EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105231/2016 Hearing at Aberdeen on 16 and 17 March 2017

5 Employment Judge: M A Macleod (sitting alone)

10 Paul Hayworth — Claimant
Represented by
Mr T Pacey
Of Counsel

15 Alba Power Ltd — Respondent
Represented by
Mr C Bennison
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The Judgment of the Employment Tribunal is that the claimant's claim of unfair dismissal fails, and is dismissed.

REASONS

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Introduction

1. The claimant presented a claim to the Employment Tribunal on 25 October 2016 in which he complained that the respondent had
35 dismissed him unfairly from his employment with them.

2. The respondent submitted an ET3 in which they resisted the claimant's claim and denied that he had been unfairly dismissed, albeit that dismissal was admitted.

3. A hearing was fixed to take place in Aberdeen on 16 and 17 March 2017.
40 The claimant appeared and was represented by Mr Pacey, Barrister, and the respondent was represented by Mr Bennison, Solicitor.

4. A joint bundle of productions was produced to the Tribunal.

5. At the outset of the hearing, an agreed statement of facts was produced on joint application by the parties, and the Tribunal admitted this to the proceedings.

6. The respondent called as witnesses Colin Carrick Watson, Commercial Manager, and Neil Fraser Mackenzie, General Manager and Director.

7. The claimant gave evidence on his own account.

8. Based on the information presented and the evidence led, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

9. The claimant, whose date of birth is 16 September 1954, commenced employment with the respondent on 18 May 2008 as a Project Engineer. His employment was terminated by the respondent with effect from 17 June 2016.

10. The respondent is a business providing dedicated support services to the aeroderivative/industrial gas and marine turbine markets, and controls and rotating equipment markets including power turbines. When the claimant commenced employment with the respondent he was a Project Engineer. His employment changed in January 2014 and he was promoted to the position of Lead Project Engineer.

11. A copy of the Project Engineers' Job Profile (69) specified that the claimant's job involved him project managing given engines in the workshop on a daily basis, taking photographs, helping inspections where possible and writing reports, sending out weekly reports and updates to clients. It also stated that his duties included *"Overseeing and helping the project engineers within the office and checking reports go out on time and covering when project engineers are away working or on holiday."* The claimant was not responsible for appraising the project engineers, nor

was he involved in any disciplinary matters relating to them. He also attended a management course in 2016.

12. The job profiles for Hayes Tulloch (who was the claimant's line manager), Natasha Wiseman, Alasdair Horne and Martin Cruickshank were also set out at 69. They were identical to that of the claimant, other than the duty to oversee and help the project engineers within the office.

13. The respondent had a "bumper year" in 2015, in which business was excellent. However 2016 was not such a good year for business. The respondent was enduring cashflow difficulties due to problems in recovering outstanding payments on invoices issued to Venezuelan clients, who were not able or willing to pay their outstanding debts. The Profit and Loss accounts (146ff) from January to August 2016 show that the respondent was running at a net loss of £1,105,123.85 for the year to date. The detailed breakdown of the monthly figures on the Profit and Loss account (148) demonstrate that significant losses were made in the months of January, February, March, June and July 2016.

14. The respondent's management took the decision that savings required to be made across the business, and determined to consider redundancy as one way of making those savings.

15. On 26 May 2016, the respondent held a "Town Hall" meeting with all staff, conducted by Mr Watson. A note of the statement he made at that meeting was produced at 34a:

"I want to update you on the current situation facing the company and give you a frank view of where we stand at the moment.

While 2015 was our most successful year yet, trading conditions for 2016 are much tougher. Customers are putting work off and are taking longer to pay invoices.

Part of this is related to the collapse in the oil price and part of it is down to the global recession and belt tightening by clients. We had invested a great deal of time and money in Latin America over the past two years,

but the oil price collapse has hit that market hard and created a cash flow issue for clients there, resulting in a delay in payment of Alba Power's invoices.

We believe we can weather the downturn and we are on a cost cutting exercise at the moment to ensure we can do so and emerge a leaner and fitter company.

We have a number of cost saving initiatives planned and as part of this process we are looking at proposals to reduce headcount.

I want to be direct with you about this and this meeting is to indicate how we are planning this process and how we will time it.

We are looking at all options and considering redundancies is the last option we will consider. However redundancies are one of the options we will be reviewing.

Once we have concluded our review, we will start consultations with the employees at risk. This will happen in the course of the next week.

