



## EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Gardner

**Respondent:** IMO Precision Control Limited

**HEARD AT:** Huntingdon      **ON:** 31 January 2017  
1, 2 & 3 February 2017  
20 March 2017 (In Chambers)

**BEFORE:** Employment Judge M. Ord  
Mrs. K. Charman  
Mr. P. Bowerman

### **REPRESENTATION**

**For the Claimant:** Mr A Watkins, Counsel

**For the Respondents:** Miss R Thomas, Counsel

## **Reserved Judgement**

1. The Claimant's complaints that he suffered discrimination on the protected characteristic of disability; his claim for a statutory redundancy payment and that his complaint that he suffered unlawful deductions from his wages are dismissed on withdrawal.
2. It is the unanimous decision of the Employment Tribunal that the claimant's complaint of unfair dismissal is not well founded, and that complaint is dismissed.
3. A costs order is made in favour of the claimant in the sum of £160 which sum is to be paid by the respondent to the claimant.
4. The remedy hearing provisionally listed for 8 May 2017 will not now be required and that hearing is vacated.

## Reasons

### Background

1. The respondent is a company specialising in the sale of industrial control and electronic components to manufacturers in the UK and beyond. The claimant was initially employed from 25 March 2013 as drive sales specialist and shortly thereafter as drives sales manager when the previous head of the drives and automation sales team left the business.
2. In April 2015, following the resignation of a colleague, the respondent decided to restructure its sales function and create two new roles of sales specialists for the north and south of the UK, removing the claimant's previous role. The claimant was unhappy and refused to accept the new role as result of which he was dismissed on the ground of redundancy.
3. The claimant says his dismissal was unfair. The respondent says that the dismissal was not unfair and that the claimant was redundant, alternatively, that the dismissal was fair for some other substantial reason justifying the dismissal of the claimant, namely the reorganisation of the sales team.

### The hearing

4. The respondent called evidence from Mr Steve Hallas (previously employed by the respondent as sales specialist), Paul Humphreys (sales operation manager), Steve Hill (director of sales) and Fausto Furlotti (chief executive officer). The claimant gave evidence himself. All witnesses gave evidence by reference to prepared witness statements and there was a substantial bundle of documents presented to the tribunal. Counsel for both parties relied on written closing submissions to which they added orally.

### The facts

5. Based on the evidence presented to the tribunal we have made the following findings of fact.
6. The claimant began employment with the respondent on 25 March 2013. He was initially employed as drive sales specialist, reporting to Mr Tiwana.
7. When Mr Tiwana left the business shortly thereafter, the claimant's title changed to UK drive sales manager. The company has four separate parts of the business dealing with electronics, industrial controls, automation and drives.
8. The claimant's role fell into three parts. The first was to achieve direct sales himself, the second was to obtain new key accounts and the third was to provide technical support to the sales team. As well as his salary he received a commission of 1% on personal sales and 1% on total drives sales.

9. The company was suffering a reduction of sales volume within the UK drives business. In the year to April 2013, just as the claimant joined the business, sales stood at £774,965. This was a reduction on the previous year's sales due to the loss of a specific contract. In the following year, the claimant achieved only 6% of his personal sales target in 11 months and there was a further reduction in the total UK drives sales to £677,610.
10. There was a similar problem (i.e. lack of sales) in the automation section. The automation sales manager was Mr McQueen. The respondent identified the problem as being caused by Mr McQueen and the claimant devoting too much time to providing technical support to the sales team and duplicating effort. In an effort to encourage each of them to devote more time to personal sales a decision was taken to increase their commission on personal sales to 2%
11. By October 2014 results were still poor. In 6 months the claimant had only achieved 27% of his sales target. The respondent continued to discuss the matter internally.
12. In January 2015 the claimant raised a complaint about his level of bonus and earnings potential. He had two meetings with Mr Hill and subsequently complained that he was working excessive hours as a result of which a third meeting was arranged for 19 February 2015, this time with Mr Furlotti. The claimant gave no evidence in chief about this meeting at all. Mr Furlotti's evidence was that the claimant alleged that he was being undervalued despite what he said was his good performance; was working too many hours and was at risk of becoming bitter about his employment. There was concern that the claimant was producing reports which were quite different to those produced by the respondent centrally and it became clear to Mr Furlotti that the claimant was providing support to the general sales team on too many occasions and not focusing on direct personal sales. Mr Furlotti analysed the claimant's weekly diary and vehicle mileage with him but was unable to identify the root cause of the alleged problem of long working hours because nothing in his mileage claims or the diary indicated that the number or location of visits he was making to customers and potential customers could explain the hours which the claimant said he was working. As a result, it was agreed between the claimant and Mr Furlotti that the claimant would raise with Mr Hill examples of excessive working hours as and when they arose so that the cause of the problem could be addressed at the time.
13. Mr Furlotti's decided to set out action plans, including an insistence that performance needed to improve with the claimant focusing more on direct sales; that at the claimant's request his bonus structure would be reviewed to reduce the impact of export sales and that the claimant would review working time and priorities in more detail with Steve Hill to reduce his working hours and improve productivity. Minutes of the meeting were provided to the claimant on 23rd February 2015 and he confirmed their accuracy on 4th March, stating that he had not been aware of personal sales targets prior to May 2014 and further that he had not previously been aware that personal target was "rated as highly as divisional growth". Mr Furlotti did not accept this to be the case and reminded the claimant of previous occasions when he had asked the claimant to focus on

