Appeal No. UKEAT/0172/17/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 January 2018

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

DR H MIRAB — APPELLANT

MENTOR GRAPHICS (UK) LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MARK STEPHENS (of Counsel) Instructed by: Lester Dominic Solicitors Upper Floors 85-87 Ballards Lane Finchley Central London N3 1XT
For the Respondent	MR THOMAS KIBLING (of Counsel) Instructed by: Cater Leydon Millard 68 Milton Park Abingdon Oxfordshire OX14 4RX

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

Unfair dismissal - reasonableness of dismissal - section 98(4) ***Employment Rights Act 1996***

The Respondent had determined that the Claimant's role as Sales Director was no longer required. The ET was satisfied this was a redundancy for the purposes of section 139 **ERA** and constituted a potentially fair reason for his dismissal for section 98 purposes. In determining whether the dismissal had been fair, under section 98(4), the ET had concluded the Respondent had done sufficient in terms of looking for alternatives, specifically it had not been required to consider "bumping" any other employee working at a subordinate Account Manager level (there were no other Sales Directors) because such an obligation only arose if the employee himself raised it and the Claimant had given no sign that he would have been willing to work as an Account Manager. In considering the fairness of the process followed, the ET accepted that the internal appeal had been "superficial" and carried out without independent judgment but considered the appeal was only relevant to an unfair dismissal claim if the original process had been unfair; that was not the case here. The Claimant appealed.

Held: *allowing the appeal in part*

The ET had erred in its approach to the consideration of alternatives. It had assumed there was a general rule that an employer was not required to consider subordinate positions unless raised by the employee but that was not what the case-law said and the ET had failed to show that it had applied the band of reasonable responses test in this regard. Even if that was not fatal, the ET had stated that the Claimant had given "no sign" that he would have been prepared to consider redeployment as an Account Manager. That was perverse given that, on either side's case, there was at least one such indication made during the consultation process and other statements made by the Claimant could similarly be construed in this way (a possibility with which the ET had apparently not engaged). The ET had further erred in law in its approach to

fairness in respect of the internal appeal. It was wrong to say (as it had) that the appeal was only relevant if the original process had been found to have been unfair. Given the errors made in terms of the ET's approach to the question of fairness, the appeal would be allowed on these points and these two issues would need to be remitted for reconsideration.

The Claimant had also sought to argue that the ET had erred in failing to take into account the size and resources of this employer and/or in failing to provide adequate reasons, expressly engaging with case-law cited by the Claimant. These aspects of the appeal were dismissed. The ET had expressly referred to the size and resources of the Respondent in its findings of fact and there was no reason to think it had lost sight of these factors in its conclusions. It had, further, not been required to expressly refer to each position of law and authority cited by the Claimant (of which there had been some 20 separate propositions and 27 cases referred to); the requirement under Rule 62(5) **ET Rules** did not go so far.

HER HONOUR JUDGE EADY QC

1. In this Judgment I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Claimant's appeal from a Reserved Judgment of the Watford Employment Tribunal (Employment Judge Southam, sitting alone between 8 and 10 February 2017; "the ET"), sent to the parties on 21 March 2017. Representation below was as now. By its Judgment, the ET rejected the Claimant's complaint of unfair dismissal.

The Relevant Background

2. The Respondent is a UK company which is part of a worldwide group based in the USA, Mentor Graphics Corporation. In the UK, the Respondent employs some 113 employees, and worldwide the group has a turnover of more than $1 billion and around 5,000 employees. Its activities are organised on a global basis, according to activity rather than geography. Staff employed in connection with a particular function may thus be found in different parts of the world, with line managers working in different territorial jurisdictions.

3. This case concerned the Respondent's Embedded Systems Division; that refers to the supply of hardware and software components to original equipment manufacturers for installation in their own products.

4. The Claimant began his employment with the Respondent in the UK on 15 February 2013, working as a Director of Sales for Embedded Systems within the Respondent's Europe, Middle East and Asia ("EMEA") region - a senior appointment. The Claimant managed a team of six and part of his remuneration was calculable on the basis of the team's performance against annual sales targets.

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5. The Claimant reported to the Respondent's Director of Worldwide Sales Embedded Systems Division, Mr MacGillivray, and heading up the Division was a Mr Perry, Vice President and General Manager for Embedded Software Worldwide. Mr Perry was ultimately responsible for some 500 staff and for the products that the Sales Team was then to sell worldwide and he took a keen interest in their activities.

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6. As the ET found, the Claimant was successful in his work. He had, however, no previous direct experience in the automotive sector and that was the market in which the Division as a whole was most successful, with - by February 2015 - some 70% of sales of Embedded Systems being to that sector. More generally, however, sales in the Respondent's Embedded Systems Division worldwide were, for 2013 and 2014, lower than forecast. In response, a new global strategy was adopted, specifically focusing on what was seen as the growing automotive market.

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7. On 1 February 2015, the sales force of the Division was divided into two. This led to two of the Claimant's sales reports being assigned to what was then the new Director of Sales in the Automotive Division, a Mr Arslan, who was based in Stuttgart; with only one of his sales reports being retained by the Claimant, that being a Mr Cardon, who was based in France. As it happened Mr Arslan, who had started on 3 January 2015, proved not to be a success and left on 23 May 2015 and was not replaced.

