Appeal No. UKEAT/0603/12/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8JX

At the Tribunal
On 17 June 2013
Judgment handed down on 22 January 2014

Before

HIS HONOUR JUDGE SEROTA QC

(SITTING ALONE)

TNS UK LTD — APPELLANT

MISS E A SWAINSTON — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DESHPAL PANESAR (of Counsel) Instructed by: Squire Sanders Hammonds LLP Solicitors 7 Devonshire Square Cutlers Gardens London EC2M 4YH
For the Respondent	MR HUW P DAVIES (of Counsel) Instructed by: Silverman Sherliker Solicitors LLP 7 Bath Place London EC2A 3DR

SUMMARY

UNFAIR DISMISSAL – Reason for dismissal including substantial other reason

The employer decided that it could no longer afford to pay for the Claimant's post as Business Development Director, and that it would cease to provide most of the services provided by the business development services and performed by the Claimant. The Employment Tribunal found that the dismissal of the Claimant was not by reason of redundancy but for 'financial reasons'. The Employment Tribunal was in error because, on its findings. the Claimant was dismissed because the Respondent's requirement for the performance of business development services carried out by the Claimant had ceased or diminished, or was expected to cease or diminish; see S139(1)(b) (i) **ERA 1996**. The fact that the decision to terminate the Claimant's post for financial reasons supported the Respondent's case that her dismissal was by reason of redundancy.

The rationale behind many redundancies is financial. The dismissal was however unfair by reason of the unfair procedure adopted by the Respondent.

HIS HONOUR JUDGE SEROTA QC

Introduction

1. This is an appeal by the Respondent from a decision of the Employment Tribunal at London South dated 10 August 2012 (Employment Judge Hall-Smith sitting alone). The Employment Tribunal upheld the Claimant's claim of unfair dismissal, although it rejected the Claimant's case that the dismissal was automatically unfair by reason of her having made protected disclosures. The appeal was referred to a full hearing by Cox J on 10 December 2012.

The factual background

2. I take this largely from the decision of the Employment Tribunal. Kantar Health UK is a division of TNS UK Ltd, a corporate entity apparently owned by WPP, which is said by the Claimant to own 40 per cent of the world's communication business.

3. The Claimant commenced employment on 6 May 2008 as "Business Development Director, Syndicated Services, UK International". The Claimant's work involved getting new business in relation to DetailMed, a service operating in the pharmaceutical sector and aimed at the effectiveness of the Respondent's clients' pharmaceutical sales form. Her role involved her identifying and supporting new business for DetailMed throughout European countries. Her salary was £72,000 per annum together with commission.

4. She was regarded as a conscientious and highly valued employee, and her role was extended as a Client Account Director in August 2008. On 28 June 2010 her salary was increased to £80,000 per annum. In April 2011 Jim Needell became the managing director of Kantar Health UK, and he carried out a full review of the business to identify where he might

make cost savings; Mr Needell's evidence is recorded by the Employment Tribunal at paragraph 18 in relation to DetailMed:

> **"Further in his statement at paragraphs 6, 7, 8 and 9, Mr Needell added:**
>
> **'It was apparent from my review that DetailMed was not a successful as had been hoped by the business and essentially was not generating a profit. In 2010 DetailMed produced $2.8 million of revenue with a gross margin of $1.15m. The expectation for 2011 was an increase in revenue to $2.9m although to fixed cost increases the gross margin was expected to fall to $1.1m. Unfortunately it was obvious very early on that the figures were not being hit and by June 2011 revenue targets had to be adjusted down to $1.5m with a gross margin of just $68K.**
>
> **Considering the figures above, with 3 permanent staff associated to the business unit we are already in a loss making situation. I therefore considered how we could make cost savings without defaulting on obligations already committed to clients.**
>
> **One potential option was to remove the role of Business Development Director. Given the role was not necessary to client service direct delivery, it would still be possible to continue offering DetailMed service to clients without the Business Development Director. It would of course mean that business development activities relating to service would largely cease but, as was clear from the fact the product was not proving profitable, these business development activities had not in any event been particular fruitful. Under my proposals, if any leads did arise from new business for DetailMed I consider I could follow up on these personally.**
>
> **I discussed these proposals with Mark Hinton-Jones CFO and Steve Page, Talent Director. We discussed how much of an impact the potential removal of Business Development Director role would have and how we could move forward with the proposals. Steve agreed considering the financial situation the potential lack of any other viable alternative there was clearly a need to make Liz's role redundant whilst still being able to offer DetailMed services to clients. Mark agreed this would potentially result in significant and essential cost savings. We therefore together decided to place Liz's role at risk of redundancy.'"**

5. It is to be noted that his recommendation was not that the Claimant should be placed at risk of redundancy but that her "role" would be. The Employment Tribunal observed that the Claimant was not consulted at this stage and the decision was reached without her input. The Employment Tribunal considered that she had greater knowledge of DetailMed than Mr Needell had.

