EMPLOYMENT TRIBUNALS

Claimant: **Mr M Parfrey**

Respondent: **The Fulfilling Station Limited**

Heard at: **Bristol** **On: 9 and 10 April 2019**

Before: **Employment Judge C H O'Rourke**

Representation
Claimant: Mr Leach - counsel
Respondent: Mr Curtis - counsel

RESERVED JUDGMENT

The Claimant's claim of unfair dismissal fails and is dismissed.

REASONS

Background and Issues

1. The Claimant was employed by the Respondent, as its managing director, for approximately four years, until his dismissal, on grounds of redundancy, with effect 11 July 2018. The Respondent Company, based in Bristol, is a subsidiary of the Global Freight Solutions Ltd group of companies (GFS), along with another subsidiary, Intermail Limited. GFS has other premises, in Newbury and Warrington. The Claimant had been the owner of a previous company that had been bought out by the Respondent/GFS, with him retaining a shareholding in the Respondent Company.

2. The issues in respect of this claim are as follows:

    a. Has the Respondent shown the reason for dismissal, namely redundancy, which is potentially a fair reason under s.98 of the Employment Rights Act 1996 (ERA)? The Claimant states that the redundancy was a 'pretext' and considered the true reason to be an effort by the Respondent to avoid paying a salary increase due to him.

b. Did the Respondent follow a fair procedure? Such procedure would include the following:

   i. Due warning of the risk of redundancy and consultation in respect of it. The Claimant did not consider that there was sufficient warning or that such consultation as was carried out was meaningful, or genuine.

   ii. Consideration as to whether a pool for selection was appropriate. The Respondent did not consider a pool appropriate in this case, as they viewed the Claimant's role as 'stand-alone' and not comparable with the roles of other employees. The Claimant disputed this, arguing that there should have been a pool.

   iii. Consideration as to whether there was suitable alternative employment available to the Claimant and if so, the offer of such employment. Again, the Claimant disputes that such was considered by the Respondent, although he does not dispute that in fact, there were other suitable alternative roles available which he was not offered.

c. In the event that there was a finding of unfair dismissal, due to a failure in procedure, the Respondent would rely on a **Polkey** defence.

d. Did the Respondent act reasonably in treating the reason for dismissal, as sufficient to justify the Claimant's dismissal, taking into account all the circumstances, including its size and administrative resources?

The Law

3. I referred myself to the definition of redundancy, as relevant to the circumstances of this case, at s.139(1)(b)(i) ERA, which states:

   '*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 the fact that the requirements of that business for employees to carry out work of a particular kind have ceased or diminished, or are expected to cease or diminish'*

4. I also reminded myself of the guidance in the case of **Williams v Compair Maxam Ltd [1982] ICR 156 UKEAT** that in determining the question of reasonableness if was not for the Tribunal to impose its standards and decide whether the employer should have behaved differently. Instead, it had to ask whether '*the dismissal lay within the range of conduct which a reasonable employer could have adopted'*.

5. Both counsel referred me to various authorities, which I set out below, as I consider relevant to my findings (and avoiding duplication):

   a. **Capita Hartshead Ltd v Bayard [2012] UKEAT IRLR 814**, which

summarises the law on the issue of the creation of a pool for selection, as follows:

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

*(a) "It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted" (per Browne-Wilkinson J in **Williams v Compair Maxam Limited** [1982] IRLR 83 [18];*

*(b) "[9]...the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn" (per Judge Reid QC in **Hendy Banks City Print Limited v Fairbrother and Others** (UKEAT/0691/04/TM);*

*(c) "There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem" (per Mummery J in **Taymech v Ryan** [1994] EAT/663/94);*

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

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

b. **Wrexham Golf Club Ltd v Ingham [2012] UKEAT/0190/12**, again on the issue of a pool, stated:

