Neutral Citation Number: [2022] EAT 53

Case No: EA-2019-000839-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21 June 2022

Before :

THE HONOURABLE MR JUSTICE BOURNE
MRS G. P. TODD
MR A. D. G. MORRIS

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Between :

MRS BUKOLA OSINUGA	**Appellant**
- and -	
BPP UNIVERSITY LIMITED	**Respondent**

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Mr Andrew Watson (instructed by Direct Access Scheme) for the **Appellant**
Mr Robert Jones (instructed by BPP University Ltd Legal) for the **Respondent**

Hearing date: 8 March 2022

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JUDGMENT

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SUMMARY

TOPIC NUMBER(S): 8 Practice and Procedure, 11 Unfair Dismissal, 19 Redundancy

Held (allowing the appeal in part)

1. The Employment Tribunal erred by not considering the issues of whether the employer had carried out a reasonable consultation, adopted a fair basis on which to select for redundancy or taken reasonable steps to seek alternative employment for employees threatened with redundancy, in circumstances where the parties had not expressly or impliedly agreed that those issues did not arise in the case (applying Langston v Cranfield University [1998] IRLR 172), and/or by not giving sufficient reasons in relation to those issues.

2. The Employment Tribunal did not err in law when it decided that there was a redundancy as defined by section 139(1)(b) of the Employment Rights Act 1996, and it gave sufficient reasons for that conclusion.

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THE HONOURABLE MR JUSTICE BOURNE:

Introduction

1. This is an appeal against a decision of the Central London Employment Tribunal ("the ET"), which dismissed the Appellant's claims for unfair dismissal, sex discrimination and unlawful deductions in a decision dated 16 July 2019. The unlawful deductions decision is not challenged but the other two are.

2. The Respondent is a university. It provides courses to, among others, many international students, and at the relevant time it maintained an International Team ("IT") to provide marketing and administrative services in relation to international students.

3. The Appellant was first employed by the Respondent from August 2011 as a temporary staff member in the Student Records office. She was a successful employee and became a permanent staff member and was promoted several times. By February 2017 she was International Commercial Manager, and her line manager, Stefanie Esswein, was Director of International Sales.

4. Ms Esswein then went on a period of partial parental leave and the Appellant accepted a temporary position of Deputy Director of International Recruitment (Interim) for a fixed term of six months from 13 February 2017. It was expected that the Appellant and Ms Esswein would work alongside each other with the Appellant covering 60% of Ms Esswein's role. For this she would be paid an extra £20,000 on top of her existing salary of £45,450. She also was, and remained, entitled to commission payments in her existing role.

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5. In March 2017 Ms Esswein found that she could not continue to cover 40% of her role. As a result, the Appellant on 31 March 2017 agreed a further variation of her contract providing for her to do 100% of Ms Esswein's job, now with the title of Interim Director International Sales, reporting to Ms Lil Bremermann-Richard. A further variation extended the arrangement to 12 February 2018. A letter signed on 20 May 2017 described her as Deputy Director International Sales (Interim). All the variation letters stated that after the interim period, she would return to her original role of International Commercial Manager and her salary of £45,450 under her existing terms and conditions.

6. Meanwhile, on 5 May 2017 Ms Bremermann-Richard resigned. Mr Stuart Kay, the Director of Marketing and Recruitment, took over responsibility for the IT from her. The IT had been identified as inefficient, and Mr Kay was given the task of improving its efficiency. Mr Khayrul Alam was given an interim promotion to the post of Team Co-ordinator for the IT, reporting to Mr Kay, and was now the Appellant's line manager.

7. On 21 August 2017 the Appellant made a request to Mr Alam for an increase in her salary to reflect that fact that she was now occupying two full-time roles. The request was referred to Mr Kay, who decided that he could not justify an increase at a time when he was being asked to make cost savings across the IT.

8. The Respondent by this time had been acquired by a new owner and had made changes to its management team. The new team considered how to make the Respondent more profitable. In September 2017 it became apparent that the Respondent had missed its target revenue in respect of international admissions by a considerable sum. Mr Kay was asked to review the structure of the IT. He began formulating a new structure for the IT in October 2017. At the start of November 2017 he circulated a consultation document which identified roles at risk.

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9. Following consultation meetings, a new structure was implemented. The Respondent dispensed with some posts on short term contracts and reduced the employed head count by 8. Both Ms Esswein and the Appellant were among the employees selected for redundancy. The Appellant's employment ended on 31 January 2018.

