EMPLOYMENT TRIBUNALS

Claimant: Mr D Smith

Respondent: Seddon Construction Limited

HELD AT: Manchester (by CVP) **ON:** 12 July 2021
12 August 2021 (In Chambers)

BEFORE: Employment Judge Peck (sitting alone)

REPRESENTATION:
Claimant: Mr R Lassey (Counsel)
Respondent: Mr J Middleton (Solicitor)

JUDGMENT

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

REASONS

Claims and Issues

1. This was a final hearing conducted as a remote hearing by CVP on 12 July 2021. The parties did not object to the case being heard remotely, with both parties being professionally represented.

2. By a claim form dated 26 November 2020, the claimant brings a claim of unfair dismissal against the respondent, having been made redundant from his Design Manager role with effect from 31 July 2020. The primary basis upon which the claimant asserts that his dismissal was unfair is that he believes that he should not have been made redundant and should have been offered employment in the vacant role of Design Manager in the respondent's Property Services business unit (which I shall refer to for ease in this Judgment as the Design Manager, Property Services role although note that it was referred to only as "Design Manager" at the relevant time). In the claimant's claim he alleges that "*quite apart from having the same job title the Alternative Role [ie the Design Manager, Property Services role] involved the*

same or alternatively similar skill set to that which the Claimant had been deploying".

3. The claimant also challenges the selection process adopted for the Design Manager, Property Services role, alleging that his previous experience in the relevant department was not taken into consideration and that the respondent failed to make it known that he needed to demonstrate leadership skills, denying him the opportunity to do so.

4. At the outset of this hearing, it was confirmed that the claimant is not seeking to allege that redundancy was not the reason or principal reason for dismissal. On clarification of his claim, in addition to the pleaded basis upon which he challenges his dismissal, it was also raised on behalf of the claimant that he considers there to have been a failure to adequately consider alternatives to redundancy or ways in which redundancies could be mitigated, including continuing to furlough him.

5. By a response submitted on 7 January 2021, the respondent admits dismissal but denies that the dismissal of the claimant was unfair, whether substantively or procedurally. The respondent's position is that a fair and reasonable process was adopted and that the decision not to offer the claimant the Design Manager, Property Services role, following what the respondent says was a fair and reasonable selection process, was one that fell within the range of reasonable responses available to a reasonable employer.

6. If the claimant's unfair dismissal claim succeeds, he is seeking compensation only.

7. The respondent's position is that, if the claimant's claim succeeds, any compensation awarded should be reduced to reflect the prospect of the claimant being dismissed in any event (a Polkey deduction). The respondent clarified that (despite its pleaded position) this was not a case in which a reduction to reflect contributory conduct on the part of the claimant would be applicable.

8. The issues to be determined are therefore as follows:

    a. Applying the test of fairness in section 98(4) Employment Rights Act 1996 (**ERA**), did the respondent act reasonably in all the circumstances in treating redundancy as a sufficient reason to dismiss the claimant?

    b. Did the respondent adequately warn and consult the claimant?

    c. Did the respondent adopt a reasonable selection decision, including its approach to a selection pool and any scoring within the pool?

    d. Did the respondent take reasonable steps to find the claimant suitable alternative employment?

    e. Was dismissal within the range of reasonable responses?

f. If the claimant's dismissal was unfair, what remedy should be awarded to the claimant?

g. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason and if so, should the claimant's compensation be reduced and by how much?

Procedure, Documents and Evidence

9. The claimant was represented by Mr R Lassey (counsel) and the respondent was represented by Mr J Middleton (solicitor).

10. In terms of oral evidence, I heard from Mr M Crawford (Head of Technical and Design Management), Ms K Harris (Preconstruction Director) and Mr J Hook (Construction Director) for the respondent. I heard evidence from the claimant for himself. Both parties had prepared and exchanged witness statements in advance.

11. I was also provided with an agreed bundle of documents which ran to 260 pages.

12. I heard oral closing submissions from Mr Middleton and Mr Lassey. Mr Middleton also submitted brief written submissions, which referred to several authorities, including the Employment Appeal Tribunal decision in **Samsung Electronics (UK) Limited v Monte-D'cruz UKEAT /0039/11/DM**. Mr Lassey had not received a copy of these in advance and both parties were therefore afforded the opportunity to submit follow up written submissions after this hearing, with accompanying authorities, which I have also considered in reaching my decision.

