EMPLOYMENT TRIBUNALS

Claimant: Mr E J Ramsey

Respondent: Mitchell's of Lancaster (Brewers) Ltd

Heard at: Manchester **On:** 7 March 2018

Before: Employment Judge Horne

REPRESENTATION:

Claimant: Ms R Eeley, counsel
Respondent: Mr R Lees, counsel

JUDGMENT having been sent to the parties on 14 March 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues

1. This is the second time that this case was listed for hearing. The first hearing took place on 10 November 2017. Unfortunately, that the hearing had to be adjourned, but not before there had been a discussion of the issues that the tribunal would in due course have to determine. Following the hearing, I recorded the issues in a written case management order as follows:

   "

   2. This claim involves a single complaint of unfair dismissal, contrary to sections 94 and 98 of the Employment Rights Act 1996 ("ERA").
   3. It is common ground that the claimant was dismissed.
   4. The first question for the tribunal is whether the respondent can prove that the sole or principal reason for dismissal was that was the claimant was redundant. It is the respondent's case that the claimant was

dismissed because the requirement of the respondent's business for employees to do the work of Head of Retail Operations had diminished.

5. Whilst the onus of proof remains on the respondent, the tribunal will need to consider the claimant's contention that there was no reduction in the requirement to do work of that kind, the respondent was not facing financial constraints as it alleges, and that the real reason for dismissal was that she had been chasing the respondent for payment of her bonus.

6. If the respondent proves that redundancy was the sole or main reason for dismissal, the tribunal must consider whether the respondent acted reasonably or unreasonably in treating that reason as sufficient to dismiss the claimant. The parties agreed that the main arguments under this heading were:

    6.1. Whether the respondent adequately consulted with the claimant and whether, in particular, consultation was unreasonable because of:

        6.1.1. failure to warn the claimant prior to 10 November 2016 of the need to make a redundancy;

        6.1.2. making up its mind before consulting with the claimant (in this regard, the claimant relies on the circumstances of the dismissal of Mr Bennett as being evidence of the respondent's alleged propensity to decide on dismissal first and follow procedures later); and

        6.1.3. giving the claimant only one day's notice of the consultation meeting on 18 November 2016;

    6.2. Whether the respondent genuinely applied its mind to the problem of identifying the correct pool for selection, in the light of the fact that the following roles were not pooled alongside the claimant:

        6.2.1. Sales Director (York Brewery)

        6.2.2. Catering development;

        6.2.3. Stock taker; and

        6.2.4. Buildings Manager

    6.3. Whether the respondent made reasonable efforts to find alternatives to dismissal, in particular:

        6.3.1. "Bumping" the claimant into one of the roles identified above; and

        6.3.2. Allowing the claimant to continue in her role on reduced hours.

7. If the dismissal was unfair, the tribunal must decide the "*Polkey* issue", that is to say, had the respondent acted fairly, would or might the claimant have been dismissed in any event? The parties agreed that

this issue would be determined at the same time as the fairness or otherwise of the dismissal.

8. All other remedy issues will be addressed once the tribunal has delivered its judgment on fairness and the *Polkey* issue.

Evidence

9. I considered documents in an agreed bundle. As discussed with the parties at the outset of the hearing, I pre-read the documents to which the witnesses had referred in their statements, and then looked at any further documents to which my attention was drawn orally during the course of the hearing.

10. At the beginning of the hearing, counsel raised an issue relating to a connection between a partner in the claimant's solicitors' firm and an organisation linked to the respondent. It is unnecessary for me to go into further detail. Following that discussion, I agreed to make an order in the following terms:

> "It is ordered that documents disclosed for the purpose of these proceedings are not to be used for any purpose other than the litigation."

11. The respondent called Mr Barker, Mrs Hodge and Mr Newton as witnesses. The claimant gave oral evidence on her own behalf and called her partner, Mr Whitehead. All these witnesses confirmed the truth of their written statements. They all answered questions, with the exception of Mr Whitehead, of whom no questions were asked.

Facts

12. The respondent is a family-owned brewery business with approximately 180 employees. It has a mixed estate of managed and tenanted pubs. It is one of two trading companies owned by Mitchell's Brewery Limited. The other trading company is York Brewery Co Limited ("York BCL"). The group also included Mitchell's Pub Management Limited ("MPML") until April 2014, when MPML was wound up.

13. At the time with which this claim is concerned, Mr Jonathan Barker was the Managing Director of both the respondent and York BCL. The Human Resources Director of both companies was Mr Barker's cousin, Mrs Julia Hodge. As if to underline the point that this was a family-run business, Mrs Hodge had one direct report, who was her husband, Mr Ashley Hodge. His role title was Building Manager. He was a time served aircraft joiner, had Advanced City and Guilds in Building Construction and Carpentry and EITB Level 3 in engineering. 90% of his role was was "hands on", carrying out repairs and roof work.

14. York BCL had a Sales Director. Reporting to the Sales Director was the Resource and Logistics Manager, who at the relevant times was Ms Jane Thornley.

15. The claimant was employed by the respondent from 8 November 2011 until 23 February 2017, latterly as their Head of Retail Operations. She reported directly to Mr Barker. Her principal responsibility was to manage the respondent's managed pubs division. Occasionally she was also responsible for site refurbishments and new pub openings. These were relatively uncommon: there were only two refurbishments in the 6 years that the claimant was employed. Other aspects of her role included marketing of managed pubs and occasional

direct management of tenant-less pubs within the tenanted estate. Until April 2014, she also worked for MPML, managing "failing" pubs. Following the MPML wind-up, the claimant had a portfolio of 19 managed pubs.

