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EMPLOYMENT TRIBUNALS

Claimant ***Respondent***

Mr J Zhang **AND** **Wind Financial Information UK Limited**

FINAL HEARING

HELD AT: **London Central** **ON: 5- 7 & 10-12 June 2019**

BEFORE: Employment Judge Brown (Sitting alone)

Representation:

For Claimant: Ms E Sole, of Counsel
For Respondent: Mr J Jupp, of Counsel

JUDGMENT

The Judgment of the Tribunal is that:

1. **The Respondent dismissed the Claimant unfairly for redundancy.**

2. **There was a 50% likelihood that the Respondent would have dismissed the Claimant fairly following a fair procedure in any event.**

3. **The Claimant did not cause or contribute to his dismissal.**

REASONS

Preliminary

1. The Claimant brings a complaint of unfair dismissal against the Respondent, his former employer. His complaint of failure to pay a redundancy payment was previously withdrawn. The issues arising in the case were agreed between the parties as follows:

Issues

Liability

1. Has the Respondent proved that there was a genuine redundancy situation relating to the role of General Manager? The Claimant avers that:

a. The Respondent has failed to prove that a genuine decision that redundancies were necessary, was to; and/or
b. That the decision was not based on reasonable information, reasonably acquired.

2. If so, has the Respondent proved that redundancy was the reason, or, if there were other reasons, the principal reason, for the dismissal?

3. If so, was dismissal on the grounds of redundancy reasonable in all the circumstances?

a. Was it within the range of reasonable responses to limit the pool from which redundancies were selected to one?
b. Did the Respondent engage in fair and meaningful consultation as a sufficiently early state (to include consideration of the Claimant's allegation that dismissal was pre-determined)?
c. Did the Respondent's failure to re-establish the Claimant on work applications make the decision to dismiss unfair?
d. Was the appeal fair, in particular were the Claimant's representations fairly considered?
e. Did the Respondent make sufficient efforts to find alternative employment?

4. If there was no genuine redundancy was the dismissal for "*some other substantial reason"* and, if so, was it reasonable in all the circumstances. The Respondent relies on the Claimant having made clear that he did not want to transfer to Shanghai.

Remedy

5, What compensatory award is just and equitable? Has the Respondent proved that the Claimant has failed to mitigate his loss and/or that a **Polkey** reduction should apply (, even if the redundancy

procedure was unfair would the Claimant have been dismissed in any event had a fair procedure been followed).

6. Did the Claimant contribute to his own dismissal and if so to what extent.

2. The parties agreed that I should decide issues of Polkey and contributory fault at the liability stage of the proceedings.

3. I heard evidence from the Claimant. I also heard evidence by video link from Ms Fang Wang, International Sales Manager for the Respondent and - at the end of the Claimant's employment - his Line Manager; Mr Lei Yan, Head of HR for the Respondent at the time of the Claimant's dismissal; and Mr Li Zhou, Senior Vice President of Wind Information Limited "Wind" and a Director of the Respondent. The Employment Tribunal had the assistance of a Mandarin/Chinese interpreter during the Respondent's witnesses' evidence.

4. There was a bundle of documents. Page references in these reasons are to page references in that bundle. Both parties made closing submissions.

Findings of Fact

5. The Respondent company is a wholly owned subsidiary of Wind Information Limited ("Wind"), which is a company incorporated in Shanghai in China. Wind is the market leader in China's financial information services industry. It provides real-time financial information and communications platforms for financial professionals, rather like the company Bloomberg in America and Europe. In China it serves more than 90% of financial institutions. It is a large company, with over 2000 employees and with offices worldwide.

6. In early 2010 the Chinese market was becoming more developed and open. Wind recognised that there was a growing international interest in financial investment in China and a demand for reliable Chinese financial information.

7. Wind incorporated the Respondent company to promote and sell Wind products to clients in the UK and Europe and to test demand for Chinese information in those markets, for at least 2 - 3 years.

8. On 1 February 2016 the Respondent appointed the Claimant as its General Manager, to lead and manage a sales team, run the Respondent company, and develop the market in the UK and Europe for Wind products. The Claimant had discussions with Mr Li Zhou, Senior Vice President of Wind and Mr Tao Zhou, who oversaw Wind's global sales before the Claimant's appointment. They told the Claimant that they were keen to grow and expand the Wind business in the UK and European markets.

9. As General Manager, the Claimant was in charge of the London office's day to day operations. His main tasks involved sales and business development, accounting and finance, office administration, human resources and recruitment, legal matters and instructing third party suppliers. Initially, the Claimant reported to Mr Tao Zhou, Head of Wind Global Sales. From 2017, the Claimant reported to Ms Fang Wang, Wind's International Sales Manager.

10. There were two other employees in the office at the time of the Claimant's dismissal. They were employed as Sales Executives. One started work for the Respondent in late 2016 and the other was recruited by the Claimant in mid 2017.

11. Within two years of his appointment, the Claimant and his team had secured contracts for the Respondent's products with prominent clients such as Standard Chartered, ICBC Standard, The European Central Bank, Citibank and Barclays. In the year ending 2016, the Respondent had received about £47,000 in receipts. In the year ending 2017, the Respondent received more than £356,000 in receipts. In that year, it made about a £90,000 profit.