Findings of Fact

13. In making my findings of fact, I have taken account of the witness statements, the oral evidence and the documents that I have been provided with. Where there was a conflict of evidence, I have determined it on the balance of probabilities.

<u>The respondent</u>

14. The respondent employs approximately 650 employees across Great Britain, of which the majority are based at the respondent's Bolton premises. There are several business units operating across the respondent's organisation including (but not limited to) North-West Construction, Midlands Construction, North-West Property Services, Midlands Property Services and Housing Partnerships.

<u>The claimant</u>

15. The claimant's employment with the respondent commenced on 30 November 2015.

16. He was employed in the role of Design Manager, working in the respondent's technical department and based in Bolton. The claimant worked in the North-West Construction business unit. He would be working on up to 3 projects at any time and his role covered the construction process from early-stage tender to delivery handover.

17. The claimant was employed to work 39 hours per week and received a gross annual salary of £57,000. In addition, the claimant received a car allowance.

18. There were no performance issues with the claimant and, as recorded in the personal evaluation plan completed in March 2020, he was regarded as being a "*solid member of the team*" who was "*adaptable / flexible*" and who was to be "*congratulated on his tutoring / mentoring of other members of the department*".

Redundancy proposal and collective consultations

19. By letter dated 11 May 2020, the claimant was invited to attend a (virtual) business announcement regarding proposed workforce changes within the respondent's organisation. At this time, the claimant was on furlough under the coronavirus job retention scheme (**CJRS**).

20. This announcement was made on 14 May 2020 and employees were informed that a potential redundancy situation had arisen, due to the covid-19 pandemic, a downturn in work and restructure. The claimant's Design Manager role was at risk, and it was proposed that 2 of the design managers (out of 6) in the Construction business unit would be made redundant. Based on Mr Crawford's evidence, I find that although there was uncertainty regarding what the respondent's organisation might look like post-pandemic, the respondent knew that it did not have a requirement for 6 Design Managers in the Construction business unit going forwards.

21. The claimant was informed that a collective consultation meeting would be taking place with employee representatives on 21 May 2020 and that selection criteria would be used to make provisional selections for redundancy.

22. The collective consultation process then took place, concluding on 4 June 2020, at which the claimant was represented by one of the at-risk design managers.

23. Following conclusion of collective consultation, the respondent scored the at-risk design managers against the selection criteria that had been shared and discussed during consultation.

Design Manager, Property Services

24. On 29 May 2020, the at-risk design managers were made aware that there was a vacancy in a different part of the respondent's organisation. This came

to light in response to a request during collective consultation that company vacancies be shared with the affected employees.

25. The claimant made enquiries about the Design Manager, Property Services role of Mr Carney (the respondent's Head of HR) and employees were informed that this role was being "ring-fenced" for the at-risk employees. I find that the claimant took this to mean that one of the at-risk design managers would be awarded this role to avoid redundancy. Based on the documentary evidence and the evidence of Mr Crawford, however, I find that what was meant by the respondent (and what, in fact, happened) was that the role would not be advertised externally until internal candidates had been given the opportunity to apply.

26. It was suggested to the at-risk employees that they might want to wait until they knew whether they had been provisionally selected for redundancy before applying for the vacant role. The claimant, however, applied for the role on 1 June 2020.

27. In his particulars of claim, the claimant asserts that "*quite apart from having the same job title the Alternative Role involved the same or alternatively similar skill set to that which the Claimant had been deploying*". The respondent's case is that the roles were different, with Ms Harris's evidence being that the Design Manager, Property Services role did "*substantially differ*" from the claimant's Design Manager role.