Those at risk will be treated fairly and with dignity, and support will be offered through this process for all employees. Any employee placed 'at risk' will be fully consulted with regarding ways to avoid and mitigate the effects of any proposed redundancy. No decision will be taken by the company until that consultation process has been completed.

It is our hope that we will be able to conclude this process as quickly as possible, to minimise uncertainty, and in any event by the end of June.

NOTE: Please ask Managers to inform staff who are away or on holiday."

16. The claimant was not in attendance at that meeting but was informed that it had taken place, and was given an indication of what was said at the meeting.

17. An "At Risk" meeting took place on 31 May 2016 (35), at which the claimant met with Mr Watson and Chloe Linklater. Mr Carrick-Watson

opened by saying: *"As you know there are potential redundancies, todays individual meeting is about this. No decisions have yet been made. We are talking to people at risk and your position is now at risk. We will have another meeting Thursday which will be the first consultation meeting…"*

5 18. The claimant confirmed that he was due to be on holiday on that Thursday, and accordingly the meeting had to be rearranged, until 7 June 2016.

19. The conversation then proceeded ("P" referring to the claimant and "C" to Mr Watson):

10 *"P: Why am I at risk?*

C: A number of standalone jobs are at risk.

P: What do you mean? I am lead and most experienced?

C: We are aware that we may lose your experience, and that is something we may have to accept but at the moment we are informing you of the risk
15 *to your employment.*

P: It's not going to be easy to start again.

C: I am aware of that Paul but during the consultation process feel free to put forward any ideas you have…

P: So you're looking for me to come up with ideas?

20 *C: Yes, if you can think of anything that avoids redundancy; if you have skills in other areas for instance. This is not meaningless consultation and if you have suggestions these will be considered.*

P: We've recently taken on four young people, moneywise better to get rid of me, no that's not true some of them are similar. Would I be able to
25 *change down position, to be one of the guys? It's a bit of a shock I am old and knackered…"*

20. On 31 May, Mr Watson wrote to the claimant (37) to confirm that the reasons for the redundancy situation were:

    - *"Reduced Workload*
    - *Downturn in Economic Climate*
    - *Cost Cutting due to the above"*

21. He went on to say that the claimant had been advised that his job was at risk and that he may be dismissed on the grounds of redundancy as a result. *"..We also discussed the possibility of providing an alternative job but there were none currently available…The meeting formally represents the beginning of a period of individual consultation. We will consider all ideas, suggestions and representations you wish to make to us in this period."* It was stressed that no final decision would be taken until the respondent had had the opportunity to consult with the claimant in full.

22. On 7 June, Mr Watson and Ms LInklater met with the claimant (38ff). It was noted at the outset of the meeting that Mr Watson said:

    "We will meet again next week for another meeting which may well depend on today's meeting. As you know we have been squeezing margins, people are taking longer to pay, limit to overtime, travel and freezes on other things.

    As you know your role is at risk and we are her to mitigate, your role was looked at as you are in a middle role, which is standalone. That role is no longer needed.

    P: So I am in a standalone position and the work I do will be moved up or down.

    C: yes that is our view.

    P: I do the same if not more than the others in my office, over time here is ridiculous, so is management. We could do an overall pay cut 10% off

management and 5% off everyone else. So I could see how 5 or 10% could affect the company. Are all the redundancy letters out?

C: I am unable to answer that as I don't believe this would be fair.

P: In my opinion, people are on more than me and my pension is genuine, there has been no score criteria.

C: No you are not in a Pool so no scoring system has been used.

P: I think the company is poorly managed, it's a fact. So you are looking for me to offer things, which it states plainly in my letter, it says there are no other jobs to offer.

C: This is still the case we don't have another job to offer at this time. W e have our second meeting next week and this is what this meeting is for to establish what may happen.

P: So would you want me to go to a three day week or take a pay cut?

C: Are these proposals you are willing to take?

P: I would consider it, is there a package?

C: There is no enhanced package.

P: No gagging, um the managerial course I did, have not received a course certificate for that, I thought we got a qualification, I had no job description, I mentored and taught the team including Hayes, gave him my experience. What if I just dropped my title and was one of the guys?

C: I would look into that…

P: There surely must be another way.

C: I know this is a difficult time but we are having to make savings, and looking at head count is one of the ways we have to do it. Hopefully the company will grow in future I know this is difficult.

P: There are things you can do sabbaticals buying extra holidays, everyone is fighting in a redundancy position. Last year was a record year, I know a couple of reasons downfall of management.

C: Not management.

