Case Number: 2304260.2019

EMPLOYMENT TRIBUNALS

Claimant: Mr P Cullen

Respondent: MacMillan Cancer Support

Heard at: Croydon (by cloud video platform) **On:** 16 and 17 February 2021

Before: Employment Judge Nash

Appearances
For the claimant: In person
For the respondent: Mr N Caiden of counsel

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

CORRECTED REASONS

1. The Claimant presented his claim to the tribunal on 3 October 2019.

2. At this hearing, he gave evidence on his own behalf. From the Respondent, the Tribunal heard from Ms K Jones, its Head of Media and Public Relations, the Claimant's line-manager and the person who made the decision to dismiss, and Ms R Leonard, its Head of Volunteering Development, who heard the appeal.

3. The Tribunal had sight of an agreed Tribunal bundle, a supplemental bundle of documents from the Claimant and with an email from the Respondent's solicitors to the Claimant dated 15 February 2021 at 13:39 concerning a disclosure search. References in this Judgment are to the agreed bundle unless otherwise stated.

The Claims

4. The only claim was for unfair dismissal under Section 98(4) Employment Rights Act 1996.

The Issues

5. Together with the parties, the Tribunal identified the issues as follows:-

   i. What was the reason for dismissal? The Respondent relied on redundancy or in the alternative on some other substantial reason, being a business re-organisation.

   ii. In respect of redundancy:-

      a. was there was a genuine redundancy situation and was it the reason for dismissal?

      b. Was there a fair procedure? Was there a fair pool, fair selection criteria, fair consultation and warning, and fair consideration of alternative work? To put this more generally, did the employer's actions at each step of the redundancy process fall within a range of reasonable responses.

      c. Should there be a so-called Polkey deduction? That is if the employer's procedure fell outside a range of reasonable procedures, if the employer had followed a fair procedure, would and could it have dismissed the Claimant fairly in any event?

      d. To what, if any, extent did the Claimant contribute to any unfair dismissal?

   iii. In respect of some other substantial reason:-

      a. Was there a business re-organisation?

      b. Was any such business re-organisation the reason for the Claimant's dismissal?

      c. Was there a fair procedure?

      d. Should there be a Polkey deduction on the same basis as above?

      e. Sanction, or to put it another say, did the decision to dismiss the Claimant in the circumstances come within a range of reasonable responses available to an employer,

      f. To what, if any, extent did the Claimant contribute to any unfair dismissal?

The Facts

6. The Tribunal found the following facts.

7. The Respondent is a national high-profile cancer charity. At the material time it employed about 1,905 staff, of whom about 677 worked at the Claimant's place of work, its headquarters.

8. The Claimant started work on 5 August 2013 as Celebrity and VIP Manager a Level 4 job. At the time of the dismissal, his team came under the Head of Media and Public Relations together with three other teams - Media and PR, Social Media, and Case Studies. Social Media was a recent addition. According to Ms Jones, "the Media and PR team was responsible for, among other things: publicity driving awareness of cancer, encouraging use of our support services, and enhancing fundraising and donations in support of the charity".

9. For a number of years prior to the events material to this claim, the Respondent had been considering and implementing a re-organisation. It had consulted with Price Waterhouse Cooper two years before the events of this claim to produce a best practice structure, an operating model and a conceptual plan that would affect all teams. In effect, there were going to be changes across the organisation, affecting most if not all teams. Ms Leonard gave evidence that there were thirteen cost-cutting programmes and re-structures across the respondent. She gave evidence that one team was removed from the structure entirely, with staff members being reallocated or roles made redundant. The proposals were taking place at different times across the organisation. Her own team was about to enter the restructuring review process at the date of the hearing.

10. In late 2018 the Respondent started to turn its mind to changes and re-structuring in the Claimant's part of the organisation. The tribunal had sight of an email in early October from Ms Guise - the Claimant's former line-manager - who said that there was some change on-going in the Celebrity and Case Studies departments. Ms Jones, who was the only witness before the Tribunal, said that she did not understand this reference to the Celebrity department but that it was not related to wider organisational changes.

