EMPLOYMENT TRIBUNALS

Claimant: Mr M Cooper

Respondent: Spicerhaart Group Services Limited (First Respondent)
Just Mortgages Limited (Second Respondent)

Heard: in Birmingham by CVP On: 28th & 29th September 2022

Before: Employment Judge Codd

Appearances
For the Claimant: Mr Gittins (Counsel)
For the Respondent: Ms Hausdorf (Counsel)

JUDGMENT

1. The claim is amended to reflect Spicerhaart Group Services Limited (First Respondent), as the Respondent to this application. Just Mortgages Limited are discharged from the proceedings.

2. The Claimant was unfairly dismissed on the 19th October 2021.

3. The Respondent breached the Claimant's employment contract by failing to pay him pension and health care insurance on his notice pay.

4. The breach of contract claim for death in service benefits fails and is dismissed.

5. The matter will be listed for a remedy hearing in accordance with the separate Case Management Order.

Employment Judge Codd 1st November 2022

DECISION AND REASON

Introduction

1. The Claimant was employed by Just Mortgages Direct Limited a wholly owned subsidiary of the Respondent. Payment of wages was made to the Claimant by the First Respondent Spicerhaart Group Services Limited. The Claimant was

employed from 3rd July 2017 until he was made redundant on 19th October 2021.

2. The Claimant's role was as one of two "New Homes Business Development Managers". The principle purpose of this role was to work with property developers with a view to developing relationships where mortgage advice could be sold (on site) to individuals purchasing new build homes. Once those relationships were established, the Claimant was responsible for maintaining and cultivating those relationships.

3. There is no dispute that the Claimant was good at his job. I have seen his pay slips for which he was well remunerated and in receipt of performance related bonuses.

4. Unfortunately, as with many businesses the impact of the Covid pandemic, had a profound impact upon the business model and working practices of the Second Respondent. Developers had closed their sites to visitors and as a consequence both the Claimant and his counterpart Mr Scott, were placed upon the governments, furlough scheme. They were not required to attend the office or to undertake any work. This remained the case until the 1st of October 2021, when that scheme came to an end.

5. During the period of Furlough, it appeared that a management decision had been taken to reduce the number of "New Homes Business Development Managers" from two to one. The Respondents therefore embarked upon a redundancy process.

6. A Zoom meeting took place on the 29th September 2021, where the Claimant and Mr Scott were informed that they were at risk of redundancy. The parties were informed that a 7 day consultation period would then take place ending on the 6th October 2021. It is not in dispute that no party put forward any counter proposals to the redundancy.

7. On the 7th October 2021, the parties were invited to confirm if they sought to remain employed and continue to compete for the remaining role. Both the Claimant and Mr Scott confirmed they wished to apply for the remaining role. They were informed that an interview would take place. There is also a dispute as to whether the Claimant raised a complaint or challenge, as to the composition of the proposed interview panel. Whatever the nature of his comments, it prompted an internal discussion about the panel (which remained unchanged).

8. There is a dispute as to the level of information provided in that meeting on the 7th October 2021 (which I shall come to in due course). Emails were then sent out on Friday the 8th of October 2021, confirming that the interviews would take place on Monday the 11th October 2021 and confirming the title of a presentation, which the parties were expected to give as part of that interview. No party raised any questions in respect of this.

9. Interviews took place on the 11th October 2021. Present within the interview were Paul Wilson the Business Development Director and direct line manager to the Claimant and Alex Scott. Also present was John Wilson the Financial Services Director. John Wilson and John Doughty, who both completed score cards of the Claimant and Mr Scott's interviews. Also present was John Philips the National Operations Director. The Respondents aver that Mr Philips was an observer and had no direct role in the process.

10. Following the interviews the Claimant was advised that he was unsuccessful and that he would be made redundant effective immediately on 19th October 2021. In accordance with his contract the Claimant received 'Payment in Liu of Notice,' albeit there is a dispute about elements of this payment. The Claimant was allowed to retain his vehicle for a month. He was then also given an opportunity to apply for other roles within the business.

11. Following this redundancy, the Claimant exercised his right to appeal, by letter dated 22nd October 2021. Due to various circumstances the Respondent's outsourced the appeal to an external agency, Kingswood Group, an agency whom they had used previously in several other appeals to a satisfactory standard.

12. The appeal hearing took place on 8th December 2021 and the Claimant was the only witness spoken to, however, written material was also considered. The appeal decision was communicated to the Respondent's HR Manager Lesley Garwood, on the 16th December 2021. There then proceeded to be an extended delay in relaying that determination to the Claimant. Kingswood Group, having considered the Claimant's appeal, recommended that the appeal be upheld. Whilst not all limbs of the appeal were considered to have merit, there was a substantial agreement with the contentions of the Claimant.

