EMPLOYMENT TRIBUNALS

Claimant: **Mr A G D East**

Respondent: **Neschen Coating GmbH**

Heard at: **East London Hearing Centre (CVP)**

On: **19 October 2021**

Before: **Employment Judge A.M.S. Green**

Representation
Claimant: Ms Polimac - Counsel
Respondent: Mr Goodwin - Counsel

RESERVED JUDGMENT

The claimant's claims for unfair dismissal and payment of a statutory redundancy payment are dismissed.

REASONS

Introduction

1. For ease of reading, I have referred to the claimant as Mr East and the respondent as Neschen.

2. I conducted a remote hearing using CVP. We worked from a digital bundle. The following people adopted their witness statements and gave oral evidence:

   a. Mr G Wienzek.

   b. Mr East.

   Mr Goodwin and Ms Polimac tendered skeleton arguments which I have considered. Both representatives made closing oral submissions.

3. In reaching my decision, I have carefully considered the oral and documentary evidence, the submissions, and my record of proceedings. The fact that I have not referred to every document in the bundle should not be taken to mean that I have not considered it.

4. Mr East must establish his case on a balance of probabilities.

The claims and the response

5. Mr East presented his claim form to the Tribunal on 7 May 2021. This followed a period of early conciliation that started on 25 February 2021 and ended 8 April 2021. The effective date of termination of his employment was 7 December 2020.

6. Mr East has claimed ordinary unfair dismissal and an entitlement to a statutory redundancy payment. He does not accept that there was a genuine redundancy situation. Consequently, he could not have been dismissed on grounds of redundancy. This rendered his dismissal substantively unfair. Alternatively, if there was a redundancy situation, another person, Mr Manteit, was employed during Mr East's notice period and Mr East was not given the opportunity to apply for the position. The process leading to Mr East's dismissal was procedurally unfair and could have been done differently. Alternatively, if his position was redundant, and he was fairly dismissed, he is entitled to a redundancy payment.

7. Neschen deny liability. They said there was a genuine redundancy situation or, alternatively Mr East was dismissed for some other substantial reason. Under all the circumstances, Neschen acted reasonably. If the Tribunal finds that Mr East's position was redundant, Neschen accepts that Mr East is entitled to a statutory redundancy payment. If the Tribunal finds that Mr East was dismissed for some other substantial reason, this does not trigger the right to a statutory redundancy payment.

The issues

8. These are the issues the Tribunal must determine.

Unfair dismissal

9. What was the reason or principal reason for dismissal? Neschen says the reason was redundancy or some other substantial reason.

10. If the reason was redundancy, did Neschen act reasonably in all the circumstances in treating that as a sufficient reason to dismiss Mr East? The Tribunal will usually decide, in particular, whether:

    a. Neschen adequately warned and consulted Mr East.

    b. Neschen adopted a reasonable selection decision, including its approach to a selection pool.

c. Neschen took reasonable steps to find Mr East suitable alternative employment.

d. Dismissal was within the range of reasonable responses.

11. Alternatively, what was the reason or principal reason for dismissal? Neschen says the reason was a substantial reason capable of justifying dismissal, namely a business reorganisation. Did Neschen act reasonably in all the circumstances in treating that as a sufficient reason to dismiss Mr East?

Redundancy

12. Was there a redundancy situation?

13. Is Mr East entitled to a statutory redundancy payment?

Findings of fact

14. Mr Goodwin referred me to the fact that Mr East made covert recordings of meetings he attended and without Neschen's knowledge or consent. I was invited to find that his behaviour was dishonest and undermined Mr East's credibility. I disagree. I accept that, at its highest, his behaviour was distasteful and there was no good reason for him to record those meetings (e.g. because he had a mental impairment that made it difficult for him to remember what was said). However, this is not a situation where, for example a recording device had been left by someone to eavesdrop private deliberations (e.g. during a disciplinary hearing which has adjourned for the decision-maker to deliberate). My general observation of Mr East was that he was reliable when he gave his evidence. I accept that in his 21 years of employment with Neschen and its predecessors, this was the first time that he had gone through consultations when his job was at risk, and he was unfamiliar with the procedure. However, when he instructed solicitors after he was dismissed and to ask them to call for documents to be disclosed of meetings that said he had already attended, recorded, and produced a transcript, he was less than candid with his instructions and I think he can reasonably be criticised for that behaviour.