12. The Claimant's contract of employment had a mobility clause which provided that the Claimant's normal place of work would be the Respondent's offices in London and that, "9.2 The Executive (the Claimant) will, if and for as long as it is required by the company, work on a temporary or permanent basis at other locations within and outside the UK …" Page 72.

13. On 2 June 2017 Ms Fang Wang emailed the Claimant, telling him of changes to international General Managers' quarterly and yearly performance metrics, page 139. From that time, the Claimant and Wind's General Manager in New York were required to record 8 client visits per week. The UK and New York sales teams were also both given a minimum quarterly target of £20,000 for new orders, starting in the second quarter of 2017.

14. Wind uses a "Gold points" system to track and evaluate sales employees' activities. Gold points are added where employees make more client visits than the minimum required and are deducted where employees make fewer client visits than the minimum required. Under Wind's international terms and conditions, where a sales employee fails to record the minimum number of client visits in a week, an email prompt will be sent to them. After three prompts, the sales employee will be demoted or dismissed.

15. The Claimant replied to Ms Fang Wang's email saying, amongst other things, that it would be better to change rules after discussion or consultation, not before. He said that the rule changes would lead to managers competing with their staff for contracts and that demotion of sales staff for those with unsatisfactory performance would be a violation of laws in the UK – so that that rule definitely needed to be revisited, page 139.

16. On 7 June 2017, following a telephone call with Ms Fang Wang, the Claimant emailed her again, challenging the company's plans for the European market and saying that European markets were not like the Hong

Kong market and those in nearby countries. He copied Mr Tao Zhou into the email. Mr Tao Zhou replied to the Claimant's email in blunt terms the same day, saying, "This is a decision of the Company, which is implemented in Europe and the US … Action speaks louder than words. Please finish the implementation this week. For overseas staff please study the executive power of the headquarters". Page 141

17. Wind also developed an "App" for all sales employees to download onto their smart phones. The App enabled employees to record their visits and retrieve client information and contact details. In addition, it enabled Wind to track and appraise the performance of its employees. Wind did not provide smartphones for their employees to use; employees were expected to download the App onto their personal mobile telephones.

18. In June or July 2017, the Claimant told Ms Wang that he was not happy to download the App onto his personal smart phone because it required permission to access his location, contacts and camera, which the Claimant considered to be in breach of his right to privacy. Ms Wang agreed that the Claimant could email her with a log of at least 8 weekly visits to clients, instead of recording them on the App.

19. The Claimant and Ms Wang continued to discuss expansion into European markets. They agreed to develop markets in the regions of Frankfurt, Paris, Switzerland and Luxembourg. Initially, Ms Wang set a target for the Claimant and one sales executive in the London office of £400,000 new contracts each for the two European regions they would be allocated. However, this target was withdrawn by agreement, page 144.

20. On 5 July 2017 Ms Wang emailed the Claimant, informing him that she had not received client visit logs from him for the period 26-30 June 2017. She reminded the Claimant that he was required to log at least 8 client visits per week by email, if not on the App. Ms Wang said her email was, ".. the first official email prompt for non-compliance with the system. If you receive three prompts about your daily work practices, it will be a serious prompt." Page 155.

21. On 1 August 2017 Ms Wang emailed the Claimant, giving him another prompt to record the required number of weekly client visits. The Claimant replied saying that Ms Wang had not taken his previous explanation as to why he could not record the required number of client visits into account. He said it was the holiday period in the UK and that many people were on vacation. He also said that he had been helping colleagues in China to communicate with UK suppliers and that this had taken a lot of his time, page 148.

22. On 5 September 2017 the Claimant emailed Ms Wang, questioning a company requirement for him to go through a payment collection planning exercise every month. He said that the payment selection schedule could be seen on the company's CRM system in any event. Ms Wang responded, saying that the company procedure required the Claimant to report the

payment plan and payment collection status to her every week; she asked the Claimant to complete the task. Page 151.

23. The Claimant replied once more, asking Ms Wang to read his email carefully and, ".. discuss specific issues in a serious way". Page 151.

24. On 12 December 2017 Ms Wang emailed the Claimant, issuing another email prompt for failure to record the required number of client visits for the period 4-8 December 2017, page 154. Ms Wang said that the Claimant should submit the log according to the company's rules and regulations and do his "basic job", page 154. On 17 January 2018 Ms Wang again emailed the Claimant saying that she had not received his visit log statistics for 8-12 January 2018. She said that this was the third email prompt to the Claimant. Again, she said that the Claimant should do his "most basic sales job."

25. In some of the Claimant's emails to Ms Wang the Claimant addressed her by her initials "WF". Ms Wang gave evidence that this was not a normal way to address a superior. The Claimant gave evidence that he had called another boss, in another business, by their initials and that there was no problem with this practice.

26. The Claimant agreed, in evidence to the Tribunal, that he had discussed the Respondent's sales performance with Ms Wang and Tao Zhou in 2017 - 2018 and that they had expressed dissatisfaction with sales in the UK and Europe. The Claimant said, in evidence, that he had told them that the European market was different to that in China, Hong Kong and Singapore.