16. The respondent had a recognised tier of management called the Senior Leadership Team ("SLT"). Members of the SLT were not directors. Their terms and conditions of employment were different from those of more junior managers. In particular, they were given health insurance benefits, they were paid different bonuses, and they had more annual leave. By 2015, the SLT had reduced in size, so that it consisted of just the claimant and Ms Thornley.

17. At the time with which this claim is concerned, the claimant's salary was £60,000. Her remuneration package included an annual discretionary bonus. Over a number of years, the awarding of bonus followed the same pattern. The respondent's financial year end was in February. The annual accounts for that year would be audited in June, about 4 months later. At that point there would be what Mr Barker described as the "annual haggle", during which he and his senior managers would individually negotiate the bonus for that year. Once the bonus was agreed, it would usually be paid in a single lump sum sometime between July and September. In this way, the claimant was awarded and paid bonuses for the financial years 2012-2013 and 2013-2014. Though the claimant had to remind Mr Barker to pay her bonus at times, it was always amicably negotiated, paid and received.

18. From 2008, under pressure from its lenders, the respondent underwent a programme of asset sales to reduce its debts. Prior to 2015, the respondent largely sold tenanted pubs, but in 2015 the respondent started selling its managed pubs. With the reduction in its managed pub estate came a reduction in profits.

19. In the summer of 2015, Mr Barker and the claimant agreed the annual bonus for the year ended February 2015. The agreed amount was £8,000. Unlike in previous years, the bonus remained unpaid by the end of September. When, in February 2016, Mr Barker did make a bonus payment, it was only £4,000: half of the agreed sum.

20. In April 2016, the position of Sales Director at York BCL became vacant and was advertised internally and externally. The claimant did not apply. It took 3 months to fill the vacancy. Eventually, in July 2016, Mr Gary Conway was appointed to the role. His salary was equal to one of the other directors and was about £10,000 per annum more than the claimant's salary. He was not considered as being part of the SLT.

21. In the meantime, in June 2016, the respondent sold a further 11 pubs in an effort to reduce its borrowing. Three of these pubs were from the managed pubs division. Following the pub sale, Mr Barker and the claimant discussed the future of her role. It is common ground that, during the course of these discussions, Mr Barker told the claimant:

    21.1. that he intended to sell more sites;

    21.2. that the claimant's job would nevertheless be secure;

    21.3. that he was looking to bring some of the tenanted sites into direct management and to acquire more tenanted sites;

21.4. that he would try to cut costs by reducing surplus staffing in Head Office; and

21.5. that one option he was looking at was to make the in-house maintenance team redundant and replace them with external contractors.

22. At the same time as this conversation, or possibly shortly beforehand, the claimant and Mr Barker had their annual haggle. They agreed on a bonus of £10,000 for the year 2015-2016. Mr Barker wrote the figure down in his notebook. By this time, £4,000 of the previous year's bonus remained unpaid. When this was added to the £10,000 they had just agreed, the total amount of outstanding bonus was £14,000. Mr Barker sought to reassure the claimant that she would be paid this amount and that he would confirm at a later date when the sum would be paid to her.

23. In July and August 2016 the respondent went through a redundancy consultation exercise, following which 4 employees in the Marketing Department had their employment terminated and a 5th employee reduced her hours to 3 days per week.

24. On 8 September 2016, the claimant and Mr Barker met in the Borough pub in Lancaster. The claimant asked Mr Barker for an update about when her bonus would be paid. He told her that she would receive her bonus in her October salary. Shortly afterwards, the claimant returned from holiday.

25. Over the summer of 2016, Mr Barker set about implementing his strategy of acquiring more sites. He focused his attention on two potential pubs in Cartmel and one in Harrogate. Having visited the Cartmel pubs and spoke to the owner, he concluded that the up front capital cost of acquisition would be unaffordable. He pulled out of the purchase in late September 2016.

26. On, or shortly after, 26 September 2016, Mr Barker gave an internal presentation which he summarised in an e-mail to staff. It was positive in its tone and did not suggest further staff reductions.

27. The claimant returned from holiday on 26 September 2016. As she caught up with her e-mails, she saw that Mr Barker wanted to meet with her. They met in Broughton later that day. The purpose of the meeting was to discuss two members of staff at a pub in Bolton-le-Sands. Mr Barker asked the claimant to dismiss them that day because they had failed to attend for their shift. When the claimant asked whether they ought to arrange an investigation meeting first, Mr Barker insisted that the dismissal take place that day. He said he did not need grounds for dismissal because the two staff members had been employed for less than two years. As instructed, the claimant dismissed the two staff members, but she was left with a sense that Mr Barker was not interested in following procedures.

28. On 28 September 2016, the respondent sold another pub (The Boar's Head) from the Managed Estate. At round about this time, a further pub, the Wilton Arms, was put on the market for sale.

29. In September or October 2016 – it was difficult to tell from the respondent's records – a number of members of staff received pay rises. Mr Barker's salary increased significantly. The extra remuneration, as Mr Barker saw it, was a premium for his additional responsibilities in rescuing the respondent from

potential insolvency. A marketing manager's salary was raised by 5% from £3,333.33 to £3,500.00 per month.

30. On 3 October 2016, the claimant met with Mr Barker to discuss the proposed new leasehold site in Harrogate. Mr Barker said that the assignment of the lease was with the respondent's solicitors. The following day, they spoke again. The claimant asked Mr Barker whether her job would be safe and Mr Barker said that the claimant would not be made redundant. At this time, Mr Barker was still hopeful that acquisition of new sites such as Harrogate would improve the respondent's profitability and reduce the need for cost-cutting measures.

