EMPLOYMENT TRIBUNALS

Claimant:	**Mr L Mullikin**		
Respondent:	**SRCL Limited**		
Heard at:	**Leeds**	**On:**	**22 August 2018**
Before:	**Employment Judge Licorish (sitting alone)**		

Representation
Claimant: **Miss H Gardiner, Counsel**
Respondent: **Mr S Proffitt, Solicitor**

RESERVED JUDGMENT

1. The claimant was not unfairly dismissed by the respondent. That complaint is dismissed.

2. The remedy hearing provisionally listed to take place on **4 December 2018** is vacated.

REASONS

1. The claimant started to work for the respondent's predecessor company, Yorkshire Environmental, as a logistics contract manager in October 1995. He held various positions throughout his employment and was the respondent's appointed dangerous goods safety adviser (DGSA). Following the respondent's decision to reorganise its business, the claimant was dismissed on 15 January 2018.

2. By a claim form presented to the Tribunal on 6 April 2018, following a period of early conciliation from 19 February to 8 March 2018, the claimant complained that he was unfairly dismissed. He believes that his role was not genuinely redundant and/or the process followed by the respondent was not fair or objective. The respondent's primary position is that the claimant was fairly dismissed by reason of redundancy.

The evidence

3. During the hearing, for the respondent the Tribunal first heard from Stuart Budd, who took the decision to dismiss the claimant, and Neil Percy, who

considered the claimant's appeal. The Tribunal then heard evidence from the claimant. All the witnesses' written statements were read by the Tribunal before the respondent called its first witness.

4. The Tribunal was also provided with an agreed bundle of documents (comprising 144 pages). The Tribunal read the pages referred to in the witness statements, during the witness evidence and in submissions. Unless otherwise stated, references to page numbers in these Reasons are references to the page numbers in the bundle of documents before the Tribunal.

5. The claimant's evidence finished sufficiently late with the effect that the parties agreed to provide written submissions and replies prior to the Tribunal reaching a reserved decision.

The issues

6. At the beginning of the hearing, the issues in the unfair dismissal complaint were discussed and agreed. Having also reviewed the contentions made during the hearing and written submissions presented, the issues to be determined can be summarised as follows:

   6.1 What was the sole or main reason for the claimant's dismissal? The respondent says it was for redundancy. The claimant contends that there was no genuine redundancy situation because, owing to the nature of its business, the respondent is required to have an in-house DGSA.

   6.2 If the sole or main reason was redundancy, did the respondent follow a fair procedure? The claimant contends that:

      6.2.1 consultation was not genuine or meaningful;

      6.2.2 the pool for selection for redundancy was unreasonably restricted to the claimant; and

      6.2.3 the respondent did not take such steps as were reasonable in identifying suitable alternative employment. The claimant submits that, in the circumstances, the respondent should have created a new merged role within its fleet team.

   6.3 If the respondent followed a fair procedure, was the decision to dismiss within the range of reasonable responses?

   6.4 If the respondent adopted an unfair procedure, was there a chance that the claimant would have been fairly dismissed in any event (the **Polkey** issue)?

Factual background

7. The respondent is a leading healthcare waste services provider in the UK. It provides a variety of specialist transport, collection and disposal services for all types of industrial and household waste, including biohazardous waste, sharps, pharmaceutical waste and controlled substance waste. The respondent is a subsidiary of Stericycle (UK) Limited and part of the Stericycle group, which provides a wider range of healthcare services. The Stericycle

group is, in turn, part of Stericycle Inc, a worldwide healthcare service provider based in the USA.

8. On 11 October 1995, the claimant started to work for the respondent's predecessor company, Yorkshire Environmental, as its logistics contract manager. Prior to that, the claimant had a career in the armed services. His duties from this period included compliance monitoring and fleet management (pages 32A to 32E). In December 1999, the claimant was appointed vehicle compliance and technical manager, and continued to be responsible for fleet management (pages 32G to 32H). At around this time, the claimant also became a qualified dangerous goods safety adviser (DGSA).

9. There are a number of applicable regulations which apply to the respondent's business. An agreement known as the ADR provides that any business involved in the transportation of dangerous goods by road "*shall appoint one or more safety advisers ... responsible for helping to prevent the risks inherent in such activities…*". The respondent accordingly appointed the claimant to carry out the role of DGSA on a standby basis, in addition to his other duties, in around January 2000.

10. The ADR states that the duties of a DGSA include monitoring compliance requirements and advising on the carriage of dangerous goods. The DGSA must also be able to monitor "*procedures for compliance with the requirements governing the identification of dangerous goods being transported*" and the business's "*practice in taking account, when purchasing means of transport, of any special requirements in connection with the dangerous goods being transported*". The DGSA may be employed in house or "*not directly employed … provided that that person is capable of performing the duties of adviser*".

11. In March 2012, the claimant was appointed logistics support manager, as a result of which in April 2012 he assumed responsibility for additional parts of the respondent's business and was formally appointed as the respondent's DGSA (pages 32L, 34 and 65A). From around this time, the size of the respondent's fleet was also growing. In the claimant's opinion, his fleet management responsibilities became "*too much for one person*". In May 2013, the claimant was appointed transport compliance manager and began to do less fleet management work. The contract that the claimant signed at this point also included a number of post-termination restrictions to the effect that he would be prevented from working with any of the respondent's clients or competitors in the clinical waste business, or in competition with the respondent, for 12 months following the termination of his employment (pages 42 to 44).

12. In April 2014, the respondent recruited a national fleet manager (page 65). At the time, Lee Jackson was solely responsible for vehicles run by ERS Medical, a subsidiary company of the respondent which provided patient transport and courier services to the health sector. From August 2014, the claimant began to hand over his remaining fleet-based responsibilities to Lee Jackson, following Mr Jackson's promotion to group head of fleet services. In April 2015, the claimant was appointed dangerous goods and regulation manager. From that time, the claimant's responsibilities were solely compliance based. The group head of fleet role was two grades above the claimant's (page 116C).