28. It is my finding that the roles were not substantially different. The job specifications were largely the same, as were the job titles. However, I also find that there were sufficient differences between the roles (including their function within the relevant business unit), to support a finding of fact that the roles were distinct and different, as follows.

    a. Firstly, there were several business units operating across the respondent's organisation and internally, these were viewed as being different businesses. When the claimant described having undertaken work for the Property Services unit, he described this as being a "*secondment*", for example and during the appeal hearing he referred to Construction and Property Services being "*two different companies*".

    b. Whilst the business units could all be described as operating within the construction sector (as was asserted by the claimant), the way in which they ran differed and an employee working in one business unit would not be familiar with the operations of another business unit. As per Ms Harris's evidence, although she had worked for the respondent for 5 years, she had limited knowledge of how the Construction business unit operated, as was also the case with Mr Hook, who worked within Housing Partnership.

    c. The uncontested evidence of Ms Harris was that the Design Manager, Property Services would deal with a higher volume of lower value projects than other design managers and, as per the evidence of Ms Harris, involved managing multiple projects at varying stages of the

design process. Whereas in the Construction unit, the design managers might deal with 8-10 projects a year, in the Property Services unit, responsibility could extend to approximately 57 projects a year, with 120 tenders. I accept the evidence of Ms Harris that this meant that the skills required and the demands of the role were different.

d. A Design Manager working in other parts of the organisation might have the support of specific individuals such as a Bid Manager. However, the Design Manager, Property Services role would involve responsibilities that were wider in scope and would have to cover tasks ordinarily carried out by such individuals.

e. The job descriptions, whilst largely the same, differed in that the Design Manager, Property Services job description included an addendum setting out additional role requirements and criteria. Although this was produced some time after the claimant was interviewed for the role, the contents of the addendum were not challenged at this hearing and I accept that the addendum accurately reflects the scope of the Design Manager, Property Services role.

f. The evidence of the claimant under cross examination, when asked by Mr Middleton if he accepted hat the Design Manager, Property Services role was different to the role from which he was made redundant, was "*I accept it is a different job, but dispute how different the role actually is*".

g. There was no challenge by the claimant (or any of the other at-risk design managers) at the relevant time to the fact that the Construction design managers were not pooled with other design managers across the respondent's group.

Claimant's provisional selection for redundancy

29. The selection matrix for the claimant was completed on 5 June 2020, with the claimant being awarded a score of 39 and being provisionally selected for redundancy, which was communicated to him by Mr Crawford on 19 June 2020.

Interview

30. In the meantime, on 11 June 2020, the claimant was interviewed for the Design Manager, Property Services role.

31. Prior to the interview, the claimant requested that he be provided with a copy of the job description and was informed that this did not exist (which is a finding I make based on the claimant's uncontested evidence).

32. No job description or other information was provided to the claimant in advance of the interview, he was simply aware that the vacancy was for a design manager in the respondent's Property Services business unit. In this

regard, based on the claimant's evidence, supported by Mr Hook's evidence under cross examination, the claimant did not fully know in advance what the Design Manager, Property Services role entailed.

33. The interview was conducted by Ms K Harris and Mr M Sargeson, lasted over an hour and the claimant was asked questions against 5 criteria and awarded a score for each.

34. It was suggested by Mr Lassey in his submissions that the claimant was only advised of the competencies required of the Design Manager, Property Services role by way of questioning, with reference being made to the fact that there was no record on the interview note of a specific discussion taking place regarding the role requirements.

35. It is my finding, however, that at the outset of the interview Ms Harris provided the claimant with more information about the role and explained to him how she believed it differed to the claimant's Design Manager role. This was the consistent evidence of Ms Harris during cross-examination and whilst she accepted that some information about competencies was provided by way of questioning, she was also clear about a specific explanation being provided. In addition, as the claimant stated in his witness statement "*the meeting opened with Katy identifying that the business is slightly different to the main contracting organisation and they needed a Design Manager that could undertake the duties but could also "flex and bend"*". It is therefore clear that at the beginning of the interview the role requirements were explained.

36. A key competency being sought was leadership, which is not in dispute. In his particulars of claim, however, the claimant asserts that the requirement for leadership skills was not made known "*in the process of considering him for the role*". I make a finding of fact to the contrary. As per my findings above, the claimant was informed of the role requirements at the outset of the interview, and he was provided with the opportunity to provide examples to demonstrate his leadership abilities through questioning. This is further supported by the claimant's comments in the appeal hearing. He explained to Mr Hook that Ms Harris had informed him that he had not demonstrated the necessary leadership skills and later stated that he was "*happy with Katy's feedback*". I do not believe that the claimant would have said this if he had not been made aware that Ms Harris was looking for leadership skills.

