EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103293/2020

Held via Cloud Video Platform (CVP) on 6, 7 and 8 January 2021

Employment Judge: J Young

Mr Alan Gordon	**Claimant** **Represented by:** **Mr A Hutcheson - Solicitor**
McPhee Brothers (Blantyre) Ltd	**Respondent** **Represented by:** **Ms N Alistari - Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant was not unfairly dismissed in terms of section 98 of the Employment Rights Act 1996.

REASONS

1. In this case the claimant presented a claim to the Employment Tribunal complaining that he had been unfairly dismissed by the respondent and sought compensation as a remedy. The claimant advised that the respondent had purported to dismiss him by reason of redundancy but that was not the true reason for dismissal. The respondent simply "no longer wished to employ him". It was also maintained that in any event there had been a failure to properly engage with the claimant in consultation.

2. The respondent admitted dismissal but denied it was unfair. They stated that the reason for dismissal was redundancy and that they had carried out appropriate consultation and advised the claimant of all alternative work. In the event that the circumstances giving rise to dismissal of the claimant did not amount to redundancy as defined they contended that the circumstances

amounted to a substantial reason of a kind such as to justify the dismissal of the claimant namely business reorganisation carried out in the interests of economy and efficiency; and that a dismissal on that basis was fair.

3. In previous preliminary hearings orders had been made for exchange of documents and witness statements to be provided for the final hearing.

Issues for the Tribunal

4. The issues for the Tribunal were:-

(a) Did a redundancy situation exist as that is defined in section 139(1) of the Employment Rights Act 1996 (ERA)

(b) If so was dismissal by reason of redundancy or for a reason which was not potentially fair under section 98(1) or (2) of ERA.

(c) If the dismissal was for redundancy was dismissal unreasonable under the general unfair dismissal provisions in section 98(4) of ERA.

(d) In particular did the respondent follow a proper procedure in failing to adequately consult with the claimant.

(e) If there was a failure to consult adequately what was the impact of the case of *Polkey v A E Dayton Services Ltd [1998] ICR 142* on whether or not dismissal would have resulted in any event and thus affect compensation.

(f) Was there any failure by the respondent in providing an opportunity for alternative employment for the claimant.

(g) If the dismissal was not by reason of redundancy was it for some other substantial reason and if so was it a fair dismissal on those grounds.

(h) If the dismissal was unfair (on either basis) what compensation should be awarded.

Documentation

5. The parties had helpfully liaised in the preparation of a Joint Inventory of Productions numbered and paginated. Reference in this Judgment to the productions are to the paginated numbers (J5-492). There was also produced a model of a concrete mixer as an aid to identifying particular features.

Evidence

6. At the hearing I heard evidence from:-

(1) Gary Rutter – Group Operations Director for the group of companies known as "Total Vehicle Solutions" ("TVS") of which the respondent forms part. He adopted as true and accurate his witness statement extending to 15 pages and answered questions in cross-examination.

(2) Matthew Wilson - initially employed on 11 January 2017 as the respondent's Production Manager and from July 2019 occupied the role of Operations Manager. He adopted as true and accurate his witness statement extending to 7 pages and answered questions in cross-examination.

(3) Emma Hudson - the respondent's Operation Director from 11 March 2019. She adopted as true and accurate her witness statement extending to 12 pages and answered questions in cross-examination.

(4) The claimant who was employed by the respondent on 5 February 1986 and whose role is discussed in the judgment. He adopted as true and accurate his witness statement extending to 23 pages and answered questions in cross-examination.

(5) Brinsley McFarlane – former Managing Director of the respondent. He commenced employment with the respondent around October

1995 and subsequently took up the position of Managing Director. He left the respondent with effect from January 2019. He adopted as true and accurate his witness statement extending to 16 pages and answered questions in cross-examination.

7. From the documentary and other productions produced the relevant evidence led and admissions made I was able to make findings on fact on the issues.

Findings in Fact

8. The respondent is one of the companies in the TVS group. The core business of the respondent comprises the manufacture (and servicing and repair) of concrete mixers. It is the only company based in Scotland. Other companies within TVS are based in Wisbech, Cambridgeshire and are engaged in the production and supply of bulk blowing equipment to the animal feed sector and in the production and supply of bespoke components for commercial vehicles such as hydraulic cranes or rolling stock for rail companies.

9. TVS acquired the respondent on 27 April 2018. Until then it had been a family business with Brinsley McFarlane as its Managing Director. He continued in that role until January 2019. Gary Rutter in his role as Group Operations Director of TVS was involved in all manufacturing activity within the group businesses and had direct responsibility for areas such as Compliance (health and safety, HR, data protection), Quality and operational efficiencies, Planning, and Inventory. He assumed those responsibilities for the respondent subsequent to the purchase by TVS.

10. The claimant had continuous employment with the respondent in the period 5 February 1986 until his employment was terminated with effect from 4 March 2020.

11. He served his apprenticeship at Blantyre Engineering and Sir William Arrol and Co in Dalmarnock Glasgow. He joined the respondent as a Plater at which time the respondent was run by the brothers John and Willie McPhee. Willie McPhee was the father of Lorna McPhee or McFarlane who married Brinsley McFarlane. Both Mr and Mrs McFarlane joined the company and

after the deaths of the brothers McPhee took over ownership of the company business and incorporated the respondent. The claimant's role changed in the course of time.

The claimant's contract

12. The claimant held a Statement of Employment Particulars dated 23 June 2010 (J54-59) setting out certain particulars of the terms and conditions of his employment. In terms of duties it was stated:-

> *"Your duties will be to manage the company's warehouse, to promote, develop and extend the company's business and its products giving it your full time attention and to carry out such other duties as may be assigned to you, consistent with your status and position.*
>
> *Specifically you are responsible for ensuring the Company's implementation of its Health & Safety Policy, and otherwise for implementation of its Health & Safety obligations and duties."*

13. There was no specific job title for the claimant within the Statement of Terms. There was no "warehouse" at the respondent's premises. The manufacturing site consisted of various buildings referred to as "sheds". In the late 80's and early 90's the claimant assisted in the construction of "Bay 3". These sheds operated as separate workshops for the completion of certain aspects of manufacture and work on concrete mixers.

Development of the respondent product

14. In the course of time the family firm saw a market opportunity to become fully involved in the construction of concrete mixers. That required the claimant after discussion with the then owner William McPhee to fully re-design the mixer which was then being manufactured. The claimant was given a free hand and engineered the necessary plates and templates for various parts to allow the mixer to be reproduced accurately.

15. When Brinsley McFarlane joined the firm around October 1995 and set about becoming familiar with the company product and process of manufacture he

recognised the claimant as the "resident expert" and the "Production Manager" who managed all incoming work, manufacture, design and repair.