13. In around September 2017, Stericycle decided to reorganise its business in the UK and Ireland. This review formed part of Stericycle Inc's global Business Transformation project. Generally, Stericycle was concerned about the longer term profitability of its medical waste business. More specifically, the respondent was in the process of selling ERS Medical. In 2017 another of the respondent's subsidiary companies, Avanti Environmental Group Ltd (Avanti), was also put up for sale. Avanti's business involved the transportation of hazardous waste by road and sea. After some delay, the sale of Avanti was completed in around May 2018.

14. Stericycle used Deloitte Consulting to review its business. Stuart Budd (the respondent's director, safety, health and compliance – UK and Ireland) explained that the part of the purpose of the review was to increase the respondent's revenue following the sale of ERS Medical and Avanti, and to reduce costs. Following the review, the respondent concluded that it should reorganise its business to increase efficiency across all areas. As a result, a number of employees were identified as at risk of redundancy and on 3 November 2017 an internal memorandum was circulated (pages 66 to 67). That document (among other things) identified the sale of ERS Medical, sustained market pressure in the medical waste business and a slowdown in growth as challenges facing the respondent.

15. As far as the claimant was concerned, during the review he had provided an analysis of his workload (pages 119 to 121). The claimant spent around 85% of his time on DGSA-related work, including dangerous goods regulations management and training; the remaining 15%, he spent on environmental management. At that time, the respondent's business was also changing. For example, as a result of the sale of ERS Medical, Stuart Budd estimated that the level of transportation of dangerous goods by the respondent would fall by between 10 and 15%. Stericycle Inc had also adopted an IT program, Safety Compliance Matter, which was shortly to be introduced in the UK. Mr Budd considered that this would reduce the amount of time the claimant needed to spend on devising corrective and preventative action plans. Mr Budd therefore concluded that because the claimant's workload was diminishing, there would not be enough compliance work in future to justify employing a full-time dangerous goods and regulation manager.

16. Stuart Budd says that he thought about but discounted the idea of creating a part-time post. In particular, Mr Budd considered that this would prove problematic because the work of a DGSA was unpredictable and sporadic. He determined that outsourcing that function would cost the respondent between £20,000 and £25,000 per year, which represented a significant saving on the claimant's basic annual salary of over £45,000. Advice and support would also be accessible by the respondent at all times. Other aspects of the claimant's role, including compliance monitoring, could be taken on by the respondent's site managers and environmental managers.

17. Stuart Budd held his first consultation meeting with the claimant on 6 November 2017 (page 70). According to Mr Budd's handwritten note, during that meeting the claimant emphasised that the DGSA role was an appointed position, he said that he would be prepared to consider a part-time DGSA role, and that there was "*potential to merge with some of fleet roles saving costs*".

18. By letter also on 6 November 2017, Stuart Budd advised the claimant that he was at risk of redundancy (pages 47 to 64 and 68 to 69). The claimant was asked for his suggestions and proposals. He was given detailed job specifications for vacancies within Stericycle's proposed new structure and asked to register his interest within a certain time. The claimant was also referred to the respondent's intranet for all other vacancies. Mr Budd identified the new role of national head of safety, health and compliance as potentially suitable for the claimant, as it contained some dangerous goods compliance work, but in the event the claimant decided not to apply for it.

19. By email on 7 November 2017, the claimant sent his written comments and suggestions to Stuart Budd (pages 71 and 72). In summary, the claimant considered that he was the only person in the respondent's business who fully understood transport compliance issues, and that none of the site managers were qualified to deal with such matters. He also anticipated that the projected costs savings in using a consultant DGSA would fail to materialise. The claimant also explained that he spent a significant amount of time travelling outside of office hours for no extra pay, but was "*willing to consider a gesture*" if the respondent wanted to reduce his hours. In addition, the claimant wrote:

   "*I also mentioned considering merging my current role into the Fleet team. Historically, prior to the current situation, I did the Fleet manager's role (currently filled by Lee Jackson), managed all the fleet truck and car procurement and successfully dealt with the Fleet insurance to the extent where we actually received a significant reduction in costs. The change away from this became necessary because the job grew to the extent that it was too much for one person to manage. So I have significant experience in our Company Fleet operations that would be of use to the Company going forward.*"

20. The following day, Stuart Budd forwarded the claimant's email to Emma Hirst (HR adviser) and his manager, Neil Percy (Stericycle's vice president for marketing development and integration). In cross-examination, Mr Budd said that he "*flagged … up*" the claimant's suggestion about the fleet team with HR and his manager because he knew that Mr Percy possessed the wider picture, having been involved in reviewing the respondent's overall structure with Deloitte. Mr Budd's managerial responsibilities and involvement in the redundancy process were confined to safety, health and compliance only. Mr Budd could not remember whether there was any discussion about the claimant's suggestion, but confirmed that he did not chase up a formal response from either Mr Percy or Ms Hirst. Neil Percy explained in cross-examination that he treated the email as "*knowledge not action*" because in terms of the redundancy process he wished to avoid becoming involved in individual cases.

21. Stuart Budd had a further informal meeting with the claimant on 23 November 2017. Neither party took notes or were able to confirm the content of that meeting. In cross-examination, Mr Budd said that he thought it involved further discussion about the reorganisation. At around this time, the respondent also became aware that the claimant had instructed a solicitor (pages 73 to 76).

