EMPLOYMENT TRIBUNALS

Claimant:	**Mr D Hulme**
Respondent:	**Rustins Limited**
Heard at:	Leicester Hearing Centre, 5a New Walk, Leicester, LE1 6TE
	By cloud video platform
On:	6 January 2022
Before:	Employment Judge Adkinson sitting alone
Appearances	
For the claimant:	Ms S King, Counsel
For the respondent:	Mr S Proffitt, Counsel

JUDGMENT

After hearing the evidence of the parties and reading their written submissions, and after the claimant withdrew his claims for breach of contract and holiday pay, IT IS ORDERED THAT

1. The claims for holiday pay and breach of contract are dismissed;
2. The respondent unfairly dismissed the claimant. However there is a 75% chance that the respondent would have fairly dismissed him in any event and so any compensatory award will be reduced accordingly; and so
3. Remedy will be decided at a further hearing to be fixed.

REASONS

1. The claimant claims his dismissal for redundancy was unfair, and that there was not a redundancy situation anyway. The respondent denies that, saying that alternatively he was dismissed for a business restructure (i.e. some other substantial reason), but says even if it were unfairly dismissed, he would have been dismissed in any event and any remedy should reflect that.
2. Other claims were withdrawn and I have therefore dismissed them on withdrawal.

Hearing

3. The hearing took place on 6 January 2022 by video link. It was listed for one day. The time estimate was insufficient. Therefore by agreement I heard the evidence and invited written submissions before delivering a reserved judgment with written reasons. If remedy were appropriate, it was agreed I would list a further hearing. This is the judgment and reasons for it.

4. Ms S King, Counsel, represented the claimant. Mr S Proffitt, Counsel, represented the respondent. I am grateful to both for their help.

5. I heard oral evidence from

    5.1. Mr D Hulme, the claimant and until dismissal an Area Sales Manager ("ASM") with the respondent,

    5.2. Mr E Krawitt, the Managing Director of the respondent, and

    5.3. Ms S Cope, the National Field Sales Manager and claimant's superior until his dismissal. Before July 2019 she was herself an ASM with the respondent.

    I have taken that evidence into account.

6. There was a bundle of documents of about 150 pages. I have taken into account those to which I have been referred.

7. Each party made written submissions. I am grateful for them and have taken them into account in reaching my decision.

8. Because the hearing was exclusively by computer we took breaks each hour for about 5 minutes to allow breaks away from the screen, with 1 hour's break for lunch. There were no other adjustments requested. There were no technical problems worthy of note.

9. Neither party has alleged this was an unfair hearing. I am satisfied it was a fair hearing.

Issues

10. The following issues arise in relation to liability:

    10.1. What was the reason or principal reason for dismissal? The respondent says the reason was redundancy or some other substantial reason, namely business reorganisation. It is disputed that there was a redundancy situation.

    10.2. If the reason were redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

    10.3. If the reason were some other substantial reason, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

    10.4. If the dismissal were unfair, is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

11. There is no allegation of contributory conduct. The claimant concedes that the ACAS Codes of Practice do not apply to this claim.

Findings of fact

12. I am satisfied that all witnesses were honest and truthful and did their best to assist the Tribunal.

13. I found the respondent's witnesses to be straightforward in their evidence and answers.

14. I found the claimant was also straightforward in his answers in cross-examination and I detected nothing that led me to consider he was in those answers seeking to hide or play down anything. His honesty was demonstrated by the fact he agreed with the respondent on a number of issues (even when they are not favourable to him). However I have a concern that the claimant has demonstrated some tendency to look for explanations that avoid the obvious one for his dismissal (his redundancy) even though they are not supported by evidence. There are two things that gave me this concern.

    14.1. Firstly he alleged that he was dismissed partly to enable to respondent to increase and so equalise the proportion of women to men in the roles. There is no evidence of this. It is a bare assertion. It was not explored in cross-examination. However he did not withdraw this allegation. It is notable he did not allege any form of discrimination because of sex.

    14.2. The second is he put forward in his evidence-in-chief a suggestion that he was made redundant as a consequence of a fire in 2018, and that the reasons the respondent advanced for his dismissal were just an excuse. This is a reference to paragraph 19 of his statement which he still adopted as evidence-in-chief. He indicated he was not going to pursue in cross-examination and did not do so. That decision in my opinion was correct. The idea that a fire in 2018 resulted in the respondent waiting for an event like the pandemic and consequent period of furlough to dismiss him because of the consequences of the fire is implausible. Besides, there is no evidence to support it.