16. In the period 1995/2000 Brinsley McFarlane successfully concentrated on sales (particularly to customers in England) to increase turnover. Those customers were pleased with the product. Prior to Mr McFarlane's input in this respect the company engaged one fitter and produced approximately 25/30 mixers per annum. However with the concentration on sales and the regard in which the product was held the respondent became the preferred supplier to many companies including larger national companies. Sales growth accelerated markedly due to the respondent mixer suiting the UK market better than European based mixers. The drum designed by the claimant along with other positive features competed favourably.

17. By 2008 the company was employing approximately 45/50 people. A further shed/warehouse had been erected with three further bays and neighbouring property purchased to accommodate growth.

18. From 1997 the claimant, on many occasions working alongside Mr McFarlane, made many improvements and innovations to the respondent mixer including:-

    (a) change of shape of the drum with angles inside the cones of the drums being differently shaped to avoid build up of product.

    (b) change in the way of the hydraulics operated; changes to ladder, platform, discharge chutes, front stool, back stool and sub frame and water tank.

    (c) quick release manhole to minimise health and safety risk. This came at the request of a customer and was a patented invention winning a health and safety award.

    (d) around 2017 design of a second chute for attaching to the "panchute". That minimised the risk of drivers' fingers becoming trapped as they adjusted that chute.

(e) a holding tank (washbox) to cope with washing residue from the drum.

(f) continual re-design of mixers to fit to new chassis.

(g) providing a loading hopper (at the request of a customer) at the rear of the mixer to provide quicker discharge of material. This was created in 2019 and adapted to the design of the mixer as a standard fit.

(h) devising a new demount system for a chassis late 2019 /early 2020. That required a hydraulic demount system which required more space than was available on the mixer. The claimant was almost complete with that work at termination of employment.

19. The claimant's position was that despite being involved in these innovations and enhancements to the mixer he was still in overall charge of production and ensuring the quality of the product which was delivered. He would be able to identify problems quickly and was always on call to help chargehands and others with difficulties. He could spot problems early. The respondent's product was "his baby" and he had no intention of allowing it to go out to the market if it was not of quality. The chassis manufacture was not controlled by the respondent and they required to adapt their product to fit different sizes of chassis as they come on the market. He required to be on hand to advise on adjustments necessary. Mr McFarlane referred to him as the "honorary professor of concrete mixers" given his intimate knowledge and passion for the product.

Development of "mortar pod"

20. Following the sale of mixers to a customer in Newcastle the respondent was asked to consider a redesign of its "mortar delivery box". Mr McFarlane agreed to take this project forward as if successful it would be a new product line for the respondent and had the potential to add significant turnover. The potential customer base was largely the same as that served by the respondent for their mixers. "Driven by" Mr McFarlane the claimant

collaborated in the design and build of a new version of the mortar delivery box. This project commenced around January 2018 and was challenging and a "huge task" which took up a great deal of the claimant's time. When TVS purchased the family business in April 2018 the claimant's position did not change. He continued to work on the mortar box project.

21. There was dispute over whether the claimant retained production line responsibilities prior to and then subsequent to him being involved in the development of this new project. His position was that while he was involved in adapting and modifying the mixer components (examples of which in para 17) he "squeezed in" his warehouse responsibilities no matter how busy and had an "eye on what everyone was doing in the workshops". On occasion he would require to await draughtsmen to produce drawings of his designs or await a part to be manufactured in the workshop for the prototype and would oversee production on those occasions.

22. Matthew Wilson joined the business initially as Production Manager from January 2017. His evidence was that from the time of his appointment the claimant was responsible for and primarily concerned with work that was related to the development of new products and that prior to the sale of the business the claimant had worked closely with Mr and Mrs McFarlane in order to progress those projects. The "non new product work" or manufacture of the standard mixer was the responsibility of him as Production Manager and the workshop supervisors. His position was that since January 2017 the claimant had not been responsible for or substantially involved in the day to day standard mixer production. He disputed that the claimant was "personally responsible for inspecting" all aspects of production during the period he was Production Manager and then, from July 2019, Operations Manager. The claimant was not involved in that work on a routine day to day basis. If however an ad hoc issue arose and advice was needed then the claimant would be the first person to be called upon.

23. Mr McFarlane acknowledged that at least from the commencement of the mortar pod project the claimant's focus was on this new product and its development.

Production and other responsibilities – organisation chart

24. In September 2018 Mr McFarlane had been asked to provide TVS Managing Director, James Warren, an "organisation chart" of the respondent business. That was provided on 7 September 2018 (J490) The organisation chart (J488) identified that the claimant's duties were in "Product and Innovation Designs". Mr McFarlane indicated that would have been the position since January 2018 when he had asked the claimant to be involved in the "mortar pod project".

25. The organisation chart showed Mr McFarlane in the position of Managing Director and Lorna McFarlane in the position of "Operations Manager". She had responsibility for the "Production Manager" Mr Wilson who in turn had responsibility for six supervisors within the workshops. She also had responsibility for the "Production Controller". Niall McAlinden who also held the position of "QHSE Manager". The claimant's name appeared in no part of the operations side of the business at that time or had any connection with supervision of the workshops or health and safety. The "Product and Innovation Designs" area also engaged draughtsmen named Glen Jones and Bruce Metcalf as at September 2018.

26. Mr McFarlane was asked various questions about the chart by the TVS managing Director (J489/490) One question was what were the different job roles between "Production Manager and Production Controller" to which the reply was given:-

> "Matt Wilson organises manpower available, sequence of travel hours, workshop HR, manages daily production meeting with Lorna's help, mixer breakdowns coming in, workshop machinery breakdowns, flow of work from Bay 3, 4, 5, 6 painting and fitting. Worksheets for nightshift.
>
> Niall manages material requirements, manages through input of material and burning table, creates and issues appropriate sequence of job cards, liaises with supervisors and job card sequences to achieve agreed production target. Monitor job cards through workshop and close off. Adjust bills scheduled to suit mobility of order book. Looks after Bay 1, 2 and 3."

29. It was also noted that the "Mixer Assembly Supervisor" managed "Bay 5 and 6" where steel parts were assembled and that the supervisors in those areas mounted "the steel frame on a chassis, finish the steel work and prep the now built mixer for shot blast and paint". Then "after painting the frame gets mounted back onto the chassis, drum fitted …" and goes to the "top yard shed for fitting".

30. It was noted that the nightshift supervisors had not been located on the organisation chart but would be added.

31. None of these production areas were stated to be the responsibility of the claimant and there was no reporting function to the claimant from production. The reporting line of the claimant was to Mr McFarlane in respect of "Product Innovation and Design".