6. On 17 June 2011 Mr Needell, with Steve Page (Kantar Health UK's Talent Director) met with the Claimant. She was told that the business of DetailMed was under pressure to make immediate cost savings and that the role of Business Development Director for DetailMed could not be sustained. She was told that a two-week consultation period had commenced. The Respondent had determined that a business development role for DetailMed was no longer

required, but the Claimant was not told this specifically other than that cost savings needed to be made and that she was at risk. The Claimant had felt for some little time that she was being sidelined and recognised that the writing was on the wall.

7. The Employment Tribunal nowhere rejected the Respondent's case that financial savings needed to be made and indeed, as appears subsequently, accepted that the decision to make the Claimant redundant was made on the basis of financial considerations.

8. Although it is not referred to in the Judgment, I was told that DetailMed's financial position was such that it ceased trading altogether in January 2012.

9. The Employment Tribunal found that the Respondent recognised that with the removal of the role of Business Development Director Syndicated Services UK International, the provision of certain services, in particular business development services, would cease. The Respondent believed that it could manage by offering DetailMed services to clients, although the business development activity would cease. The Employment Tribunal made no finding that the work undertaken by the Claimant would be continued in full.

10. On 20 June 2011 Christina Strong (Talent Manager, HR) wrote to the Claimant and explained the business case for her redundancy (see paragraph 24). Again, she was told that:

> **"[Her] current role of Business Development Director, DetailMed has been identified as being at risk of redundancy."**

11. The reasons for this are then set out, namely the poor financial performance of DetailMed, which required the Respondent "to make reductions in head count in order to make

up the shortfall". The Claimant was told that her role of Business Development Director did not contribute to the day-to-day delivery of the DetailMed service and the role was now at risk, and that the Respondent was no longer able to sustain a role in the service at that level. Given that the Claimant's role was potentially at risk of redundancy, the period of formal consultation had commenced. I, again, note that the reference is to termination of the role of Business Development Director rather than termination of the Claimant's employment. At no time has the Respondent's case as to the financial performance of DetailMed and the need to make savings been rejected by the Employment Tribunal. However, at paragraph 25 the Employment Judge said that it was clear from the terms of the letter:

> **"[…] that it had already been decided in the absence of any input from the Claimant, that her role was to disappear and that the process of consultation over the remaining period until 1 July 2011 would be focused on endeavours to find the Claimant an alternative position."**

12. It is clear the assumption of the Employment Judge was that the Claimant should have been entitled to make representations in relation to the commercial decision to terminate the post of Business Development Director of DetailMed and to challenge the Claimant's performance figures as propounded by the Respondent.

13. The Employment Judge found that the meeting on 17 June 2011 could not be characterised as a consultation meeting "in any respect"; the meeting lasted about 25 minutes. On 24 June 2011 a "first" consultation meeting with the Claimant took place. The Claimant considered that two weeks for consultation was too short, and she learned for the first time that she was the only person selected for redundancy. She was also concerned that her performance figures as put forward by the Respondent were inaccurate and had been misrepresented.

14. The Claimant's evidence was accepted, but the Employment Judge had doubts about the credibility of the Respondent's witnesses in certain respects. He found that the Claimant had been told that she was a "tall poppy", in the sense that she was a high earner.

15. The Claimant considered that the decision to dismiss her had already been taken. The Claimant felt she was being frozen out and her role was already being taken over by Mark Sales, the Head of Stakeholder Management. He attended meetings that the Claimant would normally have been expected to attend herself.

16. The Claimant expressed interest in posts shown on the Respondent's group website for client directors. She was told, however (although this was not identified on the website), that the posts were "on hold".

17. On 1 July 2011 the Claimant met Ms Page and Ms Strong, and her redundancy was confirmed. She was told DetailMed could not sustain a Business Development Director salary.