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8. It was a key part of the Claimant's case before the ET that Mr Perry was heavily influential in decision making within the Division, even to the extent of being involved in decisions to dismiss individual employees, for which alternative reasons were then given to justify the ending of their employment. Specifically, early in the Claimant's employment, he

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had seen one of his technical reports dismissed from the business, purportedly by reason of redundancy but in reality because Mr Perry had felt the employee was insufficiently engaged. In time, the Claimant also had disagreements with Mr Perry and the ET accepted that he had then been excluded from certain meetings and emails. The Claimant also relied on the fact that in 2014 Mr Perry had put pressure on Mr MacGillivray to have Mr Cardon dismissed and the Claimant had worked with Mr MacGillivray to resist that suggestion and Mr Cardon had been retained (the suggestion being that this was something that had annoyed Mr Perry).

9. More generally, the restructuring of the Division's salesforce made a significant difference to the Claimant's responsibilities. Specifically, he was now required to concentrate only on sales to the general sector and would not receive commission from the efforts of those engaged in the automotive sector (now part of an entirely different team). The Claimant emailed Mr MacGillivray about this at the time, expressing his unhappiness about what he saw as an effective demotion and making clear that he was not prepared to become simply an Account Manager, saying he had received advice from an employment lawyer that he would have a very good case if he resigned in such circumstances. In the event, as the ET expressly found, the Claimant was not made an Account Manager and he stayed with the Respondent as a Sales Director, accepting the changes that had been made, which saw the automotive work being assigned to an entirely different team and a consequential reduction in the Account Managers in the Claimant's team.

10. Thereafter, the Claimant continued to work well and in August 2015 the Respondent recruited another member of the General Embedded Systems Sales Team in Europe, a Mr Braun, who was based in Germany but reported into the Claimant.

11. In November 2015, Mr MacGillivray worked with the Respondent's Human Resources Business Partner, Mr Spiro, on a proposal to also remove the position occupied by the Claimant as Director of Sales in the EMEA Area. The document they created, which was then forwarded to the United States, referred to the changes that had been made and to the fact that the majority of the existing business of the Division was in the automotive market, with the General Embedded subdivision being the smaller emerging segment of the business. More specifically, it was stated that the Claimant was responsible for a small team of two and for growing the General Embedded business to meet assigned objectives but it had become clear there was insufficient business opportunity in the region and growth objectives were not being met. Given the small size of the team and business opportunity, it was concluded that the Sales Director position was no longer required and should be eliminated. Although there had been no consultation with the Claimant at that stage, the document went on to state that any alternative positions would be investigated and these would be considered prior to the termination of employment of any impacted employee, i.e. the Claimant.

12. The Claimant was duly informed that he was being placed at risk of redundancy during a telephone call on 3 February 2016. He was told there had been a review of the business strategy of the General Embedded Sales channel and a decision made to reduce operating expense; although it was said that no final decision had been taken, he was told the likely impact was that there would be no continuing requirement for a Director of Sales. Further, as this was a unique role within the business, he was at risk of redundancy but that there would be a period of consultation to consider ways to avoid that outcome and the Claimant was invited to put forward any ideas he might have.

13. Later that day, the Claimant sought Mr MacGillivray's advice as to whether he should still attend the Respondent's annual sales conference. During that discussion, the Claimant asked whether he was going to be considered for an individual contributor role - that is as an Account Manager assessed on the basis of his own sales, rather than as a Director assessed on the basis of his team - to which Mr MacGillivray responded that there was no guarantee that such an additional position would be approved for Europe.

14. During the consultation discussions that followed, the Claimant contended that the situation had been engineered, he had been singled out and it was an unfair dismissal. Mr MacGillivray disagreed, referring back to the Claimant's earlier email expression of dissatisfaction and his refusal to take an individual Account Manager plan and role at that stage. As for possible alternative positions, after the first meeting Mr Spiro had sent the Claimant a link to an internal website showing vacancies worldwide, around 10 in the UK and some 275 overall worldwide. The Claimant looked at those in Europe but found nothing suitable, although when he was asked by Mr Spiro if he had looked at the vacancies, he said he had not.

15. There were three consultation meetings in total during the course of February 2016. At the end of the third, on 29 February 2016, Mr Spiro concluded that they had not been able to avoid the Claimant's redundancy and said his notice would start that day. The decision and the Respondent's reasoning was then confirmed by letter of 1 March, which also advised the Claimant of his right of appeal.

16. The Claimant's subsequent appeal was rejected after a telephone hearing on 8 March 2016. His suggestion that he should have been compared with Account Managers in other areas outside the UK was rejected on the basis that the Respondent was only required to consider

positions in the UK and, in any event, the Claimant had not been an Account Manager - he had previously rejected that possibility - but had, rather, been employed in a unique role as Sales Director which had been made redundant.