15. With those observations in mind, I make the following findings of fact on the balance of probabilities.

16. The respondent is a manufacturer of and supplier of speciality paints, wood and stone finishes, renovators and other related products. At the material time, it had about 55 employees, and it did not have a Human Resources department or facility.

17. Before the redundancy exercise, the respondent divided the United Kingdom into 10 areas, each with an ASM. One of those was Scotland. This was a separate area because of its size, population distribution (mainly in the Central Belt) and numerous islands off the west and north coast, isolated areas and market conditions. Its ASM worked only 2 days per week (all other ASMs were full time). In addition the respondent sold products to

the Channel Islands. However sales were very low because it is a small area both geographically and from a population perspective. Therefore the islands were added to one of the other areas depending on how easily that ASM was able to access transport to the islands. The other areas were defined by postcodes.

18. The respondent sold its products to large regional customers who sold direct to the public, wholesalers who, in effect, acted as intermediaries between small retailers and the respondent and to other large online and bricks and mortar retailers. It did not sell directly to the public.

19. Mr Hulme began his employment with the respondent on 29 April 2013 as an ASM. He covered the Midlands area. He was field-based and worked mostly from home. He was able to access the Channel Islands by flights from local airports and so the Channel Islands were assigned to him.

20. In early 2020, there began a worldwide pandemic of the Covid-19 virus which was easily spread and could cause serious illness or death. In late March 2020, the UK government imposed restrictions on workplaces, essentially closing physical shops and requiring employees of nearly every business to work from home. This was called “lockdown”. There was a rapid downturn in economic activity. The UK government created a scheme which allowed employers to furlough staff, and the government would refund 80% of the wages of those furloughed staff, up to a particular monthly cap per staff member. Furloughed staff were forbidden under the scheme to do any work for the employer who had furloughed them (though they were entitled to work elsewhere without it affecting the furlough arrangement). While the government reimbursed 80% of pay, the scheme did not itself affect the rights and obligations under a contract of employment. Therefore absent agreement, employees would still have been entitled to a full wage provided they were ready and willing to provide service.

21. The effect of the lockdown was that ASMs were unable to visit their customers because many of their bricks and mortar customers could not or did not open or did not want them on site for health reasons. There was a drop in orders of about 25%. Many ASMs were uncomfortable going out to visit people anyway because of the health risk.

22. On 30 March 2020 the respondent decided to place the ASMs, including the claimant on furlough for an initial period of 3 months. (It later put another 22 employees on furlough.) The reason was to see how matters developed in the initial phase of lockdown. The situation was unprecedented (certainly in modern times) and there was no known data or model to which the respondent could refer to predict the likely development. Because of the uncertainty, senior managers also took pay cuts albeit they were not furloughed but continued working.

23. That same day, the respondent told the ASMs of the plan and that they would have to accept that their pay would be reduced to 80% of normal pay. The respondent emailed agreements to the ASMs for them to sign and return. Like all subsequent meetings, it took place remotely. The claimant has not criticised the method used for remote communication at each

meeting so I assume that each method used is considered reasonable and presented no unfairness from the claimant's perspective.

24. Mr Krawitt emailed a letter to Mr Hulme on 1 April 2020, acknowledging the claimant had agreed to be furloughed, asking him to sign and scan back the letter intimating his agreement by noon 2 April 2020.

25. Mr Hulme asked for it in Excel format because his printer lacked black ink and he was hoping to change it to colour and print it. He asked if he could send the form back once he had secured some ink. Mr Krawitt replied

"Darren, it is important you return this letter signed by noon tomorrow 2 April 2020 or we will start the redundancy of consultation process. You will need to find alternative ways of printing the letter if your printer doesn't work. I do not understand the printer ink issue because you submitted expenses for ink on 26 March 2020...

"I suggest you liaise with Sonia if there are any issues."

26. The claimant suggested that this was a threat of redundancy if he did not sign and is evidence that the redundancy situation on which the respondent relies is, in short, untrue. I accept that is Mr Hulme perceived the wording as a threat. It was a time of great uncertainty for almost everyone and it is understandable that things might be misinterpreted. I do not accept his perception is correct, however. I accept Mr Krawitt's evidence that the respondent faced a stark choice in late March-early April 2020. To survive it reasonably believed that if furlough or pay-cuts were not possible, then staff would have to be made redundant because its trade had significantly reduced and there was no telling when or how it might resume. I accept, that this was mentioned at the meeting on 30 March with the ASMs. I conclude that Mr Krawitt was doing no more than expressing what had been said already and warning of the real alternative if furlough is not possible on these terms. While a few extra days delay might in hindsight have presented no problem I do not think it was unreasonable for the employer in those unprecedented times and who had evidence that the claimant had ink, to insist on the prompt response.

