Case Number: 2206779/2020

Reserved Judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Mr N Rull		**Estee Lauder Cosmetic Ltd**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central **ON: 29-30 September; 1 October 2021 (in chambers)**

BEFORE: Employment Judge A M Snelson **MEMBERS: Ms S Campbell Ms L Jones**

On hearing the Claimant in person and Mr S Purnell, counsel, on behalf of the Respondents, the Tribunal adjudges that:

(1) The Claimant's claim for a protective award is not well-founded;
(2) The Claimant's complaint of unfair dismissal is not well-founded.
(3) Accordingly, the proceedings are dismissed.

REASONS

Introduction

1 The Respondents are the UK vehicle for an international group of companies with headquarters in the USA which manufactures and markets a wide range of skin-care, make-up, fragrance and hair care products. In August 2020 the group employed some 48,000 people worldwide.

2 The Claimant was continuously employed by the Respondents from 13 October 2014 until 20 August 2020, latterly as a full-time Counter Manager on an annual salary of £25,500.

3 By a claim form presented on 18 October 2020 the Claimant brought a claim for a protective award and a complaint of unfair dismissal. Both claims were

resisted: the former on the ground that no obligation to consult collectively arose, the latter on the ground that the Claimant was fairly dismissed for redundancy.

4 The case came before us on 29 September this year with three days allowed. The Claimant appeared in person. The Respondents had the advantage of being represented by Mr Sebastian Purnell, counsel.

5 Having heard evidence and argument on liability over days one and two, we reserved judgment to spare the parties the cost and trouble of attending on day three.

The Legal Framework

Protective awards

6 By the Trade Union and Labour Relations (Consolidation) Act 1992 ('the 1992 Act'), s188, the duty to consult collectively arises only where the employer is proposing to dismiss as redundant 20 or more employees at one "establishment".

7 In *UDSAW & anor v WW Realisation 1 Ltd (in liquidation), Ethel Austin Ltd & anor (C-80/14)* [2015] ICR 675 the Court of Justice of the European Union ('CJEU') considered the concept of an 'establishment'. We agree with and gratefully adopt *verbatim* the following extracts from Mr Purnell's helpful summary of the main propositions to be drawn from the judgment:

(1) An employment relationship is essentially characterised by the link existing between the worker and the part of the undertaking or business to which he is assigned to carry out his duties.
(2) As such, the term "establishment" must be interpreted as designating the unit to which the redundant worker is assigned to carry out his duties.
(3) An "establishment", in the context of an undertaking, may consist of a distinct entity, having a certain degree of permanence and stability, which is assigned to perform one or more given tasks and which has a workforce, technical means and a certain organisational structure allowing for the accomplishment of those tasks.
(4) The terms "undertaking" and "establishment" are different. An establishment normally constitutes part of an undertaking. That does not preclude the establishment being the same as the undertaking where the undertaking does not have several distinct units.
(5) Consequently, where an undertaking comprises several entities, it is the entity to which the redundant worker is assigned to carry out his duties that constitutes the "establishment."

8 In the *USDAW* case, the CJEU did not explicitly hold that each of the Woolworths stores under consideration was a separate 'establishment'. That was a matter for the domestic court (the Employment Tribunal) to determine. But in *Lyttle v Bluebird UK Bidco 2 Ltd* (C-182/13), another case concerning a chain of stores, the CJEU went rather further, stating:

> **51. In the present case … it appears that each of the stores … is a distinct entity that is ordinarily permanent, entrusted with performing specified tasks, namely primarily the sale of goods, and which has, to that end, several workers, technical means and an organisational structure in that the store is an individual cost centre managed by a manager.**
>
> **52. Accordingly, such a store is capable of satisfying the criteria set out in the case-law cited … above relating to the term 'establishment' …**

Unfair dismissal

8. The unfair dismissal claim is governed by the Employment Rights 1996 ('the 1996 Act'), s98. It is convenient to set out the following subsections:

> **(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.**

9. Although our central function is simply to apply the clear language of the legislation, we are mindful of the guidance provided by the leading authorities. From *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 EAT and *Post Office v Foley; HSBC Bank v Madden* [2000] IRLR 827 CA, we derive the cardinal principle that, when considering reasonableness under s98(4), the Tribunal's task is not to substitute its view for that of the employer but rather to determine whether the employer's decision to dismiss fell within a band of reasonable responses open to him in the circumstances. That rule applies as much to the procedural management of the case as to the substance of the decision to dismiss (*Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23 CA). The 'band of reasonable responses' principle is applicable in the redundancy context no less than where the dismissal is based on conduct, capability or any other reason (*Williams v Compair Maxam Ltd* [1982] ICR 156 EAT, particularly at 161E).

10. Under a line of authority starting with *Polkey v A E Dayton Services Ltd* [1988] ICR 142 HL, the higher courts have recognised that the obligation on the Employment Tribunal to ensure that compensatory awards under the 1996 Act, s123(1) represent 'just and equitable' compensation may necessitate, in

appropriate cases, applying a discount to reflect the possibility that, but for the unfair dismissal, the Claimant would have been dismissed in any event, either when he or she was dismissed or at some later point.

Oral Evidence and Documents

9 We heard oral evidence from the Claimant and read a statement presented by him in the name of Ms Debbie Anderson, Retail Manager. We heard evidence on behalf of the Respondents from Ms Havva Akmanlar, Area Sales & Education Manager – ADF, Ms Alex Macleod, National Field Saled & Education Manager, and Ms Becky Davies, National HR Business Partner – Retail. All gave evidence by means of witness statements.

10 In addition to the testimony of witnesses we read the documents to which we were referred in the two-volume bundle.

11 We also had the benefit of a chronology, a cast list and the written closing submissions presented on both sides.

The Facts

12 The facts essential to our decision, either agreed or proved on a balance of probabilities, we find as follows.

13 As we have mentioned, the Respondents are the UK arm of an international group of companies. They deal in a wide range of products across 11 or 12 brands in the UK. Their workforce, employed directly by them, is organised and managed by brand. Their products are typically sold through ‘concessions’ or ‘counters’ within department stores and pharmacies. Some outlets are classified as ‘consultant stores’ and some ‘non-consultant stores’. In the former, the Respondents provide staff to sell and market the relevant brand; in the latter they rely for these services on the workforce of the relevant retail organisation.

14 The Claimant first worked for the Respondents in a temporary, maternity cover role with the Clinique brand at House of Fraser (‘HoF’), Croydon commencing on 13 October 2014. His contract noted his work location as HoF, Croydon.

15 The Claimant’s next appointment, which took effect on 18 June 2015, was as Counter Manager for the Aramis & Designer Fragrances (‘ADF’) brand at HoF, White City. He received written notification of the transfer of his contract to the ADF brand and of his new work location at White City.

16 Between 4 June 2018 and his dismissal on 20 August 2020 the Claimant was employed as Counter Manager for the ADF brand at HoF, Oxford Street. Again, he received written notification of the change in work location.

17 The Claimant accepted in cross-examination that all three appointments were store-specific. He did, however, make the point that he did not receive fresh contracts of employment when the appointments in 2015 and 2018 took effect.

18 It was common ground that the Claimant's contract of employment included a mobility clause. It was also not in dispute that the mobility clause was never invoked in his case and the Respondents' evidence that mobility clauses were very rarely enforced was not challenged. The Claimant did on occasions, by agreement, work temporarily away from the stores at which he was based. Not unnaturally, the Respondents encourage this as it assists them to plug temporary gaps or meet unusual demand. They argue that it also benefits employees by widening their experience. Employees working on short-term projects away from the store to which they are assigned are treated as visitors: they are not added to the local establishment.

19 It was not in dispute that department stores such as HoF, Oxford Street are run to a large extent as autonomous entities. They have a local management structure. Income and expenditure, and profit and loss, are reckoned locally. Staff are engaged on a site-specific basis (even if, under a mobility clause, the employer is contractually entitled to transfer employees from one location to another).

