Case No: 2501608/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr G Lovell

Respondent: Peratech Holdco Limited

Heard at: Newcastle (remotely via CVP) **On: 14 January 2021**

Before: Employment Judge A.M.S. Green

Representation

Claimant: In person
Respondent: Ms L Gould - Counsel

RESERVED JUDGMENT

The claimant's claim for ordinary unfair dismissal is dismissed.

REASONS

Introduction

1. For ease of reading, I have referred to the claimant as "Mr Lovell" and the respondent as "Peratech".

2. I conducted a final hearing on liability and remedy. We worked from a digital hearing bundle. The following people adopted their witness statements and gave oral evidence:

    a. Mr Jon Stark - Peratech's Chief Executive Officer and the dismissing officer.

    b. Ms Kelly Harle-Peratech's Global Head of Talent

    c. Mr Tolis Voutsas - Peratech's Chief Technical Officer and the appeal officer.

    d. Mr Lovell.

By way of general observation, all of the witnesses answered the questions that they were asked. They were neither evasive nor vague and I found them reliable. Mr Lovell elected not to cross-examine Ms Harle or Mr Voutsas.

3. As Mr Lovell was not represented, I carefully explained the procedure to be followed at the hearing and gave him extra time to prepare his closing submissions. To enable him to prepare his submissions, I also gave him permission to take a screenshot of the list of issues relevant to his claim. Ms Gould tendered her skeleton argument at the hearing which was accepted for consideration. Both she and Mr Lovell made closing oral submissions.

4. Mr Lovell must prove his claim on a balance of probabilities.

5. In reaching my decision, I have carefully considered the oral and documentary evidence and the submissions. The fact that I have not referred to every document produced in the hearing bundle should not be taken to mean that I have not considered it.

The claim

6. Mr Lovell has claimed ordinary unfair dismissal. He presented his claim to the Tribunal on 27 August 2020. This followed a period of Early Conciliation via ACAS which started and ended on the 27 August 2020. The effective date of termination of his employment was 31 July 2020. Consequently, he presented his claim to the Tribunal in time.

7. At the beginning of the hearing, I wanted to clarify with Mr Lovell what it was he was claiming. Essentially, he is claiming that he was unfairly selected for redundancy by Peratech.

The issues

8. At the beginning of the hearing, I agreed a list of issues with the parties which I must determine in reaching my decision. The issues are as follows:

    a. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? Peratech asserts that it was a reason relating to redundancy or some other substantial reason. In this regard was the reason for the dismissal Peratech's ceasing to carry on business or reduction in requirements for employees to carry out work? Mr Lovell says that he was not the only person performing the role that was at risk of redundancy and that he should have been placed in a selection pool with his former colleague, Mr Andrew Purdie. Alternatively, he could have been bumped and appointed to a more junior position.

    b. If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

c. If Mr Lovell was unfairly dismissed and the remedy is compensation, if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that he would still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway? See: **Polkey v AE Dayton Services Ltd [1987] UKHL 8**; paragraph 54 of **Software 2000 Ltd v Andrews [2007] ICR 825**;

Findings of fact

9. Having considered the evidence I make the following findings of fact.

10. Peratech is a Force-Sensing HMI/MMI Solutions Company, and the inventor/developer of proprietary Quantum Tunneling Composites materials that seeks to commercialise and scale its business to its biggest key market, which is primarily China, Korea, and the rest of Asia. Peratech employs approximately 23 of its employees in the United Kingdom and approximately 28 employs in the rest of the world.

