EMPLOYMENT TRIBUNALS

Claimant: Mr R Cooper

Respondent: Hubbway Ltd

Heard at: Newcastle (by CVP) **On:** 12 and 13 July 2021

Before: Employment Judge Martin
Mrs B Kirby
Mrs R Bell

REPRESENTATION:

Claimant: Miss G Halliwell (a lay representative)
Respondent: Mr P J Van-Zyl (Solicitor)

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's complaint for a redundancy payment is dismissed upon withdrawal.

2. The claimant's complaints of breach of the Working Time Regulations (holiday pay) and breach of contract (notice pay) are dismissed upon withdrawal.

3. The claimant's complaint of unfair dismissal is not well-founded and is hereby dismissed.

4. The claimant's complaint of age discrimination is also not well-founded and is hereby dismissed.

REASONS

Introduction

1. Mr N Hubb, Managing Director of the respondent company, and Mrs Hubb, (wife of Mr N Hubb) director of the respondent company, gave evidence on behalf of the respondent. The claimant gave evidence on his own behalf. A written statement

was provided by Mr T McGloin who did not attend to give evidence and therefore little, if any, weight was placed on his evidence.

2. The Tribunal was provided with an agreed bundle of documents marked Appendix 1. Further additional documents were provided by the respondent during the course of the hearing, which comprised an email and some payslips/requests for holidays.

The Law

3. The law which the Tribunal considered was as follows:

4. Section 139(1) of the Employment Rights Act 1996 states:

> "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."

5. Section 98(1) of the Employment Rights Act 1996 states:

> "In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show:-
>
> (a) The reason (or if more than one the principal reason) for the dismissal; and
>
> (b) That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

6. Section 98(2) of the Employment Rights Act 1996 states:

> "A reason falls within this subsection if it:-
>
> (c) is that the employee was redundant."

7. Section 98(4) of the Employment Rights Act 1996 states:

> "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."

8. Section 13(1) of the Equality Act 2010 states:

"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than it treats or would treat others."

9. Section 13(2) of the Equality Act 2010 states:

"If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim."

10. Section 136 of the Equality Act 2010 states:

"If there are facts from which the court could decide, in the absence of any other explanation that a person has (A) contravened the provision concerned, the court must hold that the contravention occurred."

11. Section 136(3) of the Equality Act 2010 states:

"Section (2) does not apply if A shows that A did not contravene the provision."

12. The case of **Williams & Others v Compare Maxam Limited [1982] IRLR 83** where the EAT held that in cases involving redundancy employees should be given as much warning as possible of impending redundancy; the employer should consult with the union and employees; there should be a fair and objective selection criteria and selection under that criteria should be undertaken fairly. Finally, the employer should consider alternative employment before any dismissal.

13. The case of **Iceland Frozen Foods Limited v Jones [1982] IRLR 439** where the EAT held that the function of the Employment Tribunal is to determine whether in the particular circumstances of each case the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

14. The case of **British Aerospace PLC v Green & Others** where the Court of Appeal held that the question for the Employment Tribunal in cases of alleged unfair selection for redundancy is to consider whether the claimant was unfairly dismissed not whether some other employee could have been fairly dismissed. The Tribunal is not entitled to embark upon a reassessment exercise. In general, an employer who sets up a system of selection which can reasonably be described as fair and applies it without any covert sign of conduct which mars its fairness will have done all that the law requires of him.

15. The case of **Polkey v A E Dayton Services Limited [1987] IRLR 503** where the House of Lords held that when considering whether an employee would still have been dismissed even if a fair procedure had been followed, a Tribunal can decide that was the case but there is no need for an all or nothing decision and the Tribunal can reflect that by reducing the amount of any compensation.

16. The case of **Murray v Foyle Meats Limited [1999] IRLR 562** where the House of Lords held that the test is whether there was a reduction in the need for employees to carry out work, not a reduction in the requirement for work. If an employer concludes the same amount of work can be done by fewer people, or agency staff, it is still a redundancy situation.

17. The case of **Abernethy v Mott, Hay and Anderson [1974] IRLR 213** where the Court of Appeal held that the reason for dismissal in any case is a set of facts known to the employer.