20 At the time of the events with which this case is concerned the Respondents employed 17 people at HoF, Oxford Street. Of these, 12 were placed at risk, of whom two worked within the ADF brand, the Claimant, a full-time Counter Manager, and Ms Wendy Leibman, a part-time Beauty Adviser.

21 Collective consultation did not take place at HoF, Oxford Street. But at stores where the Respondents contemplated 20 or more redundancies, collective consultation was carried out.

22 Over some years up to 2020, the steady decline in the retail sales market resulted in a substantial reduction in the Respondents' operations. Thus, for example, between 2016 and 2018 staffing of the ADF counter at HoF, Oxford Street had been cut by more than 50%.

23 Then came the Covid-19 pandemic, which rendered dire trading conditions catastrophic. In consequence, the Respondents required brand managers to conduct productivity assessments and come forward with cost-saving proposals. Most of this activity seems to have taken place between March and May 2020. In the case of ADF, the task fell to Ms Macleod, a witness before us. Having studied the available information and taken advice from the Respondents' Finance Department, she arrived at a number of conclusions. One was that, given the exceedingly modest performance of ADF products at HoF, Oxford Street in the period from July 2019 (sales turnover of only £41,000), a substantial saving would be achieved by cutting the ADF headcount there to nil, despite the fact that, on that basis, sales were projected to fall further, by about a quarter.

24 The Claimant did not suggest that Ms Macleod's assessment was one which she was not entitled to make. The Respondents adopted it.

25 Ms Macleod's work in relation to ADF at HoF, Oxford Street was one small part of a company-wide exercise involving all (or perhaps all but one) of the

Respondents' brands marketed in the UK.[1] It resulted in a total of more than 4,000 employees being placed at risk and, ultimately, about 700 compulsory redundancies. Inevitably, the deletion of posts and consequential reorganisation had the consequence of producing a number of vacancies, into which some redundant staff could be moved. It seems that something like 200 such vacancies arose.

26 The decisions based on the brand-level assessments led to affected staff, including the Claimant, being notified on 2 June 2020 that they had been placed at risk of redundancy. The Respondents then embarked on a large-scale 'mapping' exercise designed to identify alternative roles for employees at risk, coupled with a programme of individual consultation with those employees.

27 The mapping work in the case of non-managerial staff was performed by means of an algorithm, the results of which were checked by HR officers for errors. In the case of managerial roles, HR officers performed the exercise individually, measuring redundant posts against comparable, or potentially comparable, vacancies. No specific methodology was prescribed, but two criteria were recognised as particularly important: the financial turnover of the relevant concession or counter and the size of the team for which the manager was responsible.

28 Perhaps understandably, the Claimant resents the fact that, for mapping purposes, no account was taken of the personal qualities or experience of individual post-holders. But his argument misunderstands the nature and purpose of any conventional mapping exercise, which focuses entirely on assessing the redundant *role* against any putatively comparable *role* in the new structure.

29 One corollary of this was that the mapping process did not offer any route to promotion. It was concerned with sideways, not upward, moves. And although it would perhaps have been open to the Respondents to entertain, as part of the redundancy consultation programme rather than through the mapping exercise itself, applications by redundant employees for vacancies at a higher level, the scheme which they settled on excluded that possibility. We accept the evidence given on their behalf that they judged that the mapping process should enable all vacancies to be filled by means of lateral transfers and considering applications for upward moves would add needless complexity and delay. We will return to the subject of promotions a little later.

30 The Claimant raised the subject of 'bumping' in the course of the consultation. The redundancy scheme did not contemplate 'bumping' and that fact was explained to him.

31 The redundancy scheme made no provision for what was to happen if the mapping exercise and consultation programme did not result in any particular vacancy being filled. In the nature of things, it was then for the responsible brand managers to solve the problem as they saw fit. (For the avoidance of doubt, our finding is that the *redundancy scheme* excluded promotions; it did not exclude the

[1] Six or seven other brands were retailed at HoF, Oxford Street alone.

remote possibility of a redundant employee being ultimately appointed (outside the scheme) to a higher level position for which, for one reason or another, operation of the scheme had not yielded an appointable candidate. As we will explain, there was at least one such case.)

