EMPLOYMENT TRIBUNALS

Claimant: Mr A Flanagan

Respondent: Odema Limited

Heard at: Manchester **On:** 5 December 2019

Before: Employment Judge Phil Allen
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Mr J Christou (IT Director)

JUDGMENT

The judgment of the Tribunal is that:

1. The respondent has shown that the claimant was dismissed for the potentially fair reason of redundancy.

2. The respondent's decision to dismiss the claimant by reason of redundancy was unfair in the circumstances. The claimant's claim for unfair dismissal therefore succeeds.

3. The compensatory award to be made to the claimant should be reduced by 66% on the basis that the outcome would have been the same had a fair procedure been followed (*Polkey*).

REASONS

Introduction

1. The claimant was originally employed by the respondent from 2009, and more recently from 1 July 2014 until his employment terminated on 8 March 2019. The role filled by the claimant at the end of his employment was that of Project Manager.

2. The claimant had a significant accident on 30 November 2018 which resulted in a broken collar bone and a significant brain injury. In February 2019 the claimant

was put at risk of redundancy and, after a short period of consultation, he was dismissed by reason of redundancy.

3. The claimant alleged that his dismissal was unfair. He contended that it was due to issues he raised in relation to the Managing Director's daughter (who had been an employee) in 2018, or in the alternative it was in any event not a fair dismissal. The respondent relied upon redundancy as the fair reason for dismissal.

Claims and Issues

4. At the preliminary hearing on 10 October 2019 the issues to be determined had been identified for the liability hearing. The issues were as follows:

(1) Can the respondent show that they dismissed the claimant for a potentially fair reason within section 98(1) Employment Rights Act 1996? The respondent states that it was redundancy; the claimant does not agree.

(2) If so, was the decision to dismiss fair in the circumstances? In particular, did the respondent adopt a fair selection process by consulting adequately, applying a reasonable pool for selection, using a fair and transparent method of selection, considering and offering suitable alternative employment?

(3) If the claimant was unfairly dismissed, do the "*Polkey*" principles apply to limit any compensatory award on the basis that the outcome would have been the same had a fair selection process been applied?

Procedure and Hearing

5. At the 10 October 2019 preliminary hearing concerns had been discussed about the claimant's ability to give evidence and to represent himself. Both parties were prepared for the final hearing and were very keen for it to be heard as soon as possible. A medical report was available which expressed concerns about the claimant attending the tribunal hearing. Given the claimant's fragile physical and mental health and desire to get the hearing over with, the case was listed for one day. Despite the claimant's GP's concerns about the claimant's ability to give evidence, the claimant wished to proceed.

6. The claimant represented himself. He was supported by Mrs Flanagan (his wife) and a friend (Mr Morgan). The respondent was represented by Mr Christou, IT Director. At the start of the hearing a number of adjustments were discussed and were made as required. Breaks were taken at regular intervals throughout the hearing. The claimant gave evidence from the representatives' table rather than from the witness table, enabling him to be supported by his friend and his wife (albeit when answering questions, it was ensured that the evidence given was the claimant's). The claimant also received support from Mr Morgan and his wife while asking questions and presenting his case. The claimant was ultimately able to represent himself perfectly well in the hearing.

7. At the start of the hearing the order of evidence was outlined and the claimant was offered the opportunity to give evidence first if that adjustment would assist him

in being able to give evidence when he was best able to do so. The claimant decided that this was not an adjustment he required or which would assist him, and accordingly the evidence was heard in the usual order, with the respondent's witnesses giving evidence first.

8. The Employment Tribunal heard evidence from Mr James Christou, the respondent's Operations and IT Director; and from Mr Ben Coates, the respondent's Finance and Administration Manager. The claimant gave evidence and Mrs Janice Flanagan, the claimant's wife, also gave evidence.

9. The Employment Tribunal was also provided with a witness statement from Ms Stacey Flanagan, the claimant's daughter, but as Ms Flanagan did not attend the hearing and aspects of her statement were in dispute, that statement was given very limited weight.

10. The Employment Tribunal was also provided with a joint bundle of documents containing approximately thirty documents, and there were a number of documents which were referred to in the course of the hearing.

Facts

11. From 2009 the claimant was employed by the respondent. He was first engaged as a driver and subsequently filled other roles before becoming an engineer. The respondent is a specialist IT deployment company carrying out IT project installations, support and maintenance work. The evidence before the Tribunal was that the respondent's main customer (a well-known restaurant chain) currently makes up around 95% of the company's work.