5 *P: No not downfall but downturn.*

P: They were warned about PDVSA warned and warned.

C: We are not going to see different external factors, this is noted in minutes, if you have suggestions please make them, if you can put something together, please do so, you can do that now or you can give it
10 *to us Thursday. While the process is normally meetings 123 this can change if we need more we can do more.*

P: This process is quite cruel.

C: It is a statutory process and helpful, management don't always know everything, ideas may change the redundancy process. It is worthwhile
15 *we are trying to do everything fairly…"*

23. In advance of the meeting of 14 June, the claimant prepared the following note setting out his proposals to avoid redundancy within the respondent's business.

"Cost cutting ideas for Alba Power

20 *As you are no doubt aware compulsory redundancies can and do damage morale and can be very costly in terms of management time. The estimated cost to a company like Alba Power is between £10,000 and £16,000 per candidate. Please see below a few suggestions that in most cases are less draconian and are definitely reversible allowing Alba*
25 *Power to respond accordingly to the extra work load if business picks up.*

General (all staff)

- *Removal of or reduction in discretionary benefits (pension/medical)*
- *Ask for voluntary redundancy or early retirement*
- *Reduction in hours/days worked*
- *Reduction in Salary*
- *Recruitment freezes*
- *Buying extra holidays*

Personally

I would be willing to consider a four day week as a cost cutting solution.

However, if this change in working hours is deemed acceptable as an alternative to redundancy, I would expect to continue as an Alba Power and as an extension of my current contract.

Having been in this industry for 40 years now I know that work load throughout the year can vary greatly and I am sure that this is just a blip. I am convinced that Alba Power will recover from this downturn/challenging period and I would like to be here when they do.

See you on the 14th June 2016."

24. The second consultation meeting took place on 14 June 2016. Again, Mr Watson and Ms Linklater met with the claimant (41ff). Mr Watson referred to the note provided by the claimant, and said that while he understood the point about one off costs involved in a redundancy process, and the demoralising effect upon the business, the company had been left with too many people for the work available, and that since his role was a stand alone role, it was not sustainable.. He went on to point out that a number of measures had been taken – recruitment freeze, reduced overtime, travel costs cut, no bonuses and mobile phone bills

reduced – but that the respondent was left with headcount reduction as a way of managing the business.

25. There was an exchange between the claimant and Mr Watson as follows:

"P: I know for a fact, if I hadn't been here for two years, I would be gone now. Are you making me redundant or not?

C: We are taking advice all the way through this process and we have to be fair, we have to look at other opportunities and options.

P: Laying off personnel, what's the deal am I being made redundant?

C: We have not arrived at that decision yet, we are still consulting with you, and this will be a decision for the next meeting which is the final meeting.

P: Is it a statutory package?

C: Yes, you will receive a statutory package from date of termination. I realise you feel this process has been strung out. We would like to have our final meeting to pull everything together. I can't give you today the final answer.

P: If and when I am made redundant, at least two months redundancy and garden leave?

C: We haven't decided yet some employees may have pay in lieu of notice others may work their notice.

P: Ok.

C: Ok any decision is largely based on our need.

P: I understand.

C: Do you have any other questions?

P: Can I take a minute?

C: No problem, very difficult time, best we can hope for, you may not agree but hopefully you understand

P: You are doing it because you have to…"

26. Mr Watson wrote to the claimant on 16 June 2016 (43) to invite the claimant to a final consultation meeting on 17 June 2016. Mr Watson and Ms Linklater met with the claimant on that date (44ff).

27. Mr Watson confirmed that there were no updates or outstanding points from the previous meeting, and asked if the claimant had anything to add. He said he did not. Mr Watson also said that the respondent had no vacancies at that point, and asked if he had any further questions or suggestions, to which the claimant replied by saying that *"I know for a fact if I hadn't been here two years I wouldn't be sitting here."*

28. Mr Watson then advised the claimant that no measures had been identified to avoid redundancy, he issued him with notice to terminate his contract with effect from 17 June 2016. He advised that the redundancy package came to just under £5,748. He explained what was included in the payment, which he would receive on 24 June, and advised that the claimant had a right to appeal against dismissal to Mr Neil McKenzie.

29. Following the meeting, Mr Watson wrote to the claimant on 17 June (46) to confirm the termination of the claimant's employment on 17 June 2016 and to explain the payments to be made to the claimant on termination on 24 June.