32 Some mapping schemes are designed to effect what amount to compulsory transfers of redundant employees to vacancies in a new organisational structure. This was not one such. Rather, the aim was to leave it to the affected employees to decide for themselves how to respond to the situation in which they found themselves, subject to the proviso that they would be free to apply only for vacancies judged by the mapping procedure to be comparable to their own.

33 The mapping work was carried out under considerable time pressure. The shape of the restructuring was not fully apparent until all brands had completed their assessments and the Respondents had taken all necessary consequential decisions. Only then was it possible to ascertain what vacancies would require filling. Meanwhile, staff had been placed at risk and there was an urgent need in their interests to conclude the process as quickly as possible.

34 The parallel consultation exercise also entailed a huge amount of work. It involved over 16,000 consultation meetings, held by 119 consultation managers and involving dozens of other members of staff.

35 The Respondents rightly envisaged that many of the vacancies created by the reorganisation were likely to attract numerous applications. Three measures sought to assist those responsible for decision-making in such cases. First, it was decreed that applicants employed within the brand in which any particular vacancy was offered had priority over any applicants working within any other brand. Secondly, redundant managers underwent a 'Management Selection Interview', which resulted in them receiving a score designed to reflect their skills and attributes. Thirdly, candidates were required to rank the positions for which they wished to be considered in order of preference. It was envisaged that in any case where there were more than one 'in-brand' applicant for a vacancy, the second and third measures would provide an objective basis for selecting the winner, or at least whittling the field down to a small number.[2]

36 The Claimant subsequently attended a Management Selection Interview and received a score of 8/15, which placed him in the 'average' class. In the event, as we will explain, nothing turns on that score (about which he raised no particular complaint), and we will say no more about it.

37 The Claimant was invited to, and attended, consultation meetings with his line manager, Ms Akmanlar (a witness before us) on 4 June, 11 June, 25 June and

[2] The interplay between the second and third measures was not explored before us. Would a higher score trump a higher preference ranking, for example? But the question does not arise on the dispute before us.

16 July 2020. The meetings were minuted and the notes taken represent a fair (although not comprehensive) record of what was said.[3]

38 At the first meeting Ms Akmanlar explained to the Claimant that the Respondents were seeking to reduce their headcount in order to improve productivity and financial sustainability and that their priority was to find alternative employment for him if that could be done. He raised certain questions, which she promised to look into.

39 On 5 June 2020 the Claimant sent an email to Ms Akmanlar raising further queries to do with the consultation process. She promised to pick them up at the next meeting.

40 On 9 June Ms Akmanlar wrote to the Claimant inviting him to the second consultation meeting. She also sent him information about the selection criteria to be used in dealing with applications for vacancies, including the Management Selection Interview procedure.

41 At the second consultation meeting on 11 June Ms Akmanlar addressed the questions which the Claimant had raised in correspondence. Turning to alternative employment, she asked him what brands he was willing to work for and what locations he would consider. He replied that he was prepared to work for any brand, provided that he was based in London.

42 Following the meeting Ms Akmanlar sent a message to Ms Macleod commenting that the Claimant appeared to have set up a social media group for employees at risk of redundancy. She added an 'emoji' which the Claimant (on seeing the document following disclosure in these proceedings) understandably saw as unsympathetic. Ms Macleod later had a private word with Ms Akmanlar on the subject of the importance of careful communication. That said, we find that the ill-considered use of the emoji in a hasty private exchange was simply an error of judgment and that Ms Akmanlar was not dismissive of the worry and upset inevitably experienced by those affected by the redundancy process. Nor was she insensitive to the offence which the Claimant might feel on reading the message. Not surprisingly, the thought that he might ever see it did not occur to her.

43 At the third consultation meeting on 25 June the Claimant inquired about the redundancy payment to which he was entitled. Ms Akmanlar replied that if dismissed he would qualify for a statutory redundancy payment of just under £2,500, which he found disappointing. She also pointed out that he would be entitled to be accompanied at the anticipated fourth meeting.