*21. The word "pool" is not found in section 98(4) of the Employment Rights Act 1996. But it is well known to employment lawyers and those who work in human resources. It gives expression to a key decision which has to be made when an employer has decided that its requirements for employees to carry out work, or work of a particular kind, have ceased or diminished. Which employees will be considered for selection? The group of employees from whom the selection will be made is often called "the pool". There is no rule that there must be a pool: an employer, if he has good reason for doing so, may consider a single employee for redundancy: see, for an example, **Halpin v Sandpiper Books Limited** at paragraphs 14-15. Thus it is sometime said that there may be a "pool of one"; a somewhat inelegant phrase representing an underlying reality.*

*25. The Tribunal did not criticise the conclusion of the Club that the role of Club Steward should cease. Its reasoning seems to proceed from its finding that the Club did not consider developing a wider pool of employees. At this point the Tribunal needed to stop and ask: given the nature of the job of Club Steward, was it reasonable for the Respondent not to consider developing a wider pool of employees? Section 98(4) requires this question to be addressed and answered. On its face, it would seem to be within the range of reasonable responses to focus upon the holder of the role of Club Steward without also considering the other bar staff. The Tribunal does not say why it was unreasonable to do so. This may be because the Tribunal had in mind the words of Mummery J in **Taymech** which we have quoted; but no judgment should be read as a statute. There will be cases where it is reasonable to focus upon a single employee without developing a pool or even considering the development of a pool. The question which we do not think the Tribunal really addressed was whether this was such a case.*

c. **Mugford v Midland Bank [1997] UKEAT IRLR 208**, as to consultation, stated:

(1) where no consultation about redundancy has taken place with either the trade union or the employee the dismissal will normally be unfair, unless the Industrial Tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.

(2) consultation with the trade union over selection criteria does not of itself release the employer from considering with the employee individually his being identified for redundancy.

(3) it will be a question of fact and degree for the Industrial Tribunal to consider whether consultation with the individual and/or his union 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.

d. **Fulcrum Pharma (Europe) Ltd v Bonassera [2010] UKEAT/0198**, which is an example of a case where an employer's consideration, or otherwise, of a pool for selection was successfully challenged (taking into account **Taymech**).

The Facts

6. I heard evidence from the Claimant and on behalf of the Respondent, from Mr David Field, the Operations Director of GFS, who conducted the redundancy process and Mr Daniel Ennor, the Commercial Director of GFS, who heard the Claimant's appeal.

7. The Respondent is a medium-sized employer, with approximately 200 employees and several premises. It has all the appropriate managerial and administrative resources for an employer of that size.

8. It was common ground that the Group was not, at the time, operating profitably. Although there was some dispute about the figures and the proportion of loss attributable to each company, the Claimant acknowledged that the audited accounts submitted to Companies House for the Respondent showed a loss, pre-tax, of approximately £95,000 for financial year 17/18 (to March 2018), up from approximately £6,000 the previous year [205]. He relied, however, instead on management accounts, which showed, he said, a profit of approximately £13,000, to January 2018 [197] and he '*could not understand'* why these figures differed so markedly, in just two months. He did accept '*potentially'*, however that he '*could understand a decision to cut costs, to include job losses'*. Mr Field said, in cross-examination that management accounts were the '*best available at the time and did not show all invoices and that the audited accounts were the true picture.*' He accepted that the majority of GFS losses for that year (of £600,000) lay with Intermail. There was also some discussion as to why a proportion of GFS's Head of Fulfilment (a Ms Boessl) salary was shown on the management accounts of the Respondent and explained that it essentially was a costs sharing exercise within the GFS Group, as she had responsibilities across the Group, to include the Respondent. Intermail met 75% of her salary, with the Respondent meeting the balance.

9. On appointment, in 2014, the Claimant had been told that his salary would be reviewed, over time, with the aim of increasing it to £50,000, plus a car allowance. He complained, however, that his salary did not increase to that level and he had discussions with the financial director of GFS in September 2017, stating that he felt that '*had been led down the garden path'*. This conversation, in turn, initiated negotiations about GFS/the Respondent buying out his share-holding, culminating in him being offered, on 9 January 2018 (all dates 2018 hereafter), £30,000 for his shares, as well as a new role within GFS as 'Head of Fulfilment – Bristol', on a salary of £50,000. He would report to Ms Boessl, who, at the time, was Head of Fulfilment for GFS [58].

