EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4103335/18 Held at Aberdeen on 9 and 25 January 2018

Employment Judge: Mr N M Hosie (sitting alone)

Mr Romeo Fernandes	Claimant Represented by: Mr M Dempsey – Counsel
Aramark UK Ltd	Respondent Represented by: Mr W Lane – Solicitor, Peninsula

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant was unfairly dismissed by the respondent and that a Remedy Hearing should be fixed to assess an appropriate award of compensation.

REASONS

Introduction

1. Mr Fernandes claimed that he was unfairly dismissed by the respondent Company ("Aramark"). Aramark admitted the dismissal but claimed that the reason was redundancy and that it was fair.

2. The claimant accepted that there was a genuine redundancy situation in consequence of the "down manning" of the Galaxy 1 where the claimant had been working. The issue was the narrow one of whether the respondent had taken reasonable steps to redeploy the claimant.

The Evidence

3. I heard the evidence and oral submissions on behalf of the parties on 9 January. However, subsequently I invited the parties' solicitors to make further written submissions in relation to relevant case law which my own researches had revealed and I continued my deliberations for that purpose. I received the claimant's submissions on 24 January and the respondent's submissions on 25 January.

4. On behalf of the respondent I heard evidence from: -

- Lee Bridgehouse, Operations Manager, who took the decision to dismiss the claimant.
- Steve Duthie, Senior Operations Manager, who heard the claimant's appeal against the dismissal.

I then heard evidence from the claimant.

5. Each of the witnesses spoke to written statements.

6. Each party lodged a bundle of documentary productions, which meant that there was considerable duplication. I shall refer only to the respondent's bundle ("P").

The Facts

7. Having heard the evidence and considered the documentary productions, I was able to make the following material findings in fact. By and large, these were either agreed or not disputed. Aramark is a "food services and facilities management partner" to organisations across a range of sectors. It operates globally.

8. The claimant was employed by Aramark as a Steward from 17 December 2007 until 14 December 2017, when he was dismissed on the ground of redundancy. He was employed as "core crew" on an offshore oilrig known as "Galaxy 1", which was owned by Transocean. As core crew he was employed on a full-time, permanent basis with the respondent on the rig. There were 17 core crew on the Galaxy 1, which included stewards, chefs and others. As a Steward he looked after those working on the rig. He dealt mainly with hospitality and housekeeping, such as the provision of linen, tidying rooms, serving meals and drinks and general housekeeping duties. He normally worked 84 hours per week. His normal working pattern was three weeks offshore on the rig followed by a three weeks' rest period onshore.

Redundancy

9. At the start of 2017, Transocean informed Aramark that it intended to permanently down-man the Galaxy 1 to a "cold stack" which meant that all the personnel working on board the rig would be removed, and the installation would completely shut down.

10. As a result of Transocean's decision to down-man, Aramark would no longer be required to provide catering and hospitality services on the Galaxy 1.

11. Aramark's contract with Transocean covered 11 installations. Of those 11 installations, Transocean eventually down-manned all but 3. The Galaxy 1

was either the fifth or sixth of those 11 installations to be down-manned by Transocean. It is understood that Transocean eventually sold the Galaxy 1 to another Company. The rig was moved and is currently in Rotterdam.

"**Heads-Up Call**"

12. In mid-March 2017 Lee Bridgehouse, Aramark's Operation Manager, had "heads-up" telephone calls with each of the Galaxy 1's core crew, including the claimant. During these calls he told each employee that Transocean had decided to down-man the Galaxy 1 to a cold stack and that a redundancy exercise would take place.

13. The following documents were included with the productions:

- Aramark's "Offshore Redundancy Policy" which had been agreed with the trade unions (P.164/165).
- A "Joint Memorandum of Agreement" between the Caterers Offshore Trade Association ("COTA") and the Trade Unions and (P.166-179).
- Aramark's "Core Crew Agreement" (P.180/181).

