RM

EMPLOYMENT TRIBUNALS

Claimant: Mr Barrington Brown

Respondent: Hewlett-Packard CDS Limited

Heard at: East London Hearing Centre

On: 26th and 27th July 2018

Before: Employment Judge Reid (sitting alone)

Representation

For the Claimant: Mr A Korn, Counsel

For the Respondent: Mr A Smith, Counsel

RESERVED JUDGMENT

The judgment of the Employment Tribunal is that:-

1. **The Claimant was not unfairly dismissed by the Respondent contrary to s94 Employment Rights Act 1996 and this claim is dismissed.**

2. **The following claims were withdrawn either prior to or at the hearing and are dismissed on withdrawal:**

   - **claim for automatic unfair dismissal under s103A Employment Rights Act 1996 (protected disclosure)**
   - **claim for automatic unfair dismissal under s104 Employment Rights Act 1996 (assertion of a statutory right)**
   - **claim under s189 Trade Union and Labour Relations (Consolidation) Act 1992 for a failure to inform and consult appropriate representatives**
   - **claim for an unlawful deduction from wages under s13 Employment Rights Act 1996.**

3. The claim under Regulation 15 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE 2006) did not proceed because the Tribunal did not have jurisdiction to hear it because it was brought out of time.

REASONS

Background

1. The Claimant was employed by the Respondent from 16th February 2011 (including prior service with his previous employer Xchanging Global Insurance Ltd, 'Xchanging') to 15th May 2017 when he was dismissed following a move of his job from Basildon to Gatwick. That move arose because of a service provision change under TUPE 2006 whereby the contract to supply network support to Gatwick Airport Limited held by his previous employer Xchanging transferred to the Respondent in March 2017.

2. The Claimant brought claims for unfair dismissal, for a failure to inform and consult under Regulation 15 of TUPE 2006, for a failure to consult under s188 Trade Union and Labour Relations (Consolidation) Act 1992 and for unpaid wages under s13 Employment Rights Act 1996 amounting to £866. The Claimant withdrew a number of claims prior to the hearing (identified in the list of issues as withdrawn) namely the s188 claim (it being accepted that there were insufficient dismissals to trigger collective consultation obligations), for unfair dismissal based on assertion of a statutory right under s104 Employment Rights Act 1996 and for unfair dismissal on the basis of having made a protected disclosure under s103A Employment Rights Act 1996. He also withdrew his claim for unpaid wages during the hearing.

3. The Respondent raised a preliminary point on the claim for a failure to inform and consult under Regulation 15 of TUPE 2006, on the basis that it had been brought outside the time limit in Regulation 15(12). I decided to deal with this matter at the outset rather than leaving the matter to be determined at the end of the hearing (as contended for on behalf of the Claimant) because if not allowed to continue it would reduce the area of enquiry by quite some degree given that the detail of the TUPE consultation process undertaken by the transferor prior to transfer would not need to be covered in detail. I did not extend time under Regulation 15(12) and therefore did not have jurisdiction to hear the Regulation 15 claim. I gave oral reasons at the hearing. However I identified that the context of the subsequent redundancy consultation by the Respondent was the prior TUPE consultation by the transferor and that some limited cross-examination of the Respondent's witnesses about that process might be appropriate (to the extent they were involved) for example in relation to what the Claimant had been told was happening to him and his job.

4. The Claimant attended the hearing and gave oral evidence. The Respondent's witnesses were Ms Ibbotson (HR), Mr Stranks (the Claimant's manager post

transfer), Mr Sharpstone (involved in the management of the transfer of the Gatwick contract to the Respondent) and Mr Trethowan (who dealt with the Claimant's appeal against dismissal). There were witness statements from all the witnesses plus two supplemental witness statements, from the Claimant and Mr Sharpstone, both of which were admitted because both dealing with the same additional issue. There was a one file bundle. I was provided with helpful written submissions on both sides, supplemented by oral submissions, including in relation to any *Polkey* deduction and contributory fault in the event the Claimant went on to win his unfair dismissal claim and compensation needed to be decided.