15. Neschen is a German headquartered company. Its business is the production and sale of modern self-adhesive media and coating solutions for a variety of applications, including book protection, repair films, graphic media, and industrial coatings.

16. Mr East started his employment with Neschen's predecessor, Hunt Graphics Europe Limited on 24 January 2000 as a Regional Sales Manager (UK). His role within that company required him to travel extensively throughout the United Kingdom, Ireland, Scandinavia and South Africa on sales visits, which required him to visit existing customers and prospective customers to generate new business. In 2001, shortly after Mr East started his employment with Hunt Graphics, it was acquired by Neschen AG, who was subsequently acquired by Blue Cap AG in 2016. His employment was subsequently transferred under TUPE to Neschen. His continuity of

employment began on 24 January 2000 and ended 7 December 2021 when he was dismissed.

17. When Mr East started working for Neschen, it had a factory in Basildon which had offices and people working there. However, it was closed in 2012. After the closure, only Mr East and one other employee remained in the United Kingdom. The other employee was the ex-managing director who left the business in the wake of a round of redundancies before the Blue Cap takeover. By the 2019/2020 Mr East was the only employee in the United Kingdom. He represented the entire base of Neschen's UK and Ireland's operations. All of Neschen's other employees were based outside the United Kingdom.

18. Neschen's UK and Ireland's sales figures declined in the years 2017-2020 [98-100]. In 2017 the United Kingdom's sales were €1,782,509.83. In 2018, the United Kingdom's sales were €1,777,300.95. In 2019, the United Kingdom's sales were €1,144,158.22. In 2020, the United Kingdom's sales were € 1,096.446.81. In 2017, Ireland's sales were €134,018.37. In 2018, Ireland's sales were €95,944.52. In 2019, Ireland's sales were €375,759.65. In 2020, Ireland's sales were €53,306.23. Under cross-examination, Mr East accepted that there had been a decline in sales before the Covid pandemic hit the United Kingdom and Ireland. Mr East also accepted under cross-examination that in 2018, the United Kingdom and Ireland only hit their budget target in 3 months out of 12 (i.e. 86.29%) [91]. He accepted that this was also the similar position in 2019 and that there had been a significant shortfall in sales. Under cross-examination, Mr Wienzek accepted that sales had been declining in other countries.

19. To address declining sales, in 2019, Mr Wienzek, Neschen's Head of Business Unit Documents (since January 2021), but previously the Sales & Marketing Director, informed Mr East that it had been decided that the South African sales market would be removed from his remit and transferred to another employee, Mr Richard Bachora, whose sales territories at that time comprised eastern Europe, the Baltics and Scandinavia.

20. Mr Wienzek kept a note of meetings that he had with Mr East. Mr East agreed in cross-examination that these were the only notes available to the Tribunal and that there were no other notes in the hearing bundle.

21. Mr East was referred to a note of a meeting that he had with Mr Wienzek on 21 February 2019 [65]. It is noted that he made it clear to Mr East that he must significantly increase his frequency of visits to dealers and customers especially in his core area of England. Mr East agreed in cross-examination that this was what was said at the meeting. He also agreed that he was told that he needed to see more people around the country. I have no reason to doubt the accuracy of that note.