11. In any event by late 2018/early 2019 Ms Jones had put together a final restructuring proposal for her part of the organisation. The overall change was to combine previously separate teams. There was to be less of what the respondent termed "silo working", that is there would be more mixing of teams and staff would work more across the organisation. There was a plan to reduce headcount but, in the event, this was secured by not replacing staff. Thus, the reorganisation would not involve any further reduction in headcount.

12. Part of this proposal was to merge the Celebrity and VIP team with the Case Studies Team, under a new senior manager. Under this restructure the claimant's job would cease to exist. According to Ms Jones, after this restructure some of the Claimant's current duties would be performed by junior staff and some would be transferred to the new senior manager post. The tribunal accepted Ms Jones's evidence as to how the claimant's current duties would be shared out because she was the person in charge of the restructure and her evidence on this point was plausible and consistent.

13. Ms Jones prepared a role profile for the new senior manager job which was to be a Level 4 job. The title was Senior Manager Stories and Voices ("the new job").

14. The Respondent considered whether it should map over the Claimant's existing job to the new job. According to the Respondent, its practice was that if two jobs were mapped as significantly similar, the existing job holder would be automatically offered the new job. However, if the new job were not sufficiently similar, the existing job holder would have to re-apply for the new job along with anyone else, internal or external. The crucial issue was therefore whether the claimant's current job would be mapped to the new job.

15. The Tribunal had sight of various respondent emails relating to the restructuring and the claimant's job. However, the tribunal heard little if any evidence from the parties to these emails.

16. The tribunal saw at page 116 an email dated 13 March 2019 to the Head of Change from the HR person responsible for this matter. This stated that that there was one person at risk from redundancy (which it was agreed was the Claimant), whilst other colleagues' current jobs were mapped to similar jobs.

17. The email further referred to the Claimant, and a colleague of his, as having long service, and the Respondent wanting to be fair and treat them with dignity after, 'their time with us'. The email also stated that the respondent did not want to be 'rushing into performance management after years of service and delivering an okay job would not be right and would also leave us at risk'. The email referred to the Claimant and a colleague spending time with influential external people. It expressed concern that such external people might go to the respondent's senior team and cause difficulties.

18. Accordingly, there was evidence that at this stage Human Resources was considering it possible, if not more than that, that the Claimant's employment would come to an end and that there was some thinking around performance management.

19. The difficulty for the Tribunal in determining what was in the respondent's mind at this time was that it did not hear from either the writer or recipient of this email. It only heard from Ms Jones who was running the re-structure from what might be described as the 'technical end' of the restructure; she came up with the ideas and she implemented them. The Tribunal did not accept her explanation that email's reference to performance management was related to putting the Claimant into a new role and finding that he was not able to perform and needing to go down a performance management route. This did seem likely to the Tribunal due to the timeframe. There would be no need to rush into performance management if the Claimant were in the new role. In the view of the tribunal, the email was more likely to be referring to performance management as an alternative to redundancy. This was more likely to be time-critical in light of the forthcoming restructure.

20. The Tribunal saw a 14 March email which stated that the mapping might put a Level 4 employee (which was agreed to be the Claimant) at risk. The email

referred to a demotion to a talent role and the Claimant, it later transpired, was offered a demotion to a talent role. The email stated in terms that the Claimant's leaving the respondent would be a reputational risk to the Respondent and the Claimant's leaving was added to the Respondent's risk register.

21. Ms Jones's evidence was that these emails showed the respondent carrying out risk management. The respondent was working out the potential risks to the organisation if the re-organisation went through as planned.

22. The respondent provided no specific date for when the job mapping was done. Ms Jones said that it happened soon after the 14 March which fitted with the other dates and so the Tribunal accepted this as the likely date.

23. The Respondents operated its job mapping as follows. Essentially, for one job to be mapped to another, there needed to be at least a 60% match. Anything less than a 60% match was automatically a no-match. Within the job, the Respondent graded the responsibilities from A to E, from A – a complete match, to E - no match at all.