18. The Claimant appealed to the Regional Talent Director, François-Olivia Dommergus. The Claimant maintained that her role was not redundant but that the reason for her dismissal was that managers were not comfortable working with her after certain alleged public interest disclosures (PIDs) she had made. Her appeal was dismissed. Mr Dommergus rejected the suggestion she was dismissed by reason of her PID disclosures (she had made allegations about unethical business practices) and said that the redundancy decision was made by reference to ""real" financial data":

> **"DetailMed was proving to be highly unprofitable as a business whether this is compared to official budgets or simply taken in isolation. As such the business rightly considered that you should discontinue your role while continuing to offer the DetailMed service to clients."**

19. Mr Dommergus considered this to be "a fair and reasonable rationale for redundancy and I believe the company followed a full and fair process".

20. I have already referred to the fact that, although the Employment Tribunal did not refer to it in its Judgment, the business of DetailMed was closed in its entirety in January 2012.

The Decision of the Employment Tribunal

21. The Employment Tribunal identified the issues; whether the dismissal was a fair dismissal by reason of redundancy, the Claimant denying there was a redundancy situation and asserting that the dismissal was both automatically and ordinarily unfair. The Employment Tribunal then referred to a number of authorities: **Abernethy v Mott, Hay and Anderson** [1974] ICR 323 CA, **Elliott v University Computing Ltd (Great Britain)** [1977] ICR 147, **Safeway Stores PLC v Burrell** [1997] IRLR 2000 EAT, **Murray v Foyle Meats Ltd** [1999] IRLR 562 HL, **Mugford v Midland Bank** [1997] IRLR 208 EAT, **Capita Hartshead Ltd v Byard** UKEAT/0445/11 and **Association of University Teachers v University of Newcastle-upon-Tyne** [1987] ICR 317 EAT. The Employment Judge does not identify what principles he drew from these authorities.

22. The Employment Tribunal then set out paragraph 139(1) of the **Employment Rights Act 1996** (ERA), which defines when an employee should be taken to be dismissed by reason of redundancy. I note at this stage that the Employment Tribunal did not specifically direct itself to section 139(6) of the Act, which has some significance in this case. The Employment Tribunal then referred to section 98 of the ERA, dealing with the fairness of dismissal.

23. The Employment Judge noted that if an employer showed that the reason for the employee's dismissal was redundancy, a fair dismissal against the background of section 98(4):

> **"[…] should involve meaningful consultation with the employee or employees at risk, an opportunity afforded to the employee during the consultation process to raise any issues and a requirement on the employer to identify any suitable accommodation for the employee concerned."**

24. The Employment Tribunal then turned to its conclusions. At paragraph 58 the Employment Judge said:

> **"In the circumstances of the case, I found that the process which led to the Claimant's dismissal was entirely driven by costs implications. In the absence of any documentation relating to a review which Jim Needell and Steve Page alleged they had undertaken I treated their evidence with some scepticism. There was no discussion with the Claimant who was in a very senior position with the Respondent about the future of her role and I concluded that a decision had been made in the absence of any contribution from the Claimant in relation to the future, if any, for her role."**

25. I note that the Employment Tribunal did not find any other reason for the dismissal of the Claimant than that it was "entirely driven by costs implications".

26. The Employment Judge (paragraph 59) considered that:

> **"[…] it was the Claimant who would have had the most focussed insight and knowledge of the viability and profitability of the DetailMed business and the prospects for future markets and business. I heard no evidence that the Claimant's role in terms of work was diminishing […]."**

27. In paragraph 60 the Employment Judge said:

> **"I found that the decision had been made to terminate the Claimant's employment solely on reasons of costs before the consultation process had begun. I am confirmed in my conclusions by the reference to the Claimant being a tall poppy during the subsequent meetings, and the fact that the Claimant was essentially told in terms that her role was going."**

28. A fair reading of this paragraph suggests that the Employment Judge was conflating termination of the Claimant's post with the termination of her employment. In paragraph 61 the Employment Judge considered that:

> **"[…] there could have been no meaningful consultations against a background where the Respondent in the absence of any input from the Claimant had determined that her role was too expensive as evidenced by the fact that the Respondent's own notes of the final meeting on 1 July 2011 had recorded that 'DetailMed cannot sustain a Business Developer salary'."**

29. This of course goes not to the termination of the Claimant's employment but to the termination of the post that she had held. At paragraph 63 the Employment Judge held there was no measurable chance that a consultation could have lead to anything other than dismissal; the consultation was only a cosmetic exercise and a sham. I note here that the Employment Tribunal considered that it would have been a legitimate consideration that the commercial rationale for the deletion of the post might have been challenged and that paragraph 63 was again predicated on the conflation of termination of the post and termination of the Claimant's employment.