27. The respondent updated employees on 9 April 2020 about the situation and extended the ASMs' furlough on 16 April 2020. Their furlough was extended a number of times thereafter, the date of which do not matter.

28. In May 2020 the respondent's sales started to pick up and were "strong" in May, June and July 2020. However this was due to a change in customer behaviour. Mr Krawitt explained that before lockdown consumers preferred to buy their paint and the like from bricks and mortar stores, perhaps because of concerns about colours or delivery. However during lockdown consumers had moved significantly to buying from online stores, in particular from large online national retailers. These retailers did not deal with the ASMs but instead contacted head office and placed orders through Ms Cope and her colleague Mr I Slater. In addition a lot of other stockists continued to decline to want to see ASMs personally, instead being content to place their orders through head office instead. Other factors were at play. Many people in the United Kingdom were furloughed at took the opportunity to undertake do-it-yourself renovations. The respondent's products tend to

be sold through specialist shops – some of which remained open unlike the larger national retailers – so demand was driven by what consumers had access to. There were shortages in some of the larger mainstream manufacturers which drove consumers to the respondent. The respondent perceived these factors were temporary: shops would reopen, supply issues would resolve, people would either return to work or be made redundant.

29. The claimant has suggested that this is no different situation to what existed before lockdown and the increase in sales shows the ASMs were not redundant. I do not accept that. It is quite clear from Mr Krawitt's evidence that, while sales did return significantly, the method of those sales had moved away from the ASMs to dealing with head office. There was a dispute about one particular online retailer. Mr Hulme suggested they did not deal with head office but through an agent in Austria. I do not have to decide which is correct because on either case this large online retailer was not dealing with the respondent through ASMs. In my opinion the following factors also support Mr Krawitt's evidence:

    29.1. Firstly the lockdown did not suddenly end. The essential theme of avoid unnecessary contact with third parties remained.

    29.2. Secondly it was so widely reported and experienced at the time that business affairs that had thereto been in person had moved online and remained there, and the evidence accords with that. The Tribunal's own experience shows that to be the case in particular: for example today's hearing is online.

30. I conclude that in fact Mr Hulme's own acceptance that sales had increased during the ASMs' furlough supports the respondent's case the ASMs as then constituted were superfluous to requirements. If sales increased while the ASMs were all absent, it must be the case that their absence was of no effect: or to put it another way the ASMs as then constituted were not a necessary or indeed important part to the sales that the respondent was now achieving. Even more bluntly the claimant's own case shows the ASMs as then constituted were an irrelevance to the respondent's business at that time.

31. In July 2020, the lockdown had eased though significant restrictions remained in place. People had started to return to work, and shops had started to reopen.

32. In July 2020, as part of the preparations from coming out of lockdown, the respondent reviewed its need for ASMs. It decided that the ASMs should be refocused to being salespeople whose role was to persuade existing stockists to take additional lines and to secure new stockists, and less focused on taking orders from existing customers. The new job description for the new ASM shows this to be the case because of its greater focus on expanding sales rather than simply taking orders. It says:

"We expect about 30% of your time managing existing customer orders and maintaining relationships. We expect about 70% of your time to sell new lines and brands to existing customers and opening accounts with new customers and finding new stockist to buy from wholesalers. You will do

this in a combination of field sales called and phone coverage. In this role you will need to spend time researching prospects and fully understanding and exploiting your territory.

“Good, effective planning to take a strategic approach to large customers and efficiently managing small customers will be paramount followed by slick execution.”

33. The claimant accepted this was a different focus to the existing ASM role.

34. The respondent also concluded that the increase in sales online and orders coming directly to the head office meant that they now needed only 7 ASMs. They therefore set about dividing the United Kingdom up into regions.

35. They decided that

35.1. Scotland would remain as one region and be kept out of the reorganisation, though the job description would be updated. The reason was the ASM for Scotland worked only 2 days per week and the region was not covered for the remaining days. The geography and population distribution meant that it was not realistic to merge it with other areas or to expect other ASMs to cover it.

35.2. The Channel Islands would be added to whichever new region appeared most suited to absorb it.

35.3. Northern Ireland did not have an ASM before and that would continue. The respondent did low trade in Northern Ireland. That had not changed in lockdown.

35.4. The remaining parts of the country would be divided in 6 regions.

36. Mr Krawitt, Ms Cole and Mr Slater devised the new areas from the ground up, seeking to balance geographical size with the number of customers (and potential customers) and volume of sales (and potential sales).