Findings of Fact

The Claimant's employment at Basildon and move to Gatwick

5. The Claimant was employed by Xchanging from 16th February 2011 (page 32) as a Network Engineer based in Basildon, working office-based and remotely for Xchanging's client London Gatwick Limited. He worked in this way with another colleague also based in Basildon, Mr Riyaz. The other employees dedicated to the Gatwick contract were based at Gatwick. Clause 3 of his contract recorded his place of work as Basildon but also said that he could be required to work at other locations in the UK on a permanent basis (page 34).

6. The Claimant was notified along with the other affected employees that there was going to be a change of contractor such that their employment would be transferring to the Respondent. There had been some initial discussion as to whether the Claimant and Mr Riyaz fell within the scope of the transfer (page 87A-88B) but it was then confirmed to the Claimant and Mr Riyaz that they did fall within the transfer on 23rd February 2017 (page 88C). The transferor identified that this meant a move for the Claimant and Mr Riyaz to Gatwick (page 89,90). I find that the first time the Claimant became aware that a move to Gatwick was being implemented was on 1st March 2017 when Mr Sharpstone met with the Claimant and Mr Riyaz in Basildon (AS para 9). Mr Sharpstone reported back to Ms Ibbotson of the Respondent that the meeting had gone well (page 92) from which I find that the Claimant had not said at the meeting that he would not move to Gatwick. The Claimant told Mr Sharpstone (page 92) that he would be on leave from 7th March (but not that it was sick leave in order to have an operation on his foot). The Claimant was therefore aware from at least 1st March 2017 that his job was moving to Gatwick. He was already aware that the transfer was scheduled for 28th March 2017 (page 89B) so had some idea of the timescale.

7. I find that the reason for the move of the Claimant's and Mr Riyaz's jobs to Gatwick was because of the client's requirement that all employees now had to be based at Gatwick and two employees could no longer do any work remotely from another office location. The Respondent provided the client with a statement of works recognising that the client wanted to improve operational support (page 68). The services were to be provided on-site (page 69) and by way of an on-site team, the team size needing to be sufficient to deliver the service. I find that the statement of works was the basis on which the Respondent was awarded the contract by the client and whether or not the

terms were legally binding or not, the commercial reality was that the client was allocating the contract to the Respondent on the basis that the arrangement was to be an on-site service with all staff based at Gatwick. I find that the detail of who was in the team and how the work was organised or allocated was left up to the Respondent because the client did not stipulate the size of the team or the necessary shift arrangements but however the Respondent organised it, the client had stipulated all team members had to work on-site at Gatwick. Even if Ms Ibbotson was not prepared to initially provide the Claimant with documents to show this (C para 4), it was nonetheless the commercial reality. If she had provided it (CI para 28) it would have been clear to the Claimant that on-site employees were required so would not have affected the outcome.

8. The Claimant was however signed off sick from 7th March 2017 for a foot operation, initially signed off until 18th April 2017 (page 193, dated 20th March 2017). I find it unlikely that he did not know when he met with Mr Sharpstone on 1st March 2017 of this operation a few days later, taking into account it was pre-booked (C para 2). He also chose to tell Ms Ibbotson on 9th March (2 days after the operation) (page 96) that he was on leave, suggesting holiday not sick leave. I find he was not being forthcoming with the Respondent at this stage as to why he was absent, even in general terms and even if he did not wish to discuss the details of his health with the Respondent at this stage when it was not yet his employer. If he was at this stage really wanting to stay with the Respondent after transfer in an alternative role not involving Gatwick (or keen to explore if anything else was possible) I find he would have been more forthcoming as he would have been keen to make sure that his recovery time off could be accommodated and any arrangements necessary thereafter put in place.

9. Ms Ibbotson then introduced herself to the Claimant (page 94) and set up a phone call with him on 13th March 2017 (page 96, 97). Various documents were emailed to the Claimant (page 100) on 13th March including the transfer letter confirming that the job was at Gatwick (page 101). I find that Ms Ibbotson became aware that the Claimant was in fact off sick during the call on 13th March 2017 (page 172A) and that the recovery period was 2 months. I find that the Claimant did not say in this call that he would not move to Gatwick. However he did raise the extra travel time and cost of the travel (CI para 12) and there was a discussion about possible shift patterns, travel allowances and working from home.