13. The Respondents disagreed with the recommendations of Kingswood Group, however, and did not follow the recommendations. On the 9th of March 2022 the Respondents wrote to the Claimant advising him that his appeal had been dismissed (notwithstanding the recommendations of Kingswood Group) and set out the justification for that decision.

14. For understandable reasons associated with the delay, by that stage the Claimant had already embarked upon early conciliation with ACAS and issued his ET1 claim on 14th March 2022. His claim was made in time and there is no dispute regarding this. The claim then came before me on the 28th and 29th September 2022. I heard extensive evidence from five witnesses and due to the constraints imposed by the length of the evidence, I reserved matters for a written decision.

Preliminary Issues

15. The Claimant named two Respondents to the application. They are companies within the same group. The Claimant fulfilled his employment tasks for the Second Respondent, however, he was paid by the First Respondent. Given the interconnected nature of the business, there was no opposition to the contention that the claim should be amended to reflect a single Respondent, against whom any decision could be enforceable. There was no opposition to the fact that this ought to be the First Respondent and I therefore amended the claim accordingly, having assessed that no advantage or prejudice would be incurred by either party.

16. The Claimant, although he had been represented previously by Solicitors, had engaged the services of direct access Counsel for the final hearing. As part of the pleaded case the Claimant sought to argue that Paul Wilson, ought to have been included in the redundancy pool. The Claimant argued that this was in effect a new limb of the claim and may result in further disclosure being required.

17. No party sought to persuade me that this was so significant as to require an adjournment and indeed all parties agreed that an adjournment would be disadvantageous. I considered that the matter was implicit within the Claimant's case that the process and the pool was unfair and that no party was taken by surprise. I indicated that whilst I would not straight jacket the advocates, this would be a matter that I would exercise careful case management of, so as to prevent and escalation which derailed the hearing. I considered carefully the article 6 rights of the parties involved and I have been entirely satisfied that both parties have been able to argue their respective positions on this point in a proportionate manner and that it was discussed appropriately within submissions.
18. In relation to two emails sent between Lesley Garwood and the Kingswood Group, the Respondent had redacted passages of these emails. The Claimant was concerned regarding this, as was I. I was informed by Ms Hausdorf for the Respondents that this was due to litigation privilege. Following an extensive

discussion I accepted Counsel's assurance in this regard and did not seek to go behind the redaction.

19. Finally, whilst it was not raised as a preliminary matter, it became apparent during cross examination of the Claimant, and included within the supplemental bundle material, that there was some issue with the directorships held by the Claimant. It would appear that information regarding the Claimant's history at Companies House has been researched as part of these proceedings. Ms Hausdorf put to the Claimant that he had been in breach of his contract as a result of this activity, which the Respondent says they have subsequently been made aware of. This was denied by the Claimant, who argued that his other interests were complementary. I raise this now as a preliminary issue, as it came somewhat as a surprise during the evidence. No application had been made by the Respondent to amend their ET3 Response. Ms Housdorf argued that at the very minimum that this issue was relevant to any 'Polkey' argument.

20. I raise this matter now, because it should be plain that this was a new matter that was sought to be introduced. I did not give permission for an amendment of claim nor was any counter claim sought by the Respondent. I therefore have placed no weight upon the Claimant's other business interests. It has not been properly raised or litigated and in any event, is unlikely to be either determinative or influential in any way to the outcome of these proceedings.

Issues

21. Having dealt with these preliminary matters, I agreed with the parties that the issues for me to decide related to whether there had been an unfair dismissal and a breach of contract claim relating to the PILON payment. Although 'Polkey' arguments concerned remedy, I agreed with the parties that I would consider them at this stage and invited the parties to deal with them in evidence and submissions.

22. I have been assisted by the parties providing a comprehensive schedule of issues for the hearing. By way of summary, these essentially relate to, whether there was an unfair redundancy process, resulting in an unfair dismissal, either on its facts or for procedural deficits. Secondly the Claimant argues that the failure to compensate him for health insurance, death in service and pension benefits amounted to a breach of contract. This Judgment is limited to liability and Polkey determinations.

Unfair dismissal

23. Section 98 of the Employment Rights Act 1996, deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). The burden of proof rests with the employer to demonstrate the reasons. In this case the Respondent relies upon 'redundancy' as being the potentially fair reason for dismissal.

24. Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider S98(4), without there being any burden of proof on either party, namely whether the respondent acted fairly or unfairly in dismissing for that reason. I must consider the overall merits and circumstances of the case when balancing this issue.

25. A principal limb of the Claimant's case was that the procedural aspects of his dismissal and indeed the redundancy process were unfair, and that had a fair process been applied, he argues that he would not have been dismissed.

26. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed, in accordance with the principles in Polkey v AE Dayton Services Ltd

[1987] UKHL 8; Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; and Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604.