11. Peratech employed Mr Lovell from 3 November 2014 until 31 July 2020. There was some disputed evidence about what Mr Lovell's job title and position was at Peratech at the time of his dismissal. Peratech say that he was Senior Prototype Production Technician at their head office in Brompton-on-Swale, North Yorkshire. Mr Lovell says that he started working for Peratech as an Assembly Test Technician as set out in his contract of employment and, whilst he received pay rises, he was never formally promoted. I prefer Peratech's position and find that Mr Lovell was promoted to the position of Senior Prototype Production Technician on this matter for the following reasons:

    a. When he was cross examined, Mr Stark explained that whilst he did not have direct management responsibility for Mr Lovell there had been an "all hands" meeting of all of the staff at the company in one room where he would share details of organisational changes with everyone. At one of these meetings, he shared the fact that Mr Lovell had been promoted to the position of Senior Prototype Production Technician. He also explained that Mr Lovell enjoyed a 10% pay rise because of that. In re-examination Mr Stark was clear that he had told the entire company about the promotion and he had mentioned Mr Lovell on many occasions to give public recognition of his capabilities and building prototypes. The purpose of the organisation chart was to walk through the workforce with the structure of the organisation and people's new roles.

    b. I was referred to a document entitled "TRS Operations" [190 C]. This showed Peratech's organisational structure showing Mr Lovell being identified as "Sr Prototype Technician". Although Mr Stark was unsure about when this organisation chart was prepared, he was certain that it would have been shared with the entire workforce. This was not challenged by Mr Lovell and I also note at the bottom of the document there is a copyright notice showing the date 2018.

    c. When Mr Lovell was cross examined he agreed that he went to meetings when the organisation chart was discussed. There had been

a reorganisation around September 2018 and there had been an all-hands meeting to discuss that.

12. Mr Andrew Purdie was employed as a Prototype Production Technician as evidenced by the organisation chart that I have referred to above. Under cross-examination, Mr Lovell accepted that at no point was Mr Purdie given the title of Senior Prototype Technician.

13. In his witness statement, Mr Stark explains that he led the strategic decision to take actions to increase Peratech's chances of surviving the Covid pandemic. He requested redundancy proposals and he was responsible for the final decision as to whether Mr Lovell would be made redundant. This was not challenged by Mr Lovell in cross examination. I have no reason to doubt the factual accuracy of what Mr Stark has said.

14. Mr Stark goes on to explain in his witness statement that he spoke to Ms Harle and Mr Rob Smith (Labs Operations Manager) several times between 9 July 2020 and 15 July 2020 to discuss Peratech's plans for the future. These discussions arose because of changes required to ensure the continuity of Peratech. The changes were necessary because there had been a significant drop in potential revenue, a fundamental change to how business was being conducted in their biggest markets resulting from Covid and from geopolitical volatility around global trade policies. Peratech and recently lost 80% of its projected annual revenue from two major customers in Korea, and it was necessary to shift the focus to the only market that could help them to recoup the loss of business quickly which was China. Because of that, they learned that to be competitive in the Chinese market, they needed to accelerate the speed and number of customer-prototype iterations. To add to the problem, new regulations regarding air-shipping prototypes or products with batteries in and out of China prohibited Peratech from sending full prototypes directly from the United Kingdom which added as much as 7-10 days just for shipping prototype parts. Their competitors were producing revisions of prototypes in 7-10 days. Peratech could simply not continue in the current structure and remain competitive. The company was at risk of no longer being a going concern and something had to be done. Mr Stark gave the leadership team the remit to create a prototype capability in China while creating as little stress on the company cash levels and employees as possible, knowing that some disruption was unavoidable. Mr Lovell did not challenge this evidence in cross-examination and I have no reason to doubt the factual accuracy of what Mr Stark said.

15. As part of the review, Mr Stark explains in his witness statement that it became clear that the role of the Senior Prototype Technician could be at risk of redundancy because the key duties undertaken in that role were rapidly shifting to China, in closer proximity to their customers. They had seen proof of effectiveness with the China versus UK solution in April and May 2020, and at that point Mr Stark and Mr Smith agreed that they should consider removing this role from the UK structure. Mr Lovell did not challenge this evidence in cross examination and I have no reason to doubt the factual accuracy of what Mr Stark said.