direct sales, an approach which the claimant had referred to as a "flawed strategy."

14. Mr Furlotti's concern was that the continuing downturn in sales was not likely to improve and that if matters remained as they were the claimant would continue to follow what Mr Furlotti described as the claimant's own agenda rather than the priorities set by the company for him to focus on direct sales. He and Mr Hill agreed that the best solution was to move the claimant and Mr McQueen into sales specialist roles whose only remit was direct sales and to combine the drives and automation products as that was the direction of travel for the industry generally. The immediate difficulty they had in implementing that strategy, however, was the lack of drives experience which Mr McQueen had and he was therefore considered unsuitable for a combined drives and automation role. The decision was therefore to keep the restructure under review whilst Mr Furlotti considered the feasibility of training Mr McQueen in drives technology so that the change of focus/structure could be implemented.
15. At the beginning of April 2015, however, Mr McQueen resigned and Mr Furlotti and Mr Hill therefore felt able to restructure, by removing the two sales manager roles and replacing them with two drives and automation sales specialists. Mr Hill and Mr Furlotti agreed that there was a clear business need for this restructure as the product sales manager roles were not working effectively. Mr Hill indicated that he was very keen to retain the claimant. Mr Furlotti agreed as he also considered the claimant was a good salesman who had been operating in an ineffective manner in his previous role.
16. Mr Furlotti intended to make the product sales manager positions redundant and to offer one of the new sales specialist roles to the claimant. Mr Hill was concerned that that approach could alienate the claimant and that he could achieve a better result by approaching the claimant, explaining the need for change and getting him to buy in to the new structure. The market rate for the sales specialist role was £30,000-£35,000 and Mr Hill felt that the claimant's salary level would need to be maintained (at £40,000) to help the transition process. Mr Furlotti agreed to Mr Hill's approach.
17. The claimant met Mr Hill later in April 2015. According to the claimant Mr Hill told him that Mr McQueen would be replaced by a more junior salesperson who would report to the claimant and that the claimant's responsibilities being expanded to include management of the automation division as well as drives. Mr Hill identified the meeting as taking place on 21 April at the Cedar Court Hotel in Bradford. According to Mr Hill he emphasised that the claimant's focus on supporting the UK general sales team was not working and that the company had lost confidence in the concept of product sales managers so that it would not continue with it. He advised the claimant that he was considering removing that role and replacing them with two sales specialists for both drives and automation products and splitting the country in two (North and South) so that there could be an increase in sales whilst reducing the claimant's travelling time and working hours. The new roles would be directed at personal sales only with technical support for the general sales team to come from head office. The claimant was told his salary level would be unaffected and that if a junior sales engineer was

recruited for the other role the claimant could, if appropriate, adopt a mentoring role and be responsible for that person's development. Mr Hill was adamant (and we accept) that at that meeting he did not say that the Claimant would be managing the other sales specialist, nor did he indicate that the new role was any form of promotion.