31. On 6 October 2016, the claimant began a period of leave following a family bereavement.

32. Some time in October 2016, the leasehold acquisition in Harrogate fell through. By this time, the claimant's portfolio of managed pubs had decreased to 13.

33. By 24 October 2016, the claimant had still not received any of the £14,000 bonus owed to her. Although she was still on sick leave, she e-mailed Mr Barker the same day, to discuss some operational matters. In her e-mail she asked Mr Barker to confirm that her bonus would be paid in the pay run on 28 October 2016. Three days later, Mr Barker replied. He expressed concern for the claimant's health and dealt with the operational issues that the claimant had raised. He confirmed that the dismissal of the staff members at Bolton-le-Sands had been confirmed on appeal. In relation to her query about her bonus, Mr Barker's e-mail summarised the challenging state of the respondent's finances and concluded, "This has unfortunately meant that discretionary bonus has not been paid at the end of October due to financial constraints…"

34. At the end of October 2016, Mr Barker undertook a cash flow forecast, intended to predict cash flow over the next quarter. He predicted that, by January or February 2017, the respondent would have to borrow further money in order to stay solvent. He knew from his experience of dealing with the respondent's lenders that they would not advance any further money without a credible cost-cutting plan.

35. Shortly afterwards (the evidence was unclear as to exactly when) a directors' meeting took place between Mr Barker, Mrs Hodge and the Finance Director. This was one of a number of impromptu meetings with no written agenda and no minutes. At this meeting, the directors decided to remove the SMT from the organisation. This meant deleting the roles of Head of Retail Operations and Resource and Logistics Manager. The directors were confident that they themselves could absorb the functions of the two roles. At the same time, the directors considered the possibility of deleting other roles and rejected it. In particular, they decided that they would not save money by outsourcing the building maintenance function and that they could not afford to lose Mr Hodge. My finding is that these were final decision. It was never seriously contemplated by any of them that they would change their minds. This is a significant finding and I explain, briefly, my reasons for making it. Mr Barker's oral evidence was that the decision to delete the claimant's role was made at a directors' meeting prior to the claimant being informed she was at risk. This was also what I initially understood to be Mrs Hodge's oral evidence, although she later sought to row back from it. My finding is also consistent with Mrs Hodge's subsequent actions in not discussing with Mr Barker the claimant's proposal to continue in her role

part-time. Their decision inevitably meant that the respondent had to begin a redundancy consultation process for the claimant and Ms Thornley. At no point before coming to this decision did the Directors speak to claimant about the possibility of deleting her role.

36. On 10 November 2016, the claimant was driving to Scotland to deal with family matters when she received a telephone call from Mrs Hodge. The claimant expressed her preference to continue with the call, rather than park her car and ring back. Mrs Hodge then informed the claimant that the Senior Management Team was at risk of redundancy and that the claimant's and Ms Thornley's jobs were affected. She then asked when the claimant would be able to attend a meeting. The claimant asked whether the decision was anything to do with the claimant asking Mr Barker for payment of her bonus. Mrs Hodge did not know that the claimant's bonus was still outstanding, but her surprise was as nothing compared to the shock the claimant felt. The last that she had heard about the future of her employment was Mr Barker's reassurance that her job was safe.

37. Immediately following the telephone call, Mrs Hodge sent the claimant a letter confirming the main points of the discussion. It stated:

> "…we regretfully informed the Senior Management Team that the Company is having to reduce overheads at the Head Offices in Lancaster and York. I am writing to confirm that the position of Head of Retail Operations is at risk and you should regard the receipt of this letter as warning notice of that potential redundancy".

38. The letter went on to announce the start of a formal consultation process. The claimant was invited to put forward alternative proposals and suggestions. There followed further explanation of the rationale behind putting the claimant's role at risk:

> "…it merely reflects the reduction in work load following the disposal of 40% of the Managed Estate in the last 12 months."

39. Mrs Hodge's letter asked the claimant to make contact with her to arrange the "the first consultation meeting next week". She was asked to bring to the consultation meeting any correspondence relating to the bonus.

40. Although the letter indicated that the respondent had to reduce its overhead costs, it did not explain why its proposed means of achieving that cost reduction was the removal of the SMT, as opposed to any other roles.

41. The claimant acknowledged Mrs Hodge's letter by e-mail on Monday 14 November 2016. Understandably she expressed her disappointment, having been assured that her job was safe. She asked Mrs Hodge to discuss the issue of her bonus with Mr Barker. Her e-mail not put forward any alternatives to dismissal. She informed Mrs Hodge that she would contact her later in the week to discuss a meeting date.

42. By Thursday 17 November 2016, the claimant had not made contact with Mrs Hodge. The claimant's first consultation meeting was due to take place that week and there was only one more working day left. In order to ensure that the consultation timetable did not slip, Mrs Hodge e-mailed the claimant at 9.26am on 17 November, inviting her to a meeting the following day at 2pm. The same day,

there was "without prejudice" correspondence between the claimant and Mr Hodge with a view to entering into a settlement agreement.

43. The claimant did not attend the meeting or make contact with Mrs Hodge in advance of the scheduled meeting time. At 3.52pm on 18 November 2016, Mrs Hodge e-mailed the claimant, proposing to continue the consultation via written submissions. Her e-mail repeated the rationale given in the 10 November 2016 letter. It drew the claimant's attention to current advertised vacancies, all for Pub Manager positions. On the subject of the claimant's bonus, Mrs Hodge repeated her request for supporting documents and set out her – incomplete – understanding of the current position. Mrs Hodge was unaware that a bonus had been agreed for 2015-2016. As a result, her letter only referred to the bonus for year 2014-2015 and the fact that, of that bonus, £4,000 remained outstanding.