The ET's Decision and Reasoning

17. The ET accepted the Claimant's case that Mr Perry had substantial influence and power within the Respondent and that there had been disagreements between the two of them. The ET was also prepared to accept that Mr Perry probably did not like the Claimant and it was possible that he had proposed the Claimant be placed in charge of the General Embedded Sales System channel. It was not prepared to accept, however, that there was any continuing issue regarding the Claimant's involvement in the proposal relating to Mr Cardon's employment and it did not consider that the matters relevant to the decision to subdivide the Embedded Systems Sales Team were the reasons for the Claimant's ultimate dismissal the following year. Specifically, the ET concluded:

> **"17. … Mr Perry's interests lay in maximising sales of the division as a whole, including general embedded systems. If the claimant had been successful in his new role after January 2015, I am sure that Mr Perry would have been pleased. He did not in any way, at least on the evidence presented to me, seek to procure the dismissal of the claimant at the time of the subdivision in January 2015. …"**

18. More particularly, the ET noted that, having determined to subdivide the Sales Team into two, the initial appointment of a Sales Director for the Automotive Sales' Division had not been a success and that appointee had lasted little more than four months and that subdivision had then continued with no Sales Director. As the ET observed:

> **"17. … Between May 2015 and November 2015, when the restructure plan that affected the claimant was devised, the automotive sales channel existed without a Director of Sales. Given the imbalance in revenue between the two sales channels, it is almost inconceivable that close observers of the structure of that part of the business would not notice that the more successful subdivision was achieving its results without the need for a Director of Sales. It is therefore logical that the business would think very carefully about whether or not it needed to have a Director of Sales in relation to the general embedded systems sales sub-division."**

19. In the circumstances, the ET concluded:

> **"18. In my judgment, this is a much more likely and feasible reason for the claimant's dismissal, than that Mr Perry was determined to remove the claimant from the company. I cannot rule out the possibility that Mr Perry and/or others wanted to place the claimant in a position where he was likely to fail. This seems to me to be an inherently unlikely proposition however. Any business wants to succeed by maximising sales. What is more likely is that, based on his success as Director of Sales in the combined division, the claimant was perceived as someone who could develop the general embedded systems sales division into a more successful business sector. The automotive subdivision did not require the claimant's special expertise because it was already successful.**
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> **19. My judgment as to the reason for the claimant's dismissal is therefore that the business decided that it no longer required a Director of Sales in the general embedded system sales division and that that decision was particularly underlined by continuing relatively poor sales in that subdivision and the fact that the more successful automotive subdivision did not have such a position. The consequence of those factors was to lead to a decision to dispense with the claimant's role. In my judgment, that was the reason for his dismissal."**

20. Having thus identified the reason for the Claimant's dismissal, the ET was further satisfied that this met the definition of redundancy under section 139 of the **Employment Rights Act 1996** ("ERA") and was a reason that was capable of being fair for the purposes of section 98. Specifically:

> **"21. … The role of Director of Sales was distinct from the role of Account Manager. I did not hear much about this, but I infer that the role of the director was to motivate and encourage the Account Managers, because the Director of Sales would be rewarded by their efforts. It was a distinct role and the respondent's decision to dispense with it represents a decision to cease a requirement for an employee to carry out work of that particular kind. The section 139 test is therefore satisfied and the reason is therefore a potentially fair reason by reference to section 98. The reason that the claimant lost his job was, as a matter of causation, because the respondent took the decision to dispense with the role of Director of Sales in the general embedded systems sales channel."**

21. Turning next to the question whether the decision to dismiss the Claimant for that reason was fair, the ET disagreed with the view expressed on the Claimant's appeal to the effect that the Respondent had only been required to consider positions in the UK:

> **"23. … notwithstanding that the respondent is a company registered in the United Kingdom, which represents a comparatively small part of the overall business operated by the group of which it is a part, the claimant was regarded as part of a global structure. His colleagues and subordinates worked in different legal jurisdictions across the world. …"**

22. On the other hand, the ET accepted the Respondent's point that there was no requirement that it compare the Claimant with other Account Managers, wherever situated:

> **"23. … in my judgment, in terms of selection, the claimant was entitled to be compared and placed in a pool with any other Director of Sales in the embedded systems division, viewed as a whole, including individuals working in different countries. However, there were no other Directors of Sales in that division. In my judgment, the respondent was entitled to regard the claimant as occupying a unique position. Put another way, the adoption of a pool of one was not outside the range of reasonable selection options. …"**

23. As for consultation, accepting that a decision had been made at a global level in November 2015 to dispense with the Director of Sales - a decision made without any consultation with the Claimant - the ET rejected the suggestion that the Respondent had been obliged to consult with the Claimant before making what was essentially a business decision for it: consultation was something that followed the making of that decision, as a requirement in UK law and needed to occur locally, not globally.