Previous redundancy

12. In 2014 there was a reduction in the volume of the respondent's work. Volunteers for redundancy were sought from the engineers. The claimant volunteered, in part because he did not want other engineers to be made redundant. He was therefore made redundant on 21 May 2014, receiving a statutory redundancy payment of £3,480.

13. The claimant was re-engaged on a zero-hours contract of employment which commenced on 22 May 2014. In that contract the claimant was described as an Engineer Supervisor. The evidence before the Employment Tribunal appeared to be that the claimant did not in fact have any break between his previous role and being engaged on a zero-hours basis. In any event, from 1 July 2014, the claimant was re-engaged by the respondent on a permanent basis as part of the respondent's engineering staff. In evidence, the claimant contended that there had been no break in his employment and the evidence of the respondent's witnesses appeared to be that there had only been a weekend between the two engagements. However, in terms of liability, nothing material turned upon the length of the claimant's service.

14. The claimant had received a statutory redundancy payment in 2014, meaning that the period of continuous service for any subsequent redundancy payment calculation needed to start afresh from when that payment was made. The previous voluntary redundancy was also relevant as it partly informed the thinking of those at

the respondent when considering whether to place the claimant at risk of redundancy in 2019.

The claimant's role

15. There was dispute in evidence about whether the claimant was re-engaged as a Project Manager, the respondent contended that this was his role but the claimant disputed that it was saying this was not his title and the role was interchangeable with others. There was no contract document which recorded this title. The claimant's own witness statement referred to him as being engaged as a Project Manager from July 2014, and on the claim form the claimant himself had entered his job title as Project Manager. The respondent's witnesses stated that the claimant was a Project Manager. The Employment Tribunal finds that the claimant was engaged in the role of Project Manager, albeit that there was nothing in writing which confirmed that at the time.

2018 issues

16. There is no dispute that in late 2018 issues arose in relation to the daughter of the respondent's Managing Director, who at that time was working at the respondent. A meeting took place in October 2017 at which a number of people, including the claimant, highlighted to the Managing Director issues relating to the way in which the Managing Director's daughter conducted herself. It was also agreed that, shortly after that meeting, the claimant subsequently presented an ultimatum to the Managing Director that either his daughter left the business or he did. The Managing Director's daughter left the respondent at the end of December 2017.

17. The claimant's evidence was that the Managing Director acted differently towards him after that event. However in evidence he also said that in the two weeks prior to his accident he perceived that the Managing Director's unhappiness was waning and he hoped that it would do so.

18. The claimant asserted that his subsequent redundancy occurred as a result of the Managing Director's unhappiness with the way the claimant had conducted himself in relation to his daughter. There is no evidence to support this save for the claimant's own assertion. There was a considerable period of time between the events of 2018 and the claimant being placed at risk of redundancy. The claimant's own evidence was that he perceived that the Managing Director's unhappiness was waning. There was also clear evidence from both Mr Christou and Mr Coates about the reasons why the claimant/claimant's role was placed at risk of redundancy and the discussions which had led to that occurring. Their evidence was that, whilst the Managing Director was part of those discussions, the decision reached was a collective one to which his contribution was only a part.

19. Accordingly, the Employment Tribunal does not find that that the 2018 issues were the reason for the claimant being placed at risk of redundancy in 2019 (or a part of the reason).

November 2018

20. In September/October 2018 the respondent's main customer informed the respondent that all new IT installation projects had been put back until at least the

beginning of the second quarter of the 2019 calendar year. This was described by Mr Coates in his evidence as being a devastating blow to the respondent, as new project installations were the main source of revenue to the respondent. In evidence he explained how the installations ceasing would also have a knock-on effect upon the number of projects in subsequent months, and on the respondent's cashflow because of the time involved in the respondent being paid for such installations.

21. It is common ground that this decision of the respondent's customer led to the respondent having to consider making reductions to its own workforce. The claimant himself was involved in discussions about reducing the number of engineers employed by the respondent and confirmed in evidence that he himself was involved in the redundancy process. Five engineers were made redundant following an announcement which was issued on 30 November 2018, which led to a consultation period which ended on 14 December 2018, with individuals made redundant effective 31 December 2018. The evidence given by the witnesses, including the claimant, was that the number of non-employee engineers being used also reduced.

