EMPLOYMENT TRIBUNALS

Claimant: Mr S Digpaul

Respondent: Entrust Datacard Corp (1)
Datacard Ltd (2)
M D Herzog (3)
Mr X Coemelck (4)
Mr T Ball (5)

Heard at: **Leicester** **On: 4, 5, 6, 7 & 11 November 2019**

Before: **Employment Judge Victoria Butler**
Mr ME Robbins

Mr A Wood

Representation
Claimant: Mr R O'Dair Counsel)
Respondent: Mr J Braier (Counsel)

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The Claimant's claim of unfair dismissal against the 2nd Respondent is not wellfounded and is dismissed.

2. The Claimant's claim of automatically unfair dismissal against the 2nd Respondent by virtue of Regulation 7 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") is not well-founded and is dismissed.

3. The Claimant's claim that the 1st and 2nd Respondents failed to inform and consult him in accordance with Regulation 13 TUPE is not well-founded and is dismissed.

4. The Claimant's claim of indirect race discrimination against the Respondents is not well-founded and is dismissed.

5. The Claimant's claim of victimisation against the Respondents is not well-founded and is dismissed.

REASONS

Background

1. The Claimant was employed by the 2nd Respondent as a Senior Product Manager until his dismissal on 16 November 2017. He claims the following:

    - Unfair dismissal under s.98(2) Employment Rights Act ("ERA");
    - Automatically unfair dismissal by virtue of Regulation 7 TUPE";
    - A failure to inform and consult in accordance with Regulation 13 TUPE:
    - Indirect race discrimination – section 19 Equality Act 2019 ("EQA"); and
    - Victimisation – s. 27 EQA.

2. He notified ACAS on 15 December 2017 under the early conciliation procedure and ACAS issued the early conciliation certificates on 29 January 2018. The ET1 was presented to the Tribunal on 26 March 2018 and the ET3 was submitted on 4 July 2018.

The issues

3. The issues agreed between the parties were as follows:

Dismissal

i. It is agreed that the claimant was dismissed on 16 November 2017.

TUPE – service provision change ("SPC"): relevant transfer *ii. What were the activities carried on by the 2nd Respondent for the 1st Respondent before the 1st Respondent's appointment of Mr DePompolo?*

iii. Were the activities carried on by the 1st Respondent immediately after that appointment fundamentally or essentially the same as those carried on by the 2nd Respondent immediately before it?

iv. Before the transfer, was there an organised grouping of employees from the

2nd Respondent whose principal purpose was the carrying out of those activities?

v. *What the claimant assigned to that grouping?*

vi. *It is the Claimant's case that he, on his own, formed an organised grouping whose principal purpose was the carrying out of activities for the 1st Respondent.*

TUPE – dismissal

vii. *If there was a relevant transfer through a SPC, was that transfer the sole or principal reason for the Claimant's dismissal?*

viii. *If yes, was the sole or principal reason for the dismissal an economic, technical or organisational ("ETO") reason entailing changes in the workforce?*

ix. *If no, the Claimant is treated as unfairly dismissed. If yes, the Claimant's dismissal needs to be considered under the ordinary unfair dismissal principles pursuant to section 98 ERA.*

TUPE – failure to inform and consult

x. *If there was a relevant transfer, did the 2nd Respondent comply with its obligations to inform and consult in respect of the relevant transfer, pursuant to regulation 13 TUPE?*

xi. *Was the Claimant's claim filed within three months of the relevant transfer (subject to the extension of time under Regulation 16A TUPE)?*

xii. *If not, the Claimant does not seek to argue that it was not reasonably practicable to bring the claim in time, and accordingly the Tribunal does not have jurisdiction to consider the claim.*

Ordinary unfair dismissal

xiii. *What was the reason for the Claimant's dismissal? The 2nd Respondent's position is that the Claimant was redundant.*

xiv. *Was that reason a potentially fair reason?*

xv. *If the reason for the Claimant's dismissal was redundancy, did the 2nd Respondent follow a fair procedure, and in particular, did the 2nd Respondent comply with the requirement to consult with the Claimant or was any consultation a sham?*

Indirect discrimination

xvi. Did the Respondents apply either of the following provisions, criteria, or practices ("PCPs"):

- *That a person providing the services provided by the Claimant should work in and reside in Shakopee, Minnesota, USA; or*
- *That such a person should already be living and working in Shakopee?*

xvii. If so, were non-US nationals put at a particular disadvantage by the PCP by reason that:

- *Non-US nationals faced immigration hurdles not faced by US nationals;*
- *Non-US nationals were likely to be more expensive to employ than US nationals by reason of relocation costs; and/or*
- *Non-US nationals were less likely to be living in Shakopee?*

xviii. Was the Claimant put at that disadvantage?

xix. If yes, it is agreed that the Respondents establish a legitimate aim, namely the business need of centralising the product management team in Shakopee for reasons of efficiency and productivity. ***NB*** *Mr O'Dair subsequently stated in his skeleton argument that 'it is not admitted that the Respondents actually had such an aim'.*

xx. Was the application of the PCP a proportionate means of achieving that legitimate aim?

xxi. If either PCP is found to be indirectly discriminatory, was its application an effective cause of the Claimant's dismissal?

xxii. If yes, which of the Respondents are liable for such discrimination?

Victimisation *xxiii. It is agreed that the Claimant did a protected act when raising discrimination in his appeal letter on 11 October 2017 and subsequently in the appeal hearing.*

xxiv. It is agreed that the Claimant's effective date of termination was brought forward on 15 November 2017 from 24 November 27 to 16 November 2017.

xxv. Did that amount to a detriment?

xxvi. Was the claimant's effective date of termination brought forward because he had done a protected act?

xxvii. If yes, which of the Respondents are liable for such victimisation?