32. In respect of warranty matters it did appear that the claimant had a part to play along with others. His expertise may be required depending on the nature of the problem identified as a warranty issue. In answer to the question "who takes after sales calls and looks after warranty" it was stated:-

> "Lorna, Niall, Brinsley, Sharon, Alan Gordon and Jim Muldoon all field after sales calls dependent on problem/query. Niall logs NC"

Supervisor responsibilities

33. Mr Wilson advised that in relation to various manufacturing and production processes:-

    (a) The fabrication and welding of components were scheduled by him and managed Mr Szwerc (Fabrication Supervisor).

    (b) The fabrication and welding of the sub frame was managed by Mr Szwerc (Fabrication Supervisor).

    (c) Drum manufacture was managed and overseen by Mr Szwerc and Mr Kelly (Drums Supervisor).

(d) Unit assembly and build were managed by Mr McClure (Mixer Assembly Supervisor).

(e) Short blast and paint were managed by Mr Mallon (Paint Shop Supervisor).

(f) Unit/Drum landing were managed by Mr McClure (Mixer Assembly Supervisor).

(g) Fitting was managed by Mr Muldoon (Mixer Fitting Supervisor) for dayshift and Mr Juroslaw for nightshift; and

(h) Quality control was managed by Mr McAlinden.

34. Those supervisors were as named on the organisation chart of September 2018 with reporting line to Mr Wilson as the Production Manager. There was no reporting line to the claimant.

Traveller File

35. The respondent had introduced in terms of quality control a "traveller file" which comprised a series of forms to document the build through production of the respondent mixers. The responsibility for "sign off" in relation to this file was in the hands of Mr Larkin and was then passed to Mr McAlinden as the respondent's Risk Manager who carried out the final review. If satisfied that all was in order authority was given to the invoicing and sale of the product. The claimant had been party to the introduction of this process. The documentation comprising a "traveller file" (J113-466) was in respect of mixers given the production numbers "19/0135 19/0178, 19/0179; 19/0180; 19/0209; 19/0217; 19/0218; 19/0222; 19/0227; 19/0236; 19/0239; 19/0242; and 19/0236". That documentation was dated between September/December 2019, being when those numbered mixers "travelled" through the production process, and carried detail of the inspection conducted to ensure appropriate build quality of the product. None of that voluminous documentation had been signed off by the claimant. He explained this was simply a "tick box exercise" and that he was "working in the background and

holding all together – in all tasks need to incorporate me in the decision making" and that he had "people in place to check quality for me".

The position from January 2019

36. Brinsley McFarlane remained Managing Director of the respondent until January 2019. The claimant continued to be involved in the "mortar pod project". Prior to that time, he had spent "100% of his time on the project" because there was great pressure to have it completed.

37. Emma Hudson was employed as Operations Director from 11 March 2019. Her position was to "direct and co-ordinate internal structures based on the company's policies, goals and objectives to ensure an efficient working environment and that deadlines were consistently met". She had responsibility for various areas including "promoting and enforcing safety in the workplace" and "overseeing manufacturing functions". Matthew Wilson reported to her.

38. Subsequent to the departure of Mr McFarlane the claimant advised that there was a "management team there but no one told me what role I was in and it was left very ambiguous". He attended and reported to production meetings and there was "no one to turn to". He made no approach to Emma Hudson to clarify his position or to the higher levels of management within the group structure.

39. He continued with his work on the "mortar pod project" but there were difficulties and problems in the development of this product and Mr Rutter curtailed the project in September 2019 because of "cost overruns, missed customer deadlines and no confidence that the project could be completed". The customer from whom the project was being developed was advised and discussions continue as to the financial consequences. There had been no orders for the mortar pod and it had never been completed. To that point Mr Rutter explained that the respondent had invested approximately £50,000/£60,000 on this particular project and was being asked by the customer to commit a further £20,000 to introduce a more sophisticated set of hydraulic controls. There was no confidence that the additional

expenditure would result in a satisfactory outcome. That factor together with operating losses in the respondent's business in 2018/2019 and the desire to improve overall profitability meant that the work on that project should cease.

40. The respondent was then keen to reduce operating costs and increase profitability by concentrating expenditure and production time on its core and standard range of mixer related products. The respondent was aware that there was a steady and healthy demand from existing customers for the manufacture and delivery of its standard range and there was no longer a need for a new product development or anyone dedicated to "new project development" within the business. As the claimant worked on his own he required from time to time help and involvement of other employees to create material from his designs. That took employees away from the core tasks and away from the production of the product which had become standard by April 2018.

41. Subsequent to discontinuation of the mortar pod project the respondent made sales of 152 mixers of various sizes in the period January 2020 – October 2020 (J96). Apart from one "12m mixer" held in stock for over a year but sold in March 2020 all sales were all mixers of a standard design and barrel size. None of the sales required additional product development and no one had been employed or engaged in that role. Mr Rutter also advised that potential orders not aligned to the core/standard product had been declined.

42. As at January 2020 the organisation chart for the respondent (J60) identified the claimant as "Development Engineer". Emma Hudson in the position of Operations Director reported to Mr Rutter as Group Operations Director. Several individuals reported to Ms Hudson including Matthew Wilson as Operations Manager. There was no direct report line to Ms Hudson from the claimant. Neither was there any report to the claimant by any of the production supervisors or production manager.

43. The claimant's position was that subsequent to discontinuance of the mortar pod project he was "effectively left to my own devices. No one from senior management contacted me about anything". In the immediate aftermath of

the decision not to proceed with the mortar pod project the claimant undertook a series of maintenance related jobs and tasks including the building of the "barn door" to replace a damaged roller door in bay 10 and thereafter the installation of a drain cover in the main yard. However he indicated that the supervisors still contacted him on a daily basis and asked him to solve problems as previously. He did not think that either Emma Hudson or Matthew Wilson would know about this because they were "not interested".

Complaint of being marginalised

44. The claimant considered that from about spring 2019 he was being ostracised and sidelined from the business of the respondent and that progressed as the year continued. The time of the daily production meeting was altered from 10.30am to around 9am or earlier around summer/autumn of 2019.That meant he could no longer attend production meetings because of his working hours arrangement. That change was made without discussion with him. Because of his knowledge he had been active during those meetings in the discussion on production issues.

45. Ms Hudson and Mr Wilson advised that the production meeting had been changed to the earlier time to improve efficiency. No one had been consulted about the change. Holding the meeting earlier in the day prior to the first morning break meant that supervisors and managers were not awaiting instruction for a significant part of the morning to ascertain what production related changes might may take place. Since the initial change the respondent had experimented with holding the production meetings at 9.30am every other day and also 8.30am every day. It was anticipated that the time of that meeting might continue to be flexible but essentially it was changed to enable supervisors and managers to get on with the production process having been able to set the process at an earlier meeting.

46. A further issue which concerned the claimant was the removal of drawings, files and other engineering notes that had been collected by him over the years without being told. His position was that on Friday 1 November 2019 Mr Wilson told him not to attend work on the following Saturday as scheduled.

