# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
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| Dr Hamid Mirab | **v** | Mentor Graphics (UK) Limited |

**Heard at:** Watford **On:** 10 July 2018

**Before:** Employment Judge Southam

**Appearances**
**For the Claimant:** Mr M Stephens, Counsel.
**For the Respondent:** Mr T Kibling, Counsel.

## RECONSIDERATION JUDGMENT

Upon reconsideration of the judgment sent to the parties on 21 March 2017:

1. The claimant's dismissal was unfair.

2. The percentage chance that the claimant would have secured re-employment with the respondent after a fair appeal is 10%. At most such re-employment would have been at a salary comparable to that paid to Gregor Braun.

3. The claimant's remedy is listed for hearing at **Watford Employment Tribunal, Radius House, 51 Clarendon Road, WATFORD, WD17 1HP on Monday 11 March 2019** with one day allowed. The hearing is not reserved to Employment Judge Southam.

## REASONS

### Background

1. At the end of a three-day hearing in which I sat alone in these proceedings, I decided that the claimant, who had brought a claim of unfair dismissal against the respondent, had not been unfairly dismissed. I dismissed his claim. A provisional remedy hearing was vacated. My judgment and the reasons for it were sent to the parties on 21 March 2017.

2. The claimant appealed against that judgment and his appeal was determined by Her Honour Judge Eady QC sitting alone at the Employment Appeal Tribunal on 4 January 2018. She held that the appeal should be allowed in part. She decided that the matter should be remitted to the Employment Tribunal and the parties were agreed that the matter should return to me if that was at all practicable. It was practicable and I heard the reconsideration as above. In these Reasons, numbers appearing in square brackets are references to page numbers in the original hearing bundle.

**Reconsideration Hearing**

3. The parties were represented as before. The representatives presented written submissions, which I considered. I had also before the hearing re-read my own judgment and read the judgment of the Employment Appeal Tribunal issued on 8 March 2018. I also reconsidered some of the evidence. Once I had done so, and when the representatives appeared before me, I said that I agreed that it was incorrect of me to say, as I did at paragraph 30 of my judgment, that there was no sign that the claimant ever offered to accept an account manager position. In particular, the claimant had said in an email addressed to Daniel MacGillivray [228] at the time of the first consultation meeting: "Does that mean I am not going to be seriously considered for an individual contributor role?" I also accepted that, at the second consultation meeting held on 29 February 2016 [269-270] the claimant said: "I was acting as an AM - why not the German guy?" I accept that these were indications that the claimant might have been willing to consider the position of account manager.

**Issues**

4. The questions I had to decide were limited to two aspects of the process which led to the claimant's dismissal. The Employment Appeal Tribunal's direction to me appears at paragraphs 53-63. I take these points in reverse order, because that is how I considered them on reconsideration. The first question I considered was whether the respondent's failure to consider the alternative of the claimant being moved to an account manager position, which would have meant "bumping" another employee, fell outside the range of reasonable responses. Accepting as I do that there were indications that the claimant was willing to consider the position of account manager, the question therefore becomes whether, set against that background, the failure to consider that alternative fell outside the range of reasonable responses.

5. The second question I had to decide was whether the unsatisfactory nature of the appeal in this case of itself rendered the dismissal unfair. It was said by the Employment Appeal Tribunal at paragraph 54 of their judgment that, where the appeal gives rise to unfairness in the process, it will not inevitably lead to a finding of unfair dismissal, but it is a relevant matter and it is an error of law to exclude it from consideration. I therefore have to apply those considerations in relation to the claimant's appeal.

**Submissions and Conclusions – Re-employment**

6. I therefore begin with the question of alternative employment. Mr Kibling submitted that there were five matters which suggested that, notwithstanding that the claimant had given the indications referred to above about the possibility of his taking an account manager position, it was not outside the range of reasonable responses for the employer not to consider the possibility of bumping another employee to enable the claimant to take that employee's position.

7. The first of those matters was that in March 2015, on the occasion of the restructure which led to the division of the respondent group's worldwide Embedded Systems Division being divided into a General subdivision and an Automotive subdivision, the claimant had said [93] that he gave up a very good job with wide responsibility and was not prepared just to become an account manager selling below-par non-competitive products. If the respondent was doing this so that he would resign, he would sue the company and he said he had been advised that he had a very good case. Thus, Mr Kibling submitted, the claimant had already rejected the idea of becoming an account manager.

8. The second point relied upon in supporting the proposition that it was not outside the range of reasonable responses for the respondent not to consider the suggestion, was that there was a significant difference in salary, amounting to some £70,000, between the claimant's salary and that of Gregor Braun based in Germany.

9. The third reason was that there had been financial reasons for the claimant's termination. There was investor pressure to improve the company's performance generally and the claimant was operating at only 46% of his team target.

10. The fourth point relied upon by Mr Kibling was that the claimant did not look, or perhaps more accurately, stated that he had not looked at the jobs on the company's vacancy list during the consultation period. The claimant told his employers that he had not looked at the list, although he had in fact.

