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EMPLOYMENT TRIBUNALS

Claimant: **Mr J Lane**

Respondent: **Visioncall Ltd**

Heard at: **East London Hearing Centre**

On: **6-7 September 2018**

Before: **Employment Judge Russell (sitting alone)**

Representation
Claimant: **In person**
Respondent: **Ms S Robinson (HR)**

JUDGMENT

The judgment of the Employment Tribunal is that:-

(1) The claim of unfair dismissal fails and is dismissed.

(2) The claim for a redundancy payment fails and is dismissed.

REASONS

1 By a claim form presented to the Tribunal on 24 April 2018, the Claimant complained that he had been unfairly dismissed from his job of Clinical Director (a post which he had held from 1 June 2015 until 22 February 2018) and that he was entitled to a redundancy payment. The Respondent resisted all claims.

2 I heard evidence from the Claimant on his own behalf. I was provided with signed witness statements from two former colleagues, Ms Sharon Bagley and Ms Diane Glendinning. Both were prepared to attend Tribunal although neither in fact did so. I read those statements and attached such weight as was appropriate in the circumstances.

3 For the Respondent, I heard from Mr Ed Sweeting (Joint Venture Relationship Manager); Ms Caroline Rae (Head of Finance) and Mr Brian McGuire (Managing

Director).

4 I was provided with a bundle of documents by the Respondent. There were also additional documents attached as appendices to the statement of Ms Rae dealing specifically with financial matters. This was not the most helpful format in which to present important documents, not least as there was no pagination. However, with the assistance of Ms Robinson, the Claimant, the witnesses and I were able to find our way through the relevant evidence.

5 The claim had a rather unfortunate start. It was listed for two days but there were insufficient judicial resources to hear the claim. As it appeared from the file that there was an outstanding application by the Claimant for leave to amend to include a claim of discrimination, the hearing was converted to a Preliminary Hearing. The Claimant sought leave to amend based upon the fact that he was living in Northern Ireland and that the cost of his travelling and residing in the United Kingdom when at work, he said, had improperly led to his redundancy selection. The Claimant confirmed that he relied upon where he was living rather than his colour, nationality or ethnic or national origins. I was not persuaded that residence or domicile fell within the definition of race set out at section 9 of the Equality Act 2010. I declined leave to amend as such a claim was out of time and on the merits it was obviously hopeless.

6 As there was no race claim, both parties indicated that they were ready for a final hearing on the unfair dismissal and redundancy payment claims. The hearing would ordinarily have been re-listed but for the disruption that this would have caused to both parties. The Claimant had travelled from Northern Ireland for the hearing and the Respondent and its witnesses from Scotland. Both parties were prepared to wait until I had finished the other hearing in my list and conclude the case in whatever time was left. Having regard to the overriding objective and the desire to avoid unnecessary delay and expense, I therefore agreed with the parties' application that the full merits hearing should proceed. In the event, the hearing commenced after lunch on 6 September and concluded the following day, albeit with a reserved Judgment. Due to pressure upon judicial time, the promulgation of this Judgment has taken longer than I anticipated or indeed would have liked. I apologise to the parties for any distress that this may have caused to them.

Findings of fact

7 The Respondent is a national business providing eyecare in a domiciliary setting. It is the largest eyecare provider in the UK care home market, with 11 practices throughout the United Kingdom and employing approximately 300 members of staff. Each regional practice comprises clinical staff (including optometrists) and a local management team.

8 The Claimant is an experienced optometrist, clearly committed to the provision of eyecare to the most vulnerable in society. In June 2015 he commenced his employment as a Clinical Director with the Respondent. Over the course of the following years there were discussions between the Claimant and the Respondent about whether or not the parties would enter into a joint venture partnership (JVP). Such a business model involved the Respondent and two individuals (a Clinical Director/Lead and an Operations Director) forming a company to provide optometry

services within a defined geographical area. The two individuals would be directors of that business and responsible for its day to day operation in return for 49% of the profits. The Respondent would provide centralised support in return for 51% of the profits. The local management team as directors of the business would therefore have a direct financial incentive to improve performance in that branch.