37. The claimant performed well at the interview and Ms Harris found the claimant to have good technical ability. However, the claimant was unsuccessful, which Ms Harris informed him of verbally on or around 18 June 2020. In addition to lacking the relevant leadership skills, Ms Harris (and Mr Sargeson) formed the view that the claimant did not have the skillset to maintain and operate multiple tenders and live projects at any one time.

38. The claimant's witness evidence is that he was informed by Ms Harris that someone else had been appointed "*who demonstrated better soft skills and leadership in the interview*". This was not specifically put to Ms Harris during cross examination, but the role remained on the vacancy list, which I take as evidence that it had not been filled at the time of this conversation. It is

therefore more likely than not that Ms Harris did not make this comment, even if that is what the claimant genuinely recalls.

Individual consultation with the claimant

39. By email dated 19 June 2020, the claimant was provided with a copy of his scoring matrix and was invited to attend a (virtual) individual consultation meeting, to be chaired by Mr M Crawford, with Ms L Cullen (HR Advisor) also in attendance. The claimant was informed that the purpose of the meeting was to discuss the proposed redundancy, the scoring and to consider any alternative proposals or suggestions that the claimant had to avoid redundancies. The claimant was also informed of his right to be accompanied.

40. This meeting took place on 25 June 2020. The claimant challenged the scores that he had been awarded against the selection criteria and these were discussed in detail. This included him complaining that the scores did not reflect feedback that he had received during performance appraisals and he referred to issues never having been raised with him regarding the quality of his work. Mr Crawford agreed that he would look at the scores again. Mr Crawford did so, adjusting the score against one of the criteria by 1 point (resulting in an increase of 2 points to the claimant's overall score).

41. There was also discussion at the meeting about the Design Manager, Property Services role, which the claimant noted was on a vacancy list shared with him at this meeting. Ms Cullen agreed that she would check whether the role was still vacant.

42. Following the meeting, Ms Cullen contacted Ms Harris, stating that the claimant "*would like for me to ask if you could re-consider him for the Design Manager opportunity again*". This was not specifically what the claimant had requested, but he did not challenge this at the relevant time. Ms Harris responded to Ms Cullen that "*we won't reconsider him…He seemed to be strong on process and technically sound, however, he didn't demonstrate the leadership experience / capability we were looking for*".

43. A second individual consultation meeting with the claimant took place on 2 July 2020, again chaired by Mr Crawford with Ms Cullen in attendance. Feedback was provided regarding the adjusted score and the Design Manager, Property Services vacancy.

44. At this stage, I note as a finding of fact that during the individual consultation meetings with the claimant there was no mention of the possibility of him remaining on furlough under the CJRS as an alternative to redundancy. This was not raised by the claimant, nor was it raised by the respondent.

45. The evidence of Mr Crawford was that he addressed his mind to furlough at the individual consultation stage, but he willingly accepted that this was not discussed during the individual consultation process. His evidence was that this was because it had been dealt with during collective consultation. Based on this, and the notes of the collective consultation meeting on 4 June 2020

(the contents of which were not challenged by the claimant) at which reference was made to furlough, I find that furlough had been discussed and considered during the collective consultation process and that Mr Crawford was aware of this at the time of conducting the individual consultation meetings.

Claimant's redundancy dismissal

46. The claimant's redundancy dismissal was confirmed to him on 2 July 2020. He was given 4 weeks' notice of termination, during which he would remain on furlough. The claimant was notified of his right of appeal.

Appeal against dismissal

47. By email dated 6 July 2020, the claimant submitted his redundancy appeal, in which he challenged the necessity for a redundancy, referring to the Design Manager role on the vacancy list shared with the claimant at the final consultation meeting on 2 July 2020.

48. An appeal hearing was arranged and took place on 22 July 2020, chaired by Mr Hook (Construction Director in Housing Partnership), with Ms Littler (Senior HR Advisor) also in attendance.