44 On 2 July the Respondents circulated the first of two vacancies lists. An accompanying email re-confirmed the key principles of the redundancy process, namely that promotions would not be considered and that the assessment of comparability would take account of team size and financial turnover. The list supplied in the case of each vacancy details of the role, the brand, the store, the

[3] The parties agree that the Claimant's covert and unpermitted recording discloses a longer answer to his question at the second meeting on the subject of 'bumping' than the contemporary note. Nothing turns on that difference.

location, the hours, the work pattern and whether the position was temporary or permanent. The only information not shown was the salary or rate of pay. We were told that the brands had insisted that it should not be included in the list (although any applicant would inevitably become privy to it in early course).

45 Owing to the particularly acute trading difficulties confronting ADF, there was only one vacancy in that brand, for a Counter Manager position at Boots in Liverpool.

46 Having considered the list, the Claimant made applications for positions coded as CLM36, CLM30, BUM02 and BUM01. We will deal with these in turn.

47 CLM36 was a full-time, 5-days-per-week Clinique Retail Manager post at HoF, Oxford Street. The Claimant's application was rejected on the ground that appointment to that vacancy would have amounted to a promotion. The Clinique counter had an annual turnover in 2018/19 of £330,000 against the £89,000 generated by the ADF counter. And in contrast with the Claimant's 'team' of one part-time assistant, the Clinique manager was to manage a team of three. The successful candidate overcame competition from at least 12 other applicants including the Claimant. She was one of two managers already working within the Clinique brand, both of whom identified CLM36 as their first choices.

48 CLM30 was presented as a five-day, 30-hours-per-week Clinique Retail Manager vacancy at Debenhams, Uxbridge. In fact, it was advertised in error: there was no vacancy as the role was already occupied by an 'at risk' manager, who was to be confirmed in his post.

49 BUM02 was a five-day, 30-hours-per-week Bumble & Bumble Counter Manager role at Marble Arch. The Claimant's application was successful but he decided not to accept the offer. The pay (£16,380 p.a.) was markedly inferior to his current remuneration.[4] He explained at the time, "The salary versus the travelling distance is just not practical". The Claimant lived in West London and the distance from his home to Marble Arch was marginally less than to Oxford Street. The Respondents have never argued that refusal of the offer disqualified the Claimant from receiving his redundancy payment.

50 BUM01, a position junior to BUM02, was not judged comparable with the Claimant's and his application was not entertained. He makes no complaint about that.

51 It is worthy of note that the Claimant did not apply for CLM21, a five-day, 30-hours-per-week Clinique Retail Manager vacancy at Boots, Croydon or CLM37, a five-day, full-time Clinique Retail Manager role at Elys, Wimbledon.

52 The fourth and final consultation meeting took place on 16 July. The Claimant attended and did not exercise his right to be accompanied. Ms Akmanlar chaired the meeting. Given the Claimant's rejection of the BUM02 vacancy, she advised him that his employment would be terminated on 20 August on the ground

[4] The hourly rate was also lower.

of redundancy. A letter of 3 August confirmed that outcome and advised him of his right of appeal, which he did not take up.

53 On 7 August 2020 the Respondents circulated an updated vacancies list, accompanied by the same guidance as before. CLM30 continued to be (erroneously) advertised. CLM37 again appeared. The Claimant made no fresh application for any vacancy.

54 The Claimant gave evidence that he was assured at some unspecified point, apparently by Ms Akmanlar, that a list of 'promotional' vacancies would be circulated. We do not accept that. As already explained, such a list would not have been in keeping with the scheme of the redundancy exercise, which envisaged that all vacancies would be filled by lateral transfers in accordance with the mapping arrangements. We do accept that Ms Akmanlar may have indicated that it was possible that, if any vacancy was not filled by those means, a chance *might* arise in the future for a redundant employee to be considered for promotion to it. She certainly gave no assurance that any such opportunity *would* arise; to the contrary, she stated and repeated to the Claimant the message (already clearly conveyed) that the vacancies advertised on 2 July and 7 August were *not* intended to be filled through promotional moves. In answers to questions from the Tribunal, the Claimant said that, after receipt of the 7 August list, he had "stupidly" decided to wait for information on opportunities for promotion rather than protecting his position by expressing interest in any of the advertised vacancies.