10. In her ET claim, drafted by her husband as a lay representative, the Appellant quoted the definition of redundancy in section 139 of the Employment Rights Act 1996 and then asserted that her role was not truly redundant, the outcome was pre-determined to target her, there were no performance issues, her team were briefed that she was leaving from December 2017, an alternate sales team meeting was set up while consultation was still ongoing, the team which reported to her was now reporting to Mr Kay and she was asked to hand over to Mr Alam rather than Mr Kay. In summary, she contended, "this whole situation is a clear case of discrimination, unfair dismissal, attempt to underpay and misuse".

11. A preliminary hearing took place before EJ Goodman on 3 August 2018. The Appellant was represented by her husband and the Respondent was represented by counsel. EJ Goodman dismissed an application by the Appellant to amend her claim by adding a claim for discrimination on grounds of race. The EJ recorded that the issues for determination at the final hearing would be:

    a. in respect of unfair dismissal:

        - the reason for dismissal (redundancy according to the Respondent while the Appellant said she was dismissed for disputing her pay and that her original role was still available);
        - whether the respondent acted reasonably in treating the reason as a reason to dismiss (disputed by the Appellant because the original role was still available,

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the appeal manager participated in the initial decision and the Respondent resented the dispute about pay);

- whether the decision to dismiss was within the range of reasonable responses; and
- whether, if the Respondent had adopted a fair procedure, the claimant would have been fairly dismissed in any event (and to what extent and when);

b. whether the Respondent discriminated against the Appellant on grounds of sex by:

- failing to pay her the proper rate when acting up; and
- dismissing her, purportedly for redundancy, when she disputed her pay; and

c. the unlawful deductions claim.

12. It is noticeable that the unfair dismissal issues do not include the question whether, if dismissal was redundancy, the Respondent adopted a fair procedure (other than in respect of the identity of the appeal manager). The Case Management Summary does not refer to that omission or give any reason for it.

13. The final hearing lasted 3 days. It began on 9 January 2019 before EJ Stewart ("the EJ") and two tribunal members, one of whom was male and the other female. On the third day, the female member was unwell and could not continue to attend. By agreement between the parties, the hearing concluded on 11 January 2019 before the EJ and the male tribunal member. On 8 March 2019 the EJ and the male tribunal member met to discuss the case and reached their decision. On 4 May 2019, before the reasons for the judgment had been drafted, the male tribunal member died. In these unfortunate circumstances the reasons were completed by EJ Stewart and were sent out on 16 July 2019.

14. The ET found as a fact that the Respondent's redundancy process was motivated by a clear business strategy and was not implemented to target individual roles or individuals. Both the

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Appellant's interim role (Interim Deputy Director International Sales) and her original role (International Commercial Manager) were at risk of redundancy under the new structure, and were made redundant in due course. It also found that the Appellant's redundancy was not related to her request for increased salary and that the Respondent did not resent and/or was not embarrassed by that request.

15. Armed with those findings of fact, the ET then considered the central questions in the case and decided:

    a. The reason for dismissal was redundancy, and not the request for a pay increase.
    b. The Respondent acted reasonably in treating redundancy as a sufficient reason for dismissal having regard to the matters set out in section 98(4) of the ERA 1996.
    c. There was no unfairness in the choice of the manager who heard the appeal against selection for redundancy.
    d. The procedure was fair but even if it was not, a fair procedure would have resulted in the same outcome at the same time.
    e. There was no sex discrimination. In particular the Respondent did not treat the Appellant less favourably than it treated Mr Alam. The difference between their pay was explained by a non-discriminatory reason (namely that he started from a higher salary and was given an increment for acting up which was a lower percentage than the increment given to the Appellant). The dismissal was not on grounds of the pay request, disguised as a redundancy.

16. On 7 November 2019 the ET dismissed an application for reconsideration.

17. On 24 March 2021, at a hearing under rule 3(10) of the EAT Rules, I gave permission for this appeal to proceed.

Grounds 1 and 2

18. The Appellant is now represented by counsel, Mr Andrew Watson. By the first ground of appeal, Mr Watson argues that the ET erred in law in deciding that the reason for dismissal was redundancy. He focuses on the statutory definition of redundancy in section 139 of the Employment Rights Act 1996:

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> "(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—
> (a) the fact that his employer has ceased or intends to cease—
> (i) to carry on the business for the purposes of which the employee was employed by him, or
> (ii) to carry on that business in the place where the employee was so employed, or
> (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."

19. Mr Watson also referred to case law on section 139 including *Safeway Stores Plc v Burrell* [1997] ICR 523 and *Murray v Foyle Meats Ltd* [1999] ICR 827. We return to those cases below but, essentially, they confirm that section 139 means what it says. That in turn means (for example) that not every business reorganisation creates a redundancy situation. The section 139 definition must always be precisely applied.