37. On 13 July 2020 Mr Krawitt wrote to the ASMs inviting them to a meeting to discuss the changes. He explained that the changes in buying behaviour and that the expected more pressure on sales with a “probable” recession as the country emerged from the Covid-19 pandemic. He also wrote

“Subject to consultation, we are looking at reducing our ASM team to cover seven territories in the UK. Anybody whose territory is affected will be at risk of redundancy. Therefore we will have a consultation process. I will explain the process on the call. Attached is updated ASM job description and a map with proposed new territories. We anticipate the steps to be:

“ ● information meeting tomorrow July 14.

“ ● first individual consultation meetings on July 15 - please inform me ASAP if you have any time in conflicts for a call will ask you about your interest in a new territory.

“ ● for those territories with more than one person applying, having an interview with the applicants.

“ ● having at least one more individual consultation meeting.

"Please note we are open to your suggestions to alternatives and input during the consultation process. This may result in new issues, additional meetings or a changing timetable."

He attached the map of the new proposed areas and the new proposed job description.

38. On 14 July 2020 there was a meeting with the ASMs that Mr Hulme attended. Mr Krawitt explained the proposal as set out in the email. After the meeting he emailed the ASMs setting out in one paragraph the reason for the change and inviting each ASM to a consultation meeting. They were advised of their right to a Trade Union representative or work colleague. The last paragraph read

"If you have any questions feel free to call me at… or by email at …"

Mr Hulme suggested the ASMs were not permitted to ask questions or raise queries. In cross-examination and in light of this email he accepted that was not correct. He confirmed that despite being given the opportunity to ask questions, he did not do so.

39. Mr Hulme met with Mr Krawitt and Ms Cope on 15 July 2020. Mr Krawitt sent an email afterwards summarising his recollection of the meeting. There is no contemporaneous communication from Mr Hulme to suggest it was wrong in any material way and in cross-examination his recollection was not clear. I find as a fact it is an accurate summary.

40. The meeting began with an explanation again of the reasons for the proposals and of the proposals themselves. In addition the explored the alternatives of voluntary redundancy and establishing a pool of at-risk employees and interviewing those for the area they may be interested in and in the event of more than one applicant for an area, using that interview as a criterion, along with others, to select employees for redundancy.

41. They did not discuss the criteria that would be used at the interview or the marking criteria for redundancy with the ASMs. The new ASM posts were not externally advertised.

42. In the meeting Mr Hulme indicated he was interested in becoming ASM for the Midlands area. Mr Krawitt added at the end the following text to the note

"Please let me know as soon as possible if you are interested in any other territories or want to withdraw yourself from consideration. You also mentioned that you have covered Wales in the past and would be willing to cover Scotland.

"We are currently recruiting for a technical service apprentice based at Waterloo Road and you should tell me if you're interested in that role."

43. Mr Hulme did not express to the respondent an interest in any other area, though it is clear he was given the opportunity to do so. He did not consider the technical service apprentice role to be a suitable alternative because it was, he considered, a step down from his current role.

44. The email also said

"Throughout the consultation we would like to consider any alternatives to redundancy. If you have any suggestions as to how redundancies can be averted then please contact me with these and we will discuss them when we meet next.

"We will meet again and on Wednesday 22 July 2020 in the morning for an interview or second consultation meeting. [Ms Cope] or I will be in contact with you before then you're in touch to bring a trade union representative or work colleague with you to this meeting.

"If you have any questions please feel free to call me or talk to Ms Cope"

45. Mr Hulme accepted in cross-examination that he was able if he wished to ask questions or make suggestions, as this letter shows. He did not however do either. I am satisfied from the evidence that I heard the invitation for suggestions and alternatives was a genuine invitation.

46. After the consultation, the respondent continued to proceed with its proposal. It does not appear any alternative was suggested by any other ASM. None was suggested by the claimant. Therefore all ASMs but Scotland's ASM were pooled because those areas were to be reduced from 9 to 6, with the Channel Islands and Northern Ireland to be added to whichever area appeared most convenient.

47. Mr Hulme replied on 15 July 2020 to Mr Krawitt's note. He applied to be ASM for the new Midlands area. He said he would cover Scotland if needed at some point in the future to further reduce UK territories.

48. More than one person applied for the Midlands. The other applicant was "BoP". Therefore it was necessary to interview Mr Hulme and BoP. Mr Slater and Ms Cope wrote out an interview outline that consisted of 14 questions. There was no consultation about these questions. There is nothing in the questions that appears to be unreasonable, however.

49. Mr Slater interviewed Mr Hulme on 22 July 2020 at 11:00.

50. However the respondent decided that other factors were important too. Mr Slater and Ms Cope were left to develop an overall matrix for assessing scores.