9 The traditional pathway to a JVP was for the Respondent to employ directly the person who would become the Clinical Director/Lead whilst the parties negotiated the financial and legal terms of the agreement, due diligence undertaken and the new company formed. Mr Sweeting estimated that this would take approximately six months; the Claimant disagreed suggesting a period of a year or so. On balance, I consider that a decision about suitability would be taken in or around six months but that it could take up to six months longer to execute the legal agreement. Neither party suggested that this was an indefinite process whereby the person could remain directly employed even when it became clear that no JVP could be agreed. The process was adopted for other individuals, for example a person offered employment as Clinical Lead on 18 September 2017 with a view to becoming Clinical Director upon signature of an anticipated JVP agreement. Indeed, the Claimant's "statement of issues" admits that all other 11 regions either have or are recruiting a Clinical Director to move towards JVP.

10 By December 2016 the Claimant had had initial discussions with the Respondent about the possibility of a JVP partnership for Essex and whether the Respondent would help him find the capital investment required. At that time, the Claimant was employed in the North East branch. At a meeting in Glasgow in December 2016, the possibility of a JVP for Essex was again discussed between the Claimant, Mr McGuire and Mr Sweeting.

11 On 21 December 2016, Ms Rae provided the Claimant and his proposed Operations Director (Tracey) with financial information which she suggested they take their time to go through and stated that she would answer any questions they might have. The financial information included profit and loss accounts, projected profit and loss accounts, an indicative valuation for Essex and an indication of the level of local team investment which would be required. The Claimant agreed to transfer to Essex where he would be employed as Clinical Lead. I find that this was consistent with the pathway to JVP. Whilst the Claimant had been employed as a Clinical Lead for some time already, the negotiations regarding Essex had become more advanced in December 2016 and by inference it was logical that he move to manage the branch for which he may soon enter into a JVP. As Clinical Lead for Essex, the Claimant was provided on a monthly basis with information about the performance of that branch, including operational statistics, reports and an updated monthly profit and loss. The joint intention was that the Claimant would improve the productivity and profitability of the branch.

12 One week after his transfer to Essex, the Claimant's proposed JVP Operations Director (Tracey) resigned. For a period of approximately six months, the Claimant did not have an Operations Director in post. This had the effect of increasing the Claimant's workload as he was required to undertake some of the operations management work directly. I infer that it also delayed the negotiations for the JVP until another Operations Director could be identified. In or about June 2017, a new

Operations Director (Ms Glendinning) was appointed for Essex. Mr Sweeting had concerns about her performance and the Claimant accepts in his witness statement that she "struggled with the role".

13 Prior to the Claimant's transfer to Essex, the branch financial performance was not strong. In the 11 months to February 2017, the EBITDA was £89,062 (ranging from a monthly low of a £3,695 loss to a high of £13,599 profit). This figure did not take into account the central support charge which was a contribution towards central office overheads. With effect from February 2017, this central support charge was shown on the Profit and Loss account as a separate deduction. The figure was initially £12,587 a month for Essex (although it reduced to £8,040 a month from March 2018). The Claimant's case is that this was an artificial increase in the operating costs designed to show Essex as less profitable than he believes was the case.

14 I did not find the Claimant's evidence on this point persuasive. On her profit and loss analysis spreadsheet, Ms Rae had re-credited the central support charge for Essex in the period after February 2017 expressly to ensure that there was consistency for the analysis of the results. Even with the central support charge re-credited to the Essex branch after February 2017, its EBITDA decreased and the total for the period March 2017 to December 2017 was an overall loss of £52,040. In other words, even if the central support charge was entirely disregarded the performance of the Essex branch declined significantly from February 2017.