22. The claimant's second formal consultation meeting took place on 19 December 2017. Prior to that meeting, Emma Hirst emailed Stuart Budd (pages 78 to 79). The Tribunal concludes on balance that this email indicates the content of the discussion which had taken place in late November. It focusses on whether the claimant's role was in fact redundant:

    "*We have now reviewed all the documentation provided and are confident that the removal of most of the content of Laurence's role does mean we are making an appropriate decision in terminating his employment on the grounds of redundancy, however, as Laurence is adamant we cannot make him redundant due to the continued DGSA work and has instructed a Solicitor in this matter, it is clear he is not quite aware of the extent of the change to the role …*

    …he needs to understand what changes there are i.e. reduced levels of customer services, reduction of workload due to Avanti loss, etc, and why that means there is such a limited amount of work remaining. I don't think he understands that the workload will reduce so drastically, and that is what is pushing his resistance, as he believes there is still a role for him that doesn't differ from his current.

    Once we have a very thorough and blunt conversation with him, where we confirm the outcome of the review and discuss the remit of the role and how it will change, we can invite him in in January for a final consultation … and make him redundant. We cannot do this without a meeting first to explain the change to the role, and we need to be very thorough with this.

    In the background we need to start making arrangements with the external provider and get a date in January so that the day we make Laurence redundant, we start using them, so as to not have a gap in having a DGSA."

23. Stuart Budd replied to Emma Hirst to the effect that the respondent already had in hand provisional arrangements to obtain external safety advice. By email to Ms Hirst later on 19 December 2017, he also reported the content of his second formal meeting with the claimant and asked for further advice (pages 77 to 78). In summary, Mr Budd had explained to the claimant that the need for a DGSA had diminished to approximately one day per week, owing to changes in the respondent's ways of working and a reduction in the size of the business. However, the claimant had also asked why the group head of fleet had not been placed at risk of redundancy. Mr Budd wrote to Emma Hirst:

    "*It is correct to say that the fleet role and the DGSA role were a combined role 3 – 4 years ago prior to the growth of ERS Medical and the appointment of Lee Jackson. I explained that this was not considered as Lee is in a separate team and each team is considered separately when reviewing the needs of the business. It is Laurence's view that as Lee was appointed after him to do a job similar to him that the principle of "last in / first out" [LIFO] should apply when assessing redundancy. What is your view? Is Laurence's position supported by law?"*

24. Stuart Budd's final meeting with the claimant took place on 12 January 2018 (pages 80 to 83). The stated purpose of the meeting was to review "*all alternative options*". Among other things, the claimant said that he was "*not*

qualified" for any of the available roles within the new structure and "*not interested*" in any other vacancies. The proforma record of the meeting also notes that Stuart Budd discussed with the claimant the issues he had raised in respect of Lee Jackson's role.

25. Emma Hirst prepared handwritten notes prior to the meeting which summarises the "*points to cover*" in the final consultation meeting with the claimant (page 80A). Most importantly, the claimant appeared to remain of the view that "*there is a full time DGSA requirement within the business*". However, the respondent had concluded that the DGSA role was going to reduce from around 85% to 15% of the claimant's existing duties. A number of reasons were also given for not placing the group head of fleet at risk of redundancy – namely that the roles were now entirely separate and different; the claimant had not worked in fleet for almost three years, and when he did it was a combined role; Lee Jackson had been recruited specifically to take over all of the claimant's fleet-based duties; and LIFO "*is not the way redundancy works*".

26. By letter on 12 January 2018, Stuart Budd terminated the claimant's employment with a payment in lieu of notice (pages 84 to 86). The claimant appealed against that decision by email to Neil Percy on 16 January 2018 (page 90).

27. The claimant sent the grounds of his appeal to Neil Percy on 6 February 2018 (pages 92E and 113A to 113B). The claimant again mentioned LIFO, and also his staff appraisals and length of experience with the respondent. The claimant's material objections to the decision to dismiss him were:

    27.1 The group head of fleet services should have been included in the redundancy pool. Accordingly, consideration should have been given to dismissing Lee Jackson and retaining the claimant in a combined group head of fleet/DGSA role. The claimant described this as "*bumping*".

    27.2 The claimant's DGSA role was not redundant because the requirement to identify and classify all dangerous goods for transport remained, according to the relevant regulations. In the claimant's view, no in-house employees were qualified to do this. By using a consultant DGSA, the respondent was no longer complying with its regulatory requirements. A full-time DGSA role was required "*to adequately comply with the Regulations*". By way of example, the claimant referred to an incident in early January 2018 while he was on annual leave whereby a colleague had authorised the transportation of what he described as "*toxic soup in an unsuitable package, on an unsuitable vehicle*". The claimant says that on his return to work he was able to intervene and stop that authorisation.

28. The claimant's appeal hearing took place on 9 February 2018. Emma Tarbuck (the respondent's senior HR adviser) also attended the hearing, and a recording was made and transcribed by the respondent (pages 93 to 113). There was some confusion at the beginning of the hearing because Neil Percy thought that the claimant was working from a document that he had not seen. Following a ten-minute adjournment, Mr Percy was able to clarify that the document was in fact the claimant's grounds of appeal which he had read in preparation for their meeting.

29. During the meeting Neil Percy acknowledged that the claimant had been a high performer. He explained that he had researched the points the claimant had made and the redundancy process. Mr Percy understood that LIFO could be used as part of a range of selection criteria, and often as a last resort, but the respondent's business review had been concerned with "*functional need … at the time and going forward*". The risk was that someone hired more recently could have a valuable set of skills within a certain function which could be lost if the respondent prioritised longer serving employees.

30. The Tribunal also notes that Neil Percy stated that the analysis of the respondent's business with Deloitte had been "*by function*" (that is to say, compliance and fleet had been evaluated separately), but also accepted that historically there had been an overlap between those functions. However, since 2014 they had been "*very much viewed as different*". Although there continued to be "*a little bit if overlap in terms of dangerous goods carriage and the implications they have for fleet*", during discussions with Deloitte a decision had been taken about the reorganisation to keep those functions separate. Otherwise the respondent would have had to look for similar historical conflicts in all of its departments. The DGSA role "*was very much seen as that's part of the compliance world, going forward that's the way we want to run the business…*". At one point Mr Percy also asked the claimant for clarification about the bumping issue: "*Are you saying that you think you should be the group head of fleet?*" The claimant replied: "*I think I should have been considered for the role and I think it should have been offered to me. And then we wouldn't be having this conversation*."