"**Pooling & Provisional Selection for Redundancy**"

14. Aramark identified that all of the employees permanently based on the Galaxy 1 (i.e. the Galaxy 1's Core Crew) were at risk of redundancy. This included the claimant.

15. All the Galaxy 1's core crew were placed into a redundancy selection pool and a "last in first out" ("LIFO") selection criterion was applied to the pooled employees to provisionally select candidates for redundancy. Aramark and the Unions had agreed to use LIFO as a selection criterion and this was reflected in Aramark's Offshore Redundancy Policy (P.165).

16. Aramark had vacancies for some of the Galaxy 1 core crew on other installations and, as agreed, these were made available to those who had the longest length of service.

17. The claimant had the seventh shortest length of service and this meant that he was provisionally selected as a potential candidate for redundancy (P.185).

18. Accordingly, on 16 March 2017 Aramark sent a letter to the claimant inviting him to an "At Risk Meeting" (P.133/134).

First Redundancy Consultation Meeting on 18 April 2017

19. Minutes of that meeting were produced (P.135). I was satisfied that they were reasonably accurate. The meeting was conducted by Lee Bridgehouse, Operations Manager, and the claimant had the benefit of trade union representation. The following are excerpts: -

*"**6)** I (Lee Bridgehouse) advised Romeo Fernandes that Aramark would immediately cease recruitment in these areas and commence a search for alternative employment within Aramark……..*

***7)** I advised Romeo Fernandes that in order to prevent a redundancy situation occurring, Aramark want to understand what position he would consider as an alternative. I confirm the parameters for re-deployment as follows:*

(a) What would he consider as a minimum salary? - COTA Grade A
(b) Would he consider working offshore on any asset? - Yes
(c) Would he consider onshore work? - No
(d) What location would he consider mobilising offshore from? - Would prefer Northern Sector but would consider all
(e) What kind of position would he consider? – Grade A Steward and Grade C Lead Steward.

Second Redundancy Consultation Meeting on 25 April 2017

20. Minutes of that meeting were also produced (P.138). I was satisfied that they were reasonably accurate. As no suitable alternative core crew role had been found, Mr Bridgehouse advised the claimant that he was entitled to 9 weeks' notice which he would be expected to work. However, he would continue to look for a permanent position for him and if a suitable one was found, he would let him know.

21. The Minutes record the following questions which were raised by the claimant's Trade Union representative and Mr Bridgehouse's answers: -

"*(1) When can an employee appeal? What is Aramark's policy?*

a. Details of where to address any redundancy appeal will be sent in the confirmation of redundancy letter where appropriate.

(2) Has a stable position been found in the meantime?

a. Lee advised the meeting that a stable position has not been found otherwise Romeo would have been advised."

Notice of Redundancy

22. The respondent wrote to the claimant on 5 June to advise him that his position of Steward had become redundant and that his employment would terminate on 27 June 2017, at the end of his notice period, which he was required to work (P.139/140).

Notice Extension

23. The respondent sent a further letter to the claimant on 5 June to advise that they were able to extend his notice period to enable him to, *"work on the Safe Caledonia on a short-term project*" (P.141). The claimant accepted this offer.

24. The claimant gave evidence that at the second consultation meeting he was advised by his trade union representative to put forward the proposal that he could work on the Safe Caledonia, but when he raised this he was advised that: *"this was a zero hours contract rig and so core crew could not go on it".*

25. There is no reference to this in the Minutes, but the claimant gave his evidence in a consistent, measured and convincing manner and presented as credible and reliable and his evidence in this regard was not challenged. I was satisfied, therefore, that there was this exchange at the second consultation meeting and I so find in fact.