16. As a result of those discussions, Mr Stark says in his witness statement that he instructed Ms Harle to start a redundancy consultation process. Ms Harle would lead the initial stages, Mr Smith and Mr Doug Balderston, the Chief

Financial Officer, and Mr Stark would support her in the process and assist in creating potential alternative employment solutions. Mr Stark had the final decision on the proposed redundancy alternatives. Mr Lovell did not challenge this evidence in cross examination and I have no reason to doubt the factual accuracy of what Mr Stark said.

17. Mr Stark explains in his witness statement that Ms Harle shared the redundancy proposal documentation with him on or around 21 July 2020 and he confirmed that he was happy with the proposal. Mr Lovell did not challenge this evidence in cross-examination and I have no reason to doubt the factual accuracy of what Mr Stark said.

18. In his witness statement, Mr Stark suggests that they included the facts that they have lost more than 80% of the expected business was one of the key rationales for the redundancy situation, and they required a structural change to be competitive. Given that they were a small company and did not have a pool of people in most roles, Ms Harle, Mr Smith and Mr Stark considered whether Mr Lovell should be in a pool of one. The initial discussion regarding pooling took place on 20 July 2020. Given the small size of the company and what Mr Stark regarded as common knowledge that they had many "single-contributor" roles in the company, they agreed that Mr Lovell's position was unique. They discussed and confirmed that whilst there was a junior prototype technician role, the roles were different and distinct from each other because the junior role was limited to mechanical assembly work and generally did not have the breadth or depth of skill to provide full prototype capability to meet basic customer requirements. Mr Lovell did not challenge this evidence in cross-examination of the fact that discussion took place and I have no reason to doubt the factual accuracy Mr Stark has said.

19. On 22 July 2020, Mr Lovell was informed of the proposed organisational restructure and that his role was at risk of redundancy. At the time, Mr Lovell was on furlough and social distancing practices were in place which meant that the meeting had to take place by telephone.

20. Ms Harle wrote to Mr Lovell on 22 July 2020 [79]. She put Mr Lovell on notice that the position of Senior Prototype Technician was no longer required within the organisation because of the loss of 80% of the business from two major customers, customer projects and building of demos will be executed by the Engineering team in China and because of the considerable impact on the business globally as a result of Covid. Consequently, his position was at risk of redundancy. She then went on to say that, as mentioned during the meeting, before any final decision was taken, they intended to consult with Mr Lovell. During the consultation they would like to ensure that he understood their proposals and the commercial reasoning behind the proposed redundancy of his role and give him opportunities to ask any questions he wished to raise and any suggestions that he might have to avoid redundancy. He was invited to a consultation meeting to take place via Microsoft Teams on 27 July 2020.

21. Mr Lovell attended the consultation meeting on 27 July 2020. The meeting was also attended by Mr Balderston, Mr Smith, Ms Harle and Mr Chris Muteham (Director, Solutions Development). A copy of the minutes of that meeting have been produced [101]. During that meeting, the proposals were discussed in more detail as well as considering any alternative suggestions

that Mr Lovell made such as taking a different role as a Test Technician. I note from the minutes of that meeting that Mr Lovell raised the question of bumping under which a more junior member of staff would be let go to retain the skills of senior staff. He suggested that this should apply in his situation in respect of Mr Purdie, where he said that both men had the same job essentially, but he had more skills and experience than Mr Purdie. I note that Ms Harle acknowledged this suggestion and informed Mr Lovell the matter would be taken back to Mr Stark. She is also recorded to have said that no decisions had yet been made and everything would be talked over with Mr Stark. Mr Lovell was also recorded to have said that he would be prepared to consider any roles. Mr Lovell did not challenge the summary of the meeting.