24. The Tribunal had sight of the mapping document at page 710. It was a little confusing because, in effect, the jobs were the wrong way around in that the old job was set out as if it were the new job and vice versa. Nevertheless, the new job was described as having responsibility for, broadly speaking, story-telling, with celebrities, but also what might be described as ordinary people who had been through cancer. The job holder would work with other managers to deliver a media strategy, management of relationships with celebrities, case studies, experts and so on. The old job in contrast led with relationships with celebrities and strategy with celebrities.

25. In the view of the Tribunal, some scores in the mapping exercise were difficult to understand. For instance, when comparing the purposes of the two jobs, the respondent scored at grade E, the lowest score, meaning that there was no overlap. However, based on the job description, this was not accurate. There was some overlap between the old job and the new job on this measure. For instance, both would be responsible for celebrities. In the view of the Tribunal, this could have been graded as C, that is some important difference.

26. Nevertheless, other scores in the mapping exercise did appear, on the evidence before the tribunal, to reflect accurately the differences between the two jobs. The new job included some elements which were not present in the old job. For instance, the new job involved not only work with celebrities but recruiting and managing diverse personal stories. The old job involved building and managing relationships between the Celebrity Team and other departments. The new job involved understanding the department's need for stories, which might well include celebrities. The old job involved enabling delegation of local celebrity approaches whereas the new job involved enabling teams to recruit and manage their own stories ensuring quality control and data control, and rigorous budget management.

27. Further, a number of duties did not appear in the new job although they were part of the Claimant's job, for instance developing innovative celebrity opportunities for the Respondent or providing consultancy advice across the Respondent for the fitness and relevance of celebrities and VIPs for campaigning events. The new job also had much more emphasis on building relationships across different parts of the Respondent's operations.

28. The mapping exercise also considered the person specification for the new job. The new job needed a person to develop and manage a range of spokespeople and third-party voices and stories, to manage effectively across a variety of stakeholders including talent and supporters, and to build relationships with senior employees both internally and externally.

29. The result of the job matching exercise was that the new job was not sufficiently similar to the claimant's current job. Accordingly, he was not automatically offered the new job and because his current job was disappearing, was at risk of redundancy.

30. On 5 April Ms Jones emailed her line manager, Ms Guise, about the re-organisation to say that she would brief the Claimant and his colleague who was also at risk. She stated that the Claimant and his colleague had relations with the CEO and the senior management team and, 'have been known to escalate things'. The email went on to say that it was therefore important to brief the CEO and the management team in advance. The Claimant agreed that he was not afraid to speak to senior management, if necessary, over the heads of his immediate managers.

31. On 1 May Ms Guise emailed the CEO stating that, 'unfortunately, the proposal puts one person at risk (the Claimant) as a result. This is always a very difficult situation and is unavoidable if we want to build the strategic and ambitious approach'.

32. Ms Jones had emailed all staff in the teams affected by the restructuring, including the Claimant, to invite them to a meeting on 3 May. However, Ms Jones had an informal meeting with the Claimant on 2 May. She told him that his post was at risk of redundancy and the Claimant asked Ms Jones to be honest about his chances in the new job. Ms Jones said that she had an alternative idea, a Level 5 job, which was at a lower level that the claimant's current job.

33. In cross-examination, the Claimant agreed that, in effect, everything was on the table at this meeting. The Tribunal also had sight of a script to which Ms Jones was working during these consultation meetings and during which Ms Jones had said that the Claimant could consider the Level 5 job, but there was no reference to the new job at Level 4.

34. On 3 May 2019 the first individual consultation meeting between Ms Jones and the Claimant took place. It was confirmed to the claimant that the new job had not been matched to his current job and that the respondent had identified the Level 5 job - Talent Relationship Manager. The claimant was told that there were two jobs available following the reorganisation which

would form part of the Claimant's current team. However, there were two other members of staff in the frame so the claimant realised that in effect three staff including himself would have to compete for two jobs. The Level 5 job was a significant salary reduction for the claimant, from £50,000 to £36-39,000 per year. The Claimant was offered three-month salary protection.

