EMPLOYMENT TRIBUNALS

Claimant: Mr J Whiting

Respondent: JRI Orthopaedics Limited

Heard at: **Leeds** **On:** **11th & 12th October 2017**

Before: Employment Judge Lancaster

Representation
Claimant: In Person
Respondent: Mr M Warren-Jones, solicitor

JUDGMENT having been sent to the parties on 12 October 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided taken from the transcript of the oral decision delivered immediately on the conclusion of the hearing.:

REASONS

1. Mr Whiting had worked for some four and a half years as the respondent's New Product Development Manager. He was dismissed by reason of redundancy on 13 January 2017, redundancy is of course potentially fair reason for dismissal and I am satisfied that that was indeed the principle reason (sections 98 (1) (a) and (2) (c) Employment Rights Act 1996).

2. There was a diminution in the requirement for the employer to have a particular employee as the NPD Manager (section 139 (1) (b) Employment Rights Act 1996). Those remaining functions which Mr Whiting had previously carried out were reallocated. One of the five staff who had previously reported to him was effectively promoted to a supervisory role with responsibility for two of the team, one of the team was transferred across and reported to the newly appointed Head of QARA, and Mr Agass, the Chief Operating Officer assumed more line management responsibility. The net result was that there was one employee less in the NPD department. That is a redundancy.

3. However, I have concluded that it was unfair to treat that as sufficient reason in these circumstances for dismissing this claimant(section 98 (4) Employment Rights Act 1996). A redundancy can be for whatever reason ,

I do not have to enquire whether it was a good or bad reason (section 139 (6)) Employment Rights Act 1996). In this case I am satisfied that Mr Agass took an executive decision to restructure the company and that meant he had no need for an NPD Manager. That is his right as a manager. however he took that decision in a wholly untransparent way. I have heard Mr Agass give evidence, he is I have to say a singularly unimpressive witness. I do not accept his evidence that he appointed the new Head of QARA and only then decided to remove the position of NPD Manager. I am quite satisfied that these must have been concurrent considerations in his mind and that in appointing the QARA Manager, which only went to external advert without informing others who were in the company of his proposals he was creating a situation where he knew that the claimant would not only be at risk of redundancy but in effect would be made redundant.

4. The claimant I am quite satisfied would have been competent to fulfill the new position of QARA Head. Whether he would have been the better candidate over and above the person externally appointed, Mr Adusei, or indeed over the possible internal candidate, Mr Sowden, I am unable to say. The claimant had earlier identified the possibility of his managing not only NPD but also compliance, which under the restructure fell under QARA rather than an employed compliance manager as it had up to October 2016. He clearly believed he had the skill set necessary. The respondent was entitled to reject that proposal but equally at the point where Mr Agass was considering his own restructure of the company it would certainly have been preferable if he had been transparent in identifying the matters under consideration and allowing proper meaningful consultation. However having offered the new position to Mr Adusei, which he accepted just before Christmas, it was then effectively a ‘fait accompli’; there was already a new Head of QARA in post at the point where on 3 January 2017 it was announced to Mr Whiting that he was at risk of redundancy.

5. The redundancy process was conducted very shortly; Mr Agass announced from the outset that he intended to make his final decision just eight days later on 11 January. In the event that decision was postponed but only by two days to 13 January. It is right that in the intermediate period Mr Agass did indicate that as many consultations meetings as were necessary could be arranged but the reality was that there was no possibility of meaningful consultation because Mr Whiting had not been in the loop as to the proposed restructure which affected him. Also at the point where he was first told of his potential redundancy on 3 January Mr Agass was somewhat disingenuous in not even announcing to him that he had appointed Mr Adusei. That was publicly however acknowledged within the company that same day and discovered by Mr Whiting when he came out of that first meeting. It is also quite clear that Mr Agass must, contrary to what he told Mr Whiting, have been able had he chosen to do so to have given an indication of how he would potentially restructure the NPD department by promoting the Principal Project Engineer Joel Treen to a supervisory role and increasing his salary, as he also increased the salaries of others in that department.