18. The case of **Igen Limited v Wong [2005] IRLR 258** where the Court of Appeal held that the Employment Tribunal should go through a two stage process. The first stage requires the claimant to prove facts from which the Tribunal could conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The Tribunal is required to make an assumption at the first stage which may be contrary to reality, the plain purpose being to shift the burden of proof at the second stage so that unless the respondent provides an adequate explanation the complainant will succeed.

19. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld.

20. Although there are two stages in the Tribunal's decision making process, Tribunals should not divide hearings into two parts to correspond to those stages. Tribunals will generally wish to hear all the evidence, including the respondent's explanation, before deciding whether the requirements of the first stage are satisfied and, if so, whether the respondent has discharged the onus which has shifted.

21. The case of **Shamoon v Royal Ulster Constabulary [2003] IRLR 285** where the House of Lords held that in cases of direct discrimination the Tribunal must look for the "reason why" treatment was afforded.

Issues

22. Prior to the hearing the claimant had withdrawn his claim for a redundancy payment.

23. During the course of the hearing the claimant's representative confirmed that the claimant was not pursuing his claims for holiday pay and notice pay as it appears that a subsequent payment was made on the Friday before this hearing in respect of those outstanding complaints. The claimant accordingly, having checked the position, decided not to proceed with those claims, and those complaints were dismissed upon withdrawal.

24. In respect of the complaint of unfair dismissal, the Tribunal had to consider what was the reason for dismissal. It was pleaded as redundancy.

25. The Tribunal therefore had to consider whether there was a redundancy situation.

26. The Tribunal had to then consider whether the respondent acted fairly and reasonably in dismissing the claimant for redundancy, in particular whether they warned and consulted the claimant about the potential redundancy situation, had a fair objective selection criteria which was fairly applied, and whether the respondent considered alternative employment.

27. The Tribunal also had to consider whether if a fair procedure had been adopted and whether dismissal was a reasonable response in the circumstances of the case. The Tribunal had to consider whether the claimant would have been fairly dismissed if a fair procedure had been adopted.

28. In relation to the complaint of age discrimination, the Tribunal had to consider whether the claimant was treated less favourably than a younger employee by being dismissed for redundancy.

29. In that regard the Tribunal had to consider who was the appropriate comparator. The claimant's representative indicated that the comparators were those other employees in the workshop who had not been selected for redundancy.

30. The Tribunal then had to consider whether the claimant had proved primary facts from which the Tribunal could conclude that the difference in treatment was because of the claimant's age.

31. The Tribunal then had to consider the respondent’s explanation and whether they could prove a non-discriminatory reason for any proven treatment.

Findings of Fact

32. The respondent is a small company located in Cramlington in Northumberland, which is engaged in the sale, hire and maintenance of plant and tools for the civil engineering, construction and events sectors. It is a family run business.

33. The claimant was employed as a Plant Fitter. He had worked at the respondent company for over ten years and was a very experienced fitter with over 46 years of experience. He put that experience to good effect and often was actively involved in training other employees at the respondent company. He was also actively engaged in challenging health and safety and other issues at “toolbox talks”.

34. The claimant had, some years ago, asked not to work in other locations other than the workshop and was not able to undertake overtime or hours due to family reasons. He had been based in the workshop over the last few years, effectively at his request, and the respondent had been quite content for the claimant to be based there.

35. The workshop consisted of nine other employees including one apprentice. A number of those employees had CSCS cards which were permissions which enabled them to work on remote sites, with permission to go onto those sites. The claimant did not have a CSCS card. Five of the employees in the workshop had vans fitted out which enabled them to go out to site.

36. The claimant is age 61. He was age 60 at the time of his dismissal. The claimant did not lead any evidence about the ages of the other employees in the workshop, albeit that he relied upon them as his comparators in his claim of direct age discrimination.

37. Mr Hubb of the respondent gave approximate ages for those employees. He made it clear that this was very much a guestimate on his behalf. He said that he thought that two was aged approximately 55, one was approximately 60, there was one in their forties and two approximately in their thirties.

38. The claimant cross examined Mr Hubb on that and disputed those ages, albeit that he did not put exact ages to him on cross examination. He himself had led no evidence whatsoever about the ages of those employees.