On that next morning 2 November 2019, the drawings, papers, files and engineering literature were taken from boxes inside the claimant's office. He was advised on Monday 4 November 2019 they had been removed. They were then placed under "lock and key and I required to ask to retrieve them before being able to work with them". He considered this had a huge effect on him and an indication that his "days were numbered".

47. The position of Ms Hudson on this issue was that files on that day had been removed but not done "clandestinely". The claimant had been asked in common with others to let Ms Hudson have paper documents so that they could be scanned on to the server in preparation of the planned relocation to new premises (originally scheduled for April 2021 but postponed to September 2021 due to Covid restrictions). It was part of a "site wide initiative" The claimant had been asked for the papers but had not complied and the documents were collected to enable them to be scanned. Ms Hudson spoke to the claimant to say that she had removed the papers and where these papers were located and locked along with other documents as they contained confidential and legal or sensitive information. If he required access then he should ask. Her recollection was that he had asked for certain documents which had been produced. She denied that she had any part in arranging for the claimant to be off site while that happened and was not aware of his rota. Her explanation was that it was a coincidence that he was off site at that point and her purpose was to scan these documents on to the system. At date of hearing there was "a box and a half done" but more to do. This was not singling out the claimant. Documents were disposed of after being scanned into the system. If they were too large to be scanned then they would still be retained in the boxes. If the claimant wished hard copies then he would require to ask.

Intimation of redundancy and consultation

48. Subsequent to the cessation of the mortar pod project the respondent decided that they no longer wished to be involved in "new product development" work and as it saw the position that was the role occupied by the claimant. The respondent had determined that they would proceed on the "standard" mixer

and were content that the business would be successful on that basis. While it was accepted that the claimant may from time to time had taken an interest in general production related issues and given other employees the benefit of his experience and expertise this was not a role which the respondents now required. In early 2020 it became obvious to the respondent that the claimant's position within the company needed to be placed at risk of redundancy.

Consultation meetings

49. The first consultation meeting with the claimant was held on 26 February 2020. Mr Rutter and Ms Hudson took that meeting with the claimant. He had been invited to that meeting by letter of 25 February 2020 (J61) which indicated a risk of redundancy. He was advised he could be accompanied by a work colleague. The claimant attended without accompaniment and made the point of short notice but did not seek any adjournment. At that time the claimant was advised that there had been a review of engineering activity and a decision made to concentrate on the "standard new build programme" and move away from development of products. As a result, his role became potentially redundant. At that time the claimant was advised that he could "go on garden leave on full pay" to allow him to consider what had been said. Mr Rutter explained this was an offer rather than an instruction. The claimant took it that that was what he was being told to do. In any event he was advised that there would be a further meeting on Tuesday 3 March 2020 for him to advise of his views and thoughts on the matter. (J62/63).

50. The claimant was invited to the second consultation meeting by letter of 28 February 2020 (J64). The meeting of 3 March 2020 was attended by Emma Hudson, Matthew Wilson and the claimant again unaccompanied. At that meeting the claimant explained his role in the development and manufacture of the company's product and that he had a lot to contribute to the company in the development and improvements on components such as "jigs and templates" and "the Drum welding jigs". He also indicated that there were various ways to improve the process of building drums and that he had a lot of "fuel left in the tank"; explained the part he had played in the "demount

project"; gave as an example of development work the "Econic" being a "sub frame bending jig designed and manufactured" by him; and explained that the product needed to change and evolve to continue to be attractive to the market and his ideas would speed up the manufacturing process (J66/68).

51. The claimant was invited to a third consultation meeting by letter of 8 March 2020 (J70). That meeting of 11 March 2020 was attended by Emma Hudson, Matt Wilson and the claimant and recapped on the previous meetings. By that stage the claimant had received letters advising him of vacancies on the site. At the meeting he advised that he had not had time to digest the letters and wished to speak to his family before making any response. He also asked if he could see the structure of the company with his position in it and with his position removed. Ms Hudson advised that she would supply an organisation chart with the claimant's role identified and the position with his role removed would be obvious. At that time the claimant advised that he had not received a copy of the minutes of the previous meeting and a copy was supplied to him.

52. The claimant pointed out that he had been invited to the process as a "Production Engineering Manager" and was now being made redundant as a "Design and Development individual" and considered these were two different roles and that his contract did not specify that he was on purely development work. He advised that he worked in "all different areas in the business" and that he relied on the terms of his contract. He asked and was advised that a redundancy payment would be on the statutory basis (J71/72).

53. By letter of 11 March 2020 the claimant was invited to the fourth consultation meeting (J73). With that letter he was supplied with the "organogram" (J60) and information on vacancies with the department and pay rates appropriate to these vacancies.

54. The intended consultation meeting was postponed to 18 March 2020 at which time Emma Hudson and Matt Wilson again attended along with the claimant. At this time the claimant advised he was content with the minutes of the previous meeting although he was not prepared to sign them.

55. The claimant was advised that the first meeting indicated that what his role was and gave the "reason why we weren't looking to now do any NPD" to which the claimant responded that "I still disagree with that, it's impossible going forward not to have to improve the mixer because the chassis changes constantly". This was a reference to vehicle chassis coming into the respondents which varied in dimension and design and that it was then necessary to adapt the mixer unit to fit the chassis. The meeting recapped on the claimant's position that he had a lot to offer by way of continued improvement to the mixer and processes involved. In addition, the claimant advised that he had been with the company for 34 years and was passionate about the mixer which he had designed and improved continually through the years.

56. He also advised that he felt the process was a "witch-hunt" and that you "obviously don't want me here and I don't know why but you must have your reasons". He suggested that a monetary payment would be suitable to "walk away". It was denied that there was any witch-hunt and that the discussion was about the potential redundancy situation and that it was his role that was being discontinued.

57. So far as vacancies were concerned the claimant considered that these were insulting given his experience. He pointed out that his contract indicated that he was responsible for health and safety and production in the warehouses, being the sheds, and there did not seem to be any acknowledgement of that within the process. Ms Hudson advised that the company did not have a "warehouse" and that everyone should be responsible for health and safety within the workplace.

58. After an adjournment the claimant indicated that the respondent was "putting me in this role, that's only 10% of my time, the rest of my time is spent looking after the factory, stopping mistakes and making sure everything is built right" and that the development role was being invented to mask a "witch-hunt". He maintained that the company were deliberately not understanding his role as being wider than new product development.