Safe Caledonia

26. The claimant worked on the Safe Caledonia rig from 27 June to 14 December 2017. On 15 December 2017 he received a letter to confirm his redundancy and that his employment had terminated on 14 December (P.142/143). The following is an excerpt from that letter: -

"*As confirmed in letter dated 05 June 2017 you worked your statutory notice of nine weeks. The letter dated 05 June 2017 advised that we wished to extend your notice to enable you to work on the Safe Caledonia on a short-term project.*

Unfortunately, the Safe Caledonia project has come to an end and we have been unable to secure you suitable alternative employment within that time and we confirm your termination date as 14 December 2017."

Appeal

27. The claimant appealed against his dismissal. The following is an excerpt from his appeal letter (P.148): -

"*The reason for my appeal is based on two things, the first thing being, I have heard through the grapevine that Aramark were using ad-hoc workers on some units to cover positions that should be offered to permanent employees, and my second reason is that some of the personnel who worked with me on Galaxy 1 before it was down-manned, are still working for the company. I*

believe that I should have been considered for a position before them due to my length of service!"

Appeal Meeting on 12 January 2018

28. The meeting was conducted by Steve Duthie, Senior Operations Manager, by way of conference call. Minutes of the meeting were produced (P.149-161). I was satisfied that they were reasonably accurate although the Minutes record that certain parts of the call, which was taped, were inaudible.

29. In response to the claimant's assertion that ad-hoc workers were allocated work which he could have done, the response was that these were short-term contracts, it was not clear how long they would last, and it wasn't suitable, therefore, for core crew, such as the claimant, to do that work.

30. Mr Duthie wrote to the claimant on 19 January to inform him that his appeal had been unsuccessful (P.162/163).

31. The following is an excerpt from his letter: -

"*After full consideration of the points raised in your appeal letter and at your appeal hearing on 12 January 2018, we write in response to your two points–*

- *Aramark do utilise Ad-hoc workers for short-term contracts and holiday and sickness cover and they are not offered any position which a permanent employee at risk of redundancy would be entitled to.*

- *You state that some of the personnel, who worked with you on the Galaxy 1 before it was down manned, are still working for the company and you believe that you should have been considered for a position before then due to your length of service. In response to this those employees are working on different assets from you as part of their notice extension and to remove them from their current positions to offer you would classed* (sic) *as "bumping" and this would be unlawful and therefore not an option open to us.*"

32. In the course of the appeal meeting, the claimant asked about an employee (Lauren Fyvie) who had been employed on the Safe Caledonia and was moved from there to the Clair Platform as an ad-hoc steward and had been there for over eight months (P.155/156).

33. The claimant maintained that he was advised that the respondent would look into this, but that they never told him subsequently that they had done so.

34. When he gave evidence at the Tribunal Hearing, Mr Bridgehouse explained that Ms Fyvie had been employed on the Clair to provide maternity cover.

35. The claimant also raised at the appeal meeting the fact that there had been "two recruitment drives" during his notice period. The Minutes record that there was the following exchange (P.159): -

"*RF (claimant) - Well* (sic) *we are on the track of redundancy, there has been two recruitment drives within the company.*

PB (Pauline Brechin, Senior HR Manager) – Two recruitment drives?

SD (Steve Duthie) – For Ad-hoc?

RF – Yes.

PB – Yes for short.

SD – Yeah short-term work for project, these people……..

RF – Ah Ha.

SD – Are sitting at home just now. There is no work for them just now.

RF – Sooo……

SD – Romeo I, know you (inaudible) *go into the confidence fits regards the company* (sic) *but there, there's more than 80 people at home just now sitting with no work because some of the work we, we hope come to* (inaudible) *has not taken place.*

RF – So, in other words (inaudible) *uu hh mm hire and using people when you want and send them home whenever you want.*

SD – Romeo, can I just say that everything that we do I mean, as I have said, I have been in this game for thirty years. Every action we do offshore regarding employment of people, last in, first out is all fully endorsed by the unions. The unions we are in partnership with them, every agreement is done with them and every single case. They're aware we have got monthly meetings, they're aware far the industry is going, (sic) *they're aware of the rigs that are being up-manned and down-manned, they're aware of the projects that come through ocean (?) and those that are coming to an end.*

RF – I, I, I really feel I still feel it's not right at all, the way how things have been conducted uh with people and um, um (inaudible).