10. I find based on the email at page 173 that the Claimant and Mr Riyaz had however told Ms Shand the HR manager at Xchanging that they did not want to move and wanted to be made redundant. Whilst there was no direct evidence from Ms Shand on this issue, I find it likely that that if the Claimant (and Mr Riyaz) were already thinking they did not want to transfer and wanted to be made redundant instead, they would tell their then current employer Xchanging rather than the Respondent who was not yet their employer. I find based on the Claimant's oral evidence that the idea of redundancy came up in discussions with Ms Shand because the Claimant wanted to know his options. In any event Ms Ibbotson became aware of this on 16th March 2017 (page 173) but not directly from the Claimant himself.

11. Ms Ibbotson emailed the Claimant on 20th March 2017 (page 177) asking him to confirm his travel expenses and to confirm when he might be expected to return to work so that whether he could work at home until mobile again could be explored. The Claimant's first sickness certificate was obtained on this date (page 193) despite one being required after 7 calendar days absence (page 36). Ms Ibbotson did not mention in her email the fact that she had been told by Ms Shand that the Claimant had already asked for redundancy because she had not yet been directly told so by the Claimant himself and in any event the Respondent was not yet his employer (CI para 14).

12. The Claimant responded on 23rd March 2017 (page 180). He did not respond to the question raised by Ms Ibbotson (page 177) about travel expenses and working from home whilst not mobile from which I find he was not saying it was just a temporary mobility issue but a permanent problem with the location which would not be helped by the payment of travel expenses or anything else. In his oral evidence the Claimant criticised the Respondent for not putting forward more than general ideas about any flexibility but he himself did not respond on these issues to the Respondent either asking for more detail or putting forward any suggestions himself. He said that the change of location was not suitable due to his recent surgery and that as his travel time would be doubled and the job was more physical, that would aggravate his condition which was ongoing. He asked whether there was a more local office he could work from instead on a permanent basis. I find from this email that he was making it clear directly to the Respondent that he was not going to be moving to Gatwick at any stage, consistent with his oral evidence that it was never his intention to move to Gatwick. I find that the Respondent was now being directly told this. The Claimant was still not however being forthcoming about when he might come back to work (in the new office-based local location he was asking for) or what exactly his physical restrictions were or how long they might last.

13. The Claimant's email was misinterpreted as an objection to the transfer (page 181) (when taken in conjunction with his failure to return the documents sent to him, page 179) but this matter was cleared up (CI para 18). However the fact that it was so interpreted initially means that the Respondent had already received a clear message that the Claimant would not move to Gatwick with or without any changes to his terms or special arrangements, even if this didn't technically involve an objection to the transfer.

14. Notwithstanding this clear message the Respondent persevered and Ms Ibbotson (with Ms Shand) spoke again to the Claimant again on 24th March 2017 (CI para 20) and offered him a 6 month trial period so that he could try the journey and if he did not like it could then chose redundancy. In the shorter term he was asked to see Occupational Health to consider the journey in the context of his health (referral, page 189). The Claimant says nothing about this discussion in his witness statement but I find he said that he wanted to be made redundant (CI para 20), consistent with his subsequent email (page 184). Notwithstanding this, Ms Ibbotson sent an email confirming what was proposed as regards the 6 months trial (page 185) and, if that did not work out, an agreed redundancy. Ms Ibbotson confirmed that travel expenses would be paid for the 6 months even though the Claimant had not come back to her on what they were, despite being asked (page 177). She also suggested a referral to BUPA

due to the recent surgery from which I find that Ms Ibbotson was aware that adjustments might need to be made at least in the short-term from which I find she was not ruling them out in case they were in the end required. The Claimant did not engage with BUPA (page 197,202), consistent with wanting a prompt redundancy and not wanting to see if he could stay in an alternative job with the Respondent. He criticised the Respondent for having no consideration for his health needs (C para 1) but he did not engage with the OH referral which would have given the Respondent information about his health needs and was not himself forthcoming about the nature of his condition and the associated problems in any detail. Whilst he said it was because he had not agreed to the 6 month trial period (C para 19) his refusal to engage with BUPA was also consistent with wanting a prompt redundancy (because it was a 6 month trial that the Respondent had offered) and inconsistent with wanting to explore alternative jobs with the Respondent. In the absence of co-operation from the Claimant on his health issue, the Respondent could not assess his argument that the move to Gatwick was not reasonable because of his health (CI para 23)

