EMPLOYMENT TRIBUNALS

Claimant: Mr J Gray

Respondent: Kier Construction Limited

HELD AT: Leeds **ON:** 27, 28 and 29 November 2017

BEFORE: Employment Judge Lancaster

REPRESENTATION:

Claimant: Ms A Palmer, counsel
Respondent: Mr A Smith, counsel

JUDGMENT having been sent to the parties on 4 December 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 upon the conclusion of the case:

REASONS

Introduction

1. Kier Group Plc is of course a major player in the construction industry. The Respondent in this case Kier Construction Limited, also known as Build UK, is as the name suggests its operational arm. That is divided into eight business units. One of those is Kier Northern.
2. The Claimant Mr Julian (known as Tid) Gray had only ever worked for Kier. He was latterly at the point of his dismissal the business performance director for Kier Northern. He had held that post since the end of 2014 and the beginning of 2015. He was given notice of termination in September 2016 and his employment ended after some 38 years with Kier on 7 September of this year, 2017.
3. Prior to his having become the business performance director he had been the operations director for Yorkshire. At the point of his dismissal there were three

operations directors within the northern region. Mr Gray's replacement, Michael Shepherd, was based in Leeds and covering Yorkshire and Humber. There was also an operations director based in Liverpool, Bob Adams. He had very recently been promoted to succeed David Jenkins who had retired or resigned and Mr Adams had been in post in Liverpool only since around March of 2016. There was also an operations director based in Manchester, Phillip Chadwick. He had been in post only since the end of 2014 or beginning of 2015. Prior to that there had been an interregnum in Manchester where there had been no operations director for a period of some two years.

4. The Claimant having moved to become business performance director was on the same equivalent salary as he had been as operations director for Yorkshire and therefore parallel within the line management structure to those other three operational directors.

5. He was dismissed purportedly on the grounds of redundancy when that recently created business performance director post was deleted from the structure. That is what I am concerned with in this case. The Claimant says that that is an unfair redundancy.

The background to redundancy

6. There is a dispute which I do not need to resolve about the circumstances in which the Claimant ceased to be an operations director and took on his new position. That coincided with the appointment of a new managing director for Kier Northern, John O'Callaghan. Mr O'Callaghan said there were concerns about Mr Gray's performance. The Claimnt denies there were any such problems with his work as operations director.

7. What is significant in this case is that subsequent to the creation of that post - where I pause to observe that there was no dispute that the Claimant's performance was perfectly satisfactory - a decision was taken at national board level, in around December 2015, that there should be cost cutting across the business. That operation was given the name Project Silver and it was to take effect by the end of the company's financial year 30 June 2016. By that stage it was envisaged that at least the provisional decisions as to how to make those £4 million cost cuts across the board would have been identified so that they could be included in the forecasted accounts at the end of the financial year.

8. That decision was cascaded down to senior management in around January 2016. That is when Mr Callaghan the MD for the northern region was first made aware of the proposals. At that stage they were inchoate and initially consideration was given at senior management level as to how these effective costs might be implemented across the various business units. The witness I have heard who was in part tasked with that process was group finance director Mr David Hodson.

9. In the course of Mr Hodson's enquiries he identified within Kier Northern principally two potentially redundant positions. One of those was the Claimant and the other was that of a less senior manager, Richard Mr Buck. It is clear that Mr Hodson also considered a number of other possible ways in which the books might be balanced within Kier Northern, where the proportion of the total overhead reduction was to be £300,000 to be identified in that financial year

though not necessarily taking effect immediately. For instance from various notes I have seen Mr Hodson himself had identified a query about what would happen about the outgoing operations director at Liverpool, Mr Jenkins, inquiring as to whether Bob Adams, who was then only acting up, should be confirmed permanently in that post of director. And also, certainly within the finance department as a whole as evidenced by a spreadsheet prepared by one of Mr Hodson's reportees Matt Hargreaves, there was the identification of the possibility of merging the Manchester and Liverpool offices and the mooting of various other proposals.

10. By that stage however, that would have been 30 March 2016, all those other possible suggestions for cost cutting in Mr Hargreaves' spreadsheet were as I have phrased in the course of this hearing "below the line". Above the line the sums only included the reported cost savings from the redundancies of Mr Gray and Mr Buck. Factoring those into the equation that led to the identification of the proposed and required saving of £300,000.