18. We make that finding because it is entirely consistent with the respondent's position throughout the history of this matter and find the claimant's recollection of the meeting at odds with the reality of the respondent's situation. The claimant's sales figures were poor, but the respondent had confidence in his sales ability if the structure he was working in permitted him to focus on sales and sales alone. It would be wholly inconsistent with that (and the business need to increase sales) to place a different administrative or managerial burden on the claimant and we do not accept that Mr Hill did anything to suggest that the offer being made to the claimant was either a promotion or a widening of his administrative or managerial responsibilities.
19. Mr Hill said that he met the claimant again on either the 6th or 7th of May to confirm that he wished to press ahead with the structural changes. The claimant raised two concerns; first, that the level of technical support being provided by head office might not be sufficient when compared to the technical support he had been providing and second that the role could potentially bring situations of conflict between him and the general sales team as he would be focusing solely on direct personal sales. Mr Hill said that the company would ensure that the correct level of technical support was in place and that any business generated by the general sales team that could not be supported by them with the help of head office would, under the new structure, be passed to the drives and automation specialists to handle which would boost their own personal sales pipeline. The meeting ended with Mr Hill confirming that he would proceed with the changes, that he needed time to consider the commission element of the new role, recruit the second person and organise training for the claimant on automation products. In addition, work would have to be done on the split of customers between north and south. At this stage, the claimant had indicated a preference to work in the northern part of the country. (the claimant lives in Wellingborough in Northamptonshire).
20. In relation to those two meetings we accept Mr Hill's evidence over that of the claimant. The claimant complains about a lack of discussion, but we find that there was an explanation of the position in April and then further discussion on 6th or 7th May when the rationale behind the changes and the way they would be implemented were discussed with the claimant. We find as a fact that at no stage did Mr Hill suggest to the claimant that he was to manage the second sales specialist, nor was this new role ever identified as a promotion or an increase in duties for the claimant. The purpose of the change was to enable the claimant to make more sales and reduce time spent by him on technical support and managerial matters.
21. On 11 May 2015 the claimant broke his ankle and was absent from work for a period of time. On 3rd July. Mr Hill spoke to him regarding progress on structural changes and said that he was having more success finding candidates from the

North than the South. The claimant told Mr Hill that he would have no issue in taking on the South rather than the North. He told Mr Hill that he had been making calls to new customer prospects whilst he was recuperating which he had passed on to the general sales team and there was a further discussion about the way his bonus should be structured. To increase the level of technical support based at head office, a software engineer (Mr Jolly) was identified as suitable to both receive training from the claimant on the drives technology whilst also providing automation training for the claimant. For various reasons relating to diary commitments this was not fixed until September 2015.

22. Shortly after his discussion with Mr Hill, the claimant contacted him again to say that he had identified a suitable candidate for the Northern drives and automation role (Mr Hallas). Mr Hill knew of Mr Hallas and arranged an interview with him. Mr Hallas was based in Leeds and therefore could cover the northern areas with the claimant taking on the South.
23. The claimant returned to work on 3 August 2015 on a phased return following his ankle injury. The claimant alleged in his evidence that Mr Hill had pressurised him to return to work and had told him that his company sick pay would be coming to an end. Mr Hill denied both of those things and we accept his evidence. There was no policy that company sick pay would end after 12 weeks and the company pointed to examples of individuals who had been supported for much longer periods of absence due to injury or illness. There was no contemporaneous complaint by the claimant that he was being pressurised to return to work, nor was there any evidence in support of his allegation that Mr Hill was intending to withdraw his sick pay. The claimant returned to work on a phased return because he and his general practitioner considered he was fit to do so and for no other reason.
24. On 5th August. Mr Hill met the claimant and discussed how to phase in his return to work. The claimant said he needed, for a period, day treatment at home which limited what duties he could perform and Mr Hill agreed that it should be left in the claimant's hands to determine what duties he felt comfortable undertaking. It was agreed that the claimant would initially work from home making contact with customers by telephone and not engaging in face-to-face meetings if they involved too much driving. There would be no adjustment in the claimant's pay, he would remain on full salary while phasing in his return to full duties and Mr Hill would monitor his progress via the weekly diary.
25. Thereafter, Mr Hill dealt with the claimant's personal development review, which was overdue. That focused on the future role, including identifying a need for automation training. The claimant confirmed that he would accept the southern based role with Mr Hallas working in the North. Mr Hallas was duly offered the role to commence on 1st September, which he accepted.
26. On 2nd September Mr Hill, Mr Hallas and the claimant met to discuss the regional split and customer redistribution ahead of a general sales team campaign meeting. The new structure was announced by Mr Hill at that meeting on 4th September, at which both Mr Hallas and the claimant were present. It was

emphasised that technical support would now be provided by head office and that sales leads which required more support than was available from the internal team should be passed to the drives and automation specialists under the new structure. Meanwhile, the claimant and Mr Hallas were left to finalise the details of the regional split, the claimant having identified certain nominated accounts in the North which he wished to retain due to past relationships, to which Mr Hill agreed.