36. The claimant also mentioned at the appeal other ad-hoc workers who were in long-term jobs with the company while he was working out his notice.

Respondent's Submissions

37. In support of his submissions, the respondent's solicitor referred to the following cases: -

Amazon v. Hurdus UKEAT/0377/10;
Barratt v. Dalrymple [1984] IRLR 385;
Polkey v. AE Dayton Services Ltd [1988] ICR 142;
Williams & Others v. Compair Maxam Ltd [1982] ICR 156.

38. He submitted that the claimant was dismissed by reason of redundancy, which is a potentially fair reason.

39. So far as the fairness or otherwise of the decision to dismiss was concerned, with reference to s.98(4) of the Employment Rights Act 1996 and the guidance in **Polkey** and **Williams**, the only issue between the parties was whether the respondent had taken reasonable steps to find alternative employment for the claimant.

40. The respondent's solicitor submitted the Tribunal was required to consider whether the decision that there was nothing suitable, was within the band of reasonable responses.

41. He submitted that the matter of alternative employment was discussed at the various consultation meetings and that the evidence of the respondent's Operation Manager, Lee Bridgehouse, who conducted these meetings and took the decision to dismiss, was largely unchallenged. Consequently, alternative employment was found for the claimant on the Safe Caledonia, but only for six months.

42. The claimant's position was that he should have been offered ad-hoc work. However, it was submitted, with reference **Barratt**, that this was outwith the band of reasonable responses in the circumstances. He submitted that it is not unreasonable for an employer to assume that an employee would not want a lesser or subordinate position such as ad-hoc work and an ad-hoc role is inferior to a core role. It is a "zero hours" contract.

43. Further, it was submitted that the claimant should have made it clear, at an early stage, that he would be prepared to do ad-hoc work, but he failed to do so.

44. It was submitted, with reference to the documentary evidence, there was no suggestion by the claimant or his trade union representative that he would be interested in the "*inferior ad-hoc role*". Quite the contrary, in fact, as at the second consultation meeting the claimant's representative enquired about the availability of a *"stable position*" (P.138), at the first consultation meeting there was discussion about *"a minimum salary"* and these discussions could only relate, it was submitted, to a core position and not an ad-hoc role.

45. It was submitted that the respondent was of the view that an ad-hoc role was not suitable and that the claimant's trade union representative was also of that view.

46. Further, it was open to the claimant himself to apply for an ad-hoc role, but he didn't.

47. It was submitted that the evidence of Mr Bridgehouse should be given considerable weight and that his evidence was more credible and reliable than that of the claimant.

48. The respondent's solicitor also referred, to para.17 of the Judgment of the EAT in **Amazon** at para. 17: -

"*Alternative Employment*

17. Here the Tribunal has, in our Judgment, lost sight of the review function which it was required to carry out. The quest was whether the Respondent took reasonable steps to find alternative employment for the claimant so that he could retain his employment. Even if the Claimant had no realistic prospect of securing the Labour Manager's position (see paragraph 48) because the job had been effectively promised to Miss Danvers if her six month fixed-term employment in the post went well, that does not render his dismissal by reason of redundancy unfair. It is only if there was a vacant post for which the claimant was suitable, but he was not considered for it that the employer acts unreasonably in this context."

Claimant's Submissions

49. The claimant's Counsel confirmed that the only issue in this case was whether the respondent had acted reasonably in not considering the claimant for an ad-hoc position. It was submitted that the process was flawed in that regard.

50. So far as offering an ad-hoc position to a "core employee" was concerned, Counsel referred me to the fact that alternative employment, by way of ad-hoc work, had been found for Laura Fyvie who was a core employee and by the time of the appeal meeting she had been in this ad-hoc position for several months. This was a matter which was raised by the claimant at his appeal.