30. The claimant was unhappy at the decision to make him redundant, and accordingly submitted an appeal against that decision by email dated 19 July 2016 (50). The email read:

"Dear Mr McKenzie,

I wish to appeal against the decision of making my position within Alba Power redundant on the grounds of unfair dismissal due to the fact that

not enough effort was made to find alternative cost savings within Alba Power.

Yours sincerely,

Paul Hayworth"

5 31. Mr McKenzie replied by letter dated 20 July 2016 (53) to invite the claimant to attend an appeal hearing on 21 July 2016. The claimant was unable to attend that hearing, and accordingly a fresh hearing was fixed to take place on 22 July 2016 (58).

32. The appeal hearing took place on that date, and ran from 1642 until 1702. 10 Mr McKenzie conducted the appeal, with Cathy Smith present to take notes (61ff), and the claimant attended without assistance. Mr McKenzie pointed out that the appeal process normally permitted an appeal if it were lodged within 5 days of the dismissal, but that in this case, even though the appeal was late, he had agreed to consider it. He advised the 15 claimant that he was able to overturn any decision previously made but that there would be no further appeals after that discussion.

33. The claimant then set out the grounds of his appeal:

"In a nut shell I feel that there was not enough effort made by Alba to save the redundancies. Redundancy was made unfairly. I did make a number 20 of suggestions for instance, pensions, voluntary redundancy, reduction in hours, salary cuts there are a number of things that could have been done to prevent this. It was like getting rid of dead wood and trouble makers. I'm puzzled at decision – standalone positions? How far do you want to take it? Cathy is stand alone? You are stand alone? I have been doing a 25 number of calculations and I was wondering what the wage bill for Alba was?"

34. Mr McKenzie declined to provide that information. He stated that a lot more was done before it came to redundancies. He then asked the claimant: *"Are you sticking with cost cutting as your reason to appeal?"*

The claimant replied that he was wanting to see if he could work reduced hours, having been in the industry for 40 years.

35. The claimant then said:

"Paul: I'm just going through the motions.

5 *Neil: You're just going through the motions?*

Paul: Yeah, I've been in touch with ACAS and a lawyer.

Neil: ACAS?

Paul: Yes I'm on job seekers allowance and getting legal advice and this is the next step … going through the motions on next step compensation 10 *and yeah…*

Neil: Your sticking to cost cutting or you're saying you were unfairly dismissed?

Paul: Yes cost cutting. I think that money could have been saved. None of my cost saving ideas have been taken up – Colin said it would cause 15 *bad moral (sic)…*

Neil: …Are you disputing we didn't need to do redundancies?

Paul: Em I don't know – money could be saved elsewhere.

Neil: Do you accept the workload had changed Paul?

Paul: Yes I know it's peaks and troughs, and companies have to manage 20 *peaks and troughs. I know if the rumours are true about a certain company not paying up and then the test bed will be a big outlay. I do think it's down to bad management. Voluntary redundancy maybe that was the route to go down…"*

36. The hearing concluded. Mr McKenzie wrote to the claimant on 27 July 25 2016 (67) to advise that the appeal was not upheld. He noted:

"You raised a number of suggested alternatives to redundancy including voluntary redundancy, reducing hours and salary cuts and I am satisfied that these were given due consideration by the manager conducting the consultation meetings and were not considered feasible. You have challenged why you were not pooled with other employees, however I am satisfied that you were in a unique stand-alone position and there was no requirement to consider you as part of a pool."

37. He concluded that the process was not taken lightly by the manager, and that all suggestions which were put forward were taken seriously and given due consideration.

38. In total, 16 staff were made redundant across the business as part of the exercise in the course of which the claimant was dismissed. No other project engineer was dismissed due to redundancy at that time.

39. On termination, the claimant received the sum of £11,738.35, which comprised salary of £2,125.24, holiday pay of £980.88, payment in lieu of notice of £6,539.28 and a redundancy payment of £5,748.00. Tax and national insurance deductions were made from the salary, holiday pay and payment in lieu of notice.

40. Following his dismissal, the claimant sought to find alternative employment. He set out for the Tribunal a document detailing the efforts he had made (91ff). He acknowledged that his area of expertise is relatively narrow and that the industry has only 3 players in Scotland, and therefore suggested that it was very difficult for him to find work in this area. He registered with a number of employment agencies, created a CV and sent it to a number of contacts within the industry, without success. He applied for a position as a postman with the Royal Mail, but was unsuccessful.