27. On 7 September the new structure and arrangements were confirmed to the sales team in an email which was copied to neither Mr Hallas nor the claimant. Mr Hill confirmed that this was standard practice within the respondent (i.e. that an email about specific people would not be sent to them). We accept that evidence which was unchallenged.
28. Mr Hill was thereafter on annual leave. He returned on 27 September and arranged a half-year review meeting with the claimant which took place on 13th October when they were both attending an exhibition at the NEC.
29. At that meeting the claimant complained that certain business which he had generated was not being credited to him for bonus purposes in particular in relation to Mace Industries (about which he had previously raised complaint which had been resolved) and Ford (via Newey and Eyre) which Mr Hill pointed out to him was included in his figures. The claimant also said he was still supporting the drives business as the internal support process at head office was not working but could not give any specific examples. Mr Hill told him that if he was being diverted with requests to support the general sales team he should let Mr Hill know straight away because this would be a source of concern. The claimant identified a concern about his recovery as there remained an issue over possible infection, but he was receiving medication for that and told Mr Hill that he was fine with driving although his ankle ached after long journeys. Mr Hill told the claimant to only make such journeys if they were absolutely necessary. Mr Hill's evidence which was not challenged, was that the claimant described things as under control and that he was not inhibited from carrying out his duties. Mr Hill raised concern that the claimant was not producing his weekly diary and the claimant promised to bring that up to date.
30. On 6 November 2015 the claimant instigated a grievance referring to the change of his employment terms without consultation or agreement, "resulting in effectively being assigned a different job role", that his new job role was "several grades below" his old job role resulting a lot of responsibility; a lack of tools being given to allow him to succeed in performing duties required in the new role; being accused of being a maverick; management perception of his not meeting targets; loss of commission on Mace Industries sales which was also not being counted towards his personal target and a disregard for his injuries and "stress caused".
31. The email submitting the grievance was sent to Mr Furlotti and Mr Hill. Mr Furlotti appointed Mr Humphreys to hear the grievance. Mr Humphreys read the lengthy grievance and prepared a number of questions that required a response and a list of additional information he required to fully investigate the matter. As the

claimant was shortly going on holiday, Mr Humphreys telephoned the claimant to acknowledge receipt of the grievance and explain to him the need for further evidence in support of the complaints and some additional information which he would need to investigate the points made. He said he would email a list of additional information needed to the claimant who did not object to the approach being taken. Mr Humphreys sent emails on 16th November to the claimant Mr Hill and Ms Vincent (Mr Furlotti's PA) setting out the information he needed to continue the investigation. Mr Hill replied the same day and Ms Vincent the following day. Where there were gaps in information provided Mr Humphreys sought details from other individuals within the business and on 24th November Mr Hill provided a response to the points raised in the claimant's grievance. On 25th November Mr Humphreys happened to meet the claimant at a trade show in Germany (which the claimant was apparently attending unofficially during a period of annual leave) and then again on 26 November when they were travelling home. On that occasion, the claimant asked Mr Humphreys how the grievance was progressing and Mr Humphreys reminded him that he was waiting for a response to the email of 16th November which the claimant promised to provide at the weekend. The claimant eventually replied on 29 November, enabling Mr Humphreys to complete his consideration of the grievance. On 2 December 2015. The findings and actions were sent to the claimant, Ms Vincent, Mr Hill and Mr Furlotti.

32. Mr Humphreys upheld several parts of the grievance. In relation to the claimant's complaint that there had been a change of employment terms without consultation or agreement resulting in effectively being assigned a different job role that grievance was upheld as based on the evidence provided Mr Humphreys found that there had been consultation but no agreement and there had been no formal procedure followed for any change to employment terms. The recommendation of the grievance was that which the claimant had requested, reinstatement of the original job role and responsibilities as drive sales manager.
33. As regards the second complaint (the new job role being several grades below previous job role resulting in a loss of responsibility), this was also upheld with Mr Humphreys stating that whilst there was no formal grading in place, there was a structure within the external sales team of area sales manager, regional sales manager and product business or sales manager with Mr Humphreys finding the new job role to be equivalent to somewhere between area sales manager and regional sales manager with certain areas of responsibility for a business manager having been removed from the new job role. The recommended action was the same as for complaint number 1. The third complaint (lack of tools given to allow the claimant to succeed in performing the duties required in the new job role) was also upheld as it was said that the claimant should have access to information consummate to the role in accordance with company policy which did not currently appear to be the case. Again, the same recommendation (reinstatement into the old role) was made.
34. The complaint that the claimant was accused of being a maverick was upheld in part as the evidence suggested that the term maverick had been used in the context where there was a lack of meeting of minds in terms of issues such as



strategy and personal targets, but there was also evidence to suggest that the claimant himself described himself as a maverick. No action was recommended. The complaint that there was a management perception of the claimant not meeting his targets was rejected (the finding being that the claimant had not met targets at any time during his employment); the complaint about the loss of commission on Mace Industries was rejected (the account having been passed to a colleague before any billings were made) and the complaint of a disregard for the claimant's physical injuries was upheld but only to the extent that there had been no formal return to work interview. It was recommended that a return to work interview should take place. The final complaint of "stress caused" was not concluded with further investigation required, in particular submission of any medical information and advice to be taken as to how the company should proceed from an appropriate medical expert.