Breach of contract

27. On the 19th of October 2021 when the Claimant was dismissed, he received a 'Payment in Lui of Notice (PILON) for his outstanding wages as specified in his contract. This also included payments for his accrued holiday. There is no dispute about the overall substance of the payment, however the Claimant argues that he should have also received employers pension contribution on the PILON payment. As well as compensation for loss of other fringe benefits which he would have been entitled to had he worked his notice, specifically the death in service and private healthcare benefits.

28. The period of the Claimant's notice was 4 weeks and so outstanding payments are relatively straightforward to ascertain. All parties agree that in determining this issue it will be a matter for me to analyse and determine the nature of the contract. There is no dispute that the contract is silent on these particular issues, however, other matters, such as bonus payments were specifically excluded from the PILON payments.

29. I must therefore analyse whether there has been a breach of contract, and whether that breach is material. The loss suffered by the Claimant must be quantifiable and any compensation I award should only put the Claimant in the position he would have been, had there not been a breach.

Findings and Analysis

30. I should say at the outset that all of the witnesses who appeared before me gave cogent and clear evidence. I am satisfied that there was no deliberate attempt to mislead the court by way of mistruth. However, I am alive to the fact

that that omission, may be as misleading as an outright mistruth, and that it is inherent within human nature to portray oneself in a positive light. Memory is not infallible, far from it, it is subject to corruption and change over time and manipulation in accordance with one's own outlook and ego. I therefore must approach the witness testimony bearing this in mind. Helpfully I have a substantial amount of written material and email exchanges, which go some way to filling in any gaps left by the witness testimony.

Dismissal S98(4)

31. From the written material I have seen and accepting the evidence of John Philips in this regard, the Respondent had determined in November 2020 that a redundancy situation affecting the Claimant's specific role was likely to arise. To the Respondent's credit, they maintained the Claimant and Alex Scott on the furlough scheme as long as possible. Therefore minimising the financial impact that was likely to occur. The Claimant argued in evidence that he was far from satisfied that a redundancy was necessary and that the market was far more buoyant than the Respondent perceived. The counter argument to this was that, the role had changed with the use of 'Zoom' calls, and so this saved a substantial amount of travel time. The focus would be shifting to retention rather than development of new sites, and that with the loss of travel, this could be accomplished by fewer workers.

32. I remind myself that it is not for me to analyse what I would have done in the circumstances, of any aspect of this case. From the evidence I have seen there is little doubt in my mind that the role undertaken by the Claimant and Mr Scott was subject to substantial disruption. I accept that the Respondent had a genuinely evidence based belief that there would be few opportunities to develop new sites and consequently required fewer staff. That belief may have been misguided according to the Claimant's logic. It may have in hindsight proved to have been short sighted, but that is not for me to determine, nor is the answer to that question relevant.

33. I find that the Claimant was dismissed for a potentially fair reason, pursuant to S98(4) of the ERA 1996, and that that reason was for redundancy. The real meat of this matter falls on how the Respondent conducted the redundancy process and whether it acted with procedural fairness and with appropriate resources relative to the size of its operation. Finally was the decision within the range of reasonable responses for an employer? I have been referred to various cases in respect of these matters which I shall discuss in due course.

34. As I have discussed above, senior managers were discussing the prospect of redundancy from as early as November 2020. However, the decision was not cascaded to Paul Wilson until Late September 2021. Why this was the case, remains unclear. The furlough scheme had a well-publicised end date that was notified to employers in good time.

35. Fast forwarding then to September 2021, and the need to make the redundancy took on a sudden urgency. The Claimant was due back at work on the 1st of October 2021. However, on the 28th September 2021, Lesley Garwood produced a script to be read out to the affected employees. That scrip was read to the Claimant and Mr Scott on 30th September 2021. It is a script that has been the subject of much debate during this hearing.

36. The script made it clear that a follow up letter would be sent and that there would be a 7 day period of consultation, during which time counter proposals should be put forward. It also made it plain that the pool of employees should consider alternative vacancies internally.

37. Following on from this at 10.34am on 30th September Paul Wilson sent an email to Lesley Garwood to clarify when the formal letters would be sent out and how the company portal could be accessed regarding alternative vacancies. It has been clear to me throughout the hearing that the Claimant did not know how to access the portal and I accept his evidence in this regard. I also find that Paul

Wilson was unable to access it. Whether the Claimant ever received instructions on this I am unclear. Ultimately, there were no suitable roles so it matters little, however, this is one of many strands to this process, which speak to a level of chaos and inexperience in those conducting it.

38. The next meeting was scheduled for the 7th October 2021. During the consultation period Alex Scott sought out conversations with Lesley Garwood about the process. The Claimant did not.

39. Letters dated 1st October 2021 were sent to the Claimant and Mr Scott in mirror format. These made it clear that the meeting on the 7th of October 2021 would be to discuss counter proposals, and that following this there would be individual meetings. No individual meetings ever took place.