15. After this discussion the Claimant sent an email on 28th March 2018 (page 185) saying that the relocation distance was still a problem due to his health and the fact that his journey time would be doubled. I therefore find that the Claimant was making it clear to the Respondent that whatever the Respondent offered by way of help with travel expenses or flexibility about shifts it would make no difference. He said that redundancy should now be immediately considered which the Respondent reasonably construed as a request for a redundancy as soon as possible taking into account he was never going to do the journey to Gatwick and had not made any suggestions of his own about how things could work. Whilst he understood that there was a process to be gone through he was asking for that process to start straightaway, taking into account he was off sick and not prepared to travel to Gatwick in any event and taking into account he had been told the proposed redundancy package figure. He did not repeat the request he had made earlier about working in another location closer to home and did not say he would consider other jobs. The message therefore was clearly that the Claimant wanted to be made redundant as soon as the process could be completed and this is the message the Respondent received.

Redundancy consultation process and alternative employment

16. The Respondent confirmed his request to be made redundant by letter (page 195) and invited him to a first redundancy meeting on 11th April 2018 (page 195). The Respondent was aware of its obligation to consider alternative work (page 196). The Claimant did not contact the Respondent between 6th and 11th April to tell it that he had not in fact requested redundancy (eg that somehow the Respondent had got it wrong) or to say that he was keen on alternative work. Instead he sent an email on 10th April (page 198) saying that as he was still on sick leave he would not attend the meeting. I find that he had known for some weeks that he was on sick leave (so it was not something that just came up the day before the meeting) and find that the reason was not his sick leave but that he had decided not to attend, consistent with not really engaging with the Respondent about its suggestions and not engaging with BUPA. He accepted in his oral evidence that he had been capable of attending that meeting and I find he was back driving by this time based on his oral evidence

so could have driven himself to the meeting. He did not request a phone call instead of a face to face meeting (despite the fact that a number of conversations/meetings had already been done on the phone) or ask for a postponement or special travel arrangements. I therefore find he chose not to attend, consistent with not being interested in pursuing alternative roles within the Respondent. He simply asked for information to be provided by email. There was nothing to alert the Respondent at this stage to any desire to avoid the redundancy the Claimant had asked for. The absence of such a real desire or an expressed desire was apparent when he told BUPA that he did not need to go ahead with the BUPA process because he was leaving at the end of April (page 202).

17. Ms Ibbotson then handed over the matter to Miss Giggs as she was on holiday (page 199). The Claimant promptly contacted Ms Giggs the next day raising only issues about the calculation of his redundancy payment (page 206) which he pursued with Ms Giggs over the coming days. I find that his priority was to be clear about the amount he would be paid. He did not ask about any vacancies consistent with not really wanting to stay in an alternative role.

18. Meanwhile I find that the Respondent had considered if there was alternative work for the Claimant. I find based on his oral evidence that the Claimant had access to the vacancies list via the intranet/internet and looked at these himself. I also find based on Ms Ibbotson's oral evidence that she alerted the three relevant managers of the Claimant's situation as regards any vacancies within the London area which might be available. The Claimant therefore had access to the then list of vacancies (page 239, the vacancies at the time) (apart from the final one on the list which came up after his employment terminated – see below). The only vacancy the Claimant claimed was suitable in any event was the one which came up during the appeal process (see below). After mentioning alternative work on 23rd March 2017 the Claimant had gone entirely silent on the issue. He never said even after the formal redundancy consultation started that he was keen to explore other roles or that he would accept a lower salary. I find that the Respondent made him aware of its vacancies but this was in the context of a somewhat of a vacuum, with the Claimant giving the clear impression that his priority was a prompt departure with a good redundancy package. Looking for alternative work is to some degree a two way street and the Claimant was not showing any interest in staying rather than going.