35. Mr Furlotti received the outcome of the grievance and noted that the recommendation was a reinstatement into the claimant's previous role without the feasibility of that having been considered with either him or Mr Hill.. Mr Furlotti was therefore left to consider how the claimant could be "reinstated" into a role which no longer existed, given that the new structure had been implemented and Mr Hallas had been recruited. Mr Furlotti considered that reinstating the previous structure would require the dismissal of Mr Hallas, the recruitment of an automation sales manager and would have taken the company back to the structure which the Respondent had found to be ineffective.
36. Mr Furlotti considered increasing the claimant responsibility to become drives and automation sales manager with Mr Hallas reporting to him, but considered this unsuitable because the claimant had little experience of automation products and would not in Mr Furlotti's view have been suitable in front of a sophisticated customer base. He also considered that the claimant did not have a record of personnel management and that as his personal sales figures had been disappointing a promotion would have given the wrong impression to the rest of the sales team. In summary Mr Furlotti was concerned that the company now had a new structure in place which it would have had to redesign around the claimant.
37. Mr Furlotti also considered whether there were any other roles within the company that might be suitable for the claimant if he continued to refuse the sales specialist role. The only possibility was a potential business development role in a new joint venture specialising in LED street lighting which the other party to the joint venture rejected because of cost at what was an early stage of the project, given the low margins achievable in that business.
38. Accordingly, Mr Furlotti concluded that the only suitable role which existed within the company which could be offered to the claimant was the drives and automation sales specialist role (south) and that the only practical alternative to redundancy (the claimant having been reinstated into a role which no longer existed) was to re-offer that role to the claimant. Mr Furlotti concluded that he would need to identify that the role of drive sales manager was redundant and go through a formal consultation procedure.

39. On 7 September 2015. Mr Furlotti wrote to the claimant to set out that the product sales manager position had not been productive for the company so was being made redundant. This was explained as a decision to strip out a level of management and encourage greater sales activity with the company offering the claimant the alternative role of sales specialist – drives and automation, for the south of England. The company confirmed that the position was more junior than the claimant's previous, which was reflected in the remuneration package of £35,000 per annum plus a commission bonus of 2% of sales (in addition, the claimant would continue to receive commission for the introduction of a customer called Uralelektra). Mr Furlotti asked the claimant to meet him on 11th December to discuss the matter further and he was advised of his right to be accompanied by a colleague or a trade union representative. A job description was attached to the letter.
40. On 8th December, the claimant appealed against the grievance finding. He said proper procedure had been "circumvented" because there had been no grievance meeting and whilst he accepted the first three points of the outcome he complained that nothing had happened since the grievance outcome to communicate his reinstatement into the role. He also raised complaint about other findings in the grievance outcome. On 10th December, Mr Furlotti replied, suggesting that the meeting on 11<sup>th</sup> December could also be used to discuss the grievance appeal (which he considered he was the most appropriate person to deal with).
41. At the meeting on 11<sup>th</sup> December, however, the claimant refused to discuss his appeal. He said Mr Furlotti was the wrong person to hear it, but did not suggest who else might hear it, and that in any event, he was unprepared for the hearing. The grievance appeal hearing therefore did not proceed. Mr Furlotti therefore invited Ms Vincent and Mr Symonds into the meeting to discuss the potential redundancy (Mr Symonds being the claimant's chosen representative).
42. The claimant had a prepared list of questions to ask Mr Furlotti and proceeded to read them out. Mr Furlotti answered them and at the conclusion of that questioning process the claimant said that he could not accept the alternative position as the job description required 16 customer calls per week and he was not physically able to do this because of his injury. He then left the meeting.
43. Mr Furlotti's evidence was that he could not understand that reason for rejecting the role, given that 16 customer calls per week was the standard which had been in place throughout the claimant's period of employment and was highlighted by Mr Hill at various campaign meetings and sales meetings, which Mr Furlotti had also attended. But equally, the company had not rigorously enforced that 16 calls per week target on the claimant in his previous role, nor since his return from injury in August when he was, as Mr Furlotti understood it, performing the new role. Mr Furlotti considered that the claimant was fully aware that no one had been disciplined in any way for failing to comply with the target of 16 customer visits per week.
44. Mr Furlotti's evidence, which we accept, was that he found both meetings unsatisfactory as he had not had the chance to explore any common ground or

find a compromise to resolve the situation and retain the claimant's services in a role which the company had a need for. He therefore felt that he had no option but to write to the claimant on 17 December 2015 confirming his redundancy and placing the claimant on a period of gardening leave to serve out his notice period of three months. The claimant's last day of employment was to be 17 March 2016.