30. At paragraph 64 the Employment Tribunal held that the Respondent had failed to show there was a genuine redundancy situation. Although the Employment Judge reminded himself that employers were entitled to reorganise and following such reorganisation consequences may follow, including a reduction in the workforce, it was not the role of the Tribunal to step into the shoes of the employer and determine what it might or could have done in the circumstances. The Employment Tribunal's role was to review the process and to determine whether the process adopted by the Respondent employer fell within the range of reasonable responses available to a reasonable employer at every stage of the process.

31. Then, at paragraph 65 one finds this:

> **"In my judgment in the circumstances of this case, the Respondent failed to show that the genuine reason for the Claimant's dismissal was for the potentially fair one of redundancy. The entire exercise on the evidence had been solely cost driven, following the appointment of Mr Needell as Managing Director in April 2011. The Claimant throughout the process was understandably demoralised and undermined in circumstances where she had had no previous warning or inkling before the at risk meeting on 17 June 2011 that her job was even at risk. The decision had been made to dismiss the Claimant and in my judgment the meetings which followed amounted to no more than unconvincing endeavours to package the process as a redundancy exercise."**

32. Again, this paragraph reveals a conflation of the termination of the role for cost reasons and termination of the employment. One asks rhetorically if the decision of the Respondent to create a redundancy was solely cost-driven, i.e. that the Respondent could no longer afford the role of DetailMed Business Development Director, is that not for reasons of redundancy, in that its requirement for an employee to carry out the work of business development director ceased or diminished or was expected to cease or diminish?

33. The Employment Judge then went on to consider and reject the claim of dismissal by reason of having made a protected disclosure. The Employment Judge did not conclude that her dismissal was in any way connected with what he had found amounted to a protected disclosure:

> **"The Claimant's dismissal, in my judgment, was on the basis of cost, and that in the absence of any identifiable review or discussion with the Claimant, a decision had been made to dismiss the Claimant on grounds on cost."**

The Notice of Appeal and grounds in support

34. For the Respondent, Mr Panesar submitted, firstly, that the Employment Tribunal was wrong to find that there had not been a redundancy situation because the decision to terminate the Claimant's post was cost-driven. The Employment Tribunal had applied the wrong test. Almost all redundancy situations, he submitted, were driven by cost considerations. I note at this stage that I would have welcomed the assistance of lay members as to what the best

industrial practice is how to conduct a redundancy exercise where there is a pool of one, and the extent to which consultation would enable employees to challenge the commercial rationale behind the decision to terminate their roles.

35. Secondly, Mr Panesar submitted that it was an error of law for the Employment Tribunal to become involved in the examination of the commercial merits of the decision to terminate the Claimant's role. He drew attention to *Harvey on Industrial Relations and Employment Law,* to which I shall turn shortly, and the cases therein cited as authority for the proposition that an Employment Tribunal will not go behind the facts and investigate how the redundancy situation arose, whether it could have been avoided and whether there were any viable alternatives. He submitted that the Employment Tribunal will not go into the rights or wrongs of a declaration of redundancy. The correct test for an Employment Tribunal to determine in considering whether or not there was a redundancy was simply whether the dismissal of the employee was attributable to the requirements of the business to carry out work of a particular kind; he drew attention to the decision in **Robinson v British Island Airways** [1977] IRLR 477. Mr Panesar drew support for his submissions that the Employment Judge had inadmissibly become involved in an investigation of the commercial merits of the decision to dispense with the post of Business Development Director by reference to the passages I have referred to at paragraphs 18.6 and 58.15 of the judgement.

36. The Respondent, Mr Panesar reminded me, did not submit, and there was no finding by the Employment Tribunal, that the Claimant had been replaced or that the number of employees had not fallen. If the Employment Tribunal had found that because work remained to be done there was no redundancy situation, that would also be an error. He drew attention to a number of authorities, including **Cook v Tipper** [1990] ICR 716 and **Campbell v Dunoon and Cowal**

Housing Association [1993] IRLR 496. Mr Panesar submitted that the Employment Tribunal had accepted the commercial merits of the decision to terminate the post of Business Development Director and had accepted the Respondent's evidence of its financial pressures; certainly, this was never rejected by the Employment Tribunal. The Employment Tribunal had simply, while accepting the commercial rationale for the dismissal, refused to accept it as being a valid basis for a dismissal on the grounds of redundancy.