11. I am satisfied therefore that when the suggestion was filtered down from Mr Hodson to Mr O'Callaghan as to what would happen in his division, what was put to Mr O'Callaghan was that the redundancy of those two named people would effect the required savings. In so far as there is any dispute between Mr Hodson and Mr O'Callaghan I accept Mr O'Callaghan's evidence. That is I accept Mr O'Callaghan's evidence that he was not expressly informed by Mr Hodson of any of the other possible, If I may put it this way, "blue sky thinking" as to how costs might be reduced.

12. Subsequent to that Mr O'Callaghan made the decision that he in fact agreed with that suggestion. He did therefore declare that the Claimant was at risk of redundancy and informed him of that at a meeting when Karen Jackson from HR was also present. That was on 17 June 2016.

The reason for dismissal

13. Applying the law of the Employment Rights Act 1996 to that briefly expressed scenario I am quite satisfied that the reason for dismissal was indeed redundancy and in fact there is now no dispute on that point.

14. A redundancy is for the relevant purposes where there is a cessation or diminution in the requirement for employees to carry out work of a particular kind and that cessational diminution can be either permanent or temporary and for whatever reason.

15. The underlying reason for redundancy in this case is Project Silver; the requirement that costs should be cut across the business. It is now common ground that that is not a matter which falls within my remit to consider and nor is it something for the Claimant to challenge. The Tribunal will not go behind the fact of a redundancy and investigate how the redundancy situation arose. I am not concerned with the reason why this was a redundancy situation. That is a strategic management decision which as I have said was taken at the highest level. It may not necessarily have been a good decision and certainly some subordinate managers, including Mr O'Callaghan and those on a similar level within other business units, challenged the proper rationale for that but they were obliged to implement it. As I say I do not go behind those facts.

16. Given that financial imperative to save money I accept Mr O'Callaghan's evidence and therefore find as a fact that it was he who took the decision that the post of performance director, which he had initiated only some 18 months previous, could in fact now be removed. I do not accept the submission that was in any way dictated to him. It was a suggestion certainly put by Mr Hodson but I accept Mr O'Callaghan's evidence that he independently considered the business needs within his unit and concluded that that was the appropriate way to save the requisite amount of money. He had quite properly identified that 18 months after the creation of that position the business could in fact revert to the status quo ante and continue without a dedicated manager director performing those duties.

17. That does not mean that everything that the business performance director did ceased to be undertaken within the business. Quite the opposite. A particular number of those duties allocated to the Claimant under the acronym SHE (which is safety, health and environment) were obligations that had to be performed by somebody. In the past they had been undertaken by the individual operation directors. In the event they were transferred to a recently created senior operation director post in the north west. That was Mr Commins. Other duties that were required still to be done were re-distributed amongst other directors. That classically meets the definition that there is a diminution in the requirement for work to be done by employees. The work was still there but the number of employees required to do it had reduced by one.

The fairness of the dismissal

18. There is no doubt the Claimant was dismissed because of that redundancy situation. The issue then is whether or not the decision to treat that as sufficient reason to dismiss this particular Claimant was in all the circumstances fair or unfair. That is under the general provisions of Section 98 of the Employment Rights Act and the burden of proof is neutral at this stage. The Respondents have satisfied the initial burden, without demur, of establishing that the reason for dismissal was the potentially fair one of redundancy.

19. In any dismissal which is alleged to be unfair on the grounds of redundancy following Langston v Cranfield University [1998] IRLR 172 it is implicit that the Tribunal in assessing that neutral burden of proof will look at whether or not there was fair selection, fair consultation and fair exploration of alternative employment.

Consultation

20. The key question in this case to my mind has then turned out in the event to be this: Was in all the circumstances it fair or unfair not to have consulted with Mr Gray prior to Mr O'Callaghan determining that the position of business performance director could be deleted? Should he have been consulted about the decision to remove that post from the structure either before the decision was effectively taken by Mr O'Callaghan prior to of 17 June or in the subsequent consultation? The reason why that is the most significant element of this case is this because once that decision was taken a decision was also taken in consequence that the Claimant was then placed in a pool of one in relation to the risk of redundancy. That was because his business performance development role was a stand alone position and the point is forcibly made that that then

made it very difficult then for him to challenge what is termed, albeit somewhat loosely, his "selection for redundancy".