24. As for the consultation that then took place, the ET concluded:

> **"27. … Given the narrow effect of the decision made in November, it is difficult to see that the respondent could have done anything more in terms of consultation with the claimant. There was no attempt to pretend otherwise than that the decision to remove the particular role placed the claimant at risk of redundancy. His redundancy was a likely outcome, and the focus of consultation should have been in relation to redeployment, as to which see below."**

25. In the circumstances, the ET did not accept that the Respondent had failed to consult with the Claimant.

26. The ET also considered the extent to which the Respondent had made efforts to find alternative employment for the Claimant. On this point, the ET concluded as follows:

> **"30. There is no sign that the claimant ever offered to take an account manager position, although it must be said there were no such vacancies. It might have been possible for the respondent in the UK to consider within the wider company the possibility of "bumping" someone like Gregor Braun, but the claimant himself did not suggest it. I did consider the decision in *Barratt Construction v Dalrymple* [1984] IRLR 385 in this respect. That case suggests that the onus was not on the respondent to suggest to the claimant that he might wish to take a more junior position. Of course, if the claimant himself had suggested it, the respondent would have been bound to consider that suggestion. I do not think that the respondent could have done any more in this respect than they did do."**

27. Finally, the ET addressed the fairness of the appeal, agreeing with the Claimant's submission that the appeal had been a superficial exercise, carried out without independent judgment. The ET did not, however, find that this rendered the dismissal unfair:

> **"31. … The appeal is only relevant if the original process was unfair, and I do not hold that it was."**

The Appeal

28. The Claimant's appeal has been pursued on three grounds:

(1) the ET erred in concluding that the Claimant's dismissal had been fair, given its findings regarding the appeal;

(2) the ET further made a perverse finding when it held (see paragraph 30) that the Claimant had not himself suggested bumping;

(3) in finding also (see paragraph 30) that the Respondent could not have done any more in terms of seeking alternative employment for the Claimant, the ET had erred and/or failed to provide sufficient reasons for that conclusion.

29. The Respondent resists the appeal, essentially relying on the Reasons provided by the ET.

Submissions

The Claimant's Case

30. By his first ground of appeal, the Claimant contended it was an essential part of the process of fairness for an employee to be offered the opportunity to appeal against any formal decision made by an employer. It was part of the procedural structure established to ensure fair treatment, see per Browne-Wilkinson J (as he then was) at page 95 of **Sillifant v Powell Duffryn Timber Ltd** [1983] IRLR 91 EAT, cited by Lord Bridge in **West Midlands Co-**

Operative Society Ltd v Tipton [1986] ICR 192 HL at page 203, and see further per HHJ Peter Clark at paragraph 16 in **London Central Bus Company Ltd v Manning** UKEAT/ 0103/13.

31. Here, the Claimant's dismissal was the product of two decisions: the decision to terminate his employment and the rejection of his appeal. Section 98(4) of the **ERA** required the ET to consider the fairness of both stages, as the Court of Appeal had confirmed in **Taylor v OCS Group Ltd** [2006] ICR 1602, see in particular per Smith LJ at paragraph 47. Specifically, Smith LJ had referred to open mindedness as a relevant factor. That was apposite given the ET in the present case had held the appeal was a superficial exercise in which the decision taker had brought no independent judgment. More specifically, it was apparent that defects in an appeal process were not relevant only if a properly conducted appeal could have made a difference. Following the approach laid down in **Polkey v A E Dayton Services Ltd** [1988] ICR 142 HL, a failure to apply the appeal process fairly might render a dismissal unfair, even if it would ultimately have made no difference to the outcome, albeit that might be a matter relevant to remedy, see **Tarbuck v Sainsbury's Supermarkets Ltd** UKEAT/0136/06, in particular paragraphs 77 to 80. Here it was apparent that the ET had erred in law in finding that the appeal is only relevant if the original process was unfair (see ET paragraph 31).

32. As for the second ground of appeal, the Claimant contended the ET had made a perverse finding when it had held (see paragraph 30) that the Claimant had not himself suggested that he be bumped into a subordinate role. This was perverse given that Mr MacGillivray had confirmed in his evidence (see paragraph 67 of his witness statement) that, before the Claimant was dismissed, he had raised the suggestion "*that it should be Thomas Cardon who should be dismissed and not him*". It was further perverse given that the notes of the final consultation

meeting confirmed that the Claimant had then asked "*Why not the German guy?*" (that being a reference to Mr Braun). Moreover, that this had been understood as a reference to Mr Braun being bumped from employment and the Claimant then given his role instead, was something acknowledged in the Respondent's closing submissions before the ET (see paragraph 3 of that document). Further, the ET itself had found (see paragraph 14.9 of its findings of fact) that, before he was dismissed, the Claimant had raised an issue whether he would be considered for "*an individual contributor role*". But for the ET's error in this regard, it would have been likely to have held the dismissal unfair for failing to consider or achieve redeployment in a subordinate role elsewhere in the organisation.

33. As for the third ground of appeal, in finding (also at paragraph 30) that the Respondent could not have done anything more in terms of seeking alternative employment for the Claimant, the ET had erred in law and/or failed to provide sufficient reasons for that conclusion. Specifically, the ET had failed to engage with the Claimant's case founded upon **Fulcrum Pharma (Europe) Ltd v Bonassera** UKEAT/0198/10, that, within the consultation process, the Respondent should have addressed the question whether the Claimant would be prepared to consider a more junior role at a reduced salary. It had been wrong for the ET to consider that **Barratt Construction Ltd v Dalrymple** [1984] IRLR 385 laid down any rule that it was for an employee to raise this issue before it was relevant, see paragraph 25 **Whittle v Parity Training Ltd & Anor** UKEAT/0573/02. As it made clear in **Fulcrum Pharma** (see paragraph 30) "*a starting off point may be to determine within the consultation process whether the more senior employee would be prepared to consider the more junior role at the reduced salary*".