44. The claimant e-mailed Mrs Hodge on 21 November 2016. Her e-mail included a request for further information. This included the respondent's organisation structure, role profiles, salary packages, business rationale and redundancy selection criteria.

45. The claimant did not apply for any of the Pub Manager positions. This was not because she was awaiting details of salary packages. As part of her own role, the claimant knew what a Pub Manager's salary was.

46. The settlement negotiations continued. In parallel, the claimant and Mrs Hodge discussed ways to move the consultation forward. On 25 November 2016, the claimant proposed a series of dates for a meeting, the earliest of which was 5 December 2016. Mrs Hodge replied on 28 November 2016 that she did not agree to wait so long for the first meeting. On 30 November 2016, the claimant e-mailed Mrs Hodge, accusing her of failing to consult, and indicating that she would be happy to meet up for a consultation meeting. As it turned out, the meeting did in fact take place on 5 December 2016, but it was quickly abandoned because the claimant became upset and then requested an "off the record" discussion to negotiate possible settlement. A further meeting was arranged for 9 December 2016, but by agreement that meeting was also converted into an "off record" discussion. Negotiations continued.

47. On 16 December 2016, the claimant e-mailed Mrs Hodge with a mixture of negotiating points and observations about the consultation process. She expressed her view that the consultation had been a "paper exercise" and that a decision on her redundancy had already been made. She did not suggest any alternatives to dismissal. A meeting was arranged to take place later that day, but Mrs Hodge received a message that the claimant was too distressed to attend. She therefore re-arranged the meeting to 19 December 2016, insisting that, if they had not reached a settlement by then, the meeting would go ahead as a redundancy consultation meeting.

48. The meeting went ahead on 19 December 2016. Much of it was unproductive. The claimant made criticisms of the consultation process up to that point, and Mrs Hodge gave her competing point of view. They discussed what payments would be owing to the claimant in the event that her employment were to terminate. Eventually there was some discussion about the rationale for placing the claimant's role at risks and the possible alternatives. The claimant asked why the building maintenance team had not been put at risk. Mrs Hodge replied that their workload had not been significantly affected by the reduction in the

Managed Estate: it just meant that they had a shorter backlog of work. The claimant asked why the SMT had been chosen for cost saving as opposed to the catering function. Mrs Hodge's reply was that the SMT functions could be absorbed by the directors. After a break, the conversation turned to the claimant's bonus. Mrs Hodge confirmed that the claimant would be paid her full £14,000 entitlement, regardless of whether she entered into a settlement agreement. The claimant suggested the possibility that she might work part-time as a solution to the reduction in her portfolio of managed pubs. Mrs Hodge asked her whether she was interested in any of the Pub Manager positions. The claimant replied, "It is a job role I have never completed…But I would [like] the opportunity to go away from today and consider it." The meeting ended with Mrs Hodge saying she would be in touch later in the week.

49. Following the meeting, Mrs Hodge discussed with the Finance Director the possibility of the claimant working part-time. They agreed that there was no requirement for a part-time Head of Retail Operations going forward. Mrs Hodge did not speak to Mr Barker about this possibility. As I have already indicated, the fact that Mrs Hodge did not bother to take this step suggests to me that Mrs Hodge already knew that a final decision had been made to delete the claimant's role altogether. As I find it, such conversation as there was between Mrs Hodge and the Finance Director was merely going through the motions.

50. Mrs Hodge did not wait for a response from the claimant about the possibility of taking a Pub Manager position. By letter dated 23 December 2016, Mrs Hodge gave the claimant "formal notice of dismissal due to redundancy." She was not required to work her notice period. The letter restated the rationale: the sale of 40% of the Managed Estate had resulted in the SMT roles, including the claimant's role, being absorbed by the directors. That being the case, the letter explained, there was no need for the claimant to remain in a part-time role. The letter listed the communications between Mrs Hodge and the claimant since 10 November 2018, describing them as "written submissions".

51. The claimant appealed against her dismissal by e-mail dated 3 January 2017. Her grounds of appeal were essentially complaints about the adequacy of the consultation process and unfairness in the course of "without prejudice" negotiations. One of her points, which the claimant had already made, was that she had never agreed to consultation taking place by "written submissions". Her e-mail did not suggest alternatives to making her redundant. In a subsequent e-mail on 8 February 2017, the claimant asked for further points to be taken into consideration. In addition to further procedural points, the claimant raised the following issues:

    51.1. She had not been given details of why her position was selected for redundancy;

    51.2. She should have been allowed to continue working in her role part-time; and

    51.3. She was not given the opportunity to be "bumped" into the roles of Catering Manager, Company Stocktaker/Auditor, or roles within marketing or HR.

52. I pause briefly to record two facts relevant to this latter ground of appeal. The roles of Catering Manager, Company Stocktaker/Auditor and Marketing Manager

were all filled by employees with more than two years' continuous employment. The other notable fact is that the role of Pub Manager was not included in this list.

53. An appeal meeting took place on 14 February 2017. It was chaired by Mr Newton, a Non-executive Director, who had had no previous involvement in the redundancy process. By the time the meeting started, Mr Newton had pre-read the considerable correspondence that had passed between the claimant and Mrs Hodge. In his non-executive capacity, Mr Newton was already aware of the asset disposal programme driven by the respondent's lenders. In general terms he had been kept up to date with staff changes, but had stayed out of the consultation process. His general contribution to the business was strategic, as opposed to operational.