45. On 15th March, the claimant was re-offered the position of drives and automation sales specialist. Mr Furlotti reoffered him that role and said it would be open for acceptance until 24 March 2016. The claimant rejected it on 21st March for three reasons; first, that he was not physically able to carry out the role, second, that it was a junior role for which she was overqualified and third, that the salary package was by his calculation "20% less" than in his previous role. Mr Furlotti replied on 29th March. He emphasised the flexibility around the 16 calls per week benchmark and sought to address the other points raised. He re-offered the new role to the claimant "in an effort to find a resolution".
46. By letter of 4 April 2016 the claimant again rejected the offer of the new role.
47. The claimant's employment had ended on 15 March 2016. There was an administrative error so that his statutory redundancy payment was not paid promptly, but this was rectified as soon as it came to the company's attention, albeit after the issue of the claimant's tribunal claim.
48. Against that background, the claimant claims that he was unfairly dismissed

### **The law**

49. Under section 94 of the Employment Rights Act 1996, every employee has the right not to be unfairly dismissed
50. Under section 98 (1) in determining whether the dismissal of an employee is fair or unfair, it is the employer to show the reason (or more than one the principal reason) for the dismissal and that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
51. Under section 98(2) (c) redundancy is a potentially fair reason for dismissal.
52. Under section 98 (4) where an employer has established the reason or principal reason for dismissal and that it is a potentially fair reason for dismissal, the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 sufficient reason for the dismissing the employee and shall be determined in accordance with equity and substantial merits of the case.
53. Under section 139 an employee who is dismissed should be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly

attributable to the fact that the requirements of the business for employees to carry out work of a particular kind has ceased or diminished or are expected to cease or diminish.

54. In the case of *Hollister v National Farmers Union* [1979] ICR 542 the Court of Appeal found that where a reorganisation of the business, which an employer had felt obliged to undertake, was coupled with an applicant's refusal to accept a new contract that had rightly been found by an employment tribunal to be a substantial reason of the kind such as to justify the dismissal of the claimant, and that the question of whether or not such a dismissal was justified did not depend on whether there had been consultation or negotiation with the employee before the dismissal. That that was only one of the factors for consideration. Further there was no necessity for the employers to consult the applicant about the reorganisation of the business and the tribunal's role was to determine whether the employer had acted reasonably in treating the reason found sufficient to justify the dismissal of the employee.
55. In *Kerry Foods v Lynch* [2005] IRLR 680 proposed changes to the claimant's terms and conditions of employment were found not to amount to a breach of the implied contractual term of trust and confidence in circumstances where the employer had not unilaterally varied the contract, but had given lawful notice of termination coupled with an offer of immediate re-engagement on the new terms. Further, in relation to establishing a substantial reason within section 98 (1) it is not necessary for the employer to show the quantum of improvement achieved by the proposed changes in terms and conditions of employment. In that case, the findings of fact made by the tribunal showed the advantages to the employers of the proposed changes, which was sufficient to pass the low hurdle of showing some other substantial reason for dismissal
56. In *Scott & Co- v Richardson* EATS/0074/04 a tribunal was found to have erred in its approach to the assessment of some other substantial reason by expressing its own view of the commercial decision leading to the business reorganisation which had required alteration to the terms and conditions of the applicants employment rather than addressing the employers reason.
57. In *Catamaran Cruisers Ltd V Williams* [1994] IRLR 386 the Employment Appeal Tribunal found that the tribunal had erred in holding that the respondent's employees had been unfairly dismissed for refusing to accept new terms of employment, which were less favourable than their existing ones in circumstances in which acceptance of the new terms was not vital for the survival of the employer's business. There was no such rule of law. The tribunal must examine the employer's motives for the changes and satisfy itself that they are not sought to be imposed for arbitrary reasons What has to be carried out is a balancing process.