59. This meeting concluded with the claimant being advised that further communication would be in writing (J76/81).

Termination of employment

60. By letter of 20 March 2020 the claimant was advised that his employment was terminating by reason of redundancy (J83/85) and that would effective from 24 March 2020. The detail of pay and redundancy to be received was identified. The letter stated that there had been a review of the business and:-

> *"Due to the order book capacity being full for at least the next six months the company has decided that it will significantly scale back an NPD activity in order to concentrate on its standard products line".*
>
> *As you know the company has explored ways in which your redundancy could be avoided. During our discussion you put forward proposals that were either linked to the previous NPD projects that you have undertaken or were relevant to the infrastructure of the facility. We took your comments in relation to both these issues into consideration but did not feel that they assisted in terms of the company's decision to move away from NPD products for the foreseeable future. We also discussed the possibility of existing alternative vacancies with you. You were given details of all available vacancies but you made it clear that you did not wish to be considered for any of them. In the circumstances we have not been able to identify any way in which your redundancy can be avoided.*

Appeal

61. The claimant was offered a right of appeal against that decision and intimated an appeal by letter of 26 March 2020 (J89/90). The essence of his appeal was :-

- there was no redundancy situation and that the function performed by the claimant was to ensure that a satisfactory mixer was produced. He inspected each stage of production from fabrication of the assembly template through to welding of the full assembly. He maintained he was uniquely qualified to perform this role to the

highest standards and no other person in the company possessed that expertise. He was able to detect problems at early stages and it was essential to the company's operations that these functions continued to be performed.

- He also indicated that he was primarily responsible for the design of the "McPhee mixer" and that continual product development was essential for the company to prosper and to serve the requirements of its customer. He indicated customers sought product modification on an ongoing basis.

- The termination of his employment in those circumstances was not redundancy but that the company simply no longer wished to retain him as an employee.

- There was no meaningful engagement with him as regards his functions and the necessity for them. The contract use of the word "warehouse" was interchangeable for "sheds" and he was responsible for the operation in those sheds.

62. Prior to an appeal hearing being fixed the claimant withdrew his appeal by letter of 7 April 2020 (J92) indicating that the respondent "by its conduct has irreparably damaged the necessary relationship of trust and confidence" and that he could not seek reinstatement and so required to accept the reality of dismissal. He advised that he would be taking matters to a Tribunal.

63. He received a letter in response from James Warren, Group Managing Director (J93) which noted sorrow at the claimant's decision to withdraw from the appeal process but denied there had been any irreparable breach of the implied term of mutual trust and confidence. He indicated that he had not seen anything in the process which indicated any belief other than that his role was genuinely redundant. (J93).

Events subsequent to termination of employment

64. It was agreed that at termination of employment the claimant was paid a redundancy payment which would satisfy any basic award and that to take

account of monies paid in lieu of notice wage loss would commence from 12 June 2020. The claimant was paid at the rate of £3,741.06 net per month with the respondent. Additionally, he was entitled to a pension. The employer contribution ran at the rate of £109.41 per month.

65. The claimant has care responsibilities towards his wife. With the respondent he worked flexible hours usually from 10am and required to return home at lunchtime. The respondent had shown flexibility in that respect. However those needs meant it was more difficult to obtain regular employment.

66. He reached the view that he should be self-employed and considered that prior to July 2020 there was simply no prospect of obtaining suitable alternative employment due to the Covid restrictions. His wife had been shielding and it would not be possible for him to go into a workplace with any confidence. Had he not been dismissed he would have been in furlough from McPhee from April 2020. He received Universal Credit of £339.51 per month from 14 October 2020

67. He had made various attempts to gain employment. He had enrolled to work as a driver on a flexible basis for Amazon around September 2020. He completed the final step required of him on 25 October 2020 which paid £12/£15 per hour. As at the date of hearing he had not made earnings from that opportunity.

68. On 26 October 2020 he had attended an interview for Menzies delivery and awaited hearing from them as to the possibility of employment subsequent to checks being carried out by the company.

69. He also set up a chauffeur's business on eBay at end of October 2020. At date of hearing he had not received any requests for services as a chauffeur.

70. In September 2020 he had paid £13,000 by way of a franchise fee to acquire a "dog trainer's franchise". He was intending to pursue that line of business but it could not progress at the present time due to the Covid restrictions.

71. He also registered with Courier Expert in July 2020 but did not consider that job to be economically viable given the long-haul trips that he may require to undertake. Another business idea for wallpaper design had yet to flourish

72. The respondents had heard a suggestion that Mr McFarlane may be continuing in the mixer business in the respondent's existing premises once they moved to their new site. Mr McFarlane indicated that this was a possibility and he had spoken with Mr Warren the TSV Managing Director on the topic of what might become of the site once the respondent vacated. He advised that there were various possibilities ie selling the site; renting out part of or all of the site; or returning to the production of concrete mixers which may be the least favoured option. Another possibility was concentrating on the repair and maintenance of mixers. He could not say if there would be any realistic employment opportunity for the claimant in these circumstances.

73. Emails produced by the respondent (J485/486) confirmed that Lorna McFarlane proposed the purchase of a "plasma cutting machine" which would be required in the context of the manufacture of concrete mixers.

74. It was confirmed that another 16 employees were made redundant from the respondent's business following the national lockdown which was imposed from 23 March 2020.

Submissions

75. I was grateful for full submissions. No discourtesy is intended in making a summary.

For the Respondent

76. It was submitted for the respondent that there was a genuine redundancy situation pursuant to section 139(1)(b) of the Employment Rights Act 1996 (ERA).

77. The approach to the Tribunal should be governed *by Murray v Foyle Meats [2000] 1AC51* which affirmed the decision in *Safeway Stores v Burrell [1997] ICR 523.* In this case the claimant's work had diminished by the

discontinuance of new product development and his dismissal was attributable to that reason. That stood irrespective of the terms of the employee's contract or function.

78. The respondents in this case had sought to go to standard production and there was no new product development from cessation of the mortar pod project in September 2019.

79. There was evidence that apart from one 12 metre drum mixer all sales by the respondent in 2020 were of standard produced mixers.

80. The evidence of the respondent was that the business had made an assessment of its financial situation and took the decision to orientate toward standard production rather than invest in the development of new products. As a consequence, the claimant's work diminished.

81. The claimant was the only individual affected by this diminution in work. He was the only person capable of producing new products and that was his role between the beginning 2018 and September 2019. The emails setting out the organisation chart set out the roles within the organisation and the claimant was on new product development and not responsible for production.

82. It was clear that the claimant had a lot of freedom in his role with the company until such time as takeover took effect. Latterly there was no formal managerial role for him. He may be the "go to man" on production problems but he was not the only person who could perform that role and it was certainly not his primary function.

83. Much was made of the contractual terms and his functions over the course of a long and distinguished career. A variety of labels was given to him. It was not disputed that he was multi skilled and very experienced but the evidence showed that he was not formally or informally in the position of a manager.

84. Fairness of a redundancy dismissal is often considered under the principles in *Compair Maxam Ltd [1982] IRLR 83.* The issue there is whether the claimant was fairly selected for redundancy under reference to selection of

the pool of employees, the meaningfulness or otherwise of consultation, and consideration of alternative employment.