35. The Claimant said immediately that he was extremely uncomfortable at competing against his reports for this job. He felt that he would contribute to at least one being redundant if he won the Level 5 job.

36. On 7 May 2019 Ms Jones wrote to the Claimant confirming that his role was at risk of redundancy. On 17 May there was a second individual consultation meeting between the Claimant and Ms Jones. At this meeting, the Claimant confirmed that he did not want the Level 5 job and he asked why he was not matched into the new job. Ms Jones said it was not a performance issue and HR were responsible for the mapping.

37. On 24 May, (page 350), there was a third individual consultation meeting which discussed the job mapping. Ms Jones said that she was satisfied that the claimant's current job and the new job did not match. She had written the profile for the new job and had highlighted the difference between the jobs. She told the Claimant that he could apply for the new job and the Claimant said that he did not wish to do so. Ms Jones said that he could challenge the mapping.

38. On 7 June, the Claimant emailed Ms Jones saying that he disagreed with the job mapping and asking for his scores. This in effect was a request for the job mapping document completed by HR (at page 710). Ms Jones forwarded this to HR.

39. On 11 June there was a fourth individual consultation meeting. The Claimant was at a disadvantage in setting out his objections to the mapping score because he had not yet seen the mapping or any guide to the respondent's thinking on the comparison. Ms Jones, and a representative from HR who was also at the meeting, said why they believed the two roles were not matched. Ms Jones, on this occasion, provided considerable detail and, in fact, more than appeared on page 710, although the Claimant could not have known that at the time.

40. The Claimant was dissatisfied with the Respondent's decision on mapping and on the 12 June emailed the Respondent with his own comparison between the two job profiles which resulted in a match. Ms Jones replied on 21 June with a very detailed table (at page 413) setting out the areas of comparison in over 30 different areas in the job description and also in the person specification. Ms Jones spoke to HR who confirmed that the Respondent would not release the mapping document at page 710 to the claimant.

41. The consultation on the redundancy had closed on 15 June. There was then a second group consultation meeting on 24 June which the Claimant did not attend as he was on annual leave.

42. The Respondent then started recruitment for the new Level 4 job. It was advertised internally and externally. The claimant did not apply.

43. The Claimant had his final individual consultation meeting on 4 July 2019 (page 496). He was told that no suitable alternative work had been identified and he was accordingly on notice of redundancy. The Claimant raised that he had not been able to challenge the job mapping. Both the claimant and respondent agreed that there was no expectation that the Respondent would get back to him about the mapping.

44. The redundancy decision was confirmed on 5 July in writing, and the respondent offered the claimant an appeal.

45. On 10 July, the Claimant appealed (page 524). He said in his appeal that the new job was very much part of the old job. It had just been expanded and given a new job title. He also stated that the dismissal was pre-determined.

46. The Claimant was given garden-leave from 5 August 2019 until his effective date of termination.

47. Ms Leonard was tasked with the claimant's appeal. She had not previously been involved in this matter and was senior to Ms Jones. She wrote to the Claimant on 22 July inviting him to the appeal.

48. The appeal meeting took place on 26 July. The Claimant said that the crux of his appeal was that he had not been allowed to effectively challenge the mapping because he was not given the mapping rationale or information until too late in the process. According to the minutes, the claimant said that he agreed that the person specification did not match. The Tribunal found that the Claimant had indeed said this because the Claimant provided amendments to the minutes, but he did not amend this point.

49. After the meeting Ms Leonard agreed to consider all of the documents. Ms Leonard wrote to the Claimant on 5 August 2019 saying that she had upheld the decision to dismiss and did not consider that the two jobs mapped to each other (page 620).

50. The Claimant's effective date of termination was 29 August 2019.

51. The Respondent went through a recruitment process for the new job and there was a successful internal candidate who was appointed on 20 September 2019. This person remained in post at the date of the tribunal hearing.