22. The evidence of both Mr Coates and Mr Christou was that in the days prior to 30 November 2018 there was also a discussion about the claimant's role. Mr Coates was concerned about the future viability of the business. As the claimant's project manager role was primarily involved with the installation of new work and a particular programme which was coming to an end, it was perceived that the need for this role was substantially reducing. The Employment Tribunal accepts the respondent's evidence. Where the respondent's principal customer has reduced the work required, it is accepted that the Project Manager's role may be one identified as being capable of being placed at risk of redundancy as a cost saving. The claimant was unaware of these discussions at that time.

The claimant's accident

23. Unfortunately, on 1 December 2018 the claimant had a serious fall, unrelated to his work for the respondent. The claimant went to hospital. He suffered a broken collar bone and a serious head injury. As a result, there was no discussion with the claimant about the possibility of his role being placed at risk of redundancy at that time.

24. The Employment Tribunal heard evidence in answers to questions, that this did have one knock-on effect for the claimant. As the claimant was an engineer, one of the things which could have been explored with him when he was placed at risk of redundancy, was whether he could have stepped back to undertake the role of an engineer with either another permanent engineer being made redundant (or the use of non-employed engineers being reduced further). The possibility of the claimant reverting to be an employed engineer was never considered with the claimant in November when the reduction in the numbers of employed engineers was taking place, as a result of the claimant's injury.

25. The Employment Tribunal heard considerable evidence about the claimant's conscientious wish to continue to undertake work during his period of absence. The claimant was not happy with the way in which he was stopped from undertaking work whilst being absent on ill health grounds, or with the fact that his access to the respondent's systems was blocked by Mr Christou. Mr Christou's evidence was that, at least by January 2019, it was evident that the claimant's injuries were serious, that

he was signed off as unfit for work, and therefore it was a responsibility of the respondent to make sure that the claimant did not undertake work during that period. His evidence was that this was the reason why the claimant's access was stopped and why the claimant was stopped from undertaking work from home. The Tribunal finds Mr Christou's evidence to be true and reasonable in this respect, albeit the claimant's obvious frustration is also accepted and understood. The claimant did have a commendable wish to continue undertaking some work while off on ill health grounds. However, for the purposes of the issues to be determined by the Tribunal, what occurred during this period does not have any material impact upon the outcome.

26. The claimant was paid full sick pay in December 2018 and January 2019. His contractual entitlement was to four weeks' full pay only, but in fact the respondent exercised its discretion to extend his company sick pay to two months (at full pay). Mr Christou's evidence was that this was something that was agreed by the respondent's Managing Director (which is accepted as further evidence that the claimant's contention that the real reason for his dismissal was the Managing Director's view of the claimant and the issues involving his daughter, was incorrect).

27. There was some contact between the respondent and the claimant's daughter during January 2019.

The claimant's redundancy

28. The evidence of Mr Christou and Mr Coates was that in February 2019 it was again felt necessary to revisit the issue of redundancies, as the respondent's situation had worsened. They both gave evidence that the respondent looked at staffing in all areas. In a three-way discussion between Mr Christou, Mr Coates and the respondent's Managing Director, it was identified that the claimant's role as project manager should be placed at risk of redundancy.

29. There was no documentation which recorded the conversations that took place. Mr Christou's evidence was these conversations occurred over a number of discussions. His evidence was that there was consideration of other roles, but the conclusion was that the claimant's responsibilities had significantly reduced and what remained could be absorbed into the work undertaken by the Technical Manager, the Logistics Manager and Mr Christou himself, whereas the claimant could not undertake those other roles. In Mr Christou's view the claimant did not have the technical expertise to undertake the Technical Manager role and he did not have the required skills in using Sage to be able to undertake the Logistics Manager role. As a result, only the claimant was placed at risk of redundancy, albeit the respondent had given consideration to which of these three roles should be made redundant.

30. The claimant's evidence was that these three roles did not exist as distinct and separate roles, that they were all interchangeable and that he could have done the work undertaken by the others. Whilst the Tribunal does not find that the claimant was correct in this assertion and it accepts Mr Christou's evidence, nonetheless this is one issue which should/could have been explored and discussed in a full and fair redundancy consultation process with the claimant, and the claimant did not have any genuine opportunity to raise this view – or at least he did not feel he had the opportunity to do so.