55 No 'promotional list' was circulated prior to the Claimant's dismissal or, so far as we are aware, at any point thereafter.

56 On 19 August 2020, the Claimant raised a formal grievance, complaining about various aspects of the redundancy process. Under the Respondents' procedures, notice of at least 48 hours must be given before holding a formal grievance hearing. Ms Macleod arranged a telephone meeting for 20 August, the last day of the Claimant's employment. In that meeting she explained that she was dealing with the matter informally. She heard his representations, many of which were repeated in his claim before the Tribunal. On 28 August, wrote to him explaining that his complaints had not been upheld and giving reasons.

57 The Claimant complained that he was unfairly treated in comparison with a individual to whom we will refer as JF. She was employed on the ADF counter at Debenhams, Oxford Street. The productivity assessment there resulted in a proposal for retention of JF's role, but with a reduction in weekly hours. JF agreed to the proposal and was retained on reduced hours.

58 The Claimant also compared his treatment to that applied to his witness, Ms Anderson. She was a Beauty Adviser for the Estee Lauder ('EL') brand at HoF, Croydon, working 22.5 hours per week. She was placed at risk as a result of the proposal to reduce the EL headcount at that store to one, in the form of a four-days-per-week (26.25 hours) Retail Manager. She applied for the Retail Manager post but was rejected on the ground that appointment to it would amount to a promotion. She was aggrieved by this because, prior to the redundancy process, she had been offered an equivalent position (for the same brand at the same store)

and had turned it down. Consultation meetings were held through June and July 2020 and, on 30 July, she received notice of dismissal. By 12 August, the Retail Manager vacancy had still not been filled and decision-makers within EL took the decision to offer the position to Ms Anderson. She accepted. The engagement was concluded directly between the brand managers and her. It was not part of the centralised redundancy scheme, which was run by the Respondents' central HR function. The annual salary was £12,967.50.

59 The vacancy to which DA was ultimately appointed was not included in the lists distributed on 2 July and 7 August and we accept that the Claimant did not have separate notice of it.[5] This was an oversight. It may well explain why no candidate eligible under the redundancy scheme applied.

60 The Claimant made covert recordings of the consultation meetings. That was expressly prohibited in the Respondents' 'Redundancy FAQ' document circulated to affected staff. He did the same thing at the meeting with Ms Macleod on 20 August 2020, despite being told in terms that he was prohibited from doing so.

61 The Claimant told us that the redundancy process affected his mental health. We fully accept that he must have experienced considerable stress and anxiety, as would all his colleagues whose careers and livelihoods were put in jeopardy. That said, the Respondents were not made aware, and had no reason to suspect, that he was mentally or emotionally vulnerable to the extent that any special measure or adjustment was called for in his particular case. We find that he was treated courteously and with respect, as were the offer employees involved.

Secondary Findings and Conclusions

Protective award

62 In our judgment, the Claimant's claim for a protective award is misconceived. On the principles set out in the *USDAW* and *Lyttle* cases (summarised above), the only proper conclusion is that the individual stores to which the Respondents' employees were assigned constituted separate 'establishments'. And on that footing, given the undisputed facts, no obligation of collective consultation arose in respect of the redundancy proposals at HoF, Oxford Street.

Unfair dismissal

63 What was the true reason for dismissal? We are satisfied that it was the fact that the Claimant was redundant when his post was abolished and he was unsuccessful in applying for a position in the new structure. It is not in question that the reorganisation resulted in a requirement for fewer employees to carry out work of the kind performed by the Claimant. Accordingly, redundancy, a potentially fair reason for dismissal, is made out.

[5] It did appear in a separate list (referred to as a 'Sharepoint list'), but that was available only to managers at a higher level than the Claimant.

64 Did the Respondents act reasonably in treating the reason as a sufficient reason to dismiss? We remind ourselves that we must confront that question by asking whether their action fell within a permissible range of options. We are quite satisfied that it did.