10. While the Claimant was content to proceed with the share sale, he reserved his position in respect of the new role and asked whether the two issues were dependent on each other and that continued to be the case into February [63].

11. Over this period, GFS engaged a new operations director, Mr Field and he started work on 22 January. He stated that he was tasked '*with looking at the whole of GFS's logistics operation and to review it from start to finish.'* (to include the Respondent and Intermail). He said that as part of his familiarisation with the business, he spoke to various senior managers, to include the Claimant, first meeting him on 24 January.

12. Following a planned holiday, he met again with the Claimant on 20 February. He was aware from what he was told by other directors [72B&D] as to the offer that had been made to the Claimant in January and that the Claimant's

position on the share sale/new role remained the same, i.e. that he had not declared his decision on the latter. He noted that an email from another director, a Mr Cotty, of 19 February, said that '*we are making this offer to Martin* (the Claimant) *to encourage him to stay and to recognise the goodwill in his shareholding.'* [72B]. The Claimant agreed that at that meeting Mr Field set out GFS's vision, as to bringing in the two subsidiary companies (including the Respondent) into GFS proper, hence the proposed deletion of the 'managing director' role, to be replaced by 'head of fulfilment'. Mr Field also said in his statement (8-11) that he '*had no agenda against Martin and I was only looking at best options for the business'*. He envisaged that the proposed changes could take about a year and he '*wanted to know whether he* (the Claimant) *was on board, because from what he was saying he didn't sound very positive … Martin said to me that "my future's not here, I don't want to work for these guys anymore." He told me that he was hoping to head out to China to look at some new business ideas in April. He clearly told me that he was planning on leaving.'* He went on to say that in light of that, he encouraged the Claimant to do '*a deal'* and secure '*a proper handover'* … '*in an orderly way'*, to which, he said, the Claimant said he would think about it and let Mr Field know. He was challenged in cross-examination as to the accuracy of this recollection of what the Claimant said to him and he was '*quite clear'* about it and '*was shocked, as this was our first meeting'* and '*when somebody says they are going to China, what can you do?*'. He said he saw '*no point in discussing options with somebody who was not going to hang around. He started the conversation… within 10 minutes … It was a hassle for me, as I was new to the business and didn't' 'know him from Adam".* He also said in cross-examination that his only involvement was in relation to the Claimant accepting, or not accepting the new role and that whether or not the purchase of the Claimant's shares was agreed '*was not my call, but that the business was worth nothing and we needed him on board.'* When it was suggested to him that in fact Mr Cotty wanted the Claimant out of the business, he said that he '*didn't believe that. It was only when I became involved, I decided that the role was not needed, as things had changed. It was my call*.' He denied that any *'die had been cast from that point, so the Claimant would be out, regardless.'* He denied that he had '*formed a view already that the Claimant would be removed*', stating that '*I was only back* (from holiday) *three days. I'm good, but I'm not that good. I met all the managers and had no opinion. I didn't know the business at the time, so couldn't make a decision*.'

13. Apart from stating that he agreed to meet Mr Field on 20 February '*to hear what he had to say'*, the Claimant's statement (17) is surprisingly silent on the contents of this meeting. In cross-examination, he agreed that while he had used the '*my future's not here'* phrase, he stated that he had said '*long-term future'*. He didn't accept Mr Field's evidence that it was clear to Mr Field that '*he didn't want to be with the Respondent'*, saying that he said 'long-term' and that Mr Field was making assumptions. He also denied that he had referred to going to China, but accepted that he subsequently did go, to a trade fair in Canton. He said he was confused by a subsequent email from Mr Field, but accepted that following this meeting there were ongoing discussions, for some weeks, with Mr Field, as to attempting to agree an '*exit package*', with offers

and counter-offers. He said, however that Mr Field had '*assumed I wanted to leave and never discussed with me why I hadn't accepted the original offer'*. It was suggested to him that the reason why Mr Field assumed he wanted to go, was because that's what he had told him, which question he didn't answer, but did accept that he had never told Mr Field he wanted to stay and that it was '*fair to say'* that he had never corrected the impression Mr Field had as to his intentions.