31. Mr Coates' evidence differed slightly from that of Mr Christou's, when he was asked questions. His evidence was that they respondent believed that they were doing the right thing by the claimant in putting him at risk of redundancy. This was based upon the fact that:

- the claimant had accepted voluntary redundancy in the previous exercise, suggesting that he would do so again;
- he was undertaking a home build project and would like the six months off; and
- due to his injury he would be better off being made redundant than he would be simply being paid SSP.

32. Mr Coates' evidence (when answering questions) was very clear that the decision about whether or not the claimant was redundant was one for the company to make, not one for the claimant, and it was one that they made, with the best intentions of the claimant at heart.

33. The Tribunal finds Mr Coates' explanation of why the claimant was put at risk of redundancy to be accurate and to reflect the factors taken into account when the decision was reached. It also finds that Mr Christou's evidence was correct - the claimant's role was discontinued and ceased to exist and the claimant's role differed from the roles of the Technical Manager and the Logistics Manager.

34. Mr Christou telephoned the claimant on or around 18 February 2019, he outlined the respondent's financial issues and asked to meet with the claimant. A letter was sent to the claimant dated 21 February (document 12) explaining the impact of the respondent's client's decision on the respondent and confirming that regrettably the respondent had reached the point where they needed to reduce their overheads further. In the letter Mr Christou stated:

> *"we are now of the opinion that the change in operational requirements means that the role of Project Manager will cease to exist after 1 March 2019."*

The letter went on to confirm that there was to be a period of consultation. The claimant's evidence was that he never received this letter; Mr Christou's evidence was that it was sent by post and recorded delivery. It is accepted that the letter was sent, albeit it appears that it was not received.

The meeting on 28 February

35. On 28 February 2019 Mr Christou had a meeting with the claimant, at his home (at the claimant's request), which was also attended by Mrs Flanagan. There was a note provided to the Employment Tribunal (document 13) which recounted what Mr Christou said was talked about in that meeting. He said that he reiterated that there was hardly anything for the Project Manager to do, hence why the claimant was being placed at risk of redundancy. The claimant raised the allegation that he thought he was being treated worse because of the conflict with the Managing Director's daughter, which was denied by Mr Christou who said it had nothing to do with the proposed redundancy.

36. It was common ground that there was some discussion about what would happen if work picked up later in the year. Mr Christou said that the claimant would be able to come back if that occurred. Mr Christou says he referred back to the 2014 events. At this point, Mrs Flanagan made very clear in no uncertain terms that her view was that the claimant was never coming back to work for the respondent. The claimant emphasised in evidence that this was the view of his wife and not himself, but nothing turns on the statement in any event. There was some discussion about redundancy pay.

37. Mr Christou informed the claimant that there was a further meeting planned for Friday 1 March and that he would telephone the claimant after that meeting (that is a meeting between decision-makers, not one with the claimant). Mr Christou's evidence was that he also referred to a meeting on the subsequent Monday 4 March.

38. In the claimant's statement he describes Mr Christou as saying that it was 99% likely that he would be made redundant. Mr Christou, when answering questions in the Tribunal hearing, emphasised that what he said was that it was 99% certain that the role of Project Manager was to cease, and it was about the role he was speaking.

39. Mrs Flanagan's evidence was that Mr Christou in this meeting also referred to other people in the project office being spoken to about redundancy. It is found that the claimant and his wife were left with the impression by Mr Christou that others were being placed at risk of redundancy, which turned out not in fact to be the case. Mr Christou's evidence was that they considered making other redundancies but ultimately did not.

40. It is common ground that in this meeting there was no discussion about: whether the claimant could fulfil the alternative roles of Logistics Manager or Technical Manager; why the claimant's role had been selected; or any alternative employment for the claimant (including that of an engineer). There was no discussion about potentially retaining the claimant in employment, using him instead of contractors as an engineer, or about the timing of redundancy if the workload might increase in the future (as at this time the claimant was being paid SSP only, his ongoing employment represented only a limited cost to the respondent).

Alternative employment

41. On being asked whether there was any consideration by the respondent of moving the claimant into an engineering role, Mr Christou's answer was that he did not think that was an option at the time due to the claimant's medical condition. In evidence Mr Coates also confirmed that some subcontractors continued to be engaged as engineers in February and March 2019 although he was unable to confirm how many.

Confirmation of decision

42. Following this meeting, Mr Christou's evidence was that there was a subsequent telephone conversation in which the claimant was informed that he was to be made redundant. The claimant alleged that there was no such conversation and that he found out he was redundant when his phone stopped working.