15 The Claimant's case is that the Essex branch overheads were further skewed by the fact that he was being provided with car rental by the Respondent at an uneconomic rate. I accept that this overhead was unduly high before July 2017 when it was reduced from £1,989.51 per month to initially £390 and then £405 per month. Had this reduction been made sooner, it would have saved about £7,500 in total. A further distortion in the overheads was said to be the Respondent's refusal to permit the Claimant to make his own flight and accommodation bookings which would have saved approximately £100 per week on his flights and £50 per week on his accommodation. I accepted that these were realistic savings which could have been made and which would have generated an annual saving of about £6,000 (allowing for holiday absence). These combined savings would have been about £13,500 but would still have left a loss of £38,500 over a 10 month period.

16 I found Ms Rae to be a compelling, credible and clearly honest witness. I accept that her reports were produced entirely based upon the financial data available to her and are a reliable indicator of the true performance of the Essex branch. Ms Rae's analysis that a branch which had historically underperformed had become significantly more unprofitable after the arrival of the Claimant was accurate and reliable. The decline was not due to the inclusion of the central support charge on the profit and loss account. Further, after the reduction in car rental from July 2017, the branch made a profit only in October 2017 (of £6,281) and November 2017 (of £4,933) to which the notional addition of £500 per month for flight and accommodation savings would have been modest.

17 The under-performance of the Essex branch was part of a pattern of growing financial pressure upon the Respondent in 2017 which generated a need to improve efficiencies, reduce costs and stimulate growth. Whilst its bank did not give any

particular instruction as to how costs could be reduced, I accept Mr McGuire's evidence that it did require senior management to give serious attention to the future performance of the business. The Respondent decided to increase its emphasis upon the JVP model across the whole business. In other cost cutting measures, Ms Roe, Mr McGuire and Mr Graeme Manson reduced their salaries and there was a general reduction in marketing costs.

18 It is against this background of increased financial pressure upon the Respondent and under-performance at Essex that, in September 2017, Mr Sweeting emailed the Claimant, copied to Mr McGuire amongst others, asking that the local management team formulate an action plan to increase performance and to reduce cost. This need for improved efficiency also led to the placement of Ms Basi at Essex for six months to support Ms Glendinning in operational matters and to project manage a turnaround in the performance of the team at the branch. The Claimant and Ms Glendinning make clear in their evidence that they did not welcome Ms Basi's involvement nor the greater focus of Mr Sweeting upon reducing overheads at Essex. On balance, I find that the greater involvement of both Mr Sweeting and Ms Basi in the management of Essex was not an attempt to replace the Claimant but a genuine and pressing need to improve the performance and efficiency of that branch by providing additional management support.

19 At a two-day conference in September 2017, the Respondent discussed each clinic's performance, costs and contributions to central overheads. The figures for Essex branch were of sufficient concern to lead to a review of its performance in order to assess its long-term viability. This led to the production of a viability study in October 2017, attached as Appendix A to Mr McGuire's statement which records the Respondent's concern about the EBITDA loss and the changes required to ensure profitability. Mr Sweeting made a business case with the senior management team that they should move faster to introduce the joint venture structure into the Essex branch. Mr McGuire agreed. The Respondent decided to keep the Essex branch trading under a JVP agreement and no longer directly to employ a Clinical Director. In other words, the Claimant's role was at risk of redundancy but there was a possibility of some limited future employment whilst the JVP agreement was finalised. Whether or not the Claimant agrees with the rationale, I accept Mr McGuire's evidence that part of the reason was the desire to reduce the costs of directly employing the Claimant (salary, performance related bonus, expenses and annual living allowance). Another part of the reason was the belief that a JVP Clinical Lead would as a director with a profit share in the branch be more motivated to maximise profitability.