40. The discussion on the 7th October was in a group format and this did not offer individual consultation with the employees. They were asked if they wish to apply for the role and both confirmed that they did. It was in my view a clumsy process. It would have been preferable to have spoken to both individually. It is perhaps not fatal to the procedural fairness, but it is another straw to be added to the proverbial 'Camel's back'. Likewise was the abject failure to arrange an individual meetings, following the meeting on 7th of October 2021, in accordance with the process set out by the Respondent in it's letter dated the 1st October 2021.

Meeting on 7th October

41. There are several key elements to this meeting which require a determination. Firstly, what information the meeting imparted. It is also uncontroversial, that no party was informed that there would be competency based questions. I have no difficulty in determining this, as it is clear that the questions were not formulated until after this meeting.

42. Secondly the parties were informed that they would need to give a presentation.

There is a dispute about the exact nature of the information given in this regard. No notes were available of this meeting taken by Paul Wilson. In evidence he said that he would have taken notes and sent them to Lesley Garwood. I am not convinced by this. I have not seen any notes of this meeting and absent their disclosure, I find that there were none taken at the time.

43. Mr Wilson said that during the meeting that he would have given the parties the title of the presentation. However, I note his careful choice of words here – "*I would have done."* That is not the same as confirming a memory that he did. I have observed that memory is not infallible. An expectation or hope that something was said, is not the same as confirmation of a memory of its occurrence. When I asked the Claimant whether he received the title in the meeting on the 7th of October 2021, he confirmed that he did not. On balance I prefer the Claimant's evidence in this regard. I find that nothing other than the expectation of a PowerPoint presentation was explained.

44. I am fortified in the view I expressed above, as it is clear from the email chains that Paul Wilson contacted Lesley Garwood immediately after the meeting on the 7th October 2021, to seek her advice as to the next stages. In her response at 11.50am she stated *"This is now going to be a conversation with John as you will now need to agree the interview criteria and questions……"* This goes again to the heart of the chaotic nature of this process, that no forethought was given to this and only 24 hours was allotted to complete this task.

45. It is clear that then a discussion took place between Paul Wilson and John Doughty, to construct the interview criteria. This was criteria that would need to be set for an interview the following Monday, some two working days later. In fact the emails which Paul Wilson sent out to the candidates were not sent until after 4pm on Friday the 8th October, confirming the interview times, panel constitution and title of the presentation.

46. Considering the details of this email, it is clear to me that there was simply insufficient notice provided to both parties. In my view to provide notice late on a Friday by email for a presentation to take place on the Monday morning was unreasonable. This is particularly the case as this process had started in November 2020 and neither party was physically in work. It provided no opportunity for clarification, challenge or consultation. Not least because Lesley Garwood herself was not in work that day and was not available to any party for support.

47. Finally, there was an issue with the panel constitution. The Claimant had raised issue with John Doughty being upon the interview panel. That much is clear. It is clear that the Claimant was aware of the constitution as there are numerous emails about it. The Claimant in his evidence articulated some reasons as to his challenge. His perception that John Doughty should not be on the Panel as he had no knowledge of the role and could not be objective. He had also had some experience of an alleged incident where John Doughty is said to have 'trodden on his toes', to the detriment of retaining a client. I do not need to determine the truth of this. John Doughty told me he was unaware of the problem. I agree. It is clear that the explanation provided by the Claimant was provided after the decisions, and the Respondent was unaware of the specific challenge.

48. However, the Respondent should have been aware of what the challenge was. Had they conducted the individual meetings promised, or queried with the Claimant what his issue was, then they could have made an informed decision. Again this speaks to me of the inexperience of the individuals responsible for this process. To be seen to be fair and objective, they needed at the very least a conversation with the Claimant.

49. Instead this was dealt with by a series of emails internally which dismissed the issue and confirmed it was for the Respondent to set the process and not for the Claimant to dictate it. Unfortunately, there are several issues here. Firstly

there were obvious discussions between Paul Wilson and John Doughty about this matter which are undocumented, and unevidenced. I do not know what they discussed. It may be immaterial. However, more crucially the email from Paul Wilson makes it clear that the Claimant 'challenged' the presence of John Doughty.

50. The evidence of Paul Wilson before me has sought to distance himself from the use of that word. It has been diluted to 'surprise'. I am not persuaded by this. I consider it more likely that the words used at the time are the accurate reflection of the situation. The fact that there was a challenge which went both without investigation and without any response to the Claimant is a flaw in my view. It is a fundamental pillar of a redundancy process, that the decision must be capable of challenge. If the decision is challengeable, so is the constitution of those that arrive at the decision and the prejudice or experience which they may bring to it. The fact that this challenge went unanswered, speaks volumes to the approach taken by the Respondent, whether or not that challenge was justified.