65 Self-evidently, it was open to the Respondents to reorganise their workforce in response to the severe trading difficulties which confronted them. Equally self-evidently, it was open to them to judge that deletion of the Claimant's post and that of his part-time colleague were proper and appropriate measures in the circumstances. Accordingly, the key contest in the case has been over the manner in which the Respondents sought to meet their obligation to take reasonable steps to secure for the Claimant and other redundant employees the opportunity to be considered for alternative employment.

66 Having stepped back to review the redundancy process in the round, we are satisfied that it fell within a range of permissible options open to the Respondents in the circumstances. The mapping exercise, an appropriate measure carefully executed, rightly focused attention on roles, not candidates. It was proper, and certainly permissible, to exclude promotions (which were rightly stated to have no place in the mapping scheme) from the redundancy consultation process as a whole. The Respondents reasonably envisaged that mapping would facilitate lateral transfers of suitable candidates into the vacancies which would arise and that entertaining promotions would add needless complexity and delay. It was obviously right, and on any view permissible, not to include 'bumping' as part of the scheme: that would not have been in keeping with the central idea of mapping, which is concerned with matching roles, not comparing individuals. It would also have added avoidable complexity and attracted challenges and complaints of unfairness.

67 We further find that suitable measures were devised to cater for instances where vacancies attracted more than one eligible applicant. It was certainly permissible to accord priority to 'in-brand' candidates, since they could be expected to bring product knowledge to their new roles rather than needing full induction and training. And where a 'tie-breaker' was still required, the second and third criteria (the Management Selection Interview scores and the candidates' preference ranking choices) provided objective measures on which to base selection decisions. The scoring of the Claimant was not the subject of challenge and, in the event, had no bearing on his dismissal.

68 There is, in our view, nothing in the Claimant's comparison of his case with that of EF. Her agreement to a reduction of her hours avoided a redundancy from arising. By contrast, deletion of his role had the inevitable result of making him redundant.

69 We are also satisfied that the Respondents acted reasonably – and certainly permissibly – in judging that CLM36 was pitched at a higher level than the Claimant's role, having regard to the (permissible) criteria of turnover and team size.

70 Consultation was necessarily limited in scope, being directed almost entirely to the search for alternative employment. It would not have been appropriate, let alone necessary, to consult on the structural decisions giving rise to the reorganisation, which were quintessentially strategic and managerial matters for the employer alone. The consultation did not simply amount to 'box-ticking', as the Claimant suggested. Relevant information was shared. Lines of communication were kept open. The Claimant was assured that it was always open to him to return for further information.

71 We are also clear that the Claimant was not offered a false expectation of being presented with promotion opportunities. As he accepted in his evidence, he was foolish to pin his hopes on such a possibility coming to pass. The entire scheme was aimed at dealing with the reorganisation by means of level transfers: a chance for promotion would only arise in the unlikely event of the process running its course and leaving vacancies unfilled.

72 The Respondents (through Ms Macleod) dealt fairly and reasonably with the Claimant's last-minute grievance. It was appropriate to deal with it as an informal grievance. No point which he raised warranted interfering with the redundancy process as it applied to him, whether by suspending the notification of dismissal, extending the notice period, or otherwise.

73 We do not say that the redundancy process was perfect. We do find a blemish in the omission of the EL Retail Manager position at HoF, Croydon from the published lists of vacancies. It was also unfortunate that the CLM30 position was advertised in circumstances where no vacancy arose. In addition, it is at least arguable that the policy of excluding pay information from the vacancies list was unjustified. And it would have been preferable for completeness to include in the documents circulated to affected staff an explanation of precisely how (and in what order) the second and third 'tie-break' criteria, where in play, would be operated to determine competitions for vacancies in the new structure.