19. A second meeting was arranged for 12th May 2017 (page 212). The Claimant was informed that one outcome could be his dismissal for redundancy. At the end of the day before (page 212) the Claimant said he would not be coming. The meeting was at Gatwick but he had not attended the previous one in central London either and he did not ask for a postponement or a change or location or any other special arrangements. He confirmed in his oral evidence that he was also capable of attending this meeting but chose not to. His redundancy was confirmed by letter dated 12th May 2017 (page 215) emailed to him on 15th May 201 (page 214). I find his employment terminated on 15th May 2017 when he received the letter by email because that is the date he was notified of the termination. The fact that some payments were due to him on the next payroll date (26th May 2017) does not make the termination date that final payment date.

20. Promptly the next day the Claimant wrote to Mr Trodden, whose name he had been given as to who to send any appeal. I find that this letter was focused on the package he wanted to reach agreement on, saying he would still like to reach an agreement. He did not in terms appeal his dismissal or say that alternatives to redundancy had not been explored. His solicitor a few days letter sent in a further appeal/grievance (page 219) only now raising the issue of the Claimant not having been properly considered for suitable alternative employment. The email said that the Claimant had not been given the opportunity to provide his feedback prior to dismissal but I find, taking into account the findings set out above, that he had been asked on a number of occasions but had chosen not to reply or engage or attend the two redundancy meetings. The email also said that there was no reason the Claimant could not have worked at another office but I have found that this was not a realistic option because the statement of works was clear as to where the employees had to be based – see above.

21. The Claimant asked that the appeal be dealt with in writing (page 225). Mr Jurov tried to persuade him that the meeting was the Claimant's opportunity to give his version of events (page 224-225) but the Claimant insisted that the matter be dealt with on paper, despite the appeal meeting being on the phone (page 226). Again, this was inconsistent with wanting to discuss alternatives to redundancy including other roles.

22. Mr Trethowan dealt with the appeal. There was then a delay in communicating the outcome to the Claimant (AT para 20). The Claimant accepted in his oral evidence that the way Mr Trethowan conducted the appeal was reasonable and that Mr Trethowan had approached the issues with an open mind.

23. I find that the role at Citibank (which was the only alternative role which the Claimant suggested he would have applied for and carried out – C supplemental statement para 3) arose around the end of May 2017 (page 368 final line). The Claimant's case was that he should have been offered this role (C supplemental witness statement para 4). I find the vacancy arose in around the last week of May 2017 based on the oral evidence of Mr Sharpstone to the effect that vacancies were posted within a few days from when it was known the previous incumbent was leaving. The Respondent should reasonably have been alert to potentially suitable new vacancies arising whilst the appeal was being dealt with particularly because there was a delay in completing the appeal process and it was not suggested that the Claimant still had access to the on-line vacancies list once his employment had ended (something which the corresponding collective process envisaged could be an issue page 60 para 4.3) I find that the Respondent did not consider this role as regards the Claimant at this time. However I find that in relation to this particular role the Respondent acted reasonably in not identifying it as possibly suitable for the Claimant (ie any failure to spot it and tell the Claimant was reasonable) firstly because it was at a considerably lower salary level (the Claimant never having indicated he would consider lower paid roles such that the Respondent should have been alert to lower paid roles) and secondly because it involved physical cabling work (and the Claimant had already said he had problems due to his health which he had said meant that the more mobile Gatwick job was not suitable). In relation to the lower salary I find there was a considerable

difference. The maximum Citibank salary was £31,467. The Claimant's salary was £36,324.72 plus a shift allowance of 30% of his basic salary (page 32, 65) which meant his total gross pay was in the region of £47,221. That was some £16,000 higher than the Citibank role. In all the circumstances therefore I find that the Respondent acted reasonably in not specifically identifying and then advising the Claimant of that vacancy.

24. I also find that given the big salary drop the Claimant would not have taken the Citibank role in any event particularly at such an early stage when he had not yet started to look for other work elsewhere. I also find that the Claimant would not even have taken this role as a temporary solution pending finding another better paid job elsewhere because he consistently behaved like someone who wanted to leave and not someone who wanted to stay, even on a temporary basis.