43. There were text messages included in the bundle which showed Mr Christou endeavouring to contact the claimant on 5 and 6 March 2019, but being unable to speak to the claimant as he was in hospital at the time (document 14). The claimant subsequently received a letter dated 7 March 2019 which confirmed that he was being made redundant. He received this on Friday 8 March 2019 (document 15). This letter makes no mention of any conversation that week.

44. Based upon what is said in the letter and the text messages, the Tribunal finds the claimant's evidence to be correct and no telephone conversation took place. There was no evidence provided to the Tribunal which explained the need for the redundancy consultation process to be concluded urgently or without any further conversation or meeting with the claimant.

45. In the 7 March letter, Mr Christou thanked the claimant for his loyalty and valuable contribution to the respondent's business. He said in evidence before the Tribunal that the claimant had been a committed and valuable employee for the respondent.

46. The letter informed the claimant that his position would be redundant from 8 March and confirmed the payments the claimant would receive. The claimant was paid a statutory redundancy payment based upon continuous employment from 1 July 2014.

Appeal

47. The claimant subsequently appealed. The claimant asked to be allowed to bring a member of his family to an appeal meeting. The appeal meeting, with the respondent's Managing Director, was arranged for Wednesday 20 March. The claimant declined to attend. Accordingly, no appeal hearing took place.

The claimant's potential to return to work

48. In his evidence, the claimant was keen to emphasise that at the time he did wish to return to work and that he was committed to the respondent's business and would have returned to work with them if he had been able to do so. However, he was also clear (and honest) in confirming that, as a result of the injuries that he suffered, if he had not been made redundant he would not have been able to actually return to work with the respondent in the period prior to the Tribunal hearing. It was also his evidence that, unfortunately, it is unlikely that he ever will be fit enough to be able to do so.

The Law

49. What is being considered is section 98 of the Employment Rights Act 1996. It is for the respondent to show the principal reason for dismissal. The Employment Tribunal is then required to determine whether a fair process was followed and whether the decision to dismiss was fair in all the circumstances.

50. The primary provision which governs unfair dismissal is section 98 of the Employment Rights Act 1996 which, so far as relevant, provides as follows:

> *"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this sub-section if it … is that the employee was redundant …

(4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

*(b) shall be determined in accordance with equity and the substantial merits of the case***".**

51. The definition of redundancy for the purposes of section 98(2) is found in section 139 of the Employment Rights Act 1996 and, so far as material, it reads as follows:

"(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –

(b) the fact that the requirements of that business –

*(i) for employees to carry out work of a particular kind … have ceased or diminished or are expected to cease or diminish"***.**

52. The proper application of the general test of fairness in section 98(4) has been considered by the higher courts on many occasions. The Employment Tribunal must not substitute its own decision for that of the employer: the question is rather whether the employer's conduct fell within the "band of reasonable responses": **Iceland Frozen Foods Limited v Jones [1982] IRLR 439 (EAT)** as approved by the Court of Appeal in **Post Office v Foley**; **HSBC Bank PLC v Madden [2000] IRLR 827**.

53. In cases where the respondent has shown that the dismissal was a redundancy dismissal, guidance was given by the Employment Appeal Tribunal in **Williams & Others v Compair Maxam Limited [1982] IRLR 83**. In general terms, employers acting reasonably will seek to act by giving as much warning as possible of impending redundancies to employees so they can take early steps to inform themselves of the relevant facts, consider positive alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere. The employer will consult about the best means by which the desired management result can be achieved fairly, and the employer will seek to see whether, instead of dismissing an employee, he could offer him alternative employment. A reasonable employer will depart from these principles only where there is good reason to do so.

54. The importance of consultation is evident from the decision of the House of Lords in **Polkey v A E Dayton Services Limited [1987] IRLR 503**. The definition of consultation which has been applied in employment cases is taken from the Judgment of Glidewell LJ in **R v British Coal Corporation and Secretary of State for Trade and Industry, ex parte Price [1994] IRLR 72** at paragraph 24:

"It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body with whom he is consulting. I would respectfully adopt the test proposed by Hodgson J in R v Gwent County Council ex parte Bryant … when he said:

'Fair consultation means:

(a) consultation when the proposals are still at a formative stage;

(b) adequate information on which to respond;

(c) adequate time in which to respond;

(d) conscientious consideration by an authority of the response to consultation".