41. The claimant explained in evidence that he has not, other than the postman position, applied for jobs outwith his skill set as he "is not desperate yet". He recognises that there are, for example, lots of bar staff jobs available but he has not yet felt the need to apply for such jobs.

42. He applied for, and was awarded, Job Seekers' Allowance from 21 June 2016, at £73.10 per week (111). The letter confirming his entitlement advised that he would not be paid beyond 27 December 2016.

Submissions

43. For the respondent, Mr Bennison presented a written submission, to which he spoke. His submission is summarised briefly here.

44. He observed that the claimant's case, set out in the ET1, is that:

- There was no genuine redundancy situation, born of no economic downturn and/or reduced workload facing the respondent; and
- The respondent failed to adopt fair selection criteria and/or the consideration of the principle of "bumping".

45. He argued that the law does not interfere with an employers' freedom to make such business decisions, and that the employer is not required to justify its reason for making redundancies.

46. Referring to section 139 of the Employment Rights Act 1996 (ERA), and to **Murray and another v Foyle Meats Ltd (Northern Ireland) [1999] IRLR 562**, he argued that there is no doubt on the facts of this case that there was a redundancy situation. The requirements of the particular kind which the employee was employed to do had ceased or diminished given the factors impacting the respondent's business and that it was these factors which wholly or mainly caused the dismissal of the claimant. He accepted this during the process and under cross examination.

47. The respondent sought to identify alternative courses of action in the consultation process, and Mr Bennison submitted that the claimant accepted that they had acted upon these alternatives to redundancy in a thorough and meaningful manner.

48. They adopted a fair process, meeting with all staff in the first instance and then individually with the claimant on four occasions. They consulted fully

with the claimant, in Mr Bennison's submission. At no time did the claimant assert that it was not a genuine redundancy situation, nor that he should have been pooled with the Project Engineers. He never suggested that the process was not fair. Mr Bennison focused on paragraph 16 of the ET1, whose assertions were accepted by the claimant not to be supported by the evidence before the Tribunal. The claimant said he was simply "going through the motions". This was, said Mr Bennison, because the claimant wanted to get through the appeal in particular and raise proceedings in order to obtain compensation from the respondent.

49. As to the issue of pooling, he submitted that the Tribunal must decide whether the employer's choice of pool was within the range of reasonable responses, and should not substitute its own view of what the pool should have been (**Hendy Banks City Print Limited v Fairbrother and others UKEAT/0691/04/TM**). It is primarily a matter for the employer to determine the definition of the pool, and provided that it applies its mind genuinely to this matter, it will be difficult for an employee or Tribunal to challenge its choice.

50. The claimant was in a standalone position, and therefore in a pool of one. In his evidence he said he was effectively carrying out the same role as the Project Engineers, but he never raised this during the process. The respondent asserts, however, that the claimant was in a managerial role, was paid for that role and carried out managerial duties. He was also placed on a management course in order to cement his role.

51. Mr Bennison submitted that if the Tribunal is not persuaded that the claimant was dismissed on the grounds of redundancy, it should find that the reason for dismissal was some other substantial reason, that is, the need for the respondent to restructure its business.

52. He then argued that the claimant has submitted an inaccurate Schedule of Loss.

53. Mr Bennison finally addressed the credibility of the evidence, and maintained that the respondent's evidence had been left unaffected by the claimant's case, being totally supported by the documentary evidence. The claimant made a number of concessions in his evidence which undermined his argument that there was no genuine redundancy situation here. He accepted that there was a genuine need for the company to take action to stabilise the business, that he had been consulted with fully, that the concerns raised at paragraphs 16 and 17 of the ET1 could not be justified, and that there had been a fair and meaningful consultation.

54. The claimant has completely failed to mitigate his losses, and showed that he had simply decided to sit and wait to see what was going to happen.

55. Mr Bennison concluded by arguing that the claimant's case had catastrophically failed, and that proceeding to Tribunal amounted to an abuse of process.

56. For the claimant, Mr Pacey made an oral submission, which, again, is summarised briefly below.

57. He resisted the suggestion that the claimant's actions amounted to an abuse of process. He pointed out that the majority of the documents relied upon by the respondent were only provided to the claimant five days before the start of the merits hearing. The claimant, said Mr Pacey, was in the dark as to why there was a redundancy situation, having not been given the information as to the financial black hole which the company was facing.

58. Mr Pacey argued that the claimant was consistent in his evidence that he did not understand that there was a financial crisis facing the company. He said that he thought that the situation was brought about by bad management, an opinion which he was free to express. He submitted that it could have put a different complexion on the pleadings had the respondent's advisers chosen to disclose the information at an earlier stage.