20. In this case the Respondent relied on a diminution in the requirement of its business for employees to carry out work of the kind carried out by the Appellant. Mr Watson submits that the ET was therefore required to identify the work which employees including the Appellant did before the reorganisation and the extent to which that work was needed after the reorganisation, and the number of employees required to do that work before and after the reorganisation. He argues that the ET, which did not refer to section 139 or to the cases on it, failed to ask and answer these questions. Instead it focused only on the fact that certain roles were deleted and the relevant duties were "absorbed" into other roles, but without explaining which employees absorbed which duties. It reached only "headline conclusions" but did not make detailed findings. In that way, he submits, the ET elided the deletion of the Appellant's particular role with the different concept of a diminution in the need for work of the kind done by her. What it found may have been a reorganisation but it was not necessarily a redundancy.

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21. More generally Mr Watson points out the brevity of the ET's reasons. After setting out the facts, under the heading "The Law" they state merely:

> "The statutory provisions relating to unfair dismissal, in particular, section 98 of the Employment Rights Act and relating to direct discrimination on grounds of sex, in particular section 13 of the Equality Act 2010 are to be taken as incorporated into these reasons albeit that, for reasons for space they are not set out."

22. Mr Watson therefore submits that this is not one of those cases where the Appeal Tribunal must be slow to interfere because an ET has given a clear and correct self-direction on the law, and that it cannot be demonstrated that the EJ had the statutory definition of redundancy well in mind.

23. Mr Watson adds that gaps in the ET's reasoning cannot be filled by reference to the Respondent's evidence, because it cannot be assumed that that evidence was accepted other than where the ET has so stated.

24. In the alternative to ground 1, Mr Watson relies on ground 2 of the appeal, arguing that the ET failed to give sufficient reasons for concluding that the Appellant had been dismissed for redundancy. He contends that the reasons did not meet the standard set out in *Meek v City of Birmingham District Council* [1987] IRLR 250, by which sufficient reasons must be given to enable the parties to know why they have won or lost. This ground is put in two ways. First, there is a general complaint that the reasons are insufficient overall. Second, the Appellant complains that they do not deal with specific points taken before the ET, namely that the Appellant's original post of International Commercial Manager must have continued to exist because the dismissal letter referred to the Appellant's "role" rather than "roles" being deleted, and that evidence showed there were still admissions to a dentistry course which previously the Appellant had dealt with and which now were being dealt with by another employee.

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25. In response, Mr Robert Jones, representing the Respondent, points to the pleadings. The Appellant's form ET1 quoted the relevant provisions from section 139, and then his client's form ET3 referred to the statutory definition of redundancy with specific reference to paragraph (b)(i) and stated that, due to the restructure, "a number of middle management roles were no longer required". It also states that the Appellant's original International Commercial Manager role and other posts at the same level were made redundant and were not replaced.

26. Meanwhile Mr Kay's witness statement also addressed the redundancy situation. Mr Jones points out that the ET adopted numerous paragraphs of that statement in its reasoning more or less verbatim, and so clearly accepted Mr Kay's evidence. The ET did not at any point reject anything said by Mr Kay. The witness statement identified factors leading to a diminution in demand from international students and said, at paragraph 6.7:

> "As a result of the above factors, the Respondent had fewer international student applications and, consequently, fewer agents were needed to deal with the reduced volume of work. However, the IT still had 5 members of staff at director level, meaning the IT was top heavy in terms of management and therefore expensive in terms of its internal costs."

27. Mr Kay's statement also set out his thinking about the relevant roles. He made criticisms of the Appellant's role (but not of her) and stated that in respect of her work on recruitment for dentistry courses, "there was not a great need for a specific manager from the IT for this specific area and most of the role could be adequately covered by the Marketing Team". Mr Kay made similar observations about the roles of others such as Ms Esswein who were made redundant.

28. Mr Jones therefore submits that, given that the ET rejected the contention that the Appellant was dismissed because she had requested a pay increase, it was clear on the evidence that she was dismissed because of the diminution in the Respondent's requirement for employees to

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carry out work of the kind which she carried out, and the ET made a valid finding to that effect in ruling that dismissal was for redundancy.

29. We asked Mr Jones whether the ET's reasons sufficiently identified the "work of a particular kind" in respect of which section 139 refers to a diminished need for employees. He replied that the evidence shows that an "entire layer of middle management" was removed, though he accepted that the ET's reasons do not make it entirely clear precisely what work those managers were doing. But he also submitted that it is not necessary to identify the "particular kind", because a diminution in the requirement for employees to carry out work of any kind will satisfy the test, and that in this case the reduction in headcount (8 permanent employees plus others on temporary contracts) proved that such a diminution had occurred.