49. The claimant submitted a statement for the appeal hearing, in which he stated that he believed that the Design Manager, Property Services role was equal to the role from which he had been made redundant and that he did not believe that his redundancy was necessary. He also stated that he believed that his exit had been engineered, setting out several factors on which he based this belief.

50. At the appeal stage, the claimant raised concern about the Design Manager, Property Services role remaining vacant, stating that he believed that the intention was to fill the role externally, which he considered to be unfair.

51. During the appeal hearing, the claimant confirmed to Mr Hook that he was not provided with a job description for the Design Manager, Property Services role in advance, explaining that he "*understood there was to be extra round the edges due to small works*".

52. The claimant did not, however, raise concerns about not being provided with the job description in advance of his interview. Nor did he complain that this prejudiced in him the interview. Indeed, when asked by Mr Hook "*leadership leading a team – made clear*" the (uncontested) appeal notes record that the claimant replied "*DS working with current team, there were no direct reports. In Property Services lot of it is traditional work. How I interpreted KH brief was helping bid submission, working with the site team, handing over to site teams, and monitoring. No JD. Nothing in the interview that concerned me*".

53. I also find that, at the relevant time, the claimant accepted the feedback that was provided to him by Ms Harris taking into account his comment at the

appeal hearing that "*I was happy with Katy's feedback….not sour grapes about not getting job. It is about vacancy left on the vacancy list*."

54. The claimant's appeal was unsuccessful, as communicated to him by letter dated 25 July 2020. He was informed that no offers had been made to date for the Design Manager, Property Services role, which is why the vacancy remained on the vacancy list issued on 2 July 2020.

55. The claimant's employment terminated on 31 July 2020.

Design Manager, Property Services

56. On 13 July 2020 an external candidate was interviewed for this vacancy and an offer was made on 28 July 2020.

Law

57. This claim is brought under the ERA and the primary provision is section 98 which, so far as relevant, provides as follows:

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

the reason (or, if more than one, the principal reason) for the dismissal and

that it is either a reason falling within sub-section (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 sub-section if it…is that the employee was redundant…

(3) …

(4) Where the employer has fulfilled the requirements of sub-section (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".

58. The proper application of the general test of fairness in section 98(4) has been considered by the EAT and higher courts on many occasions and the tribunal must not substitute its own decision for that of the employer, rather it must apply the band of reasonable responses test and consider whether an employer acted in a reasonable way given the reason for dismissal.

59. Dismissal can be a reasonable step even if not dismissing the employee would also have been a reasonable step.

60. In cases where the respondent has shown that the dismissal was a redundancy dismissal, the leading case on fairness is that of the EAT in **Williams & Others v Compair Maxam Limited [1982] IRLR 83**. In general terms, employers will give as much warning as possible of impending redundancies to employees, consult with them about the decision, the process and alternatives to redundancy and take reasonable steps to find alternatives such as redeployment to a different job.

61. Tribunals frequently derive assistance from the **Compair Maxam** guidelines, but it is worth reiterating two cautionary points made by the EAT in that case. First, the guidelines are not principles of law but standards of behaviour that can inform the reasonableness test under section 98(4). A departure from these guidelines on the part of the employer does not lead to the automatic conclusion that a dismissal is unfair, nor should a tribunal's failure to have regard or give effect to one of the guidelines amount to a misdirection in law. Secondly, the guidelines represent the view of the lay members of the EAT as to fair industrial relations practice in 1982 and are not absolute. Practices and attitudes in industry change with time and new norms of acceptable industrial relations behaviour emerge. The overriding test is whether the employer's actions at each step of the redundancy process fell within the range of reasonable responses.

Decisions and Reasons

62. It is not in dispute that the reason or principal reason for the claimant's dismissal was a potentially fair one under section 98 ERA, namely redundancy. The test of fairness set out in section 98(4) must therefore be applied. Did the respondent act reasonably in all the circumstances in treating redundancy as a sufficient reason to dismiss the claimant? At each stage of the redundancy process was the range or reasonable responses test satisfied?

Did the respondent adequately warn and consult the claimant?