21. I am quite satisfied that Mr O'Callaghan genuinely considered that this was the better way of effecting the cuts that were forced upon him. It is accepted quite frankly by him that had he not been under those financial pressures he would not wish to lose this position. He also quite frankly accepts he would not have wished to lose the Claimant, and I repeat there has been no criticism of his performance in the business role.

22. Effectively having received the intimation from Mr Hodson, on 3 March, that the necessary cost cuts could be achieved by removing Mr Gray's position Mr O'Callaghan accepts that he did not then consult with Mr Gray about that possible removal of his post.

23. When he was to inform him in person on 17 June that he was at risk of redundancy. Effectively this decision had already been taken and there is some evidence in various emails from the expressions used to indicate that the post had already been decided by that point to be redundant. But equally it was only the start of a consultation process where other documentation and other forms of expression clearly indicate, quite properly, that he was at risk of redundancy and that decision would only be confirmed at the end of consultation. From that I conclude that this was a genuine decision by Mr O'Callaghan to place the Claimant at risk of redundancy and enter into consultation, whilst realistically acknowledging that, unless something unexpected occurred, the outcome would indeed be that he was confirmed as redundant.

24. In the intervening period between 3 March and 17 June there had been some discussion at senior management level - which did include the Claimant - about the removal of Mr Buck's position and indeed that of another employee, Mr Shillito. That had been discussed at their board level and in principal agreed. It is accepted by Mr O'Callaghan that although at that stage he must, following his conversation with Mr Hodson, have been contemplating the issue of whether to remove the Claimant he did not of course discuss that with him and his other co-directors at that meeting of 17 March.

25. I have been concerned by the fact that it certainly would have been possible for Mr O'Callaghan to have chosen to consult in advance. It appears he did not make the final decision as to how to proceed until mid June. So from March that is some three months. It would have been possible in that time, had he wished, to have consulted with the Claimant and to have discussed generally those matters. But whether or not that lack of consultation is fair or unfair is a matter for me having regard simply to questions of fact and degree. There is no automatic obligation to consult in this regard. Nor, conversely, is it as a matter of law the case that an employer is never under an obligation to discuss the possible removal of a post. Ordinarily this will come within management discretion and it is a question of fact and degree for the tribunal as to whether that discretion was reasonably exercise in all the circumstances. The authority for the fact that it is never, as I say, as a rule of law the position that there is no obligation to consult at this stage comes from the case of Air 2000 Ltd v Mallam 2004 UKEAT/07773/03MAA & UKEAT/0058/04/MAA.

26. On the facts of this case in my judgment it was a proportionate level of consultation. Even though there was three months during which Mr O'Callaghan

may have elected to consult more widely about how he should proceed I conclude that these are still essentially strategic decisions for him as the MD for Kier Northern. It is not simply the position that he looking at a possible re-structure that might remove the Claimant's position. He is looking at an imperative to reduce costs substantially and he as MD is best placed to have regard to the overriding concerns of the business as to whether any alternative means of effecting those cuts to be put in place.

27. So decisions for instance, which I accept as a fact that Mr O'Callaghan did indeed take into consideration, as to whether alternatively he could cut costs by removing the Manchester office or by removing one of the operational directors in the north west were matters for him and not properly open to consultation. On balance I conclude it would not have been reasonable to seek to consult with the Claimant in isolation about removal of his post. The Claimant would not be in a position to contribute directly to decisions that ultimately fell within the responsibility of Mr O'Callaghan as to how he managed his region. Beyond that point when the Claimant was informed that he was at risk of redundancy, within the subsequent process of consultation again I accept Mr O'Callaghan's assertion that he would if appropriate matters were brought to his attention have been prepared potentially to re-visit his decision. Therefore I conclude that the level of consultation about the decision to make the Claimant's stand alone post redundant was also adequate in all the circumstances.