30. As to ground 2, Mr Jones submitted that the reasons overall were *Meek*-compliant and reminded us that, in order to meet that standard, an ET does not have to deal with every point mentioned in submissions, but only with those necessary for an understanding of the outcome. The ET's findings about the deletion of the Appellant's original role and the absorption of her duties by others were a sufficient answer to the points on which she had relied.

31. We agree with many of the criticisms expressed by Mr Watson in support of grounds 1 and 2. In our judgment, whilst one must express sympathy with the difficult circumstances in which the reasons were drafted, the ET's decision came perilously close to being inadequate. Whilst it clearly explained that the Appellant was dismissed because of a reorganisation, and not for the illegitimate reason she had put forward, the necessary further ruling that the reorganisation actually led to a redundancy situation as defined by section 139 was not explained nearly as clearly as it should have been.

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32. As we have said, when an employer relies on section 139(1)(b), it must prove that the requirements of its business for employees to carry out work of a particular kind had ceased diminished or was expected to do so. In *Murray v Foyle Meats Ltd* [1999] ICR 827, Lord Irvine LC said at 829-830:

> "… the language of paragraph (b) is in my view simplicity itself. It asks two questions of fact. The first is whether one or other of various states of economic affairs exists. In this case, the relevant one is whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second question is whether the dismissal is attributable, wholly or mainly, to that state of affairs. This is a question of causation. In the present case, the tribunal found as a fact that the requirements of the business for employees to work in the slaughter hall had diminished. Secondly, they found that that state of affairs had led to the applicants being dismissed. That, in my opinion, is the end of the matter.
>
> This conclusion is in accordance with the analysis of the statutory provisions by Judge Peter Clark in *Safeway Stores Plc v Burrell* [1997] ICR 523 and I need to say no more than that I entirely agree with his admirably clear reasoning and conclusions."

33. The case of *Safeway Stores Plc v Burrell* [1997] ICR 523 EAT also made clear, at 530G per Judge Peter Clark, that the fact of a business reorganisation does not, by itself, prove a redundancy situation. It remains necessary to ask whether, as a matter of fact, a reorganisation has led to a reduced need for employees to carry out work of a particular kind.

34. An ET, when deciding whether a redundancy situation arose, should always begin with the statutory definition of redundancy and the limb(s) of the definition on which the employer relies. In a case such as this it should identify the question as being whether the requirements of the business for employees to carry out work of a particular kind have diminished. It should then identify the relevant work and make a finding of whether or not there was a diminution in the requirements for employees to carry it out, preferably identifying which employees carried out the work before and after the alleged diminution. That structure was missing from this decision, making it necessary to search for the necessary elements.

35. Nevertheless, we conclude that those elements are present.

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36. The ET's relevant findings of fact, in our judgment, were the following:

    a. Mr Kay was asked to reorganise the IT to make it more efficient.
    b. Mr Kay investigated the team's roles and found that these were not clearly defined, the team had poor profit margins and the team was giving too many discounts and serving regions that were performing poorly.
    c. The new management team decided to pursue efficiency by focusing on the Respondent's core areas of accountancy and law and moving away from other areas including international admissions.
    d. In September 2017 it became apparent that there were high visa refusal rates in some key countries and other developments had resulted in fewer international student applications.
    e. As the ET put it at paragraph 26 of the decision, "making the IT more efficient meant redundancies", so Mr Kay was asked to review the IT's structure. His proposed structure reduced the head count.
    f. The proposed changes also affected the Respondent's Student Management Centre ("SMC"), and there was some duplication in processes and functions between the IT and the SMC.
    g. The proposed changes reflected the business need to increase efficiency.
    h. The proposed strategy "put several roles at risk and the risk related to the roles being performed, and not to the individuals performing those roles".
    i. Mr Kay concluded that the Appellant's original role of International Commercial Manager and Ms Esswein's role of Director of International Sales should be removed from the structure and their duties should "be absorbed by other roles".

37. The ET therefore found that (1) the dismissal was driven by the reorganisation, (2) the deletion of posts in the reorganisation was in response to factors including (a) a drop in the number of international students and applications and (b) a perceived duplication of processes and functions between the IT and the SMC and (3) the deletion of posts led to duties associated with those posts being "absorbed" by the holders of other posts.

38. Whilst we would not accept a blanket proposition that a reduction in headcount will always prove a redundancy, we do accept that in this case, the found facts, in combination, can only mean that there was a reduction in the requirements of the business for employees to carry out work of the kind carried out by the holders of the roles in question.