22. There was another meeting on 30 June 2019. Mr Wienzek took a note of that meeting [65]. It was noted that Neschen had significantly reduced Mr East's sales area because he apparently had mobility restrictions. It is then noted "no objection or comment from AE [i.e. Mr East]". Under cross-examination, Mr East did not deny the accuracy of what was written. The

note then goes on to record that long haul flights to South Africa (trade fairs) were recalled twice at short notice and other flights (apart from 3-4 sales meetings in Germany) within Europe do not take place on the part of Mr East. The result was that Mr East's territory no longer included the entire continent of Africa but only the United Kingdom and Ireland as his sales territory. This meant that he had a significant increase in his capacity to enable him to focus on the home market and to visit more customers. Mr East agreed under cross-examination that he was being required to focus his attention on the United Kingdom and Ireland. I have no reason to doubt the accuracy of that note and the reason for requiring Mr East to focus on the UK and Ireland business.

23. There were further meetings on 2 and 5 December 2019 [65]. Under cross-examination, Mr East agreed that without having South Africa within his remit, he had more capacity in his role [i.e. to focus on the UK and Ireland business].

24. Mr Wienzek's notes then refer to an email dated 21 February 2020 [66]. It is noted that there was a telephone call with Mr East where it was suggested by Mr Easy that the proposed number of visits was too high. It is further noted that Mr East did not provide any real justification for his objection and did not propose any alternatives. Under cross-examination, Mr East agreed that Mr Wienzek had suggested that Mr East should conduct 5 to 8 sales visits per day four days per week.

25. In 2020, when the Covid pandemic hit, under cross-examination Mr East accepted that there had been a very severe fall in income and sales for the United Kingdom and Ireland. In his witness statement at paragraph 11, Mr Wienzek expands on this to say that as the Covid pandemic took hold in about March 2020, Neschen's sales worldwide immediately collapsed and, overnight, international sales trips were no longer possible to generate any new business and customers. Consequently, the company was concerned about its profitability and survival as a business.

26. In paragraph 12 of his witness statement, Mr Wienzek states that they were particularly concerned about the United Kingdom market following the additional impact of Brexit, which started to take hold towards the end of 2019. Post Brexit, the customs duties imposed on imports into the United Kingdom from the EU meant that their products became less competitive and more expensive in the UK market. The delivery times of products following Brexit also increased from 1 to 2 days Brexit to one week because of additional administration and customs requirements. This aspect of Mr Wienzek's statement was not challenged under cross-examination, and I have no reason to doubt what he is saying. Furthermore, the volume of sales already referred to above reflects that decline in business.

27. In mid-2020, Neschen conducted a review of their network of sales representatives and decided to undertake a restructuring of their sales function. They were reviewing where cost-cutting measures could be introduced. The United Kingdom was seen as the first obvious target for cost-cutting because it was believed there was no justification for having a local country sales representative. In his witness statement at paragraph 15

Mr Wienzek states that the shrinking UK and Irish market could instead be looked after from its head office in Germany as had been the case with many other sales territories where they did not have a local presence. In the light of the lightly further impact of Brexit, they also did not anticipate any likely growth in the United Kingdom in the medium term.

28. On 17 August 2020, Mr Wienzek and Ms Inge Gertz (Neschen's Head of Finance & HR) wrote to Mr East to warn him that his role had been provisionally selected for redundancy [106]. The letter said, amongst other things:

> *As a result of uncertain market conditions following Covid-19 and the likely impact Brexit on our business and following 5 years of decreasing sales in your sales territory, the Company is considering restructuring its UK based sales function to respond to the reduced demand and create some necessary efficiencies, which if progressed, will mean that your role is at risk of redundancy.*
>
> *This is a provisional decision and the Company will consult with you and continue to try to identify ways in which your redundancy can be avoided. The Company will also try and identify any alternative positions within the Company that may be appropriate for you. Please let me know if you think that there are ways in which we can avoid having to make you redundant.*

The letter also invited Mr East to a telephone consultation meeting on 19 August 2020 at 8:30 AM. The aim of that meeting was expressed to give Mr East a chance to discuss the proposed redundancy in more detail including possibilities for alternative employment and any ideas or proposals that he might have for avoiding redundancies or reasons why he thought Neschen should not select him for redundancy.