27. In 2017, as a result of his not meeting the Company standards for client visits, the Claimant scored lowest Gold points for Winds Overseas Managers, page 262. However, on another metric of sales performance, the Claimant was the highest performing of Wind's Overseas General Managers for the period 1 January 2017-31 January 2018, page 279.

28. It does not appear to be in dispute that the Claimant and his sales team did meet the £20,000 per quarter new sales order target from 2017.

29. During a conference call on 12 February 2018, Ms Wang told the Claimant that the Respondent had decided to relocate the Claimant to Shanghai. The Claimant has a house in the UK and had been hired as a local UK citizen. He was paid in UK pounds and was in a UK pension scheme. That day, the Claimant emailed Miss Wang saying that certain information, including the purpose of the relocation, the timeframe of it, salary level and payment method, the tax arrangements, medical insurance cover, UK pension arrangements, accommodation arrangements and holidays, all needed to be specified by the Respondent before it could issue a transfer order, page 157.

30. Ms Wang did not reply, but nevertheless, on 14 February 2018 - the last working day before the Chinese New Year and the Chinese New Year week's holiday - Mr Tao Zhou sent an email announcement to the UK sales staff group email, which included some executives in Shanghai, saying that the

Claimant had been transferred back to Shanghai from the London branch and that his regional manager rank remained unchanged. Mr Zhou's email said that all staff should be at their new posts by 22 February 2018, page 161. 22 February 2018 was the first working day after the Chinese New Year Holiday.

31. On 14 February 2018 the Claimant emailed Ms Wang, copying Mr Tao Zhou and forwarding his 12 February 2018 email requesting clarification. He said that there was a procedure to be followed in the UK before relocation, page 159.

32. The Claimant did not start work in China on 22 February 2018. He returned to his desk in London on around 26 February 2018, after a pre-booked holiday. He emailed Ms Wang on 26 February 2018, asking whether there had been any progression regarding the issues he had raised before the Chinese New Year, page 165. Ms Wang simply responded by asking the Claimant for his identity documents for Human Resources to file. The Claimant provided those documents. At the same time, the Claimant noticed that he was unable to access the UK Customer Relationship Management system to record information about sales processes, such as client's details, sale figures, calculations and forecasts and to upload sales agreements. Wind's management used the CRM system to grant approvals at every stage of the deal-signing process.

33. The Claimant also noticed that he had been removed from two WeChat (Chinese equivalent of WhatsApp) chat groups for overseas sales staff of the Respondent group companies. There were 32 and 11 members, respectively, of these chat groups and the chats were used to discuss work-related matters. On occasion, managers gave instructions to staff using these WeChat groups.

34. On 5 March 2018 the Claimant also discovered that he was no longer the authorised contact at the Respondent for the Respondent's external payroll processing firm, page 172. On 7 March 2018, he discovered that the Respondent's accountants had been instructed to liaise with someone other than the Claimant, page 168.

35. In evidence to the Tribunal, Ms Wang said that she considered that the Claimant was no longer the Respondent's General Manager after 14 February 2018, and that this would have remained the position until she received notification from Wind that the Claimant had been confirmed as the London General Manager. She said that she had not received such notification and that she considered that she had been doing the job of General Manager for London from 14 February 2018.

36. Mr Lei Yan told the Tribunal that he considered that the Claimant was not General Manager of London after the relocation order. He said that the Claimant was a staff member of Wind, but that the Claimant's work arrangements and position needed to be assessed thereafter.

37. The Claimant, nevertheless, continued to work in London, undertaking client visits, attending functions and events and performing at least some of

the duties which were consistent with the role of General Manager in London, page 234-235.

38. The Respondents' witnesses told the Tribunal that Wind decided, in early 2018, that the UK business was not as profitable as had been hoped and that costs could be saved if the Claimant was relocated to China and paid by Wind instead. The Respondent's witnesses, Mr Lei Yan and Mr Li Zhou, gave conflicting evidence about what figures were used to come to this decision. Mr Zhou talked about a financial report which was not in the Employment Tribunal bundle. There were no records of any meeting, or discussions, during which the Claimant's relocation and the reasons for it were decided. The Claimant had been meeting the £20,000 new contracts per quarter target which had been set for the UK sales team.

39. On 1 March 2018 the Claimant sent a grievance to Mr Tao Zhou. He said that he had tried to talk to Ms Wang and Mr Tao Zhou about relocation to Shanghai a couple of times, but had not received any concrete response, page 174. In the grievance letter, the Claimant said that the Company could not relocate him overseas without consulting him, let alone asking an employee to move overseas within such a short timescale without specifying the arrangements for this. The Claimant said that this was a breach of contract and a breach of trust and confidence. The Claimant said that he was willing to talk about matters, but asked the Respondent company to withdraw the relocation email, undo the changes to the CRM system and put him back into the WeChat groups, pages 176-177.

40. On 2 March 2018 Tao Zhou replied, saying that the decision to relocate the Claimant to Shanghai was a completely normal intra-company transfer. He said that Ms Wang had communicated with the Claimant many times before the Spring festival and this was the first time that Tao Zhou had received an email from the Claimant regarding the issue, page 174. Mr Tao Zhou's statements in the email were incorrect, in that Ms Wang had not communicated with the Claimant about his relocation and Tai Zhou had been previously copied into the Claimant's email about the relocation on 14 February 2018. The Claimant replied, saying that Ms Wang had only told him about the relocation on 12 February and that, despite his emails of 12 and 14 February to Ms Wang and Tao Zhou, he had received no reply, page 173.