6. More particularly, apart from the general lack of opportunity for meaningful consultation as to possible alternatives to Mr Whiting's redundancy what I consider to be principally unfair in this case, is the failure by the respondents to consider a pool for selection. I find as a fact that Mr Agass did not consider a pool, although he says he did. Although in the letter dismissing the appeal Mr Ayres also claimed that that matter had been considered, I am quite satisfied it was not. In the initial letter given to Mr Whiting after the meeting on 3 January the only possible reference to alternative employment is if there were existing vacancies; there is no suggestion that consideration was given either at the outset nor during the 10 days of the consultation process to pooling anybody else. Nor when during the appeal stage the question of a pool was expressly brought up was it in fact properly addressed. That is because as he said in evidence Mr Ayres did not consider on principle that it was appropriate to consider the Claimant, as a manager for pooling with his former subordinates.

7. This is a relatively small company. In some situations it would be feasible to consider, where there is a genuine cost cutting exercise on grounds of efficiency, looking at the overall workforce and considering in the round where any cuts might be made. I do not however consider it unreasonable for the respondent not to have taken that option here. The immediate redundancy situation had arisen in a specific part of the business. Nor in fact do I consider it unreasonable not to have pooled the claimant with other Managers. He tells me, and I have no reason not to accept it, that he would have been competent to take on other managerial positions in Product Management in particular. However at the time there was no obvious interchangeability with those other Managers across the company and the redundancy had arisen in a particular department, that is NPD, that is his department.

8. But within that department there were other employees, formerly managed by the claimant, and all of those were roles that he could have undertaken himself. He had the relevant qualifications and experience. The only qualification that one of his team had which he did not have was that Danielle DeVilliers, the Senior Project Engineer, had a PhD, but I accept Mr Whiting's evidence that that qualification was not necessary for the role she actually fulfilled. His engineering qualifications and background, and his previous experience of doing similar roles for other companies would have enabled him to move to any of those subordinate positions. So even though there was no obvious vacancy I consider it unfair for the respondent not to have even addressed its mind to the possibility of looking at the entire NPD department. That is particularly so because it was quite clear that the claimant would have been prepared to consider subordinate positions, even though they would entail a reduction in salary and in particular those engineering positions. Within the team there is a Project Coordinator which is not an engineering post, that is Amy Hill. In reality Mr Whiting frankly accepted he would be very unlikely to have accepted her role and I agree. But all the others were engineers or, in the case of the Clinical Project Scientist Duncan Sharpe, had a scientific background, and the claimant with his expertise would have been able to fulfill those roles. He would also no doubt obtain a degree of job satisfaction that would have meant he would indeed have been prepared to consider any of them.

9. The claimant had been with the company for four and a half years. That was longer than Danielle DeVilliers who had been there only for just over a year; longer than Mark Burgess whom the claimant had appointed some eighteen months earlier, and longer than the Clinical Scientist Duncan Sharpe who again the claimant had recruited. The only person who had been there longer was Joel Treen who had been there some nine years. Although their salaries were lower they were still not insignificant. Joel Treen was on some £44,000 increased almost immediately upon the claimant's dismissal to £49,000 or thereabouts. Danielle DeVilliers was on some £33,000, again with an immediate £5,000 pay rise to some £38,000. Mark Burgess was on £28,000. Duncan Sharpe was recruited on £35,000 with an increase of £5,000 to £40,000. The claimant's basic salary was a little over £60,000. The claimant tells me, which again I accept, that he had the luxury of not requiring to replicate his previous salary because he was not the main breadwinner in his family. And so provided there was sufficient interest in the job he would, I find, have been prepared to accept any of those positions. Indeed he expressly stated that he would, have considered Danielle DeVilliers' post. Also the fact that he considered he should have been pooled with the other members of the team, and he drew particular attention to the fact that Joel Treen had effectively been promoted to assume some of his former managerial role (which is perfectly clear from the respondent's own organogram although Mr Ayres denied it in the appeal outcome letter), clearly indicate that he was prepared to take on other lesser roles.