Polkey or Chagger reduction

xxviii. If the Claimant's dismissal is found to be unfair (whether under TUPE Regulation 7(1) or ERA section 94) and/or discriminatory, to what extent should compensation be reduced on the grounds that had the 2nd Respondent followed a fair procedure, it might have dismissed the Claimant fairly and/or without discrimination in any event?

The hearing

4. This case was heard on 4, 5, 6, 7 and 11 November 2019. The Tribunal met on 4 November 2019 to read the relevant documents and witness statements.

5. Prior to the hearing the parties helpfully presented:

- An agreed list of issues
- A chronology
- An agreed bundle
- A bundle of authorities (for both liability and remedy)
- Skelton argument (on behalf of the Claimant)

6. References to page numbers in these Reasons are references to the page numbers in the agreed bundle.

The evidence

7. The Tribunal heard evidence from:

On behalf of the Claimant:

- the Claimant

On behalf of the Respondents:

- Dan Herzog (Director of Product Management at the 1st Respondent and named as the 3rd Respondent)
- Tony Ball (Senior Vice President for the Secure Access business at the 1st Respondent and named as the 5th Respondent)
- Xavier Coemelck (Regional Vice President Europe, the Middle East and Asia at the 2nd Respondent and named as the 4th Respondent)
- Edward Hildebrand (Head of Talent Management at the 2nd Respondent)

8. We are satisfied that all the witnesses we heard from were honest and genuine and we thank them for this. This case is, in the main, one of differing perspectives on the rationale and implementation of the Claimant's dismissal by reason of redundancy.

The facts

9. We have made our findings of fact based on the material before us, taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. We resolved any conflicts of evidence that arose on the balance of probabilities. We have taken into account our assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts.

10. The findings of fact relevant to the issues which we determine are as follows:

Background

11. The Claimant resides in Leicester with his wife and three children. His wife has her own business running a pre-school and the Claimant is actively involved in the local Sikh community and temple. He is also a Special Constable with Leicestershire Constabulary. The Claimant's parents live in Nottingham. They are both frail and he visits them fortnightly. He has brothers in Nottingham and Hitchin, and he meets up with them regularly too.

12. The Claimant's sister passed away in 2015 leaving him with the guardianship of her five children, who also reside in Nottingham. He visits them either weekly or fortnightly and this, along with his other family and community ties in the East Midlands, means that he is not able to relocate, either in the UK or abroad.

13. The 1st and 2nd Respondents' business is the provision of secure identification cards and smart cards to businesses, government and educational bodies. This includes the software such as on-line security platforms, and the hardware products, such as printers, to produce the ID cards. In 2013, the 1st and 2nd Respondents merged bringing together the 2nd Respondent's predominantly hardware business with the 1st Respondent's software business. The 1st Respondent has its Headquarters based in Shakopee, Minnesota, USA. It has a number of subsiduary legal entitles under which non-US staff are employed, including the 2nd Respondent. The global business trades as Entrust Datacard Corporation.

14. The Claimant was employed by the 2nd Respondent which is a UK entity based in Hampshire, albeit his services were provided to the 1st Respondent. He commenced employment as a Channel Manager on 20 September 2004 and was issued with a contract of employment (p.96–121). He later became Channel Sales Director for Europe, Middle East and Africa (EMEA). Both roles were home based, and the Claimant would travel to the 2nd Respondent's offices in Whitely, Hampshire when required.

15. In July 2012, the Claimant was appointed to the role of Senior Product Manager reporting to Kathleen Phillips, Vice President of Product Management and Marketing (p.122-123). Again, this role was home based, although he was line-managed from the US and required to travel to Shakopee as and when needed.

16. The Claimant's role was focussed on hardware products, specifically printers, for ID cards. He was part of the Hardware team (p.249) sharing a common objective and was not, on his own, an organised grouping whose principal purpose was the carrying out of activities for the 1st Respondent. The Claimant was the only member of the Hardware team not based in Shakopee. The Marketing and Engineering teams for Hardware were also located there.

17. The 1st Respondent has a remote working policy, but this only covers the US entity (p.124 – 125). The 2nd Respondent does not have a formal remote working policy, although the Claimant worked remotely from home.

18. In addition to regular travel to Shakopee, the Claimant spent eight weeks there with his family during the summers of both 2013 and 2014. He was unable to do so in 2015 due to the death of his sister and made no further extended visits thereafter.

19. In August 2013, the 1st Respondent applied for an L-1 visa for the Claimant under its L-1 blanket petition which was granted in November 2013 (p. 129 – 174). This visa allowed the Claimant to enter the US without restrictions and relocate there for a defined period. It was granted with effect from 14 November 2013, expired on 1 August 2016 and documented in his passport (p.170A).

20. In or around June 2016, the Claimant had a performance review. A standard question on the pro-forma is "Are you willing to relocate?". The Claimant confirmed "No" (p.191).

21. In September 2016, Tony Ball joined the 1st Respondent as Senior Vice President and General Manager of Identity and Access Management. He was responsible for the Secure Access business including the desktop printing which personalises identification cards and authentication for remote access to networks.