41. On 8 March 2018 the Claimant received a phone call from Lei Yan, the Respondent's Head of Human Resources in Shanghai. Mr Lei Yan was calling to discuss the Claimant's relocation. Lei Yan told the Claimant that the Respondent wanted him to move to Shanghai to received sales and marketing training because London's sales performance had not been going well. The Claimant responded that there should have been a reasonable procedure before the decision was made and that there were issues with tax and salary which needed to be addressed. Mr Lei Yan told the Claimant that the Respondent's preliminary view was that the Claimant should go to Shanghai for about half a year. Lei Yan proposed that the Claimant sign a new service agreement with the Chinese company, so that the Claimant would not have to pay UK tax. The Claimant said that he would definitely not be willing to do

that. Mr Lei Yan said that the company would not normally provide accommodation in China; non-provision of accommodation was common practice in China. The Claimant said that, if the Company would not solve the accommodation problem, he would not go back to China. The Claimant and Mr Yan talked about performance issues between the Claimant and Ms Wang and about the Claimant not submitting client visit lists and not using the Wind App, pages 178-184.

42. The Claimant emailed Tao Zhou again on 9 March 2018, saying that the Respondent had failed to acknowledge his grievance, or to investigate or to make a decision on it. He copied Lei Yan and Ms Wang into that email, page 184. On the same day Mr Lei Yan replied, saying that he was responsible for the matter and that he had had a telephone conversation with the Claimant about the relocation to Shanghai the previous day. He said, "Why still a grievance?" page 191.

43. Mr Lei Yan called the Claimant again on 14 March 2018. He told the Claimant that the business in the UK was performing badly, so that Headquarters wanted to carry out redundancies to reduce costs. He said that the Company was considering not having a leader in charge of the UK branch, but only having two salespersons, with Ms Wang in charge of them directly, page 193.

44. On 23 March 2018 the Claimant wrote to Lei Yan, repeating that his grievance had not been addressed or answered, page 203.

45. The Claimant was paid at the end of March 2018, but he was only paid his basic salary and not sales commission which he had previously received and to which he was entitled, page 309.

46. On 13 April 2018 Wind Human Resources wrote to the Claimant, inviting him to a grievance hearing, page 205. The hearing, which was conducted by way of telephone call, took place on 18 April 2018. It was conducted by Lei Yan, with an HR employee, Wan Xiaoyan also present, page 209.

47. On 25 April 2018 Mr Lei Yan wrote to the Claimant, saying that the Respondent had decided to rescind the relocation order and uphold the Claimant's grievance. He said that the Respondent accepted that it had given the Claimant insufficient notice of relocation and that the consultation process could have been handled better. Mr Lei Yan said that it was clear that the Claimant did not want to relocate to Shanghai and that the Company would not require him to do so, page 218.

48. The Respondent company did not, however, reinstate the Claimant's access to its CRM system. It did not restore him to the WeChat groups. It did not make an announcement to other staff saying that the Claimant's relocation had been rescinded.

49. The next day, 26 April 2018, Mr Li Zhou, Mr Lei Yan and Wan Xiaoyan had a meeting. Wan Xiaoyan took the minutes of the meeting. The meeting

minutes were entitled, “Cancellation of Regional General Manager of the UK Company dated 26 April 2018”. The minutes said that the UK Respondent Company’s accumulated operating income at December 2017 was £404,658 and that its costs were £380,863. The meeting said that, following this, it was unanimously agreed that cost savings should be considered. The minutes recorded that, to the end of March 2018, the UK company’s income was £487,942 and its costs were £459,263. The meeting minutes said the company was not optimistic about the business conditions of Wind Financial UK. The minutes recorded, “In order to save costs, the Company decided that it no longer needed a UK Regional General Manager position, the future management of the UK company will be directly undertaken from Shanghai or Hong Kong”. Mr Li Zhou signed the meeting minutes as director, page 219.

50. Mr Lei Yan told the Tribunal that, after rescinding the relocation order, Wind felt that it had no other options. He said that it would not be in the interests of Wind or the Claimant if the Claimant continued to be General Manager.

51. On the other hand, Mr Li Zhou told the Tribunal that the decision of 26 April was a preliminary decision, subject to consultation with the Claimant. He said that the decision was made at the last minute, knowing the financial position of the London office and that the Claimant’s relationship with Ms Wang would not improve.

52. On 7 May 2018 Mr Lei Yan wrote to the Claimant. He referred to his phone call with the Claimant on 14 March 2018, wherein he had said that the company had reviewed its business and decided to reorganise to carry out efficiency savings. He said that, as he had explained on 14 March 2018, the company considered that it no longer needed a General Manager for its UK London office and that the business should be managed from Shanghai. He said that the Claimant was at risk of redundancy. He said, “.. no decision has been made at this stage, and you will be fully consulted with about any proposals affecting you”. He invited the Claimant to a consultation meeting, page 224.