31. Finally, Neil Percy thought that there had been "*an abject failure of process*" regarding the "toxic soup" incident, but notwithstanding this the DGSA role had diminished and would do so further.

32. At the end of the meeting, Neil Percy told the claimant that nothing appeared to "*jump out*" at him to suggest that the respondent had behaved unfairly, but he would discuss what had been said with Emma Tarbuck and arrive at a decision in writing. In evidence, Neil Percy explained that following the meeting he reviewed the claimant's comments during their meeting and looked again at the consultation documentation.

33. By letter dated 14 February 2018, Neil Percy upheld the decision to terminate the claimant's employment (pages 114 to 116). Mr Percy's material conclusion was that the group head of fleet role had been identified during the review as "*an ongoing strategic requirement*" for the respondent's business, separate from the compliance function, and therefore was not placed at risk. In evidence, Mr Percy says that he had concluded that the role profile for and systems involved in the group head of fleet role in 2018 were significantly different to the managerial duties the claimant had performed some time ago. The claimant would have had to retrain, and such a move would have presented a risk to Stericycle's business owing to the strategic importance of the group head role.

34. Neil Percy also concluded that the "toxic soup" incident had resulted from "*a serious procedural failure*" which did not affect the overall business case for outsourcing the DGSA role. In evidence Mr Percy explained that he had looked into this incident as best as he could. He spoke to the claimant's line

manager, David Williams, who confirmed that the claimant had not reported any such incident on his return from annual leave in early January 2018 and Mr Williams was independently unaware of any issue in this respect. Mr Percy asked Mr Williams to make further enquiries in any event, but he was again told that there was no record of any such incident having taken place.

35. The claimant's solicitor subsequently emailed Neil Percy on 16 February 2018 (pages 113F to 113G). In summary, the claimant's solicitor considered that Mr Percy had failed to address the specific issue as to whether the respondent had considered dismissing the group head of fleet services and slotting the claimant into that position. If the claimant was sufficiently qualified to carry out that role as well as his own, his solicitor contended that the claimant ought to have been bumped into it. Secondly, the claimant believed that the "toxic soup" incident had occurred as a direct result of the decision to remove his post. Although Mr Percy had assured the claimant that the respondent would investigate what had happened, he had nevertheless arrived at a decision as to its cause. As a result, the claimant suspected that Mr Percy had set out simply to endorse Stuart Budd's original decision.

36. After the claimant issued his Tribunal claim, the respondent obtained further information from him about the alleged "toxic soup" incident. Stuart Budd explained that on 2 January 2018, a customer asked the respondent to collect and dispose of several expired reagents (substances for use in chemical analysis and other reactions). In total, 10 litres of various substances required disposal. Three of those substances were hazardous. The enquiry was passed to the respondent's compliance team and further information (including safety data sheets) was obtained from the customer (pages 79B and 136 to 140).

37. During this time, because the respondent's waste assessment adviser had been temporarily transferred to another department, Stuart Budd explained that the enquiry was passed to an environmental adviser. That adviser appeared to accept the consignment on 5 January 2018, but then emailed the claimant for advice on 8 January 2018. The claimant provided that advice on the same day and the adviser accordingly replied to the customer (pages 79D to 79E and pages 127 and 134). The claimant maintains that at any time between acceptance of the consignment on 5 January 2018 and his intervention, the respondent could have collected the incorrectly packaged and labelled load, thereby contravening safety regulations. As a result, the public and the respondent's staff could have been put at risk, with potentially serious regulatory consequences for the respondent.

The relevant law

38. Section 98 of the Employment Rights Act 1996 (the ERA) states:

> "(*1*) *In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

(2) A reason falls within this subsection if it … is that the employee was redundant ...”

39. Section 139 of the ERA defines redundancy:

“(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, or
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.”

40. The reason for dismissal in any case is the set of facts known to the employer or may be beliefs held which cause it to dismiss the employee.

41. According to **Murray & Anor v Foyle Meats 1999 ICR 827**, whether an employee is redundant under section 139(1)(b) of the ERA involves two questions of fact. In this case, have the requirements of the business for employees to carry out work of a particular kind ceased or diminished, or are they expected to do so? If so, was the employee’s dismissal wholly or mainly attributable to that state of affairs?

42. If an employer can show that dismissal was for a potentially fair reason, section 98(4) of the ERA states:

“*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.”

43. The case of **Polkey v A E Dayton Services Limited 1998 ICR 142** explains that generally employers will not have acted reasonably in treating a potentially fair reason as a sufficient reason for dismissal unless and until they have taken certain procedural steps which are necessary in the circumstances of that case to justify that course of action. More specifically, in redundancy cases, **Polkey** states:

“*The employer will not normally act reasonably unless he warns and consults any employees affected or their representatives, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation*.”

44. In **Langston v Cranfield University 1998 IRLR 172** the EAT explained that requirements in respect of consultation and redeployment are so fundamental that they will be treated as an issue in every unfair redundancy case. For this reason, Tribunals will be expected to consider each of those requirements even if they have not been raised specifically by the claimant. However, in applying the test of reasonableness in section 98(4) ERA, if the Tribunal is satisfied that the employer adopted an unfair procedure, in assessing liability and according to **Polkey** it is not then permitted to ask whether it would have made any difference to the outcome if all appropriate procedural steps had been taken, unless doing so would have been "*utterly useless*" or "*futile*".

45. As explained in **Williams & Others v Compare Maxim Limited 1982 ICR 156** in relation to redundancy cases, in considering the issue of fairness (relating not only to the decision to dismiss but also the procedure adopted), the Tribunal must review the employer's actions and decide whether they "*lay within the range of conduct which a reasonable employer could have adopted*". The Tribunal cannot substitute its view and decide what it would have done in the same circumstances.