20 On 10 October 2017, Mr Sweeting met with the Claimant and warned him that he was at risk of redundancy. The reasons were discussed in the meeting and sent to the Claimant in a letter of the same date. In particular, the need to restructure the business to improve sustainability in growth in Essex, the decision that a JVP be put in place to achieve required cost savings and to reflect the same structure in place in other parts of the country. The Claimant was warned that as a result the role of employed Clinical Director would no longer exist and that there would be a formal consultation process.

21 The first consultation meeting did not take place until 24 October 2017 due to difficulty agreeing mutually convenient dates. In the meantime, the relationship

between the Claimant and Mr Sweeting deteriorated. The Claimant gave evidence to the effect that Mr Sweeting was behaving in an improper manner, describing hostile and aggressive behaviour and inappropriate interference in the operation of Essex. Mr Sweeting denies behaving improperly, rather he says that it was the Claimant who was not behaving professionally during the consultation period. The difficulties can be seen in an email exchange between Mr Sweeting and the Claimant on 20 October 2017. Mr Sweeting expressed concern about the Claimant's failure to respond to his emails, calls and texts, or customer complaints and interaction with Ms Basi. The Claimant denied any failure to engage and suggested that it was Mr Sweeting who was responsible for poor staff morale at the branch. I appreciate that for both the Claimant and Mr Sweeting this was a difficult and unsettling time. Each believes to be true their subjective interpretation of the other's behaviour. On balance I find that each was wary of the other but that neither behaved aggressively or inappropriately as alleged.

22 The consultation meeting took place on 24 October 2017 and lasted about half an hour. The meeting was conducted by Mr Sweeting and the Claimant was accompanied. The Claimant understood the need for cost savings but set out his belief that the costs had been overinflated due to his associated costs such as flights and car hire. Mr Sweeting and the Claimant discussed the JVP model and whether or not this would be a role of interest to the Claimant. The Claimant was concerned that he had not been offered a specific JVP deal for Essex. The Claimant asked about other roles on offer and Mr Sweeting showed him a list of vacancies. These were predominantly for optometrists but also included JVPs in Yorkshire and Manchester. Mr Sweeting told the Claimant the range of salaries for each, in response the Claimant asked what was being offered. Mr Sweeting asked the Claimant if he had any suggestions to avoid redundancy, he said no, he was interested in the suggestions the Respondent had. Mr Sweeting told him that their suggestion was to move to a JVP. The Claimant asked what was on offer by way of redundancy package and said that he expected to be paid in lieu or placed on garden leave.

23 The Claimant asked for more details of the investment expected of him in a JVP and stated that no further information had been made available to him since his conversation in December 2016. Mr Sweeting explained that he would be sent a full financial pack which was the same as that discussed in his monthly management meetings and agreed to provide the Claimant with the same information as would be provided to others looking at JVP, including the investment.

24 On 2 November 2017, Mr McGuire and Mr Sweeting attended Essex. An email sent by Mr McGuire the next day to the Respondent's HR adviser clearly expresses his view that that the Claimant was becoming disruptive and de-stabilising and should be subject to performance management. The email includes the following:

> "**Ed is dealing with the redundancy process with JL. Ed is going to speak to you about the possibility of not even offering James Lane the shares/equity Clinical Director role as I do not wish to go into business with him due to his attitude and behaviours not being of the standards required of a company Director."**

25 HR advice was that if Mr McGuire wanted to backtrack on the offer of a JVP it should be made clear by him personally and not by Mr Sweeting in the consultation process. HR expressed concern that if the JVP was removed the employment

relationship would be destroyed and, with performance management on top, could lead to a resignation and constructive dismissal claim. Mr McGuire candidly admitted in oral evidence that on 3 November 2017 he was 95% convinced that he would not enter a JVP with the Claimant but he still regarded him highly as an optometrist and would still have employed him in that capacity. I accept that evidence as truthful and reliable and find that the concern about a JVP arose only after the branch visit on 2 November 2017.

