EMPLOYMENT TRIBUNALS

Claimant: Mr Robert Maxwell

Respondent: JCA Engineering Ltd

Heard at: **Watford (by CVP)** **On:** **15-16 March 2021**

Before: **Employment Judge Reindorf (sitting alone)**

Representation

Claimant: In person

Respondent: Ms J Danvers (counsel)

RESERVED JUDGMENT

The claimant's claim for unfair dismissal fails and is dismissed.

REASONS

Introduction

1. In a claim form presented on 21 July 2020 the claimant brought a claim for unfair dismissal. He complained that, in dismissing him for redundancy from his role as a Divisional Contracts Manager with effect from 17 July 2020, the respondent had failed to apply a pool for selection or to consult

with him adequately and that his dismissal was predetermined. The respondent denied that the claimant had been unfairly dismissed.

The issues

2. The issues were set out in an agreed list of issues as follows:

Liability

1. The Respondent accepts that:

1.1. the Claimant was an employee;

1.2. he had the requisite length of service to bring a claim for unfair dismissal;

1.3. the claim was brought in time.

2. It is agreed that the Claimant was dismissed and that his employment ended on 17 July 2020.

3. Can the Respondent show (on the balance of probabilities[1]) that the reason or principal reason for the dismissal was a potentially fair reason (s.98(2))? The Respondent's case is that the Claimant was redundant because the requirement for an employee to carry out work of the particular kind that the Claimant was doing had diminished or ceased.

4. If the Claimant was dismissed for a potentially fair reason, was the dismissal fair or unfair (having regard to the reason)? In particular:

4.1. Was the Claimant fairly warned and consulted about the redundancy?

4.2. Was the Claimant fairly selected, in particular, did the Respondent consider the question of pool and was the Respondent's choice of pool within the range of reasonable responses available to an employer in the circumstances?

4.3. Did the Respondent take reasonable steps to seek alternative employment?

[1] I.e., show that it was more likely than not.

Remedy

5. *Would the Claimant have been dismissed fairly in any event? If so, when?*

6. *What compensatory award, if any, should be made?*

The Evidence and Hearing

3. The hearing was conducted remotely by video (CVP). The parties did not object to this. A face to face hearing was not held because it was not requested and all issues could be determined in a remote hearing.

4. The hearing took place over two full days. Judgment was reserved due to lack of time.

5. I heard evidence from Thomas Absalom (Managing Director) and Tim Edwins (Director) for the respondent. The claimant gave evidence on his own behalf. All witnesses produced written witness statements and were subjected to cross-examination.

6. There was an agreed trial bundle consisting of 460 pages, into which various items of late disclosure were incorporated. A very helpful chronology, cast list and neutral note of the law were produced by Ms Danvers, to which the claimant made no objection.

Findings of Fact

7. The claimant was employed by the respondent as a Divisional Contracts Manager ("DCM") from 31 July 2017. He managed the respondent's fit-out division. This was one of four project teams in the business. The claimant was responsible for managing a team of four contract delivery management staff and for budgeting, planning and delivering fit-outs and refurbishments primarily for office buildings. This work involved decoration, fitting partitions, joinery and fittings and fixtures. It also included an element of overseeing mechanical and electrical works, which were usually incidental to the main fit-out or refurbishment work. On occasion the claimant worked on stand-alone mechanical or electrical projects, such as replacing light fittings or air handling units. The portfolio of the fit-out division was worth under £2 million. The claimant had construction qualifications and experience relevant to this role.

8. The other three project teams were managed by Dean Mulvaney, Steve Hill and Rudi Filmalter. Prior to the claimant starting employment with the respondent, Mr Filmalter was a Divisional Contracts Director ("DCD") and Mr Mulvaney and Mr Hill were DCMs. In early July 2017 both Mr Mulvaney

and Mr Hill were promoted to DCD [44], although these promotions were not announced within the business until October 2017 [59].

9. These three teams worked largely on mechanical and electrical engineering projects installing plant and infrastructure in live critical environments. An example would be replacing a power generator or chiller plant in a hospital or a data centre. They also did an element of construction or fit-out work, in particular where it formed part of a larger project. Each of these teams comprised around six employees and had portfolios of works worth around £10 million. The DCDs all had engineering qualifications.