85. An employer should genuinely apply their minds to the selection of a pool and in this case the claimant fell into a pool of one *(Capita Hartshed Ltd v Byard [2012] ICR 1256).* This was a reasonable approach to take based on all the facts available to the respondent at the time. He could not have been pooled with others because no one else did NPD work. He was not a manager as such.

86. In so far as consultation was concerned it was submitted this was performed thoughtfully and with an open mind. The use of the term "garden leave" by Mr Rutter in the first meeting was not an indication that the respondent approached consultation with a closed mind or that it was a foregone conclusion. Mr Rutter's evidence was that this was a misnomer and that essentially the claimant was being offered paid leave and that the consultation meetings were set to consider the claimant's responses and any alternative roles.

87. It was not made out that there was any animus on the part of Ms Hudson towards the claimant. She had sought and allocated tasks towards the end of the mortar pod project. The claimant sought to make much of the movement of production meetings and papers being scanned but those were not matters which could be said to have been deliberately played to undermine and marginalised the claimant. They were business issues. It was clear that the claimant did not regard Emma Hudson as having the technical expertise necessary to be in charge of operations. He did not view her as the one who was in reality his manager and was part of the new "status quo".

88. While the claimant may have regarded the alternative job offers as an insult, they were the vacancies available and the respondent did require to put them forward. It was appreciated that they were well below his level but there was no intention to demean him. The respondents may have been criticised had they not followed the appropriate process in that respect.

89. The sister companies of the respondent were based geographically distant and distant also in terms of their function and there was no job opportunity within those organisations.

90. In the event that the dismissal was found to be procedurally unfair then there should be a "*Polkey*" deduction because:-

    (1) The same result would have been obtained on a fair procedure being adopted.

    (2) The claimant withdrew his appeal and cut off the opportunity to have any procedural defects reviewed. There was no history between the claimant and Mr Warren as the Chairman in the event it was thought that Ms Hudson had animus towards the claimant.

    (3) The company made others redundant after lockdown in March 2020 and there was a significant chance of dismissal of the claimant at that time even if dismissal had not taken place in March 2020.

For the Claimant

91. It was submitted for the claimant that there were three areas in which there had been a failure by the respondent:-

    (1) A failure to engage with the claimant so that the respondent was properly informed about his position.

    (2) Failure to adopt a fair process meant it was not possible to say that the same result would have been achieved.

    (3) The conduct of the respondent demonstrated that the true reason for dismissal was not redundancy but simply that they no longer wished the claimant in the company.

Failure to engage

100. It was submitted that it was critical for an employer to inform itself properly about an employee for their to be a fair process. Emma Hudson had commenced employment with the respondent two months after the departure

of Mr McFarlane and had not engaged with the role of the claimant or made enquiry as to his capabilities. Neither had there been any assessment of the claimant on conclusion of the mortar pod project. It was only when the claimant raised his contract of employment did Ms Hudson look at that document. There was confusion over his title. On the one hand he had been described as "Development Engineer" (J60) and on the letter of invite to consultation meeting as "Production Engineering Manager". There was no effort made to analyse his position. Neither was there any reference to any email exchange between Mr McFarlane and Mr Warren of September 2018 which had no part to play in this matter.

101. The organisation chart at J60 should have been introduced earlier in the process and it was beholden on the respondent to introduce the claimant's contract as a basic document. In that contract the claimant had an express duty to manage the warehouse. There appeared to be a refusal by Ms Hudson to engage in that matter because she did not consider the company had a warehouse. However it was clear from Gary Rutter's evidence that he well knew that warehouse was reference to the bays or sheds where the manufacturing process was conducted. So the claimant never got to explain how he coped with the effect of the mortar pod project on his management responsibilities. Also the contract referred to health and safety responsibility. Ms Hudson seemed to consider that this was "standard to everyone" and therefore not of consequence but there is particular reference to that within the contract document. There was a duty to ensure implementation.

102. Refusal to engage had also extended to the potential improvement of the production line. Again in the consultation meeting (J67/68) the claimant had been "closed down" stating that this was not an appropriate time to hear of these matters. This was exactly the time at which these matters should have been raised and considered.

103. It was submitted that at every turn the claimant was closed down and he did not get the chance to articulate that he had capabilities and responsibilities beyond new product development work. Ms Hudson did not understand his role and that came about from a refusal to engage with the claimant.

Result of proper process

104. It is always problematic to determine what would have been the position if there had been proper process by engagement with the claimant but the likelihood was that it would have been determined that the claimant did manage the process because:-

(1) His contract indicated that role.

(2) The absence of any handover meant that there was no engagement with Mr McFarlane and he would have advised of the true role of the claimant. Mr McFarlane's witness statement indicated he clearly saw the claimant in a management role.

(3) The claimant himself would have given information about his role in ensuring that work was done properly and the correct processes were being utilised. The claimant was unique in knowing all the workings of the product. While there may be supervisors in certain areas they were not capable of having an overall view of the whole process.

105. Mr McFarlane was clear in saying that the mortar pod project was one to which the claimant had been "seconded". The claimant was clear that he still managed to squeeze in management duties and keep an eye on his responsibilities because it was "in his blood". He was not just a "knowledgeable boffin" but in a management position.

106. Mr Rutter had no view of the claimant as he had no personal knowledge of the position prior to April 2018 when TVS acquired the business. He may have had a skewed view of the responsibilities of the claimant.

107. It had been accepted by Mr Wilson that at night if issues arose then the claimant may be asked by Mr Wilson to assist in a resolution. The fact that the claimant would do this out of hours and may have to attend the factory was indicative of his responsibilities and of a problem being passed "up the chain".

108. Someone needed to oversee the production process and Mr Wilson did not have the necessary experience when he arrived or thereafter. The claimant was the person who had built the mixer and the natural person to oversee production.

109. Had there been engagement on health and safety then it would have been appreciated that the claimant had a role to play in this area. It was a role that still required to be played out.

110. Additionally, the claimant could have made modifications to improve the manufacturing process. The modifications were more than just altering fixing points. Particular knowledge was required to enable modifications to be made to the mixer assembly and this was something within the province of the claimant. That role did not become redundant. There would be continuing modification required. If the respondent had informed itself properly it could not be said there would have been the same result.

Reason for dismissal

111. So far as reason for dismissal was concerned the cumulative conduct of the claimant pointed to a simple desire to have the claimant out of the company.

112. That included (a) failure to engage; (b) an unwillingness to have any dialogue which might mean that the claimant was retained; (c) reference to garden leave in the context of the process showed a closed mind.

113. It was also submitted that failure to communicate with the claimant properly on scanning and preservation of documents and the manner of their removal was significant. There was no communication with him about the process to be involved in sudden removal of documents from his domain. Ms Hudson's evidence was not consistent in this respect in that she claimed that the claimant had access to documents on "various occasions" but also says that access was never sought.