51. While most of the process which the respondent followed was not challenged, it was significant that the claimant, although redundant, was able to work an extended notice period doing ad-hoc work.

52. Counsel referred me to the respondent's "Offshore Redundancy Policy" (P.164) which provides, under the heading "MEASURES TO AVOID OR MINIMISE REDUNDANCY", that: -

1. *ARAMARK will immediately cease recruitment of new staff, except in areas where there is no alternative, and retraining or redeployment is not practicable.*"

Counsel submitted that the respondent was in breach of that Policy as during the claimant's notice period it had engaged in a "recruitment drive" for ad-hoc employees and It was clear that the claimant's skills were appropriate to do ad-hoc work.

53. Although there was no evidence of any discussions with the trade unions, it was the respondent's position that the unions would not have accepted the claimant as being suitable for redeployment to an ad-hoc role. However, the claimant had made it clear at the appeal meeting that he would be prepared to take on "short-time work" (P.150).

54. Although, there was reference to a "minimum salary" at the first consultation meeting (P135), that did not mean that he was only prepared to consider a core position, as ad-hoc workers are on the same pay grade as core workers.

55. There was an obligation on the respondent to take reasonable steps to find alternative employment for the claimant. It was submitted that, at the very least, they should have "flagged up" to him the fact that there was a recruitment drive.

56. It was submitted that it was not reasonable in all the circumstances for the respondent not to consider the claimant for an ad-hoc role and that this rendered his dismissal unfair.

Discussion & Decision

57. In every unfair dismissal case where dismissal is admitted s.98(1) of the Employment Rights Act 1996 ("the 1996 Act") requires the employer to show the reason for the dismissal and that it is an admissible reason in terms of s.98(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. An admissible reason is a reason for which an employee may be fairly dismissed and among them is that the employee was redundant. That was the reason which the respondent claimed was the reason for the claimant's dismissal.

58. In consequence of the down-manning of the Galaxy 1, I was satisfied that there was a genuine redundancy situation in terms of s.139 (1) (b) of the 1996 Act and that the claimant was dismissed for that reason. That was not disputed by the claimant.

59. The remaining question which I had to determine, therefore, under s.98(4) of the 1996 Act, was whether the respondent had acted reasonably in treating the reason for dismissing the claimant as a sufficient reason and that question had to be determined in accordance with equity and the substantial merits of the case. In doing so, I had regard to the authoritative starting point for Tribunals assessing the fairness of a redundancy dismissal, namely the guidance of Lord Bridge in **Polkey**: -

"*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 maybe reasonable to avoid or minimise redundancy by redeployment within his own organisation*****"** (my emphasis).

60. The claimant's Counsel took no issue with the fairness or the procedures which the respondent followed, or the selection pool. The only issue was whether the respondent had taken reasonable steps to redeploy the claimant and whether, as Counsel submitted, it was unreasonable not to offer him ad-hoc work. I am obliged to Counsel for focussing the issue in this way.

61. It is clear from the relevant case law that a reasonable employer will consider whether instead of dismissing for redundancy he can offer alternative employment.

62. The claimant was part of the respondent's "core crew" which meant that he had a permanent, full-time, position as a Steward on the Galaxy 1 and generally worked a regular pattern of three weeks on the rig offshore and he then had a three-week rest period onshore. At the time of his dismissal, he had been employed by the respondent for over six years.

63. The respondent also had a number of so-called "ad-hoc employees". Unlike core crew, ad-hoc employees are on "zero hours contracts" and have no guarantee of work or pay.

64. However, ad-hoc Stewards do exactly the same work as core crew Stewards, enjoy the same rate of pay and although they are engaged on a "short-term agreement", this can sometimes last for several months, as was the case with Lauren Fyvie, for example, who was engaged on an ad-hoc basis to provide maternity cover. I also heard of other ad-hoc employees who had been engaged "short-term" for many months. Indeed, in cross-examination Lee Bridgehouse said that the respondent had some ad-hoc employees who had been engaged in excess of 20 months.