54. On the day before the meeting, Mr Newton spoke to Mr Barker, who had explained that the decision to delete the claimant's role was made because of the need to cut costs following the sale of assets.

55. The appeal meeting lasted 79 minutes. During that time, Mr Newton took the claimant through her grounds of appeal, asking appropriate questions along the way.

56. Once the meeting was over, Mr Newton set about making a decision. He addressed all of the claimant's grounds of appeal in an 11-page outcome letter dated 20 February 2017. His overall conclusion was that the dismissal should stand. The process of deciding the outcome and writing the letter took him about three days. I am satisfied that he went through the exercise conscientiously and methodically. It was his own decision and he wrote the letter in his own words. When it came to operational matters, however, such as what roles were required within the business, Mr Newton deferred to the judgment of Mr Barker. Mr Newton rejected the notion that the claimant should have been considered for "bumping". It is not clear whether Mr Newton reached this particular decision for himself, or whether he deferred to the opinion of Mr Barker. Mr Newton did not consider the question of whether the claimant should have been placed in a selection pool alongside Mr Conway. That point had not been raised during the appeal meeting.

57. Mr Newton responded to the claimant's suggestion of part-time working. His outcome letter merely stated,

> "this was addressed in Mrs J Hodge's letter to you on 23 December 2016."

58. In his evidence to the tribunal, Mr Newton told me that he thought that a part-time Head of Retail Operations role would be difficult to fulfil in practice, because of "the 24/7 nature of the pub business". He did not express that reason in his letter. My finding is that, although this was Mr Newton's sincerely-held belief at the time of giving evidence, it was not something that went through his mind at the time of deciding the appeal. Had it been part of his reasoning, I would have expected it to have been stated in the very detailed outcome letter. It is more likely that, on this point, Mr Newton allowed himself to be guided by the opinion of the executive directors.

59. At a date of which I am unaware, Ms Thornley was also dismissed for redundancy.

60. So far as I am aware, nobody was recruited to replace the claimant or Ms Thornley. If recruitment of a successor had been a serious possibility, I would have expected the respondent's witnesses to have been asked about it. For my purposes I proceed on the footing that neither of these individuals was replaced.

61. With the exception of the reason for dismissal, to which I shall return, this concludes my findings of fact.

Relevant law

62. Section 98 of ERA provides, so far as is relevant:

> 98 General
>
> (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 … a reason falling within subsection (2) …
>
> (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.

63. Section 139 of ERA defines redundancy. It reads, relevantly:

> (1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to-
>
> …(b) the fact that the requirements of that business…(i) for employees to carry out work of a particular kind…. Have ceased or diminished or are expected to cease or diminish.

64. "That business" means the business for the purposes of which the employee was employed by the employer: s139(1)(a).

65. The reason for dismissal is the set of facts known to the employer, or the set of beliefs held by him, that causes him to dismiss the employee: *Abernethy v, Mott, Hay and Anderson* [1974] ICR 323, CA.

66. Where the reason for dismissal is redundancy, the tribunal must consider whether the employer acted reasonably or unreasonably in treating redundancy as a sufficient reason to dismiss. In *Williams v Compair Maxam Ltd [1982] IRLR 83*, the EAT set out the standards which should guide tribunals in determining whether a dismissal for redundancy is fair under s 98(4). Browne-Wilkinson J, giving judgment for the tribunal, expressed the position as follows:

"… there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:

- The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.
- The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.
- Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.
- The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.
- The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

The lay members stress that not all these factors are present in every case since circumstances may prevent one or more of them being given effect to. But the lay members would expect these principles to be departed from only where some good reason is shown to justify such departure. The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim."

67. It is not for the tribunal to substitute its view for that of the respondent. The tribunal can intervene only where the respondent has acted so unreasonably that no reasonable employer could have acted in that way.

68. An employer dismissing for redundancy must act reasonably in deciding on which employee or employees should be "pooled" for selection. In *Capita Hartshead Ltd v Byard [2012] IRLR 814,* Silber J summarised the relevant legal principles in this way:

"Pulling the threads together, the applicable principles where the issue in an unfair dismissal claim is whether an employer has selected a correct pool of candidates who are candidates for redundancy are that

(a) "It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted" (per Browne-Wilkinson J in *Williams v Compair Maxam Limited*…)

(b) "…the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn" (per Judge Reid QC in *Hendy Banks City Print Limited v Fairbrother and Others* (UKEAT/0691/04/TM);

(c) "There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem" (per Mummery J in *Taymech v Ryan* EAT/663/94);

(d) the Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has "*genuinely applied*" his mind to the issue of who should be in the pool for consideration for redundancy; and that

(e) even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it."

69. An employer will not usually dismiss fairly for redundancy unless it makes reasonable efforts to consult its employees. In *R v British Coal Corporation and Secretary of State for Trade and Industry ex parte Price and Others* [1994] IRLR 72, Glidewell LJ said this:

"24. It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in *R v Gwent County Council ex parte Bryant*, reported, as far as I know, only at [1988] Crown Office Digest p19, when he said:

'Fair consultation means:

(a) consultation when the proposals are still at a formative stage;

(b) adequate information on which to respond;

(c) adequate time in which to respond;

(d) conscientious consideration by an authority of the response to consultation.'"

70. Where the employee appeals against dismissal, the tribunal must examine the fairness of the procedure as a whole, including the appeal: *Taylor v. OCS Group Ltd* [2006] EWCA Civ 702.