74 But none of these flaws (in so far as they were flaws) operated to disadvantage the Claimant or were, or could reasonably be seen as, liable to occasion any prejudice to him. As to the first, the Respondents had no possible reason to imagine that he would be, or might be, interested in a part-time position in Croydon paying £12,967.50 per annum. (An error depriving him of the opportunity to apply for a vacancy which, on an objective assessment, might reasonably have been seen by the Respondents as potentially attractive to him might have caused us to arrive at a different outcome.) As to the second, the erroneous advertising of CLM30 was an irritating distraction but it caused no prejudice to the Claimant. (The picture might have been different if, for example, candidates had been limited to four applications: in such circumstances it might have been argued with force that the error had caused him to waste one of his chances. But there was no such limit.) As to the third, the absence of information about pay rates in the vacancies lists was perhaps unnecessary, but it did not prejudice the Claimant or any other potential candidate. Any manager would probably have had a shrewd idea of the likely range and in any event it was open to anyone at risk to express interest in multiple vacancies, including any they might subsequently decide to discard if they judged the pay inadequate. The Claimant

was no doubt one of many who did precisely that. The same goes for the fourth. The absence of clarity as to the interplay between the second and third 'tie-break' criteria was not a point of concern to the Claimant. If it had been, he could have asked Ms Akmanlar about it at any of the four consultation meetings between them or at any other time. And in any event those criteria were not engaged in his case, or at least not to his disadvantage: the only competition for which he was entered, he succeeded in.

75 We bear in mind that the law does not set a standard of perfection in redundancy exercises. And the context is important: the process was on a very large scale and had to be completed under considerable time pressure. It would have been most surprising if there had been no blemish. We are quite satisfied that, in all the circumstances, any imperfections came nowhere near to warranting the conclusion that the procedural conduct of the redundancy exercise as a whole, let alone that of the Claimant's case in particular, fell outside the range of reasonable options open to the Respondents.

76 It follows that the dismissal was not unfair.

77 Had we come to a different conclusion on liability, namely that the dismissal was unfair owing to the failure to publish the EL role in Croydon to which, ultimately, DA was appointed, we would in any event have made no award of compensation. The Claimant would not have been entitled to a basic award, having received a corresponding sum in the form of a redundancy payment (see the 1996 Act, s122(4)(b)). And, under the *Polkey* principle, any compensatory award would have been reduced to nil because we are satisfied that, had the post been duly advertised, (a) it would in all probability have attracted candidates with a better claim to it than him (in particular, 'in-brand' candidates who would have taken precedence) and, (b) even if we are mistaken about that, despite his tactical and opportunistic evidence to the contrary, he would not have considered applying for it. (We bear in mind in particular his evidence about the burdensome 5-hour daily commute from his home in West London to Croydon and back in 2014 to 2015, the fact that he expressed no interest in the 30-hours-per-week CLM21 Croydon role or the more readily accessible, full-time CLM37 Wimbledon vacancy, and his rejection of the BUM02 offer, paying £3,500 more than the EL Croydon position.)

78 Similarly, if we had somehow found that the Respondents had acted impermissibly in excluding him from the competition for CLM36, we would have held that the lost chance had no value and no compensatory award should be made, given that there were two candidates who already worked within the Clinique brand and had marked the vacancy as their first choice.

79 Mr Purnell submitted that any award of compensation should be extinguished on the further ground that the Claimant had culpably caused his dismissal by failing to accept the BUM02 position. We reject that argument. He made a choice which was entirely reasonable and understandable.

80 Mr Purnell further contended that in any event it would not be "just and equitable" to make a compensatory award given the undisputed fact that, despite

being expressly prohibited from doing so, the Claimant had covertly recorded not only the consultation meetings but also the informal grievance meeting with Ms Macleod. We agree that his behaviour was underhand and reprehensible but, had we found merit in the complaint of unfair dismissal, we would not have considered his conduct, regrettable as it was, so grave as to disqualify him from recovering due compensation for the tortious treatment which (on this hypothesis) he had suffered.

Outcome

81 For the reasons stated, the claims fail and the proceedings must be dismissed.

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EMPLOYMENT JUDGE - Snelson

9th Nov 2021

Reasons entered in the Register and copies sent to the parties on: 09/11/2021
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..... for Office of the Tribunals