The Applicable Law

52. The applicable law is found at Sections 98(4) and 139 of the Employment Rights Act 1996 as follows:-

> **98 General.**
> (1)In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a)the reason (or, if more than one, the principal reason) for the dismissal, and
(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2)A reason falls within this subsection if it—
…
(c)is that the employee was redundant, …

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b)shall be determined in accordance with equity and the substantial merits of the case.

139 Redundancy.

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

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

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

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

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

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

(ii)for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

Submissions

53. The Tribunal had sight of a skeleton argument from the respondent, that was provided to the Claimant. The Tribunal also heard brief oral submissions from both parties.

Applying the Law to the Facts

54. The first issue was whether or not there was a genuine redundancy situation as set out in Section 139.

55. The Respondent relied on the case of *Kingwell and ors v Elizabeth Bradely Designs* EAT/0661/02, a decision of the then President of the Employment Appeal Tribunal which states (Tribunal emphasis added):-

> [3] It appears to us that there is a fundamental misunderstanding about the question of redundancy. Redundancy does not only arise where there is a poor financial situation at the employers, although, as it happens, there was such in this case. **It does not only arise where there is a diminution of work in the hands of an employer**, although, as it happens, again, there was in this case. **It can occur where there is a successful employer with plenty of work, but who, perfectly sensibly as far as commerce and economics is concerned, decides to reorganise his business because he concludes that he is overstaffed**. **Thus, even with the same amount of work and the same amount of income, the decision is taken that lesser number of employees are required to perform the same functions. That too is a redundancy situation.**
> …

> [9] It is plain from that case and from Safeway Stores Plc v Burrell and Murray and Foyle Meats Ltd that **it is not an automatic consequence of there being a business reorganisation that there is a redundancy**; nor is there a need for a business reorganisation in order that there should be a redundancy situation. The two are entirely self-standing concepts. But **if a business reorganisation leads to a diminution in the requirement for employees carrying out the relevant work, then that business reorganisation leads to a redundancy situation and if not, not.**

56. In the view of the Tribunal, the final sentence was the crux of the issue. Was there a diminution in the requirement for employees carrying out the relevant work? The Tribunal did not accept the respondent's submission that there was a diminution in the amount of work requiring to be done. The difficulty for the respondent was that the claimant's work, on the Respondent's case, was still being done; it was simply divided up and allocated to different roles. According to Ms Jones, as a result of the restructure to the new Senior Manager Stories and Voices job, some of the duties that the claimant carried out would be transferred to the more junior roles in the Celebrity Team and other duties would be transferred to the Senior Manager in the new job. Therefore, the respondent did not need a manager at the claimant's level to focus solely on celebrities and VIPs, which took up the majority of his time. This was because this function was being carried out in another role.

57. The Respondent's case was not that headcount was going down. This was avoided by failing to replace staff who had left. In this reorganisation a new job was created, and a job was deleted. The tribunal accepted that having some duties carried out by more junior and, hence, more cheaper staff, may have led to cost savings, but overall headcount did not change.

58. Neither was the respondent's case that, for instance, it was concentrating less on celebrities and more on the general public in respect of stories and publicity. It was saying that, in effect, it was re-organising how it was carrying out its various functions. The only function lost was a manager in the celebrity department. It still needed a manager responsible for celebrities. This responsibility continued in a different job or jobs.

59. In the view of the Tribunal, accordingly, the statutory definition of redundancy under section 139 Employment Rights Act was not met and there was not a genuine redundancy situation.

60. However, in case the Tribunal fell into error, and for the avoidance of doubt, it decided to go on to consider what would have been the situation if the statutory definition of redundancy was made out. It decided to do so after it had considered the respondent's second potentially fair reason for dismissal, some other substantial reason.

61. The Tribunal thus went on to consider the Respondent's alternative reason for dismissal, some other substantial reason. The respondent relied on a business re-organisation. The Tribunal considered whether there was such a business re-organisation.