71. Where an employer has failed to follow procedures, one question the tribunal must *not* ask itself in determining fairness is what would have happened if a fair procedure had been carried out. However, that question is relevant in determining any compensatory award under section 123(1) of ERA: *Polkey v. A E Dayton Services Ltd* [1988] ICR 142. The tribunal is required to speculate as to what would, or might, have happened had the employer acted fairly, unless the evidence in this regard is so scant it can effectively be disregarded: *Software 2000 Ltd v. Andrews* [2007] IRLR 568.

Conclusions

Reason for dismissal

72. The respondent has satisfied me that the requirement of the respondent's business for employees to do the work of the SMT had ceased. This was because of a decision made by Mr Barker, Mrs Hodge, and the Finance Director. Their decision was that the work done by the Head of Retail Operations and the RLM role could be done not by dedicated post holders but by the directors themselves.

73. The respondent has also proved to me that the claimant's dismissal was attributable, wholly or mainly, to that state of affairs. Between April 2014 and November 2016, the claimant's portfolio of managed pubs had decreased from 19 to 13. There is nothing to contradict the respondent's evidence that the work of the SMT was absorbed. My finding, albeit based on inference, was that nobody replaced the claimant or Ms Thornley in their roles. Moreover, it makes sense that the respondent was looking to cut costs at a time when it was being forced to go through a programme of asset reduction driven by its lenders.

74. The claimant relies on a number of facts pointing away from a genuine redundancy dismissal. I deal with them briefly:

    74.1. *The September/October pay rises* - In my view, salary increases are not necessarily inconsistent with a decision by the respondent to cut costs in certain areas. Mr Barker's pay rise is explained by his belief, which I found to be genuine, that he deserved a corporate rescue premium. The 5% increase in the marketing manager's salary makes little difference compared to the saving generated by deleting two senior roles.

    74.2. *The reassurances that her job was safe* – Mr Barker must have changed his mind between giving his words of comfort to the claimant in September 2016 and the directors' decision to delete her role in late October or early November 2016. The claimant is entitled to wonder what caused that apparent U-turn. I accept Mr Barker's explanation. Up to October 2016, he was hoping to acquire new sites, increase profits, and avoid further redundancies. By 10 November 2016, he had realised that this strategy would not work. The proposed acquisitions had fallen through. The respondent would run out of money unless it could convince its lenders that it was taking further costs out of the business.

74.3. *The claimant's chasing payment of her bonus and her absence on sick leave* – It is unlikely in my view that the decision to dismiss the claimant was because she had taken sick leave, or had chased her bonus payment or because Mr Barker had taken the decision to delay paying the balance of the claimant's bonus on 27 October. Dismissing the claimant would not make it any less likely that the claimant would insist upon payment. If anything, a dismissal would lead to an entrenched position, in which the claimant would be more likely to resort to litigation to secure her entitlement. Moreover, the claimant's theory ignores the fact that Ms Thornley was dismissed for redundancy at the same time. It seems a little far-fetched to me to suggest that Ms Thornley's role was sacrificed in order to construct a sham redundancy for the claimant, whether it was motivated by the claimant's sick leave or because of her bonus.

75. The reason for dismissal was that the claimant was redundant. I must therefore decide whether the respondent acted reasonably or unreasonably in treating redundancy as being a sufficient reason to dismiss her.

Reasonableness

Size and resources

76. The respondent is a medium-to-large employer. Although it was operating under financial constraints, it could be expected to devote substantial resources to ensuring that it carried out its redundancy procedures fairly.

Consultation

77. Many of the claimant's arguments on reasonableness concern alleged deficiencies in the consultation process. Before judging the process against the elements of fair consultation, I start with an overview. Approximately 7 weeks elapsed between the claimant being first notified of her role being at risk of redundancy and the notice of redundancy being sent to her. During that time there was one long consultation meeting, two arranged meetings which the claimant did not attend, and one which had to be stopped because the claimant was too upset to continue. There was a further meeting at which, by the agreement of all parties, was converted into an off the record discussion to discuss proposed settlement. The consultation period was followed by a conscientious appeal with a detailed outcome letter.

78. I have considered whether there was consultation whilst the proposal to make the claimant redundant was still at a formative stage. At the time consultation began, the final decision to *dismiss* the claimant had not yet been taken. The claimant relies on her experience at Bolton-le-Sands as evidence of Mr Barker's inclination to decide on dismissal first and follow procedures later. I do not think that the Bolton-le-Sands dismissal supports this inference. The pub managers concerned did not have sufficient continuous employment to complain of unfair dismissal. (Whilst the procedures in the ACAS Code of Practice apply to all employees regardless of length of service, it is a sad fact that employers frequently dispense with these procedures for short-service employees because they do not fear any adverse consequences in a tribunal.) From the facts known to me, I cannot conclude that the claimant was bullied into entering into a settlement agreement. Although, for understandable reasons, much of the content of the "without prejudice" discussions has been kept out of my sight, I know that the negotiations

had begun by 17 November 2016 and were still ongoing by 16 December 2016. This latter date was over 5 weeks after the consultation period had begun and there still had not been an effective consultation meeting. It was reasonable of Mrs Hodge to try to move the consultation process forward by setting a deadline for the conclusion of settlement talks. Mrs Hodge did not try to use the claimant's bonus as a lever to force the claimant into a settlement. It was the claimant who raised the issue of her bonus, not Mrs Hodge. At the time the claimant raised it, Mrs Hodge did not know what Mr Barker had agreed. Once she discovered the correct position from Mr Barker, she agreed that the bonus would be paid irrespective of any settlement.

