EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr M Clemes	AND	B.W.C. Plastics Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Plymouth **ON** 10 October 2018

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: Mr A Worthley of Counsel
For the Respondent: Mr J Bryan of Counsel

JUDGMENT

The judgment of the tribunal is that the claimant's unfair dismissal claim is dismissed.

RESERVED REASONS

1. In this case the claimant Mr Mark Clemes, who was dismissed by reason of redundancy, claims that he has been unfairly dismissed. The respondent contends that the reason for the dismissal was redundancy, and that the dismissal was fair.
2. I have heard from the claimant, and from Mr Phillip Tomlinson on his behalf. I have heard from Mr Guy Barker and Ms Caroline Robertson on behalf of the respondent.
3. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. The respondent B.W.C. Plastics Limited is in the business of plastic extrusion services. It is a subsidiary of BWC Holdings which owns a number of other companies within the BWC Group. Mr Guy Barker, from whom I have heard, is the sole director of the respondent and managing director and majority shareholder of the BWC Group.
5. The claimant Mr Mark Clemes has many years' experience in the plastic business. He had previously owned and run his own business, namely Mid Cornwall Plastics, which

was taken over by the respondent company when it encountered financial difficulties. The claimant was then employed by the respondent from 23 February 2006 until his dismissal by reason of redundancy which took effect on 6 February 2018.

6. The claimant was initially employed as the respondent's Production Manager, and the respondent's business operated from two sites in Cornwall. In about June 2015 the Commercial Financial Director of the BWC Group, namely Mr Paul Jesson, persuaded Mr Barker that the claimant did not have the necessary skill set for a successful Production Manager. The claimant was then "moved sideways" and became the respondent's Operations Manager on the same terms and conditions, and a new Production Manager was recruited. This meant that the claimant was no longer as closely involved in management discussions and decisions. His relationship with Mr Barker became less close. Nonetheless the claimant accepts that Mr Barker supported him by way of appropriate training, and also supported him when the claimant began to suffer from ill-health with a depressive illness. In addition, one of the respondent's other senior managers recommended to Mr Barker in mid-2017 that the claimant's position should be made redundant, but Mr Barker declined to act on this advice.
7. The respondent had approximately 14 employees working at its two Cornwall sites. Towards the end of 2017 the respondent decided to close its Cornwall sites, and to consolidate its production and customer service in a new factory in Milton Keynes where most of the BWC Group companies already operated. The respondent then engaged Ms Caroline Robertson, an employment law consultant from whom I have heard, to advise on the prospective redundancy process which would follow the decision to close the Cornwall sites.
8. All of the Cornwall employees were invited to a collective redundancy consultation meeting which took place on 3 January 2018. Mr Barker attended and informed all of the Cornwall employees, including the claimant, that they were at risk of redundancy as a result of the impending closure of the Cornwall sites and the relocation of the business to Milton Keynes. Mr Barker informed them that there would be individual consultation meetings and that the process would conclude by 2 February 2018. He invited them to visit the Milton Keynes site in order to see if they wanted to relocate there in the event that there were any job vacancies. Each of the employees, including the claimant, was given a letter dated 3 January 2018 which repeated that offer in these terms: "We may be able to offer you employment at the site in Milton Keynes and I am happy for you to take the opportunity of visiting the new head office and see the surroundings before you make any choices. We will of course allow you to travel and visit during working times and will pay reasonable expenses for you to do so. We can discuss this more during the individual consultation meetings."
9. Not surprisingly the claimant was shocked and upset at the news of his potential redundancy, which involved the closure of the business in Cornwall which he had established and with which he had been associated for many years. The claimant had suffered sporadically from a depressive illness, and became unwell following this news. He seemed unable to accept that his position was redundant, or that the respondent's business could continue without an Operations Manager.
10. In any event the claimant did not respond to the respondent's invitation to travel to Milton Keynes to discuss potential alternative employment. There was then an individual consultation meeting with the claimant, which was delayed slightly until 15 January 2018 at his request, at which Mr Barker and the claimant discussed the position. In what was a short meeting Mr Barker made it clear that the position of Operations Manager was not needed at the reorganised business in Milton Keynes and that it was highly unlikely that he would be offered that role in Milton Keynes. He did however repeat the offer of possible alternative appointment in a different role. The two roles which Mr Barker envisaged the respondent would need in Milton Keynes were packers, which is basic manual work, and setters, who undertake a role which requires more skill and experience. The claimant had the skills and experience to be a setter, which would have been a downgrading of his role from Operations Manager.