34. Similarly, the ET had failed to address the Claimant's argument founded upon **Evans v Capio Healthcare (UK) Ltd** UKEAT/0143/04, that the decision not to search for other work outside the UK within a substantial international organisation went to the heart of the fairness of the dismissal, and, yet further, the ET had failed to engage with the Claimant's argument founded upon **Bevan Harris Ltd v Gair** [1981] IRLR 520 that the Claimant's particular expertise and the size of administrative resources of this Respondent were highly relevant to the issue as to whether alternative employment should have been offered.

35. On the question of disposal, this was a case where a finding for the Claimant on his appeal or on either of the second and third grounds, must mean that only one outcome was possible: that the ET's Judgment be set aside and a finding substituted that the Claimant had been unfairly dismissed, with the matter being remitted for remedy.

The Respondent's Case

36. On the first ground of appeal, the Respondent objects that it would be wrong to read paragraph 31 of the ET's Judgment in isolation. The Judgment was to be read as a whole and it was only after considering all of the other points going to the fairness of dismissal: reason, selection, consultation, consideration of alternatives, etc. that the ET had turned to the appeal at paragraph 31. It had then effectively concluded that any shortfalls in the appeal hearing were not material as each of the grounds attacking the fairness of the Claimant's dismissal had failed. That conclusion, moreover, had to be seen in context: the Claimant's grounds of appeal had been limited (see the ET findings of fact at paragraph 14.44) and raised matters that had been considered in-depth by the ET itself - for example as to the genuineness of his dismissal - and rejected.

37. Moreover, the Claimant had not raised any discreet issues concerning the appeal hearing and the mere fact that there was a procedural failing in the appeal process would not, of itself, be sufficient to displace the fairness of the original dismissal. As had been observed in **London Central Bus Company v Manning**, a procedural defect in the appeal process, while relevant, could only render a dismissal unfair if, as stated in **West Midlands Co-Operative Society v Tipton**, it denied the Claimant the opportunity of demonstrating that the reason for his dismissal was not sufficient for the purposes of section 98(4). Moreover, **Tarbuck** had only allowed (see paragraph 80) that defects on an appeal may lead to a finding of unfairness because an appeal might enable further matters to be advanced. Given the very limited nature of the Claimant's grounds of appeal on his internal appeal, that was not this case. More generally, an appeal had to be seen as part of the process in the round; see the approach of the EAT in **D'Silva v Manchester Metropolitan University & Others** UKEAT/0328/16 paragraphs 40 to 45, and in **Kisoka v Ratnpinyotip (t/a Rydevale Day Nursery)** [2014] ICR D17. Even if the ET had erred, as the Claimant contended, it would have had to consider the same question for **Polkey** purposes which would inevitably have led to a finding of nil compensation.

38. As for the second ground, it was apparent that the ET had had regard to the case of **Barratt Construction v Dalrymple**, which established that it was not for the ET to speculate as to what further steps the employer might have taken and draw an adverse inference because it did not do so. In **Barratt** the ET had also, albeit *obiter*, gone on to hold that an employee at a senior management level who was being made redundant and was prepared to accept a subordinate position, would need to make this clear at an early stage; see further **Whittle v Parity Training**. In the present case, the ET's finding at paragraph 30 was permissible, not perverse. Specifically, regard needed to be had to the entirety of Mr MacGillivray's evidence

which had identified the Claimant's initial refusal to consider an Account Manager role at paragraph 64 of his witness statement, and had referred to the Claimant's suggestion that Mr Cardon should be dismissed as part of his argument as to how costs might be reduced so that he might continue in his own role, and that was how paragraph 67 of Mr MacGillivray's witness statement was to be understood, not as a suggestion of bumping, *per se*. It was further relevant to note from Mr MacGillivray's evidence that at the first consultation meeting the Claimant was informed of potential vacancies within the Respondent, but was not interested in considering such roles.

39. As for the Claimant's suggestion that he should be treated as an Account Manager and his reference in that context to "*the German guy*", Mr MacGillivray had given evidence as to how the Claimant had previously disagreed with such an appointment and threatened litigation (see his witness statement at paragraph 76). More generally, the Claimant's ET1 had not raised bumping as an issue, and it was not in the list of issues, and his witness statement had referred to redeployment, not bumping. What the Claimant was really suggesting was that someone else should be dismissed and the saving in costs used to retain him in the same role.

40. As for the third ground, it was again important to read the Judgment as a whole. It was, moreover, unfair to criticise the ET for failing to identify points arising from specific authorities, given how these had been raised by the Claimant below. The Claimant had supported his closing submissions before the ET with a document entitled "*Summary of Dicta and Authorities*". That had then referenced some 26 authorities spanning 47 years of employment law jurisprudence, in support of some 20 propositions of law said to be relevant to the agreed issues. Copies of the authorities had not been provided, albeit the Claimant's counsel had said regard could be had to specific authorities online, if the ET wished. In any

event, on the **Fulcrum Pharma** point, the authority did not go so far as the Claimant was seeking to suggest. Ultimately, the EAT in that case was really making the point that the ET had failed to make its findings clear. As for the authority of **Evans**, that was not even referred to in the *dicta* document and took matters no further. Finally, the reliance on **Bevan Harris** did not assist: the ET had expressly referenced the size of the Respondent's organisation at the outset of its Judgment (see paragraph 14.1) and, as had been recognised in **Bevan Harris**, all cases would be fact-sensitive (see paragraph 9 of that judgment), and although that case touched on redundancy cases, that was only in the most general sense.