29. The first consultation meeting took place on 19 August 2020. Mr East, Mr Wienzek and Ms Gertz attended the meeting. Mr East covertly recorded the meeting without their consent. He has provided a transcript of that meeting [112-124]. Minutes of the meeting have also been produced [108-110]. At the meeting, Mr Wienzek and Ms Gertz explained that redundancies were in prospect, but no decisions had been made. Mr East was warned that his role was at risk because he was the only person dealing with a market that was generating decreasing returns over a longer period. Mr East was asked for and provided proposals for avoiding his redundancy which included the following:

    a. Creating a new role for him in a new area which was Business Development Manager for the Fine Art Trade Guild/POPAI/RIBA and to focus solely on developing Neschen business in those target areas. He would work with project management, marketing, research, and development to define and develop products selling to those business sectors.

    b. To help set up and establish a dedicated Filmolux Company Operation within the United Kingdom/Irish market. Larger companies/resellers are customers of Filmolux UK (including Art systems). There would be an

add on extra additional business by selling directly to target end user accounts.

c. Not making Mr East's role redundant by working on a "break even point +" scenario/revised budget for the United Kingdom and Ireland. This would provide specific sales targets for Mr East to meet.

30. I note that the proposed redundancy payment was also discussed at that meeting and Ms Gertz advised Mr East that he would be entitled to a statutory redundancy payment of £12,912. However, it is also minuted that Mr Wienzek said that this was for information purposes only as the decision had not yet been finalised. He said that Neschen would consider Mr East's proposals. Mr Wienzek is also minuted to have said that Mr East was still able to send further suggestions and questions if anything was unclear. I also note that Mr East was told that his position was dealing in countries with a small number of customers and reference was made to for other sales representatives who were covering the rest of the world.

31. After the consultation meeting, Mr East sent his proposals in and asked several questions [124 a -c]. In his witness statement, Mr Wienzek explains why the proposals were not viable. In paragraph 22, he says that in relation to the first suggestion of the Business Development Manager, he made the point to Mr East that what had been suggested was in fact already an element of his current role, at least in part. Mr East was not generating the necessary sales and it did not make commercial sense to create a similar new role with a new job title when there was no business need for it. Furthermore, the new role proposed by Mr East would require significantly increased travel and he queried if Mr East could see himself in that position as had previously not wished to travel [126].

32. Regarding the second proposal, which was to create a new company/business this was not viable because Neschen was at the stage of shrinking and they would have to find economic solutions in order to survive. Investing in an additional company/business was very unlikely at that time because Mr Wienzek believed that it would require a €3 million turnover until matching the breakeven point. He queried whether Mr East could see that potential in the UK market. The UK market was already shrinking [126].

33. Turning to the third proposal which was to set new targets for Mr East, Mr Wienzek states in his witness statement at paragraph 24 that he had already failed to meet targets for 9 out of 12 months in 2018 and 2019 and all of his months in 2020. If the new budget was agreed, he asked Mr East what his commitment to creating turnover compared to what he had done previously he asked what other tools that he would use [126].

34. Further emails passed between Mr East and Mr Wienzek and it was agreed there would be a second consultation meeting on 28 August 2020 [131]. The letter arranging the second consultation meeting also indicated that possibilities for alternative employment and any ideas that Mr East had for avoiding redundancy or reasons why he thought he should not be selected for redundancy would also be considered.