39. We also do not accept a general proposition that section 139 does not require tribunals to identify the "particular kind" of work affected by a redundancy situation. In this case,

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however, it was clear from the findings of fact that the Respondent had reduced its requirement for employees to carry out management functions relating to international students.

40. We therefore dismiss ground 1 because a redundancy, as defined by section 139, was found on the evidence.

41. With more hesitation we also dismiss ground 2. The ET's reasons do explain to the Appellant why she lost, although not with the clarity which she might have expected. There was an unequivocal finding that the restructure put the Appellant's initial role at risk as well as her interim role. The fact (if true) that there were continuing admissions to a particular course was not inconsistent with the other findings and did not necessitate a specific finding by the ET to satisfy the *Meek* standard.

Grounds 3 and 4

42. By ground 3 the Appellant contends that the ET did not properly consider whether the Respondent acted fairly in dismissing her for redundancy, and in particular that it failed to decide whether there was a fair selection process, fair consultation and a reasonable search for alternative employment for the employees affected.

43. In *Williams v Compair Maxam* [1982] ICR 156, the EAT set out the practice which a reasonable employer would be expected to adopt when making dismissals for redundancy. Summarised briefly, the requirements are (save where there is a good reason to depart from any of them) for maximum advance warning, consultation with trade unions especially about selection criteria, the use of objective selection criteria, fair selection on those criteria having regard to any trade union representations and reasonable efforts to find alternative employment for an employee facing dismissal.

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44. *Williams* was approved by the House of Lords in *Polkey v AE Dayton Ltd* [1987] IRLR 503, where Lord Bridge said at [28]:

> "… in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representatives, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by deployment within his own organisation."

45. In the present case, no issue was taken before the ET about consultation, fair selection or search for alternative employment, and the ET did not explore the question of whether those requirements were complied with. For that reason the ET's reasons do not cover those topics, save with regard to the single very specific issue about whether an appropriate person was appointed as appeal manager. That specific issue is no longer live.

46. Mr Watson relies on the EAT's decision in *Langston v Cranfield University* [1998] IRLR 172.

47. In *Langston* the claimant was a research assistant, employed by a university under a series of fixed-term contracts. His final contract expired without being renewed and he was dismissed for redundancy. He represented himself before the industrial tribunal (as it then was). The EAT would later proceed on the basis that he did not raise the issue of fair consultation, but that he did raise the issue of alternative employment. However, the industrial tribunal identified as the only question for determination whether the claimant had been unfairly selected for redundancy, and decided that question against him.

48. On appeal to the EAT, Mr Langston sought to raise the issues of consultation and alternative employment. Judge Peter Clark referred at [19] to the basic principle that the appeal tribunal will not entertain a point of law which was not raised below save in certain exceptional circumstances (which were not present in that case). But at [21] he noted that this "must be

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seen in the context of cases where a principle is so well established that an industrial tribunal may be expected to consider it as a matter of course”. He gave as examples certain issues which a tribunal will always consider when assessing compensation for unfair dismissal, whether or not the parties raise them.

49. The EAT allowed the consultation issue, as well as the alternative employment issue, to be argued, and it ruled that the industrial tribunal had erred by not deciding those questions in addition to fair selection. The core of its reasoning was as follows:

> “29
> (3) The principles of law relating to unfair redundancy dismissals have developed since the Employment Appeal Tribunal decision in *Jones*. They are encapsulated in the words of Lord Bridge in *Polkey* [1987] IRLR 503 to which we have referred.
>
> 30
> (4) Where an applicant complains of unfair dismissal by reason of redundancy we think that it is implicit in that claim, absent agreement to the contrary between the parties, that the unfairness incorporates unfair selection, lack of consultation and failure to seek alternative employment on the part of the employer.
>
> 31
> (5) Because there is now no onus on either party to establish the reasonableness or unreasonableness of the dismissal under s.98(4) it is for the industrial tribunal to determine that question 'neutrally'.
>
> 32
> (6) In these circumstances we think it is incumbent on the industrial tribunal to consider each of the three questions mentioned in (4) above, in the same way that an industrial tribunal will consider the threefold *Burchell* test in an appropriate conduct case. It is desirable that at the outset of the hearing the live issues are identified by the industrial tribunal.
>
> 33
> (7) Normally, an employer can be expected to lead some evidence as to the steps which he took to select the employee for redundancy, to consult him and/or his trade union and to seek alternative employment for him.
> 34
> (8) We would normally expect the industrial tribunal to refer to these three issues on the facts of the particular case in explaining its reasons for concluding that the employer acted reasonably or unreasonably in dismissing the employee by reason of redundancy.
> 35
> In setting out these propositions we are not seeking to replace the statutory test under s.98(4) but to ensure its practical application in redundancy cases.”