10. Because Mr Mulvaney and Mr Hill had been promoted into DCD roles by the time the claimant was recruited, he was the only DCM working for the respondent for the duration of his employment. He was keen to achieve promotion to DCD, and the respondent hoped that, in time, he would do so.

11. The claimant discussed Mr Mulvaney's and Mr Hill's promotions with his line manager, Dean Cocklin. Mr Cocklin told him that he would be considered for promotion to the DCD role when his team and portfolio had developed to a comparable extent.

12. On 7 October 2019 the respondent announced that it had conducted a review of its structure and organisational objectives, which was set out in a document entitled Organisational Structure and Roles and Responsibilities Matrix [93]. This shows a new structure containing five levels of employee, with Directors at Level 1 and Team Members at Level 5. At Level 2 were "Divisional or Department Directors or Operations Managers", reporting to Executive Board Directors. Divisional Director ("DD") was to be the new job title for the DCDs. Within the Projects Division, Level 2 employees were identified in the document as "Divisional Directors", and Level 3 employees are identified as "Contract Managers". The accompanying list of Roles and Responsibilities for Level 2 employees again states that a Level 2 employee is a "Divisional Director or Operations Manager". There is no mention in the document of Divisional Contract Managers.

13. The list of Roles and Responsibilities for each level in the new structure was not intended by the respondent as a detailed job description for each employee. Rather, it was a broad and generic description of what employees at each level were expected to "[be] Responsible [for], Own and Approve" within the business. Each level contained employees with a broadly similar level of responsibility and accountability across the business as a whole. Level 2 employees were subject to the same Key Performance Indicators.

14. The claimant attended a meeting with Tim Edwins (Director) and Ian Jackson (Chairman) at which a job description entitled "Division Level 2

– Divisional Director (Projects)" [76] was read out to him. In this job description there is no indication that the claimant was not intended to become a DD along with the Mr Mulvaney, Mr Hill and Mr Filmalter. This was an unfortunate and confusing error. However at the meeting Mr Edwins explained to the claimant that whilst he would remain a DCM at that stage, the company would like to see him achieve promotion to DD in time.

15. Mr Edwins emailed the job description to the claimant and Mr Mulvaney, Mr Hill and Mr Filmalter on 18 November 2019 [75]. Again, in this email he did not distinguish between the position of the claimant and the position of the other three employees.

16. The outcome of the restructure was that the three DCDs became DDs and the claimant remained a DCM. All four roles were at Level 2 and all reported to Mr Edwins, Mr Cocklin having been moved to a different role. All four attended monthly "Directors' meetings" and worked collaboratively together in various ways. The claimant was at the same level of seniority and responsibility as Mr Mulvaney, Mr Hill and Mr Filmalter and there was cross-over between their work. However it remained the case that the technical discipline which was the focus of the claimant's work was different to theirs, and that the fit-out division which he managed generated substantially less revenue than the other three project teams.

17. An organogram was circulated in February 2020 which showed the claimant as a DCM and Mr Mulvaney, Mr Hill and Mr Filmalter as DDs [159]. The claimant queried this with Mr Edwins by email on 27 February 2020 [163]. It is clear from this email that the claimant was under the impression that he should not be described as a DCM any more, but that he had become a DD. It is not surprising that he had that impression given the confusing content of the documentation produced during the 2019 restructure.

18. Mr Edwins replied to the claimant on 2 March 2020 that he had a meeting with Mr Jackson that week [163]. At that meeting, Mr Jackson told Mr Edwins that he did not consider that the claimant was ready for promotion to DD because the fit-out division was not generating sufficient revenue to justify it. Mr Edwins did not report this conversation back to the claimant and the matter was not discussed between them again until the redundancy exercise later in the year.

19. The respondent's business was significantly adversely affected in 2020 by the coronavirus pandemic national lockdown. As far as the claimant's team was concerned, at the beginning of lockdown in March 2020 there were two live fit-out projects for the same client, which was based in the West Country. One of these projects was already close to completion. Both projects were halted at the client's request shortly after the beginning of lockdown. There was one possible fit-out project in the pipeline, again for the same client. A Contract Manager in the claimant's team lived near

to the client and could be utilised to deal with whatever work needed to be covered for the client during lockdown. It was therefore decided by the respondent that the claimant should be placed on furlough. The claimant was informed by letter dated 9 April 2020 that he was to be placed on furlough from 20 April 2020 [181].