51. In the end the factors for scoring each ASM were attendance (which was weighted to form 5% of the overall mark) new customers secured (12%), new product sales (12%), use of technology (7%), key account experience (12%), teamwork (13%), trust (13%), professionalism (13%) and interview (13%). Teamwork, trust and professionalism were each marked out of 6. There were no criteria defined for what would attract 6 points, 5 points etc. and no record of what factors led to the respondent award a particular score to an employee.

52. Mr Hulme accepted that these were potentially relevant criteria. He did not suggest any others. In particular he accepted teamwork, trust and professionalism were important. Mr Krawitt was particularly keen to emphasise the importance of trust, explaining to me that the respondent had had an unfortunate incident in the past where a sales manager had undermined the respondent's trust.

53. Attendance, new customers secured, new product sales were derived from data held by the respondent. The interview was derived from the mark that Mr Slater gave after he had interviewed the candidates. I have not seen notes of the interview to see how it was calculated.

54. The other marks were awarded by Mr Spencer and Ms Cope giving marks they genuinely believed appropriate. The IT scores were not derived from any form of assessment or other evidence that the respondent held. It was based on an honest belief, and no more. The trustworthiness, teamwork and professionalism scores were marked out of 6 and not based on evidence like disciplinary record, capability records, performance reviews or the like. No attempt was made to look for such evidence. There was no prior attempt to define what might merit a 6, 5 4, and so on. These criteria are described on the mark sheet as "teamwork subjective score out of 6", "teamwork with other parts of Rustins subjective score out of 6" and "professionalism and preparedness out of 6". The marks were awarded on the basis of what Mr Slater and Ms Cope felt appropriate. Whatever criticism may be made of this process, I am satisfied from Ms Cope's evidence that they awarded what they felt "fair" rather than manipulating the scores for a desired outcome. Mr Krawitt had no input into the scores.

55. Mr Hulme and BoP scored the same for attendance and teamwork. BoP scored more for new product sales, use of technology, key account experience, trust and professionalism. Mr Hulme scored higher on the others, including the interview. Mr Hulme's overall score was 59, BoP's 68.

56. As a result, the respondent offered the role of Midlands ASM to BoP, and she accepted.

57. Mr Hulme suggested a possible explanation for his selection was to equal the gender profile of the ASMs. I reject that. There is no evidence for it beyond his assertion and, given his tendency to make other suggestions that are implausible (the allegation he was dismissed for a reason linked to a fire in 2018), I tend to find it difficult to accept as being credible in any event.

58. Because Mr Hulme had not applied to be ASM for any other area, the respondent moved to a second stage consultation meeting. It did not offer him other areas because, even though he scored higher than 5 other ASMs (some of whom were appointed to their chosen area), he had not expressed any interest in them.

59. I find as a fact there were no other suitable roles for the claimant. The respondent was in effect changing its business. There were no other jobs apart from the apprentice role. I agree it was not suitable, but it was the only role available. Mr Hulme did not suggest other suitable roles were in fact available. Besides the evidence is inherently plausible given the impact of the Covid-19 pandemic and lockdown, and the change is shopping habits.

60. Mr Krawitt invited Mr Hulme to a final consultation meeting. This took place on 29 July 2020. He was reminded of his right to be accompanied.

61. At the meeting Mr Krawitt explained to the respondent that he had been unsuccessful in securing the role as Midlands ASM. He confirmed that the respondent therefore was making Mr Hulme redundant.

62. Mr Krawitt gave Mr Hulme an opportunity to raise any concerns or other relevant matters, but he did not do so because, as Mr Hulme explained, he was in shock.

63. Mr Hulme never asked to see the proposed criteria either before, during or after the consultations or interviews or to see the other candidates' scores.

64. Mr Krawitt sent a letter the same day confirming the outcome. The letter made no reference to a right of appeal. Mr Hulme did not try to appeal his dismissal in any event. Mr Krawitt says the omission of the reference to an appeal was an error. I accept that. However there is no other document to which my attention was drawn that would make it clear the claimant had a right to appeal. I find as a fact that, absent being expressly told of the right to appeal, the claimant would not have known he had that right.

65. On 7 August 2020 Mr Slater wrote a reference for the claimant. It described the claimant in complimentary terms. I do not accept it is in contraction to the points awarded in the selection exercise. Both are complimentary about the claimant.

Law

66. The parties have referred me to a number of cases in support of their case. I have considered all the cases and the submissions but for simplicity cite only those that I believe are relevant to explaining the relevant law I must apply.