51. Finally it is worth noting at this point that the emails sent on the 8th of October 2021 also made the constitution of the panel clear. The parties were advised that this would consist of Paul Wilson, John Doughty and John Phillips. The Claimant must have realised at this point that his challenge was unanswered. He had no time to seek further clarification, prior to the interview and I can readily understand why he did not take it further at that stage.

Interview Process

52. The interviews took place on the 11th of October 2021. The Claimant went first at 10am. It is clear from the emails that Lesley Garwood was provided with the questions that morning. Mr Gittins focused in his cross examination of Lesley Garwood about the events leading up to the meeting. Ms Garwood had been off work on the 8th of October 2021. Mr Gittins challenged the tasks that she had to complete in 27 minutes before the meetings took place. Namely to speak to both Mr Doughty and Mr Wilson about the challenge made by the Claimant

and assess the objective nature of the questions provided. Mr Gittins' contention that there was too little time to complete this effectively, carries some force.

53. I am not persuaded that Lesley Garwood had a proper oversight of these issues. Her guidance here was limited. The process was rushed and in effect she had no time to challenge matters. By this stage, of the Respondent's own design and rushed timescale, there was little alternative to progressing with the interviews.

54. I have before me the score cards, and comments of John Doughty and Paul Wilson for both candidates. There is no score card for John Phillips who was also present. It was suggested to me in evidence that he was an observer. In his own account he said that he was there to support his colleagues, both conducting and subject to the interview process.

55. I struggle with this suggestion. The email of the 8th October 2021, made it clear that John Phillips was to be part of the constitution of the interview panel. Something which all have sought to distance him from. If he was not part of the panel, what was his role? I struggle with the moral support function which he suggested in his evidence. I say that for two reasons. Firstly, the emails made it implicit he was there as a decision maker. If he was simply an observer, that should have been made clear. Secondly, the evidence of Paul Wilson and John Doughty was clear that John Phillips provided commentary on who gave the best presentation.

56. I therefore find that John Phillips was at the panel in some form of decision making capacity. That his role within that meeting was undocumented and unclear. The influence he had over the decision making is incapable of objective analysis as a result. If it is incapable of analysis, it would have been difficult for the Claimant to objectively challenge at an appeal stage.

57. Turning then to considering the physical conduct of the interview. Objective criteria such as performance, pay and length of service were side-lined from the process. I am told that this was because there was nothing to choose between the candidates (albeit Alex Scott had a considerably longer service record). Again I struggle with this suggestion. The emails from Lesley Garwood advised about coming up with a criteria, questions and scoring mechanism. It did not mention other factors such as service. The decision to exclude these objective matters in the decision making, looks more like an oversight to me, rather than intention.

58. It may well be the case that in hindsight, there was little to choose between the candidates on their record. But I find it was hindsight that excluded these matters, because of the rushed and inexperienced approach by the Respondent, these matters were overlooked.

59. I am told that objectively there was little to choose between the records of Alex Scott and the Claimant. However, if I were to accept this, it would be upon the testimony of the witnesses. There is insufficient evidence before me to substantiate that claim. I find that I cannot place weight upon this argument, because the Respondent has not discharged their burden to evidence their assertion. What difference these objective criteria would have made to the outcome is unclear. But the absence of its consideration in the balancing denied the Claimant a legitimate avenue of challenge.

60. I turn then to consider the scoring criteria. These are divided into two sections. The first five questions are related to competencies surrounding the presentation. The second half consisted of seven competency based questions including a scenario based question.

61. These were the subject of significant cross examination of Lesley Garwood as to whether these questions were subjective or objective. In her evidence she said you could argue them either way. I disagree. On my interpretation, these

questions are subjective, or at least the overwhelming majority of them are. The title of the presentation; *"Protecting and developing JMNB introducers"* provided no framework information to the candidates, as to what benchmarks would be used to assess this against.

62. This is then further complicated by the fact that each answer is scored out of 5. Seemingly with no benchmark as to what a good answer was, or what the answer they were looking for was. There was no way that scoring could reasonably be seen as anything other than an opinion based ranking. No scoring criteria was formulated. There was, on the witness evidence, no moderation of the scores (despite what I have said about the role of John Philips). Equally no particular answer is weighted for its importance, over and above any other factor.

63. Subjective criteria, that are subject to a bland aggregation, rather than reflection, moderation and discussion, are perhaps unlikely to be of evaluative quality.

64. By way of example I consider the responses to question 6 in part two: *"How would you obtain and plan for a current introducers future plans?"* leaving to one side that the question makes little sense to an outsider, the scoring provided by John Doughty was 2 and Paul Wilson 4 for the Claimant (out of 5). Subjectively they were at either end of the spectrum. Why this was is unclear on their notes. This example serves to highlight the inconsistency applied to the scoring process.