20. The claimant was amongst the 20% of employees (including other members of senior management) who were put on furlough by the respondent. A salary reduction was also implemented across the business, with the directors reducing their pay by 40%.

21. The respondent put in place new email addresses for the claimant and the other furloughed employees in order to keep them up to date with important information without allowing them to engage in work activity, which would have been contrary to the rules of the Job Retention Scheme. Mr Edwins also contacted the claimant from time to time for a catch-up.

22. Soon after the start of lockdown the respondent's Board commenced a review of the business in light of the impact of the pandemic. A document entitled "Workforce Review: Redundancy Scenarios" was created by the Human Resources department [239]. This was a live document, which was updated over time as the Board discussions progressed. It analysed all areas of the business.

23. At this time there was no work at all in the fit-out division, and only one pipeline project. The forecasted turnover for the fit-out division amounted to 3.5% of the forecasted turnover for the four project teams. Its forecasted profit was £0.4 million, which amounted to 6.4% of the total forecasted profit. In that light the respondent's Board decided that the fit-out division was not viable.

24. Against that background the first draft of the Workforce Review document showed the claimant's DCM role as potentially redundant [239]. In this draft of the document it was suggested that the claimant be pooled with the three DDs for selection for redundancy. A list of differentiating factors between the DCM role and the DD roles was set out, which comprised the qualifications required for the two roles and the core work engaged in for each role. It was proposed that one redundancy should be made and that selection should be made on a "last in first out" criterion.

25. I accepted Mr Absalom's evidence that this draft of the Workforce Review document was a "starting point" and that the question of whether the DCM and DD roles should be placed together in a pool was a point of ongoing discussion at Board level and was a matter on which advice was taken. This was consistent with the documentary evidence. Later iterations of the Workforce Review document show that it was decided that the claimant should be placed in a pool of one [293] [402]. In these versions

it is suggested that a "last in first out" selection criterion would result in the same outcome as a pool of one.

26. These versions of the Workforce Review document reflect a decision taken at a Board meeting on 20 May 2020 [255A]. It appears that the change from a pool of four to a pool of one was not made on the document itself until 2 June 2020, the same day as the claimant's first consultation meeting in the redundancy process. However I am satisfied that the decision was taken prior to 2 June. If it had not been made until 2 June, the DDs would also have been put at risk of redundancy on or around that date. They were not put at risk of redundancy at all.

27. The reasoning in the later version of the Workforce Review document for reducing the pool from four to one is sparse, and in fact barely differs from what is contained in the first draft. This was because the point was not controversial amongst Board members.

28. The Board's decision was that the DD roles required a degree of mechanical and/or electrical works expertise which exceeded that required in the DCM role. DD post holders were required to have a mechanical and/or electrical qualification. The DD role involved a considerable volume of work in live critical environments. This sort of work was occasionally incidental to the DCM role, but was not required to the same extent or on the same scale as it was for the DD roles. Furthermore, the reduction in workload caused by the pandemic had specifically affected the fit-out division. For those reasons the respondent concluded that the DCM and DD roles were not interchangeable and should not be pooled for the redundancy selection exercise.

29. On 1 June 2020 the respondent sent the claimant and the other furloughed employees an email stating that it was reviewing the latest Government announcement on the extension of the Job Retention Scheme. The email stated that a meeting would be held with the claimant to discuss his individual situation. That meeting took place on 2 June 2020 and was attended by the claimant, Mr Edwins and Mr Absalom as well as Carol Pape of HR as note taker [306]. Mr Absalom informed the claimant that his role had been identified as potentially redundant, that this could result in the termination of his employment and that there would be a period of consultation. He was invited to a consultation meeting on 4 June 2020, at which he was entitled to be accompanied by a work colleague or a trade union representative. Mr Absalom told the claimant that he was to remain on furlough during the consultation period, which would be conducted according to the following timetable:

    29.1. start of consultation meeting 2pm on 4 June 2020;

    29.2. interim meeting 2pm on 11 June 2020;

    29.3. conclusion of consultation 2pm on 18 June 2020.