26 In the course of attempts to arrange a second consultation meeting, the Claimant requested: (i) a detailed breakdown of his travel and accommodation costs and how they contributed to the overall Essex loss; (ii) details of the JVP including a job description, advertisement and information pack sent to all prospective JVPs; (iii) details of suitable alternative employment and (iv) a list of all other vacancies the Respondent would like him to consider.

27 On 15 November 2017, Mr Sweeting forwarded to the Claimant from Ms Rae a note setting out an overview of JVP investment plan and a general information brochure. Ms Rae also provided a cost analysis comparing the Claimant's current costs with those of a JVP model. As she said in her email at the time, she did not consider any other information was required given that already provided in December 2016. The Claimant was also provided with the list of vacancies showing optometrist positions throughout the country and JVPs for Yorkshire, Manchester and "various".

28 Ms Rae's cost analysis was the subject of a great deal of scrutiny in the course of evidence. The Claimant's case is that it is unreliable, inaccurate and misleading. I do not agree. I accept Ms Rae's evidence that her analysis set out truthfully as she understood it at the time the notional cost of the branch as a JVP as against continued direct employment, taking into account a possibility that the Claimant would need locum cover for clinics on a Friday if he took that as a management day. The different underlying bases upon which the alternatives are predicated are expressly set out in the analysis. The analysis looks at the actual figures for June, July, August, September and October 2017. In producing an estimate of annualised cost, Ms Rae took the October 2017 figures which reflected the car rental savings since July and lower flight costs. I find that this was a fair approach designed to avoid any suggestion of improperly inflating expenses. Ms Rae relied upon a notional JVP salary of £79,000. The Claimant points out that an offer has recently been made to another potential JVP partner of salary in the region of £91,000, a sum only a little lower than his own previous package in the region of £95,000 per annum (basic salary and living allowance). I accept as truthful Ms Rae's evidence that her notional figure was based upon salaries known to her at the time. This is consistent with the offer made on 18 September 2017 which was also for £79,000 plus bonus.

29 The Claimant's failure to appreciate that the car rental saving had been properly taken into account and extrapolated forward (despite being apparent from the notes on the analysis) or indeed that the notional locum cost was simply a further alternative was consistent with a general impression that at time he did not understand fully the figures clearly set out therein. On balance, I accepted in full Ms Rae's evidence that in November 2017, she and the Respondent genuinely believed that a move to the JVP model from the existing model (without use of a notional locum) would generate cost savings of £47,568.19 per annum.

30 The second consultation meeting took place on 22 November 2017; it lasted about 2 hours and the Claimant was again accompanied. Mr Sweeting and the Claimant again discussed the possibility of a JVP. Mr Sweeting believed that sufficient information had been provided including that given in December 2016. The Claimant disagreed and believed that more up to date information was required, specifically with regard to equity and loan pay back dependent upon the projected growth and performance of the business. Ms Rae's financial analysis was discussed: the Claimant set out his belief that the costs had been inflated including Ms Basi's salary being charged to the branch. Mr Sweeting disagreed and explained that she was a Project Manager and not charged to Essex. The Claimant's misunderstanding of the central support charge and its irrelevance to the analysis is again apparent from this part of the discussion. The Claimant set out his analysis that direct employment cost only £130 per day more than a JVP. This would give an annual difference of over £30,000 between the two models. The Claimant and Mr Sweeting discussed optometrist roles, possibly as a locum, and JVP opportunities in Newcastle for which the Claimant said that he required further information. The meeting concluded with Mr Sweeting stating that he felt that they were going around in circles: the Respondent considering that it had given sufficient information and that it was for the Claimant to decide if he wished to pursue the JVP option; the Claimant saying that he had insufficient information, he required profit and loss figures, and essentially that it was for the Respondent to make him a firm offer. After a further adjournment, Mr Sweeting informed the Claimant that his job as Clinical Director was being made redundant.