79. There was however one important part of the redundancy proposal which had passed all its formative stages by the time of consultation. This was the directors' decision to absorb the senior management team roles into their own roles. At the risk of repetition, my finding is that this decision had already been made before the claimant was first notified she was at risk of redundancy. It was an important decision. So important, in fact, that in my view, any reasonable employer would have consulted the claimant before taking it. There may well be cases in which it is reasonably open to an employer to decide on the new structure before beginning consultation, and then only to consult on such matters as pooling, selection criteria, application of the criteria and alternative employment. This was not one of those cases. The claimant was a senior manager whose opinion about the new structure might have made a useful contribution. The directors' decision inevitably meant the deletion of her role. It also inevitably meant the deletion of a role (RLM) for which she might otherwise have been able to compete in a pool alongside Ms Thornley. In my view, this shortcoming was not cured on appeal. Although Mr Newton's general approach was careful, the question of which roles were needed was an operational matter on which Mr Newton deferred to Mr Barker.

80. Another important element of consultation is the provision of adequate information. Some of the claimant's criticisms in this regard are unfounded. I have concentrated on the items that the claimant requested in her e-mail of 21 November 2016. She did not need all of them in order to respond effectively. Information about selection criteria was unnecessary: it was plain that the claimant was not in a selection pool. Nor did the claimant need to see organisation charts. She knew what the existing senior management structure was and had been told in words what it was going to be. She did not know which aspects of her role were going to be absorbed by which of the directors. In my view that is something that she would probably have been able to work out for herself, knowing the main divisions of responsibility between Mr Barker, Mrs Hodge and the Finance Director. Information about salary packages and role profiles would have been unlikely to have added significantly to the quality of the consultation.

81. There is, however, one significant piece of information which the claimant requested and to which she never received an adequate response. The claimant wanted to know the business rationale for deleting her role. All she was told was that there had been a 40% reduction in the managed estate, a need to cut costs, and that the SMT roles were being absorbed. What was missing was any explanation as to why it was the SMT roles, as opposed to any other roles, that had been chosen for absorption. Any employer who had repeatedly assured an

employee that their job was safe could be reasonably expected to provide a full explanation for changing their mind. Just as importantly, the lack of information deprived the claimant of an effective opportunity to respond to the proposal to make her redundant. I will give an example of how her ability to respond was hampered. Part of her case was that she should have been pooled alongside Mr Conway. If, instead of deciding to absorb the role Head of Retail Operations, the directors had decided to expand that role to include some of the functions of Sales Director, then it may have been appropriate to pool the claimant and Mr Conway together. Arguably, Mr Conway might have been placed in a "pool of one" and the claimant might not have been at risk at all. Similar results might have been achieved by the directors deciding to absorb the role of Sales Director and leaving the claimant's role unchanged. Because the claimant did not receive an adequate business rationale, she did not know why these possibilities were not favoured. It was therefore difficult for her to mount any effective argument about pooling.

82. The claimant was given adequate time to respond to such information as she was given. She criticises the short notice of the meeting on 18 November 2016. In my view the notice of that meeting has to be looked at in the context of all the discussion that had gone on before. Friday 18 November was the last working day of the week in which the meeting was supposed to take place. The claimant had been asked for her availability and, by Thursday 17 November, still had not provided it. Mrs Hodge therefore had to choose between delaying the consultation meeting until the following week, or selecting the last day of that week and giving the claimant one day's notice. This was only going to be the first consultation meeting any although the claimant was on sick leave I don't consider that it was unreasonable to give her that time frame. If the claimant needed extra notice she could have asked for it.

83. I turn to the question of whether the respondent gave conscientious consideration to the proposals put forward by the claimant. With one exception, I accept that conscientious consideration was given. In coming to this view, I have looked at the whole consultation process and, in particular, Mr Newton's careful appeal. The exception relates to the claimant's proposal to continue in her role part-time. This suggestion was dismissed out of hand by Mrs Hodge and the Finance Director and, as I have found, Mr Newton did not independently apply his mind to it.

84. In the course of her evidence, the claimant mentioned what she said was a further example of inadequate consultation. On 16 December 2016 the claimant was informed that, in the absence of a settlement agreement, the consultation process would continue on 19 December 2016. At the 19 December 2016 meeting, the claimant said she would consider applying for a Pub Manager role. Mrs Hodge then decided to dismiss the claimant without waiting to hear whether she would apply for such a role or not. This is not, strictly speaking, an allegation of unreasonable failure to provide alternative employment: it is not part of the claimant's case that she should have been considered for a Pub Manager role. But I have considered the point as being one of inadequate consultation. I agree with the claimant that Mrs Hodge's decision was premature. In my view, however, this particular defect was cured on appeal. The claimant had a full opportunity to say which roles she should have been given. She never

expressed any interest in a Pub Manager role, either in her grounds of appeal or at the appeal meeting.

Pool for selection

85. I turn to the pool for selection. I remind myself that the test is not whether I agree or disagree with the pool, but rather whether the respondent genuinely applied its mind to the problem and had a rational basis for selecting the pool that it did. In my view, the directors did genuinely apply their mind to the question of selection. They did not think that they could absorb the role of Building Manager because that was a specialised role demanding a qualification and technical skill which they did not have. Nor could the Building Manager role effectively be merged with the claimant's role in a way that would allow the claimant to compete for it. The respondent could make more cost savings by deleting the senior management team than by deleting subordinate roles. The lower down the management chain that the directors looked for roles to absorb, the more they would end up micromanaging the business.