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50. Mr Watson also referred us to *Remploy Ltd v Abbott* (2014) UKEAT/0405/14.

51. Remploy was a non-departmental public body whose operations included subsidised factories providing employment for people with disabilities. Its Government funding ceased and it proposed to close something like 36 sites, putting 1,750 employees at risk of redundancy. In the litigation there were 1,660 claimants, represented by what the EAT described as "highly competent legal advisers, solicitors and counsel". Directions were given for a centralised approach involving test cases in various categories. There was then "considerable correspondence" dealing with case management, including a list of issues which was not finalised but was "largely agreed informally". The different categories of case raised different issues about, inter alia, aspects of the fairness of the redundancy procedure. Further case management hearings took place. The claimants applied to amend in order to add a number of issues, in particular as to whether there was a reasonable search for alternative employment, though they also contended that an amendment was not actually needed in order for these to be advanced. An EJ gave permission for the amendments, noting that in any event "the Tribunal was bound to investigate whether there were any alternatives to dismissal either at the stage of liability or remedy", that being a reference to the ruling in *Langston*. The respondent appealed, contending that the amendments should not have been permitted and that these were of fundamental effect, had not been raised in the claim forms and would disrupt the management of this very substantial litigation, and submitting that *Langston* was not applicable to this kind of case.

52. Judge Serota QC, sitting in the EAT, allowed the appeal, reasoning as follows:

    a. The starting point is that a point not set out in a claim form (originally or by amendment) cannot be raised on appeal: *Chapman v Simon* [1994] IRLR 124.
    b. In a race discrimination claim, a tribunal therefore must confine itself to the acts specified in the claim, unless it allows an amendment, and cannot find some other act of discrimination and give a remedy for it: *Ahuja v Inghams* [2002] EWCA Civ 1292.

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c. Only in exceptional circumstances can a point not raised in the ET be raised in the EAT on appeal: *Kumchyk v Derby City Council* [1978] ICR 1116.
d. Amendment of a claim will be permitted or refused applying the well-known principles from cases including *Selkent Bus Co Ltd v Moore* [1996] IRLR 661.
e. An amendment is not required in "circumstances in which a point is so well known and obvious that an ET may be expected to determine the point in any event even if not specifically advanced by the parties. This may well be so in a case in which either or both of the parties are not represented" [73].
f. "The high water mark of such cases is perhaps *Langston* …" [74].
g. *Langston* was not followed by the EAT in *Buckland v Aifos* [2005] All ER (D) 40 (Oct), where the parties had themselves defined the issues so it was not appropriate for the ET to consider other issues.
h. *Langston* is not "of blanket application". Whether an ET is bound to take a point not raised by the parties will depend on the circumstances.
i. It is not easy to see how the ET could take a point that depends on factual investigation unless the parties have prepared and led some evidentiary material: "The question, for example, of whether the Respondent was in breach of its obligations in relation to seeking suitable alternative employment cannot be determined in a factual vacuum" [82].
j. Permitting the amendments would require "comprehensive new case management", perhaps including abandoning the test cases approach. The EJ's decision was clearly wrong on the facts.

53. As to *Langston*, Judge Serota said:

> **"**83. I do not consider that the principle in *Langston* has any application to the present case, because of its complexity, history of case management and professionally drawn notices of application. I am supported in my view that an amendment was necessary because the Claimants evidently accepted this was the case by making an application (even if they now assert they may not have needed to) to amend, and the Employment Tribunal acceded to the application.
>
> …
>
> 85. I do not take HHJ Peter Clark in *Langston* as saying that in any case where a point such as failure to seek alternative employment on the part of an employer in cases of alleged unfair dismissal in redundancy dismissals has not been taken in the Employment Tribunal, it can always be taken on appeal, or that the Employment Tribunal is required to take the point of its own motion. It may be that in some cases where the pleadings are sparse and a point is so obvious that an Employment Tribunal should take the point even if it has not occurred to the parties, provided the Employment Tribunal brings this to the attention of the parties so they can deal with it. On the other hand there will be, for example, cases in which there has been comprehensive case management and the parties have elected not to regard the point as being an issue that requires to be decided. Neither do I take HHJ Peter Clark to have said that if a particular series of factual allegations related to a pleaded issue were not raised, the Employment Tribunal is nonetheless bound to determine them. The Judgment in *Langston* has no resonance at all in a complex case such as the present, where the parties are well represented and have engaged in extensive case management, and the addition of the new points would be likely to derail the previous case management and delay any trial. I do draw support from the decision of HHJ Ansell in *Aifos*, who came to a similar conclusion. I consider

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> that the Employment Tribunal fell into error in holding that it was required by *Langston* to consider all aspects of unfair dismissal by reason of redundancy, whether raised by the parties or not."