37. Mr Panesar's third point was that the Employment Tribunal had not approached the case on the basis of a consideration of the range of reasonable responses but had substituted its own views; this point was not pursued in oral submissions, and I note Mr Panesar's Notice of Appeal had suggested it was within the range of reasonable responses for the Respondent to treat the Claimant's role as redundant and it was entitled to its own commercial perception that the part of the business supported by the Claimant lacked commercial viability and the Respondent believed that the business could function without the Claimant's role.

38. The fifth point in the Notice of Appeal is that the Employment Tribunal had conflated the termination of the Claimant's role and the termination of her employment. Mr Panesar drew attention to the passages of the decision of the Employment Tribunal at paragraphs 25 and 60, which I have set out earlier, in support of this submission. By conflating the termination of the role and the termination of the role and the termination of the Claimant's employment, the Employment Tribunal had not been able to enter into a proper analysis of the duty to consult. The decision to terminate the role should have no influence on the fairness of the dismissal, he submitted.

39. The Notice of Appeal raised a number of perversity points, but in his submissions Mr Panesar recognised that these added little to the principal points he had made about the Employment Tribunal conflating the termination of the Claimant's position as Business Development Director and the termination of her employment.

The Claimant's submissions

40. For the Claimant, Mr Davies submitted that the Employment Judge treated the Respondent's witnesses with scepticism and, when there was a conflict, preferred the evidence of the Claimant. He further submitted that the burden of proof fell on the employer and the dismissal would be unfair unless the Respondent could establish a potentially fair reason for the dismissal; see **Babar Indian Restaurant v Rawat** [1985] IRLR 57. This proposition is not controversial.

41. Mr Davies submitted that as the Employment Tribunal had found that the consultations were a sham, as the decision to dismiss had been made prior to consultation, and there was no need for the Employment Tribunal to consider section 98(4). Even if there were a redundancy situation, the dismissal would still have been found to be unfair. He pointed in particular to the potential unfairness of having a redundancy pool of one; but I do not know whether this was a point argued before the Employment Tribunal.

42. So far as whether there was a redundancy situation was concerned, it was submitted that the Employment Judge did not find that the dismissal could not have been by reason of redundancy because it was cost-driven. The dismissal on the grounds of costs was not synonymous with dismissal on the grounds of redundancy. Although a reduction in requirements of a business for employees to carry out work of a particular kind might be

cost-driven, the Respondent still needed to prove that there was in fact an actual or expected cessation of the business or a cessation or diminution in its requirements for employees to carry out a particular kind of work. This was something that the Respondent had failed to prove because the Employment Judge had rejected the evidence of Mr Needell and Mr Page. He went on to submit that the Employment Judge had been entitled to find the decision to terminate the Claimant's employment was solely on reasons of cost. Pausing there for a moment, I would ask why, if a decision has been taken to terminate a post for reasons of cost, coupled with a decision not to replace that post, that did not reflect a reduction in the requirements of the Respondent's business for employees to carry out the work of Business Development Director. It was either actual or expected. Mr Davies accordingly challenged the argument that there was a redundancy situation at all.

43. The Claimant was, Mr Davies accepted, dismissed for reasons of cost, but he submitted there was no diminution in her work and the requirements of the business never diminished; there was no finding to that effect by the Employment Tribunal.

44. There was evidence that some of the Claimant's work was being carried out by Mr Sales, so there was no reduction in the requirement in the particular work carried out by the Business Development Director; this was not said by the Employment Judge in his Judgment. There was evidence, I note, that was not rejected by the Employment Judge that the Respondent had taken a commercial decision to largely cease business development activities relating to service.

45. Mr Davies disputed that the Employment Tribunal had explored or sought to explore the commercial rationale of termination of the post. It had accepted that this was on the grounds of cost, but it had not accepted the commercial rationale.

46. The Employment Tribunal was entitled to find that the Respondent's decision to terminate the post and to dismiss the Claimant was outside the range of reasonable responses. There was no need for the Employment Tribunal to consider **Polkey v A E Dayton Services Ltd** [1987] IRLR 503 on the findings it had made.