11. Lastly, Mr Kibling relied on the proposition that the claimant did not have automotive skills and did not speak French or German.

12. For the claimant, Mr Stephens said that, in answer to a request for further information, the respondent's solicitors had indicated that the claimant's skills were not an issue and that the Embedded Systems division of the company had been identified as an area of potential growth where it should seek to expand its activities and is striving to have a fully trained and skilled workforce [43]. He submitted that this should be the context for the search for alternative employment; the company had a continued need for skills in that area. It was not for the claimant to raise the issue, but it

might well be reasonable for the respondent to consider the matter of its own initiative.

13. In case it should be submitted that the claimant's comment at [270] was in the context of selection for redundancy as opposed to a search for alternative employment, Mr Stephens submitted that the reasonable employer will recognise that the point had been made and take it into account in considering questions of possible re-deployment.

14. Mr Stephens also relied on the point that I had made in relation to the appeal, that Dr Geeva was wrong to suggest that the company was only considering the possibility of alternative employment within the UK.

15. My conclusions on the question of alternative employment are as follows. In relation to the points relied upon by Mr Kibling, I take them in order as set out above. I do not consider that the fact that the claimant had threatened to sue the company for constructive dismissal back in March 2015 is relevant to a redundancy position one year later. If that was the only factor, the company might still have considered the possibility of alternative employment, and more specifically bumping another employee in order to accommodate the claimant in an account manager role. Nor do I think that the difference in salary between the claimant and Mr Braun, alone, is a matter which absolves the respondent from responsibility to consider that question. If it was a necessity to offer the claimant a much reduced salary and if bumping was for other reasons a realistic possibility, then the difference in salary should not have dissuaded the respondent from taking that action. However, the third point relied upon by Mr Kibling is I believe relevant and material to the question whether it lay outside the range of reasonable responses for the respondent to fail to consider bumping. It was the fact that the claimant was working at 46% of his team target. In my judgment that is something that the employer is entitled to bear strongly in mind as part of this process, as well as the first two considerations.

16. As to the fourth matter relied upon by Mr Kibling, that the claimant falsely told his employers that he had not looked at the vacancy list, this suggests a lack of engagement on the claimant's part. In my judgment it is highly relevant to the question whether an employer should reasonably consider such a step as the bumping of another employee so as to accommodate the claimant in a subordinate position.

17. The third and fourth matters are therefore reasons operating on the employer's mind, which led them not to consider bumping Gregor Braun so as to accommodate the claimant.

18. The last factor relied upon, in my judgment, is not relevant. I found as facts that the claimant's specialism in security was relevant to automotive applications as well as to other applications, and it was accepted that he could not speak French or German. I was told today that the language of the company was English but it seemed to me that an account manager might well have to engage with customers in their own languages. In fact,

I heard no evidence about the extent to which that was necessary and cannot make any findings in that respect. Today, what is clear from my earlier findings of fact was that the automotive division was settled and that, when the claimant was asked if he wanted to join the automotive division, he said that he wanted to go back to the status quo, which was something different.

19. Finally, I need to consider the question of bumping itself. It seems to me that it is a fairly drastic step for a company to take. The proposition is that someone without employment rights might well be dismissed so as to accommodate somebody who does have employment rights. But the position here is more complicated because Mr Braun worked in Germany and I heard no evidence about employment laws in Germany.

20. It is a finely balanced decision but I consider that, taking all of those factors into account, it was not outside the range of reasonable responses for the respondent not to consider bumping Mr Braun so as to accommodate the claimant in an account manager role. I accept of course that the matter was raised in the way in which I have described above, and the claimant did not himself raise the question of bumping. It might have been reasonable in principle for an employer to consider bumping, but on the facts of this particular case I do not consider that it was outside the range of reasonable responses for them not to do so. I note from the decision of the Employment Appeal Tribunal (paragraph 62) that it was open to me so to conclude, once I accepted that some indication had been given by the claimant about a willingness to consider an Account Manager role.

**Conclusions – Appeal**

21. I now turn to the question of the appeal. My view about the appeal was expressed somewhat briefly in paragraph 31 of my original judgment. I said that it was a superficial exercise and that Dr Geeva brought no independent judgment to the process. He was also wrong about the question of whether a search for alternative employment could be confined to the UK.

22. On re-reading the claimant's appeal dated 3 March 2016 [279-280], I note that the claimant did not mention the question of alternative employment. He did however, refer back to his email of 21 February and so I considered that document as well [267-268], although Mr Stephens did not rely on it. Perhaps that was because the claimant did not mention any wish to be re-deployed in that document either. Dr Geeva in his evidence before me accepted (paragraph 10 of his witness statement) that the claimant had suggested at the appeal conference call that he was simply an account manager and whilst he should have been regarded as being potentially redundant; others should have been selected in the event. Dr Geeva appears to have regarded this point as simply going to the question of the construction of the pool for the selection and Dr Geeva did not address the question of whether the claimant might be offered an account manager

position to be achieved by means of bumping. The question I have to decide is whether it was outside the range of reasonable responses for him to so fail, notwithstanding that the claimant himself did not raise the matter. I must bear in mind that, even though I have held that the dismissal itself was not unfair, I cannot ignore the appeal process. In this respect I accept that the authorities referred to in the appeal proceedings: Taylor v OCS Group Ltd. [2006] ICR 1602, West Midlands Co-Operative Society v Tipton [1986] ICR 192 and London Central Bus Company Ltd v Manning UKEAT/0103/13 are binding on me.