65. The respondent normally has a pool of around 120 ad-hoc employees and, although there is no guarantee of work, each of them is likely to be allocated work in any given year and the respondent will endeavour to ensure that there is an even distribution of work, over the year.

66. I was mindful of the EAT decision in **Barratt** to which I was referred by the respondent's solicitor and the *"Obiter dicta"* that: - "*Where an employee at senior management level who has been made redundant is prepared to accept a subordinate position he ought, in fairness, to make this clear at an*

early stage so as to give his employer an opportunity to see if that is a feasible solution."

67. However, after the Hearing, in the course of my deliberations, I had cause to consider the following passages in Harvey on Employment Law at section D paras. [1728] and [1729]: -

[1728]

However, other divisions of the EAT have accepted that employers might be expected to offer an alternative job even if it involves demotion and should not readily assume that the employee will reject it (Avonmouth Construction Co. Ltd v. Shipway [1979] IRLR 14), or at least they might be expected to discuss the possibilities with the employee (Huddersfield Parcels Ltd v. Sykes [1981] IRLR 115, EAT and Abbotts and Standley v. Wesson-Glynwed Steels Ltd [1981] IRLR 51). On the latter point, the EAT in Fulcrum Farma (Europe) Ltd v. Bonassera UKEAT/0198/10 (22 October 2010, unreported) stated that the starting point might be the element of consultation with the senior employee to ascertain his or her views on a possible demotion, thus linking the question in to the overall consultation requirement. Moreover, where such alternative employment is available, the employers must ensure that sufficient information is given to the employee to enable him to make a realistic decision about whether to accept the job or not (modern Injection moulds Ltd v. Price [1976} ICR 370, EAT).

[1729]

Of course, it is perfectly true that what is reasonable depends upon all the circumstances of the particular case. To that extent it may be contended that the Barratt Construction case is not directly in conflict with the other decisions mentioned in this paragraph. But clearly there is a marked difference in emphasis between the cases. This perhaps reflects in part the fact that the Scottish EAT has taken the view that once it is established that a dismissal is not automatically unfair under ERA s 105, it is extremely difficult for an employment tribunal to find that it is unfair under ERA s 98(4). In most cases it is likely that the employer's duty to take reasonable steps to find alternative employment will extend to exploring with the employee the possibility of jobs in subordinate positions."

68. As I had not been referred to these cases in submissions at the Hearing, apart from **Barratt**, as I recorded above I invited further submissions, in writing, from the parties' representatives. I refer to for their terms and now summarise them.

Respondent's further submissions

69. The respondent's solicitor submitted that it was appropriate for the principles articulated by the Scottish EAT in **Barratt** to be applied and when this was done, in the present case, *"the respondent did not act outwith the band of reasonableness in respect of its efforts to locate suitable alternative employment for the claimant".*

70. He submitted that, *"Harvey is correct to observe that there is a 'marked difference' in emphasis between the Scottish division of the EAT and the English and Welsh division".* The Scottish division suggest an onus on the employee to advise his employer that he might be prepared to accept an inferior position. Whereas the English and Welsh division suggest no such onus, or at least a much reduced one. He submitted that, given that *"marked difference",* it was appropriate for a Scottish Tribunal to follow the Scottish division of the EAT.

71. He further submitted that neither the claimant nor his trade union representative had made it clear that the claimant would be prepared to accept an ad-hoc position which was, *"an inferior position to the claimant's core crew position".* Indeed, they *"positively suggested"* otherwise.

72. That being so, when the **Barratt** principles are applied, it could not be said that the respondent acted outwith the band of reasonable responses by not offering the claimant an ad-hoc role.

Claimant's further submissions

73. The claimant's Counsel set out first the law relating to the offering of alternative, subordinate roles and then the application of that law to the present case.