54. The learned editors of Harvey on Employment Law at [1683] argue that the *Langston* approach in general remains good law but may be subject to exceptions in cases such as *Remploy*.

55. Mr Watson emphasizes that *Remploy* was a very different kind of case from *Langston* and that the present case, a claim by one individual, acting without legal representation, is much closer to *Langston*. He accepted that, in a case where a case management summary showed that a claimant entered into an informed agreement not to take one of the points specified in *Polkey*, *Langston* would not require the ET to pursue the point of its own motion.

56. Mr Watson contends that the ET's decision in this case does not ask or answer the questions of whether there was, overall, a fair consultation process or a fair selection process or a reasonable search for alternative employment. Mr Watson submits, under ground 3, that the ET therefore erred in law by not raising those questions.

57. In the alternative, under ground 4, Mr Watson relies on that omission to establish that there was also a failure to meet the *Meek* standard.

58. Mr Jones submitted that the starting point is found in *Dundee City Council v Malcolm* (2015) EAT at [18], where this tribunal ruled that an ET is required to remain neutral and cannot enter the arena and advance a case which a claimant could have advanced but has failed to. He submitted that there is a crucial distinction between, on the one hand, a tribunal making a claim for a claimant which the claimant did not make, and on the other, a tribunal helping a

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claimant to articulate the claim which he did make. *Langston*, he submits, permits the latter but not the former.

59. So, he contended, where it is implicit in a claimant's pleaded case that the *Polkey* issues are relevant, the tribunal should make this explicit and make the necessary case management orders at preliminary hearing stage. Mr Jones agrees that *Langston* establishes that much, but submits that if and to the extent that it goes further, it was wrongly decided and is inconsistent with *Remploy.*

60. This case, Mr Jones says, resembles *Remploy* more than *Langston* in that here, the Appellant from the start (assisted by her husband) advanced a very clear case that she had been dismissed for asking for a pay increase and not for redundancy at all, as opposed to a case based on any of the *Polkey* points. Her case contained no implicit *Polkey* point. Therefore, he submits, the tribunal was not required to raise the *Williams/Polkey* issues itself and give a ruling on them.

61. In the alternative, Mr Jones submits that although the ET's reasons are succinct, they do sufficiently address the guidelines given in *Williams*. The ET heard from Mr Kay and had before it his redundancy consultation document, and was satisfied that Mr Kay had conducted a proper process.

62. Finally Mr Jones reminds us of the ET's alternative finding that even if there had been procedural unfairness, a fair process would have resulted in the same outcome at the same time. Therefore any further exploration of the process would serve no purpose.

63. That last point, it seems to us, goes to the disposal of the appeal if it succeeds. Mr Jones can argue that there would be no point in remitting the claim to the ET because that point means that it is bound to fail. However, we are not persuaded by that argument. If there is a live issue

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of procedural fairness which the ET has not yet dealt with, then it should deal both with that issue and with the consequences if the issue turns out to be well founded. In any event, we consider that the single unreasoned sentence at paragraph 44 of the ET's reasons could not be regarded as *Meek*-compliant if the outcome of the claim depended on it.

64. As to ground 3, we have compared *Langston* with *Remploy*.

65. We were not really assisted by *Buckland v Aifos*. That case concerned the fairness of a dismissal on grounds of capability, not redundancy. The appeal turned on a narrow and different question of whether, when a respondent had contended unsuccessfully that a fair procedure would in any event have resulted in a dismissal within 2 months, the tribunal was bound to go on and ask itself more widely what the outcome would have been if the procedure had been fair.

66. In our judgment, *Langston* establishes that a tribunal in a redundancy case should consider the issues of fair selection, fair consultation and alternative employment unless the parties explicitly or implicitly make it clear that any of those are not in issue. *Langston* itself demonstrates that a mere omission to raise any of those points, by itself, does not mean that they are not in issue.

67. *Langston* is therefore a limited exception from the usual rule, as stated in *Dundee City Council v Malcolm*, that an ET should not consider issues unless the parties raise them. As Judge Serota QC recognised in *Remploy*, there are a few questions which arise in employment law and are so "obvious" that a tribunal should investigate them whether or not they are raised by the parties.