30. The claimant asked several questions, including whether there was a redundancy process or procedure in place. Ms Pape told him that the respondent was following the statutory procedure.

31. Mr Jackson sent the claimant a letter on 2 June 2020 containing some of the details which had been discussed in the meeting earlier that day [308].

32. The claimant attended the meeting on 4 June 2020 with Mr Edwins, Mr Absalom and Ms Pape. He was accompanied by his colleague Bechi Onuora. In addition to the notes taken by Ms Pape [309], the claimant took a covert voice recording of part of the meeting, on the basis of which he later amended the minutes [314]. A wide ranging discussion took place about the reasons for the potential redundancy situation. The claimant said that he was in the same salary band with the same tasks and activity as the DDs, and that the position he was in did not feel fair. Mr Absalom said that information would be provided to him about this from Ms Pape in advance of the next consultation meeting. The claimant asked whether the DDs had been placed at risk. Mr Absalom told him that the meeting was not to discuss anybody else's position. The claimant then asked Mr Absalom whether the DCM role was different to the DD roles. Mr Absalom's answer was "no but we're consulting about your position regardless of if it's a DCM title, a DD title… we're discussing your position, we're not discussing anybody else's position". In evidence, Mr Absalom's explanation for this statement was that the DD and DCM roles had the same KPIs etc and that in terms of the claimant's role within the business he was viewed as the same as the DDs. I accepted this evidence.

33. By letter dated 4 June 2020 Mr Jackson invited the claimant to the next consultation meeting on 11 June 2020 [322].

34. At some stage the respondent began to send to the claimant's dedicated furlough email address vacancy bulletins (for example [419] which shows an email sent to him during his notice period). Given the downturn there were no meaningful opportunities for alternative employment with the respondent's business. One vacancy arose for a Resident Maintenance Supervisor. It was not clear whether this particular role was brought to the claimant's attention. He said in evidence that he would not have been interested in this role in any event.

35. On 5 June 2020 the claimant emailed Ms Pape, Mr Absalom and Mr Edwins expressing concerns about the fairness of the redundancy process. In particular, he felt that the selection criteria should have been shared with him at the meeting on 4 June 2020 when he asked why he was being treated differently to the DDs.

36. In reply Mr Absalom and HR provided the claimant with a document explaining the rationale for placing him in a pool of one [325] [333]. This stated that his role was not sufficiently interchangeable with the DD roles to warrant a wider pool because the areas of technical discipline were

different. That is, the DD roles were concerned with mechanical and electrical work and the DCM role was concerned with fit-out work. The document went on to say that even if the roles had been interchangeable, the respondent would have been likely to use a "last in first out" selection criterion which would have resulted in the same outcome. The document asked the claimant to comment on the proposals for reallocating his tasks to other employees.

37. By letter dated 11 June 2020 the claimant responded to the document of 5 June 2020 and stated that he did not wish to attend any further redundancy consultation meetings [336]. In this letter the claimant said that he was shocked at the suggestion that his role was not the same as the DD roles, and set out a list of reasons why he regarded the roles as interchangeable and suitable for pooling. He said that he felt the decision to place him at risk of redundancy was predetermined and was made at the point at which he was placed on furlough. He said that he could not see what advantage there was in him participating further in the consultation process, in which he had lost faith.

38. Mr Absalom treated this letter as the representations that the claimant would have made if he had attended the consultation on 11 June 2020. He prepared a document responding in considerable detail to the points the claimant had made, which was sent to the claimant on 16 June 2020 [341]. This said that "the roles are too distinct in terms of responsibilities, skills and experience to enable the incumbent in one role to fill the other" and that the claimant did not "have the technical skills, qualifications, track record or experience to undertake one of the Divisional Director roles". He also provided the claimant with information on current vacancies (of which there were none) and a draft statutory redundancy pay calculation.

39. The claimant's final consultation meeting was held in his absence on 18 June 2020 [359], preceded by a preliminary meeting between Mr Absalom, Ms Pape and Mr Edwins [353]. At 10:43am that day the claimant sent another letter by email to Mr Absalom, setting out what he considered to be inaccuracies in Mr Absalom's letter of 16 June 2020 [356].

40. At the final consultation meeting Mr Absalom, Mr Edwins and Ms Pape reviewed the claimant's correspondence. They concluded that the claimant's role was redundant and that because there were no suitable alternative vacancies he would be dismissed with effect from 17 July 2020.