55. On the issue of consultation **Mugford v Midland Bank [1997] IRLR 208** says:

"*It will be a question of fact and degree for the [employment] 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.*"

56. An employer is required to take reasonable steps to find the employee alternative employment. The Employment Appeal Tribunal in **Lionel Leventhal Limited v North [EAT 0265/04]** said that "*it can be unfair not to give consideration to alternative employment within a company for a redundant employee even in the absence of a vacancy*". It held that whether it is unfair or not to dismiss for redundancy without considering alternative and subordinate employment is a matter of fact for the Tribunal.

Discussion and Conclusion

The principal reason for dismissal

57. The Employment Tribunal finds that the reason for the termination of the claimant's employment was redundancy. The role of Project Manager did cease to exist at the respondent. The claimant fulfilled a unique role. Whilst the claimant could have undertaken the duties of others and others could have undertaken his duties to cover absence, the claimant did fulfil a unique role and that unique role ceased to exist. The backdrop was a significant need for cost savings by the respondent which resulted in a number of engineering redundancies in late 2018. The fact that other redundancies did not occur in 2019, does not stop redundancy being the reason for the claimant's dismissal. The evidence of Mr Christou and Mr Coates is accepted as explaining why the respondent decided to dismiss the claimant.

58. For the reasons identified above, the Employment Tribunal does not find the reason for dismissal was the claimant's issues with the Managing Director's daughter the previous year. The claimant's ill health clearly was a factor in the decision as identified by the evidence of Mr Christou, but that does not make his ill health the principal reason. Ill health was a factor in the way in which the process was undertaken and consideration given to alternative employment, but not the reason for the decision itself. The reason was redundancy.

The redundancy process

59. In terms of fair process, the consultation process followed by the respondent was very limited and (at best) fairly cursory.

60. The consultation process consisted of one telephone call and one meeting with the claimant. A fair redundancy consultation process will usually involve more than a single meeting (although this may depend upon the circumstances of each case). There will normally need to be an opportunity for an employee who is being consulted about potential redundancy, to consider what has been said to him and to respond after considering it. There should be discussion about alternative employment. There was a particular need for a full consultation process for someone in the claimant's position, that is with serious head injuries. The respondent was aware that the accident had an impact upon the claimant and his recollection of events. That made it even more important that a full consultation process be undertaken and documented. This was not done in this case.

61. There was no discussion with the claimant about the selection process that had been undertaken and there was no discussion about whether or not the claimant could fulfil the roles of Technical Manager or Logistics Manager and/or whether those people should instead have been made redundant or also placed at risk. A fair consultation process would have at least explained and explored with the claimant why it was his role and not theirs which was being placed at risk. The claimant would have had the opportunity in a fair process to have explained why he felt he could have done those roles in preference to those in post. The respondent may have had a thought-through reason for the decision not to place all three at risk of redundancy, but the absence of any genuine explanation to, or discussion with, the claimant about the thought-process and the decisions made, demonstrates a lack of any genuine consultation with him.

62. There was no discussion with the claimant about alternative employment. In practice, the opportunity for the claimant to have moved to an engineering role and for an additional engineer to have been made redundant, was lost by the delay in the claimant being placed at risk following his accident. However there should have been some consideration with the claimant about: whether the respondent could engage fewer consultant engineers or whether redundancy could be avoided by doing so; and/or whether redundancy could be delayed to see what the position was when he was fit enough to return to work. This latter option may have been a possible resolution as the claimant was not actively working at the time. The obligation on the respondent was to explore such options with the claimant and consult about them, which they did not do.

63. Mr Christou’s evidence was that the claimant's ill health was the reason why alternative employment was not discussed. That is not a fair reason for not considering alternative employment, nor does it remove the need to consult about it as part of a fair consultation process.

64. The Tribunal finds that: the consultation with the claimant was so inadequate as to render the dismissal unfair; consultation with the claimant was not undertaken when the proposals were still at a formative stage; and there was inadequate information provided to him on which to respond as part of the consultation.

Consultation and the decision

65. The Tribunal finds that the fact that the claimant was being made redundant had in fact already been determined by the respondent prior to the consultation meeting taking place. This is demonstrated by: the terminology used by Mr Christou in the letter sent to the claimant (whether or not received – but it sets out unequivocally what had been determined); and Mr Christou's statement in the meeting that it was 99% likely that the claimant would be made redundant, whether or not that was applied to the post or the individual. The evidence of Mr Coates was effectively that the decision to dismiss the claimant had been made before any consultation took place, reinforced by his emphasis that it was a decision for the respondent to make not one for the claimant (which appeared to demonstrate that he took no account of what was said in any consultation meeting). In practice when Mr Christou went into the consultation meeting with the claimant, the decision to terminate his employment had already been made.