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68. *Remploy* can clearly be distinguished from the present case. It involved very substantial multi-party litigation which was subject to intensive case management by the tribunal with the assistance of highly qualified representatives over a long period. Where efforts had been made to produce lists of issues, and these did not include the *Polkey* issues, it was clearly right to regard that omission as being by implicit agreement. Judge Serota QC was therefore right to regard *Langston* as having no application.

69. We therefore do not consider that *Langston* and *Remploy* are inconsistent or that *Langston* was wrongly decided. There was no error in Judge Peter Clark's ruling that the three *Polkey* issues (fair consultation, fair selection and reasonable search for alternative employment) fall into the "obvious" category which must be addressed unless the parties exclude them by agreement. Judge Clark did not disregard the basic principle that a point not taken below cannot be taken on appeal, referring to *Kumchyk* for that very proposition. But where the complaint on appeal is that the tribunal itself should have raised a point at first instance, that point will by definition not have been taken below. In our view the EAT is not barred from considering whether an omission of that kind was an error of law. And nor would the raising by an ET of a *Polkey* point amount to an illegitimate introduction of a new cause of action. Rather, those points will be in the nature of particulars of an existing claim for unfair dismissal. They therefore do not infringe the principle stated in cases such as *Ahuja v Inghams*.

70. There is a practical question of when the *Polkey* issues should be investigated by the ET. Nowadays it is standard practice for the issues in a claim such as this to be considered at a preliminary hearing. That is the stage at which *Langston* ought to be applied. As Judge Serota QC said in *Remploy*, if such matters were canvased at the start of a final hearing the result could be that parties would be unprepared and hearings might have to be adjourned.

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71. In the present case it is not apparent that this happened at the preliminary hearing. Whilst a list of issues was compiled, there is no record of whether the *Polkey* issues were omitted by agreement. It would have sufficed for the Case Management Summary to record that the Appellant was asked whether she wished to raise any of those issues and answered that she did not. Absent such a record, it is possible that those issues (or the possibility of relying on them in the alternative to the Appellant's primary case) were overlooked. That possibility is obviously increased by the fact that the Appellant did not have professional legal representation.

72. If those issues had been raised, and *Langston* cited, for the first time at the final hearing, the ET might have faced a difficult decision. It would have had to decide whether the parties were able, then and there, to address those issues fairly. If not, it would have had to decide, as a matter of case management discretion, whether to adjourn the hearing to enable them to be addressed.

73. Nevertheless, we have come to the conclusion that, applying *Langston*, there was an omission by the ET to consider the *Polkey* issues.

74. It is true that, as Mr Jones says, the Appellant's claim was at all times advanced in clear and precise terms, unlike Mr Langston's claim. For that reason this was a more borderline case than *Langston*. However, where the Appellant did not have professional legal representation and the Case Management Summary does not record any discussion about the *Polkey* issues, we do not consider that those issues can be regarded as having been excluded by agreement.

75. The appeal therefore succeeds on ground 3.

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76. We also allow the alternative ground 4, as we do not consider that the ET's reasons can be read as containing a clear and sufficient determination of the issues of overall fair consultation, fair selection and reasonable search for alternative employment. Although the ET did not express anything other than acceptance of Mr Kay's evidence, it did not explicitly accept his evidence on these wider issues, no doubt because it was not setting out to determine them.

Disposal of the appeal

77. It was agreed by the parties in the event of grounds 3 and 4 being allowed, and we agree, that the issues of fair consultation, fair selection and reasonable search for alternative employment should be remitted to a differently constituted ET, which will consider them in light of the existing finding that the Appellant was dismissed by reason of redundancy and not because of her request for a pay increase. It will be for the ET to case manage the remaining process, but we also agree with the parties that they should both have the opportunity to adduce further evidence on the remaining issues.

78. Mr Watson contended that in the event of this outcome, we should also remit the claim for discrimination on grounds of sex, on the basis that if the ET finds a breach of any of the *Polkey* principles, such a breach could amount to facts which would establish discrimination in the absence of another explanation, thereby giving the Respondent the burden of proving that the Appellant's sex was not the reason for her treatment.

79. We nevertheless accept the submission of Mr Jones that we should only remit the aspects of the claim for unfair dismissal which we have identified. A party bringing a claim for discrimination must plead the acts or omissions which are said to be discriminatory. In this case the Appellant complained of being underpaid, and of being dismissed for asking for a pay increase under the guise of redundancy. At the preliminary hearing those precise acts were

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recorded in the list of issues. It seems to us that an allegation of discrimination consisting of a breach of any of the *Polkey* principles would amount to a new claim and not just to particulars of the existing claim. It follows that the remitted issues do not touch on the discrimination claim which the ET heard and dismissed.

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