39. The respondent has produced an indication of what the claimant was undertaking over the last three years of his employment. Page 120 shows that in 2018 most of his work was in tower lights (58%); in 2019 it was 66% and in 2020 it was 51%. 10% of his work was dumper trucks in 2018, with 5% in 2019 and approximately 10% in 2020. In terms of rollers, he was undertaking 19% approximately in 2020, with 6% in the earlier years. He undertook approximately 5% on excavators, which was slightly higher in the earlier two years where it was approximately 10% of his workload. Most of the other utilisation of components was nominal as far as the claimant was concerned. In terms of 2020 that was no more than approximately 5% of his time spent on other components. The time he spent in the earlier two years was also largely nominal on other components including generators and various other components (page 120).

40. It was therefore quite clear that half of the claimant's work was in undertaking tower lights work.

41. The coronavirus pandemic hit the country in March 2020. The country went into lockdown in March 2020 which had a significant impact on the respondent's business. The respondent's business substantially diminished. The respondent said that is encapsulated in the document which shows the percentage utilisation over a six month period in 2018, 2019 and 2020 (page 120 of the bundle). It is quite clear that those percentages reduced quite substantially by March 2020 and continued into April and June, with the percentage having dropped in April by half from the previous year, and almost a third by the following month in May and June from the previous year (page 120).

42. The respondent also shows that the percentage utilisation of tower lights substantially reduced over that period, if one looks at a six month period from January to June in 2018, 2019 and 2020. At page 120 it shows that, from being 90% in January/February (albeit that those months are in winter and one would expect a higher percentage usage), it dropped in 2020 to only 17% by June, and had started to reduce to 47% in March and then continued to reduce to 25% in April and then 24% in May, with 17% in June 2020. When comparing that utilisation to the same months in 2018 and 2019, the reduction was over 50% for both 2018 and 2019 in April. By May it had reduced by almost a quarter (87% in 2018 and 68% in 2019) to only 24% in 2020. In June it had reduced from 80% in 2018, 62% in 2019 to 17% in 2020.

43. The respondent said that most of the remaining business which they were able to do during the Pandemic was on larger construction sites and quarries, but there was a substantial diminution in that work as well. There was very little work in the workshop itself and the business had to somehow become more flexible in the way that it operated.

44. Initially the respondent put most of the employees on the Government furlough scheme in March 2020, including the claimant. The respondent did retain some of their staff by way of a skeleton staff at that stage to keep the business operating.

45. Most of the respondent's work was off site in undertaking repairs on largely larger sites, which were the only ones which were really continuing anything much during the early months of the pandemic. Accordingly, the respondent needed to try and have a flexible workforce due to the limited work which was available at that stage. Over the last three years most of the work which the claimant undertook was on the tower lights.

46. The Government furlough scheme was put in place by the Government from 23 March 2020 initially until June 2020. It was subsequently extended at various times on short notice.

47. The respondent decided that, due to the substantial reduction in their business and problems with cash flow, they needed to look at reducing their costs, in particular their workforce, to try and put the business in a position where it could go move forward and be viable for the future, due to the substantial decline in the respondent's business, as is evidenced by page 120 of the bundle.

48. By around the middle of May 2020, the respondent decided that they would need to make redundancies in certain areas of the business, including the workshop.

49. On 19 May 2020, the respondent wrote to all employees warning them of possible redundancies in the particular areas that had been identified. The letter to employees is at pages 52-54 of the bundle. It sets out the reason for redundancies is due to the pandemic and indicates that, in the claimant's case, his role is provisionally identified at risk. The respondent indicate that the roles at risk are three in the workshop, one in telesales and marketing and in the fabrication shop, although they subsequently decided not to make any redundancies in the fabrication shop. In the letter the respondent indicated that the criteria which they were intending to use was flexibility in relation to location and hours of work, skills and experience, and, if necessary, disciplinary record, timekeeping and length of service (page 53 of the bundle).

50. The selection criteria are at page 59 of the bundle. The selection criteria utilised was flexibility and location. It gave that criteria the highest rating of x5. It identified the criteria factors being marked being as:

- Fully flexible in terms of location;
- Willing to travel to site to effect repairs; and
- Unwilling to travel to another site,

51. Skills and experience received a rating of 2, the second highest criteria. Those factors taken into account were:

- Full range of skills and no concerns with care and attention;
- Full range of skills but concerns raised during last 12 months;
- Incomplete range of skills and concerns with care and attention; and
- Incomplete range of skills and concerns raised with care and attention during last 12 months.