22. After the meeting, Ms Harle emailed Mr Stark and Mr Balderston and copied in Mr Smith to update on the redundancy consultation [105]. She enclosed the notes of the consultation meeting and told them that the Mr Lovell felt that they had not considered the redundancy pool properly and that it should include Mr Purdie because he believed that their roles overlapped. She also referred to the fact that Mr Lovell had mentioned unfair dismissal. This included a link to the Citizens Advice website entitled “Employment tribunals - legal test for unfair dismissal claims-redundancy”. Under cross-examination, Mr Lovell accepted that Peratech were looking into his concerns. He also accepted that Peratech were investigating what it said about the pool and whether their decision to place in a pool of one was right or wrong.

23. On 28 July 2020, Ms Harle wrote to Mr Lovell inviting him to attend a second consultation meeting on 31 July 2020. In her letter, she referred to the first meeting that took place on 27 July 2020. She summarised this as follows. The position that he held remained at risk of redundancy. Peratech was contemplating termination of his employment because of redundancy for the following reasons:

    a. A loss of 80% of the business from two major customers.

    b. Business and market conditions require a change in organisational structure.

    c. Considerable impact on the business globally as a result of Covid.

    d. Peratech had considered things carefully and had reached the view that customer projects and building of demos would be executed by the Engineering team in China.

    e. Peratech was, therefore, proposing to remove the position of Senior Prototype Production Technician.

    f. Following a process of consultation, Peratech has been unable to identify any way in which the redundancy of his position could be avoided.

24. On 28 July 2020, Mr Stark emailed Ms Harle [129]. The title of the email was “GL consultation follow-up”. He stated amongst other things that he wanted her to review his thoughts as to how they could keep Mr Lovell. In summary they were offering him a job where the customers were (i.e. China) as this

was where his job had gone. He goes on to say "it would be one thing to bump people down and have the move, the [sic] they cannot do the job. It is why we gave him the promotion, which, he did accept, and take the additional salary" He also enclosed a link from a firm of solicitors summarising their responsibility to Mr Lovell on the question of bumping. This email illustrates that Peratech were considering the question of bumping that had been raised by Mr Lovell.

25. Mr Stark sent another email to Ms Harle on 28 July 2020 [131] entitled "job role differences" where he said that there were two options: apply for Test Engineer role or move to China. He suggested rearranging the order. He went on to say "he will not get the Test Engineer role. It's very software driven". Ms Harle replied to that email later the same day to inform him that she was putting a list together of the differences between what Mr Lovell and Mr Purdie do. They would then go through it later.

26. On 29 July 2020, Mr Lovell emailed Ms Harle with evidence of technical drawings in support of his claim to have design capability [122]. This was relevant to the question of an alternative role.

27. There was disputed evidence between the parties on the question of the roles performed by Mr Lovell and Mr Purdie. Mr Lovell's position is that both men essentially performed the same duties and should, therefore, have been placed in a pool of two candidates for redundancy. Peratech's position is that the roles performed by both men were sufficiently different to justify placing Mr Lovell in a pool of one person. I prefer Peratech's position for the following reasons. On 30 July 2020, Mr Smith sent an email to Ms Harle [137]. He had reviewed weekly schedules from the point of the Covid lockdown back to the beginning of 2019 to analyse tasks that had been assigned to Mr Lovell and to Mr Purdie. He broke these tasks down into 3 groups: Senior assembly, Demo/Prototype builds and Jig assembly. He set these out in tabular form. For each group of tasks, the cells in the table showed the total number of tasks of each type over the previous 15 months and how many of those were assigned to each person. The figures were set out as a percentage of the whole. If the task was shared, he counted that has one task for each person. He accepted that there may have been swapping of tasks during the week by each person for various reasons, but they were as decided by Mr Smith and Ms Harle. The table is reproduced below:

	Senior assembly	**Demo/proto-build**	**Jig assembly**
Andrew	232/292 79.50%	28/101 27.70%	14/40 35%
Purdie	60/292 /20.50%	73/101 72.30%	26/40 60%

28. Under cross-examination, Mr Lovell accepted that Mr Smith had conducted this analysis and he also accepted that there was no reason for Mr Smith to make up the figures. He also agreed that Peratech thought that there was a difference between his role and Mr Purdie's role. The seniority data Mr Smith provided in the table was for Ms Harle to pass on to Mr Stark which supported what they already thought the differences were between the two roles. He also agreed that the main point of what Peratech was saying was that Mr Purdie was able to build sensors and was needed to work in the United