62. The case law tells us that establishing a business re-organisation is a relatively low hurdle for an employer to overcome. There must be genuine

and rational thinking behind a re-organisation. According to the Court of Appeal in *Hollister v National Farmers' Union 1979 ICR 542, CA*, there must be a sound good business reason. It is important to remember that the employer does not need to show a reason which the Tribunal considers sound but one which, according to *Scott and Co v Richardson EAT 0074/04*, 'management thinks on reasonable grounds is sound'. A tribunal may not substitute its view for that the of the employer. An employer needs to show that there are clear advantages to the re-organisation but it does not, according to *Kerry Foods Ltd v Lynch 2005 IRLR 680, EAT* have to show any particular quantum of improvement. According to *Catamaran Cruisers Ltd v Williams and ors 1994 IRLR 386, EAT*, a re-organisation should not be imposed for arbitrary reasons.

63. The Tribunal considered on these facts whether there was a genuine and rational reason for the employer's decision. The Tribunal bore in mind that it may not substitute its view. The question was, did the management on reasonable grounds think that there was a sound business reason? The Tribunal found that was, for the following reasons.

64. Re-organisation was a long-term project for the Respondent. The Respondent had evidence that it had decided to change the way in which it organised its organisation. In effect, it wanted to "pool" stories, whether they were from celebrities or members of the general public. The respondent wanted, as it put it, less silo working, that is less working within departments and more cross-departmental working.

65. This Tribunal, as the case law points out, is in no good position to judge if this was or was not a reasonable way of running the organisation. However, in the view of the Tribunal, this employer had sound reasons to make its re-organisation. It merged two teams, changed emphases and redistributed responsibilities for reasons it was able to explain, and this led to the removal of the Claimant's job.

66. The Tribunal considered the Claimant's case that to some extent this re-organisation was carried out in bad faith, that is the purpose, or one of the purposes, was to remove his old job. The Tribunal rejected this argument for the following reasons.

67. There were organisation-wide changes going on. The loss of the claimant's post was part of a re-organisation of his department. The respondent had previously carried out re-organisations of other departments and had gone on to carry out re-organisations in further departments. The tribunal accepted that this did not necessarily mean that an employer might not seek to take advantage of a wide-ranging reorganisation to remove a particular employee. However, Ms Jones was a relatively recently appointed manager who had been given an open brief to consider re-organisation. She considered a significant re-organisation of PR and media departments which she managed. Teams were merged and re-organised and priorities were changed.

68. Further, the Tribunal was unable to identify a good reason why there should be any such motivation on the respondent's part. The clearest explanation came in the Claimant's submission that his colleague had wanted to be upgraded to Level 4, and the Claimant had supported her in this; the purpose of the re-organisation to some extent was to frustrate this. However, the Tribunal heard no evidence on this and there was no explanation as to, even if this were true, this would cause such a significant re-organisation including the merging of teams and a change in cross-department working.

69. The claimant also relied on the negative references to him and his colleagues in the respondent's discussions at an early stage. However, these were predominantly predicated on what would happen if he left. In the view of the Tribunal, these comments were the respondent risk-managing departures of staff. The claimant's role, working with celebrities, was, the tribunal accepted, likely to involve people who could be high profile and therefore the risk was inevitably greater in his team than in some other teams. These comments were made once the reorganisation had resulted in the claimant's job disappearing.

70. The Tribunal accordingly found that the Respondent had discharged the burden on it of showing that there was a business re-organisation and therefore some other substantial reason for the dismissal.

71. As the respondent had shown a potentially fair reason for dismissal, the Tribunal therefore went on to consider reasonableness. According to the Employment Appeal Tribunal in *St John of God (Care Services) Ltd v Brooks and ors 1992 ICR 715*, if there is a sound business re-organisation, the reasonableness of the employer's conduct must be judged in that context.

72. The first question for the Tribunal was whether or not there was a match between the Claimant's old job and new job. The Tribunal found that there was no such match for the following reasons.

73. In the view of the Tribunal, there was a real overlap between the two jobs. However, there were also significant differences, for instance the new job had more emphasis on relationships with senior managers. Although the Claimant did have a number of relevant skills and experience for the new job, it was not a 60%+ match. The tribunal had found that some of the mapping for the new job was incorrect. However, this was one example out of a lengthy list. Further, a Tribunal must be wary of re-embarking on a re-mapping exercise. Although HR did the mapping exercise, on the Respondent's case, on the papers, the respondent's HR was in a considerably better position than the tribunal to judge the elements of both jobs.