10. The specific case of Danielle DeVilliers reinforces my decision that this dismissal is unfair. On the same day, that is 3 January 2017, that the claimant was told that he was at risk of redundancy Danielle DeVilliers had given in her notice in writing. In the ordinary course therefore she would have left the company, there would have been a vacant position and the obvious solution would have been to explore whether the claimant was indeed prepared to take on her role. I am satisfied that he would have done so and that would have avoided the redundancy. That did not happen. Though I have had no particular detail given there must have been conversations with the respondent and Ms DeVilliers when Mr Aggas persuaded her to withdraw her notice and the respondent accepted that withdrawal so that she remained in employment. On that basis the respondent purportedly says there was no vacancy and in the absence of a vacancy they did not have to consider alternatives for the claimant. As expressed in the closing submissions of Mr Warren-Jones that was because Ms DeVilliers was considered to be a valued employee, one whom the respondents wished to keep. The obvious implication of that is that they determined that, for some reason, the claimant was not a valued employee. So even though Danielle DeVilliers was on the point of leaving which would have prevented the necessity for redundancy that option was not explored.

11. In actual fact the respondent chose a pool of one and I am satisfied on the evidence before me that that indeed indicated in this particular case that they had chosen the pool in such a way as to ensure that it was a particular individual, Mr Whiting, who was made redundant. That is particularly reinforced by the way that Danielle DeVilliers' case was

treated. It is also reinforced by the fact that there was a wholesale lack of transparency in the appointment of Mr Adusei and the restructure of the department which actually therefore created the situation where they could afford to lose a Manager at Mr Whiting's level. There is also some supportive evidence that in a previous redundancy exercise other employees who were made redundant had equally not been pooled although pools might have been available. Though it lends some background support that observation that this was the way that Mr Agass operated is not necessarily to my decision: it is evident on the facts in this instance that this is what happened..

12. So for those reasons, the lack of meaningful consultation, in consequence of the way the restructuring was handled, the failure to consider suitable alternative employment that would have arisen on Ms DeVilliers leaving, but more particularly what I find to be an unreasonable failure to consider an appropriate alternative pool of selection within the entire NPD department, the dismissal of this claimant for redundancy in these circumstances is unfair.

13. Had Mr Whiting been placed in a proper pool for selection for redundancy alongside all of the other people in the NPD department with engineering or scientific qualifications (and I leave out the Project Coordinator Amy Hill who is in a different position) that is had he been pooled with Mr Treen, Mr Burgess, Ms DeVilliers and Mr Sharpe there is no realistic possibility on an objective and fair redundancy selection that he would have been at the bottom of that list. He has considerable experience in this particular industry and had been with this respondent longer than anyone bar Mr Treen, he has the relevant qualifications, he had fulfilled those roles in the past.

14. Also there is the Danielle DeVilliers factor. In reality as of 3 January she had put in her resignation, had there been a properly considered pool that included her I see no realistic prospect that she would in fact engaged in that process. She had decided to put in her resignation; I can see no reason why she would then have retracted that resignation in order to submit herself to possible selection for redundancy. There would be no advantage to her, she did not have the two years' qualifying service, she would not have reaped any financial gain by claiming a redundancy payment had she in fact been made redundant or volunteered for it.

15. So in those circumstances on the particular facts of this case there should be no Polkey deduction. The criteria put t forward by Mr Warren-Jones on behalf of the respondent, in fact would merely have perpetuated the subjective nature of this exercise. It is simply to repeat the failings of the respondent to say that these others were all valued employees who they would have wished to keep as opposed to the claimant who by implication they had decided no longer fitted. I do not consider it an appropriate criterion on a redundancy selection to consider whether or not somebody, because of their previous expertise in management would be looking to move on. So for those reasons there should be no deduction.

16. The matter remains adjourned for a remedy hearing on 18 December by which point it should be ascertainable whether the claimant in fact secured

alternative employment. If he has that will make the calculation of loss relatively straight forward. If he has not I will still of course then have to conduct the exercise in assessing how long he is likely to continue his loss of earnings. Those earnings would be at the very minimum the same level of pay that Danielle DeVilliers would have received. I will hear submissions on the next occasion as to whether there should be a slight increase to reflect the fact that he may have been offered the higher paid position of Joel Treen. The difference between those figures is not great and I have already indicated in the course of discussion that if I were faced with that choice it is highly likely I would have no option but to split the difference. That is my provisional view at this stage. Unless the matter is resolved in the meantime it will be listed for remedy hearing to assess the compensatory loss with no deduction on the grounds of Polkey.

Employment Judge **Lancaster**
Date 13th October 2017