Kingdom. He also accepted that the data Mr Smith provided supported what differences existed between both men's roles and that Mr Purdie spent most of his time on sensor assembly. In his evidence, Mr Lovell had suggested that nothing should be made of the fact that he had attended a meeting with Mr Stark in London, and he claimed that either he or Mr Purdie could have attended. He used this as justification to support his proposition that both men essentially completed the same tasks and occupied the same role. However, when he was pressed on this under cross-examination, it was put to him that Mr Stark had specifically invited Mr Lovell because of his personal skill set and he was unable to produce any evidence to support his proposition that Mr Purdie would have been invited to that meeting had he not been on holiday.

29. Mr Lovell attended the final consultation meeting on 31 July 2020. Mr Stark, Mr Balderston, Mr Muteham and Mr Smith also attended. During that meeting, Peratech presented Mr Lovell with its findings that it had reached in relation to the various challenges that he had raised about his proposed redundancy. It reviewed and responded to each of Mr Lovell's written objections to the proposals in turn during that meeting. The objections focused on why other employees should be made redundant and not on alternatives to removing his role from the structure. Peratech confirmed that Mr Lovell had been promoted and had been given a pay increase to reflect his skill set. Peratech also confirmed Mr Lovell's role was significantly different from Mr Purdie's and explained that the meetings that Mr Lovell had attended, the scope of work for which he was responsible and the activities he carried out were reflective of his more senior position. Mr Lovell was given an opportunity to make any suggestions for alternatives to redundancy during the meeting. He queried why Peratech continued to engage agency staff and was told of the importance of agency staff and why this did not impact on the fact that his role was redundant. Peratech considered whether or not to bump Mr Lovell into a more junior position but decided that that would not be appropriate because of the differences in skill sets despite the role being more junior. A more junior position would not have been appropriate. In cross-examination, Mr Lovell accepted that his suggestion that he be bumped had been considered by Peratech after he had raised it with them. He also agreed with Ms Gould that they had reached a conclusion on that.

30. On 31 July 2020 Ms Harle wrote to Mr Lovell to confirm that his employment would terminate by virtue of redundancy [157]. Peratech were unable to find an alternative position for him. Mr Lovell would be paid in lieu of five weeks' notice and would also receive payment for 15 days holiday that had accrued. He was notified of his right to appeal.

31. On 6 August 2020, Mr Lovell wrote to Mr Balderston to exercise his right of appeal [170]. His ground of appeal was that Peratech had not carried out a proper selection process by only having a selection pool of one when there was another candidate carrying out the same role as well as not considering other candidates in similar roles in which skills were interchangeable. He believed that he had been unfairly dismissed as a consequence.

32. Mr Balderston replied to Mr Lovell in a letter dated 7 August 2020 [171] inviting him to an appeal hearing to be held via Microsoft Teams on 12 August 2020. He notified Mr Lovell of his right to be accompanied by a trade union representative or a work colleague. He notified Mr Lovell that the appeal would be heard by Mr Voutsas.

33. In his witness statement, Mr Voutsas says that he had no prior involvement with any aspect of the initial redundancy proposal or the resulting consultation process. Whilst he knew that there was a redundancy process taking place, he had not been involved with any of the discussions around who could be at risk, who could be in the pool or any consideration of alternative roles. Mr Voutsas' evidence has not been challenged in cross-examination and I have no reason to doubt what he is saying.

34. Mr Voutsas conducted the appeal hearing on 12 August 2020. Mr Lovell attended as did Mr Muteham. In his witness statement, Mr Voutsas states that at the beginning of the hearing, he reminded Mr Lovell that he was impartial and would listen to him and then provide recommendations to Mr Balderston and Mr Stark. He goes on to say that he was comfortable that he could overturn the decision to dismiss Mr Lovell for redundancy if he felt that was appropriate. Mr Lovell did not challenge this evidence and cross-examination and I have no reason to doubt what he is saying.