31 The decision to give notice of dismissal ending on 22 February 2018 was confirmed in a letter dated 27 November 2017. In it, Mr Sweeting stated that Mr McGuire would speak to the Claimant about JVP opportunities in Essex and Newcastle and that the Claimant could still express interest in current and new vacancies during the notice period. Following the second consultation meeting, the Claimant was not provided with the Newcastle profit and loss figures. I accept the Respondent's evidence that the profit and loss figures for Essex were already known and provided to the Claimant on a regular basis as part of his role in the branch since February 2017.

32 The Claimant's appeal against dismissal was heard by Mr Manson on 2 January 2018 and the Claimant was again accompanied. The Claimant expressed his belief that he had been treated unfairly and that he believed that the redundancy came down to his travel and accommodation costs. There was further discussion about the profitability of the Essex branch and the possibility of alternative employment. The Claimant was concerned that vacancies had not been given to him until 16 November 2017 email and believed that the decision to dismiss was predetermined. The Claimant maintained that the Respondent's figures did not give a true indication of the Essex branch costs. When asked whether or not he would be prepared to reduce his salary the Claimant equivocated before answering no, probably not. The Claimant also asserted that the Respondent had not given sufficient consideration to bumping another Clinical Director or Clinical Lead. As for alternatives, the Claimant maintained that he had been given insufficient information to be able to apply for anything on the vacancy list and that the Respondent had failed to put a firm offer on the table for him.

33 By letter dated 5 February 2018, the Claimant was informed that his appeal against dismissal was not successful. Mr Manson did not agree that the rationale for

redundancy was insufficient or based solely upon travel time and accommodation costs. Nor did he accept that insufficient efforts had been made to provide suitable alternative employment and/or other work. The Respondent had not offered a role because it did not believe them suitable, not least due to the salary reduction, but nor had the Claimant expressed any interest in applying. The consultation process had not been rushed and Mr Sweeting had agreed to re-schedule the meetings on a number of occasions. Mr Manson considered that bumping was not appropriate and that there was nobody else with whom the Claimant should have been pooled. Mr Manson considered that the financial information provided by Ms Rae in December 2016 and during the consultation process to be detailed and adequate but that negotiations had reached a "stalemate" leaving the ball in the Claimant's court to decide whether or not to take matters further. This was a genuine redundancy situation with correct procedures followed. Nevertheless, Mr Manson formally offered the Claimant the role of optometrist in Bristol at £70,000 per annum, paying for his own travel and reporting to another manager given the Claimant's concerns about his working relationship with Mr Sweeting.

34 The Claimant formally rejected the offer on 22 February 2018 as he did not consider this to be fair and reasonable and as it would be impossible to work with Mr Sweeting. As such, the Claimant's employment terminated the same day and he was paid in full for salary and received a redundancy payment of £1,467 as shown on his final payslip. The Claimant was not replaced as Clinical Lead/Director at Essex.

Law

35 It is for the employer to show the reason for dismissal and to satisfy the tribunal that it is a potentially fair reason, section 98(1) Employment Rights Act 1996 ('ERA'). Redundancy is a potentially fair reason for dismissal, section 98(2)(c) ERA.

36 The definition of a redundancy is set out at section 139 ERA and provides that:

> **(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—**
>
> **(a) the fact that his employer has ceased or intends to cease—**
> **(i) to carry on the business for the purposes of which the employee was employed by him, or**
> **(ii) to carry on that business in the place where the employee was so employed, or**
>
> **(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.**

37 It is not open to the Tribunal to decide the reasonableness of a decision to create a redundancy situation or to investigate the commercial and economic reasons which lead to that decision to make redundancies beyond being satisfied that it is not a sham and was based on proper information (whether the decision is genuine, not

whether it is wise), **James W Cook and Co (Wivenhoe) Ltd v Tipper and ors** [1990] ICR 716, CA.