66. The Tribunal finds that there was not conscientious consideration of any response to consultation, as the decision had already been made before consultation commenced.

Unfair dismissal

67. As a result of the findings above, the Tribunal's decision is that the respondent acted unreasonably in treating its reason as a sufficient reason for dismissing the claimant in all the circumstances of the case (in accordance with equity and the substantial merits of the case). The dismissal of the claimant was unfair.

Polkey

68. A full and fair redundancy consultation process would have taken slightly longer than that undertaken by the respondent, possibly a further week or two. However, had such a process been undertaken, it is likely that the claimant would still have been made redundant in any event.

69. Mr Christou's evidence about the claimant's inability to fulfil the other roles which absorbed his responsibilities is accepted. The claimant's role had ceased to be required due to the reduction in demand from the respondent's major client. Whilst the possibility of alternative employment as an engineer should have been part of the consultation with the claimant as part of a fair process, the Employment Tribunal does not find it likely that in early 2019 an alternative role could have been found.

70. However, it is possible that had full and thorough consultation been undertaken the claimant could either have been retained in an engineer role in preference to utilising a contractor, or it is possible that the claimant's dismissal could have been deferred as he was absent on ill health grounds in any event (pending a future up-turn in the respondent's work).

71. In those circumstances it is just and equitable to reduce the award made to the claimant to reflect the likelihood that he would have been made redundant in any event had a fair process been followed. That reduction should be significant, to

reflect the likelihood of dismissal by reason of redundancy even had a full and fair consultation process been undertaken. However, it is not possible to say that had a fair process been followed there was only one outcome. As a result, the compensatory award to be given to the claimant should be reduced by 66%.

72. It was agreed, as part of the issues to be determined, that this issue (known as *Polkey*) would be determined at the same time as the liability issues (it is issue 3 above). This Judgment does not determine the other remedy issues which will need to be determined following a separate remedy hearing, if one is required. However, the finding of fact recorded at paragraph 48 (based upon the claimant's own evidence) is one that the Tribunal has recorded in this Judgment. That finding will have a significant impact upon remedy. That issue will need to be addressed at a remedy hearing.

Remedy Hearing

73. At the end of the Employment Tribunal hearing it was confirmed that the matter should be listed for a remedy hearing for three hours to be heard at **10.00am** on **Thursday 12 March 2020** before Employment Judge Phil Allen at **Manchester Employment Tribunal, Alexandra House, 14-22 The Parsonage, Manchester, M3 2JA**. That hearing will now be required to determine the remedy to be awarded.

74. The following orders are made, to prepare for the remedy hearing:

a. Any documents upon which either party intends to rely at the remedy hearing and/or which are relevant to the issues to be decided shall be sent to the other party by no later than **Friday 7 February 2020** (not including any documents included in the bundle prepared for the liability hearing). The claimant's documents shall include any documents which evidence any benefits or earnings he has received. If the claimant has sought to obtain new employment, the documents shall also include any documents which evidence his attempts to do so. If any medical reports or documents are relevant to the claimant's ability to work or the possibility of him doing so, they should also be included;

b. The respondent shall prepare and provide to the claimant a bundle of documents for the remedy hearing, paginated and indexed, by no later than **Friday 21 February 2020**. The respondent shall bring three copies of that bundle to the remedy hearing (in addition to its own copy). The claimant shall bring the copy which has been sent to him. The content should be agreed if possible. The remedy bundle does not need to include any documents which were already included in the bundle prepared for the liability hearing.

c. The parties shall send to each other full written statements of the evidence of any witnesses (including the claimant) which they intend to call on issues relating to remedy by no later than **Monday 2 March 2020**. No additional witness evidence may be allowed at the hearing without the permission of the Tribunal. The parties shall bring three copies of their own statements to the hearing (in addition to their own copies).

d. By no later than **Thursday 5 March 2020** the claimant shall send to the respondent and the tribunal an updated schedule of loss setting out what remedy the tribunal is being asked to award. The claimant shall bring three copies of his schedule to the hearing (in addition to his own copy).

Employment Judge Phil Allen

Date: 20 December 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
2 January 2020

FOR THE TRIBUNAL OFFICE