86. Once the decision had been made to absorb the two SMT roles, the pool for selection was obvious. It was the holders of those roles. In those circumstances there was no need for selection criteria.

87. The only remaining question relevant to selection was whether the claimant and Ms Thornley should have been given the opportunity to compete for other roles that were filled by existing post-holders. Another name for this is "bumping". There was a reasonable basis for refusing to bump the claimant into the role of Building Manager. The claimant lacked the qualifications and experience for the role. The other roles identified by the claimant were all occupied by post-holders with more than 2 years' service. Had the claimant been bumped into their roles, even after a selection exercise, they may have legitimately complained of unfairness themselves. It would only be a rare case in which a tribunal can interfere with an employer's refusal to bump employees out of their role to make way for a more senior employee. One of the risks involved with bumping redundancies is that there would then be a cascade of further bumping redundancies resulting in the people at the bottom of the organisation feeling the pain.

Alternative employment

88. There were, of course, possibilities of retaining the claimant in employment without having to dismiss anyone else: the Pub Manager vacancies were still open at the time the claimant was dismissed. But, as is clear from the list of issues, it was not part of the claimant's case to the tribunal that the respondent acted unreasonably by failing to offer the claimant a Pub Manager role.

89. As I have already stated under the heading of consultation, the respondent did not properly consider the claimant's suggestion of part-time working, because the directors had already made up their mind.

Overall reasonableness

90. Having examined the respondent's decision against the usual requirements of fairness, and examined the claimant's criticisms, I now step back to address the statutory question. Did the respondent act reasonably or unreasonably in treating redundancy as a sufficient reason to dismiss the claimant? In my view, the

respondent acted unreasonably. Its directors made up their mind too early about which roles to absorb. They failed to provide sufficient information to the claimant to enable her to participate fairly in consultation about that particular question. Those facts alone, in my view, took the decision outside the reasonable range. The dismissal was therefore unfair.

Polkey issue

91. The only remedy sought by the claimant was compensation.

92. For the purposes of assessing a compensatory award, I must attempt to recreate a hypothetical world in which the respondent acted fairly. In particular, I have to imagine a scenario in which:

    92.1. the directors had consulted the claimant before finally making up their mind about which roles to absorb;

    92.2. conscientious consideration had been given to the proposal of part-time working; and

    92.3. Mrs Hodge had provided an adequate rationale for choosing the claimant's role for deletion; but

    92.4. in other respects, the process had been conducted as it actually was.

93. In my view there would have had to be a further directors' meeting after 19 December 2016 in order to consider the claimant's proposals, especially her suggestion that her role be retained on a part-time basis. Fairness would have demanded that he final decision on whether to delete the roles would not be taken until there had been some effective consultation on that issue. In order to give conscientious consideration to the claimant's suggestion, they would have waited until Mr Barker was available to attend the directors' meeting.

94. I must now speculate as to what the directors' decision would have been at that further meeting. I am quite sure that they would have decided to dismiss the claimant for redundancy. They would have given notice of termination as soon as practicable after that meeting. I have already explained why I think it was reasonably open to the respondent to select the claimant and not to create a wider pool. I have also explained why the respondent reasonably decided against alternatives to dismissal. For the purposes of the *Polkey* issue I go a little further. Not only were these decisions within the reasonable range, they are decisions that the respondent would have reasonably maintained despite all the arguments raised at this tribunal hearing.

95. At a further meeting, the directors would inevitably have decided not to continue with the claimant's role, even on a part-time basis. The need to drive down costs was more important to the directors than the freedom to concentrate on their core roles. By taking on extra work, namely the responsibilities of the SMT positions, they had the opportunity to present a credible cost-saving measure to the respondent's lenders. Even half of the claimant's remuneration would have been £30,000 per year plus bonus. Their priority was to save the money.

96. My findings in this regard take full account of the need to assume that the claimant would have been furnished with adequate information. The respondents' witness statements and oral evidence contain the business rationale for choosing the SMT roles for redundancy: the rationale which I concluded was missing from the information provided during the consultation

process. Knowing that rationale, and assisted by counsel, the claimant had a full opportunity to press the case as to why she should not have been dismissed. The respondent's witnesses were unshaken. I touch upon one example, which does not appear in my findings of fact above. In cross-examination, the claimant explored ways of avoiding deletion of the SMT roles. One of these fell outside the list of issues. It was a suggestion that the respondent could outsource the building maintenance function and the claimant could take on responsibility for overseeing the contractor. Mrs Hodge's answer to that suggestion was compelling. They looked at the costs of such an exercise and decided that it would be more expensive than keeping the existing team in-house. Any outsourced contractor would build in the costs of TUPE transfer into any tender price.

97. At this stage of my decision, it is relevant to revisit Mr Newton's evidence that the role of Head of Retail Operations would be difficult to perform part-time because of the nature of the pub industry. I am sure that Mr Newton would have maintained that view had the issue of part-time working been given proper consideration.

98. In short, therefore, had the respondent acted fairly, the outcome would have been exactly the same. It would merely have occurred some time later.

99. Once I announced this part of my decision, I heard submissions from counsel as to when the further directors' meeting would have happened. It was common ground between the parties that the earliest that the directors could have been together would have been the beginning of the New Year. My finding is that the meeting would have taken place on the first working day of 2017. That was Tuesday 3 January. Notice of termination would have been given on that date. Compensation should be calculated accordingly.

100. Following this separate announcement, the parties agreed the amount of compensation.

Employment Judge Horne

1 June 2018

REASONS SENT TO THE PARTIES ON

16 June 2018

FOR THE TRIBUNAL OFFICE