74. He submitted that the position in **Barratt** and the line of authorities, starting with **Avonmouth** could be reconciled. He referred to the following passage

at para 12 in the Judgment of the EAT in **Leventhal Ltd v. North UKEAT/0265/04/MAA**: -

"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".

75. This was approved by the EAT in **Fulcrum** and it was submitted that the first three factors applied to the present case.

76. In support of his submission that **Barratt** could be reconciled with the other decisions of the EAT, Counsel said this: *"In **Barratt** Lord McDonald referred to the previous authorities, including **Avonmouth**, but distinguished them on the basis that they were decided when the employer still had the onus of proving the fairness of the dismissal. By the time of **Barratt,** the onus was now a neutral one, and, as there was no evidence that an enquiry into alternative, subordinate, positions would have been fruitless, the Industrial tribunal should not have found that the employee was entitled to the benefit of the doubt. This was case specific and does not change the question of fact that the tribunal must decide, as set out in **Leventhal**. Further, the EAT in **Barratt** held that the principle that a reasonable employer will not make an employee redundant if he can employ him elsewhere, even in another capacity was good law. Thus, it is submitted that the distinction of prior case law in Barratt turned purely on the particular evidence before the Tribunal".* Also, the EAT in **Barratt** was explicit that it was not laying down a hard and fast rule.

77. Counsel also referred to the Judgment of Keith J. in **Dial–A–Phone v. Butt UKEAT/0286/03/TM** at para 19 that the question is one of fact to be decided by the Tribunal.

78. In any event, Counsel submitted that the case law relating to offering a subordinate position did not apply to the present case as the ad-hoc role was not "subordinate". It involved the same work and the same pay grade. The only difference was that there was no guarantee of work.

79. At the first consultation meeting, the claimant informed Lee Bridgehouse that he would accept a *"Grade A Steward, a Grade C Lead Steward, with COTA Grade A, as a minimum salary"* and the ad-hoc roles which became available fell into that pay grade and job description, albeit under different contractual terms. It was submitted, therefore, that the claimant need not have stated his willingness to accept a "*subordinate role"*.

80. In the alternative, Counsel submitted that even if I were to find that the ad-hoc role was subordinate, nevertheless the claimant was unfairly dismissed as the respondent failed to offer him an available ad-hoc position. Even though the ad-hoc positions only became available after the consultation period, the claimant was working his notice and he had advised the respondent that he would accept, *"short term contracts here and there"*.

Conclusion

81. While the issue was narrowly balanced and the submissions by the respondent's solicitor were attractive, I was satisfied, after considering all the relevant case law, that the submissions by the claimant's Counsel were well-founded and were to be preferred. I was satisfied that the EAT authorities could be reconciled and that the ad-hoc position was not a subordinate one such as to exclude it from consideration for redeployment of the claimant by a reasonable employer.

82. What was of crucial importance in my deliberations is that the case law makes it clear, time and again, that each case has to be judged on its own particular facts and circumstances. As the EAT said in Leventhal, *"whether it is fair or unfair to dismiss for redundancy without considering alternative and subordinate employment is a matter of fact for the Tribunal".*

83. While the discussion at the consultation meetings was almost exclusively in relation to an alternative core crew position, that was because the respondent was of the view from the outset that an ad-hoc role was not a suitable alternative. However, the claimant had advised the respondent of the Grades and salary scale which he would accept, which accorded with an ad-hoc role, and at his appeal meeting he raised the issue of him doing ad-hoc work and said this (P.150): "*and Aramark, I could have actually given a little bit short time I could eventually have given employment within the company even if it a short contract here and there*" (sic). He also referred to there being a recruitment drive for ad-hoc roles when he was working his notice, that other core employees had been given ad-hoc work which had lasted for several months, and of course he was engaged on the Safe Caledonia for several months on a short-term contract.