22. The Access Control business had stagnated, and Mr Ball was recruited to investigate why, and plan for future growth. As part of his review, Mr Ball felt that the Director of Product Management Connell Smith, who was the Claimant's line manager, was not performing to the required standard to drive growth and he ultimately left the 1st Respondent by agreement. Mr Ball did not replace Mr Smith initially and undertook some of his duties for a period, during which time the Claimant reported directly to him.

23. On 1 October 2016 the Claimant was refused access to the US because his visa had expired. Accordingly, he had to return to the UK and was unable to fulfil his visit. Thereafter, the 1st Respondent applied for, and was granted, a B-1 visa for the Claimant on the basis that less US travel would be required (p.199). The B1 visa is a temporary visa allowing visits for business purposes and was the most appropriate for the Claimant at that time.

24. In December 2017, the Claimant gave a presentation requesting approval for the launch of a printer portfolio. As part of his presentation he supported an integrated approach to sales by unifying *'hardware, Software, and Supplies to drive growth across*

Access Control Segment', thereby acknowledging the need for cross collaboration (p.216 – 235).

25. On completing his review, Mr Ball concluded that the Marketing and Engineering teams needed to be co-located in Shakopee. The hardware products were aging and not performing well, and the focus needed to be on the next generation of products. He believed that the teams should be located in Shakopee to cover what would be a one billion dollar plus portfolio, and to have regular and direct contact with the senior Leadership team - in his words 'the team needed to be walking the corridors in Minnesota to do this effectively". Mr Ball required his direct reports to be based in Shakopee to support his strategy.

26. Mr Ball recruited a Global Head of Hardware to replace Mr Smith and the role was advertised internally and externally. The Claimant 'acted up' for several months whilst the recruitment process took place, but only in respect of the hardware element of Mr Smith's previous role. Mr Ball invited the Claimant to apply, but made it clear that it was based in Shakopee. The Claimant duly applied but advised Mr Ball that he was not willing to relocate. Accordingly, he was not offered the role. The successful candidate was the 3rd Respondent, Dan Herzog who took up the role with effect from March 2017. He was hired to manage the product development of the next generation issuance printers and his brief was to apply a totally fresh perspective on the hardware portfolio. Mr Herzog's strategy to achieve future objectives was against a background of the 2016/17 revenue and profit targets not being met.

27. Mr Herzog had autonomy to manage his direct reports as he saw fit. On review, he also concluded that the Hardware Product Management team needed to be in Shakopee, alongside the other teams and key stakeholders. The Claimant was the only member of the team based outside Shakopee and the time difference and lack of presence was presenting difficulties. The difference in time zone meant that the Claimant was not present to make critical decisions, co-ordinate discussions with other team members in a timely fashion, resolve unforeseen and unexpected challenges and setbacks in real time and generally manage the completion of projects to the schedule and expectations required.

28. In March 2017, Mr Herzog undertook the Claimant's performance review. Whilst there were many positive elements to the review, Mr Herzog identified difficulties that had been experienced with the launch of what was called the Platinum Plus Program. He noted that *'In terms of rollout of the program internally, there have been challenges around clarification of project workflows, requirements from stakeholders and related processes that were not in place at launch. These are being worked through after the launch of the program and are being resolved. Insuring (sic) that these details are in place and that all stakeholders understand their responsibilities and workflows will be critical to maintaining momentum and meeting our revenue objectives for the Platinum Plus Program in FY18."* (p.203).

29. In June 2017, Mr Herzog formally presented his plan to centralise the team in Shakopee (p.248 – 251). A part of his overall proposal was that the Claimant's role would be co-located with the rest of the team in Shakopee. Mr Herzog also reduced the overall headcount of Product Managers from four to two. Once Mr Herzog's plan was signed off and the Claimant's role was at risk of redundancy, he liaised with Ed Hildebrand, Head of Talent Management at the 2nd Respondent, on the correct process to follow. The Claimant's role was the only one affected by this proposal, so he was in a pool of one.

30. Mr Hildebrand phoned the Claimant on 14 September 2017 to discuss the proposal and avoid the Claimant receiving a letter out of the blue, without warning. He sent the letter that same day by e-mail (p. 252). The letter confirmed the rationale behind the proposed redundancy, namely that co-location was the key to future success. It confirmed that *"From an organisational perspective, the ideal structure to accomplish this objective is a hardware product management team based in close proximity to the appropriate stakeholders in these groups, all of which are located at our Shakopee headquarters. Without this co-location, our effectiveness and speed of development will be significantly slowed, which in turn will slow our time to market for new products and prevent us from meeting our revenue growth objectives……..It is very important that you are fully involved in the consultation process and we are keen to take account of your views and suggestions before reaching any final decisions on redundancy…. Please be aware that Dan and I are available at any time for discussions during this consultation period"* (p.253 – 254). The Claimant was invited to attend a first consultation meeting on 20 September 2017.

31. The meeting took place as scheduled and Mr Herzog dialled into the meeting by phone. Mr Hildebrand attended as HR support in the UK and Cassy O'Neill, HR Business Partner, was supporting Mr Herzog by phone in the US. The Claimant declined the right to be accompanied. Mr Herzog explained the rationale behind the proposal again and was clear that the Claimant was free to suggest alternatives to redundancy as part of the consultation process. The Claimant said very little in this meeting other than he believed that his role could continue remotely and that he disagreed with the decision to move it to Shakopee (p.256–257, p.259).

32. Mr Hildebrand confirmed that the Claimant was welcome to make suggestions for alternatives to redundancy and 'these must be received in writing as soon as possible'. He also explained that Mr Herzog would like him to stay on for a period of eight weeks after the close of the consultation to help transition some of the key projects he was working on to the US team. The Claimant said he would think about it. Mr Hildebrand also advised the Claimant that they were not aware of any alternative roles in the UK at that time, but pointed the Claimant to the internal vacancies on the intranet to view (p.265-269).