46. The Tribunal must also assess the procedure overall, including any appeal. In this respect, it is unhelpful to try to categorise an appeal as either a rehearing or a review of the original decision. The question is whether the appeal was sufficiently thorough and approach of the decision maker sufficiently open minded with the effect that the overall process was fair, notwithstanding any earlier deficiencies (**Taylor v OCS Group Ltd [2006] ICR 1602**). By contrast, a defective appeal process can render a dismissal unfair if it should or could have found a flaw in the original decision to dismiss. The fundamental question is whether the appeal raised matters that might have affected the outcome.

47. The **Polkey** issue becomes relevant at the stage of assessing compensation. That case explains that any award of compensation may be nil if the Tribunal is satisfied that the claimant would have been dismissed in any event. However, this process does not involve an "all or nothing" decision. If the Tribunal finds that there is any doubt as to whether or not the employee would have been dismissed, the **Polkey** element can be reflected by reducing the normal amount of compensation accordingly.

Conclusion

48. The claimant's and respondent's representatives made a number of written submissions, and replied to each other's. I have considered those documents and summarise the parties' submissions below where appropriate. The parties will otherwise recognise how the Tribunal has dealt with their submissions in its findings of fact relevant to the issues to be determined, and its application of the law to those facts.

49. The first issue is: what was the sole or main reason for the claimant's dismissal? The Tribunal accepts that the claimant was dismissed for redundancy. The fact of a reorganisation does not in itself show that there was a redundancy situation. Nevertheless, following its review with Deloitte the respondent concluded that there would be insufficient work for a full-time dangerous goods and regulation manager. The respondent reached this conclusion because the DGSA-related work had diminished and would

continue to do so significantly in the future. Stuart Budd explained in evidence that the respondent also decided to stop providing safety advice free of charge to its customers. This was because, according to the applicable regulations, responsibility rests with the producer or consignor to identify and classify its waste, and employ its own DGSA (whether in house or externally) for that purpose.

50. The respondent decided that it could use an external consultancy in future and on an ad hoc basis, rather than an in-house DGSA, as a result of which it would save money. Existing site managers and environmental advisers could otherwise assume responsibility for other aspects of the claimant's role. As a result, a decision was taken to delete the claimant's role from the respondent's structure because it was no longer required. That is a redundancy situation. The claimant was the respondent's only employee who carried out the functions of a DGSA.

51. Most importantly, in deciding this issue, the Tribunal must consider the business requirement for <u>employees</u> to do work of a particular kind. Nevertheless, the claimant argues that, notwithstanding the respondent's review of its business, the requirement for it to employ an in-house a DGSA remained. This is because the respondent continued to be the carrier and in some cases consignor of dangerous goods, which according to the applicable regulations must be properly identified and classified. The claimant accepts that using an external DGSA may be appropriate where the transport of dangerous goods is ancillary to the main business operation (for example, a paint manufacturer). However, he believes that more is required if the transport of dangerous goods is a core part of the business, as is the case with the respondent. As in his appeal, the claimant relies on the "toxic soup" incident to prove his point.

52. First, the Tribunal did not find the claimant's reliance on the "toxic soup" incident particularly persuasive. Among other things, the incident occurred while the claimant was still employed but on annual leave. The Tribunal would have expected the claimant, as the respondent's appointed DGSA, to have flagged up the incident <u>before</u> he left his job if it had been as serious as he contends. The claimant also said during his evidence that he had been surprised by the environmental adviser's actions because he had trained him. The Tribunal further accepts Stuart Budd's evidence that, for the respondent, the incident in fact demonstrated the drawbacks of relying on one person to provide safety advice.

53. Secondly, in cross-examination the claimant conceded that he thought the respondent's decision to use external advisers was "*unwise*", although he accepted that other organisations do so. It does not however necessarily follow that the redundancy situation was not genuine for that reason. Most tellingly, during his appeal the claimant acknowledged that the decision came down to a matter of opinion, and his opinion was that the decision was wrong: "*Having said that, if you ask eight DGSAs the same question you would probably get eight different answers*" (page 98). During his evidence, the claimant attempted to resile from that statement. He now considers that, based on the logic of his argument for the purposes of these proceedings, all DGSAs would "*eventually agree*" with him.

54. As the respondent submits, the function of the Tribunal is not to investigate the commercial and economic reasons which prompt a decision, or to investigate the rights and wrongs of that decision to decide whether it agrees or disagrees with the respondent's actions. There was no suggestion that it was a sham decision. In particular, Stuart Budd explained during his evidence that NHS Trusts and the Department of Health use consultant DGSAs. The Tribunal therefore accepts on balance that there was a genuine redundancy situation, notwithstanding the fact that the claimant disagreed with the respondent's decision to obtain safety advice from an external consultant.

55. The Tribunal further accepts that the claimant's dismissal was wholly or mainly attributable to that state of affairs. As a result of the respondent's review of its business, the claimant was placed at risk of redundancy and eventually dismissed once the respondent had concluded that there was no alternative but dismissal.

56. The next issue, therefore, is whether the respondent followed a fair procedure prior to reaching its decision to dismiss the claimant. In terms of the consultation process, essentially the claimant believes that the respondent took the decision to dismiss him at an early stage and certainly by the time of his second consultation meeting in December 2017. The respondent therefore failed to consider any of his suggestions put forward during the consultation process and as part of his appeal.

57. According to the **Williams** case, employers should give as much warning as possible of impending redundancies to enable affected employees to consider possible alternative solutions and, if necessary, find alternative employment. General guidance on the issue of consultation was set out by the EAT in **Mugford v Midland Bank 1997 IRLR 2008**:

   "*It will be question of fact and degree for the … tribunal to consider whether consultation with the individual … was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy*."