The Relevant Legal Principles

41. The starting point in any unfair dismissal claim has to be section 98 of the **Employment Rights Act 1996**, which relevantly provides as follows:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
>
> **(b) 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.**
>
> **(2) A reason falls within this subsection if it -**
>
> **…**
>
> **(c) is that the employee was redundant, …**
>
> **(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case."**

42. The Respondent here put its case on the basis that the Claimant's dismissal had been by reason of redundancy as defined by section 139 **ERA**. Although the genuineness of that reason was put in issue by the Claimant, the ET accepted the Respondent's case finding that it no

A longer required a Director of Sales in the General Embedded Sales Division and that was the reason for the Claimant's dismissal; a reason that met the requirements of section 139 and was capable of being fair for the purposes of section 98.

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43. Having thus determined the reason for dismissal and having regard to that reason, the ET was then charged with determining whether the dismissal was fair or unfair, on which question the burden of proof was neutral as between the parties. The test it was bound to apply

C was that of the range of reasonable responses of a reasonable employer in the relevant circumstances, which included the size and administrative resources of the employer; the ET had to determine that question in accordance with equity and the substantial merits of the case.

D

44. In a redundancy case, considerations of alternatives to the redundant employee being dismissed will generally involve looking for other potential roles that are vacant at the relevant time. There may, however, be cases where it might be reasonable to look for a vacancy that

E might be created, possibly at the expense of another employee - "bumping", see per Bean J (as he then was) in **Lionel Leventhal Ltd v North** UKEAT/0265/04 and paragraph 30 of **Fulcrum Pharma (Europe) Ltd v Bonassera** UKEAT/0198/10. There is, however, no rule that an

F employer must always consider bumping in order to dismiss fairly in a redundancy case, not least as, where this might involve the employee in question being moved into a subordinate and less well paid role, that might not be seen as something that the employer should reasonably be

G expected to initiate; see **Barratt Construction Ltd v Dalrymple** [1984] IRLR 385 and **Whittle v Parity Training & Anor** UKEAT/0573/02. The question will always be for the ET to determine, on the particular facts of the case, whether what the employer did fell within the

H range of reasonable responses.

45. Moreover, when considering an unfair dismissal claim, an ET should have regard to the overall process, which includes any appeal, see **Taylor v OCS Group Ltd**, per Smith LJ, in particular paragraphs 47 to 48:

> **"47. Although, as we have said, both *Whitbread* and *Adivihalli* contain a correct statement of the law, it would be advisable for *Whitbread* not to be cited in future. The use of the words 'rehearing' and 'review', albeit only intended by way of illustration, does create a risk that ETs will fall into the trap of deciding whether the dismissal procedure was fair or unfair by reference to their view of whether an appeal hearing was a rehearing or a mere review. This error is avoided if ETs realise that their task is to apply the statutory test. In doing that, they should consider the fairness of the whole of the disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care. But their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage.**
>
> **48. In saying this, it may appear that we are suggesting that ETs should consider procedural fairness separately from other issues arising. We are not; indeed, it is trite law that section 98(4) requires the ET to approach their task broadly as an industrial jury. That means that they should consider the procedural issues together with the reason for the dismissal, as they have found it to be. The two impact upon each other and the ET's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss. So for example, where the misconduct which founds the reason for the dismissal is serious, an ET might well decide (after considering equity and the substantial merits of the case) that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee. Where the misconduct was of a less serious nature, so that the decision to dismiss was nearer to the borderline, the ET might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee. The dicta of Donaldson LJ in *Union of Construction, Allied Trades and Technicians v Brain* [1981] IRLR 224 at page 227 are worth repetition:**
>
> > **Whether someone acted reasonably is always a pure question of fact. Where parliament has directed a tribunal to have regard to equity - and that, of course, means common fairness and not a particular branch of the law - and to the substantial merits of the case, the tribunal's duty is really very plain. It has to look at the question in the round and without regard to a lawyer's technicalities. It has to look at it in an employment and industrial relations context and not in the context of the Temple and Chancery Lane."**

46. In **West Midlands Co-Operative Society v Tipton** [1986] ICR 192, the House of Lords held that the failure to permit an employee to exercise a right of appeal may render an otherwise fair dismissal unfair. In **London Central Bus Company Ltd v Manning** UKEAT/0103/13, His Honour Judge Peter Clark expressed the point as follows:

> **"16. … Whilst the conduct of the internal appeal process is relevant to the overall question of fairness under s.98(4), the question, as Morritt LJ formulated it in *Westminster City Council v Cabaj* [1996] IRLR 399, paragraph 29 by reference to the House of Lords decision in *Tipton v West Midlands Co-operative Society Ltd* [1986] IRLR 112 and *Polkey v A E Dayton Services Limited* [1987] IRLR 503 itself, is whether the procedural defect denied to the Claimant employee an opportunity of showing that the employer's reason for dismissal, here capability, was an insufficient reason for the purpose of s.98(4)."**

47. As the EAT in **Tarbuck v Sainsbury's Supermarkets Ltd** UKEAT/0136/06 stated, a defect in the appeal process is not only relevant if a properly conducted appeal would have made a difference to the outcome, albeit that it might be relevant to compensation.