14. Mr Field said that that meeting was followed by another on 27 February, at which they '*had a very similar conversation at which he confirmed that, from his point of view, he didn't want to stay on, as his heart was no longer in it. He asked me to see what kind of deal could be put on the table.*' The Claimant does not mention this meeting in his statement and in cross-examination said he couldn't recall it, as there had been '*lots of meetings'*.

15. The Claimant agreed that at no point did he indicate that he wished to take up the new role, as he '*wanted more time to consider it'*. It was agreed evidence that at a subsequent meeting, on 6 March, Mr Field told him that he had decided, having reviewed the Bristol operation that there no role for a Head of Fulfilment (Bristol), as it '*was not necessary or required'* (13), with the focus in the future to be on Newbury. The Claimant said no business reasons were given for this decision and despite being referred again to the accounts, said he stood by his view that the Respondent Company was performing well. Mr Field said he made '*no formal proposal of redundancy'*, and '*didn't actually use the word'*, but the Claimant said that Mr Field told him his position was redundant. Mr Field denied that what '*was really happening was that he'd formed a view that as the Claimant would accept the offer* [58 & 83A]*, he would implement Mr Cotty's wishes.'* He was referred to the Claimant's email of 9 March [76] in which he refers to his '*role appear*(ing) *to be redundant'* and it was suggested that the Claimant had got that information from him.

16. Additionally, in that email, the Claimant said that '… *if there is no alternative role for me to do, I understand that following proper discussion, it may be the case that I leave employment on the grounds of redundancy and following payment of my notice period and a redundancy payment.'* The Claimant accepted that as at 6 March, he was aware that he was in a redundancy situation.

17. <u>Findings in respect of the Claimant's Intentions in respect of his Employment</u>. It is clear to me and I so find that from the outset of negotiations with him in January, throughout, to his eventual dismissal that despite his protestations now in evidence, the Claimant had no wish whatsoever to remain in the Respondent's/GFS's employment and that his sole focus was on negotiating the best possible exit deal, but that the offers made by the Respondent were unsatisfactory, right through to the conclusion of the appeal process. I make this finding for the following reasons:

    a. I preferred Mr Field's evidence, generally, on this issue. He was clear and emphatic as to his discussions with the Claimant and his genuine concerns about the Claimant's lack of motivation to remain with the

Respondent, particularly as he (Mr Field) himself was only just in post and that a precipitative departure by the Claimant would have been problematic for him. I don't believe that Mr Field was implementing some 'plan' by Mr Cotty, or other directors, to have the Claimant removed, but, initially was seeking to get the Claimant to stay on, as GFS wished, in the new role and then when it became clear to him that the Claimant didn't wish to do so, looked more critically at the role generally, deciding, '*on his call'* that it was no longer required. If, as is suggested by the Claimant, there was some 'pre-determination' to be rid of him, it seems a strange way to embark on this by offering him a new role, on an enhanced salary. Conversely, in terms of plausibility of evidence, I drew adverse references from the Claimant's failure to even deal with these discussions, either at all, or in any detail, in his statement, indicating to me a desire to gloss over them. I note also what I consider his evasiveness in later questioning about the purpose of the appeal hearing (more detail below).

b. Even on the Claimant's own evidence, he had, in the first substantive meeting with Mr Field, on 20 February, used the '*my future's not here'* phrase, now seeking to caveat it with the inclusion of the word '*long-term'*. I don't believe his evidence on this latter point, finding that he made it quite clear to Mr Field that he would be leaving in the future.

c. It would seem remarkable that Mr Field would remember the Claimant's mention of a future business trip to China, if the Claimant had not actually said that that was his intention and I don't believe that he has stated this with the benefit of hindsight. This recollection is supported by the Claimant's admission that he did, in fact, subsequently go on such a trip.

d. He never, in the three months in which the 'Head of Fulfilment' role was on the table, indicated a willingness to take it, nor offered any explanation, at the time, or now, as to why he didn't. An obvious explanation is that he didn't want it, as his '*future was not here'*, combined possibly with the 'demotion' from managing director, to a subordinate role under Ms Boessl (as recorded by Mr Billett in his email of 19 February '*something he* (the Claimant) *has concern about'* [72B]).