53. The Claimant attended a first consultation meeting with Lei Yan on 15 May 2018. The Claimant spoke at length about his views about the future of the London office. Mr Lei Yan said, “We agreed that as for the current operation of the UK company a separate Regional Manager is not needed anymore for the UK company … the UK company will be managed by Shanghai or Hong Kong directly, that is the case now”. Page 231. He said that the company had tried to avoid redundancy by asking the Claimant to go back to Shanghai. He said that the company wanted to have the Claimant’s thoughts and ideas, page 231.

54. The Claimant provided detailed notes of all his activities during his employment and gave them to Mr Lei Yan, page 234.

55. There was a further consultation meeting on 27 May 2018. The Claimant said that there was a management position in New York. Mr Lei Yan

said that the Company had not yet decided to remove the General Manager position and that he needed to check the position on New York, page 239.

56. Mr Lei Yan told the Tribunal that, following this meeting, he discussed the position with Mr Li Zhou and Wan Xiaoyan and that, together, they decided to dismiss the Claimant.

57. Mr Li Zhou told the Tribunal that he and Mr Lei Yan did talk, but that Lei Yan had made the decision to dismiss and that Mr Li Zhou had not agreed or disagreed with it.

58. On 5 June 2018, Mr Lei Yan wrote to the Claimant saying, ".. we have decided to make you redundant." He said that the General Manager role in London was no longer required as the Hong Kong office would manage the UK operation and that the company needed to make immediate savings and maintain profitability, page 247.

59. The Claimant appealed against the decision by letter of 6 June 2018 to Mr Li Zhou, setting out his achievements as General Manager, page 249. He attended a redundancy appeal meeting by telephone with Mr Li Zhou and Lei Yan on 15 June 2018. At the meeting, the Claimant set out his arguments about why it was not sensible for the Respondent to remove the UK General Manager's post. He said that he was the only employee who spoke fluent English left in the UK and that he had unique skills and experience that the remaining employees lacked. Mr Li Zhou said that the company had made a decision on 24 April, based on discussions with relevant teams including the management in Hong Kong. He said the company had make its decision finally. He thanked the Claimant for all his work and apologised to him. Mr Lei Yan then said that Mr Li Zhou had expressed his opinion and Mr Lei Yan asked whether the meeting could stop there. The Claimant immediately responded that that would not be in line with procedure because it needed to be possible that the Respondent might change its decision, otherwise the appeal meant nothing.

60. Mr Li Zhou told the Tribunal that he, Mr Lei Yan and Ms Fang Wang all decided not to uphold the appeal.

61. On 25 June 2018 Mr Lei Yan wrote to the Claimant rejecting his appeal, pages 260-261.

62. Mr Li Zhou told the Tribunal that the Claimant had skills which the company recognised and had wanted to develop and that he had himself considered creating a financial news position for the Claimant in London. Mr Li Zhou said he had discussed this with the Claimant at the outset of the Claimant's employment, but not at the end of his employment.

63. In August 2018 the General Manager of Wind's New York office left the business and was not replaced. There has not been a General Manager in the Respondent's London office since the Claimant was dismissed. The Claimant had the highest fixed salary in the London office, however, due to

different structures for commission payments, one of the sales executives was paid more than the Claimant in certain months. From the figures at page 246 of the Tribunal bundle, in the last quarter of 2018 the wages bill for the London office was only £10,000 lower than in the quarters when the Claimant was employed.

64. In evidence to the Tribunal, the Claimant told the Tribunal that he had a British passport. He made clear, however, that he had provided the Respondent with his Chinese ID, as requested, when his relocation to Shanghai was being discussed.

Relevant Law

65. By *s94 Employment Rights Act 1996*, an employee has the right not to be unfairly dismissed by his employer.

66. *s98 Employment Rights Act 1996* provides it is for the employer to show the reason for a dismissal and that such a reason is a potentially fair reason under *s 98(2) ERA,* " .. or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held." Redundancy and "some other substantial reason" are both potentially fair reasons for dismissal.

67. It is generally not open to an employee to claim that his dismissal is unfair because the employer acted unreasonably in choosing to make workers redundant, *Moon v Homeworthy Furniture (Northern) Ltd* [1976] IRLR 298, *James W Cook & Co (Wivenhoe) Ltd v Tipper* [1990] IRLR 6. Courts can question the genuineness of the decision, and they should be satisfied that it is made on the basis of reasonable information, reasonably acquired, *Orr v Vaughan* [1981] IRLR 63.

Redundancy

68. Redundancy is defined in *s139 Employment Rights Act 1996.* It provides so far as relevant, " ..an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
…
(*b*) the fact that the requirements of that business—

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

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

69. According to *Safeway Stores plc v Burrell* [1997] IRLR 200, [1997] ICR 523, 567 IRLB 8 and *Murray v Foyle Meats Ltd* [2000] 1 AC 51, [1999] 3 All ER 769, [1999] IRLR 562 there is a three stage process in determining whether an employee has been dismissed for redundancy. The Employment

Tribunal should ask, was the employee dismissed? If so, had the requirements for the employer's business for employees to carry out work of a particular kind ceased or diminished or were expected to do so? If so, was the dismissal of the employee caused wholly or mainly by that state of affairs?

70. If the employer satisfies the Employment Tribunal that the reason for dismissal was a potentially fair reason, then the Employment Tribunal goes on to consider whether the dismissal was in fact fair under *s98(4) Employment Rights Act 1996*. In doing so, the Employment Tribunal applies a neutral burden of proof.