84. It was the respondent's position that when considering re-deployment, they would not consider offering a core crew employee who had been made redundant ad-hoc work. The evidence of Mr Bridgehouse was that he was: *"aware that the unions do not consider ad-hoc roles to be a suitable alternative to core crew roles".*

85. Clearly ad-hoc work is less favourable than core crew work, in as much as there is no guarantee of work. Although I did not have the benefit of hearing evidence on behalf of the trade union, as I understand it, the union's position is that they will not accept that an offer of ad-hoc work is suitable alternative employment such as to deprive an employee of the right to a redundancy payment. Pauline Brechin, the respondent's HR Manager, explained this to the claimant at the appeal meeting (P157/158). However, in my view, the requirement on an employer to take such steps as may be reasonable to avoid redundancy by redeployment within its own organisation is a different issue. The issue is one of reasonableness in the particular circumstances of the case. It's hard to imagine a trade union facilitating the dismissal of one of its members, by not even being prepared to consider redeployment to an ad-hoc role in the circumstances of the present case. The Minutes of the appeal

meeting did record the claimant replying to Ms Brechin as follows (P158): *"Pauline, I never mentioned that I want to work Ad Hoc pool, what I am saying there was I ….."* but not only is his full reply not recorded, I was satisfied from the other comments he made that he had conveyed to the respondent that he wished to be considered for ad-hoc work and that he should have been considered when there was a recruitment drive, but that was not something the respondent was even prepared to consider. They were only prepared to consider core crew vacancies for the claimant. The core crew vacancies that did come up were offered to at risk core crew who had longer service than the claimant and that was why he was dismissed.

86. In any event, in my view, the ad-hoc role was not a *"subordinate/inferior position"* The actual work, responsibilities and rate of pay were exactly the same and while there was no guarantee of work, all ad-hoc employees would be given work in any given year, which the respondent tried to even out, and there was always the prospect that, although "short-term", it could last for many months and of the employee concerned eventually being offered "core-crew". Nor was the claimant a "Senior Manager", as was the case in **Barratt**.

87. In the present case, there was at least one "recruitment drive" by the respondent for ad-hoc employees during the claimant's notice period, a matter which the claimant raised at his Appeal (P159) and, of course, he continued to do ad-hoc work by way of a short-term agreement on the Safe Caledonia for several months and his notice period was extended to enable him to do so. However, the claimant was not made aware of the "recruitment drive" at the time and did not have the opportunity to apply.

88. Further, as the claimant's Counsel drew to my attention, the respondent's "Offshore Redundancy Policy" (P.164) provides under the heading: "Measures To Avoid Or Minimise Redundancy" that the respondent: "*will immediately cease recruitment of new staff, except in areas where there is no alternative and retraining or redeployment is not practicable.*" By

embarking on this recruitment exercise, therefore, the respondent was in breach of that Policy.

89. I was driven to the view, therefore, that in the particular circumstances of this case, it would have been reasonable for the respondent to have consulted the claimant about the ad-hoc work which was available and its failure to do so rendered his dismissal unfair.

Remedy

90. It was agreed that I would issue a Judgment in respect of liability only, as the assessment of compensation is not straightforward in this case. The claimant received a redundancy payment and will not therefore be entitled to a Basic Award. However, so far as the Compensatory Award is concerned, this will depend (having regard to **Polkey)**, what ad-hoc work was available to the claimant during his notice period and how long that work would probably have lasted and whether there were any prospects of that work becoming "core".

91. I invite the parties to liaise with a view to reaching agreement on an appropriate level of compensation. I anticipate that this will require the respondent to provide details of the ad-hoc work which was available at the relevant time, namely at the time of his dismissal and throughout his extended notice period, and its likely duration.

92. However, if the parties are unable to reach agreement extra-judicially it will be necessary to fix a Remedy Hearing. I shall now arrange, therefore, for a date to be fixed for such a Hearing.

93. Employment Judge: Nicol Hosie
Date of Judgment: 31 January 2019
Entered in the Register: 01 February 2019
And Copied to Parties