74. Looking at the differences between the old job and new job, the Tribunal found that it was a decision which came within a range of reasonable decisions that the jobs did not map over. Stepping back, the Tribunal did not think that this was a surprising conclusion because the emphasis of the two jobs were different.

75. The Tribunal, for the avoidance of doubt, could not substitute its view on whether a 40% match was a suitable cut-off. However, in any event, the Tribunal viewed this as a reasonable approach to take.

76. The Tribunal therefore went on to consider whether, in the circumstances, the respondent's procedure was fair. A Tribunal is subject to the so-called range of reasonable responses test. It must not substitute its view of what it constitutes a fair procedure for that of the employer. The question is, did the procedure adopted by the employer in these circumstances come within a range of procedures available to a reasonable employer in the circumstances.

77. The Claimant's case on procedural failings was primarily that he was not given the scoring, or the explanation or the thinking behind the scoring before the end of the consultation period.

78. The tribunal understood the claimant's case to be that in the July final consultation meeting he tried to raise the fact that he disagreed with the mapping. The Claimant was consistently clear that he regarded this as a central issue. Whilst he had the two job profiles to compare, this was not the same as having the mapping or the thinking behind the mapping. What the Claimant really needed was Ms Jones's table at page 413 (with which he did not raise specific disagreements) or page 710 which was less detailed. After the final meeting, there was an agreement that the Respondent would come back to him on other matters, it did not come back to him on the scoring and mapping.

79. The question for the Tribunal was whether this was enough to take the Respondent's procedure outside of the reasonable range. In the view of the Tribunal, the Respondent's approach in failing to provide the Claimant with either page 710 or Ms Jones' more detailed table at page 413, in good time, was ~~wise~~ **unwise**. This was illustrated by the Claimant having a clear and genuine sense of grievance that the Respondent was not being transparent. This was unlikely to give him faith in the respondent's process. No witness was able to explain the Respondent's reluctance to provide this information. Ms Jones said that she was sympathetic to the Claimant's wish to see the mapping or thinking behind it. The Tribunal accepted her evidence because it was evident that she put a considerable amount of time and effort into producing the document at page 413.

80. The Tribunal took into account that the Claimant had the advantage of an appeal. Ms Leonard engaged with the mapping and made an independent decision that the jobs were not mapped across, albeit one influenced by Ms Jones's review at page 413.

81. In the view of the Tribunal, this was sufficient to bring the procedure within a reasonable range available to the employer. Although the Tribunal was not convinced that the Respondent's failure to provide its thinking behind the mapping at an early and effective stage was wise, to find that this made the procedure unreasonable would be an impermissible substitution of the Tribunal's view for that of the employer.

82. However, for the avoidance of doubt, if the Tribunal has fallen into error on this and the failure to provide the mapping did render the procedure unfair, the Tribunal went on to consider what its decision would be. The Tribunal would have to carry out a Polkey exercise to consider if the respondent could and would have dismissed the claimant fairly, absent the procedural failure.

83. The tribunal would have found that any such failure would have made no difference for the following reasons. If the Claimant had been provided with either pages 413 or 710 at an early stage, he would, it is reasonably safe to assume, have made the same objections to the mapping as he did at the appeal and before the Tribunal. In the view of the Tribunal these objections would not have taken the Respondent's mapping decision outside of the reasonable range.

84. The Tribunal having considered procedure, went on to consider sanction or to put it another way, was dismissal a fair response to the circumstances? The Claimant claimed that the dismissal was pre-determined and hence unfair. The Tribunal had found that the dismissal was not pre-determined in that the purpose of the re-organisation was to exit the claimant from the organisation, or that the respondent took advantage of the reorganisation to exit the claimant.