58. It has since been established that if consultation prior to a dismissal for redundancy has been insufficient in any way, that failure can also be remedied on appeal (**Lloyd v Taylor Woodrow Construction 1999 IRLR 782 EAT**).

59. In essence, fair consultation involves the provision of adequate information, following which the employee should be given a fair and proper opportunity to respond and express their views. In response, the employer should then consider the employee's views properly and genuinely (see, for example, **King and others v Eaton Ltd 1996 IRLR 199**). The claimant also refers the Tribunal to similar guidance as set out in **R v British Coal Corporation and Secretary of State for Trade and Industry ex parte Price 1994 IRLR 72**, which further confirms: "*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*."

60. The Tribunal is satisfied on balance that the claimant was given fair warning and adequate information. Among other things, the claimant understood the respondent's reasons for the restructure and he was provided with information about vacancies which arose as a result, as well as access to other redeployment opportunities. The claimant conceded in cross-examination that he was warned about redundancy and was invited to participate in a process that lasted for more than two months. The claimant attended three formal meetings and one undocumented meeting during the process, but maintains that consultation was not meaningful.

61. The claimant submits that the respondent failed to consider his proposal to move into the fleet team, and no proper consideration was given to his suggestion that the group head of fleet should have been placed at risk of redundancy or he should have been slotted into that role. The claimant further maintains that, as at 19 December 2017, the decision to dismiss the claimant had already been taken, and in January 2018 Stuart Budd went into the final consultation meeting with a closed mind notwithstanding its stated purpose. As part of the consultation process, the claimant argues that Mr Budd also failed to consider other alternatives raised with him in cross-examination, including the claimant working fewer hours as a DGSA but remaining on call in another unspecified role. In the claimant's view, none of these defects were remedied on appeal.

62. The Tribunal accepts on balance that the respondent's consultation with the claimant was not so inadequate as to render his dismissal unfair. Most importantly, based on what was said at the time, overall the Tribunal is satisfied that the respondent's consideration of the claimant's views fell within the range of reasonable responses.

63. First, the Tribunal notes at this point that the claimant's contentions and evidence during the hearing in respect of a potential role within the respondent's fleet team differed significantly from the specific documented objections he raised during the consultation process, his appeal, in the grounds of his claim and his witness statement. The Tribunal accepts that the claimant initially appeared to raise the issue in general terms (as found at paragraphs 17 and 19 above). Nevertheless, subsequent discussions and correspondence focussed solely on the group head of fleet role. In the Tribunal's judgment, in view of the claimant's subsequent persistence in pursuing the group head of fleet issue, he is unlikely to have readily abandoned any other aspiration to be integrated into the fleet team generally if that is what he meant by his earlier comments.

64. The respondent could be criticised for its initial response to the claimant's suggestion about a possible fleet role, in that Stuart Budd for valid reasons escalated the matter in early November 2017 but did not follow it up, and Neil Percy for equally valid reasons declined to become involved in the claimant's case at that point. Nevertheless, according to the **Mugford** case the Tribunal's task is to consider the overall picture.

65. In the circumstances, the Tribunal therefore accepts that it was reasonable for the respondent to conclude from the claimant's stated position, as the consultation process progressed and during his appeal, that the claimant considered himself on a par with the group head of fleet because (in his

opinion) he used to do that role. It reasonably appeared to the respondent that the group head of fleet was the alternative role that he was prepared to do, rather than a more junior role under the line management of Lee Jackson. The claimant submits that he gave very different evidence during the Tribunal hearing, but the Tribunal was not persuaded by that evidence as assessed against the contemporaneous evidence before it.

66. The Tribunal also accepts that the focus of further discussions between Stuart Budd and the claimant after the first consultation meeting and prior to Emma Hirst's email in December 2017 appeared to be that the claimant was "*adamant*" that the respondent could not make him, as a DGSA, redundant and that he had instructed a solicitor on this basis. That was the subject matter of the guidance provided by Emma Hirst to Stuart Budd prior to his second formal meeting with the claimant. Put simply, the advice given to Mr Budd was that the respondent was confident that the removal of the claimant's role from its restructure would be on the grounds of genuine redundancy. The priority therefore was to make sure that the claimant understood the extent of the expected diminution of the DGSA aspect of his role, and that is what Mr Budd proceeded to do as part of the second formal consultation meeting.

67. Secondly, the Tribunal accepts that the respondent gave reasonably proper and genuine consideration as to whether the group head of fleet should also have been placed at risk. Stuart Budd discussed the issue with the claimant during their second formal meeting and sought further guidance thereafter. He discussed the issue again with the claimant during their final meeting, and provided a reasonable and genuine rationale for rejecting the claimant's views.

68. Thirdly, the Tribunal accepts that Stuart Budd continued to conduct the second and third consultation meetings with a sufficiently open mind. He accepted in the cross-examination that Emma Hirst's email prior to the second meeting appeared to predetermine the outcome. However, he also said that if the claimant had made any further suggestions (that is to say, other than those already aired), he would have considered them. The Tribunal is satisfied that this accurately reflects Mr Budd's approach throughout the consultation process on the basis that he did just that following his second formal meeting with the claimant, notwithstanding Ms Hirst's email prior to that meeting. He did not dismiss out of hand the issues that the claimant raised regarding the appropriate pool and LIFO, but sought further guidance from HR based on his knowledge of the historical overlap between the respondent's compliance and fleet functions.

69. The Tribunal further accepts that it was reasonable for the respondent to put in hand provisional arrangements to obtain out-of-house safety advice because it was legally required to do so. Indeed, part of the claimant's initial objection to being placed at risk was that savings would be difficult for the respondent to realise because "*you are going to have to appoint a new me the day I leave*" (page 71). Stuart Budd explained during his evidence that he made provisional arrangements to ensure a seamless transition. The fact that he did so does not take the quality of the respondent's consultation with the claimant outside the band of reasonable responses.