67. The **Employment Rights Act 1996 section 111** entitles a person who has been employed for a sufficient period to bring a claim for unfair dismissal

68. The **Employment Rights Act 1996 section 98** provides (so far as relevant):

"(1) In determining … whether the dismissal of an employee is fair or unfair, it is for the employer to show—

"(a) the reason (or, if more than one, the principal reason) for the dismissal, and

"(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

"(2) A reason falls within this subsection if it—

"…

"(c) is that the employee was redundant "

"…

"(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

"(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

"(b) shall be determined in accordance with equity and the substantial merits of the case.

"…"

Redundancy

69. The **Employment Rights Act 1996 section 139** provides (so far as relevant)

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

"…

"(b) the fact that the requirements of that business—

"(i) for employees to carry out work of a particular kind, or

"(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

"have ceased or diminished or are expected to cease or diminish."

70. The approach to whether there was a redundancy under limb (b) is as follows (**Murray v Foyle Meats Ltd [1999] IRLR 562 UKHL**)

70.1. The first is decide whether one or other of various states of economic affairs exists.

70.2. The second question is whether the dismissal is attributable, wholly or mainly, to that state of affairs. This is a question of causation.

71. What work amounts to "work of a particular kind" is a factual matter for the Tribunal to determine (**Murray**). The focus is on the tasks to be performed rather than on the nature of the job itself (**Johnson v Nottinghamshire Combined Police Authority (1973) 8 ITR 411 NIRC**).

72. When it comes to reasonableness the burden of proof is neutral. The tribunal should consider all the circumstances including the employer's size and administrative resources.

73. The Tribunal has considered the guidance in **Williams v Compair Maxim Ltd [1982] IRLR 83 EAT**, which set out a number of salient principles, some or all of which are likely to be relevant in a redundancy-based unfair dismissal case. Its guidance is as valid whether or not a trade union was recognised or active in the workplace.

74. In **Compair Maxim** Browne-Wilkinson J (as was) said

"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

"… [T]he tribunal must be satisfied that it was reasonable to dismiss each of the [Claimants], on the ground of redundancy. It is not enough to show simply that it was reasonable to dismiss an employee; it must be shown

that the employer acted reasonably in treating redundancy "as a sufficient reason for dismissing the employee," i.e. the employee complaining of dismissal. Therefore, if the circumstances of the employer make it inevitable that some employee must be dismissed, it is still necessary to consider the means whereby the applicant was selected to be the employee to be dismissed and the reasonableness of the steps taken by the employer to choose the applicant, rather than some other employee, for dismissal.

75. As to guidance, the Employment Appeal Tribunal in **Compair Maxim** said the following are hallmarks of a good practice.

"1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

"2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

"3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

"4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

"5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment."

"The lay members stress that not all these factors are present in every case since circumstances may prevent one or more of them being given effect to. But the lay members would expect these principles to be departed from only where some good reason is shown to justify such departure. The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim."

76. The "reasonable responses test" applies to selection for the pool **Capita Hartshead Ltd v Byard [2012] ICR 1256 EAT** i.e. it is a matter for the employer.

77. Criteria for selection should be objective, but that is not to exclude the possibility of subjective criteria being used or relevant where they are appropriate, provided steps are taken to avoid so far as reasonable arbitrary

assessment of them. That appears to be the guidance from cases like **Mental Health Care (UK) v Biluan UKEAT/0248/12 EAT** (where an employer was unfair for applying such rigid objective criteria. Underhill J remarked that it was unusual for an employer relying on competence not to refer to appraisals or the views of managers).

78. As to consultation generally, **Compair Maxim** emphasises importance of consultation cannot be overstated. The key principles applicable to disputes about consultation were set out in the case of **Mugford v Midland Bank [1997] IRLR 208 (EAT)**:

"(1) Where no consultation about redundancy has taken place with either the trade union or the employee the dismissal will normally be unfair, unless the Employment Tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.

"(2) Consultation with the trade union over selection criteria does not of itself release the employer from considering with the employee individually his being identified for redundancy.

"(3) It will be a question of fact and degree for the Employment Tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy."

79. I also mindful that I must not substitute my own decision for what the employer actually did. In applying **section 98(4)** I must at all times be cognisant of determining according to an objective standard whether what this employer did was within the range of things that could have been done by a reasonable employer, acting reasonably. That is, almost without fail, a consistent thread running through all of the leading authorities mentioned above.