59. However, he submitted that this did not get the respondent over the burden of proving the reason for dismissal in this case. The respondent, he said, has led no evidence as to the fall in the kind of work carried out by the claimant, other than Mr Watson and Mr McKenzie saying that they would target middle management. Nothing was said about the kind of work carried out by the claimant. The respondent needed to keep engineers to do the work of the company.

60. Mr Pacey said that while some other substantial reason was pled in the alternative, that did not get the respondent off the hook. Essentially the respondent was seeking to say that they redistributed the work, and pushed it upwards and downwards. The evidence was very general. The principal reason for the downturn was, he said, the cashflow problems caused by non-payment of invoices.

61. He argued that the respondent is obliged to consider alternative employment, but from the start in this case the respondent failed to do so and that precluded the respondent's mind being open to alternative employment. It got worse, in fact, because they declared that his work was no longer needed, and was a standalone position. These are two crucial issues which proper consultation would require to address.

62. In the consultation meeting on 14 June (41ff), there is no reference to his kind of role or work, nor to selection criteria or pooling. The obligation, he submitted, was repeatedly landed at the claimant's door. It is incumbent upon the respondent to conduct the consultation in a meaningful manner.

63. There were no score criteria set out. The pool and the criteria were determined at the start. The matter, he submitted, is sharply focused in the job profiles (69) where there is very substantial overlap between the different roles. The claimant gave evidence that one of the engineers actually earned more than he did. Even if the respondent is only considering middle managers, they should be comparing middle managers. Because the evidence does not tie the matter to a particular level of work, the respondent has to demonstrate why the claimant has to

be removed in this exercise. The department was unique, but the respondent failed to explain why.

64. Mr Pacey referred to **Capita Hartshead Ltd v Byard [2012] ICR 1256**, in which the EAT summarised the principles at paragraph 31. He submitted that it is not for the Tribunal to decide whether they would have thought it fairer to act in some other way, but whether the dismissal lay within the rage of conduct which a reasonable employer could have adopted, but that it is not impossible for the claimant to challenge the dismissal. Here, he said that the employer had failed to address its mind to the problem. The appeal outcome letter, in addition, provides no reasoning which would tell the claimant why he was selected.

65. Mr Pacey went on to submit that there is no evidence that the claimant was a unique employee who could not be compared with others. If the pool had been appropriately drawn, someone else would have been dismissed. The claimant was earning less than some of the ordinary engineers, so could have been compared to them. He may have had a better pension historically, but that was not a relevant consideration – they were all engineers doing engineering tasks.

66. He went on to address the question of mitigation, on which the claimant had been strongly criticised. The marketplace is very limited. He has attempted to get on with his career, and has provided a comprehensive bundle of documents showing the efforts he has made.

67. Mr Pacey invited the Tribunal to find that the claimant had demonstrated his good faith throughout the consultation process.

68. He also sought to dismiss the respondent's alternative submission that the reason for dismissal may have been some other substantial reason, on the basis that there has been no analysis of the reorganisation now alleged to have taken place.

69. Mr Pacey asked the Tribunal to find that the claimant was unfairly dismissed and to make an award appropriate to the schedule of loss,

subject to the basic award having already been dealt with by payment of the redundancy payment.

The Relevant Law

70. The Tribunal considered carefully the statutory provisions, firstly, in relation to unfair dismissal. The respondent require to show that dismissal, where admitted, was for a reason potentially fair under section 98(1) of the Employment Rights Act 1996 (ERA).

71. I also had regard to section 98(4) of ERA, in which the Tribunal needs to be satisfied that in the circumstances the employer acted reasonably in treating the reason relied upon as a sufficient reason for dismissing the employee.

72. I was referred to, and took account of, the definition of redundancy contained within section 139(1) of ERA:

"(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."