25. I find that the Respondent complied with its own redundancy procedure in all material respects to the extent relevant (page 58-59) taking into account the above findings, as regards paras 1.1 and 1.2 (vacancies were made available to the Claimant and a redeployment process followed) and para 1.3 (internal vacancies were advertised). Para 1.4 was not complied with on the evidence before me (redeployment form to be placed on HR Sharepoint) but I have found that the 3 relevant managers were aware of the Claimant's situation which achieved the same objective that those hiring were aware of his situation. The Claimant had never indicated any interest in transferring to another job, department or site (para 1.6) save for the request on 23rd March to work from a closer office location which the Respondent could not accommodate given the clarity of the client's requirements (see above). The Claimant never asked to job share (para 1.8). What the Claimant had done in practice was volunteer for redundancy once he knew it was an option (para 1.9) and the Respondent had complied with his request. There were no selection issues because the Claimant had put himself forward and not been selected.

26. Taking into account the above findings I therefore find that the Respondent had not failed to undertake a meaningful consultation with the Claimant (ET1 para 28.2) but had done what it could in the absence of any real participation and interest from the Claimant, whose primary concern was leaving with the best redundancy package he could as soon as the process could be completed. There were no selection issues (para 28.2). The Respondent considered the Claimant for suitable alternative employment (para 28.2). I find that para 4 (page 59) covered a group redundancy situation where there was going to be selection and group consultation, which did not apply in the Claimant's situation.

Relevant law

27. The relevant law is the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE 2006) as amended with effect from 31st January 2014. Regulation 7(1) provides that a dismissal of an employee is automatically unfair if the sole or principal reason for the dismissal is the transfer. Regulations 7(2) and 7(3) provide that where the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce of either transferor or transferee before or after a relevant transfer (an ETO) the

dismissal is not automatically unfair and the dismissal is regarded as for redundancy or for a substantial reason of a kind such as to justify dismissal of the employee holding the position they held. Regulation 7(3A) provides that the phrase 'changes in the workforce' includes a change to the place where employees are employed to carry on the employer's business or to carry out work of a particular kind for the employer.

28. I was referred by the Claimant's Counsel to *Donnelly Global Document Solutions Group Ltd v Besagni [2014] ICR 1008* and *Berriman v Delabole Slate Ltd [1985] ICR 546* (both of which were considering the pre 2014 amendment version of TUPE 2006).

29. If there was an ETO, the relevant law was s98 Employment Rights Act 1996 (fairness of dismissal). s139 Employment Rights Act 1996 defines a redundancy situation.

30. I was also referred on behalf of the Claimant to *Stacey v Babcock Power Ltd [1986] IRLR 3* and *West Midland Co-operative Society v Tipton [1986] IRLR 112* on the issue of alternative vacancies arising during an appeal process, to *Willliams v Compair Maxam Ltd [1982] IRLR 83* on the guidelines for a fair redundancy and to *Avonmouth Construction Co Ltd v Shipway [1979] IRLR 14* on the issue of offering a vacancy involving a demotion. I was also referred on behalf of the Respondent to *Barratt Construction Ltd v Dalrymple [1984] IRLR 385* on the issue of vacancies involving a demotion.

Reasons

31. Taking into account the above findings of fact, the sole reason for the Claimant's dismissal was the Respondent's need for him to relocate to Gatwick to service the contact with its client London Gatwick Limited. That need for the Claimant to relocate affected the Claimant and Mr Riyaz, the only two employees engaged on the contract prior to the transfer who were office- based off-site in Basildon (the rest of the transferring employees already being based at Gatwick). The Claimant therefore fell within Regulation 7(3A) TUPE 2006 because there was a 'change in the workforce', being a change of workplace. There was therefore an ETO for the purposes of Regulation 7(2) and his dismissal was therefore to be regarded as for redundancy or for some other substantial reason.