23. It seems to me that it would have been possible for Dr Geeva to ask the claimant whether he was seeking re-employment with the company and if his answer was that he did so, there might well have been an adjournment to consider whether that was feasible. I accept that an appeal is an opportunity for an employer to have a fresh look at a situation which has led to someone's redundancy. That did not occur in this case. In my judgment it does fall outside the range of reasonable responses for an employer to fail in that way. The purpose of an appeal is to give the employee a final opportunity to avoid losing his job. In my judgment the limited nature of Dr Geeva's appeal process denied the claimant that opportunity and rendered the dismissal unfair.

**Polkey**

24. In the light of that finding, communicated to the parties after my deliberations on the day of the hearing, further submissions were made. Mr Kibling suggested that, if there had been a fresh look at the question, nothing would have come of it. He conceded that there was a very small chance of re-employment as a result of anything that might have resulted from the suggestion that I now think Dr Geeva should have made. Mr Stephens on the contrary submitted that there was a very considerable chance that the claimant might have been re-employed, and that there was even a possibility of creating a vacancy.

25. If as I accept, a failure to conduct a fair appeal process could render the dismissal unfair, there must be a possibility that it would ultimately make no difference to the outcome, although it may be relevant to remedy: Polkey v A E Dayton Services [1988] ICR 142 HL. In Software 2000 Ltd v Andrews [2007] ICR 825 it was said by Elias J, at paragraph 54 of his judgment, that:

> 24.1. (1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.
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> 24.2. (2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the

> employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).
>
> 24.3. (3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.
>
> 24.4. (4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

26. In assessing a Polkey deduction, there is no need for an "all-or-nothing" approach. Tribunals can and should assess the percentage chance that the result would have been the same if a fair procedure had been followed.

27. I do not accept Mr Stephens' point about the likelihood of re-employment. Any question of determination of the possibility that a different result might have come about on application of Polkey principles must nevertheless be based on the evidence presented to the Tribunal, accepting that it is for the Tribunal to draw such inferences that are reasonable in order to arrive at what is a speculative judgment.

28. My findings in this respect rely upon evidence given at the full merits hearing. There has not been a remedy hearing. The Polkey question had not arisen at that time.

29. In his evidence to the Tribunal at paragraph 89 of his witness statement Mr MacGillivray said that he pursued the request to add back some headcount costs, but in line with his initial inclination he asked only for a reduced sum to cover an applications engineer, which is a technical post.

30. The fact that the claimant was on a much higher salary than Gregor Braun is also relevant, but both of those matters go to the question of whether or not an additional post could have created and not the question of bumping, which is the question I have been asked to consider.

31. However, the fact that the claimant was working at 46% of his team target is a relevant factor to assessing the chance that the claimant might have been offered and accepted alternative employment as a result of a bumping exercise involving Mr Braun.

32. I have also to bear in mind that this is a senior employee and that the only possibility of his securing re-employment with the respondent was if a less senior employee on a much lower salary was bumped so that he could be

accommodated. In my judgment this in an inherently unlikely scenario on the facts which I heard.

33. I also bear in mind that Mr MacGillivray asked the claimant if he was looking to go back into the automotive division. That suggests that there might have been a possibility of re-employment there, but I come back to the other relevant finding in relation to this that there were no vacancies within the embedded systems division worldwide. Bumping was therefore the only possibility.

34. I cannot hold that there was no possibility that the claimant could have secured some form of re-employment by that means, but for the reasons given above (paragraphs 29-33), I put the possibility at a very low chance and I assess it at 10%. I also think that the process might have been extended by not more than two weeks to allow the respondent to consider the position, if a fair appeal as indicated had taken place.

35. Having regard to all of those matters I need to reverse my earlier decision to the effect that the dismissal was unfair, although that relates only to the appeal and not to any failure on the part of the respondent to identify alternative employment. I have also concluded that the prospect of the claimant securing re-employment by the route I have described was 10% and that should be reflected in any remedy. Furthermore, at most, re-employment, if it had occurred, would have been in my judgment at a salary comparable to that paid to Gregor Braun.

36. I sincerely hope that the parties will in fact be able to reach agreement about this matter without further hearings. It is now more than two years since the dismissal and over 15 months since my decision was sent to the parties. A remedy hearing has been fixed and the representatives agreed that it would not be necessary for me to determine that remedy should the remedy hearing itself be necessary.

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Employment Judge Southam

Date: 24 / 8 / 2018

Sent to the parties on: .....

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For the Tribunal Office