70. Finally, the Tribunal accepts that the respondent reasonably considered other alternatives to the claimant's redundancy. In evidence, Stuart Budd explained that at the time he thought about a part-time DGSA role but deemed it "*too risky*". Most importantly, he thought that there was a "*weakness*" in relaying on one person for safety advice, as had been demonstrated by the "toxic soup" incident, because when the claimant was on annual leave routine questions were necessarily held over until his return.

71. Further and separately, the Tribunal accepts that the claimant was given an additional opportunity to present his views as part of his appeal. The transcript of that meeting shows that Mr Percy was well prepared for the hearing, the conversation was wide ranging and free flowing, and Mr Percy made concessions where appropriate and sought clarification where necessary. Although Mr Percy expressed a provisional view at the end of the appeal hearing, he was also sufficiently open minded to agree to reserve his decision pending further consideration of all matters that had been raised by the claimant. He tried to obtain more information about the "toxic soup" incident. Most importantly, in cross-examination Neil Percy also acknowledged that by the end of the appeal hearing he better understood the claimant's previous fleet experience, but as part of his research before their meeting he knew that as at 2018 the existing group head of fleet was an enhanced role: it entailed more than simply running the department. The Tribunal further accepts that Mr Percy did not consider any other fleet manager roles as part of his deliberations because by that point he reasonable understood the group head of fleet to be role the claimant was prepared to do.

72. The next question is whether the respondent adopted a fair basis on which to select for redundancy. The claimant submits that the respondent gave no consideration to the appropriate pool. It should have considered including the fleet team in the pool on the basis that the claimant had the relevant skills to carry out "*that role*" (sic), whereas none of the fleet team were qualified DGSAs (submissions, paragraph 28a). There is also no legal requirement that the pool should be limited to employees doing the same or similar work, and it fell outside the range of reasonable responses to conclude that the claimant should be in a pool of one.

73. The Tribunal notes that the claimant generally appears to raise two distinct issues in his submissions. The first is whether one or more fleet roles should have been pooled with the claimant's, and a selection for redundancy made on the basis that the claimant had previous fleet experience, or whether he should have been "bumped" into a fleet role. The second issue is whether the claimant should have created a hybrid fleet/DGSA role in order to retain his expertise. In the Tribunal's judgment, the first issue goes to the composition of the pool for selection whereas the second goes to the respondent's efforts to redeploy the claimant. Both issues obviously go to the sufficiency of the respondent's consideration of alternatives to redundancy.

74. The Tribunal again notes that the issues in respect of the pool for selection raised by the claimant during the consultation process and his appeal, and his claim and witness statement focus solely on "*that role*" – that is to say, the group head of fleet. The Tribunal is therefore satisfied that at the relevant time the claimant in fact sought to compare himself with Lee Jackson because, in his view, that role was on a par with his previous fleet

responsibilities. In the circumstances, although the claimant again appeared to initially raise the issue in more general terms, the Tribunal accepts that it was reasonable for the respondent to engage with and concentrate on the issue as specified by the claimant as the consultation process progressed and as part of his appeal.

75. Employers have a great deal of flexibility in choosing a pool from which to select employees for redundancy, as long as they apply their minds to the decision and act from genuine motives. However, it may fall outside the band of reasonable responses to restrict the pool artificially. Nevertheless, the claimant maintained in evidence that because historically his role contained fleet management responsibilities, the decision to place him in a pool of one fell outside the range of reasonable responses owing to the "*crossover in expertise*".

76. In the circumstances, the Tribunal accepts on balance that there was active and sufficient consideration of pooling in the claimant's case. Although there were other ways in which the respondent could have dealt with the issue, Stuart Budd and Neil Percy provided a reasonable explanation for not widening the pool for the selection beyond the claimant.

77. Most importantly, at the time of the reorganisation the claimant's role was unique within the respondent and he had carried out that role for three years. Neil Percy explained in cross-examination that his substantive role includes assessing Stericycle's business to determine how it can be improved, and working with the relevant teams to implement any changes. As part of the respondent's restructuring exercise in 2017, he worked with Deloitte to analyse each process and assess the roles that were potentially redundant. The Tribunal has found that Mr Percy explained to the claimant during his appeal meeting the thought processes and reasons involved in the respondent's original decision to keep its compliance and fleet functions separate (summarised at paragraph 30 above). The initial decision that the claimant was in a unique position does not, however, render any subsequent consultation process meaningless, in that the claimant took the opportunity to challenge the respondent's decision during that process.

78. In December 2017, the claimant then raised with Stuart Budd the issue as to why Lee Jackson had not been placed at risk of redundancy. Mr Budd readily conceded that the claimant's role used to include fleet responsibilities and sought advice, including whether the claimant had raised a valid point about LIFO. In the circumstances, the Tribunal accepts that there was reasonable consideration of the pooling issue raised by the claimant during the consultation process, and the respondent reasonably rejected the claimant's contentions at the time (as found at paragraphs 24 and 25 above).

79. The claimant thereafter argues that the respondent should have looked for a vacancy that might have been created at the expense of another employee (known as "bumping" – see, for example, **Lionel Leventhal Ltd v North UKEAT/0265/04** and **Fulcrum Pharma (Europe) Ltd v Bonassera UKEAT/0191/10**). As the respondent submits, however, there is no rule that an employer must always consider bumping in order to dismiss fairly in a redundancy case. The question is: according to the facts of the case, what should the employer reasonably be expected to initiate? The respondent directs the Tribunal to a summary of the principles contained in the recent

case of **Mirab v Mentor Graphics (UK) Ltd UKEAT/0172/17/DA**). Once again, in considering this issue the Tribunal's function is to consider the respondent's actions and decide whether in all the circumstances that response fell within the reasonable range available to it.