48. Finally on the determination of fairness, I note that it has been frequently emphasised that whether or not an employer has acted reasonably in all the circumstances of the case is essentially a question of fact for the ET, see for example **Bowater v Northwest London Hospitals NHS Trust** [2011] EWCA Civ 63. Since appeals to the EAT are on points of law only, this plainly provides a limited role for intervention, but the EAT can - and should - interfere if the ET has misdirected itself in law or reached a decision contrary to the facts, or if the decision is perverse.

49. As for criticisms raised in respect of the ET's reasoning, by Rule 62(5) of the **ET Rules 2013**, Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**, it is provided:

> **"(5) In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how that law has been applied to those findings in order to decide the issues. Where the judgment includes a financial award the reasons shall identify, by means of a table or otherwise, how the amount to be paid has been calculated."**

50. Rule 62 does not, however, provide a straitjacket for ETs. The requirement is for the ET to substantially comply with that Rule; the Reasons provided should be sufficient for the parties to be able to understand why it was that they won or lost - see **Meek v City of Birmingham District Council** [1987] IRLR 250 CA - bearing in mind that the Reasons will be directed primarily towards parties who know in detail the arguments and issues in dispute, and do not need those details to be spelled out, as might be required if the Reasons were directed solely towards strangers.

Discussion and Conclusions

51. I start with the first ground of appeal and the question of fairness, taking into account the internal appeal in this case. It is not really in dispute that the ET was wrong to state, as it did in the last sentence of paragraph 31, that the appeal was "*only relevant if the original process was unfair*". That failed to recognise the part that the appeal process plays in the overall determination of fairness (see **Taylor v OCS**) and it was simply wrong as a matter of law (see **Tipton** and **Tarbuck**).

52. The Respondent urges that the ET's findings on the appeal - that it was superficial and failed to bring any independent judgment to the process - have to be seen in context: (1) as against the limited nature of the Claimant's internal appeal; and (2) given the ET's very full findings on all other points on fairness and, specifically, on the points raised in the internal appeal.

53. Those are fair observations but I do not consider that I can ignore the ET's erroneous self-direction in this case. First, because, although the ET has recorded only limited grounds of appeal being raised by the Claimant at paragraph 14.44 of its findings of fact, it would seem that there was some expansion of those points during the course of the telephone appeal hearing (see the ET's findings at paragraph 14.45) and I do not consider I can simply assume that the broader points rejected on the appeal did not potentially raise matters that might have affected the outcome (for example, as to whether the Claimant should have been compared with Account Managers outside the UK). In the circumstances, there was thus an issue before the ET - raised as part of the overall assessment of the fairness of the dismissal - as to whether the Claimant had been unfairly denied the opportunity of showing that redundancy was an insufficient reason for his dismissal in the circumstances of this case. I return to the issue of

alternatives to redundancy when addressing the second and third grounds of appeal below, but, on this first point, I do not think it could be said that the appeal was not relevant to fairness in this case because nothing raised by the Claimant on the internal appeal could, given the ET's own findings, have made any difference to the outcome. To adopt such an approach would, in my judgment, be contrary to **Tipton** and **Tarbuck**, and more generally to the approach laid down in **Polkey**.

54. I reiterate, the appeal is part of the overall process in any dismissal and thus relevant to the ET's determination of fairness. A specific part of the process might be unfair but cured by other aspects; usually the appeal itself will perform that function, but, where it is the appeal that gives rise to an unfairness in the process, that is a matter that is relevant to the ET's assessment. I do not go so far as to say it will always, or inevitably, lead to a finding of unfair dismissal - that would be to usurp the assessment of an ET on the facts of any particular case - but it is a relevant matter and it is an error of law to simply exclude it from consideration. On this point I am satisfied that the ET thus erred in its approach and I therefore allow the appeal on ground 1.

55. I turn then to grounds 2 and 3 and it seems to me right to take these together, not least as the focus of the Claimant's criticism is that the ET failed to properly consider the case on fairness in terms of the alternative possibility of his being employed as an Account Manager. In considering this case, it is necessary to bear in mind a number of factors that plainly weighed with the ET. First, the position of Account Manager was reasonably seen by the Respondent as something that the Claimant viewed as a demotion. Indeed, he had made his position very clear at an earlier stage: if he was to be treated as an Account Manager, or individual contributor - as opposed to the Sales Director heading up the team and remunerated accordingly - he would view that as a constructive dismissal. Moreover there was plainly a difference between the

roles. The Claimant had not been wrong in identifying this fact in his earlier complaint. Thus, as the ET had found, when it came to the decision to make the Claimant's position redundant, he was in a pool of one: there was only one Sales Director in the Division and that was a position that could clearly be distinguished from the Account Managers. That was an approach that the ET permissibly found fell firmly within the range of reasonable responses (see paragraph 23).