33. After the close of the meeting, Mr Hildebrand spoke with the Claimant about the transition period further and the Claimant confirmed again that he would think about it. Mr Hildebrand relayed this to Mr Herzog and suggested a further incentive for the Claimant to stay. Mr Herzog was of the view that it would not make sense to offer any additional incentive (p.260).

34. The 1st Respondent did not offer the Claimant the role in Shakopee as the Claimant had made it clear that he would not relocate. Further, the US immigration laws would only allow the Claimant to permanently relocate in the absence of available skills in the US and the required skillset was readily available in Minneapolis. The 1st Respondent does not have a specific budget to fund relocations and funding is not made with any regularity by the 1st or 2nd Respondents due to the cost burden and immigration issues. There was no business case to fund relocation for the successful candidate, wherever they were located, in light of the availability of the required skillset in Minnesota. The Claimant did not suggest that he would consider moving to Shakopee to undertake the role in this meeting because he had no intention of relocating.

35. In parallel with the consultation period, the 1st Respondent submitted a job requisition for the Senior Product Manager role in the US and began discussions about communication to the wider team in the event that the Claimant was made redundant (p.262-3). Mr Herzog also prepared a transition plan (p.270). If the Claimant was not made redundant, these processes would have been halted.

36. Mr Hildebrand invited the Claimant to a second consultation meeting on 3 October 2017 (p.273). He confirmed that '*we are very keen to take account of your views and suggestions before reaching any final decisions on redundancy, however if no alternative options are forthcoming before or during this meeting, then the outcome may be that your role is made redundant with immediate effect……..Please be aware that Dan and I are available at any time for discussions during this consultation period'*. The Claimant did not make any contact with Mr Herzog or Mr Hildebrand prior to this meeting to discuss his potential redundancy.

37. At the second meeting, Mr Hildebrand recapped on the Respondent's proposal. The Claimant had prepared a statement and reiterated his belief that he could continue successfully in the role remotely and disagreed with the decision to move it to Shakopee. He did not offer any alternative proposals and Mr Hildebrand confirmed that the Respondents could not think of alternatives either. The Claimant asked if there was any opportunity to move to Shakopee with a relocation package and Mr Herzog confirmed there was not since there were no funds available. In the absence of any alternative proposals or suitable alternative roles, Mr Hildebrand confirmed Mr Herzog's decision that the Claimant was dismissed by reason of redundancy (p.274-275, p.258). The Claimant confirmed that he would be seeking legal advice.

38. At no point during the consultation period did the Claimant provide any feedback or alternative proposals to redundancy, other than to say that he disagreed with the decision.

39. Mr Hildebrand confirmed the Claimant's dismissal in writing and that his effective date of termination would be 24 November 2017. The period between 3 October 2017 and 24 November 2017 would not count as part of his notice period and he would receive twelve weeks' pay in lieu of notice on termination. The letter confirmed the Claimant's

right to appeal and highlighted a job opportunity for him in Reading (p.277-279). The Claimant did not apply for this role.

40. An internal announcement was agreed with the Claimant which was circulated on 5 October 2017 (p.282).

41. The Senior Project Manager role was advertised on 5 October 2017 (p.289A-B). The Claimant did not contact Mr Herzog or Mr Hildebrand to say that he was interested in it.

42. After the close of the Claimant's consultation period, the 1st Respondent had discussions with Mr Andrew DePomolo (a current employee of the 1st Respondent based in Shakopee) about taking up the Senior Project Manager role (p.290). Mr DePomolo contacted the Claimant on 13 October 2017 to tell him that he was taking up the position (p.297), but it was not announced until 27 October 2017 (p.318).

43. It was agreed as part of the transition plan that the Claimant would fly to Shakopee on 13 November 2017 to do a final handover (p.282A).

44. The Claimant appealed the decision to dismiss him in a letter on 11 October 2017 (p.291-292). His grounds of appeal were i) that the consultation was a tick box exercise; ii) that the Respondents did not engage with him during the consultation period; iii) that the Respondents did not reconsider making him redundant 'without hesitation', nor would they consider a relocation package and, therefore, there had never been any intention of retaining him; iv) that he had been discriminated against on the grounds of his non-US nationality and his UK ethnic origins; v) that such discrimination could not be justified; and vi) that his dismissal was unfair because moving his role to the US was an unnecessary infringement of his private and family life in the UK.

45. The appeal was heard by Mr Xavier Coemelck, Regional Vice President for EMEA at the 2nd Respondent and the 4th named Respondent. Mr Coemelck was experienced in handling redundancy situations and was open-minded about the outcome. He contacted HR to confirm that he had true autonomy in his decision and Mr DePomolo's appointment could be revisited if necessary. He was told that it could. The Claimant was invited to attend an appeal hearing on 19 October 2017 (p.298) although this was rescheduled at the Claimant's request for 25 October 2017 (p.302).

46. On 16 October 2017, the Claimant telephoned Nic Shoeten-Sack, Senior HR Business Partner - EMEA, as the colleague who was going to accompany him wanted to ensure that this would not affect him negatively. Ms Shoeten-Sack told the Claimant that the colleague should speak to her for reassurance, but that he should not be concerned. She also explained the appeal process to the Claimant and made a file note of the call (p.301).