28. In reality of course it was extremely unlikely that Mr O'Callaghan would reverse his considerate management decision taken in mid June. He was aware of all the factors and had weighed those but he did not make that decision prematurely without giving the Claimant at least the opportunity to seek to raise matters as well. On that key point whether or not there is a failure to consult about the decision to remove the Claimant's post and leave it as a stand alone position of risk of redundancy I conclude that the Respondent did act within the range of reasonable responses open to it. That part of the decision making process by Mr O'Callaghan is fair. And having made that key finding the rest of the case falls away very quickly.

The pool for selection

29. Initially it had been suggested that the failure to pool the Claimant with his other operational directors was unfair. It is now conceded that that decision too fell within the range of reasonable responses. I agree. I am perfectly satisfied that the Respondent did apply its mind to the question of whether there should be a pool. I have Mr O'Callaghan's evidence that he did that before informing the Claimant that he was at risk in consultation with Ms Jackson from HR. It is also recorded within the eventual decision after the 2 September meeting to confirm the Claimant's selection for redundancy. Shortly prior to that the rationale for the pool of one is recorded in a memo dated 31 August.

30. This was also a matter that was considered when in the course of the consultation process the process was stalled for a period when the Claimant raised a grievance. One of the points on that grievance was whether or not there should have been pooling. Mr O'Callaghan gave evidence to Mr Paddam who conducted the grievance. That is recorded in Mr Paddam's conclusion and again it is clear the Respondent gave consideration to what the appropriate pool was.

Similarly the matter was expressly dealt with at the appeal by Mr Stott. In particular Mr Stott considered the Claimant's specific argument at that point, which was not necessarily that he was at that time doing work interchangeable with the operational directors but that because of his skill-set and the fact that he had previously performed that role for a significant period he ought nonetheless to be pooled with them.

31. Where the Respondent has properly directed its attention to the question of the pool was very hard of course for any claimant to show that that was unfair. In any event it is now conceded that the decision not to pool the Claimant for the reasons given was reasonable. I can summarise those reasons briefly as saying that he was in a stand alone position, there were differences between Yorkshire and the North West and Mr O'Callaghan considered that having direct practical knowledge of the markets in Manchester and Liverpool outweighed any potential greater generic experience that the Claimant may have had over the two occupants already there.

32. It is not a necessary part of my decision to determine the issue and I do not know what the outcome would have been had the Claimant been placed in a pool with those other operational directors. It is by no means certain that he would have come bottom of the scoring in that exercise but that is immaterial because the decision not to carry out that process was a reasonable one.

Suitable alternative employment

33. The general conduct of the consultation was appropriate. The time allowed was certainly adequate. The Claimant was informed he was at risk on 17 June. The first consultation meeting took place on 2 July. There were then delays, partly as I have said because of the wait for the grievance, but also in part because the Claimant requested further information in writing. That information was given to him and ultimately a final meeting was held on 2 September. That is a period of some two and a half months over which consultation took place. In the course of that consultation and indeed during the subsequent 12 months notice period it is now accepted that there is no failure to consider suitable alternative employment. There simply was none. The Respondents did look at possible lesser positions, put the Claimant on an "at risk" register and notified him of vacancies. For understandably reasons the Claimant expressed the view very early on that he was not prepared to consider a lesser position and it is common ground that there were no positions at director level that n fact emerged during that period. The separate question of selection for redundancy does not arise because there was no requirement to have a pool. He was a single position.

Conclusion

34. In so far as the Claimant thinks he was pre-selected by being placed in a pool of one I have already dealt with that in regards to whether it was fair or unfair not to have consulted him further on the rationale for Mr O'Callaghan's decision to take this strategic step rather than any others that may have been open to him. As I have said Mr O'Callaghan may have chosen to consult and given the Claimant's longstanding service that might have been the more courteous position. However I can understand why he did not do so and as I say I am not prepared to say it fell

outside the range of reasonable responses open to him in his position as MD for Kier Northern in these particular circumstances. He was impelled by a mandate to save costs which she could not challenge so that he had to make cuts against his will. It was no doubt a difficult decision but is was a reasonable one in this situation.

35. So having viewed the matter in the round I consider this was a fair dismissal for the reason of redundancy and the claim of unfair dismissal necessarily fails.

Employment Judge Lancaster

Dated: 16 January 2018