56. Secondly, when it came to searching for alternative roles, the Respondent did not, of its own initiative, suggest that the Claimant might take on the role of Account Manager. That was not something it raised, either as a straightforward alternative to his existing position or as a result of bumping another Account Manager in order to provide such an alternative role. On the ET's findings of fact, however, it would be hard to suggest that the Respondent was itself bound to raise this matter: (1) because there were no Account Manager vacancies at the relevant time; (2) because the Claimant had not identified any such suitable vacancies from the list that had been provided to him; and (3) because of the Claimant's previously forceful objection to being employed in this capacity. Given that background, I do not think it could be said that the ET obviously erred in failing to find that the Respondent's response in this respect fell outside the range of reasonable responses. This was not a case - per **Fulcrum Pharma** - where there was an obvious point in seeing whether the Claimant would be prepared to take on the subordinate role.

57. That said, there was some evidence before the ET that the Claimant had himself raised this possibility. Admittedly, he had not done so in terms of any of the vacancies he had looked at; indeed he had told Mr Spiro he had not even considered these. He was certainly not suggesting that there was an alternative subordinate vacancy that he should have been

considered for, but he had raised the position of other employees engaged as Account Managers in the Division when contending that an alternative should be found, other than making him redundant.

58. For the Respondent, it is said that this should not be taken as a clear indication that the Claimant was raising the possibility of bumping; that was not a term he used and, in fact, his emphasis was on one of the other employees being dismissed to save costs, so that he might be retained in his role. I can see that was certainly a part of what the Claimant was raising at the time and it might be possible that the Respondent reasonably understood that to be his focus, and that he was, at no stage, saying he was prepared to take on an Account Manager role. What concerns me, however, is that the ET did not make a clear finding in this regard but stated in rather more stringent terms that there was "*no sign that the claimant ever offered to take an account manager position*" (paragraph 30) and further stated that the Claimant had not suggested bumping someone like Mr Braun, something the ET apparently considered was necessary for this to be a relevant factor for the Respondent to consider, per **Barratt Construction**.

59. The ET's reasoning in this regard (see paragraph 30), is troubling in a number of respects. First, **Barratt Construction** does not lay down any such rigid rule, although, as I have allowed, it might have been open to the ET to find that it was entirely within the range of reasonable responses for the Respondent in this case not to consider the point unless and until raised by the Claimant. Second, and more substantively, on either side's case, there was at least one indication that the Claimant had offered to take an Account Manager's position. As the Respondent's counsel had acknowledged in his closing submissions, in the last consultation meeting the Claimant had alluded to the fact that he "*was acting as an AM. Why not the*

German guy?" (that being a reference to Mr Braun). In addition to this indication, the Claimant also relies on other statements he made, referring to the possibility of other Account Managers being dismissed (although the Respondent says these might equally have simply gone to his cost-cutting point), and he references the ET's own findings (in paragraph 14.29) that he had specifically raised with Mr MacGillivray the possibility of his being considered for an individual contributor role, albeit there were no specific vacancies identified in this regard.

60. Whether or not all of these references are capable of the construction the Claimant urges, or whether they should be given the alternative construction that the Respondent suggests (at least, in all but one case), I am persuaded that the Claimant is right to say it was perverse of the ET to conclude that there was *no sign* that he had ever offered to take an Account Manager position, and, further, that, because of the ET's overly rigid interpretation of **Barratt Construction**, this meant it inevitably fell into error in how it approached the question of fairness in this respect.

61. For completeness, I should say that I do not accept that the ET's error went wider. There is no reason for inferring that it failed to take into account the size and resources of this Respondent - to which it expressly referred at the outset of its findings of fact, and to which it alluded at various stages in its Judgment. I further do not criticise the ET for failing to pick up on each reference in the case law in the Claimant's closing submissions, or for failing to expressly reference particular cases. The adequacy of its reasons should be judged in context and I do not accept that it thereby erred.

62. Where the ET erred was in considering the quite discreet point of fairness in terms of the Respondent's consideration of alternatives. Specifically, as to whether the decision making

process fell outside the range of reasonable responses because of the failure to consider the alternative of the Claimant being moved to an Account Manager position which, on the ET's findings, would necessarily have meant bumping another employee. The ET erred because it considered: (1) that this could only be relevant if raised by the Claimant, although of itself that might not have been a fatal error; and (2) that the Claimant had given no sign that he would take such a position. The ET might have found that, even if the Claimant had given such a sign, the Respondent had reasonably rejected it (given, for example, the significant pay difference - see the reference in the Respondent's closing submissions - or, by way of another example, given that this would then require the Respondent to dismiss another employee), but it needed to consider the point and failed to do so and that was an error.

63. The errors I have thus identified on the consideration of alternative employment in a subordinate Account Manager role and on the issue of the internal appeal go to the ET's approach to the question of fairness. These are not, contrary to the Claimant's submissions, matters on which there can be only one answer or on which it would be appropriate for the EAT to substitute its decision. These were relevant matters for the ET's assessment and they remain for the ET to assess.

64. On the basis that this matter should thus be remitted to the ET, the parties are agreed that it should return to the same Employment Judge, if that is at all practicable.