38 In order for the dismissal to be fair, the Respondent must follow a fair procedure. Guidelines for what is generally expected when considering the fairness of a redundancy were set out by the EAT in **Williams –v- Compair Maxam Ltd** [1982] IRLR 83, suggesting that there should be: (i) as much warning as possible; (ii) objectively chosen and fairly applied selection criteria; (iii) consultation about ways of avoiding redundancy, such as alternative employment; and (iv) where there is a trade union, whether the union's views were sought. These are guidelines only and are not principles of law. When considering pooling and bumping, the overarching test is whether the employer's decision fell within the range of reasonable responses.

39 In deciding whether the dismissal was fair or unfair, the tribunal must consider the whole of the disciplinary process. If it finds that an early stage of the process was defective, the tribunal should consider the appeal and whether the overall procedure adopted was fair, see **Taylor –v- OCS Group Limited** [2006] IRLR 613, CA per Smith LJ at paragraph 47.

40 If a dismissal is unfair due to procedural failings but the appropriate steps, if taken, would not have affected the outcome, this may be reflected in the compensatory award, **Polkey v A E Dayton Services Ltd** [1987] IRLR 503, HL. This may be done either by limiting the period for which a compensatory award is made or by applying a percentage reduction to reflect the possibility of a fair dismissal in any event.

Conclusion

41 The Claimant's case is that the redundancy situation was a sham designed to secure his dismissal and replacement by Ms Basi. I do not agree. The financial analysis undertaken by the Respondent supports its case that the Essex branch had been underperforming for some considerable time. The situation became worse after the Claimant's transfer to Essex. The central support charge did not artificially inflate branch costs because in her analysis, Ms Rae discounted it. Even allowing for the reduction in car rental, flight and accommodation costs the Essex branch had a loss of £38,500 over a 10 month period. The Respondent was under growing financial pressure generally in 2017 and serious attention was required to improve profitability. The Respondent's desire to move to a JVP model for Essex and therefore to remove the position of employed Clinical Director was based upon proper information, was genuinely held and was consistent with its other cost cutting measures generally. Based upon my findings of fact I find that there was a genuine redundancy situation: the requirement for an employed Clinical Director in Essex was expected to cease and be replaced by a director of a new company JVP.

42 The decision to place the Claimant at risk of redundancy was taken in October 2017. It is consistent with Mr Sweeting's request in September 2017 for an action plan to increase performance and reduce cost. It is also consistent with the two-day conference in September 2017 and the viability study for Essex which followed in October 2017. This caused the decision to move faster to introduce the JVP model in Essex and the consequent redundancy of the Claimant. I did not find persuasive the Claimant's case that Mr Sweeting and/or Mr McGuire had tried to side-line him with the

introduction of Ms Basi. Ms Basi was brought in to support Ms Glendinning who was not performing well. Ms Glendinning was Operations Manager and it is natural that in her supporting role, Ms Basi became involved in the running of the branch. The increased focus of Mr Sweeting and Ms Basi was the genuine result of problems in performance at the Essex branch, even if it was not welcomed by the Claimant.

43 The Claimant's case is that the decision to dismiss him was a sham, again relying upon what he regards as the unreliable financial analysis of the Essex branch performance. As set out above, the Claimant demonstrated a fundamental misunderstanding of the profit and loss figures both in respect of the central support charge and the relevance of the reduction in his costs. The unreliability of the Claimant's case on the financial analysis is amply demonstrated by the minimal £6,000 per annum saving possible on accommodation and flight costs even on his own case when considered against a saving of £47,000 if the JVP model was introduced. I conclude that Mr Sweeting was not motivated by anything other than the need to make savings and improve performance. A JVP partner would have a direct financial interest in the profitability of the branch as well as reducing overall cost. Redundancy was the genuine reason for dismissal.