80. Despite the code of practice and guidelines in the cases, ultimately each case must turn on its own facts and be broadly assessed in accordance with the equity and substantial merits: **Jefferson (Commercial) LLP v Westgate UKEAT/0128/12 EAT; Bailey v BP Oil Kent Refinery [1980] ICR 642 CA; Camelot Group plc v Hogg UKEATS/0019/10 EAT(S); Taylor v OCS [2006] IRLR 613** among many other cases. **Hogg** makes it clear that unspecified challenges should be discouraged. **Taylor** emphasises that a flaw at one stage does not make the whole process automatically unfair.

Some other substantial reason – business reorganisation

81. It is permissible to dismiss because a reorganisation means the employee's services are no longer required: **Lesney Products and Co Ltd v Nolan [1977] ICR 235 CA**. Under **section 98(1)(b)** the first step is to assess if there are good business reasons for the change in terms and conditions or structure of the company.

82. The employer need not prove the reorganisation is essential or indeed any particular "quantum of improvement", provided it shows sound, good business reason": **Hollister v NFU [1979] ICR 542 CA; Kerry Foods Ltd v Lynch [2005] IRLR 680 EAT**.

83. If there is a sound business reason for a reorganisation, the reasonableness of the employer's conduct must be judged in that context: **St John of God (Care Services) Ltd v Brooks aors [1992] ICR 715, EAT**.

84. The fact the reason is a dismissal for some other substantial reason does not in my view mean no procedure need be applied. It might still be appropriate for there to be consultation, assessment of impact and consideration of alternatives at the minimum: see e.g. **Richmond Precision Engineering v Pearce [1985] IRLR 179 EAT**.

***Prospect of fair dismissal in any event -* Polkey**

85. If I find that the Claimant's dismissal is unfair it is necessary for me to consider whether there was a chance that she would have been dismissed in any event (the principle expressed in **Polkey**). The task for the Tribunal has been explained by the EAT in **Hill v Governing Body of Great Tey Primary School [2013] IRLR 274 EAT** in the following terms:

"'First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have been dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between the two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer would have done) … The Tribunal has to consider not a hypothetical fair employer but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand.''

86. **Polkey** deductions are not limited merely to procedural unfairness. They may be made in cases of substantive unfairness.

Conclusions

87. I turn then to my conclusions.

What was the reason or principal reason for dismissal?

88. I am satisfied on balance that the respondent dismissed the claimant because of his redundancy. Based on the findings of fact above, it is clear that consumer behaviour during lockdown had changed to such an extent that the ASMs as constituted were no longer needed. The work for them therefore, claimant included, had at least diminished, and appeared to have ceased. It is because of that situation, the respondent commenced the redundancy process and, ultimately, why it dismissed the claimant.

89. I reject the suggestion there was no redundancy situation. The evidence plainly shows that was the case. The claimant's case could only succeed if

one assumed sales alone equated to the need for ASMs. That is wrong because it fails to recognise the development of other sales channels.

Was the dismissal fair or unfair in all the circumstances?

90. Based on my findings of fact,

90.1. Mr Hulme was not selected for any reason connected with an attempt to equalise the gender balance in the ASMs. There was no such aim.

90.2. Based on my findings of fact, and in particular that he was encouraged to ask questions (as supported by the written documents) I am satisfied the consultation was genuine in terms of providing information and providing an opportunity for suggestions and alternative suggestions. The respondent was open to any suggestions.

90.3. I am satisfied that the pool was appropriate. The level of work in Scotland (noting the ASM is part-time unlike the other ASMs), the geography and the population distributions justify treating this separately from the remainder of Great Britain. The issues about Northern Ireland and the Channel Islands in my opinion are distractions because it is reasonable that they be bolted onto another area afterwards as appears most suitable.

90.4. The factors identified and the weight attributed to them by the respondent in the exercise were all within the range of reasonable responses. The claimant himself accepted some matters were important and has shown nothing that might suggest anything outside the range of options open the respondent.

90.5. Nothing turns on the fact he did not see his or anyone else’s scores. He raised no query about it at the time and nothing was spelt out in the case before me. It seems to me that such queries he took at the hearing were insignificant. They did not cause me to think the marks awarded could be described as unreasonable. It is telling he did not in his own evidence, having seen the scores, point to any obvious error or obviously unfair assessment.

90.6. I do not think there is any complaint to be had about the lack of suitable alternative employment. He was an ASM. The sales team was being reduced. Head office did not require sales team to process orders since it had coped successfully through the furlough when none of the ASMs were working. He did not suggest any job that might have been suitable. I accept the respondent’s evidence that there were none.

90.7. Nothing turns on the fact he was not offered a chance to work in a different area. He had a fair chance to apply to be an ASM is other areas if not successful in the Midlands and was encouraged to do so. It was his choice not to do so. I see no

reason why a reasonable employer would be expected to raise it again.

91. However in my opinion the following facts together make the dismissal for redundancy unfair:

91.1. Neither he nor other members of staff were consulted about the selection criteria. While he did not challenge them in any real way at the hearing, fairness would have given the claimant the opportunity to make observations about the criteria and how they might be assessed or weighed up.

91.2. I do not think that the criteria of teamwork (13%), trust (13%), professionalism (13%) are unreasonable criteria. I do conclude that the way the respondent approached these criteria was beyond that which one should expect from a reasonable employer of the respondent's size and with the resources. They became too subjective. The reasons are as follows:

91.2.1. As noted by the label the respondent itself applied to these criteria, these are subjective. If such a high proportion of the final score was attributable to subjective criteria, the reasonable employer would have made sure that it had considered in advance what attracted top marks down to what attracted low marks so as to maintain consistency between candidates. It did not.

91.2.2. In addition, because they are subjective and so present a clear risk of arbitrary marking, the reasonable employer would have looked for evidence that pointed to one score rather than another by looking to examples from the claimant's work. Disciplinary records, reviews, capability issues customer feedback would all have been things to look at. The respondent did not do that in this case. While it would have retained a subjective element, it would have been based on assessment of real examples – i.e. evidence based - and not on a discussion that in essence was no more than a "hunch" or "feeling" about what was right.

91.3. Finally I think the failure to offer an appeal was unfair. The respondent argues that there is no code of practice that requires the offering of an appeal. That submission in my view is misguided. When someone has been dismissed then I think it is a hallmark of fairness to allow them to challenge that initial decision. It is reflected in other aspects of unfair dismissal law as a basic step, and I cannot see why a redundancy dismissal should be different. An appeal allows an opportunity for new relevant factors to taken into account, an opportunity to investigate a flaw in the process or look at new evidence. It may also have allowed for an alternative to dismissal to be explored.

91.4. The respondent also makes the point the claimant did not in any event ask to appeal. I do not accept that is relevant. Such an argument is flawed because it is premised on the basis that the claimant did not try to do something that the respondent did not tell him he was entitled to try to do. The claimant was of course not aware an appeal was available to him. It is not in a policy anywhere to which I have been referred. If therefore the respondent was prepared to entertain an appeal, it was incumbent to say so.

92. I have reflected that the respondent is a small employer and lacked a human resources department. I accept that any redundancy exercise therefore may not be of the same nature as that undertaken by, say a large, well-resourced employer. However there is no suggestion that the size or resources meant they could not have gathered or looked to evidence to justify their marks for trust, professionalism or teamwork, or have thought about what they felt should merit 6 points etc. I also bear in mind this employer is not unsophisticated. I do not see how the size or resources prevents the offering of an appeal. I do not accept a reasonable employer of similar size and resources would not have consulted about the selection criteria.

93. The dismissal therefore was unfair.

Some other substantial reason

94. I will deal with this briefly. Were this not a redundancy situation then I would have considered the respondent had shown it was some other substantial reason. On my findings of fact it had clearly proven there were good, sound business reasons for the reorganisation.

95. However in my opinion a reasonable employer would have followed more or less the same procedure as a redundancy. The reasonable employer would see that work of a particular kind has ceased or diminished and would therefore be following a redundancy-like process.

96. The matters I believe make a redundancy dismissal unfair would also make a dismissal for some other substantial reason unfair too.

97. The dismissal would therefore have been unfair too.

Polkey

98. In my opinion had this employer followed a fair procedure, there is a 75% chance that the claimant would have been dismissed in any event.

98.1. He would still have been in the pool.

98.2. While there was no consultation over the criteria, there is no criticism of them from Mr Hulme. Therefore they are likely to have remained the same.

98.3. There is no reason to believe he (or BoP) would have achieved significantly different marks even the marks for trust, professionalism and teamwork were clearly evidence-based or the marking boundaries were better defined. Therefore it seems

a significant, real possibility he would have still come second to BoP.

98.4. The other marks are likely to have been the same.

98.5. He did not apply for any other area. Therefore because there is a significant chance he would not have scored higher than BoP, he would still be out of a job. Even if offered a chance to be ASM of a different region, the fact he never applied even when encouraged to do so., strongly suggests he would have declined in any event.

98.6. An appeal is likely to have been unsuccessful. There were no alternative roles, no other ASM posts and nothing to suggest that the respondent would have been persuaded it had made an error in selecting BoP over the claimant (without even considering how it might undo such a theoretical error).

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Employment Judge Adkinson

Date: 18 January 2022

JUDGMENT SENT TO THE PARTIES ON

20 January 2022

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FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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