47. Mr Davies disputed whether the Employment Judge had in fact conflated the termination of the role of Business Development Director and termination of the Claimant's employment.

The Respondent's reply

48. Mr Panesar submitted that if an employer decides that work can be done by two rather than three employees, there would be a redundancy situation; that appears that from section 139(1)(b)(i) of the Act, to which the Employment Judge did not refer.

49. The Employment Judge had not found against Mr Needell's evidence as to DetailMed's financial situation as set out in paragraph 18, neither did the Employment Judge find that *all* or even most of the Claimant's work had been taken over. The Employment Tribunal also appeared to accept what Mr Needell had said at the meeting of 17 June 2011 set out in paragraph 20 of the decision of the Employment Tribunal.

50. Having regard to the finding at paragraph 23, I have some doubts about this submission.

51. Mr Panesar repeated the submission that even if the Claimant's role were being taken over in its entirety by other employees, there would still be a redundancy situation, as the Respondent required fewer employees to undertake the work.

52. There was undisputed evidence of the need for the Respondent to reduce its costs, but what had wrongly entered into the situation was the Employment Judge treating the question of costs as not being a relevant factor in a redundancy.

The law

53. I start by referring to sections 139(1) and (6) of the **ERA 1996** which provides as follows:

> **"Redundancy**
>
> **(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 —**
>
> **(b) the fact that the requirements of that business -**
>
> **(i) for employees to carry out work of a particular kind,**
>
> **have ceased or diminished or are expected to cease or diminish.**
>
> **6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily *and for whatever reason*."** [my italics]

I particularly draw attention to section 139(6)(i), to which the Employment Judge did not refer. Thus, a person is dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the requirements of the business for employees to carry out work of a particular kind to have ceased or diminished, or expected to cease or diminish. "For whatever reason" would clearly encompass a financial reason.

54. There are a number of helpful passages in *Harvey*. *Harvey* makes clear that the question of an Employment Tribunal is not what the reason is for the dismissal but what the reason is for the redundancy:

> **"6) Cause of redundancy situation**
>
> **[777]**

> **The point cannot be made too strongly that the Act is not concerned to enquire what caused the redundancy situation. The question is what was the reason for the dismissal, not what was the reason for the redundancy. ERA 1996 enquires whether the dismissal was attributable to a cessation of the business or a cessation of, or diminution in, its requirements, but it says in terms that the cessation or diminution may arise 'for whatever reason' (ERA 1996 s 139(6)). To that extent the employer does not have to justify a declaration of redundancies. For the purposes of the redundancy scheme, the tribunal will not go behind the facts and investigate how the redundancy situation arose and whether it could have been avoided and whether there are any viable alternatives; the tribunal will not go into the rights or wrongs of a declaration of redundancy (*H Goodwin Ltd v Fitzmaurice* [1977] IRLR 393, EAT; *Moon v Homeworthy Furniture (Northern) Ltd* [1976] IRLR 298, [1977] ICR 117, EAT; *Association of University Teachers v University of Newcastle-upon-Tyne* [1987] ICR 317, EAT; *James W Cook & Co (Wivenhoe) Ltd v Tipper* [1990] IRLR 386, [1990] ICR 716, CA)."**

It has not been suggested that this passage does not accurately reflect the effect of the authorities referred to so that I do not need to refer to them specifically

55. There is a helpful passage on the topic of disappearing work:

> **"Disappearing Work**
>
> **(1) Introduction**
>
> **[841]**
>
> **It is the third kind of redundancy situation which has given rise to most of the cases: the employee is dismissed because the business no longer needs any employees or as many employees to do work of a particular kind (whether generally or in the place where the employee was employed), or anticipates being in that position.**
>
> **[842]**
>
> **This kind of redundancy situation may come about in various ways: perhaps there is a recession in the trade, so that the output of the business needs to be reduced; perhaps modernisation means changing the product or the process and replacing old skills with new; perhaps a rationalisation scheme results in a more efficient use of labour, so that the same output can be achieved with fewer employees. Or rationalisation may involve mechanisation or computerisation, so that the same output can be achieved with a smaller labour force. Or again, rationalisation might result in a decision to outsource work, so that the business needs fewer employees because the work in question is to be done by independent contractors instead. In all these cases the employee becomes surplus to requirements and redundant as defined."**

56. Indeed, *Harvey* notes cases where employees have been dismissed for reasons of cost but the employers have been held to be precluded from arguing that they were not redundant:

> **"Requirements of the business**
>
> **[850]**

There is a redundancy situation where the requirements of the business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish. The redundancy scheme looks at the situation from management's perspective.