63. Firstly, I am satisfied that overall the respondent adequately warned and consulted with the claimant.

64. He was first made aware of his role being at risk of redundancy on 14 May 2020 and his redundancy dismissal was not confirmed until 2 July 2020. During this period, consultation was undertaken on both a collective and individual basis and that process afforded the claimant an opportunity to raise queries, put forward suggestions and request information, which he did (both himself and via his employee representative).

65. At the individual consultation meetings with the claimant, he was offered (although did not exercise) the right to be accompanied and I am satisfied that due consideration was given to the points raised by him. This is evidenced by the fact that Mr Crawford agreed to review the claimant's scores against the selection matrix (resulting in an adjustment being made) and Ms Cullen made follow up enquiries of Ms Harris, as agreed. The documentary evidence also

shows that there was dialogue with the claimant throughout, primarily in the form of email correspondence.

66. I am also satisfied that the extent to which the respondent considered (or did not consider) continuing to furlough the claimant, as an alternative to redundancy, was not unreasonable.

67. Mr Lassey submitted that the respondent failed to give *any* consideration to furlough as an alternative to redundancy during the individual consultation process and that this should be fatal to the respondent's defence. But I disagree.

68. As per my findings of fact, the option of furlough was given consideration by the respondent at a collective level, and this was not disputed by the claimant. Although Mr Crawford was not individually responsible for the decision to proceed with redundancies, I accept his evidence that, having assessed the impact of the pandemic to the respondent's organisation as known at the relevant time, the respondent did not consider this to be a feasible alternative to making redundancies.

69. As I have found, the respondent did not re-consider or re-assess this at the individual consultation stage or on appeal. But I believe that Mr Crawford and Mr Hook were entitled to rely upon the previous considerations and decisions that had been made on a collective basis regarding the feasibility of continued furlough. It was not unreasonable for them to do so, as opposed to assessing the feasibility of furlough on an individual basis. It was also not unreasonable for them not to revisit this issue, in circumstances where they knew with some certainty that there would not be a future need for 6 Design Managers in the Construction business unit.

70. Of course, my decision in this regard may have been different had the claimant specifically raised the issue of furlough during his individual consultation (or on appeal), but he did not do so.

Did the respondent adopt a reasonable selection decision, including its approach to a selection pool and any scoring within the pool?

71. As part of his pleaded case, the claimant does not challenge the decision of the respondent to place all the design managers in the Construction business unit at risk of redundancy or the approach taken when making provisional selections for redundancy. Whilst he challenged the scores awarded to him against the selection criteria at the relevant time, he does not do so as part of his pleadings.

72. In any event, I am satisfied that this stage of the redundancy process satisfies the range of reasonable responses test and that there is no identifiable basis upon which I can interfere with the approach taken by the respondent.

Did the respondent take reasonable steps to find the claimant suitable alternative employment?

73. As per my findings of fact, the claimant's Design Manager role and the Design Manager, Property Services role were distinct roles, despite there being similarities between them. On that basis, I conclude that the respondent was entitled to select candidates for the Design Manager, Property Services role based upon their performance in a competitive interview process. This was not an unreasonable approach.

74. In reaching this view, I have taken account of the submissions made by both parties on the **Samsung Electronic** authority and its applicability to the facts of this case. In **Samsung**, the EAT rejected as incorrect the tribunal's finding that it was unreasonable of the employer not to use past performance in appraisals when assessing an employee for a new role. According to the EAT, the assessment tools to be used in an interview of this kind were a matter for the employer's discretion. If the tools used had been plainly inappropriate that might have been influential when determining the fairness of the dismissal, but that was not the case here. The post in question in **Samsung** was a new job, despite similarities it might have had with the employee's previous role. Accordingly, it was understandable that the employer should choose to interview for it on a forward-looking basis.

75. Mr Middleton submits that this is case "*four-square concerned with the principles of Samsung Electronics*". Mr Lassey submits that it has no applicability, on the basis that **Samsung** only applies where *all* employees within a pool are selected for redundancy and are *all* invited to apply for newly created roles. He submits that this case is not a forward-looking style of redundancy described by **Samsung**, but a classic redundancy situation as envisaged by **Compair Maxam**.

