the scores that he had given the Claimant and the scores that he had given Mr Watts.

110. It was notable that both the Claimant and Mr Watts scored highly. It was also notable that the Claimant outscored Mr Watts in respect of quite a number of criteria, though not overall. The primary area of difference between the Claimant and Mr Watts, was that Mr Watts had a lot more hands-on experience working in

the foundry and had a foundry based NVQ level III. This stood Mr Watts in very good stead in respect of quite a number of the selection criteria and ultimately gave him the edge.

111. The Claimant was docked a mark for his suspension in 2019. We find that that was unfair. The suspension itself was not an indication of misconduct. The outcome of the investigation was that the Claimant was exonerated. Mr Moses simply misunderstood this - he had understood a suspension to be tantamount to an informal warning. In his evidence to the tribunal he conceded that and regretted the error.

112. The Claimant had a contractual right, which he drew to the Respondent 's attention in the consultation and appeal process, to a job as a maintenance engineer in Rochester in the event of being made redundant. We repeat our findings about how that issue unfolded. So far as an *unfair dismissal* claim is concerned, we consider that it was outside of the band of reasonable responses to fail to revert to the Claimant having taken advice from Mr Jones to indicate what the Respondent 's position actually was. Mr Jones told the Claimant what his advice to the Respondent was, but the Respondent never told the Claimant whether or not it would accept Mr Jones's advice and never made clear to him one way or the other whether he could return to Rochester as a maintenance engineer (and if so when and on what terms).

113. Stepping back and looking at the matter in the round in our view the dismissal was overall unfair in the sense of being outside of the band of reasonable responses.

114. In our assessment above we have dealt with all of the matters that the Claimant raised in the list of issues save for the allegation that Mr Moses was not allowed to make decisions on who should be made redundant without interference from others. In our judgement Mr Moses was able to independently and without interference decide upon the selection criteria and score the members of the technical/engineering department pool. Beyond that however the design and conduct of the redundancy process was not a matter for him but for Mr Rogers. That simply reflected the relative seniority and roles of those individuals in the business rather than any kind of unfairness.

Race discrimination

115. We have stepped back from the findings of fact and asked ourselves what inferences if any of race discrimination might be drawn. We ultimately reached the view that the answer was none. We considered all of the evidence that but find it useful to make a few specific comments:

115.1. Mr SS' conduct is impugned by the Claimant. However Mr SS had long-since left the business before the redundancy issues arose and we are satisfied that he had no role whatsoever in influencing or deciding any of the issues that we have to determine.

115.2. The Claimant was suspended in April 2019, that does appear to have been an unjust suspension, but it was Mr SS' decision to suspend the Claimant.

115.3. We were troubled by the fact that Mr Moses deducted the Claimant one mark on account of the suspension. However, we noted that Mr Moses was simply left to his own devices when doing the marking and did not have the benefit of any HR or employment law assistance. We accepted his explanation which is that he simply thought that the suspension was indicative of a conduct issue along the lines of an informal warning. We found him to be a truthful and impressive witness.

115.4. We noted that the Claimant felt that Mr Moses had spoken down to him over the years, but the evidence about this was vague and we are satisfied that Mr Moses in fact thought highly of the Claimant. What the Claimant experienced as Mr Moses speaking down to him was actually Mr Moses speaking to him as a manager. The Claimant did not truly accept that Mr Moses was his manager and we think that is why he experienced Mr Moses' interactions with him in a negative way.

116. Turning then to the complaints of race discrimination themselves. The first complaint is that the Claimant was dismissed. The Claimant was indeed dismissed. The reason why the Claimant was dismissed was because he was redundant. The dismissal had nothing whatsoever to do with race.

117. The dismissal was the product of four primary matters:

117.1. Firstly the Respondent finding itself in an economic situation whereby it needed to save costs through headcount reduction. We fully accept that Respondent was indeed in this position.

117.2. Secondly, Mr Rogers deciding that the Claimant should be pooled with the other members of the engineering/technical department. We are entirely satisfied that Mr Rogers' decision was based solely on business considerations that had nothing to do with race. The Claimant was in the engineering/technical department and it was the most logical place for him to be pooled. There was no good reason for him to be pooled with the NPI team and the fact he was not had nothing to do with race.

117.3. Thirdly, Mr Rogers deciding that the business could and should lose two members from the Claimant's pool. Again this decision was based on an assessment of business need that had nothing at all to do with race. It did mean losing two good employees but that was necessary to save cost.

117.4. Fourthly, Mr Moses scoring the Claimant third. The Claimant's race simply did not come into this at all. Mr Moses scored the Claimant against the criteria based upon his experience of working with the Claimant for a long-period of time. He made one mistake which related to the deduction of a point for the Claimant's suspension, but as above that was an innocent error. We repeat the other points made above under the unfair dismissal heading about Mr Moses' scoring of those in the Claimant's pool.

118. We are satisfied that a comparator who had been in the same position as the Claimant, i.e.., had done the same job as him to the same standard, but was of a different race (eg white British) would have been treated in exactly the same way.

119. We do not accept that the members of the NPI team were relevant comparators. Their circumstances were materially different in that they performed different roles to the Claimant. Moreover, they had not yet been identified as a resources which the business could dispense with. Mr Rogers was still in discussions with Mr Ellis about that. However, once Mr Rogers' view on that matter prevailed the entire NPI team was in any event made redundant a short time later.

120. The reason why the Claimant was not offered the role of maintenance engineer was because there was a mix up. Mr Rogers was expecting the Claimant to come back to him

and tell him if he was interested in the role after his meeting with Mr Jones. The Claimant was expecting Mr Rogers to approach him. Neither of those things happened. The parties were unfortunately at cross-purposes. This had nothing whatsoever to do with race.

121. We are satisfied that if the Claimant had been of a different race (e.g. white British) the treatment would have been identical.

Conclusion

122. A remedy hearing will be listed to deal with remedy issues generally and case management orders will be made under separate cover to prepare for that hearing.

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Employment Judge Dyal
Date: 6 July 2021

Sent to the parties on
Date: 8 July 2021