71. *Williams v Compair Maxam Ltd* [1982] IRLR 83, sets out the standards which guide tribunals In determining the fairness of a redundancy dismissal. The basic requirements of a fair redundancy dismissal are fair selection of pool, fair selection criteria, fair application of criteria and seeking alternative employment, and consultation, including consultation on these matters.

72. In *Langston v Cranfield University* [1998] IRLR 172, the EAT (Judge Peter Clark presiding) held that so fundamental are the requirements of selection, consultation and seeking alternative employment in a redundancy case, they will be treated as being in issue in every redundancy unfair dismissal case.

73. "Fair consultation" means consultation when the proposals are still at the formative stage, adequate information, adequate time in which to respond, and conscientious consideration of the response, *R v British Coal Corporation ex parte Price* [1994] IRLR 72, Div Ct per Glidewell LJ, applied by the EAT in *Rowell v Hubbard Group Services Limited* [1995] IRLR 195, EAT; *Pinewood Repro Ltd t/a County Print v Page* [2011] ICR 508.

Pool

74. There is no principle of law that redundancy selection should be limited to the same class of employees as the Claimant, *Thomas and Betts Manufacturing Co Ltd v Harding* [1980] IRLR 255. In that case, an unskilled worker in a factory could easily have been fitted into work she had already done at the expense of someone who had been recently recruited. Equally, however, there is no principle that the employer is never justified in limiting redundancy selection to workers holding similar positions to the claimant (see *Green v A & I Fraser (Wholesale Fish Merchants) Ltd* [1985] IRLR 55, EAT.

75. In *Taymech v Ryan* [1994] EAT/663/94, Mummery P said, "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 the problem."

Alternative Employment

76. In order to act fairly in a redundancy dismissal case, the employer should take reasonable steps to find the employee alternative employment,

Quinton Hazell Ltd v Earl [1976] IRLR 296, *[1976] ICR 296; British United Shoe Machinery Co Ltd v Clarke* [1977] IRLR 297, *[1978] ICR 70*.

Polkey

77. If an employer has dismissed an employee in a way which is unfair, the ET can then consider what is the likelihood that the employer would have dismissed the employee fairly, had a fair procedure been adopted – *Polkey v Dayton Services* [1987] 3 All ER 974.

78. In *Gover v Propertycare Limited* [2006] ICR 1073, the Court of Appeal held that the *Polkey* principle applies, not only to cases where the employer has a valid reason for dismissal but has acted unfairly in its mode of reliance on that reason, so that any fair dismissal would have to be for exactly the same reason. Tribunals should consider making a *Polkey* reduction whenever there is evidence to suggest that the employee might have been fairly dismissed, either when the unfair dismissal actually occurred or at some later date. In making an assessment, Tribunals should apply the principles set out in *Software 2000 Limited v Andrews* [2007] ICR 825.

Contributory Conduct

79. By *s122(2) ERA,* where the Tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent, the Tribunal shall make such a reduction. By *s123(6) ERA*, where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding. *Optikinetics Limited v Whooley* [1999] ICR 984: it is obligatory to reduce the compensatory award where there is a finding of contributory fault. The reduction may be 100% - *W Devis & Sons Limited v Atkins* [1977] ICR 662.

80. In *Nelson v BBC (No 2)* [1980] ICR 110, the Court of Appeal said that three factors must be satisfied if the tribunal is to find contributory conduct:
(a) The relevant action must be culpable and blameworthy
(b) It must actually have caused or contributed to the dismissal
(c) It must be just and equitable to reduce the award by the proportion specified.

81. It is open to a Tribunal to make deductions both for *Polkey* and contributory fault.

Discussion and Decision

Reason for Dismissal

82. I considered, first, whether the Respondent had shown the reason for dismissal and that it was a potentially fair reason; that is, whether the Respondent had shown that the reason for dismissal was, either, redundancy, or some other substantial reason by way of business reorganisation.

83. The Claimant contended that the Respondent had not done so. He contended that the decision was partly because of performance issues and the difficult relationship between Ms Wang and the Claimant.

84. I decided, on all the evidence that I had heard, that the Respondent had shown that it had decided that it did not need a General Manager in its London office and that this was why the Claimant was dismissed. That accorded with the definition of the redundancy in *s.139 Employment Rights Act 1996*.

85. It was clear from the evidence that, at the date of the relocation order at the latest, the Respondent had decided that it did not require a General Manager in its London office and that the London office would be managed from Hong Kong by Ms Wang instead. From 14 February 2018 Ms Wang and Mr Lei Yan, at least, considered that the London office was being managed directly from Hong Kong. The Claimant was removed from emails and WeChat groups and his accounts and payroll duties were removed shortly thereafter and allocated to others outside London. These duties and roles were never returned to any employee in London. In the telephone call with Mr Lei Yan on 14 March, Mr Yan told the Claimant that the company wanted to remove the General Manager in London. That was also recorded as having been decided at the meeting on 26 April between Lei Yan and Li Zhou. On 14 March and 26 April, the reason given for the removal of the General Manager role was the financial performance of the London office being disappointing.