114. Additionally there was no courtesy of advance notice of the change in production meetings. The claimant was being marginalised.

115. The claimant was working on the demount project (separate from mortar pod project) when he was placed on garden leave and that project was finished after he left. So work that he was engaged in was interrupted to make him redundant.

116. All these matters combined led to the conclusion that the respondent simply wished rid of the claimant rather than there being a true redundancy situation.

117. On the appeal the claimant was justified in his view that trust and confidence had been damaged to the extent that he could no longer see a position for himself in the company. In that event the attributes of Mr Warren were irrelevant.

Loss

118. So far as loss was concerned it was submitted that the claimant had narrow expertise. He was in his late fifties and had given his life to the development of this particular product. He had made attempts to find alternative employment. The dog training franchise may be a source of income but in the present restricted circumstances there was simply no opportunity for him to obtain suitable employment. He had been in a position of seniority with the company and the schedule of loss showed that the cap on awards was exceeded in this case and so one year's gross salary should be awarded.

119. While there was talk of Mr McFarlane resurrecting a mixing business at the site occupied by the respondent these were not matters which would not suddenly materialise. In the meantime, there was no reasonable possibility of the claimant being employed.

120. So far as other redundancies were concerned there was no explanation in the evidence as to how this might have affected the claimant. It was highly speculative to assert that he would have been made redundant at that point.

Conclusions

The claimant's management responsibilities

121. A fundamental factual dispute that required to be resolved from the evidence was the managerial responsibilities of the claimant. There was no dispute on the claimant's contribution to the development of the concrete mixer produced by the respondent. It was "his baby" in that over the years he had expended his whole time and effort at work and at home in thinking about improvements which might be made to the product and implementing those improvements. The product would not have been as saleable as it was had it not been for the claimant's contribution.

122. However, on the evidence I did consider that his role in developing improvements and making adaptions to the mixer had taken him away from a continuing managerial role in the production process. It is accepted that he may have been be the "go to man" to iron out any difficulties or problems in the production process but other personnel had been put in place to oversee the particular parts of the production process.

123. On the evidence I did consider that by the time the "mortar pod project" was put in place he did not have managerial responsibility for any part of the production process or that he carried out overall oversight of the production process. I consider that the organisation chart prepared and produced by Mr McFarlane in September 2018 was accurate in placing the claimant in the position of "new product development". There was no connection with that role and oversight of the production process. That had been the position since at least early 2018 and I favoured the evidence of Mr Wilson when he indicated that the claimant had had no particular managerial role in the production process in 2017. He had moved on into a development role.

124. By that time various modifications and adaptations designed and then engineered for the mixer had been made part of the standard manufacturing process. There was a standard product of quality available for manufacture and that process took place without the involvement of the claimant as he undertook the mortar pod project. He was not part of the overall check of

quality. His position was that he would be able to spot difficulties early in the process but there was no evidence that he had a role as part of that process. Detail was given of the managers and supervisors in place for the production process and that did not include the claimant. It appeared he had no overall role to play in approving the production process in accord with the "traveller file" or any final quality check.

125. I also accepted the evidence that any modification necessary to the mixer assembly to fit on to new and different chassis could be performed by the existing personnel. There was a design team who were able to effect the change to the manufacturing process to enable the mixer to be fitted to differing chassis. While there may have been a role performed by the claimant in the past and that there was no doubt he would have the ability to engage in that process it was a function being performed by others.

126. Accordingly, I considered that the respondent was correct in their assessment of the position that there was no managerial responsibility for the claimant in the production process when they came to a view that the mortar pod project and "new product development" should be discontinued around September 2019. From the evidence the claimant as the years had unfolded had become more and more involved in modifications and new adaptations rather than production oversight. By the point when the mortar pod project came on board he was wholly involved in new product development and had lost his role in the production process.

127. That was highlighted by the claimant going on to other tasks on the site not connected with the production process when the mortar pod project ceased. He carried out repair/renewal to roller doors and to the drainage function but did not step into or back into any oversight role in the production process. He made no representation that he should be involved in that process. While he might not have perceived either Emma Hudson or Mr Wilson as having the necessary seniority and expertise in the product those were the individuals who had oversight of the production process and there was no evidence that he worked alongside or with them in that function.

Was there a redundancy situation?

128. Redundancy is defined in s139(1) of the Employment Rights Act 1996 (ERA). In this case there was no cessation of business or intention to cease business and so the applicable statutory words are:-

> "*For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –*
>
> *(b) the fact that the requirements of that business –*
>
> *(i) for employees to carry out work of a particular kind 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."*

129. Thus, redundancy does not only arise where the employer is in financial trouble or struggling to provide work. It can occur where there is a successful employer with plenty of work but for commercial and economic business reasons decides to reorganise and a lesser number of employees are required to perform the same functions.

130. It is the requirement for employees to do work of a particular kind which is significant. If fewer employees are needed to do work of a particular kind there is a redundancy situation. If the requirements of a business for employees to carry out work of a particular kind of work have ceased or diminished or are expected to do so there is a redundancy situation. There is no need for an employer to show an economic justification for that decision.

131. In this case the requirements of the business for employees to carry out work of a particular kind had ceased or diminished because of the decision to discontinue the mortar pod project and with it new product development. The reasons for that were explained by Mr Rutter namely that the project had met difficulties and they were continuing problems in bringing the project to

fruition. Further significant financial commitment was being sought. The company decided that they would not continue with that project or indeed other "new product" work but revert to the production of the standard mixer. That was a commercial decision. It is accepted then that the requirements of the business for employees to carry out work of a particular kind had ceased or diminished and that there was a redundancy situation.

132. The second issue is whether the dismissal is "wholly or mainly attributable" to that state of affairs.

Reason for dismissal

133. On this aspect of matters the claimant's position was that the company simply wished to get rid of him and so the dismissal was not "wholly or mainly attributable" to cessation or diminution of the requirements of the business to carry out work of a particular kind.

134. For the claimant it was submitted that the indications that the respondent simply wished rid of him were evidenced by (a) the change of time of production meetings so as to exclude the claimant; (b) sudden removal of documents and drawings from the claimant's domain; and (c) lack of engagement within the consultation process to ascertain his true capabilities and position.

135. On the issue of the production meetings the evidence was that no notice was given to any employee of the change of time and the claimant was not singled out in this respect. Due to his personal circumstances his working hours commenced 10.00/10.30am and so an earlier meeting would not suit. At the same time there seemed business sense in having an earlier meeting to discuss production issues so that those engaged in the production process were able to proceed with the day's work aware of any necessary production issues. As indicated at the point when these meetings were changed the claimant was engaged in the mortar pod project which took him out production and so those meetings could continue without his involvement. I did not think it was a deliberate exclusionary tactic by the respondent. The claimant may well have felt excluded and that is understandable given his history with the

respondent but I did not consider the evidence showed an ulterior motive. It appeared that the production process continued satisfactorily with these meetings being rearranged and without the claimant's involvement. The evidence showed that there had been a number of mixers built and delivered without the claimant being in production meetings.