41. The claimant was notified of his dismissal for redundancy by letter dated 19 June 2020 from Ms Pape [367]. He was offered the right to appeal against the decision, but he did not do so.

42. The claimant's dismissal was announced to the business by email on 19 June 2020.

The law

43. By section 94 of the Employment Rights Act 1996 ("ERA") an employee has the right not to be unfairly dismissed.

44. In a claim for unfair dismissal, the employer must show the reason (or, if more than one, the principal reason) for the dismissal, and that it is a potentially fair reason (s.98(1) ERA). Potentially fair reasons include redundancy (s.98(2(c) ERA).

45. If the employer has shown that the dismissal was for a potentially fair reason, the Tribunal must determine whether the employer acted reasonably or unreasonably in treating that reason as sufficient reason to dismiss the employee. In determining this question the Tribunal must have regard to the circumstances of the case, including the size and administrative resources of the employer's undertaking and equity and the substantial merits of the case (s.98(4) ERA).

46. In conducting its enquiry under s.98(4) ERA the Tribunal should keep in mind that:

    46.1. the "band of reasonable responses" test applies to all aspects of the dismissal (*British Home Stores Ltd v Burchell* [1980] ICR 303; *Graham v Secretary of State for Work and Pensions (Jobcentre Plus)* [2012] IRLR 759 CA); and

    46.2. the question is not whether there was something else which the employer ought to have done, but whether what it did was reasonable (*Sainsbury's Supermarkets v Hitt* [2003] IRLR 23 CA).

47. Redundancy is defined in s.139(1) ERA, which provides (in relevant part) that an employee will be taken to have been dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that the requirements of the business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish.

48. Guidance as to the proper approach to redundancy dismissals was provided by the Employment Appeal Tribunal in *Williams v Compair Maxam* [1982] ICR 156 at 161 by Browne-Wilkinson J. The principles in this case are stated to apply to redundancy situations in which a union is involved, but can inform the assessment of other redundancy situations. The employer should:

    1. …seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

2. …consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

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

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

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

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

49. The approach set out in *Williams* presupposes that a pool of employees will be identified from which some will be selected. The traditional approach is that where a pool is used, it should include all those employees carrying out work of a particular kind but may be widened to include other employees whose jobs are similar to or interchangeable with those employees. This is not, however, an absolute requirement.

50. The principle that a Tribunal should not substitute its own view for that of the employer, and should consider instead whether a decision lay within the range of reasonable responses also applies to selection pools (*Green v A & I Fraser (Wholesale Fish Merchants) Ltd [*1985] IRLR 55).

51. An employer is not necessarily required to identify a pool at all, and may place the affected employee in a "pool of one". It is not necessarily unreasonable for an employer to limit the pool to people doing work of the kind that has diminished (*Green*). Furthermore the fact that employees perform similar tasks (or even have same title) does not automatically

mean that their roles are interchangeable (see, for example, *Lomond Motors v Clark* UKEATS/0019/09/BI where two accountants were not considered to be interchangeable because one did not have the requisite experience to cover the other's site).

52. In *Capita Hartshead Ltd v Byard* [2012] IRLR 814 the EAT gave guidance as follows:

the applicable principles where the issue in an unfair dismissal claim is whether an employer has selected a correct pool of candidates who are candidates for redundancy are that:

(a) It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted" (per Browne-Wilkinson J in Williams v Compair Maxam Limited *[1982] IRLR 83);*

(b) ...the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn (per Judge Reid QC in Hendy Banks City Print Limited v Fairbrother and Others *(UKEAT/0691/04/TM);*

(c) There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem (per Mummery J in Taymech v Ryan *EAT/663/94);*

(d) the Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has "genuinely applied" his mind to the issue of who should be in the pool for consideration for redundancy; and that

(e) even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it.

53. In *Samels v University of the Creative Arts* [2012] EWCA Civ 1152 the Court of Appeal upheld the Employment Tribunal's decision that it was permissible for the employer to place the employee into a pool of one. Mr Samels had been a grade 5 equipment technician, and was the only employee in that position. The CA agreed that the employer was not required to put the grade 4 equipment technician into a pool with Mr Samels to create a pool of two. Nor was the employer required to place Mr Samels into a pool with two store persons, although there was some overlap between their roles and Mr Samel's role. The post of store person

was not sufficiently similar in substance that it ought to have been included in the pool.