## **Conclusions**

58. Applying the facts found to the relevant law we have reached the following conclusions.

59. During the course of the claimant's employment with the respondent he failed to meet any of the sales targets either on an individual or collective basis which the company had set. This was the position not only for drives which was the claimant's responsibility as drives sales manager but also for automation, where Mr McQueen held the similar role.
60. After disappointing results in the financial year 2013/2014 Mr Hill determined to review the position in October 2014, believing that it was still "early days" but by October 2014 results were still disappointing. The respondent's senior managers considered that both the claimant and Mr McQueen were spending too much time supporting the general sales team which was duplicating effort and insufficient time on their own direct personal sales.
61. The claimant (and other members of the sales team) was well aware of his own poor personal sales by virtue of the sales information distributed by the respondent to all members of the sales team. Notwithstanding the claimant being told of the importance of personal sales, the position did not improve sufficiently.
62. Matters came to a head in January 2015, when the claimant complained that his bonus structure was insufficiently generous and also add that he was working excessive hours. Mr Furlotti determined to investigate those matters and met with the claimant on 19 February 2015. Mr Furlotti was concerned that the claimant continued to follow his own sales strategy, rather than pursuing personal sales, emphasised the strong potential which he believes the claimant had and said that he must focus more on personal sales.
63. At this stage, the company had concluded that the best solution to the problem of poor sales performance was to restructure the sales team to remove the sales manager positions and to instead have two sales specialists covering half of the country each, selling both drives and automation products. That, they perceived, was the way the industry was moving. The immediate barrier to this was Mr McQueen, the automation sales manager who, it was felt, would be unsuitable for the new role. That problem was solved so far as the respondent was concerned when in April 2015, Mr McQueen resigned. The respondent determined that it could then implement the changes it considered necessary to increase sales by employing two sales specialists and removing the role of sales manager from both the drives section and the automation section.
64. This was discussed with the claimant by Mr Hill, initially at the end of April 2015 and then again in early May. If the claimant felt that the intention of the company expressed in either of those meetings was that he should become the manager of the other sales specialist or otherwise obtain some form of promotion by this reorganisation, then he can only have formed that conclusion by failing to listen to what Mr Hill was telling him and failing to have regard for the fact that the reason for the change was the poor sales performance of the business and in particular the two sales managers (of which he was one) by their being diverted from a focus on sales.

65. When the respondent was having difficulty in identifying a suitable person to be the second sales specialist working alongside the claimant, the claimant identified Mr Hallas as a potentially suitable recruit and when the respondent suggested that the claimant should take responsibility for the southern part of the country as Mr Hallas was based in Leeds, he readily agreed.
66. Mr Hallas was recruited on 1 September. He, the claimant and Mr Hill met on 2nd September and the new roles were announced and presented to the general sales team on 4th September. The new sales specialists were to concentrate on personal sales and the technical support previously offered by the claimant and Mr McQueen in their earlier roles was to be provided by head office. Whilst the claimant had some doubts about the ability of head office to provide this technical support to a suitably high-level that does not alter the fact that his focus was clearly and explicitly said to be on personal sales. Notwithstanding the fact that the new role was considered by the respondent to be one which would attract a lower salary than the sales manager role, the respondent wish to keep the claimant in post and retain his services and thus were, at that stage, prepared to make no change to his basic rate of remuneration.
67. The claimant's mid-year review on 13th October reiterated the focus of the new role. The claimant said that it was at this meeting that he was told for the first time that not only was he not being promoted in the restructure, but that he was in his view being demoted by reference to the duties of the new role. We have rejected that because throughout the entire period it was clear that he respondent's problem was a lack of sales, that it identified the solution to be replacing the sales manager roles with sales specialist roles to release the sales potential of both the claimant and the other sales specialist. The respondent had a need for more sales, not more management., and considered, based on his apparent long hours of work and his poor sales performance, that the claimant (as a result of his own actions or otherwise) had been distracted from sales and spent too much time on technical support. At no time had the claimant been told anything which could reasonably lead him to believe that he was being promoted into a position whereby the specialist salesman covering the other half of the country would be his line management responsibility. Indeed no paperwork, reports or other information had been provided to or requested by him to deliver the information that he would require to measure the performance of the other sales specialist (Mr Hallas).
68. The claimant then presented a grievance requesting that he be reinstated into his previous role because he had not agreed to the change of role. To that extent grievance was upheld and Mr Humphreys as grievance manager recommended reinstatement into the previous role. That created a problem for the respondent as the restructure had been carried out and the previous role no longer existed. Further, if implemented, the outcome would have been to prevent the managers of the business from taking the action they considered necessary to improve the business' performance. The respondent, in particular Mr Furlotti, came to the conclusion that the only solution was to make the sales manager role redundant (the step initially proposed by him, but rejected as Mr Hill believed he would be more likely to keep the claimant in the business by explanation, consultation and discussion), advise the claimant that he was at risk of redundancy and that

unless some other role could be found for the claimant he would be redundant. He considered the alternatives, including a return to the previous, failed, structure, but none of them were appropriate for the business needs and therefore advised the claimant in writing of the risk of redundancy and called the claimant to a meeting to discuss his potential redundancy.