136. On the issue of papers being moved again there was an explanation of a good business reason for centralising documents and plans and drawings within the one central resource. To do that it was necessary to collect and scan in documents for various parts of the business. The fact that the claimant's papers were removed to the scanning process abruptly seemed to be driven by impatience on Ms Hudson's part that that the claimant had been slow in dealing with the request that he provide the papers. He would be possessive of these documents and drawings given they were his work. However, given that the respondents intended to move into new premises and sought to operate the business in a way which was "paperless" there was a necessity to take the necessary steps to collect the papers and scan them into the central resource. I accepted that the respondent was entitled to take these steps. There is a general move toward a "paperless" business environment. Again, the way in which it was done may have lacked some sensitivity but I did not consider there was an underlying motive to "sicken" the claimant or to deliberately marginalise him so he had no role.

137. Since the landmark cases of *Safeway Stores Plc v Burrell [1997] ICR 523* and *Murray and Another v Foyle Meats Ltd [1999] ICR 827* there is removed the need to consider exactly what an employer can or cannot be required to do under his or her contract of employment or that there must be a diminishing need for employees to do the kind of work for which the claimant was employed. The real question was whether the dismissal of the employee was caused wholly or mainly by the cessation or diminution of work of a particular kind.

138. In the consultation meetings the position of the claimant seemed to change as those meetings unfolded. In the second meeting (J66/68) the claimant's position was that he had still a lot to offer the company albeit the mortar pod

project was discontinued and that there would be no new projects in the foreseeable future. He referred to his design of all parts of the product and that there were new ways to improve the process of production and design. In essence he indicated that he had the capability not only to improve the present product but to manufacturing process.

139. As matters proceeded he became more insistent that he still carried out a production role and that his job description was set by the 2010 Statement of Terms and had essentially not changed. However as explained I considered the position had changed. Ms Hudson was certainly dealing with the matter on a narrower basis namely that the claimant was an individual who was engaged in new product development and that aspect of the business was ceasing. As a result, the respondent did not need as many employees as it did before and as he was engaged in that area of work it was sad but inevitable that he was the candidate for redundancy.

140. However, if the redundancy situation was a reason for an employee's dismissal it is irrelevant that instead of dismissing the employee for redundancy the employer could have required the employee to move to another kind of work. In this case it was not disputed that the claimant could be capable of carrying out other work. The approach set out in *Murray v Foyle Meats Ltd* is that it removes the need to consider exactly what an employee can or cannot be required to do under his or her contract of employment and accords better with the wording of the statute. The criticism of the engagement with the claimant was essentially that there was a failure to find out exactly what he could or could not do. However, that was not a consideration which demonstrated that the reason for dismissal was not related to redundancy.

141. It was the position of the claimant that his skills were required in effecting modifications to the mixer (apart from fixing to differing chassis) because the market would demand a continuing improved product. That may be. However, to concentrate on the "standard" mixer and not to seek continual modification and improvement is a commercial decision for the respondent to take and it is not part of the Tribunal's function to indicate that the respondent

should retain the services of an individual because that would be wise. That would be to interfere with the employer's commercial judgment and not to consider whether dismissal was truly "wholly or mainly attributable" to redundancy.

142. On an examination of the evidence here I considered that the reason for the decision to dismiss was redundancy and that was a genuine reason. I do not find there to be evidence that the claimant's "face didn't fit" or that he had been a nuisance so had to go, or the like. It was driven by the decision to discontinue the line of work in which he had been engaged for some time. While he may have been capable of doing other things within the respondent business that does not affect the genuineness of the reason for dismissal.

"Unfair" redundancy

143. A redundancy dismissal can be unfair under the general unfair dismissal provisions contained in section 98(4) of ERA. In *Williams and Others v Compair Maxam Ltd* the Appeal Tribunal did lay down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. It is not for a Tribunal to impose its own standards to decide whether the employer should have behaved differently. Instead it has to ask whether the dismissal lay within the "range of conduct which a reasonable employer could have adopted". The factors suggested in *Compair Maxam* as those that a reasonable employer might be expected to consider were:-

- whether the selection criteria were objectively chosen and fairly applied
- whether employees were warned and consulted about the redundancy
- whether there was a Union and the Union's view was sought
- whether any alternative work was available.

144. In this case given the decision to discontinue new product work and the line of work in which the claimant was engaged then there was a certain

inevitability about the selection of the pool. The claimant found himself in a pool of one in these circumstances. The selection criteria was essentially to consider who was involved in that line of work and the only answer was "the claimant".

145. There was a warning and consultation about the redundancy. While there were criticisms made of the lack of engagement with the claimant I do not consider that was a criticism which affected the essential enquiry. As indicated the claimant had had an immeasurable impact on the company's business and product. However, at the time when this matter was being considered I did not take the view that he had a production oversight or responsibility. He was engaged in developing a new product. That was his role and as indicated I considered from the evidence that followed a course of conduct over his period of employment by which he made a transition into that role. It was no surprise that he was the one who would be engaged in that area. The claimant appeared to me to be someone who enjoyed that challenge. When that area was discontinued then what he was capable of doing elsewhere could have been taken into account by the respondent but equally they could decide that he was the one who required to be dismissed as a result of the redundancy situation.

146. In this case as there was no Union then the respondents could not seek their view.

147. In so far as alternative employment was concerned the claimant may have been justified in considering the offers were an "insult" but they did require to be made and I did not accept that that was a demeaning tactic. The respondents put forward the positions which were available.

148. In the circumstances therefore I do not consider that there was a failure to adopt a fair procedure with the claimant.

149. Essentially therefore I did consider that there was a cessation or diminution in work of a particular kind in the respondent's business. That was borne out by the decision to discontinue the mortar pod project and new product development and concentrate on the production of the "standard mixer".

Evidence showed that the business did concentrate on the production of "standard mixers" thereafter and the respondent had not returned to any "new product development". I accepted that there was a redundancy situation and that the claimant was affected as he was the individual engaged in that line of work. As explained I did not accept that he had concurrent supervisory/management responsibilities for the production process since 2017 and at least early 2018 when he commenced work on the mortar pod project. He may have been the victim of circumstances in transition to the development role but I did consider that the reason for dismissal was wholly or mainly attributable to redundancy and not because the respondent simply wished rid of him.

150. In those circumstances the dismissal was not unfair in terms of section 98 of ERA.

Employment Judge: Jim Young
Date of Judgment: 20th February 2021
Entered into Register: 27th February 2021
Copied to parties