54. In *Wrexham Golf Co v Ingham* UKEAT/0190/12 (10 July 2012, unreported) the Employment Appeal Tribunal found that the Employment Tribunal had failed to ask itself the correct questions in concluding that the employer had acted unfairly in placing the employee in a pool of one. Mr Ingham had been a steward. The Tribunal felt that a wider pool should have been used, including the other bar staff. In overturning this, the EAT said "*[t]here will be cases where it is reasonable to focus upon a single employee without developing a pool or even considering the development of a pool*".

55. A fair consultation involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted and to express its views on those subjects with the consultor thereafter considering those views properly and genuinely (per Glidewell LJ in *R v British Coal Corpn Ex p Price* [1994] IRLR 72 at 75).

The parties' submissions

56. Ms Danvers for the respondent submitted that:

    56.1. The claimant had accepted in evidence that redundancy was the reason for his dismissal. This was a reasonable concession in light of the evidence. There had been a downturn, particularly affecting the fit-out division. The respondent had obviously taken steps to avoid redundancy, such as furloughing staff and implementing pay cuts. The number of people involved in the redundancy programme suggested that it was not targeted at the claimant or a sham. The claimant had not put forward any other reason for his dismissal.

    56.2. As to warning, the claimant was invited to three consultation meetings at which he was entitled to bring a companion. He complained that not all the information was given to him at the first meeting, but this was provided the following day, in advance of the next meeting. He was told that at the next meeting he could ask questions. He did not attend the next meeting and did not want to participate further. The points he made in writing were considered and further detailed information was provided to him. He had a fair and proper opportunity to understand fully the situation and express a view, and his representations were properly and genuinely considered.

    56.3. The key questions in the case were whether the claimant should have been pooled with the DDs and whether he was fairly selected for redundancy. The Tribunal should ask whether the respondent

considered the question and whether the choice it made was within the range of reasonable responses.

56.4. The question of the claimant's job title was a red herring. The claimant could have been promoted to DD at some point, and in any event there was a large amount of overlap in the roles and responsibilities between him and the DDs. The key difference was that in the eyes of the respondent he did not have the qualifications and expertise required to lead mechanical and electrical focussed projects. The claimant did oversee some projects involving mechanical and electrical work, but this was of an entirely different magnitude and scale to the types of projects the DDs worked on. It was clear that the industry makes the distinction between fit-out and engineering. Throughout the entire process the claimant did not at any point say that he had the expertise or qualifications to do mechanical and electrical work or indeed that there was absolutely no difference between the DDs' work and his.

56.5. Mr Absalom came to a reasonable conclusion based on his knowledge of the industry that the function and projects in the DDs' roles required a track record in mechanical and electrical work and the claimant simply did not have those qualifications or the expertise and track record required.

56.6. HR had initially raised the possibility of pooling, so it was considered. The respondent genuinely turned its mind to the question. As industry experts they reached a reasonable conclusion. The Tribunal should be careful not to fall into the trap of substituting its view for that of the respondent.

56.7. The fact that the Workforce Review document was amended on the day of the claimant's at risk meeting did not take the matter any further. There was not much to be gained from the timing of when the decision to place the claimant in a pool of one was added to a document.

56.8. As to alternative employment, the claimant was on the bulletin list for alternative vacancies. He did not suggest that he wanted the vacancy for a Resident Maintenance Supervisor. There were no others.

56.9. As to Polkey, the respondent was clear that it would have used "last in first out" if it had applied a pool. The claimant would therefore have been made redundant even if he had been pooled. Similarly, if qualifications or experience had been used as criteria for selection he would have been made redundant on that basis.

57. The claimant's position was that:

57.1. He had joined the respondent to lead the fit-out operation and during three years had done everything asked of him. Soon after he started it became apparent that there was little fit-out opportunity so he used his experience to deliver a wide range of projects outside fit-out.