[851]

The 'requirements of the business' are what the business needs to carry on from day to day in the way in which management has determined that it shall carry on—its actual, practical needs. The expression does not mean a wish list of what management would like to have in an ideal world. That is to say, it is not open to management to deny redundancy by arguing that it really needs the employee but cannot afford to keep him (*Association of University Teachers v University of Newcastle-upon-Tyne* [1987] ICR 317, EAT—popular course discontinued when outside funding was withdrawn; *Huddersfield Parcels Ltd v Sykes* [1981] IRLR 115, EAT—finding of redundancy cannot be avoided merely by claiming that the dismissal was brought about by economic necessity; *Ladbroke Courage Holidays Ltd v Asten* [1981] IRLR 59, EAT—redundancy where dismissal resulted from higher management's instruction to reduce the wages bill)."

57. I should refer to **Robinson**, as this was referred to by Mr Panesar in his submissions. In that case a flight operations manager reported to the general manager of operations and traffic. The Respondent carried out a reorganisation that involved the replacement of the general manager of operations and traffic by an operations manager who absorbed the duties of the flight operations manager. The claimant was adjudged not to have suitable qualities for the new post and was declared redundant. The Employment Appeal Tribunal upheld the decision of an Industrial Tribunal that the dismissal was not unfair. Phillips J noted that there had been a diminution or cessation of the requirement for work of a particular kind; in that case, the claimant's work was different to that of the retained employees.

58. The Judgment of HHJ Peter Clark in **Burrell** was approved by the House of Lords in **Murray v Foyle Meats**. Judge Clark said:

"70 There may be a number of underlying causes leading to a true redundancy situation; our stage 2. There may be a need for economies; a reorganisation in the interests of efficiency; a reduction in production requirements; unilateral changes in the employees' terms and conditions of employment. None of these factors are themselves determinative of the stage 2 question. The only question to be asked is: was there a diminution/cessation in the employer's requirement for employees to carry out work of a particular kind, or an expectation of such cessation/diminution in the future [redundancy]? At this stage it is irrelevant to consider the terms of the applicant employee's contract of employment. That will only be relevant, if at all, at stage 3 (assuming that there is a dismissal)."

59. The proper approach to be undertaken by the Employment Tribunal is helpfully set out in the decision of the House of Lords by Lord Irvine of Lairg in **Murray**:

> **"My Lords, the language of para (b) is in my view simplicity itself. It asks two questions of fact. The first is whether one or other of various states of economic affairs exists. In this case, the relevant one is whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second question is whether the dismissal is attributable, wholly or mainly, to that state of affairs. This is a question of causation. In the present case, the tribunal found as a fact that the requirements of the business for employees to work in the slaughter hall had diminished. Secondly, they found that that state of affairs had led to the appellants being dismissed. That, in my opinion, is the end of the matter."**

Conclusions

60. I do not consider that the judgment of the Employment Judge was impermissibly influenced by an investigation of the commercial merits of the decision to dispense with the post of Business Development Director. I do not consider that the passages in 18.6 and 58.15 bear the weight Mr Panesar has sought to place on them. The Employment Judge was quite clear in holding that the dismissal was entirely costs driven, but that the wholly inadequate consultation process deprived the Claimant of the opportunity to raise issues as to the need for the termination of the post, and to challenge the figures as to her performance propounded by the Respondent. Although it is clear that it would be inadmissible for the Employment Judge to have carried out such an investigation, during the consultation process the Claimant was entitled to raise those issues and of course was deprived of the opportunity of so doing. Ground 2 is thus not made out

61. The Employment Tribunal has however conflated the termination of a post or particular role and the termination of the employment of a person holding the post and carrying out the role.

62. The Employment Tribunal fell into error in concluding that because the decision to cease to provide business development services was driven by financial considerations and the need to reduce costs, there was no redundancy situation. The conclusion was flawed and contrary to the authorities to which I have referred.