32. I considered the argument raised on behalf of the Claimant in submissions (para 20) to the effect that Regulation 7(3A) only applied where there is a change of location for all employees. I reject this argument for the following reasons. Firstly both *Besagni* and *Berriman* were considering the version of the Regulations prior to the insertion of Regulation 7(3A). Secondly the *Berriman* decision considered the phrase 'entailing changes in the workforce' (deciding it meant a change in overall numbers) and the *Besagni* decision the phrase 'the workforce' (deciding it did not include a change of location) but Regulation 7(3A) imports that entire phrase into it and gives it a specific new meaning such that a change of workplace now amounts to an ETO. Thirdly Regulation 7(3A) includes reference to employees doing work of a particular kind which means that it can cover only part of a workforce. Regulation 7(3A) was widely drafted so as not to contain the limitations contended for.

33. Taking into account the above findings of fact, the sole reason for the Claimant's dismissal was redundancy because the Respondent's requirement for employees (the Claimant and Mr Riyaz) to carry out work of a particular kind (off site remote work) in their workplace Basildon had ceased (s139(1)(b)(ii) ERA 1996).

34. Turning to the fairness of that redundancy dismissal, taking into account the above findings of fact, the Respondent had complied with its own redundancy procedure (as relating to individuals who volunteer for redundancy) conducted a reasonable individual consultation with the Claimant (though he decided largely not to take part in it) and looked for alternative work for him. He had access to all the vacancies which he in fact accessed himself and the three relevant managers were alerted to his situation as regards possible vacancies. Because the Claimant had access to all vacancies it was not a situation that Ms Ibbotson or anyone else was unfairly limiting the vacancies and too narrowly (and hence unreasonably) pre-selecting those they considered relevant. Whilst the Respondent was criticised for the list of vacancies at the time containing insufficient information for the Claimant to assess them properly (submission para 24) the Claimant accessed the list himself and if he had been interested could have asked for further details of the role he was interested in, but he didn't. There were no selection issues because the Claimant asked to be made redundant. The process was not unfair or pre-determined because the Claimant asked to be made redundant in a situation where he was not prepared to give the Respondent the information to assess whether the move to Gatwick would because of his health issues be unreasonable/too much for him or involve a need for the Respondent to make adjustments in either the shorter term or the longer term. The Claimant was citing a health reason for not being able to move but unprepared to give over the information to explain why this was the case.

35. As regards any failure by the Respondent to go any wider within the HP group to look for vacancies, I find that it acted reasonably in not doing so taking into account the Claimant's apparent disinterest in staying in an alternative role and lack of participation in the redundancy consultation process.

36. As regards the Citibank alternative job, this came up in the period when the Claimant's appeal was being processed. No-one in the Respondent in fact considered whether this vacancy might be suitable for the Claimant so it was not a case that it was considered and ruled out; it was not considered. Whilst the obligation to consider alternative work continues during the appeal process (particularly in this case where that process took some time) the failure by the Respondent to consider (ie notice it had come up) and then alert the Claimant to this particular Citibank vacancy was not unreasonable because it was not a role it should reasonably have been alert to as a reasonable vacancy to offer to the Claimant because of the very significant pay reduction. It was not therefore a role which should reasonably have come onto the radar of the Respondent during the appeal process as regards the Claimant, taking into account the Claimant's absence of real engagement on the issue of alternative work and in the absence of his having told the Respondent that he would consider something with such a significant pay cut. There had been nothing to alert the Respondent that the Claimant was keen to stay (in fact he was behaving like someone keen to go) such that it should reasonably have been alert to that new

vacancy coming up (even though at a significantly lower salary) and should then reasonably have alerted the Claimant to the Citibank role during the appeal process.

37. In any event based on the above findings of fact the Claimant would not have been interested in the Citibank role even if he had been alerted to it due to the significant pay cut and due to his prioritisation of getting as good a redundancy package as possible, because he couldn't have both. Even if the Claimant had been unfairly dismissed by the Respondent because of the failure to offer this vacancy (and I find he was not) I would assess the chance that offering him that vacancy would have made no difference to the outcome as 100%, also taking into account his oral evidence that the job was unsuitable for him as below his skills set and was more of a cabling job (and so accordingly more physical, a thing he was keen to avoid).

38. I therefore conclude that the dismissal of the Claimant was for a fair reason (redundancy) and was overall fair under s98(4) Employment Rights Act 1996.

Employment Judge Reid

6 August 2018