11. At the same time (15 January 2018) Mr Barker confirmed in writing to two other setters, Mr Mugford and Mr Gaskell, more detailed terms of the potential setter's job in Milton Keynes, together with confirmation of the relocation and travelling expenses which would be paid. He also confirmed they would have a training responsibility to other setters. The claimant was not provided with this detailed information at that time.
12. There is a dispute between the parties as to the nature of the offer to the claimant in connection with a potential setter's position in Milton Keynes. Mr Barker's evidence is that the claimant did not respond to the verbal and written invitations made on 3 January 2018 to consider alternative appointment in Milton Keynes, and that having made it clear that the claimant would not be offered the role of Operations Manager in Milton Keynes, he did not respond to any subsequent suggestion that he should visit Milton Keynes and consider any alternative but junior role there. Mr Barker's contemporaneous minutes of the individual consultation meeting on 15 January 2018 make it clear that he advised the claimant that "in all probability the position of Operations Manager will be redundant", and when the claimant asked him if there would be any need for him Milton Keynes, he suggested: "that this was unlikely but all things being considered, if there was an opportunity it would not be as Production or Operations Manager but as a setter." Mr Barker also says that the following week he tried to persuade the claimant to visit Milton Keynes on 23 January 2018, but the claimant did not do so. Mr Barker was not unduly surprised because the setter's role was a more junior role on a lower salary than the Operations Manager. The claimant's position is that if offered he would have considered the roles offered to Mr Mumford and Mr Gaskell, which have been described during this hearing as "setter plus", that is to say the role of setter with additional expenses paid and with additional training responsibilities.
13. The claimant was absent from work during this time on certified sickness absence. The redundancy programme took effect from February 2018, and of the setters only Mr Mugford was eventually interested in relocating to avoid redundancy. In any event Mr Barker decided to dismiss the claimant by reason of redundancy. That decision was taken and effected on 6 February 2018. Mr Barker did not require the claimant to work out his notice because of his illness, and the claimant was therefore dismissed summarily but was paid his notice in full together with his statutory redundancy rights and accrued holiday pay.
14. The claimant exercised his right of appeal against his dismissal which was determined by Ms Robertson. His grounds of appeal were contained in a letter prepared and sent by his solicitors on 23 February 2018. The grounds of appeal were first that the role was not redundant; secondly that there had been an unfair procedure (including a failure to offer suitable alternative employment); and thirdly that the real reason for dismissal was the relationship and historical issues between the claimant and other senior managers including Mr Barker. Ms Robertson investigated the matter, which included seeking comments from Mr Barker. Mr Barker responded with a detailed email on 24 February 2018 which included the comment: "On 25/01/18 I had four key team members visit MK to see the new factory, an invitation was not extended to MC as in my opinion he did not have the necessary skills to be a machine setter."
15. Ms Robertson and the claimant then had an appeal meeting on 13 March 2018. The claimant declined his right to be represented at that hearing. The minutes suggest that the claimant felt excluded because he was not allowed to continue with his Operations Manager role in Milton Keynes, and that although he could do the setter job as well, he was not given the opportunity to apply. He said that he felt discouraged from visiting Milton Keynes.
16. At the appeal hearing Ms Robertson and the claimant discussed the alternative role of setter in Milton Keynes. She asked if he would be prepared to visit Milton Keynes and have his expenses paid to look at the available setter roles. The minutes of the meeting suggest that the claimant said that he was interested but he was unable to move from his house because of his illness which he claimed was brought on by Mr Barker. Ms Robertson's impression was that the claimant was noncommittal about working in Milton Keynes, and was more concerned about his relationship with Mr Barker, and the fact that

the claimant had set up the business from scratch which was now being taken away by Mr Barker.