35. Mr Voutsas states in his witness statement that he listened to Mr Lovell's representations and after the meeting he considered his views. Ultimately, he decided to dismiss his appeal on the following grounds:

    a. Mr Lovell's role was different to Mr Purdie's in terms of seniority, scope of responsibility and level of responsibility.

    b. The skills and duties that were transferring to China were currently being performed by Mr Lovell and Mr Purdie could not perform those duties. This was because he did not have the required skills. For example, Mr Purdie was clearly deficient in the area of electronics.

    c. Mr Lovell had not been promoted because of seniority in terms of length of service, but because of recognition for skills (compared to the requirements of a junior level technician job). Mr Lovell was recognised as a key team member in his 2019 performance review and it was recognised that he had a great deal of knowledge and experience in the areas of work in which he was involved.

    d. The role in China was not a new one, but a strategic decision made by Peratech to cease the work at the Yorkshire office and increase the work in the Suzhou office.

    e. For the purposes of the UK R & D project, a junior level technician was sufficient. There was a genuine redundancy situation.

    f. Although a detailed analysis and consultation process had been undertaken, it was clear that a final decision had not been taken until Mr Lovell had been given full opportunity to be consulted regarding the proposal and any alternative roles. It was also clear that Peratech it carefully considered and applied its mind to the question of pooling.

36. Mr Lovell did not challenge Mr Voutsas' evidence on any of these findings under cross-examination. I have no reason to doubt the reasons why Mr Voutsas decided to dismiss Mr Lovell's findings.

37. Mr Lovell secured alternative employment after he was dismissed. It is less well remunerated than his job with Peratech. In the early days after leaving Peratech, he looked for alternative higher played employment. However, when he got his job with his new employer, he decided to stick with the role in the hope that once his probationary period was completed, he might enjoy a pay rise.

Applicable law

38. The circumstances under which an employee is dismissed are set out in section 95 of the Employment Rights Act 1996 (the "Act") as follows:

> *"(1) for the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2)…., only if) –*
>
> *(a) the contract under which he is employed is terminated by the employer (whether with or without notice),*
>
> *…*

39. The fairness of a dismissal is set out in section 98 of 1996 Act as follows:

> *"(1) in determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within 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 –*
>
> *…*
>
> *(c) is that the employee was redundant,*
>
> *…*
>
> *(4) Where the employer has fulfilled the requirement 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,*

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

40. Redundancy is defined in section 139 (1) as follows:

> *For the purposes of this Act and employee who is dismissed shall be taken to be dismissed by reasons 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.*

41. In carrying out a redundancy exercise, an employer should begin by identifying the group of employees from which those who are to be made redundant will be drawn. This is the “pool for selection” and it is to these employees that an employer will apply the chosen selection criteria to determine who will be made redundant. In assessing the fairness of the dismissal, the Tribunal will first look at the pool from which the selection was made, since the application of otherwise fair selection criteria to the wrong group of employees is likely to result in an unfair dismissal. Depending on the facts, an employer may have a selection pool of one employee (see below). If an employer simply dismisses an employee without first considering the question of a pool, the dismissal is likely to be unfair.

42. The Tribunal must be satisfied that the employer acted reasonably and, in considering whether this was so, the following factors may be relevant:

    a. Whether other groups of employees are doing similar work to the group from which selections were made.

    b. Whether employees’ jobs are interchangeable.

    c. Whether the employee’s inclusion in the unit was consistent with his or her previous position; and

    d. whether the selection unit was agreed with any union.