e. He never once corrected the impression he had clearly given Mr Field, as to his intentions.

f. He did not actively seek to dispute Mr Ennor's evidence that at the end of the appeal hearing, on 14 June, his companion (Mr Cox) stated that he (the Claimant) was not appealing against the redundancy decision itself, but the 'package' being offered. His evidence on this point was unimpressive, stating that he '*didn't recall, as I was in a bit of a state'* and he '*had no idea what Mr Cox was talking about'* which I considered to be implausible, for somebody of his age and seniority. The meeting had been recorded and a copy of that recording provided to him, so he had ample opportunity to revisit it, if he wished.

g. Despite the Claimant stating that he had had the benefit of legal advice throughout, at no point in the redundancy procedure did he make a positive statement as to the need for his role in Bristol, or, alternatively, did he identify other roles that he should be offered, or considered for, or for the requirement for a pool. I fully accept, applying **Bonaserra** and preceding case law that it is for the employer to investigate such possibilities and having 'applied their mind' to the issue, to put such considerations to the employee. However, inevitably, 'consultation' is a 'two-way street' and there will be very little point in an employer 'consulting' with an employee, as to protecting their position from redundancy, if the employee has no interest in doing so, being merely focused, instead, on the financial package they hope to benefit from, when made redundant. This, as should be clear from my findings above, was the situation here and therefore the Respondent (and Mr Field in particular) was entirely justified in considering that there was no way of avoiding the redundancy of the Claimant's position, principally because the Claimant didn't wish it.

18. Consideration of a 'Pool'. The Claimant's particulars of claim asserted, for the first time that there should have been a pool for selection, to include at least his deputy manager in Bristol and '*other employees within the Newbury branch'*. In his statement, he named his deputy manager, Ms Rebecca Trimnell-Davies and Ms Anita Boessl. For the first time, in this Hearing, it was suggested also that a Mr Brazil, a warehouse manager in Newbury should also have been included in the pool. As stated above, he had not previously raised this issue, in particular in his thirty-plus page submission to Mr Ennor, in the appeal. On that basis, therefore, Mr Ennor, only being obliged to consider those points of appeal raised to him, was under no duty to come to a view on the issue of a pool. Clearly, however, Mr Field, as the decision-maker, was. He said in his statement that he believed that the Claimant's role as managing director in Bristol '*stood on its own and that there was no other role that was comparable. This meant that it was only Martin's role that we were considering, at this stage and so there was no need to consider him alongside other employees'.* The Claimant asserted that Mr Field had said that Ms Trimnell-Davies would '*run Bristol'* (thus implying that she was replacing the Claimant), but Mr Field said that '*As Warehouse Operations Manager in Bristol, Rebecca's role was very different to Martin's and included picking and packing items and data entry, with some supervision as well'.* In cross-examination, he firstly clarified Ms Boessl's position, namely that while she had had, until January 2018, the title of Head of Fulfilment, i.e. the same as that being offered to the Claimant, she had been promoted to Director of Logistics GFS and she had, in any event, being doing a more senior role than that of the Claimant, as she was Head of Fulfilment for the Group, not just Newbury and already oversaw Bristol. He viewed the name change as symbolic only, properly recognising her status for the job she was already (and continued) doing. She earned £65,000 per annum (compared to the £37,000 earned by the Claimant, or the £50,000 he could have potentially earned in his new Head of Fulfilment role).