17. Ms Robertson rejected the claimant's appeal and confirmed her decision in her letter dated 6 April 2018. It was a detailed letter which ran to several pages, but in short she confirmed that the claimant's role was clearly redundant following the closure of the premises in Cornwall; that the consultation procedure collectively and individually was a fair procedure and that the claimant had not expressed an interest in pursuing opportunities for possible alternative non-managerial employment in Milton Keynes; and that the real reason for his dismissal was the redundancy, and not because of any historical issues with Mr Barker or other senior managers.
18. Having established the above facts, I now apply the law.
19. The reason for the dismissal was redundancy which is a potentially fair reason for dismissal under section 98 (2) (c) of the Employment Rights Act 1996 ("the Act").
20. The statutory definition of redundancy is at section 139 of the Act. This provides that an employee shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to (section 139(1)(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 so employed by him, or (ii) to carry on that business in the place where the employee was so employed: (section 139(1)(b)) "the fact that the requirements of (the employer's) business for employees to carry out work of a particular kind, or 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"
21. I have considered section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".
22. I have been referred to and I have considered the cases of Modern Injection Moulds Limited v Price [1976] IRLR 172 EAT; Barratt Construction Limited v Dalrymple [1984] IRLR 385 EAT, and Lionel Levanthal Limited v North [2004] EAT. I take these cases as guidance, and not in substitution for the provisions of the relevant statutes.
23. The claimant brings his claim for unfair dismissal on the basis that redundancy was not the real or primary reason for his dismissal, and that the dismissal was unfair in any event, because of the absence of an appropriate selection procedure, and because of the failure to offer reasonable alternative employment. I deal with each of these issues in turn.
24. The claimant argues that the real reason for his dismissal was a breakdown in the relationship between the parties and that effectively Mr Barker "wanted him out" of the business. It is true that the relationship between Mr Barker and the claimant had varied from their previous closer relationship. This followed the claimant's move from Production Manager to Operations Manager with the result that he was less involved with the senior management and had less contact with Mr Barker. It is also clear that Mr Barker continued to support the claimant with training, and during his sickness absence, and had refused to act on an earlier recommendation from another manager to make the claimant redundant. These actions do not support the claimant's contention that the real reason for his dismissal was a breakdown in the relationship, or that Mr Barker simply "wanted him out".
25. In my judgment the statutory definition of redundancy is clearly met. The employer ceased to carry on business in the place where the claimant was employed which satisfies s139(1)(a)(ii) of the Act. In addition, the respondent's requirements for the claimant to carry out work of a particular kind, that is to say his role as an Operations Manager, had ceased or diminished, which satisfies s139(1)(b)(ii) of the Act. The respondent had 14 or so employees in its Cornwall premises, and all of them were treated equally and subject to potential dismissal for redundancy as a direct result of the

closure. I reject the claimant's argument that his dismissal was for any other reason, and I find that it was wholly or mainly attributable to redundancy.