43. The Tribunal will judge the employer's choice of pool by asking itself whether it fell within the range of reasonable responses available to an employer in the circumstances. As the EAT put it in **Kvaerner Oil and Gas Ltd v Parker and Ors EAT 0444/02**:

> *different people can quite legitimately have different views about what is or is not a fair response to a particular situation… In most situations there will be a band of potential responses to the particular problem and it may be that both of the solutions X and Y will be well within that band.*

44. Regarding the possibility of a selection pool of one person, I remind myself that in **Capita Hartshead v Byard 2012 ICR 1256, EAT** B, an actuary, no longer had enough work because of a decline in the number of pension funds she managed (through no fault of her own). Although there were three other actuaries, she was treated as being in a pool of one. According to CH Ltd, this was because there was not enough work to sustain for actuaries and, given the personal nature of the work done by an actuary for a pension fund, there was a risk of losing clients if they were transferred between actuaries. When B was made redundant, she lodged an unfair dismissal claim, arguing that all four actuaries should have been included in the pool. An employment tribunal upheld that claim, finding that the risk of losing clients from reassigning actuaries was "slight", and that the employer could not reasonably have concluded that including other actuaries in the pool would have been "utterly useless".

45. Upholding the Tribunal's decision on appeal, the EAT rejected an argument that the statement in **Taymech Ltd v Ryan EAT 663/94** that "how the pool should be defined is primarily a matter for the employer to determine" necessarily meant that tribunals are precluded from holding that the choice of pool for selection by the employer is so flawed that the employee selected has been unfairly dismissed. That statement only applies where the employer has "genuinely applied his mind to the problem" of selecting the pool. Even then, the EAT thought that an employer's decision will be difficult, but not impossible to challenge.

46. I now turn to bumping. Job losses confined to one team can result in the dismissal of skilled and experienced staff who are of greater long-term value to the organisation of another individuals whose posts are not directly affected. One way around this problem is to define the pool for selection broadly so as to encompass a number of different teams or job titles. The lawfulness of such a course of action was confirmed by the House of Lords in **Murray and anor v Foyle Meats Ltd 1999 ICR 827, HL**.

47. In **Lionel Leventhal Ltd v North EAT 0265/04** the EAT gave more detailed guidance on the circumstances in which an employer should consider bumping. A senior editor was selected for redundancy because he was the company's most expensive employee. An employment tribunal found as dismissal unfair, partly on the basis that the employer should have considered making a more junior employee redundant and offering his or her job to the claimant rather than merely assuming that the claimant would be unwilling to accept the resulting drop in salary. On appeal, the EAT was referred to case law, including the Court of Appeal's decision in **Thomas and Betts**

Manufacturing Co v Harding 1980 IRLR 255, CA which established that it can be unfair for the employer to fail to consider offering alternative employment to a potentially redundant employee, even in the absence of a vacancy. In the view of the EAT in **Leventhal**, whether or not such a failure is unfair is a question of fact for the Tribunal, which should consider matters such as:

a. Whether or not there is a vacancy.

b. How different the two jobs are.

c. The difference in remuneration between them.

d. The relative length of service of the two employees, and

e. the qualifications of the employee in danger of redundancy.

The EAT accepted that the Tribunal had been entitled, on the facts, to hold that the employer's failure to take the initiative in considering the above matters rendered the claimant's dismissal unfair

48. the factors set out in **Leventhal** were referred to with approval by another division of the EAT in **Fulcrum Pharma (Europe) Ltd v Bonnassera and anor EAT 0198/10**. In that case, B was recruited in January 2006 as a human resources executive/office manager with responsibility for all HR matters and for managing a team of administrative staff. After a year, as a result of rapid growth in the business, B had given up her supervisory duties and become HR manager. By mid-2008, C had joined as HR executive, in a supporting role to B. In 2009, however FP Ltd decided to reduce its HR function to one executive role, which was the role being carried out by C, intending to use an external consultancy for more complex HR issues. B was advised that her role was at risk of redundancy. Be argued that both she and C should have been put at risk, and that C should have been made redundant because B had more experience and had performed both roles. FP Ltd maintained that C's role was not directly affected as it intended to continue to operate with an HR executive role. B was dismissed and brought a claim for unfair dismissal. The employment tribunal, in holding that B had been unfairly dismissed, considered that has the HR function was being reduced from 2 to 1, the pool for selection should have been two, namely B and C.