19. When asked whether it didn't occur to him to consider any competitive exercise involving the Claimant and Ms Boessl, he said '*no, they were two different roles. Anita was building the business, whereas the Claimant was running it.'* In respect of the handling of the Claimant's MD role after he was dismissed, he said that much of it was taken over by the Group's customer services and accounts department and that the Claimant '*had being doing stuff an MD doesn't do'*. Ms Boessl took overall charge for the site, but she allocated tasks out and wasn't, for example, answering phones, as the Claimant had done. When it was suggested that had there been a competitive exercise, the Claimant would have had at least a 50/50 chance of being retained, Mr Field said he '*didn't think so – the Claimant was a do-er. Anita is a manager. He was an MD in name only.'*

20. When asked about putting the two warehouse managers (Mr Brazil and Ms Trimnell-Davies) into a pool, he said '*no, they had different jobs and tasks. They answered phones, packed boxes'*. When it was suggested to him that that was what the Claimant did, he said '*he didn't pack boxes. I wouldn't expect him to do that.'* He denied that he was exaggerating the manual aspects of the roles, stating that he'd seen it in practice. Those employees' salaries were between £25,000 and £32,000. He agreed that given the Claimant's experience, he might have had a '*strong chance'* against Ms Trimnell-Davies, but not Mr Brazil, but he saw no point in placing her in a pool, as the Claimant had made it quite clear that he wanted to go and he was '*trying to accommodate that. There was no point if he doesn't want to stay – we had many conversations.'* He said that subsequently Ms Trimnell-Davies left last November and has not been replaced.

21. Mr Ennor also said in his statement that the Claimant's role was 'stand-alone', with Ms Boessl's role '*at a level above Martin's'*. He said that her skills were well above those of the Claimant's, as she was able to think strategically, across the entire business, whereas the Claimant's role was the tactical day-to-day running of a site, which was entirely different. She had valuable qualifications, was an 'improvement' expert and had come from industry sectors of interest to GFS, to include the automotive sector. The Claimant simply didn't have the same '*leverage'*. In respect of Ms Trimnell-Davies' role, he said that the Claimant would not have been '*suitable'* for it, as he would have been '*disruptive, as I didn't believe he wanted to do it'.* He did not consider that the Claimant would have been able to carry out Mr Brazil's role, as there were wider aspects to it. He denied that there was no mention of a pool in his appeal decision, because he hadn't given any consideration to it and said that that '*was not the case. I referred to the possibility* (in relation to Ms Boessl) *in an email* [145A – 13 June, the day before the appeal hearing], *but was confident that the Claimant couldn't do her role.'* He was challenged at length as to the job descriptions for the other three roles, in relation to the Claimant's existing role and was entirely confident that the Claimant would not have had the expertise or experience to do Ms Boessl's role and that in respect of the other two roles, the Claimant '*needed to be able to mentally undertake the role. He considered those roles beneath him'*. When challenged as to how he knew that, he said that the Claimant had '*told us he wanted to leave the business'*.

22. The Claimant said, in examination in chief that if it had been suggested that he be put in a pool with those named others, his reaction would have been '*to consider it'*. He did not consider travelling to Newbury to be an issue. As to salary, he had been on £25,000 when he started, so it was something he was used to. He considered that it would have been an easier decision to accept Mr Brazil's role than Ms Trimnell-Davies, as the former's salary level was closer to his own. In cross-examination, he agreed that he'd had ample opportunity to raise whatever argument he wished to avoid redundancy, including to point to other roles, of which possibility he was aware '*from external advice received'*. When asked whether he '*understood that he had opportunities to make proposals'*, he said '*it was for them to propose'.* He accepted that in the subsequent appeal process, he made no mention of any prospective pool for selection, despite submitting a thirty-three page written submission. When it was suggested to him that he didn't suggest any pooling because he knew there were no realistic alternatives, he said '*that's what I was told'* and when it was further suggested that if he considered that statement wrong, he could have told the Respondent so, said that there was '*an underlying conspiracy against me, because I had not accepted the original offer'* and that the decision had been made before Mr Field's involvement.