73. I took account of the case of **British Aerospace** **v** **Green** **[1995] IRLR 437**, and in particular the following passage:

> *"Employment law recognises, pragmatically, that an over minute investigation of the selection process by the Tribunal members may run the risk of defeating the purpose which the Tribunals were called into being to discharge, namely a swift, informal disposition of disputes arising from redundancy in the workplace. So in general, the employer who sets up a system of selection which can reasonably be described as fair and applies it without any over signs of conduct which mars its fairness, will have done all that the law requires of him."*

74. The Tribunal also had regard to the decision in **Mitchells of Lancaster (Brewers) Ltd** **v** **Tattersall** **[2012 UKEAT/0605/11]**, in which it is stated:

> *"Just because criteria of this sort are matters of judgment, it does not mean that they cannot be assessed in a dispassionate or objective way, although inevitably such criteria involves a degree of judgment, in the sense that opinions can differ, possibly sometimes quite markedly, as to precisely how the criteria are to be applied, and the extent of which they are satisfied, in any particular case. However, that is true of virtually any criterion, other than the most simple criterion, such as length of service or absenteeism record."*

75. I was referred to a number of other authorities. The well known case of **Williams & Others** **v** **Compair Maxam Ltd** **[1982] ICR 156** sets out basic principles for employers to carry out a fair redundancy process. It is necessary for a Tribunal to take into account current standards of fair industrial practice, such as whether the employers had given the maximum warning of impending redundancies, whether they had consulted with the union as to the criteria to be applied when selecting employees for redundancy, whether those criteria were objective rather than subjective, and whether they could have offered employees alternative employment before dismissing them.

76. In **Mercy v Northgate HR Ltd [2008] ICR 410** the Court of Appeal upheld the decision of the Employment Appeal Tribunal to overturn the Employment Tribunal's judgment that the claimant in that case had not been unfairly dismissed on the grounds of redundancy. The Tribunal had found the dismissal to be fair despite finding one "glaring inconsistency" in the operation of the redundancy selection criteria to the detriment of the claimant. The Tribunal had erred by taking the view that in the absence of bad faith they could not determine that the employer had acted unfairly. Quoting the Employment Appeal Tribunal decision, the Court of Appeal stated: *"The lawful basis of intervention [by the Employment Tribunal] would be where glaring inconsistency, whether as a result of bad faith or simple incompetence, evidenced a decision which was outside the band of reasonableness."* The Court of Appeal endorsed that view.

77. The Tribunal also gave consideration to the cases to which the parties referred in their submissions.

Discussion and Decision

78. The first issue which the Tribunal requires to address is the reason for dismissal, which in this case is said by the respondent to be redundancy, a potentially fair reason for dismissal under section 98(1) of ERA. I leave, for the moment, the alternative argument that the claimant was dismissed for some other substantial reason.

79. The respondent relies, primarily, on section 139(1)(b)(i), in saying that the requirement of the business for work of the kind carried out by the claimant had ceased or diminished. The basis upon which they do so is that there was a need, brought about by cashflow problems and ongoing losses to the business during 2016, to make cutbacks to the business, in order to save on outgoings.

80. It is not for this Tribunal to make detailed inquiries into, or criticisms of, the respondent's management of its business or the decisions it took. I am satisfied on the evidence that there was a need for the business to review

its structure and staffing at a time when a downturn in business had led to serious financial difficulties.

81. The question, then, is whether the need for the kind of work carried out by the claimant had ceased or diminished. While it is clear that there remained a need for engineers to carry out the business of the respondent, the claimant's position was identified as different by the respondent in that he was a Senior Project Engineer, in a position of "middle management", and senior to the Project Engineers, with a supervisory role which they did not have.

82. In my judgment, the respondent has satisfied the definition of redundancy in respect of the claimant in this case and has demonstrated that the need for the claimant's work had diminished. Accordingly, the reason for dismissal was that of redundancy, a potentially fair reason for dismissal.

83. It is worth noting in passing that I was completely unpersuaded that the respondent could demonstrate, even in the alternative, that the claimant was dismissed for some other substantial reason. That appeared to be an ex post facto justification applied to the facts of the case following the presentation of the claim, and very little was set before the Tribunal on which a clear decision that that was the intention of the respondent could be made.

84. It is then appropriate to consider whether the respondent dismissed the claimant fairly on the grounds of redundancy. The claimant's two main grounds of complaint, in his ET1, were that this was not truly a redundancy situation, and that the respondent failed to identify selection criteria for redundancy.

85. It was clear from the evidence that the claimant was prepared to concede that the situation was a genuine redundancy situation, and not a sham. He was clearly upset and disappointed that he had been dismissed on the grounds of redundancy, but he accepted before the Tribunal that there were reasons why the respondent had to address the financial

circumstances with which it was faced, and reducing headcount was one of the ways in which that could be done.

86. It may well have been easier for the claimant to understand what had happened had he been provided with some of the financial information which he saw, as I was told, only 5 days before the hearing in this case, during the course of the consultation process, but now that he has seen it, he appeared to understand and accept that action had to be taken.