65. In his email to Lesly Garwood dated 7th December 2021, Paul Wilson confirms that there was discussion with the 'panel' of the scorecards and comments were discussed. No notes were taken of this discussion. In her response to Paul

    Wilson's comments about the absence of notes Lesley Garwood wrote; "*Sorry Paul, I would not have expected to have to advise as the decision making is all part of the interview process and would need to be recorded."* I agree.

66. Produced at page 361 of the bundle is a document proposed as the notes taken by Paul Wilson. This is a typed undated document. I note that the scoring of the interview was handwritten. The notes focus on the positives brought by Alex Scott and only fleeting reference is made to the Claimant. It notes the "*panel discussed*", and I have already found that John Phillips was part of that discussion in an undocumented way. The notes do not help establish what is discussed and I find that these were written in retrospect some two months after the event, in order to correct the deficit identified by Lesley Garwood. Their production was prompted by the request of Kingswood Group for all notes. The content highlights the subjectivity that Mr Wilson applied to the process.

67. Ms Hausdorf argues that the use of subjective criteria is not fatal to the process and relies on ***Canning v National Institute for Health and Care Excellence*** *UKEAT/0241/18,* by way of a qualification of the guidance provided regarding objective selection criteria in ***Williams and others v Compair Maxam Ltd*** *[1982] IRLR 83).*

68. It may be appropriate in circumstances to have a subjective interview criteria, particularly when there is nothing to distinguish either candidate objectively. However, I conclude that this is not an argument capable of being sustained in this instance. Against a chaotically organised process, with no reference to why objective criteria were excluded. The questions asked had no scoring benchmarks or moderation to guide the panel. The process is partially undocumented and frankly opaque. The role of John Phillips and its lack of transparency is deeply concerning, and the overall process itself was poorly thought through. Even if subjective criteria were justified in this instance, then its use was utterly flawed.

69. It follows, for all of those reasons that I conclude that that the selection process was unfair and flawed.

70. I have paid little attention to whether Paul Wilson should have been in the pool for redundancy selection. I find that he should not have been included. He clearly had a more senior role and other responsibilities and remuneration. In that respect the Claimant's argument about the constitution of the pool, should attract no weight in the determination.

71. Following the decision to make the Claimant redundant he was immediately dismissed on the 19th October 2021. No consultation followed the interview process. Only after his dismissal was he offered the opportunity to apply for further roles in the business. Again this process was procedurally flawed.

72. I therefore find that the original dismissal based upon the process used was outside the range of reasonable responses for a reasonable employer to conclude, particularly given the size of organisation and resources available to the Respondent.

Appeal Process

73. The Claimant lodged an appeal and there is no criticism of him in that regard. The Respondent outsourced the appeal to Kingswood Group HR Solutions. A formal hearing was held on the 8th December 2021. That appeal heard only from the Claimant, but a range of documents were considered. The Claimant amongst other matters claimed that his appeal had been prejudiced by delay. Unfortunately the delay in hearing the appeal was nothing compared to the delay in communicating the outcome. Ms Todd communicated her recommendation to the Respondent, to uphold the appeal (on most grounds), on the 16th of December 2021.

74. It appears that having received her recommendation, those in a decision making capacity at the Respondent, decided to depart from it. Unfortunately this took almost three months to communicate this to the Claimant. To suggest that the subsequent delay was not prejudicial when Ms Todd had advised that a 58 day delay in hearing the delay was prejudicial, is in my view a preposterous

decision. On this limb alone the appeal process was procedurally unfair and flawed. The mitigation offered that these were unprecedented times due to covid, and the HR department were stretched, may well be true, but it is in my view inadequate. The real reason here for the delay is obvious in my view. The Respondent didn't like the outcome of the recommendations of Ms Todd and the time was spent on a face saving exercise.

75. Ms Todd in my view, came to a reasoned and balanced view in the totality of her findings. The key areas which were upheld by her related to:

a) the absence of individual consultations,
b) lack of job description,
c) absence of objective selection criteria to inform the redundancy outcome,
d) the application of a subjective interview process to determine the redundancy outcome,
e) incorrect application of termination date (failure to consult between redundancy decision and termination),
f) failure to respond to the objection raised in respect of John Doughty.

76. This is no meagre list of transgressions. Given the analysis I have undertaken above, I can entirely see why Ms Todd came to that view. She had the benefit of the paperwork. Whilst the Respondent may be critical that she did not speak to the panel, I can readily see that this would have done little to assist the flaws she identified in the written material.