76. I do not, however, consider the application of **Samsung** to be restricted to situations only where *all* employees are provisionally selected for redundancy. As noted by the EAT (paragraph 10) "*a decision to dismiss for redundancy will necessarily involve (a) the original decision to remove the employee from his job…and (b) a separate decision to dismiss, which involves a decision that no alternative employment is available*". The fairness of an employer's approach to (b) can therefore be considered in accordance with the principles of **Samsung**, regardless of the circumstances which have resulted in that second stage being reached.

77. As the EAT observed in **Morgan v Welsh Rugby Union [2011] IRLR 376** (from which the guidance in **Samsung** derives), where an employer has to decide which employees from a pool of existing employees are to be made redundant, the criteria will reflect a known job, performed by known employees over a period. Where, however, an employer has to appoint to new roles after a reorganisation, the employer's decision has to be forward-looking, centring on the ability of the individual to perform in the new role. This sort of selection is more likely to involve an interview process.

78. And I am satisfied that the respondent's approach was consistent with these observations. It applied selection criteria reflecting a well-known job when identifying which of the design managers at risk should be provisionally selected for redundancy. When appointing for the Design Manager, Property Services role, however, it took a forward-looking approach, which I am satisfied was within the range of reasonableness.

79. That said, whilst the interview approach was not unreasonable, there was undoubtedly a flaw in the process adopted by the respondent, given its failure to provide the claimant with details of the specific job requirements in advance of the interview (in particular, those that distinguished the Design Manager, Property Services role from the claimant's Design Manager role). He had not been provided with complete information about the basis upon which the decision would be made in advance of his interview and there was therefore the potential that he would be denied the chance to fully "sell" himself at the interview. As Ms Harris accepted under cross examination "*with the benefit of hindsight*", she felt that it would have been reasonable to provide the claimant with a job description before the interview had one been available and Mr Hook conceded, if he were attending a job interview, he would expect to have received the job description in advance.

80. However, I am satisfied that this procedural flaw was remedied by Ms Harris during the interview and I accept her evidence that she believed that the claimant had everything that he needed prior to the interview to enable him to fully engage in that process. She gave information to the claimant about the competencies she was seeking at the outset of the interview and the claimant was afforded the opportunity to respond to questions having been given this information. On learning of the differences at the interview, the claimant did not ask for a break, or for additional time to prepare. The interview lasted over an hour and as explained by the claimant in his evidence, he spoke to his CV and drew upon his experiences with the respondent in answering the questions raised.

81. On this issue, Mr Lassey submitted that any reasonable employer, genuinely engaged in avoiding redundancy dismissals and offering work to at-risk employees would have given the claimant the information to enable him to succeed at interview. That it did not do so, submitted Mr Lassey, rendered his dismissal substantively and procedurally unfair.

82. Mr Middleton submitted that, whilst it may have been advantageous to the claimant to have been provided with the job description in advance, the position would not have significantly changed and the interview afforded him the opportunity to highlight the applicable skills and experience to the interview panel. Further, Mr Middleton submitted that the claimant could not have it both ways. In other words, he could not assert that his role and the Design Manager, Property Services role were the same or similar and then allege unfairness at the interview because of lack of information about the different role requirements.

83. Based on my findings of fact, I therefore conclude that the unfairness caused to the claimant by this procedural flaw was not significant and substantial and

it was not unreasonable for the respondent to have provided the information as part of the interview itself, even if not ideal.

84. I am also of the view that it was not unreasonable for Mr Hook to have relied upon the experience and judgement of Ms Harris when taking steps to satisfy himself that the claimant had been provided with sufficient information about the role for which he was being interviewed, despite the interview note not recording this fact.

85. This stage of the process was therefore neither substantively, nor procedurally unfair.

Was dismissal within the range of reasonable responses?

86. The claimant's suitability for the Design Manager, Property Services role was subject to a good faith assessment by two senior managers, including Ms Harris, at a structured and objective interview. Whilst there was a procedural flaw in the respondent's approach, it is my conclusion that the decision to dismiss the claimant was within the range of reasonable responses and it satisfied the section 98(4) test of reasonableness.

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Employment Judge Peck

12 August 2021

JUDGMENT SENT TO THE PARTIES ON

23 August 2021

FOR THE TRIBUNAL OFFICE

Notes

1. Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.