23. Conclusion on the Pool Issue. I consider, applying **Wrexham Golf Club v Ingham** that it was reasonable for the Respondent to conclude that it did not need to go beyond a 'pool of one', in the Claimant's case. Further, in respect of the application of **Taymech**, as to the Respondent 'applying its mind' to the issue, while Mr Field had little by the way of contemporaneous record of his thought processes, I am confident, from his oral evidence that he did, albeit briefly, 'apply his mind' to this issue, dismissing it relatively quickly. Mr Ennor certainly did apply his mind to the issue, as his email pre-dating the appeal hearing spells out, certainly at least in relation to Ms Boessl. My reasons for these findings are as follows:

    a. In considering 'reasonableness' and the 'range of responses test' what employer, when faced with a relatively senior and experienced employee, who says, in unequivocal terms that they wish to leave their employment and makes no positive effort to suggest any alternative, is going to go beyond a cursory examination of the possibility of a pool? It cannot be reasonable to expect an employer, in those circumstances, to nonetheless effectively ignore the stated wishes of the employee and regardless embark on what they know is going to be a fruitless exercise, creating great uncertainty and worry for those employees placed in such a pool and potentially damaging relations with them, for no good reason.

    b. Considering that the Claimant had legal advice throughout this process, which will have included advice (as he accepted, '*from external advice'*) on the various steps required of an employer, to include the possibility of a pool, his total failure to challenge the Respondent's decision not to create such a pool, indicates, to me, two things. Firstly that he had, despite his assertions now, no genuine

interest in being considered for selection on that basis and secondly that he saw the Respondent's decision not to embark on such a step as a tactical point to be exploited in subsequent Tribunal proceedings (as threatened at a relatively early stage). Challenging the issue during the redundancy process would have required some considered response from the Respondent, potentially undermining the 'value' of such an argument in these proceedings, which is why he did not raise it.

c. Ms Boessl's role was clearly not directly comparable with the Claimant's. All the evidence indicated that it was pitched at a considerably higher level than his, both in its breath of responsibilities, the range of experience and connections expected and its salary.

d. Neither was Ms Trimnell-Davies' role sufficiently directly comparable. It was clearly much junior to his own, as he'd been her managing director and would have been at a considerable salary reduction. Crucially, it would have placed the Claimant entirely directly under the control of Ms Boessl, while occupying a more junior role himself, than either MD or Head of Fulfilment Bristol, which I am entirely confident he would not have wished to do.

e. Mr Brazil's role was entirely a much-belated afterthought in these proceedings. As with the others, his role did not feature at all in the redundancy process, was not mentioned specifically in the claim, or in the Claimant's witness statement and only arose in oral evidence. I don't believe that his role was seriously in the Claimant's contemplation, despite that, as MD of one of the subsidiary companies of the Group, he must have been aware of its existence, but, instead, it was 'thrown into the mix' in these proceedings, in an effort to put the Respondent under pressure. The Respondent gave no consideration to the possibility of Mr Brazil's role being considered in any pool, for the same reason as the Claimant himself failed to mention it until this Hearing: it was so far removed from his perception of his position in the Group. In evidence, there were also significant differences in these roles, to include international trade elements not part of the Claimant's role.

24. Length of and Genuineness of Consultation. As previously-stated, participating in a genuine consultation is a two-way process and as already found, the Claimant was not interested in such a process, merely seeking, if possible, to enhance his redundancy package. Mr Field recognised, by the stage that he decided to embark on the formal process that there was no prospect of such a consultation yielding any fruit, hence his reference to needing '*to give him two weeks before I can actually formally advise him he is being made redundant'* [77B]. It was formulaic and simply a question of meeting the time requirements of a consultation 'process', but there had been several weeks of prior negotiation, without progress and Mr Field was right to be entirely resigned to the 'formal' process changing nothing.

25. Suitable Alternative Employment. The Claimant did not dispute that there was no suitable alternative employment available. Several mentions were made of such a possibility in the redundancy process correspondence and in oral evidence, however Mr Field said that the only role in the Group was a customer services advisor role, in Warrington, which was clearly not suitable for the Claimant.

26. Disciplinary Process. I simply record here, for the sake of completeness that the redundancy process was stalled, to deal with a potential disciplinary matter against the Claimant which, in the end, resulted in no sanction against him, in fact prolonging his employment and which I consider of no relevance to my findings.

Conclusion

27. For these reasons, therefore, the Claimant's claim of unfair dismissal fails and is dismissed.

_____

Employment Judge O'Rourke

_____

Date: 15 April 2019