47. Prior to the hearing, Mr Coemelck interviewed Mr Hildebrand via conference call to understand his role in the process and his perspective on the consultation process with the Claimant (p.303-306).

48. The Claimant attended the appeal hearing in person on 25 October 2017 (p. 310315). He was unable to find a colleague who was available to accompany him, so attended alone. Mr Coemelck was supported by Ms Shoeten-Sack, and they discussed each element of the Claimant's appeal. In relation to the consultation exercise the Claimant explained that he felt it was a tick box exercise and the Respondents had failed to engage with him. He acknowledged that he had not engaged in the process either, saying "*I would have engaged if love was coming from both sides*". In respect of considering other roles, he said that the 2nd Respondent had "*not made any efforts to find [him] a suitable position. [He] felt that this was a tick box exercise*" and that he was not wanted. His view was "*So why should I make an effort if the Company is not making an effort to keep me in the organisation*." He also believed that the 1st Respondent had already earmarked Mr DePompolo for his role, and that the decision to make him redundant was performance-based rather than a genuine redundancy.

49. When talking about the rationale behind the redundancy, he said that if the 1st Respondent had explained to him that the headcount had reduced from four to two then *'that would have made sense. It would be different now. But that wasn't expressed in the original letter and on the phone."*

50. The Claimant also confirmed that he was willing to relocate to Minneapolis, but only with a relocation package. This was despite saying in his appeal letter "*It would be difficult for me to locate to the US for immigration law reasons*" and "*I have been here since the mid-70s and my life is here."*

51. Mr Coemelck asked the Claimant to explain his allegation of indirect discrimination, but he refused to do so saying "*I have nothing to say. I need to speak to my barrister*".

52. After the appeal hearing, Mr Coemelck interviewed Mr Herzog and Mr Ball, albeit minutes were not taken as he did not have a representative from HR on the calls. Thereafter, Mr Coemelck considered his decision.

53. Mr Coemelck confirmed his outcome in a letter dated 7 November 2017 (p.322-325) and did not uphold the appeal. He was satisfied that there was a genuine case for moving the Claimant's role to Shakopee and it was not related to the Claimant's performance. In terms of relocating to Shakopee, Mr Coemelck confirmed his belief that the Respondent was not "legally, or contractually required to offer [him] a relocation package to the United States as a suitable alternative to avoid [his] redundancy". He alerted the Claimant to another Senior Product Manager role in Shakopee, but confirmed there was no relocation package associated with that role either. The role had been put on hold for him if he wished to apply. The Claimant did not apply because he had no intention of moving to Shakopee, either with or without a relocation package.

54. Mr Coemelck was unable to investigate the Claimant's allegation of indirect race discrimination as the Claimant had failed to provide any explanation for it. In the absence of any explanation, he investigated the grounds of the business rationale to centralise the team in Shakopee and assess if it made sound commercial sense. He concluded that it did.

55. Mr Coemelck confirmed that the Claimant's last working day was 24 November 2017.

56. The Claimant was scheduled to attend the offices in Shakopee for a final handover on 13 November 2017. Closer to the time it was decided that any remaining handover could be done by telephone and the Claimant's visit was cancelled saving the cost of the flight. It was also decided that there was no business need for the Claimant to stay after 16 November 2017, so his termination date was brought forward by six days, for which period he was paid and suffered no financial loss (p.335-342). This was confirmed to the Claimant on 13 November 2017 (p.336) and he did not express any concern. The change in date was for the aforementioned reason and not because the Claimant had raised a complaint of discrimination in his appeal.

The law

Unfair dismissal

57. Section s.98 ("ERA") provides.

"(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 subsection (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 subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(4) Where the employer has fulfilled the requirements of subsection (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."

58. Section 139 ERA provides:

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

(a) the fact that his employer has ceased or intends to cease--

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

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

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish".

59. We have had regard to the following cases:

Xerox Business Services Phillipines Inc Ltd v Zeb [2018] IRLR 495; Moon v Homeworthy Furniture (Northern) Ltd [1976] IRLR 298; James W Cook & Co (Wivenhoe) Ltd v Tipper [1990] IRLR 386; Mugford v Midland Bank plc [1997] IRLR 2018; King v Eaton Ltd [1996] IRLR 199; Polkey v AE Dayton Services Ltd [1987] IRLR 503; Samsung Electronics (UK) Ltd v Monte-D Cruz [2012] (UKEAT/0039/11); Quinton Hazell Ltd v Earl [1976] IRLR 296; Taylor v OCS Group Ltd [2006] IRLR 613; Camelot v Hogg [2011] (UKEATS/0019/10); and Mugford v Midland Bank plc [1997] IRLR 208

Discrimination

Indirect discrimination

60. Section 19(1) EQA provides:

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

Victimisation

61. Section 27 EQA provides:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

62. We have had regard to the following cases:

Homer v Chief Constable of west Yorkshire Police [2012] IRLR 601; Chief Constable of Yorkshire v Homer [2009] IRLR 262; Chief Constable of West Midlands Police v Harrod [2017] IRLR 539; R (Elias) v Secretary of State for Defence [2006] IRLR 934; Seldon v Clarkson, Wright & Jakes [2009] IRLR 262; R (Lumsdon) v Legal Services Board [2016] 1 ALL ER 931; Cadman v Health & Safety Executive [2004] IRLR 971; Hardy & Hansons plc v Lax [2005] IRLR 726; O'Brien v Bolton St Catherine's Academy [2017] IRLR 547; Essop v Home Office; Naeem v Secretary of State for Justice [2017] IRLR 588; Buchanan v Commissioner of Police of the Metropolis [2016] IRLR 918; The City of Oxford Bus Services Ltd v Harvey [2018] (UKEAT/0171/18); and Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285.

TUPE

63. Regulation 3 TUPE provides:

"(1) These Regulations apply to—

(b) a service provision change, that is a situation in which—

(iii) activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf, and in which the conditions set out in paragraph (3) are satisfied.

(2) In this regulation "economic entity" means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

(3) The conditions referred to in paragraph (1)(b) are that—

(a) immediately before the service provision change—

(i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;

(ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and

64. Regulation 7 TUPE provides:

"(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part X of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is—

(a) the transfer itself; or

(b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.

(2) This paragraph applies where the sole or principal reason for the dismissal is a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer.

(3) Where paragraph (2) applies—

(a) paragraph (1) shall not apply;

(b)without prejudice to the application of section 98(4) of the 1996 Act (test of fair dismissal), the dismissal shall, for the purposes of sections 98(1) and 135 of that Act (reason for dismissal), be regarded as having been for redundancy where section 98(2)(c) of that Act applies, or otherwise for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

(4) The provisions of this regulation apply irrespective of whether the employee in question is assigned to the organised grouping of resources or employees that is, or will be, transferred….."

65. Regulation 13 TUPE provides:

"(1) In this regulation and regulations 14 and 15 references to affected employees, in relation to a relevant transfer, are to any employees of the transferor or the transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a relevant transfer) who may be affected by the transfer or may be affected by measures taken in connection with it; and references to the employer shall be construed accordingly.

(2) Long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees, the employer shall inform those representatives of —

(a) the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it;

(b) the legal, economic and social implications of the transfer for any affected employees;

(c) the measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact; and

(d) if the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact.

(5) The information which is to be given to the appropriate representatives shall be given to each of them by being delivered to them, or sent by post to an address notified by them to the employer, or (in the case of representatives of a trade union) sent by post to the trade union at the address of its head or main office.

(6) An employer of an affected employee who envisages that he will take measures in relation to an affected employee, in connection with the relevant transfer, shall consult the appropriate representatives of that employee with a view to seeking their agreement to the intended measures.

(7) In the course of those consultations the employer shall—

(a) consider any representations made by the appropriate representatives; and

(b) reply to those representations and, if he rejects any of those representations, state his reasons.

(8) The employer shall allow the appropriate representatives access to any affected employees and shall afford to those representatives such accommodation and other facilities as may be appropriate.

(9) If in any case there are special circumstances which render it not reasonably practicable for an employer to perform a duty imposed on him by any of paragraphs (2) to (7), he shall take all such steps towards performing that duty as are reasonably practicable in the circumstances."

66. Regulation 15 (12) TUPE provides;

"*An employment tribunal shall not consider a complaint under paragraph (1) or (10) unless it is presented to the tribunal before the end of the period of three months beginning with—*

(a) in respect of a complaint under paragraph (1), the date on which the relevant transfer is completed; or

……

or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period of three months".

67. We have had regard to the following cases:

Rynda (UK) Ltd v Rhijnsburger [2015] IRLR 394; Enterprise Management Services Ltd v Connect-Up Ltd [2012] IRLR 190; Arch Initiatives v Greater Manchester West Mental Health NHS Foundation Trust [2016] IRLR 406; and Seawell Ltd v Ceva Freight (UK) Ltd [2013] IRLR 726.

Submissions

68. The Tribunal had the benefit of written submissions from Mr O'Dair and Mr Braier, together with further oral submissions which were helpful. They are not set out in detail but both parties can be assured that the Tribunal has considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

69. In summary, Mr O'Dair invited us to find that the Claimant's dismissal was unfair. Mr Ball was the real decision-maker, there was no reason why the Clamant could not continue to carry out his role remotely and the real reason for dismissal was capability. Additionally, the Claimant's dismissal was automatically unfair because it was in consequence of a SPC and there was no ETO reason for it. The 1st and 2nd Respondents also failed to inform and consult the Claimant on the transfer. Finally, the Respondents had indirectly discriminated against the Claimant in moving his role to Shakopee and victimised him by bringing forward his effective date of termination.

70. Mr Braier for the Respondents submitted that we had no jurisdiction to hear the TUPE claims (which were denied in any event), that the Claimant's dismissal was procedurally and substantively fair and that the Respondents had not victimised him. In relation to indirect discrimination, the first PCP was accepted but objectively justified. The second PCP was not applied to the Claimant so should be disregarded.

Conclusions

TUPE

71. The Claimant claims that there was a service provision change ("SPC") in accordance with Regulation 3(1)(b) TUPE, the 1st and 2nd Respondents failed to inform and consult him, and his dismissal was automatically unfair because the transfer was the sole or principle reason for it. The Respondent submits that the Claimant's claim in relation to a failure to inform and consult under Regulation 13 TUPE ("the Regulation 13 claim") is out of time.

72. If there was a SPC, it could only have occurred on one of the following events:

- The Claimant being given notice of redundancy on 3 October 2017;
- The Claimant's role being advertised on 5 October 2017;
- Mr DePomolo being announced as appointed to the role on 27 October 2017; or
- Mr DePomolo starting in the role from week commencing 06.11.17

73. On any of the above dates, the Regulation 13 claim is seemingly out of time, but it is necessary for us to consider firstly whether a SPC occurred, before we can establish the date on which it occurred and, thereafter, if we have jurisdiction to hear that part of the claim.

74. The Claimant's case is that the 2nd Respondent terminated his contract of employment and appointed Mr DePomolo to fundamentally the same role and that this was 'analogous' to the typical SPC within Regulation 3(1)(b)(iii) TUPE where services have previously been outsourced but are then taken back in house. He provided no further substance in addition to that.

75. In determining whether there was a SPC, we considered whether there was an organised grouping of employees situated in Great Britain which had as its principle purpose the carrying out of the activities concerned on behalf of the client, in this case the 1st Respondent. The Respondents accept that the Claimant provided services to the 1st Respondent, but he was clearly an integrated member of the Hardware Product Management team predominantly based in Shakopee (p.249). The Claimant has not advanced any evidence that he alone formed an organised grouping carrying out activities on behalf of the 1st Respondent, and the evidence only points to the contrary. The whole purpose of relocating his role to Shakopee was for the *team* to be based in the same place to improve collaboration.

76. We are satisfied that the Claimant alone was not an organised grouping of employees carrying out activities on behalf of the 2nd Respondent and it follows, therefore, that there was not a SPC. It of course follows that if there was no SPC, the Claimant's claims that the 1st and 2nd Respondents failed to inform and consult, and that his dismissal was automatically unfair, must also fail.

77. Consequent of this finding, jurisdiction on the Regulation 13 claim becomes somewhat academic. However, we are satisfied that on any of the possible dates listed above, the claim is out of time and we do not have jurisdiction to hear it. The latest possible date for the SPC to have occurred was 6 November 2017. The Claimant notified ACAS of his potential claim on 15 December 2017 and the certificate was issued on 29 January 2018, extending the deadline to present the claim to 29 February 2018. The ET1 was not presented until 26 March 2018 rendering the claim out of time. The Claimant failed to advance any argument that it was not reasonably practicable to present the claim in time.

78. For these reasons, the Tribunal does not have jurisdiction to hear the claim.

Unfair dismissal

79. It is not disputed by the Claimant that the 2016/17 revenue and profit targets were not met. Mr Ball was appointed with a remit to regenerate the Secure Access business, which included the Hardware element of it. Mr Ball agreed with Mr Smith that the role was no longer right for him and, instead of replacing him immediately, Mr Ball undertook some of his duties whilst completing his assessment of the business. He concluded that the Marketing and Engineering teams should be colocated, and his direct reports should be based in Shakopee. When Mr Herzog was appointed, Mr Ball gave him free reign to organise his team how he best saw fit with a view to turning it around for future growth.

80. We are satisfied that Mr Herzog independently took that view that the Claimant's role ought to be relocated to Shakopee. Mr Herzog had identified that collaboration could only be optimal if the team was in the same place – the Claimant being in a different country and time zone was a barrier to that effective collaboration. We are mindful that it is not our role to go behind his business decision, but we are satisfied that this was a genuine redundancy and not a sham as the Claimant alleges, nor was it an elaborate ruse to dismiss him because of performance. We are satisfied that the definition of redundancy in s.139(1)(b) ERA is met in that there was no longer a requirement for the Claimant to carry out his work in the UK.

81. In deliberating the substantive fairness, we also considered if the 1st and 2nd Respondents acted reasonably in not expressly offering the Claimant the opportunity to move with the job to Shakopee initially, or during the consultation process. However, we are satisfied that for several reasons, it would have been academic in any event. Firstly, the Claimant would not relocate. Secondly, US immigration laws meant it highly unlikely that a visa for permanent residence would be granted when the skillset for the role was readily available in Minnesota, never mind the wider US. Thirdly, the 1st and 2nd Respondents did not routinely offer relocation packages, nor are they obliged to.

82. In an ideal world, the 2nd Respondent would have expressly talked to the Claimant about this at the outset, but the Claimant himself did not challenge the fact that he was not offered the role, confirming that it was not in his mind to relocate. He only raised the possibility of moving to Shakopee at the second consultation meeting, but his question was targeted at whether a relocation package would have been available. We are satisfied that the 1st and/or 2nd Respondents are not obliged to offer the Claimant a relocation package as a means to avoid redundancy, but in any event, we are not persuaded that the Claimant would have relocated even if a financial package was available (and, of course, that he secured a visa) because of his commitments in the East Midlands.

83. Turing to the procedure adopted by the 2nd Respondent, we are satisfied that overall, the Claimant's dismissal was procedurally fair. Mr Hildebrand gave him advance

notice of the potential redundancy by phone so the letter did not land cold. The Claimant was invited to two consultation meetings at which he had the opportunity to engage with Mr Herzog and Mr Hildebrand about the proposal and ways to avoid it – Mr Hildebrand actively encouraged the Claimant to do this. However, he did not engage with the process, nor did he actively seek alternative employment. Mr Hildebrand advised the Claimant to look on the company intranet at the available vacancies and also alerted the Claimant to the vacancy in Reading in the dismissal letter, so we were satisfied that the 2nd Respondent had also undertaken a search for alternative employment. We are also satisfied that it was Mr Herzog who took the decision to dismiss the Claimant and that Mr Hildebrand was supporting the process in his capacity of HR Director.

84. Mr Coemelck carried out a thorough appeal and we are satisfied that his approach to it was openminded and genuine. We accept his evidence that he had the freedom to deliver the outcome he felt was right and fair, and was not constrained by the appointment of Mr DePomolo to the Senior Product Manager role in Shakopee.

85. The Claimant was warned and consulted about the proposed redundancy, he was clearly in a pool of one, and the 2nd Respondent considered whether any suitable alternative employment was available for him. As such, we are satisfied that the 2nd Respondent's decision to dismiss the Claimant was within the range of reasonable responses that an employer could have adopted having regard to the 2nd Respondent's size and administrative resources.