26. I now turn to the procedure adopted by the respondent in response to the redundancies. In the first place, this is not a case where selection criteria were applied against a chosen pool of employees. All of the respondent's employees in Cornwall were at risk of dismissal by reason of redundancy because the business closed in that location and was relocated. None were excluded, and there was no section or class of employees who were necessarily going to be retained. There was no need for any selection process as to who might be retained or selected. The starting point, subject to consultation and possible alternative employment within the respondent's group of companies, was that all of the Cornwall employees were redundant. It is simply not the case that any one employee, whether the claimant or otherwise, was selected for redundancy ahead of any other. I reject the claimant's contention that the dismissal was any way unfair because of an inappropriate or unfair selection process.
27. I now address the consultation process. There was a collective group consultation meeting with all of the Cornwall based employees on 3 January 2018, followed by a collective consultation letter handed individually to all of those employees on the same date. There was then a process of separate individual consultation, at which the employees were invited to be accompanied by a representative. Each employee had the right of appeal following any decision. That process in general terms is a fair and reasonable one. On the specific facts of the claimant's case, he had a collective consultation meeting on 3 January 2018, a letter confirming the contents of that meeting on the same date, an individual consultation meeting on 15 January 2018, and he was afforded an independent appeal following his appeal against dismissal. I find that that was a fair and reasonable consultation process in the circumstances of this case.
28. Finally, I turn to the issue of suitable alternative employment, which in my judgment is the nub of this case. It is a well-accepted principle that in general terms an employer should attempt to reduce the impact of potential redundancy by seeking to find suitable alternative employment as far as is reasonably possible.
29. As is often the way with redundancy, this is a rather sad case. The claimant was clearly shocked and upset at his dismissal from the business which he had started many years previously. The decision had an adverse effect on his health. It seems that he was unable to accept that despite his considerable skills and experience he was no longer needed by the respondent as its Operations Manager. Nonetheless the respondent was clearly entitled to take the business decisions first to close its operation in Cornwall in order to streamline its activities on one site, and secondly to consolidate the business in Milton Keynes without an Operations Manager. It is not the role of this Tribunal to assess whether these decisions were commercilally sensible or otherwise.
30. Against this background the respondent made it clear to the claimant during the consultation process that it was highly unlikely that he would survive as an Operations Manager, and that all employees were invited to consider alternative employment in Milton Keynes by visiting that site to discuss the various options, even though these were realistically limited to packers or setters. Given the considerable distance between Cornwall and Milton Keynes it was by no means a foregone conclusion that anyone would accept such an offer, and nor was it an easy decision for any employee to make, because of the disruption it would obviously have on their personal circumstances.
31. In my judgment both parties are open to criticism during the consultation process. On the one hand at no stage did the claimant confirm to the respondent that he seriously wished to move to Milton Keynes in the role of setter. This was despite having been told of that opportunity during the collective and individual consultation process. His focus appears to have been on his objections that the respondent intended to continue without an Operations Manager. Equally, the respondent could have sought final confirmation of the claimant's position before his dismissal, particularly by explaining the more-detailed terms which it was prepared to offer. At the same time the terms on offer to support a potential move to Milton Keynes were explained to Mr Mugford and Mr Gaskell, two setters whom the respondent was prepared to retain.

32. I have been referred on behalf of the claimant to the cases of Modern Injection Moulds Limited v Price and Lionel Levanthal Limited v North. These cases are not entirely on point: Mr Price was offered but refused an alternative job when the lack of financial detail given to him was said to have been "inept", and Mr North's case was one relating to the merits or otherwise of "bumping", which did not happen in this case. Equally the respondent has referred me to Barratt Construction Limited v Dalrymple in which the EAT held that the Tribunal must decide the question of reasonableness on the evidence before them in accordance with equity and the substantial merits of the case, and it is not for the Tribunal to speculate as to what further steps might be taken and to draw an inference adverse to the employer because he did not take them. The EAT added (obiter) that where an employee at senior management level who is being made redundant is prepared to accept a subordinate position, he ought in fairness to make this clear at an early stage so as to give his employer an opportunity to see if that is a feasible option.
33. Clearly each individual case is fact sensitive. The question which this tribunal has to address is whether the respondent's actions were fair and reasonable in accordance with equity and the substantial merits of the case. Put another way, were the respondent's actions within the band of reasonable responses which were reasonably open to an employer when faced with these facts?
34. It is not for this Tribunal to substitute its view of what should have been done for the actions of the employer, nor to speculate as to what further steps might be taken and to draw an inference adverse to the employer because he did not take them. On balance, despite the fact that the respondent could arguably have done more to inform the claimant of the exact details of any role on offer and to confirm his intentions, I find that on the facts of this case the respondent was entitled to conclude that the claimant was not interested in pursuing its clear offer of possible alternative employment by way of a move to Milton Keynes as a setter in a non-managerial capacity. On that basis it was reasonable for the respondent to proceed to dismiss the claimant by reason of redundancy. I cannot find that the respondent's actions were outside the band of reasonable responses when faced with these facts.
35. Accordingly, I find that the decision to dismiss the claimant was wholly or mainly attributable to redundancy, and that it was fair and reasonable in all the circumstances of the case. I therefore dismiss the claimant's unfair dismissal claim.
36. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 17; a concise identification of the relevant law is at paragraphs 19 to 22; and how that law has been applied to those findings in order to decide the issues is at paragraphs 23 to 35.

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Employment Judge N J Roper
Dated 11 October 2018