63. Was there a redundancy situation? The Employment Tribunal, in my opinion, clearly made factual findings that in order to save money the Respondent could do without the services of a Business Development Director. The unit was clearly losing money, and indeed the entire business closed in January 2012. In 2010 DetailMed had produced $2.8 million of revenue with a gross margin of $1.15 million. It was expected that in 2011 revenue would increase to $2.9 million, although by reason of fixed-cost increases the gross margin was expected to fall to $1.1 million. However, it was soon obvious that the figures were not being hit, and by 2011 revenue targets had to be adjusted down to $1.5 million with a gross margin of just $68,000. The Claimant, as has been mentioned, was considered to be a "tall poppy", and the Respondent considered it could offer the DetailMed service to clients without a Business Development Director, although business development activities relating to the service would largely cease. On a number of occasions the Employment Tribunal (by way of example, at paragraph 58) held that the process was entirely driven by cost considerations. The Employment Tribunal did not find there was any other reason for dismissal of the Claimant; for example, it did not find that the process was a sham so that she could be "managed out".

64. In my opinion, those facts are tantamount to a finding of redundancy. The Employment Tribunal did not find that the Claimant was replaced; it did not find that the numbers of employees did not fall. Although there was no evidence that the Claimant's role in terms of work was diminishing, the fact that the Respondent considered it could no longer afford the

post of Business Development Director and consequently would have less customer support created a redundancy situation, as there was a reduction in the requirement of the business for work of the particular kind carried out by the Claimant.

65. Although the evidence suggested that some of the Claimant's work was undertaken by others, there was no finding (and no evidence) that the Respondent continued to have a requirement for all of the work she had previously carried out or even that most of the work was required to be carried out. As the Claimant's counsel correctly accepted, if an employer finds it can undertake the same amount of work with fewer employees, there is still a redundancy situation. I have already drawn attention to the significance of section 139(6), as the requirement of the Respondent's business for employees to carry out the work of the Business Development Director clearly ceased or diminished or was expected to cease or diminish "for whatever reason". The reason happened to be that it was no longer affordable. Most redundancy situations probably have their origin in financial grounds. The Employment Tribunal consistently held that because the decision to remove the post of Business Development Director was driven by financial considerations it could not amount to a redundancy situation. As is clear from the words of the statute, I accept the Respondent's submission that the test that should have been applied by the Employment Tribunal was whether the dismissal of the Claimant was attributable to the requirements of the business to carry out work of a particular kind ceasing or diminishing. The Employment Tribunal should have applied the test set out in **Burrell** as approved in **Murray**.

66. The fact that the decision was cost-driven was irrelevant; no other reason for the termination of the Claimant's post was suggested by the Employment Tribunal. Ground 1 of the Notice of Appeal is made out.

67. I accept that the Employment Judge did conflate the termination of the post of Business Development Director with termination of the Claimant‘s employment; ground 5 is thus made out.

68. Regarding perversity, the findings relating to financial considerations amounted to an error of law and are not truly perverse. The question of whether or not the meeting of 17 June 2011 was a proper consultation meeting or not is again not a perversity issue but raises a point of law.

69. The finding of the Employment Judge that the consultation process was deeply flawed and indeed a sham is unassailable. There was wholly inadequate consultation which deprived the Claimant of any opportunity to challenge the commercial need for the termination of her position or the accuracy of her performance figures as asserted by the Respondent. There was inadequate time for a proper consultation process. The decision to terminate the Claimant’s post was taken apparently irrevocably prior to any consultation. There are further questions as to the fairness of the dismissal, such as whether a pool of 1 was justified, whether there should have been consideration of permitting the Claimant to take over another person’s post for which she was qualified, but in the light of the findings that I uphold, that the process was a cosmetic exercise as the decision to dismiss had been taken irrevocably before the so called process was commenced, there is no need to consider these matters further.

70. So far as the complaint about the range of reasonable responses and the suggestion that the Employment Tribunal substituted its views for those of the Respondent, I do not see how the range of reasonable responses comes into the equation at all. The range of reasonable

responses is nothing to do with a commercial decision on the part of the Respondent to make the Claimant's post redundant.

71. I am not satisfied that the Employment Tribunal failed to make findings on crucial issues; if there were to be a **Polkey** reduction, this is probably left for a remedy hearing.

Disposal

72. The appeal on whether or not there was a redundancy situation is allowed. On the facts as found by the Employment Tribunal, there was a redundancy situation, and the Claimant was dismissed for a potentially fair reason, namely redundancy. The Respondent should have been permitted to raise a case that there should be a Polkey reduction. This should be determined at the remedy hearing if there is to be one.

73. It only remains for me to express my thanks to counsel for their most helpful written and oral submissions.