69. At that meeting, however, the claimant simply read out a list of prepared questions, took Mr Furlotti's answers and left the meeting. Mr Furlotti was, inevitably, frustrated by this as he had wished to try and find common ground with the claimant to retain his services in a role which the respondent needed to be carried out, that of sales specialist. He felt that opportunity had been lost by the claimant's approach and that he was left with no option (the alternative being unacceptable with the claimant being "reinstated" into a role which no longer existed and a vacancy for a sales specialist being unfilled) but to write to the claimant giving him 3 months' notice of redundancy, placing him on garden leave during the period. He offered the role of sales specialist to the claimant on more than one occasion thereafter, albeit at the market salary rate of £35,000 per annum rather than the claimant's previous salary of £40,000 but with a bonus structure which Mr Furlotti explained could result in a higher income he previously enjoyed provided he performed as a salesman.
70. On each occasion, however, the claimant rejected the role. Mr Furlotti went so far as to continue to allow him to accept it after the claimant's employment came to an end, but he again rejected it.
71. Although he claimed at the time that one of the reasons for rejecting the claim was his lack of physical capability to carry out the role following his ankle injury, there is no continuing claim in these proceedings relating to disability discrimination or a failure to make reasonable adjustments. In any event the only aspect of the role which the claimant said he was unable to do was the 16 calls per week target, and that was a part of the sales roles which the claimant knew was not strictly enforced by the respondent.
72. We therefore find that the claimant was dismissed, and dismissed fairly, for redundancy. There was a reduced need within the respondent's undertaking for a specific role of drives sales manager to continue. The role was abolished and that tier of management (which also included the automation sales manager) was removed. The new role which was offered to the claimant was a different role. It was to be purely a sales role and had no requirement to provide technical support, an aspect of the manager role which had taken up much of the claimant's time so that his own personal sales performance was poor. We are satisfied that the statutory definition of redundancy has been met as the respondent had a reduced need for employees to carry out work of a particular kind (sales management and the provision of technical support).
73. The claimant considered that others should have been added to the pool for redundancy and pointed to Mr Wilkes as someone who should also have been at risk of redundancy. We reject that as the roles are quite different, and Mr Wilkes role was unaffected by the changes being made. Mr Wilkes is employed as the business manager for electronics, a separate part of the business with an entirely

different customer base, product lines and technology. The role is also a more senior one with full profit and loss responsibility, management control of another salesperson and responsibility for negotiating and concluding his own supplier agreements, none of which the claimant undertook in his previous role. Mr Furlotti had confirmed that the roles were in no way interchangeable and we therefore considered it entirely reasonable that Mr Furlotti should have come to the conclusion that in relation to his being at risk of redundancy the claimant was in a pool of one.

74. We also note that when the claimant commenced these proceedings he made a positive request for the payment of a statutory redundancy payment, thus claimant at least to that extent, consider that he was in fact redundant.
75. Accordingly, the claimant was fairly dismissed, the reason for dismissal being redundancy and the provisions of section 98 (4) being met.
76. Had that not been our finding, however, we would have still found the dismissal to be fair, as it would have been for some other substantial reason justifying the dismissal of the claimant. There was a reasonable decision taken by the employer that the status quo was not sustainable. There were two sales managers, the claimant and Mr McQueen, who were underperforming because they were not carrying out what the respondent considered to be the principal part of their role, namely delivering sales. Both of them had become bound up in the provision of technical support so that sales figures were suffering. The respondent could reasonably conclude, as they did, that the way to resolve that was to have the two individuals concerned focus more on sales, for them each to sell both drives and automation products and remove the need for either of them to provide continued technical support. Implementation of that decision was delayed because Mr McQueen was not considered suitable for the future role but when he resigned the restructure was put in place with Mr Hallam recruited to work alongside the claimant as a sales specialist. The claimant was offered the new role, initially, at the same rate of remuneration as he previously enjoyed with a bonus structure which, on Mr Furlotti's unchallenged evidence, would have resulted in an increase in remuneration for the claimant provided he delivered an appropriate level of sales. When he rejected that position, the respondent having concluded that his old role was not a sustainable one, the respondent would have been entitled to dismiss him for some other substantial reason. Had they done so that dismissal would have been, we conclude, fair
77. Accordingly, the claimant was dismissed for a potentially fair reason (redundancy) and the respondent acted reasonably in treating that a sufficient reason to terminate the claimant's employment. In any event, the respondent would have been entitled to dismiss the claimant for some other substantial reason, namely the reorganisation of the part company in which the claimant was employed and his refusal of the alternative role which was offered to him at the same salary as his previous position, notwithstanding the fact that salary would have been higher than the market rate for the position.
78. For those reasons, the claimant's claim fails and the claim is dismissed.



79. At the time the claimant presented his claim the respondent had failed to make payment to him of his statutory redundancy payment. He was required to present a claim to the employment tribunal to ensure that it was paid. Accordingly, it is appropriate to make an order for costs in favour of the claimant limited to the issue costs payable for the issue of a type A claim namely £160, which is the fee that would have been payable had the claimant issued a claim purely to obtain his statutory redundancy payment which was outstanding. Accordingly, pursuant to rule 76 (4) we make a costs order in the sum of £160 payable to the claimant by the respondent.

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Employment Judge Ord

Date: 21 April 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS