EMPLOYMENT TRIBUNALS

Claimant: Janice Barlow

Respondent: Horwich Farrelly Solicitors

HELD AT: Manchester **ON:** 1 and 2 October 2020

BEFORE: Employment Judge Holmes

REPRESENTATION:

Claimant: Ms L Carr, Solicitor
Respondent: Ms R Eeley, Counsel

RESERVED JUDGMENT

It is the judgment of the Tribunal that the claimant was not unfairly dismissed.

REASONS

1. By a claim form presented to the Tribunal on 29 November 2019, the claimant brought a claim of unfair dismissal arising out of her dismissal for redundancy on 6 September 2019. The respondent admitted dismissal, but contended that the dismissal was fair. The "Code "V" in the heading indicates that this was a remote hearing by CVP**,** to which the parties have consented. A face to face hearing was not held because both parties were able to deal with the hearing remotely. The respondent provided the Tribunal, and all other parties with a copy of the bundle, which was in hard copy format before the Tribunal.

2. A preliminary hearing was held on 14 April 2020, at which the claims were identified, and further particularised. Case management orders were made, and this hearing was listed. Although a List of Issues was annexed to the Case Summary, the issues in fact were narrower than the rather wider ones identified in that document. The claimant accepted that there was a redundancy situation, and that the reason for her dismissal was redundancy. The issue, therefore, was the fairness of that dismissal, substantively and procedurally. In relation to the former, the issue was whether, in placing the claimant in a pool of one, and not extending that pool to include other PAs employed by the respondent, and thereby potentially dismissing another member of that pool, in effect bumping them out of employment, the respondent acted unreasonably.

3. Whilst the hearing was listed for the determination of liability and remedy, the Employment Judge raised with the parties' representatives at the outset of the hearing whether, if the claimant did succeed in her argument relating to pool, the parties and the Tribunal would be in a position to determine remedy. The respondent had pleaded ***Polkey*** and, unless the respondent were to concede that the claimant would have had a 100% chance of being retained if a wider pool for selection had been adopted, and a selection exercise then undertaken, the Tribunal would then need to assess, for the purposes of remedy, what chance the claimant would have had of retaining employment, and upon what terms. The respondent's evidence had not been prepared on that basis, and effectively was confined to liability only. The claimant, whilst she had set out her post termination position, had equally not addressed these issues. It therefore seemed to the Employment Judge that the Tribunal could only at this stage determine liability, and, if the claimant succeeded in her claims on the basis of the pool argument, the parties would have to consider a further hearing on remedy. The parties' legal representatives agreed, and the hearing therefore proceeded solely to determine liability.

4. The respondent called Michael Rimmer, the Legal Operations Director, and Oliver Bate, the People Director. The claimant gave evidence, but called no witnesses. There was an agreed bundle. The hearing of the evidence was concluded on 1 October 2020, and the parties made oral submissions on 2 October 2020. Judgment was reserved. The Tribunal apologises for the delay in promulgation of this judgment, occasioned by the restrictions arising from the COVID–19 pandemic, and other disruptions to the Tribunal's occupation of Alexandra House. Having heard the evidence, read the documents referred to in the bundle, and considered the submissions of both parties, the Tribunal finds the following relevant facts:

4.1 The respondent is a firm of solicitors. On 6 April 1987 the claimant commenced employment with the respondent as a Secretary in its Claimant Department. She worked for Philip O'Hagan, who was the Head of that Department. She continued to work for him when he became an Equity Partner in 1989. She then became a Litigation Executive from 20 May 1999.

4.2 On 1 June 2011 the claimant's job changed to Client Relationships and Development Co-ordinator. The respondent issued her with new Terms and Conditions, and a new job description, pages 50 to 52 of the bundle. She was still responsible to Philip O'Hagan, and also to Helen Devoy, the Department Manager. At the time of her dismissal the claimant's salary was £35,350 per annum.

4.3 In 2012 the Claimant Department was re-branded as Zest Legal. This was a marketing and commercial decision, it did not affect the constitution of the respondent, and the claimant remained employed by it as a legal entity. The claimant continued to work for Philip O'Hagan during this period, as his PA.

4.4 In May 2017 the respondent announced that its Claimant Department would no longer accept new instructions and would enter a period of run-off. At this time Rob Barrett was the Managing Partner, and Tom Reynard was the Chief Operations Officer.

4.5 No timescale was specified for the wind down of Zest Legal. In terms of other staff employed within Zest Legal, 12 were redeployed into other departments, and 14 left by reason of redundancy. Those who were redeployed were redeployed into existing vacancies, and no existing employees were "bumped" so as to retain them.

4.6 The claimant was off work following an injury between August and December 2017. During her absence Philip O'Hagan also was taken ill, and was off work from September 2017, in fact, never subsequently returning.

4.7 Michael Rimmer, became Legal Operations Director in May 2019. He was Head of the Fraud Department until then, and had been overseeing Zest Legal in Philip O'Hagan's absence. The claimant's experience and knowledge of the Zest Legal operation was very helpful to Michael Rimmer, and he relied upon her considerably in this period.

4.8 By May 2019 it was clear that Zest Legal's work was coming to an end. On 2 August 2019 Michael Rimmer met informally with the claimant, to tell her that a period of consultation would be starting, and announced the potential redundancy situation. No other employees were met with , or informed of any potential redundancy situation.

4.9 On 5 August 2019 Natalie Arajs, HR Business Partner, wrote to the claimant (pages 53 to 56 of the bundle), inviting her to a first consultation meeting. The letter advised the claimant of her right to be accompanied, what the consultation process would entail, and enclosed a calculation of the claimant's entitlements on redundancy.

4.10 On 15 August 2019 the claimant attended her first consultation meeting, accompanied by Sadie Broxton. Michael Rimmer took the meeting, supported by Natalie Arjas, and a notetaker. The notes are at pages 58 to 59 of the bundle. During the meeting it was explained that the claimant was in a stand alone role, and there was no need for pool selection. She was advised that there were no alternative roles for her as a PA, with her skillset, other than admin. roles on a lower level and a lower salary. She was asked if she had any questions, but did not have any. There was discussion about the date of the next meeting, and a date that had been used in the redundancy calculations, but that, she was informed, could be pushed back.

4.11 On 16 August 2019 the respondent invited the claimant to the second consultation meeting, on 22 August 2019. In the meantime, by email of 20 August 2019, the claimant said this to her employer:

"During my first meeting with Mike he felt, in his view, that my role will not exist beyond 31 August because Zest Legal will also not exist. However, as you are aware, I always have been and remain an employee of HF. I am not in a unique position and there are a number of other PAs in the firm. All of our skills are transferable.

I believe I have the same skill set as other PA's within HF. As a result I believe the process currently being undertaken is flawed as the pool for selection is incorrect. I appear to have been singled out however a fair process would involve all PA's within HF who should be objectively scored against each other, with the lowest score proceeding to a consultation process."

She went on to say that any failure to do this made the process unfair and unreasonable, and suggested that the decision to terminate her employment had been taken before the process was conducted.

4.12 The next consultation meeting was duly held on 22 August 2019, with the same personnel in attendance, save for a different notetaker. The respondent's notes of the meeting are at pages 66 to 67 of the bundle, and the claimant's at pages 68 to 69. There was discussion about the claimant's email, and her contention that she should be in a pool of one, and that the respondent should consider "bumping" another PA from a pool of all the PAs whose skillsets the claimant considered were interchangeable. Michael Rimmer explained how he had considered this but did not believe it was appropriate.

4.13 The respondent sent the claimant a letter, that day, summarising the meeting, and recording the discussion about pooling (pages 64 and 65 of the bundle, but also a further version dated 23 August 2019 at page 71 of the bundle). The claimant was advised how the respondent had given this suggestion serious consideration, but did not consider that it would be reasonable to put in place a process that might displace another PA in another department potentially to replace them with someone who had a similar skill set, but who had worked in a different department. The letter went on to invite the claimant to a further consultation meeting on 4 September 2019.

4.14 By email of 23 August 2019 the respondent also provided claimant with a list of alternative roles (page 70 of the bundle). The claimant was not interested in any of these roles, and did not apply for any of them. Before meeting again with the claimant Michael Rimmer had consulted with HR and sought legal advice upon the bumping issue. He remained of the view that it was not appropriate.

4.15 On 4 September 2019 the claimant attended her third consultation meeting. The claimant was not accompanied in this meeting. Michael Rimmer, supported by Natalie Arajs, and a notetaker, took the meeting. There was very little further discussion in this meeting, which lasted 10 minutes. It was confirmed that the claimant's role was redundant, and

she did want to apply for any other roles. The details of her leave date and final payments were discussed, and she was advised of her right of appeal. The respondent's notes of this meeting are at page 92 of the bundle, and the claimant's at pages 95 and 96.

4.16 An outcome letter sent to the claimant, dated 4 September 2019 (pages 93 and 94 of the bundle), ending her employment on 6 September 2019, with a payment of three months' pay in lieu of notice, a redundancy payment, and pay in lieu of untaken holiday. The claimant was provided with details of how to appeal to Thomas Reynard, the Chief Operating Officer, within 7 days. The claimant was advised to give the full reasons as to why she was dissatisfied with the outcome.

4.17 On 9 September 2019 the claimant did appeal the redundancy outcome. Her appeal letter is at page 99 of the bundle. In it she says:

"I feel the process undertaken by both Natalie Arajs and Michael Rimmer has been unfair and pre-determined and I hereby wish you to accept this letter as my notice of appeal.

I look forward to hearing from you within the next 7 days with your appeal decision and thank you for your time in this matter."

4.18 On 19 September 2019 Adam McCarthy, HR Business Partner of the respondent acknowledged receipt of the appeal (page 100 of the bundle).

4.19 There then ensued some delay whilst the respondent decided who would deal with the appeal. The claimant did not chase up the issue, and did not seek a hearing.

4.20 In due course the appeal was considered without a hearing by Oliver Bate, the People Director. On 16 October 2019 he wrote to the claimant, confirming that he was upholding the decision to terminate the claimant's employment on the grounds of redundancy (page104 of the bundle). In determining the appeal, he had consulted with Michael Rimmer, and had agreed with his approach.

4.21 The other PAs who could have been included in a pool for selection for redundancy were:

Patsy Hoey – she was the PA to the Managing Partner, and had been for about 38 years.

Sarah Metcalfe – she was PA to the Costs Partners, and had been at the firm for less than 10 years.

Caryl McCulloch – she was PA to the IT Director, and had been for at least 4 years, maybe longer.

Karen Duke – she was PA to the Costs Partner , and had been since July 2016. She had been with the firm for over 12 years.

Kirsty Howard – she was a PA to a Costs Partner, but not the Costs Partner in charge of the department. She had been with the firm for at least 10 years.

The salary range of these PAs went from £26,000 per annum to £38,000 per annum. Patsy Hoey was the most senior.

4.22 The job descriptions of these employees are at pages 104a to 104j of the bundle. Michael Rimmer was taken through these job descriptions, and the claimant's, and agreed, particularly by reference to Karen Duke's, that there were many elements which were common to the claimant's job description. He agreed that the skillset for PAs was broadly similar in each role, but they would be working in different departments and would not have the same level of knowledge of the working of the department. He agreed that the claimant could probably have acquired the requisite knowledge if she was retained in another department, but this would involve some training, and time.

4.23 Mr Rimmer agreed that from time to time PAs did cover for each other during holiday or other absences.

5. Those, then are the relevant facts found by the Tribunal. There has not been any real dispute as to the facts, and the Tribunal does not consider for one moment that any witness has not told the truth as they saw it.

The Submissions

6. Ms Carr, for the claimant, made oral submissions. She invited the Tribunal to focus upon the issue of selection, and not to look solely at the nature of the work which was diminishing or ceasing, but to look at the extent to which other employees were doing similar, a word she stressed, work to that of the claimant, and the extent to which the PA jobs were interchangeable. The claimant was a very experienced PA, with good client relationships. She referred to paragraph 24 of Mr Rimmer's statement, and what he set out therein in relation to the work of PAs, and their knowledge in terms of clients, and other aspects of the business.

7. In relation to the case management system there was only one system, but the manner in which it was used would vary from department to department. The focus had been upon relationships. Mr Rimmer's letter at page 71 of the bundle did not focus upon those issues he spoke of at length in his evidence the day before, in which he emphasised the need for training and how it would be difficult to make changes to the work of the various PAs in question. He did not focus upon these issues at the time of the dismissal. Ms Carr picked up on the use of the word "significant in paragraph 10 (b) of Ms Eeley's skeleton. Mr Rimmer focused upon SLAs, and relationships.

8. Ms Carr referred to the example of Patsy Hoey, who had worked for Rob Barrett in the defendant department, but then worked for Rohan McCann when he became managing partner. He specialised in fraud. Mr Rimmer's evidence was that bumping as suggested by the claimant would create commercial difficulties. Such a move was perfectly feasible.

9. It was the similarity of the work of the claimant with the other PAs that was in issue. She referred to the comparison that had been made in evidence between the claimant's job description at page 51 of the bundle and that of Karen Duke. There was considerable overlap, but equally there were things on the claimant's job description which were not on Karen Duke's and vice versa. Mr Rimmer confirmed that the claimant had undertaken most of these tasks in the roles that she had held. Mr Rimmer had conceded that the claimant could do other roles but had relied upon the issue of training. The claimant would not have required significant training, the PA roles were similar, as the case of Patsy Hoey had demonstrated. The claimant was used to working across the whole of the wider business. The claimant had said that she could do the work of another PA without significant training.

10. Whilst Mr Rimmer had claimed that he has applied his mind to the pooling issue, he had done so in a cursory manner. Whilst he had consulted HR and sought advice, he had made his mind up at an early stage and anything the claimant said the futile.

11. The appeal was flawed. Mr Bate was new to the business, he had no knowledge of work that the claimant did, and was not in a position to credibly consider any other possibilities. He decided the appeal upon Mr Rimmer's view and position he had already made, and that simply endorsed his view that because the work at Zest was disappearing, the claimant alone should be at risk of redundancy.

12. For the respondent, Ms Eeley relied upon her skeleton argument, and her oral submissions were largely responsive to Ms Carr's for the claimant. She opened by making it clear that there was no criticism of the claimant's performance or abilities, a business decision had to be taken which had to be considered objectively. She appreciated on behalf the respondent what had been said about the similarity and interchangeability of the PA roles, but the test was not whether the claimant's proposed approach was fair, but , rather , whether the approach that the respondents took fell outside the range of reasonable responses open to them.

13. It was easy to pick on parts of Mr Rimmer statement, but that was only a summary upon which he had elaborated in cross examination. She invited the Tribunal to assess his evidence in totality. He had a good grasp of business and the skills that were used in it by the claimant and the other PAs, having been in the business for a long time. He had been tested in cross examination had given specifics in support of his conclusions. The Tribunal would have to be satisfied that he was in fact not being truthful if it were to reject his evidence.

14. There had been a focus on relationships, but that was a shorthand for the knowledge experience and expertise of the claimant and her colleagues working in this particular workplace. This was not a case where the respondent did not like the claimant, and preferred on that basis to retain all of her colleagues. The focus on

relationships was a shorthand for all the other aspects of the job and knowing the relevant systems.

15. She appreciated why there been a focus upon the transferable skills of the claimant and colleagues, and accepted that PAs had developed from basic secretarial skillsets, but it was an oversimplification to say that they could all do each others' jobs. If there were to be pooling, be would be disruption and a cost the business.

16. She noted the position in relation to Patsy Hoey, who had been secretary to the managing partner. The claimant had moved with the person, Paul O'Hagan, when he had become managing partner, but, the other way round, Patsy Hoey had stayed with the position of managing partner despite the change in the partner holding that position.

17. Patsy Hoey's job description in the bundle was far more up-to-date and reflected her position more accurately than the claimant's job description at page 51 of the bundle had done. Different departments had been involved, in that Patsy Hoey had worked with managing partner who had come from the defendant department, and then for one who had come from the fraud department, both of which are on the defendant side of the business. The claimant however had come from the claimant department, and the other department, costs, was again different.

18. In relation to Karen Duke, there was some overlap particularly in relation to secretarial duties. Equally there were things did not appear on each other's job descriptions.

19. The availability of a secretarial pool had only emerged in evidence the previous day, this was no different from any of the PAs covering the absence, or for similar reasons. This was not to be equated with a pooling situation, and this was evidence which really fell away from the relevant considerations.

20. She disputed that Mr Rimmer had only given the issue of pulling cursory consideration he had considered it with HR and had sought legal advice. The claimant had raised it in her email, Mr Rimmer had considered the issue anyway previously. The absence of any paper trail in relation to this issue was not surprising. External advice had been taken, which demonstrates how seriously the issue was taken. Mr Rimmer not simply proceed on the basis that because the Zest business was ceasing, the claimant's employment also had to along with it.

21. There was nothing to say that the claimant's representations would be futile or that Mr Rimmer's mind was made up. Mr Rimmer had a provisional view, which was not the same thing, and would then make a final decision. In the end, however, the claimant could not add much more to the process.

22. In relation to the appeal Ms Eeley appreciated that there had not been any hearing, but did not concede that this took the decision outside the range of reasonable responses, and each case had to be considered on its own facts. The claimant in her dismissal letter had been given the opportunity to appeal , and put in written grounds of appeal, but did not. Her appeal letter requested the decision within

seven days, and that was nothing to suggest that she expected or required any hearing to take place. She did not chase the matter up, or seek to make any further written representations. There was a limit to what the respondent could do in the circumstances

23. In any event, there was nothing the claimant could have added that any appeal hearing which had not already raised and which would have made any difference. The decision to deal with the appeal this way was within the band of reasonable responses.

24. The respondent had redeployed fee earners in the same or similar departments in the past. The 12 employees redeployed were not to be regarded as relevant to any pooling issue in this case. Redeployment may be a different exercise, and the legal tests to be applied are different. This previous redeployment does not have any application to the claimant's case.

The Law

25. In relation to relevant caselaw on redundancy dismissals, the leading cases are set out below in the discussion of the claims and the issues.

Discussion and Findings

26. As observed at the commencement of the hearing, save for the issue of the appeal, substantively this is a one issue case. That issue relates to the fairness or otherwise of the respondent's decision to select the claimant redundancy from a pool of one. Whilst complaint is also made the respondent did not consider making any other employee redundant thereby "bumping" them in order that the claimant may retain her employment, this is but another facet of the same issue. No bumping could occur unless and until the pool for selection redundancy was extended beyond the claimant alone. To paraphrase the Bard, "to bump or not to bump", that was the question.

27. The issue thus is a relatively narrow one, given that the claimant accepted that there was a redundancy situation, and that redundancy was indeed the reason for her dismissal. Whilst parts of her witness statement suggested that she may be challenging one or both of these aspects, in the event she did not do so, and Mr Rimmer was not cross-examined upon the basis of paragraphs 49 to 53, and 64 of the claimant's witness statement.

28. Thus the sole task of the Tribunal has been to decide whether, in not expanding the pool for selection for redundancy to include other PAs, the respondent acted unreasonably, and hence unfairly.

29. It is clear that in assessing the respondent's decisions the Tribunal must apply the same test as it would in any other unfair dismissal claim, namely that it must not substitute its own views, must decide objectively with the decisions taken by the respondent fell within the band of reasonable responses, as it is required to do by the established caselaw such as ***Foley v Post Office*** and ***Midland Bank v Madden [2000] ICR 1283***. That the range of reasonable responses test applies to pool

selection is confirmed in ***Hendy Banks City Print Ltd v Fairbrother UKEAT/0691/04*.**

30. The scope for the chosen employee to assert unfairness because of the pool chosen by the employer from which to select is limited, at least where there is no proof of bad faith. In ***Taymech v Ryan (1994) EAT/663/94*** Mummery J said '… the question of how the pool should be defined is primarily a matter for the employer to determine'. There was some softening of this in ***Capita Hartshead Ltd v Byard [2012] IRLR 814,*** cited by Ms Eeley ,where it was said that that dictum applies where the employer has genuinely applied its mind to the problem; in such a case a challenge will be difficult (but not impossible) and a tribunal does still have a role in considering this genuineness requirement. It was further added that the range of reasonable responses test applies to pool selection (referring to ***Hendy Banks City Print Ltd*** above), and there is no legal requirement that the pool consist only of employees doing similar work (***Taymech*** above). A similar approach, giving considerable latitude to the employer on this point, was seen in ***Halpin v Sandpiper Books Ltd {2012] NLJR 543*** and ***Wrexham Golf Club v Ingham UKEAT/0190/12 ,*** also cited by Ms Eeley. In both of these cases the EAT upheld as fair on the facts a chosen pool of only one, i.e. the claimant, whereas in ***Capita Hartshead*** the use of the single employee pool was unfair.

31. If it is established that there was a redundancy situation, the Tribunal then has to be satisfied that this was indeed the reason for the claimant's dismissal. If so, the next issue, however, upon which the burden is neutral, is whether the decision to dismiss the claimant was fair in all the circumstances. The leading case on the approach to fairness of redundancy dismissals is ***Williams v Compair Maxam Ltd [1982] IRLR 83*,** where the EAT set out the standards which should guide tribunals in determining whether a dismissal for redundancy is fair under s 98(4). Browne-Wilkinson J, giving judgment for the tribunal, expressed the position as follows:

> *"… there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:*
>
> *1 The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.*
>
> *2 The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.*

3 Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

4 The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

5 The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

The lay members stress that not all these factors are present in every case since circumstances may prevent one or more of them being given effect to. But the lay members would expect these principles to be departed from only where some good reason is shown to justify such departure. The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim'.'

32. In relation to warning and consultation , in the House of Lords in ***Polkey v AE Dayton Services Ltd [1987] IRLR 503, [1987] ICR 142***, Lord Bridge said this:

> *"… in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative".*

Consultation and warning are not issues in the fairness of this dismissal, nor is there any suggestion that the respondent did not seek to find alternative roles (without bumping) for the claimant , which may have been suitable for her, but which she declined, as she was entitled to , without risk to her entitlement to a redundancy payment.

The fairness of the dismissal

33. The Tribunal has no hesitation in holding that there was a redundancy situation, which was not challenged. The second issue is: was that the principal reason for dismissal? Whilst there was some suggestion in the claimant's witness statement of some ulterior intent, this was not pursued in cross – examination, and the Tribunal is satisfied that the reason for dismissal was redundancy.

34. The next issue to be addressed therefore is whether the dismissal, though potentially fair, was actually fair in all the circumstances. The caselaw cited above sets out the various factors that need to be considered in assessing fairness. Some can be disposed of at an early stage. In carrying out this exercise, however, the Tribunal reminds itself that it is not standing in the shoes of the employer, and deciding what it would have done in the same circumstances, it is reviewing the

actions and decisions of the respondent to determine whether they fell within the band of reasonable responses open to the employer.

35. The only challenge to the fairness of a redundancy dismissal is to the selection of the pool of potentially redundant employees. The pool of potentially redundant employees, in which the claimant was included was based simply upon the roles that they occupied. The role which the claimant held was being removed, and hence it was her, and only her, who was at risk of redundancy, and included in the pool for selection for redundancy.

36. In terms of the law in relation to bumping, it may be reasonable on the facts to look for possible vacancies where none immediately arise, if necessary by 'bumping' another employee, as was recognised in ***Lionel Leventhal Ltd v North UKEAT/0265/04*** , where Bean J 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'.*

37. However, this remains a matter of fact, not a legal principle, and ultimately there is no compulsion on an employer to consider bumping: ***Stroud RFC v Monkman* UKEAT/0143/13** , in which the above dictum was argued to constitute a duty to consider bumping, but that was disapproved by the EAT who pointed out that Bean J's judgment continues by stressing that it will always be a question of fact, not of legal obligation. This accords with the other authorities on this subject. In ***Byrne v Arwin Meritor LUS (UK) Ltd UKEAT/0239/02*;** Burton J. put it his way:

> *"The obligation on an employer to act reasonably is not one which imposes absolute obligations, and certainly no absolute obligation to "bump", or even consider "bumping". The issue is what a reasonable employer would do in the circumstances, and, in particular, by way of consideration by the Tribunal, whether what the employer did do was within the reasonable band of responses of a reasonable employer?"*

This was echoed in a short comment in an equally short judgment in ***Samuels v University of the Creative Arts* [2012] EWCA Civ 1152** (where bumping was an incidental question) by Arden LJ who said that ' *… the key is that it is not compulsory for an employer to consider whether he should bump an employee…. It is a voluntary procedure.'*

38. Thus, it appears to work primarily only in one direction — if an employer decides on bumping, that will generally be within the range of reasonable responses (in any action by the bumped employee, or as an incidental question in an action by the original employee who refuses it and still challenges the fairness of the procedure). However, if the employer chooses not to use bumping it will be an uphill battle for the employee to show unfairness in that decision, in the absence of further relevant factors (such as an actual proposal having been put forward by the employee in consultation, or the distinct possibility of a job share with a family member as an alternative to compulsory redundancy that occurred in ***Stroud RFC***).

39. Ultimately, Mr Rimmer accepted that the PAs did have similar skillsets, could probably do each other's jobs, did from time to time cover for each other, and with

some training and time to learn the workings of a particular department, the claimant could have been retained in another role, with another one of the PAs then being made redundant by reason of bumping. He considered, however, that this was disruptive, and would unnecessarily put at risk the jobs of other PAs who were well established in their roles, and would require a period of time for the claimant to familiarise herself with whichever department she was then redeployed to. He saw no reason to take this approach.

40. Ms Carr, in her closing submissions contended that it was "perfectly feasible" for the respondent to have considered widening the pool and considering bumping. That to do something was perfectly feasible does not mean that not to do it was unreasonable. The phrase itself betrays how the decision made fell classically within the range of reasonable responses open to the employer. It could have widened the pool, and thereby put at risk the jobs of five other employees whose roles were not otherwise at risk, itself always disruptive and unsettling in any organisation, but it chose not to. Other than to achieve the potential benefit for the claimant of her potentially retaining some employment, no other reason was advanced as to why the respondent should have done this. The employer had clearly addressed its mind to the possibility of bumping, because the claimant had actually raised it. In fact it had probably been considered at an earlier stage, but that does not greatly matter. If the employer has, as the Tribunal finds it did, genuinely addressed the issue before proceeding to dismiss, and rejected bumping for genuine and sound reasons, that is sufficient.

41. That means the decision to dismiss was within the range of reasonable responses, and was fair. That is perhaps fortunate for the respondent as the subsequent appeal, which was dealt with without a hearing, and was not a re-consideration *de novo*, would probably not have remedied any prior unfairness. There was no hearing, but equally, the claimant had not requested one, nor was there any applicable procedure whereby an appeal hearing should have been held. There is no ACAS code applicable which relates redundancy dismissals. It is notable that Oliver Bate's appeal outcome letter does not specifically address the issue of pool/bumping, but, to be fair, the claimant's appeal letter similarly fails to identify that issue as one of her grounds of appeal. All that does not, however, turn what was originally a fair dismissal into an unfair one, and the dismissal was fair. The claimant's claim accordingly fails, and is dismissed.

Employment Judge Holmes
Dated: 10 November 2020

RESERVED JUDGMENT SENT
TO THE PARTIES ON
19 November 2020

FOR THE TRIBUNAL OFFICE