44 Having decided that there was a redundancy situation at Essex branch, the Respondent warned the Claimant and commenced a consultation process. The Respondent did not consider pooling the Claimant with other Clinical Directors nor of bumping others. Rather it considered the Claimant to be in a pool of one, namely the only Clinical Director at Essex. In deciding that this was within the range of reasonable responses, I took into account the Respondent's focus upon JVP across the business nationally. This was consistent with other JVP offers made, for example in September 2017, and the vacancies for JVPs which existed when the Claimant was at risk of redundancy. The same applies to bumping. Whilst it may be that the Claimant personally would have been happy to transfer to another branch, the Respondent already had in place other JVP agreements and was generally seeking to encourage the JVP model. It would not be reasonable to bump an existing Clinical Director to make way for the Claimant. Indeed, the Claimant's suggestion of bumping arose only on appeal and suggested a failure to realise the Respondent's concern about the financial performance of the branch he had been managing.

45 The consultation process in theory lasted from 10 October 2017 until termination in February 2018 but in reality consisted of two consultation meetings, 24 October 2017 and 22 November 2017. The meetings considered the possibility of employment as an optometrist or a JVP either in Essex or elsewhere. It is fundamental that consultation in a redundancy situation be entered into in a genuine and meaningful manner. The Respondent did not offer the Claimant the possibility of staying as Clinical Lead pending conclusion of a JVP because it essentially wanted the Claimant to commit to such an agreement. From 3 November 2017, however, Mr McGuire had lost faith in the Claimant to the extent that there was no genuine attempt to engage him in a possible JVP. This is consistent with the failure to provide the Claimant with an up to date valuation for the Essex branch which would have enabled him to calculate the amount of investment required or even the Newcastle profit and loss figures. However, I have accepted as truthful and reliable Mr McGuire's evidence that notwithstanding the concern about the Claimant as a commercial partner in a JVP, the Respondent continued to be happy for him to undertake the role of optometrist. The

Claimant was aware of optometrist vacancies from the first consultation meeting but did not express specific interest.

46 After 22 November 2017, there is little evidence of any attempt to consider alternatives to redundancy by either the Claimant or the Respondent. The Claimant's case seemed to be that it was the responsibility of the Respondent to make him a firm offer of either a JVP or an optometrist position. The Respondent's case was that it had given the necessary information for the Claimant to make his own decision and that he did not do so. Overall, I considered that during the consultation period the Claimant was equivocal about what he wanted not least as he did have up to date profit and loss figures for Essex upon which he could have made an informed decision to at least express interest in principle in a JVP agreement. In the consultation meetings he was passive at best, evasive at worst when pressed about a JVP or post as optometrist. By 15 November 2017, the Claimant had been given the list of optometrist and JVP vacancies. He knew the range of salaries for optometrists. He did not apply for any of the vacant roles and after 22 November 2017 did not press the Respondent further for information relevant to alternative employment.

47 Given that the Clinical Director role was only available as part of a JVP agreement and that the role of optometrist was not suitable given its lesser salary and seniority, I am satisfied that there was no failure to offer the Claimant suitable alternative employment and that the consultation was reasonable in all of the circumstances of the case.

48 Even if the Respondent was under an obligation to make a firm offer of alternative employment, it did so on 5 February 2018 in the appeal decision letter. The Claimant declined the offer, consistent with both party's case that optometrist was not suitable alternative employment. In hearing the appeal, Mr Manson carefully considered the financial rationale for the redundancy and whether or not it was genuine or (as the Claimant suggested) motivated by personal issues. The appeal was fair and, even if there had been failures in the original consultation period which there was not, they would have been remedied when looking at the process overall.

49 The claim as originally advanced included a claim for a redundancy payment. At the effective date of termination, the Claimant had two years' completed service both aged over 41 years and his basic salary exceeded the statutory maximum week's pay of £489. As such, the Claimant was entitled to a redundancy payment of £1,467. This was paid in full in his final pay as evidenced by the payslip.

50 For these reasons the claims of unfair dismissal and for a redundancy payment fail and are dismissed.

Employment Judge Russell

Date: 3 December 2018