52. The marks were given from 0-5 with factors in-between receiving marks of 1 and 3, the top mark being 5.

53. Flexibility in relation to hours received a rating of 1. The factors being taken into account were:

- High degree of flexibility;
- Willing to work additional hours during the weekday/weekend to accommodate operational requirements even at short notice;
- Limited shift flexibility;
- Willing to work some additional hours over the weekend and during the day but with limitations/qualifications;
- No flexibility to change shift or working hours.

54. The marking range there was 0-5. The marking range in relation to the criteria was 3 and zero.

55. The respondent also included disciplinary records which also had a marking rating of one – no disciplinary record receiving five marks and a final written warning receiving zero marks.

56. Mr Hubb's evidence was that the selection criteria were deliberately slanted in favour of flexibility because he said that the respondent required a flexible workforce. He said that this was even more important when the team was going to be reduced by a third. He said that the flexibility was required because moving forwards the company required employees to be able to work both remotely and sometimes in the workshop. He said they needed a flexible workforce to meet the changing requirements of the business at this difficult time. He concluded that they needed a workforce who would be flexible and would be able to work flexibly to meet the needs of their customers, and able to work at various different locations and different hours. That was the reason why flexibility was given such a high rating in the criteria.

57. Mr Hubb said that the criteria was marked by all three of the directors who were Mr George Hubb, the Chairman and founder of the business, who is Mr N Hubb's father; by Mr N Hubb, the Managing Director, and Mr Phil Hickey, the

manager of the workshop. Mr Hubb said that they all did their own scores and then discussed them.

58. After the directors had discussed the scores for the employees, they wrote to all the employees who were at risk, which included the claimant. The letter to the claimant is at page 58 of the bundle. It is dated 29 May 2020. In that letter the respondent indicates that, further to their previous correspondence regarding potential redundancies, four positions were now at risk: three in the workshop and one in telesales. In the letter Mr Hubb indicated that where there were no viable alternatives to avoid or mitigate the effects of redundancy. He states that he has applied the selection criteria across the affected pools and the claimant has been identified as at risk of redundancy. He enclosed a copy of the claimant's matrix. He arranged a consultation meeting with the claimant by telephone to discuss those scores and any alternatives to redundancy and other matters which the claimant wished to discuss (page 58 of the bundle).

59. At the same time on 29 May 2020, the respondent wrote to those employees who were not now considered to be at risk of redundancy indicating to them that, at this stage, they were not immediately at risk of redundancy (page 60 of the bundle).

60. The claimant's scores in the matrix are at page 59 of the bundle. He scored zero in terms of flexibility in relation to location. He scored 10, being the maximum score, in relation to skills, and zero in relation to flexibility of hours. He scored 5, again the maximum score, for his disciplinary record.

61. During the claimant’s consultation on 1 June 2020 with Mr Hubb, the claimant raised concerns about the scoring process and his scores. He was concerned that he was being singled out and that the matrix had effectively been contrived to target him. He raised concerns and said that because flexibility was such an important criteria it meant that effectively he could not get any marks on that criteria because he did not work remotely, as he did not have the permissions to go on site. He effectively said that he was immediately being discounted by the criteria. He said that he also did not undertake additional hours but was never asked to do so. He also suggested in that consultation that he did not understand why he was being targeted as he was one of the most expensive and longer serving employees and therefore any redundancy payment would be higher. In the consultation, he suggested it would make more sense to keep cashflow down and to keep him on furlough. His main concern really related to the fact that the criteria which was being used, namely the use of flexibility, particularly in relation to location, effectively meant that he would almost certainly have been selected based on that criteria for redundancy. He said he could meet the criteria because he did not have the permissions.

62. In evidence before the Tribunal the claimant suggested that he could have been trained to obtain those permissions, but when that question was put on cross examination Mr Hubb said that no training was being undertaken during the pandemic. Mr Hubb said that most sites required CSCS cards, and only a small number of sites did not require such permissions.

63. The claimant then followed up his concerns after the consultation meeting. He emailed Mr Hubb. That email is set out at pages 80-81 of the bundle. In that email the claimant talks about his previous injury at work and being a spokesman for

colleagues in the toolbox talks, as well as raising concerns about the scoring matrix in terms of flexibility for location and hours of work. He refers to his extensive experience as a fitter, which he notes has been acknowledged by the company. He also refers to his age in the last paragraph, and the fact that he may be less desirable as a future employee for another company.

64. Mr Hubb sent a response to that email, which is at pages 82-83 of the bundle. He explains the reasons for the need for redundancies which is because of the reduction in levels of activity and revenue which have been adversely affected by the pandemic. He makes it clear that the claimant has not been singled out for any of the reasons indicated, and that the company has devised a selection matrix which identified the skills, attributes and experience which the respondent needed for the business for the business to go forward. He explains the reasons, as he did in his evidence in Tribunal, namely that the criteria is based on the fact that the respondent requires a flexible workforce. He referred to the claimant's lack of flexibility and unwillingness to travel to site and work additional hours compared to his colleagues. He also referred to the score that the claimant got for disciplinary record and in particular skills. He indicated that the claimant was at the top of his skills when he performed the role in respect of tower lights, but that he did need some additional support for broader electrical and hydraulic work. He indicated that he could not select for redundancy based on the level of any redundancy payment.

65. Mr Hubb effectively said in evidence that what the respondent needed going forward, due to the current situation, was a reduced workforce that was flexible. The claimant did not dispute the marks that he received for flexibility, either during the process or indeed in Tribunal.

66. In his evidence in Tribunal, the claimant complained several times that he had not been asked if he would be flexible by the respondent. When he was questioned about the matter he said that he would have been prepared to be flexible, "wouldn't I, if I had to". His evidence even in Tribunal was a reluctance in relation to being more flexible.

67. What is noticeable is that at no stage during the process did the claimant mention that he was happy to be flexible and move to different locations, or offer to do so. At that stage there was no opportunity to do so because there was no training available, but the claimant never raised the matter at any stage during the process.

68. The claimant responded to the further comments made by the respondent in an email on 4 June 2020. That email is at page 84 of the bundle. In that email the claimant suggests that the respondent has possibly got the wrong score for him (on skills) based on what they were saying, and questioned whether the other scores were correct. He also went on to indicate that the others in the pool were not warned about redundancy or provided with their matrices. Those matrices were provided to this Tribunal.

69. Mr Hubb said that he responded, as is noted at page 85 of the bundle, to the further matters raised by the claimant. He said that he recognised the claimant's strengths and where they lay and took the view that the claimant was still entitled to the highest score for skills.

70. In his evidence, to the Tribunal the claimant criticised the respondent for failing to ask whether he would be flexible in terms of location and hours. However, as indicated in his evidence, he did not suggest at any stage that he had offered by his own volition, bearing in mind that he was facing redundancy, to be more flexible, either in terms of his hours or location. This is consistent with the evidence which was presented to us in Tribunal in relation to the claimant's approach namely that he would reluctantly be prepared to be flexible if he had to, yet when he was faced with that situation, he never raised it with the respondent at any stage. That appears to reflect the fact that he never really wanted to be more flexible in his role.

71. The respondent then wrote to the claimant on 25 June 2020 to inform him that he was to be dismissed by reason of redundancy. That letter is at pages 85-86 of the bundle. In that letter, Mr Hubb, at the outset, explains why he has marked the claimant high on skills. Mr Hubb refers to the fact that the claimant does not dispute the issue about his lack of flexibility. He explains that he has a need for a smaller team to be able to cover work both onsite and to be able to work remotely. He also refers to the process which was followed. He goes on to indicate that he has not been able to identify any alternative role and the claimant has not put forward any alternatives. He then goes on to confirm termination of the claimant’s employment by reason of redundancy. He refers to the claimant having a right of appeal and the process that can be followed if the claimant wishes to appeal against the decision.

72. In his evidence to the Tribunal, Mr Hubb stated that the additional criteria of timekeeping and length of service were only going to be taken into account if all other matters were tied. He said that it did not become necessary for those additional criteria to be considered.

73. The Tribunal has noted that the respondent, like many businesses, was trying to operate in a completely unknown climate at that time. At that stage nobody really knew what would happen with the pandemic. This was an unprecedented event. The Government did implement a Furlough scheme, but was unclear whether or how that may continue going into the future. Mr Hubb said that was not aware at that stage whether the Furlough scheme would be available or for long. Mr Hubb said in evidence that he had to look at how he was going to manage his family business, which was a small business, going forward in what were unprecedented circumstances.

74. The Tribunal note that Mr Hubb responded to all the various matters raised by the claimant during the consultation process.

75. In evidence to the Tribunal, Mr Hubb said that, at the time when they were looking at the redundancies, they were considering redundancies in other departments, namely in fabrication (which they then decided not to proceed with) and in telesales. He said that there were no other jobs which the claimant had the requisite skills to undertake within the organisation. He said that the claimant did not put forward any other suggestion with regard to alternative work. This was not disputed by the claimant in his evidence. The claimant did not say in evidence that he had made any suggestions about alternative jobs which he could do at that stage. In his evidence, he did suggest that there were other jobs available, albeit he accepted that he did not necessarily have the qualifications for those other jobs.

76. In his evidence Mr Hubb said that he did consider alternative employment but that there were no vacancies. The respondent had made three people redundant in the fabrication unit. Of the two people who were made redundant in the workshop:- one was the apprentice aged approximately 18 and the other was Mr P Staniland who was approximately in his 40s. The claimant claims that the latter was largely dismissed due to issues with regard to his skills. The respondent also dismissed a telesales person who was in her 20s or 30s. The redundancies in the fabrication unit, where they were also looking at redundancies at the time, did not take place as they decided not to proceed with redundancies in that department at that stage.

77. This was a small company with, at the time, approximately 36 employees. The claimant had the requisite skills to undertake the fitter job, but did not have requisite skills to undertake the other roles in the company, and in any event there were no vacancies.

78. The claimant appealed against his dismissal. His letter of appeal is at page 88 of the bundle. The grounds of appeal were that the scoring was biased and that the matrices were manipulated to suit personal requirements; that other members of the department were not put in the consultation process, and that there was little or any effort with regard to considering alternative employment. He also refers to the lack of a contract of employment and time lapses in the process. There was also an issue at that stage with regard to the requirement to take annual leave.

79. Mrs Hubb conducted the appeal hearing. She was the only other director who had not been involved in the selection process. She had not had any experience of dealing with appeals or any other matters of that nature.

80. In her evidence to the Tribunal Mrs Hubb said that she listened to what the claimant had to say in the appeal hearing, which took place on 27 July 2020. She made notes of what was discussed at that appeal hearing, which are at pages 91-93 of the bundle.

81. In her evidence to the Tribunal, Mrs Hubb also said that she discussed the appeal with Mr Hubb and fed back to him her views.

82. There was some confusion between Mr and Mrs Hubb as to who actually made the decision on the appeal. Mr Hubb was quite clear in his evidence when he was questioned about the matter that he had made the decision on the appeal, whereas Mrs Hubb said that she had effectively made the decision at the appeal. It was suggested at paragraph 14 of Mrs Hubb's witness statement that she had reached a conclusion, albeit it is very clear that she discussed her conclusion with Mr Hubb.

83. The letter dismissing the appeal is at pages 112-113 of the bundle. The letter has Mr Hubb's signature on it, but Mrs Hubb gave evidence that she in fact drafted that letter with some assistance from the respondent's advisers. The letter addressed each of the points raised in the claimant's appeal. His appeal was not upheld. The letter was signed by Mrs Jackie Snout of the respondent's office. Mrs Hubb said that it was a mistake that her husband's name was on the letter of appeal.

84. Mrs Hubb said that she listened to the claimant and considered his views, however this Tribunal finds that it was really Mr Hubb who made the ultimate

decision on the appeal. In effect Mr Hubb made the decision to dismiss the claimant for redundancy and upheld that decision on appeal.

85. It is interesting to note that, although the respondent appears to have been getting some advice at this stage, they did not consider trying to get an external person to do the appeal. Having said that, it should be borne in mind that, at that stage, the country was still in the middle of a pandemic and therefore there was probably little opportunity (if any) for anyone external to come in and deal with any appeal.

86. In his evidence Mr Hubb acknowledged that he did enlist a contractor for approximately a month in about August 2020 to prepare tower lights for the winter season. He said that this was for a limited period as the contractor was only on site for approximately a month. The claimant suggested that that might have been longer than that, but did not suggest that it was a great deal longer than that period. He did not suggest that the contractor remained a permanent fixture engaged by the respondent.

87. Mr Hubb in his evidence also acknowledged that the respondent had advertised roles subsequently, but that these were for machine operators and would require certain qualifications and experience which the claimant did not have. The claimant did not dispute that evidence.

Submissions

88. The respondent's representative gave oral submissions. He referred to a number of cases, being a number referred to in the Order of Employment Judge Garnon and most of those referred to in this Judgment. He submitted that the dismissal was fair, and that, if there were any procedural issues that the claimant would still have fairly dismissed. He said that the criteria adopted was a fair criteria for the respondent. He submitted that the respondent gave a clear, rational, and reasonable explanation for the criteria adopted.

89. He further submitted that the claimant was not treated unfavourably due to his age. He submitted that the burden of proof did not shift to the respondent because the claimant had not even prove primary facts from which the Tribunal could conclude that any difference in treatment was because of the claimant's age. In any event he said that the respondent had a non- discriminatory reason for the claimant's dismissal which really was the fact that the claimant was not flexible. He said that had nothing to do with his age.

90. The claimant's representative became ill as she was about to provide oral submissions. She appears to have been suffering from the effects of COVID for some time. She requested to provide written submissions and has subsequently provided written submissions to this Tribunal. She asserts that the dismissal was unfair, and that the claimant was discriminated against on the grounds of his age.

Conclusions

91. This Tribunal finds that the claimant was dismissed by reason of redundancy. This was due to a substantial decline in the respondent's business, including its cashflow, at the outset of COVID-19.

92. Redundancy is fair reason for dismissal under section 98(2) of the Employment Rights Act 1996.

93. This Tribunal finds that the claimant was warned about the redundancy situation. The situation that the respondent found themselves in clearly amounted to a redundancy situation, as the requirement for the work in the workshop had substantially diminished due to the pandemic.

94. The selection criteria devised by the respondent was designed to enable the respondent business, which was a small family run business, to be in a position to be able to survive the pandemic and continue in the future. The respondent required a workforce which was flexible and able to meet the needs of their customers, and the need for flexibility was at the heart of the criteria adopted by them. This is why the criteria was directed towards flexibility, because the respondent with a decline in their business and then a reduced workforce, needed to be able to have a workforce which was able to work both in the workshop, but more significantly on various sites of their customers.

95. The criteria also included skills and disciplinary record, and, if required, would have included the more objective criteria of timekeeping and length of service, if all other matters were equal.

96. The Tribunal is mindful that, bearing in mind the respondent is able to explain the very cogent reason based on the prevailing circumstances at the time for the criteria it adopted, it is not for the Tribunal to determine that that criteria was the wrong criteria for it to adopt.

97. Although the Tribunal accepts that the claimant was unlikely to be able to meet the criteria, the Tribunal still considers that that criteria was fair in the light of the circumstances which the respondent faced and how they wanted to move their business forward in the future.

98. The criteria itself was marked by all three of the directors. It is noted that the claimant received the top score for skills which was acknowledged, but his lack of flexibility was a significant factor which meant that he was selected for redundancy.

99. The claimant was consulted about the potential redundancy situation. He suggested in his evidence that the respondent could have continued with the furlough scheme, but at that time the respondent was not aware whether the furlough scheme would have been available or indeed for how long, and they needed to plan going forward.

100. The claimant was also clearly consulted about his scores and the reasons why he was selected for redundancy. He raised the issue about flexibility and an explanation was given to him by the respondent, which is the same explanation given to this Tribunal, of the reasons why flexibility was so important in the criteria.

101. It is noteworthy that, at no stage during the process, or indeed these proceedings, did the claimant suggest that he would have been willing and able to be flexible. Throughout these proceedings and the process, the claimant has complained that he was not asked whether he would be flexible, but he never offered at any stage or suggested that he would move out of the workshop. He makes no

reference in any of his emails or in his appeal letter that he was prepared to be more flexible.

102. The respondent did consider alternative employment, but bearing in mind the difficulties that they faced at that time there was no other suitable alternative employment for the claimant for which he had the appropriate skills and qualifications.

103. The Tribunal considers that the respondent acted fairly in dismissing the claimant for redundancy.

104. The Tribunal had some concerns about the process adopted. The respondent appointed the only director who had not been involved in the selection process and who did not work in the business to undertake the appeal. She is the wife of the Managing Director. More significantly it is not clear who actually made the decision on the appeal. The Tribunal is mindful that in cases of redundancy, appeals are not necessarily always offered to an employee because a redundancy dismissal is not effectively part of the disciplinary process. In this case, the Tribunal does not, consider that the outcome would have been any different whether it was Mrs Hubb who actually made the ultimate decision or indeed even if the respondent had been able to appoint an external person to hear the appeal. It is quite clear that, during the appeal process, and this has not been disputed by the claimant, Mrs Hubb did listen to the claimant's concerns about the appeal and did discuss those and feed those back to Mr Hubb. In this case, the tribunal acknowledges that the respondent generally was taking on board the comments made by the claimant, and addressed each one of them in turn throughout the process, which is what they also effectively did on his appeal.

105. The only other option for the respondent would have been for them to appoint an outside person, but bearing in mind the prevailing circumstances at the time namely that the country was in the middle of an unprecedented pandemic and with many businesses still closed down, it is unlikely that they would have been able to appoint an external person to hear the appeal.

106. In any event, this Tribunal takes the view that the appeal process would have made no difference to the ultimate outcome of the claimant's dismissal. The Tribunal notes that all four directors of the respondent company effectively made the decision to dismiss the claimant. It was a unanimous decision by all of them. The claimant was effectively selected based on a criteria that the Tribunal find to be fair. There is no question mark about the way he was marked in relation to that criteria. The claimant does not dispute the marks he was given on the criteria.

107. This Tribunal finds that the criteria itself was fair, that there was no alternative work available, and therefore the Tribunal finds that no appeal by anyone else would have arrived at a different outcome.

108. Accordingly, for those reasons this Tribunal considers that dismissal was a reasonable response in the circumstances of the case, and that the claimant's dismissal is fair. Therefore the claimant's complaint of unfair dismissal is not upheld.

109. This Tribunal does not find that the claimant was dismissed because of his age. No evidence was led by the claimant to support that contention.

110. It was clear that the claimant was dismissed because of the selection criteria, as he himself recognised during the process and indeed during the course of these proceedings, he was selected principally because of his lack of flexibility. That was the main criteria adopted by the respondent and was the criteria on which the claimant received no marks and was effectively what led to his dismissal.

111. Further, the ages of those comparators on which the claimant relies, namely those other employees who remained in the workshop, do not suggest that age was a factor at all. The burden is on the claimant. The very limited evidence provided in respect of the ages of the apparent comparators which was in fact provided largely by the respondent. Based on that limited evidence, it appears that three out of the six who were not dismissed were not dissimilar ages to the claimant. Further, the other two employees who were dismissed with the claimant from the workshop were of entirely different ages to the claimant: one was 18 and one was in their 40s. The employee dismissed in telesales was in her 20s/ 30s and also a different age to the claimant. Accordingly, age does not seem to have been a factor at all in the claimant's dismissal.

112. The claimant himself disputed the ages provided by Mr Hubb for the apparent comparators, in cross examination, but the burden was on the claimant in relation to this complaint. He led no evidence whatsoever about the ages of his relevant comparators.

113. On that basis this Tribunal does not consider that the burden of proof in this case shifted to the respondent. Nevertheless, in any event, they have proved to the Tribunal's satisfaction a non-discriminatory reason for the claimant's dismissal, namely he was dismissed for redundancy and was effectively selected based on the selection criteria of flexibility which had nothing to do with age.

114. The claimant had pursued a complaint of a failure to provide a contract of employment to him. The Tribunal finds that he was not provided with such a contract but we cannot make any order of compensation under section 38 of the Employment Act 2002 because none of his claims have succeeded. However, the respondent might want to consider that, bearing in mind, the period of the claimant's employment a contract of employment should have been provided to him many years ago.

115. For those reasons the claimant's complaints of unfair dismissal and discrimination on the grounds of age are both hereby dismissed.

Employment Judge Martin

Date 30 July 2021