86. As part of my decision-making process, I considered whether the Respondent had shown that redundancy was the principal reason for dismissal, rather than conduct and/or capability being the principal reason for dismissal, as the Claimant contended. I also considered, if redundancy was the principal reason, whether the Respondent had acted on reasonable information, reasonably acquired.

87. The Claimant contended that the Respondents' witnesses had contradicted themselves about the information on which the Respondent based its decision to remove the Claimant's role. However, I considered that the financial performance of the London office was not really in dispute. The relevant figures, which were not in dispute, showed a modest profit in 2017, a very modest profit over the whole period 2016 to 2017, and little improvement on this in 2018. Whatever way the figures were presented, the London office profits were small at the relevant time. The Claimant agreed, in cross-examination, that Ms Wang and Mr Zhou had discussed with him that the London office sales performance was disappointing. I found that the decision to remove employment costs from the London office was based on reasonable information, reasonably acquired.

88. I decided that the principal reason for the decision to dismiss was redundancy, rather than conduct or performance. The Claimant's relationship with Ms Wang may have been part of the Respondent's decision-making process, but it was clear that the Claimant was not automatically demoted or dismissed following Ms Wang's three prompts. The relocation decision did

not dismiss the Claimant, but removed him from the London office. I decided, therefore, that the principal reason for the dismissal of the Claimant was a desire to remove the position of General Manager from the London office. That came within the definition of redundancy, rather than the Claimant being dismissed for conduct or capability.

Fairness of Dismissal for Redundancy

89. I then considered whether the Respondent had acted fairly in dismissing the Claimant for that potentially fair reason. I considered whether the Respondent had acted fairly in consulting with the Claimant when the proposals were still at a formative stage, whether it had given adequate information to the Claimant, adequate time to respond, and whether it undertook a conscientious consideration of the response. My answer to that was an emphatic "no". I concluded that the Respondent had acted well outside the band of reasonable responses in the way that it consulted with the Claimant.

90. I decided, on the evidence, that the Respondent decided to remove the General Manager London post in or before February 2018 and it did so without any warning to, or consultation with, the Claimant.

91. When the Claimant, having been told of the decision that had already been made to relocate him, asked for clarity and the details of the decision, neither Ms Fang Wang nor Mr Tao Zhou responded. The Claimant was removed from WeChat and from the UK email distribution list. His access to the CRM system was stopped. His responsibility for payroll and accounting was removed, all without any notice or consultation with him.

92. I concluded that the grievance process did not involve any meaningful consultation with the Claimant, or conscientious consideration of anything he had to say. While the Respondent purported to uphold the Claimant's grievance, it immediately confirmed its decision delete the Claimant's General Manager post in any event.

93. I decided that, just as the wording of the 26 April 2018 minutes suggested, the decision to delete the Claimant's London General Manager post was a final decision. The Respondent went through the motions of a consultation process thereafter, but it was quite clear to me that the Respondent had already decided to delete the post and there was never any possibility of it changing its mind. As I have said, the Claimant was removed from WeChat, an email distribution list and the CRM system. His responsibility for payroll and accounting were removed and they were never restored. The decision to relocate the Claimant was never rescinded insofar as other employees were never notified that it had been rescinded.

94. I also concluded that there was no consideration of the pool from which to select. I found that the Respondent did not even turn its mind to the question of pool, or whether a sales representative's post could have been deleted, rather than the Claimant's post. The decision to remove the General Manager London post was made before the February relocation order. There

was no note of any meeting in which that decision was made, or the rationale for selection of the Claimant's post, rather than others, at that time. There was no consideration of whether there could have been a reorganisation of duties of employees in London, with the Claimant, for example, assuming more sales responsibility. There was simply no evidence that this was done. Clearly the Respondent could have saved costs by deleting any posts in the London office, including that of newly recruited sales executives who did not have employment rights, but there was no evidence that any of this was ever considered at all.

95. I accepted the Respondents' evidence that it considered that moving the Claimant to Shanghai as a way of avoiding redundancy. That might have been reasonable attempt to find alternative employment for the Claimant if the Respondent had consulted the Claimant and explained its decision beforehand. However, these matters were only ever discussed with the Claimant after the decision to relocate had been made.

96. In any event, on the evidence I heard, I concluded that there was no possibility of Mr Lei Yan, on behalf of the company, changing the terms of the Claimant's relocation, or considering the Claimant's requests regarding it. In answer to the Claimant's request for accommodation, for example, Mr Lei Yan responded that the company did not do that and it was not practice in China to do so. Mr Li Yan appeared to have no discretion or authority to meaningfully consult with the Claimant about this potential alternative employment.

97. The procedure adopted by the Respondent was also outside the band of reasonable responses. I decided that the same people made the decision to delete the post on 26 April 2018, as made the decision to dismiss following the purported consultation, as made the decision to dismiss the appeal. There was no attempt to have an independent, or open, mind brought to those decisions.

98. This was a large organisation, with a very large number of employees, and a large number of senior employees. Taking that into account, it would have been feasible for this Respondent to have provided an independent decision maker.

99. Taking all those mattes into account, I considered that the decision to dismiss the Claimant for redundancy was well outside the band of reasonable responses. The decision was made without any meaningful consultation at any stage. The consultation process was a sham.