77. I have seen correspondence from Ms Todd to Lesley Garwood dated the 24th July 2022. This is in response to a detailed list of complaints about the appeal process. This makes a list of complaints and accusations against Ms Todd. Her response is understandably one of consternation. She repeatedly makes reference as to the Respondent's approach to undermine and discredit the process and defame her. She sets out an extensive response, which mitigates and rebuts the accusations made. I note that it has not been a feature of this hearing that Ms Todd was in some way unprofessional. The Respondent argues

her conclusion to be incorrect. I can easily understand why Ms Todd felt professionally aggrieved, given the tenner of that letter. There is little in the evidence that supports the approach taken by the Respondent in this regard and I cannot see that anything Ms Todd did, was outside a reasonable band of discretion and professionalism.

78. The most important aspect of this correspondence is that Lesley Garwood, stated: "*The company does accept that there were failings in the process and that, for example individual consultations did not take place. You did not however, consider if the company acted reasonably in the circumstances and /or if this failure made any difference to the overall outcome."* It is not an exhaustive list, and clearly an unfounded criticism. Ms Todd did consider the overall reasonableness and concluded that there were multiple failures in the process. That point appears lost on the Respondent.

79. In terms of the final appeal outcome email, sent on the 9th March 2022 by Lesley Garwood, this is a departure from Ms Todd's findings. Although some matters such as the PILON payments were accepted in the main, it seeks to distance itself from Ms Todd's conclusions. However, it suffers from a number of failings. Ms Todd offered justification and reasoning for her conclusions. Whilst some of that appears implicitly accepted; such as the absence of objective selection criteria, the response is in essence to blame 'furlough' and the unusual circumstances, or project the blame onto the Claimant. It did not consider the Claimant's submissions or complaint in that balancing exercise.

80. More importantly, it is not clear who makes the decision on the Appeal. Was it Lesley Garwood the author of the email, or someone else? The email repeatedly states; "*the company*" as the arbiter of the decision making. The opening to the email records; "*the reason for the delay has been a combination of workloads, absences, further investigations being necessary and holiday".* Who undertook those investigations, what they were and who decided upon them is an utter mystery.

81. I certainly cannot tell who the identity of the ultimate decision maker is, based on the evidence. It seems highly likely in my view, that the person or persons making this decision were some or all of those involved in the original process. That much is implicit in the way the response is formulated. Certainly given the resources of the Respondent, there were others within the organisation who could and should have reviewed the appeal, if they were to depart from the recommendations of Ms Todd. Had another manager done so, no doubt they would have appeared before me, to explain the rationale.

82. I find that the process subsequent to the appeal hearing, applied by the Respondent, to be a murky and unjust affair, fraught with unjustified delay and prejudice to the Claimant. I was also troubled that the Respondent lacked any written particulars of an appeal process. Given the relative size and income of the group, this seems to be curious. I was troubled by Lesley Garwood's evidence when she eluded to a 'usual process' that was followed and a reference to time periods of 7 days, yet she was clear there had been no disclosure of a written policy. It seems to me that there was some policy guidance in written form that existed and was known about internally as a benchmark. I find that this was not disclosed and ought to have properly been provided to the Claimant. I cannot attribute blame as to why this was, but it compounds the failures of the Respondent in this process.

83. For all of the reasons I have stated above, I find that the appeal decision by the Respondent was utterly flawed, and unfair. The justification for departing from Ms Todd's findings was woefully inadequate. I find that there was no independent arbiter of the ultimate appeal decision, who was distinct from the original panel. Finally the time taken to reach a decision clearly prejudiced the prospect of any re-instatement. The decision making here, clearly fell outside the range of reasonable responses for an employer.

84. I therefore find that the Claimant was unfairly dismissed. The deficits in the process were compounded by the Respondent's response to the appeal. I will consider making an award accordingly. The value of those payments will be the subject of argument at a future remedy hearing.

'Polkey'

85. I discussed with the parties that it would be appropriate within this Judgment to consider the matter's relating to Polkey reductions. In essence, I must consider whether the evidence suggests that, there is a likelihood that with an amended and perfected procedure, that the Claimant would have been dismissed in any event, and accordingly reduce any compensatory award.

86. I canvassed at the hearing the broad benchmarks of what sort of reduction the parties would advocate. The Claimant inevitably argues that had an objective criteria been applied, he would inevitably have been retained and therefore there should be no reduction. The Respondent unsurprisingly suggested that the decisions had been reached in a fair and balanced way. In so far as I found any procedural unfairness, the Respondent argued there should be a 100 per cent reduction, as the same outcome would have been arrived at.

87. I also canvassed whether or not it was in fact a straight 50 percent chance, given that there were only two parties within the pool for redundancy. For understandable reasons neither party sought to be drawn on that particular prospect.