85. Once the claimant's current job disappeared and he was not matched to the new job, in the absence of any suitable alternative work, he could in effect only avoid dismissal by obtaining one of the new jobs. The claimant quickly counted himself out of the two junior jobs in order to protect his reports. The Tribunal agreed with the Claimant that the Respondent had concluded at an early stage that the Claimant was unlikely to obtain the new senior job. This was shown by the emails, for instance, around 14 March and the fact that the Respondent specifically invited the Claimant to apply for a Level 5 job but did not invite him to apply for the Level 4 job, as shown by its own script. Further, there was no other suitable alternative work available.

86. The Tribunal accepted the Claimant's evidence that he had concluded that it was, in effect, a waste of time to apply for the new job. However, the tribunal could not know what would have happened if he had applied. Ms Jones was the recruitment lead for the new job. She knew the new job and had some knowledge of the claimant in his current job. She did not expect him to be appointed to the new job if he applied. But without the claimant's actually applying for the new job and being graded, perhaps short-listed and/or interviewed, and compared with other candidates, the tribunal has limited evidence to know what would have happened. However, in the view of the Tribunal, it is hard to find this dismissal outside of the reasonable range when a post disappeared in a re-organisation, the employer does not expect the employee to get the new job, or encourage him to apply, but the employee failed to apply.

87. In the view of the Tribunal, the dismissal therefore comes within a reasonable range.

88. Finally, the Tribunal went on to consider what would have been the situation had it had been satisfied that the facts met the statutory definition of redundancy. In the view of the Tribunal, the result would have been the same and for substantially the same reasons.

89. If the facts had met the statutory test for redundancy this would have been for substantially the same reasons that the tribunal had found that there was a business re-organisation. In respect of whether there is a genuine redundancy situation, the overarching rule for a Tribunal is that it may not consider whether a redundancy is wise, only if it is genuine.

90. A redundancy situation would have been the reason for dismissal for the same reasons as the business re-organisation was the reason for dismissal because the factual matrix would have been the same.

91. The Tribunal would therefore have gone on to consider a fair procedure. Again, the overriding test is whether the employer's procedures at each stage of the redundancy processes fall within the range of reasonable responses. To put it another way, and the same range of reasonableness test applies.

92. The leading case is *Williams v* Compair Maxam Ltd *[1982] ICR 156*. The Employment Appeal Tribunal held that an employer, to carry out a fair dismissal by reason of redundancy should seek to act in line with the following principles and should only be depart from them with good reason:

    a. To give as much warning as possible of the impending redundancies
    b. To consult
    c. The selection criteria should be objective and fair
    d. The selection criteria should be fairly applied
    e. The employer should consider suitable alternative employment.

93. In this case the Tribunal would not have accepted the parties' contention that the pool for redundancy selection was a pool of one – the claimant. On the facts, all three relevant jobs (the claimant's and his reports') were being removed. There was not a question of, for instance, one job remaining and the three employees being pooled together for redundancy purposes. On these facts, there was no pool, and no selection criteria.

94. Another way to look at this was that, instead of having selection criteria for redundancy, the employer carried out a mapping exercise from the old jobs to the new jobs. The tribunal would have found that this exercise came within a reasonable range for the same reasons set out above, under business re-organisation.

95. The tribunal would have found that the respondent's consultation and warning about dismissal came within the reasonable range for the same reason that it found the procedure came within the reasonable range for a business reorganisation. The claimant did not raise a specific case on failure to warn or consult, save for his case on pre-determination, which the tribunal did not accept.

96. In respect of some other suitable alternative work, the Tribunal would have found that the old job and the new job did not match for the same reasons as set out above under business reorganisation. There was no suggestion or evidence of any other suitable alternative work. The Claimant had access to the green room, that is the Respondent's internal vacancies on the Intranet, and he did not identify any job to which he could have applied.

97. Accordingly, if the Tribunal had fallen into error and the circumstances of this case did meet the statutory definition of redundancy, then the Tribunal would have come to the same conclusion as it did under some other substantial reason.

98. Accordingly, the Tribunal found that the Claimant was fairly dismissed, and the claim was dismissed.

Employment Judge Nash

Date: 23 June 2021