87. The other point was the failure of the respondent to adopt selection criteria in reaching the decision that he was the appropriate person to be made redundant within that department.

88. The Tribunal faced a difficulty here in that the evidence presented did not set out in any detail the identities of all of the staff who were made redundant at the same time as the claimant, though it is understood that some 16 members of staff were dismissed at the same time by reason of redundancy.

89. However, on the evidence, the respondent sought to argue that the claimant was in a unique – or “standalone” – position, which meant that placing him into a pool with others would be inappropriate.

90. It is clear that the authorities insist that Tribunals approach this issue with a degree of caution, and must not substitute their own view for that of the employer. The question, in my judgment, is whether the employer applied its mind to the question of selection, and then whether it acted within the range of reasonable responses open to a reasonable employer in selecting the claimant for redundancy.

91. Mr Pacey, in a powerful and helpful submission, argued that the respondent completely failed to apply its mind to the question of selection. Having reflected on the evidence, I am not persuaded that this is the case. The reason for the claimant’s selection was that he was considered, within the project engineering department, to be in a unique position in that he was senior to the project engineers but junior to the

head of the department. The job profiles produced in respect of the other engineers were strikingly similar to that of the claimant, but differed in one significant respect, which was that he was given supervisory responsibilities for the project engineers. Although this did not amount to full line management duties, as he was not responsible for appraisal or discipline, he was in a position to assist and supervise the engineers in the department; he was promoted from the position which each of them held, with a commensurate increase in salary; and he was provided with management training by the respondent in order to function as a manager.

92. In these circumstances, I consider that the evidence does demonstrate that he was in a distinct and different position to that of the project engineers, and that the respondent was therefore justified in treating his position as unique.

93. It is true that the claimant said that one of the project engineers was or may have been on a higher salary than he was, but as Mr Pacey pointed out the issue was not one of pay or benefits, but of whether he was in a different position to that of the project engineers. The claimant, in any event, did have what he described as a "historically better pension", which must be taken to be part of his overall package of remuneration.

94. I am therefore persuaded that the respondent did apply its mind to the question of selection, and that it was within the range of reasonable responses open to a reasonable employer to have identified the claimant as an appropriate selection for redundancy.

95. Mr Pacey also criticised the respondent for failing to identify suitable alternative employment for the claimant, suggesting that the fact that Mr Watson told the claimant at an early stage in the consultation process that there was no alternative employment available meant that consultation was not meaningful.

96. In my judgment, the respondent's position was clear: they required to reduce the number of staff employed by them, and had considered a

number of alternative courses of action, some of which were suggested to them by the claimant – recruitment freezes and overtime bans, for example – but that none had had the effect of bringing costs under control. Having reached that conclusion, they determined that the claimant's unusual position required to be removed from the structure. His management role was no longer required, as they determined it, and therefore he had to be made redundant.

97. There is no evidence before this Tribunal which would allow a finding that there were any alternative positions available as a matter of fact. I heard no evidence to this effect. None was led by the claimant, and none was sought from the respondent before me. As a result, even were I to find that the consultation process was not meaningful (which I do not), it would be impossible to make any finding that the claimant was not offered a post which would have amounted to suitable alternative employment.

98. I have concluded that Mr Watson, whom I found to be a straightforward and helpful witness, giving honest and credible evidence, did seek to carry out meaningful consultation with the claimant. He conducted four meetings with him in a manner which was open and discursive. He sought to obtain ideas and opinions from the claimant, and when he came forward with such suggestions, Mr Watson did consider them, but found that they did not satisfy the needs of the business to bring costs down to the extent which management wished.

99. In any event, the claimant's position was difficult to fathom. During the consultation process, he appeared to accept that there was a significant need for the respondent to act. He was more concerned, in my judgment, with levelling criticism at the management for the failures he considered to have been responsible for the "financial mess" they had got themselves into. He certainly conceded before me that he now understood that there was a need for reducing the number of staff employed in order to make savings.

100. In all of the circumstances, therefore, I have concluded that the respondent dismissed the claimant fairly by reason of redundancy; that they followed a fair process in doing so; and that they paid to the claimant the appropriate sums both in relation to redundancy pay and to outstanding payments due to him under his contract of employment.

101. Accordingly, it is my judgment that the claimant's claim fails, and is dismissed.

Employment Judge: Mr Murdo MacLeod
Date of Judgment: 15 May 2017
Entered in Register and Copied to Parties: 16 May 2017