80. Guidance as to factors an employer should consider when determining whether subordinate employees should be brought into a pool is contained in the **Leventhal** case:

> "12. *Whether it is unfair or not to dismiss for redundancy without considering alternative and subordinate employment is a matter of fact for the Tribunal. It depends as we see it on factors such as (1) whether or not there is a vacancy (2) how different the two jobs are (3) the difference in remuneration between them (4) the relative length of service of the two employees (5) the qualifications of the employee in danger of redundancy; and no doubt there are other factors which may apply in a particular case*."

81. The **Fulcrum Pharma** case (at paragraph 30) also provides that "*a starting off point may be to determine within the consultation process whether the more senior employee would be to consider the more junior role at the reduced salary*". In the Tribunal's judgment, these are equally valid factors in considering whether an equivalent or more senior role might be suitable.

82. At the beginning of the consultation process, the claimant was asked for and he provided his suggestions and comments. Among other things, he suggested retention a fleet role and stated that he was willing to consider a reduction in hours in his existing role. Nevertheless, the Tribunal accepts that it was within the range of reasonable responses for the respondent in this case not to consider dismissing anyone in the fleet department unless and until it was raised by the claimant. Most importantly, the Tribunal has found that the focus of claimant's (and his solicitor's) specified objections prior to and following his dismissal was that he had carried out Lee Jackson's job previously, had longer service and was a qualified DGSA, and therefore should be retained in preference to Mr Jackson.

83. In the claimant's case, although he identified the group head of fleet as a suitable alternative role, there was no vacancy. If there was, in the ordinary course of events it would have been reasonable for the respondent to have offered the role on a trial basis, thereby giving both sides the chance to see whether the job was in fact suitable. As there was no vacancy, the respondent would therefore have had to dismiss Lee Jackson (thereby also exposing itself to an unfair dismissal claim from him) to be able to give that job to the claimant.

84. In the Tribunal's judgment the claimant would need to show compelling reasons why the respondent should have preferred him over the group head of fleet. The Tribunal accepts Neil Percy's evidence that as at 2018 the fleet role was significantly different from when the claimant had fleet management responsibilities. This is demonstrated by the fact that the group head role was two grades above the claimant's and there was a significant difference of £12,000 in annual salary. In response to the Tribunal's questions, Neil Percy also clarified his rationale for rejecting the claimant's suggestion: *"Before I went into the appeal I did research on what the fleet role looked like before. I knew the ERS ambulance business had gone and Shred-it had been acquired*

in 2015. Lee Jackson had also developed in the role to group head. The role was high profile and we didn't want it impacted. The claimant did have transferrable skills but I didn't see his level of qualifications and skills and background were appropriate enough for the job as it was in 2018."

85. The claimant also submits that special circumstances apply because it would be difficult for him to find another job owing to his age, he has effectively only ever had two careers (in the armed services and with the respondent), and his contract contained post-termination restrictions on employment. Nevertheless, the Tribunal accepts that, notwithstanding the claimant's submissions, his proposal represented a serious risk for the respondent because, if it did not work out, the respondent would have lost a strategic and valued member of its group management team. On that basis, the Tribunal is satisfied that it was reasonable for the respondent to reject the claimant's suggestion. The claimant's circumstances were not sufficiently specific or unusual to take the respondent's decision outside the range of reasonable responses.

86. The claimant's remaining submission is that the respondent did not otherwise make sufficient efforts to redeploy him. The search for suitable alternative employment should not have been limited to vacancies in the new structure or more generally, but it ought to have included the creation of a new merged role (presumably incorporating the claimant's DGSA responsibilities). The respondent replies that this submission is legally unsustainable in that it invites the Tribunal to fall into a substitution mindset. The question is whether, in all the circumstances, the respondent took reasonable steps to find the claimant an alternative role.

87. The Tribunal accepts on balance that the respondent took such reasonable steps. In this case, and according to the claimant at the time, there were no suitable vacancies. The claimant was not denied the opportunity to apply for or otherwise demonstrate his suitability for a vacant position. That the respondent failed to create a merged role for the claimant does not render the claimant's dismissal unfair.

88. On the basis that the respondent had reasonably considered and rejected the claimant's suggestions, and the claimant had confirmed that there were no other suitable vacancies within its organisation, the Tribunal accepts that the respondent reasonably concluded that the claimant's employment should terminate by reason of redundancy. As a consequence, the Tribunal is satisfied that the claimant's dismissal was fair, in which case that complaint should be dismissed.

89. Further and separately, if the Tribunal had been persuaded that the respondent followed an unfair procedure, it would have turned to consider the **Polkey** issue. If a Tribunal finds that there is any doubt as to whether or not the employee would have been dismissed, the **Polkey** element can be reflected by reducing the normal amount of compensation accordingly. The burden of proof is on the respondent in this respect.

90. The claimant's main submission in terms of the process followed turns on whether the respondent unreasonably failed to consider retaining the claimant in a fleet role, either as a result of a straightforward bump or by creating a merged role. In this case, the Tribunal accepts that even if the respondent was required to consider the issue more generally and a fair procedure had

been complied with, the claimant's dismissal would have occurred in any event, in which case the compensatory award would have been reduced to nil.

91. Most importantly, the Tribunal has accepted as reasonable the respondent's rationale as to why it was essentially too risky to displace Lee Jackson. The Tribunal has also explained that it considered the claimant's evidence as to whether he would have been interested in a role inferior to Lee Jackson's as unpersuasive when assessed against the way in which the claimant crafted his appeal, Tribunal claim and witness statement. In the circumstances, therefore, if the respondent considered but reasonably rejected displacing its group head fleet, the Tribunal concludes on balance, based on the claimant's insistence at the time that Lee Jackson's was the comparative position, that the claimant was unlikely to have been interested in any unspecified but inferior fleet role.

Employment Judge Licorish

Date: 7 November 2018