86. The Claimant asserted in the appeal hearing and his ET1 that the "the decision to relocate as a disproportionate interference with his family (sic) contrary to Article 8 [Human Rights Act 1998]". No positive argument on this point was advanced in the Claimant's witness statement, during the hearing or in submissions so we conclude that the Claimant has abandoned this element of his claim. If he has not, for the avoidance of doubt, we agree with Mr Braier's submission that it should be dismissed as a hopeless argument. He was not required to leave his family or private life so there was no conceivable breach of his rights under Article 8.

87. For these reasons, we find that the decision to dismiss the Claimant was within the range of reasonable responses that a reasonable employer could have adopted, and his claim of unfair dismissal fails.

Indirect discrimination

88. The Claimant asserts that the Respondents applied the following PCPs: i) that a person providing the services provided by the Claimant should work in and reside in Shakopee, Minnesota; or ii) that such a person should already be living and working in Shakopee.

89. The Respondents assert that the first PCP should be more accurately framed as a PCP that the Hardware Product management team should be co-located for work in

Shakopee, since there was no requirement for employees to live in Shakopee or preventing an employee from commuting from elsewhere. We agree with this proposition. The Respondents do not dispute that such a PCP was applied, and that it led to the Claimant's redundancy. In respect of the second PCP, the Respondents submit that it was not applied because the role was advertised internally across Entrust Datacard, and was not limited to those already living or working in Shakopee. We agree with this submission and are satisfied that the Respondents did not apply it.

90. Turning back to the first PCP, the Respondents accept that it places non-US nationals at a particular disadvantage given that:

- US citizens are not required to obtain a visa to work in the United States, whereas a non-US national may do;
- Immigration law is such that non-US nationals must meet certain criteria in order to gain such a visa; and
- There is, therefore, a greater chance of a non-US national not having or obtaining legal authority to work in the United States than a US national.

91. The second disadvantage pleaded by the Claimant is that non-US nationals were likely to be more expensive to employ than US nationals by reason of relocation costs. In many respects, this is jumping the gun and could not come into play until such time that firstly, the Claimant affirmed that he wanted to be considered for the role and secondly, a visa was granted. Further, there was no contractual entitlement to relocation costs and the Respondents did not consider there to be any business case for funding relocation. Consequently, we are satisfied that this disadvantage does not apply in this case.

92. The third disadvantage pleaded by the Claimant is that 'Non-US nationals were less likely to be living in Shakopee'. We agree with Mr Braier's submission that this disadvantage is linked to the second PCP, which we have already found was not applied, so the Claimant could not have been put to it.

93. Therefore, the only disadvantage that remains relevant is that non-US nationals faced immigration hurdles not faced by US nationals. The joint list of issues confirmed that if the Claimant was put to that disadvantage, and we find that he was, then 'it is agreed that the Respondents establish a legitimate aim, namely the business need of centralising the product management team in Shakopee for reasons of efficiency and productivity. Mr O'Dair subsequently reneged from this on the basis that 'it is not admitted that the Respondent actually had such an aim' but he is bound by it – Sicluna v Zippy Stich Ltd [2018] EWCA Civ 1320. There are no exceptional circumstances in this case that would persuade us that he could depart from it, and none were advanced by him at the hearing.

94. In any event, and for completeness, we are satisfied that the Respondents had a legitimate aim in moving the Claimant's role to Shakopee and centralising the team for reasons of efficiency and productivity. In the context of falling revenue and profit, Mr Herzog identified problems with the Claimant's geography and the impact of that on

team and cross-collaboration. The Claimant was only team member based outside Shakopee and the time difference and lack of presence was presenting difficulties. The difference in time zone meant that he was not present to make critical decisions, co-ordinate discussions with other team members in a timely fashion, resolve unforeseen and unexpected challenges and setbacks in real time, and generally manage the completion of projects to the schedule and expectations required to ensure future growth. We are satisfied that Mr Herzog considered alternatives to moving the role but there was no other solution. Accordingly, we are satisfied that the decision to relocate the role was appropriate and proportionate.

95. For these reasons, the Claimant's claim of indirect discrimination fails.

Victimisation

96. It is accepted by the Respondents that the Claimant made an allegation of discrimination in his appeal letter dated 11 October 2017, and that this was a protected act for the purposes of s.27 EQA. The Claimant alleges in his ET1 that the detriment he suffered was his effective date of termination being changed to an earlier date.

97. The Claimant's evidence in his witness statement and under cross-examination was that he was fearful of elaborating on his discrimination complaint in the appeal in case the Respondents revoked his ex gratia payment – not that his raising of the complaint was the cause of the change in termination date. His evidence does not support the pleaded detriment. The Claimant did not demonstrate any causative link between his protected act and the change to his termination date, and we are satisfied that the real reason for the change in date was because there was simply no business need for the Claimant to stay after 16 November 2017.

98. In any event, the Claimant could not be said to have suffered a detriment. The Claimant's termination date was brought forward by six days and he was paid in lieu for that period and suffered no financial loss. We are satisfied that a reasonable worker would not consider this to his detriment.

99. For these reasons, the Claimant's claim of victimisation fails.

General

100. For the above reasons, the Claimant's claims fail.

Employment Judge **Victoria Butler**

Date 22 January 2020

JUDGMENT SENT TO THE PARTIES
FOR THE TRIBUNAL OFFICE

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