100. I found that the Claimant was dismissed for redundancy, but that the dismissal was unfair under *s98(4) ERA 1996*.

Polkey

101. With regard to *Polkey* I decided that it was extremely difficult for me to decide what this employer, acting fairly, would have done. In other words,

acting fairly, with fair consultation, from the outset. The fact was that this Respondent did not act fairly throughout the redundancy process.

102. It was not in dispute that the financial position of the London branch was not strong. On the evidence, therefore, the Respondent wanted to reduce costs. That is a factor which indicated that the Claimant might well have been made redundant in any event. The New York office General Manager left in August 2018 and was not replaced. Again, that pointed to the Claimant being made redundant in any event.

103. However, in order to have acted fairly, the Respondent would need to have consulted fairly; for example, on alternatives to redundancy. It would need to have adopted a fair approach to relocation and fair approach to determining the pool for selection. So, for example, fair consultation on relocation might have involved allowing time for the Claimant to prepare to relocate, allowing some discussion of the relocation period, considering some financial contribution to flights or relocation expenses for an employee relocating internationally and, in particular, allowing the Claimant to continue to be employed on the UK contract with UK terms and conditions - otherwise the Respondent would have been dismissing the Claimant in any event.

104. A fair approach to consultation would have involved conscientious consideration of the pool, and consultation about the pool, including consideration about whether the Claimant's post should be deleted, rather than one of the sales executive's posts. Alternatively, fair consultation might have involved reorganising roles so that the Claimant assumed more sales responsibility. The Respondent apparently envisaged this for the Claimant, following training in Shanghai. Given that payments to other employees rose after the Claimant's departure, it could have been an option for the Respondent to reorganise the office and responsibilities and to retain the Claimant.

105. I concluded that a fair approach to consultation and reorganisation may well have resulted in the Claimant, a more experienced employee, being retained and another employee being dismissed. It was not in dispute that the Claimant had unique skills. He spoke fluent English. Mr Li Zhou appeared, at the appeal hearing, genuinely to have valued the Claimant's previous contributions to the company and the skills which he had to offer.

106. I therefore considered, on all the evidence, that there was a real likelihood that the Claimant would have been dismissed for redundancy because of the disappointing financial position. However, there was a world of conjecture involved in determining whether the Respondent would have dismissed the Claimant fairly, had a meaningful consultation process been adopted.

107. I concluded that it was still no more than 50% likely that the Claimant would have been fairly dismissed, in any event, for redundancy.

<u>Contributory Fault</u>

108. The Respondent contended that the Claimant had contributed to his dismissal by his conduct. I concluded that the Claimant worked hard and diligently and that Li Zhou thanked the Claimant, apparently genuinely, for all his efforts and apologised to him for his dismissal during the appeal hearing. One of the Respondent's very senior employees, who was a primary decision maker regarding the dismissal, apparently did not consider that the Claimant had acted in a culpable or blameworthy way contributing to his dismissal.

109. Furthermore, I considered that the Respondent's pattern of dealing with the Claimant involved not consulting with the Claimant and imposing decisions on him. The Claimant was entitled, as a UK employee of a UK firm, to expect that his relationship with his employer would involve reasonable cooperation and consultation. On the evidence, he asked for no more than that. So, for example, I concluded that the Claimant was reasonable in objecting to being required to download a company App which required permission to access the Claimant's contacts and camera on his personal mobile telephone. This was a breach of the Claimant's privacy and it was inappropriate for the Respondent to expect this. If the Respondent wanted the Claimant to use an App, it could have provided him with suitable company equipment to do so, for example a cheap smartphone. Furthermore, the company's relocation decision and notification to the Claimant involved an international relocation. When he was told of the decision, Ms Wang gave him no details of its terms and conditions, including financial support to him. Ms Wang gave the Claimant extremely short notice. It was entirely reasonable for the Claimant to question this robustly.

110. Miss Wang, and the Respondent, gave the Claimant instructions throughout his employment without consultation and, apparently, without respecting the Claimant's role as manager in the region with which he was familiar. The Claimant was entitled to question Ms Wang regarding this approach.

111. I accepted the Claimant's evidence that he did address other managers by their initials and this was an acceptable practice. The Claimant's practice in doing this was not raised by the Respondent as being objectionable during the Claimant's employment.

112. I concluded that the Claimant did no more than question or probe the Respondent's decisions, imposed on him without consultation. That was not blameworthy or culpable conduct.

113. It is correct that the Claimant failed, on three occasions, to record the required number of visits to clients. Nevertheless, he met the £20,000 per quarter new orders target. It was clear that the Respondent did not propose to dismiss or demote the Claimant following the three prompts, but rather, to relocate him. As the Claimant pointed out, he complied with the Respondent's requirement for 8 client visits on all other occasions. There was evidence that the Claimant was, on at least one metric, the best performing of the Respondent's international General Managers.

114. On the balance of probabilities, I did not conclude that the Claimant was failing to meet the standards required by the Respondent.

115. I did not find that the Claimant's conduct was culpable or blameworthy. It did not contribute to his dismissal.

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Employment Judge Brown

Dated: ……..……1 July 2019..……..

Judgment and Reasons sent to the parties on:

.....4 July 2019.....

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For the Tribunal Office