57.2. There had not been a fair procedure. There should have been a pool. There is a wide measure of flexibility for employers but if the roles were interchangeable the respondent's approach cannot have been reasonable. He did not believe that they genuinely applied their minds to the question of pooling. There was little reference in the documentation to consideration being given to this. The respondent had refused to answer questions about the pool during the consultation meeting, and this further added to the suggestion that consideration was only given to it at a later date.

57.3. Suggesting the role was unique allowed the respondent to achieve its aim of dismissing him.

57.4. It was unusual that HR would make a mistake in the first version of the Workforce Review document, especially when the job titles were different. The respondent had not given a great deal of thought to the matter.

57.5. He had not been put in a pool of one on 20 May 2020. The metadata for the Workforce Review document showed that the change was only made on 2 June 2020, one hour after his at risk meeting.

57.6. The DCM title was not conclusive. His day to day functions were measured on role-specific KPIs issued to him and the DDs. There were many similarities. They often worked together on projects overseen by one of the four of them. His role as a senior projects leader was to manage a team of experts. Every project had the same core objectives.

57.7. It would not be have been overly onerous or disruptive for the respondent to identify a wider pool.

57.8. He thought it was likely that the respondent was biased towards longer serving staff and for that reason made him redundant. It was not reasonable to place him in a pool of one when there were four of them that were interchangeable.

Conclusions

Can the Respondent show (on the balance of probabilities) that the reason or principal reason for the dismissal was a potentially fair reason (s.98(2))? The

Respondent's case is that the Claimant was redundant because the requirement for an employee to carry out work of the particular kind that the Claimant was doing had diminished or ceased.

58. The respondent has discharged its burden of showing that the genuine reason for the claimant's dismissal was redundancy.

59. Although the claimant suggested that his dismissal was predetermined, the only ulterior purpose he suggested on the part of the respondent was that it might have been biased towards longer serving staff. This was no more than speculation.

60. It was clear from the evidence that the claimant's redundancy was part of a wider programme of redundancies which the respondent considered to be unavoidable as a result of the downturn in work caused by the national lockdown. The claimant's division in particular had almost no work by April 2020, and he was therefore placed on furlough at that stage. The decision to place him on furlough was genuine and was not motivated by any desire on the respondent's part to remove him from the business. In fact, the respondent had wished to see the claimant progress in the company in due course.

61. I am entirely satisfied that by May 2020 the respondent reasonably considered that the requirements of its business for employees to carry out the work that the claimant did had diminished and were expected to diminish further in future, to the extent that his role was no longer required. That was the reason for his dismissal in July 2020.

Was the Claimant fairly warned and consulted about the redundancy?

62. The claimant was given adequate warning of potential redundancy in the meeting and letter of 2 June 2020. He was given a timetable comprising three consultation meetings over a period of two weeks. This was a short period, but not so short that it fell outside the band of reasonable responses. It contained three meetings which would all be attended by senior management and HR. Meaningful consultation was possible in that timeframe.

63. The claimant complained that at the consultation meeting on 4 June 2020 Mr Absalom should have been in a position to explain to him why he had been placed in a pool of one. His case was that this meant that the consultation was not adequate. I find that the respondent acted reasonably in its approach to this issue. The 4 June 2020 meeting was an initial consultation meeting at which the broad outlines of the consultation could be discussed. The following meetings on 11 and 18 June 2020 could be used for more detailed discussion. In fact, the respondent provided a written explanation to the claimant as to why he had been placed in a pool of one the following day, 5 June 2020. Mr Absalom

provided further detail on 16 June 2020 in response to the claimant's letter of 11 June 2020.

64. The claimant chose not to attend the second and third consultation meetings. There was no proper basis for him to decide not to do so. I accept that the claimant felt aggrieved that he had been warned of potential redundancy. However the respondent had not acted unfairly or in a way which would justify the claimant opting out of the process.

65. Furthermore the claimant did not engage meaningfully with the consultation beyond suggesting that he should have been pooled with the DDs. In particular he did not respond to the questions put to him by the respondent about the proposals to reallocate his work. Had he done so he might have been able to suggest a way to avoid redundancy. That is the purpose of redundancy consultation.

66. The respondent acted reasonably in deciding to proceed with the consultation by addressing in detail the points that the claimant had made in writing in his letters of 11 and 18 June 2020. In effect, the consultation took place in writing rather than face to face. The respondent responded to all the questions put to it by the claimant and sought to engage him in constructive dialogue, which he largely rebuffed.