49. FP Ltd appealed to the EAT which agreed with the Tribunal that FP Ltd had been wrong to conclude, without any further or meaningful consultation as to the size of the pool, that the pool was one person simply because it was the manager's role that had to go. However, the Tribunal had erred in finding that the pool should necessarily have consisted of two employees without any further analysis. The facts that B had previously carried out C's role, and that C had "acted up" during B's sick leave, were not by themselves sufficient to determine that both B and C should be in the pool. The Tribunal should have considered the approach taken by the case authorities such as the **Leventhal** case.

50. It would be wrong, however, to conclude on the basis of **Leventhal** that an employer must consider bumping to avoid a finding of unfair dismissal. Indeed, in another decision the EAT held that an employment tribunal had

correctly concluded that a dismissal was not rendered unfair by an employer's failure to consider dismissing a well-established junior employee in order to retain a more highly experienced senior employee (**Byrne v Arvin Meritor LVS (UK) Ltd EAT 239/02**). These cases suggest that the duty to act reasonably does not impose an absolute obligation to consider bumping as an option but that, in particular circumstances, the failure to do so may fall outside the band of reasonable responses.

51. Where an employer has considered the possibility of bumping, and decided against it, the question for the Tribunal is not whether that decision was objectively reasonable, but whether it fell within the range of reasonable responses.

Discussion and conclusions

52. On the findings of fact, I am satisfied that Peratech genuinely applying its mind to both the sizer of the pool and the question of bumping and reached decisions that were within the band of reasonable responses. I do so for the following reasons:

    a. Mr Lovell did not challenge Peratech's witnesses on the contents of their statements over the differences between the roles performed by Mr Lovell and Mr Purdie and I agree with Ms Gould's submission that their evidence in their statements should be accepted as accurate.

    b. The conclusions that Peratech reached were reasonable and were based on evidence and were the result of a fair investigation.

    c. Peratech was required to apply its mind to those roles and reached a conclusion based on the investigation. In his oral evidence, Mr Lovell accepted that Peratech had considered the differences between his role and Mr Purdie's even before he was spoken to and consulted with during the redundancy exercise. The data analysis performed by Mr Smith which was presented to Mr Stark prior to the decision to dismiss Mr Lovell was reasonable evidence to support Mr Stark's understanding that the roles were different. Peratech was justified in placing Mr Lovell into a pool of one. Mr Lovell and Mr Purdie had different job titles, levels of remuneration and duties undertaken. This was supported by Mr Smith's analysis.

    d. I am satisfied that Peratech genuinely applied its mind to the question of pooling and bumping. There was no suggestion that Peratech was critical of Mr Lovell's work. Indeed, he was well regarded and had a particular skill set which they continued to want to utilise albeit in China. His role had ceased or diminished in the United Kingdom.

    e. Mr Lovell had performed more junior roles but this did not demand that a junior employee should be bumped out of employment to accommodate him.

    f. During the second consultation meeting, four alternatives to redundancy had been considered and reasoned decision had been provided on each of the points. If Mr Lovell had been retained, a junior employee would have to be dismissed through bumping exercise and it

was risky for Peratech to undertake such a course of action as they would have been in danger of losing two employees.

53. The evidence clearly points to the conclusion that the operative reason for dismissing Mr Lovell was his redundancy. Most of his role was relocating to China. Peratech undertook a fair consultation process with Mr Lovell to consider alternatives to redundancy. The decision to place him in a pool of one and not to bump a junior employee was reasonable. His role was moving to another country. Mr Purdie's role was remaining in the United Kingdom. As the case law indicates, it is only in exceptional circumstances can pooling and bumping decisions be challenged. This is not one of those cases.

Employment Judge Green

Date 18 January 2021