88. Looking at the evidence I have before me, it is clear that there was no material included which could be considered 'objective'. I have not seen for example; the employment or the performance records, of the employees in the 'Pool.' The Respondent says that these were not used in the process due to relative parity and because both employees had been on furlough. However, I find that I can't place reliance upon that contention. Clearly there is objective information

that could have been produced. The decision not to produce it, may well have been strategic in relation to the Respondent trying to sure up it's redundancy decision. However, without that information, it strikes me that the Respondent cannot sustain an argument that the Claimant would have been dismissed in any event, so as to justify a 100 percent reduction. The Respondent's failed to bring forth the performance information which could have easily have been made available. That strategy must in my view attract some adverse weight as far as the Respondent is concerned.

89. Equally, I am unattracted to the Claimant's argument that under an objective basis that it would be inevitable that he would be retained. He had perhaps an over-confidence in that regard. Clearly there was a risk he would be chosen.

90. I have had the luxury of time to reflect on this matter. I cannot determine that both parties in the pool were on an equal footing so as to make it a 50 percent risk of redundancy for either candidate. I simply do not have enough information determine that they were on an equal footing as contended bythe Respondent. I appreciate that there is an argument to suggest that on that basis, no 'Polkey' reduction should be made, if I do not have the evidence to determine what footing they were on. Again this is also an option that I have considered at length.

91. Balancing matters in the round, it seems to me that it is right to reflect there was an inherent possibility that the Claimant would have been selected, in any event, so there should be a 'Polkey' reduction. It strikes me that the correct balance in acknowledging the possibility, whilst noting the adverse weighting against the Respondent discussed (paragraph 88) above, that the equitable and appropriate reduction to make is 20 percent. I make that reduction accordingly to the compensatory award.

Breach of Contract

92. Finally I must turn to the Claimant's claim for breach of contract. There are three elements claimed: pension, health cover and death in service cover. The central point regarding this matter is my interpretation of the contract of employment and what matters were included, or should have been included within the PILON payment. The Claimant's simple argument in this regard is that had he worked his notice he would have received the benefit of these, and payment of the pension.

93. Death in service was to be provided after a qualifying period of 12 months of employment. Private health cover was said to be available after 12 months employment. Access to the Pension scheme had no qualifying period, and the Claimant paid into the scheme.

94. It is notable that the contract of employment does not contain the PILON clause.

That is contained within a separate terms and conditions document. The Claimant received those terms on the 18th May 2017 and was certainly on notice of them.

95. This has relevance in two regards. Firstly what payments might be included in a PILON and secondly, whether there was a formal contractual basis for the Pilon in the first place.

96. It seems to me that on any interpretation of the contract that the PILON payment is not contained specifically in the 'contract'. If it is not in the contract of employment, I struggle to see how the Respondent can properly seek to rely upon it. Terms and conditions do not carry the same weight as a contract. They contain matters which might properly be altered on a rolling basis, and do not necessarily have contractual weight without the requisite consideration.

97. The terms and conditions are silent on the operation of these matters during a notice period. I take the view that they are not specifically excluded by the contract and therefore were properly payable as part of any notice pay, whether or not the Claimant was in work.

98. I therefore determine that the failure to make the pension contribution was in breach of contract.

99. The other benefits are more complicated. In order for there to be a breach there must be some quantifiable loss. In the case of a death in service benefit there is in my view no quantifiable loss. If a lump some was paid to end that employment it is clearly not the intention for those subsidiary benefits to endure beyond the termination date. In the case of the Claimant his notice period was only four weeks.

100. Death in service has no quantifiable value, unless the Claimant had died. He did not and therefore his estate suffered no loss. I therefore do not see that in this regard any loss is quantifiable. Any award is likely to go beyond compensating the Claimant to the point that he would have been in, had there been no breach, without unjustly enriching him. ‘

101. Finally in relation to the health benefit, Mr Gittins suggested that this was quantifiable, by the cost of a replacement premium for 4 weeks. That may be so, but I note that in the schedule of loss the Claimant has failed to evidence that, or quantify it in any way. However, there is a value of £72.58 contained within his pay slips, paid on a monthly basis.

102. Again I consider that these are benefits designed to reduce sick days, and promote employee welfare. It is generally not envisaged that they would continue after the end of any employment.

103. I understand that had the Claimant fallen ill in the last month of that employment and missed out on cover, then his loss may have been very great indeed. However, that is not the facts of this case. I have wrestled with the facts and whether there is a quantifiable loss to the Claimant so as to necessitate an award. On balance I am persuaded by the argument that the Claimant should have received the benefit from the premium for the period covered by his PILON and the failure to pay that or extend the policy cover represented a breach of contract and should be compensated accordingly.

104. I therefore find in the Claimant's favour both in respect of the breach of contract and the unfair dismissal. This Judgment is limited to liability only. I will give separate case management directions to list this matter through to a remedy hearing before me. However, I encourage the parties to engage in a constructive dialog in the interim regarding remedy.

105. That is my Judgment.

Employment Judge Codd 1st November 2022