67. This was a relatively large, well-resourced employer with a dedicated HR function. I find that it conducted a careful, well-planned and well-executed redundancy process as is to be expected of an employer of that size and with those administrative resources.

Was the Claimant fairly selected, in particular, did the Respondent consider the question of pool and was the Respondent's choice of pool within the range of reasonable responses available to an employer in the circumstances?

68. I find that the respondent addressed its mind adequately to the question of whether to pool the claimant with the DDs and acted reasonably in deciding not to do so.

69. The claimant was, to a limited extent, justified in having something of an inaccurate understanding of his position in relation to the DDs. The paperwork produced during the 2019 restructure and the manner in which the day to day work was carried out after that restructure was confusing. He was at the same level in the business as the DDs and attended the same meetings as them. They all worked together frequently and their projects had a number of similarities. The paperwork did not distinguish between them.

70. However, the claimant did understand that he remained a DCM and was not a DD, that he did not have the same mechanical and electrical qualifications as the DDs and that his work was focused on fit-outs rather than on mechanical and electrical projects of the sort done in the other

three project divisions. In fact, the question of the claimant's job title was not relevant to the question of whether his role was interchangeable with those of Mr Mulvaney, Mr Hill and Mr Filmalter. Even if he had been promoted to DD, he would have remained focussed on fit-out work rather than mechanical and electrical work.

71. Insofar as the claimant held the view that in reality there was no difference between the sort of work that he did and the sort of work done in the other three teams, this was not a reasonable view. Whilst his role encompassed some mechanical and electrical works, these were incidental to the main fit-out focus of the role. Similarly, the DDs did some work which could be described as fit-out work, but that was mainly incidental to their central focus. Where the claimant supervised occasional stand-alone mechanical and electrical projects, these were not on the same scale as those routinely carried out by the other three teams. He did not work on large infrastructure projects in live critical environments in the same way that the DDs did.

72. The respondent's Board addressed its mind to the question of pooling at an early stage in its workforce review in the lead-up to putting the claimant at risk of redundancy. The HR team initially suggested that a pool of four might be appropriate. I find that it did so because there was a certain crossover between the roles, not least in that they were at the same level of seniority in the business, with the same line management, job descriptions and KPIs. The difference between the technical skills and abilities required in each role was not obvious from the employment paperwork. Once the Board considered the matter, it concluded at its meeting on 20 May 2020 that the roles were not interchangeable and could not be pooled together. The consideration given to this could have been better evidenced in writing at an early stage, but the lack of contemporaneous notetaking does not mean that the decision was unreasonable. I find that it was genuinely and properly considered. Thereafter the rationale was set out in writing for the claimant during the consultation period in Mr Absalom's letters of 11 and 16 June 2020.

73. I am mindful that the question of how any pool should be constructed is primarily a matter for the employer and it is not for the Tribunal to substitute its view of what the correct pool should be for that of the employer. I am satisfied that the decision to place the claimant in a pool of one was well within the band of responses open to a reasonable employer in the circumstances of this case. Those circumstances include the fact that it was reasonable for the respondent to regard the roles as not interchangeable and the fact that the claimant's division was affected by the downturn in work whilst the work of the other three project divisions was not so affected.

Did the Respondent take reasonable steps to seek alternative employment?

74. The claimant did not pursue an argument that he should have been offered alternative employment. I find that the respondent acted reasonably in sending the claimant its vacancy bulletins during the consultation period and during the claimant's notice period.

Would the Claimant have been dismissed fairly in any event? If so, when?

75. Given my findings above it is not strictly necessary for me to address this question. However I make clear that even if my conclusion above as to selection for redundancy is wrong, it is evident to me that the claimant would have been made redundant even if he had been placed in a pool of four. The documentation shows that the respondent was very likely to have applied a "last in first out" criterion if it had proceeded with a pool of four, on which basis the claimant would have been made redundant.

76. I am grateful to the parties for the helpful manner in which they conducted the hearing, and in particular to the claimant who approached the task of representing himself in a courteous, professional and thorough way.

Employment Judge Reindorf

Date 21 April 2021

JUDGMENT SENT TO THE PARTIES ON

26/04/2021

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J Moossavi

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