35. Mr East prepared further proposals in advance of that meeting. The second consultation meeting was held remotely on 28 August 2020. Mr Wienzek and Ms Gertz attended with Mr East, and notes were taken by Anja Buhrmester. Minutes of the meeting have been produced [131-132]. Mr East also covertly the recording without consent. Under cross-examination Mr Wienzek agreed that the purpose of the meeting was for him to ask questions and to make representations. The meeting also considered the proposals that had been previously made. Under cross-examination, Mr Wienzek understood that it was for Mr East to come up with something that he had not previously considered. There was some discussion about who would deal with the U.K.'s remaining customers but nothing had been confirmed at that stage. I note from the transcript taken from the covert recording [141] that Mr Wienzek asked Mr East where he saw himself and whether he saw any chance to replace someone else who is working on the team. In other words they were discussing alternatives to laying Mr East off. Mr East is recorded to have replied that he did not envisage replacing someone else in the team. He was emphatic because he said "absolutely no. And I, you know, they're all, they're all living in those areas as well so". He is also recorded as saying that he had no plans to move to Singapore "any time soon". Mr Wienzek is then recorded to have said "so exactly, and are, well, South America may be not so good to go there, not speaking Spanish". Mr East agreed. Mr Wienzek then referred to the Czech Republic, Slovakia which is already covered by "Richard" who spoke the local languages. Mr East is recorded as agreeing. He also agreed with Mr Wienzek speaking the local language helps but was not absolutely necessary. I then note that Mr Wienzek said the following:

It wouldn't give a benefit to our company if you take over Richard's area, is what I mean. Um, and also, looking at the fact that he is doing-, I mean they've accomplished too that is going to Africa, so areas that you have done already, er, and I think it's not really what you like to do, so it would be quite critical to put you there and take somebody off who is doing it, er, in a high-performance way.

Mr East is then noted to have understood that. It minutes the fact that Mr East did not want to travel internationally for his work.

36. The meeting then went to talk about the proposed redundancy package. It was also agreed that Mr East could send further proposals in which would be considered [145].

37. Mr East then submitted updated versions of his proposals [134-137]. The first alternative would be to engage in a part-time consultancy basis to service United Kingdom and Irish customers. The second alternative was to engage him on a sales agency basis pursuant to which he would be paid a commission.

38. In paragraph 31 of his witness statement, Mr Wienzek explains why he rejected these proposals. They did not avoid the need for redundancy but were in fact predicated upon Mr East being dismissed for redundancy. Neschen needed to reduce costs and engaging someone on a reduced

basis in the United Kingdom did not make commercial sense when they could simply reallocate the duties to another member of the sales team who would also cover a number of different countries at the same time. Mr Wienzek and Ms Gertz decided that there was no way to avoid dismissing Mr East.

39. On 7 September 2020, Mr Wienzek, Ms Gertz and Mr Kai Tittgemeyer (Neschen's Managing Director) wrote to Mr East confirming the decision to dismiss him for reasons of redundancy [153-154]. The letter stated, amongst other things:

> *As discussed with you during the redundancy consultation process, due to declining sales over a number of years and uncertain market conditions following Covid-19 and the impact of Brexit on our business, the Company has decided to close its UK operation to respond to the reduced demand and creates unnecessary efficiencies.*
>
> *As part of our redundancy consultation process we have explored ways in which your redundancy could be avoided, and the possibility of alternative employment. You have submitted various proposals which we have discussed with you. Further to our second redundancy consultation meeting 28 August 2020 you have sent further proposals through which we have also considered. Unfortunately, despite these further considerations, we have not been able to identify any suitable alternative employment for you or any way in which your redundancy could be avoided.*
>
> *I am writing to confirm that the Company has decided to make you redundant and the Company is hereby serving you notice to terminate your employment, in accordance with Clause 2 of your contract of employment (the "Contract"), with the required notice period being 3 months.*
>
> *In accordance with Clause 2.2 of your Contract we will be placing you on garden leave for your notice period and you are not required to work following 07. 09.2020. Your employment will therefore terminate at the end of your three month notice period on 07. 12.2020. You will receive your usual benefits up to that date in the normal way. All contractual benefits will come to an end on the termination date. Following termination of your employment, you will receive:*
>
> - *A statutory redundancy payment of £12,902. This is calculated based on your current age, length of service of 20 years and the statutory weekly redundancy payment of £538. This payment can be made free of tax.*
>
> *…*

40. Mr East instructed a firm of solicitors, Tolhurst Fisher, to act on his behalf relating to the termination of his employment. On 11 September 2020, Tolhurst Fisher wrote to Neschen challenging the dismissal. They said that the following, amongst other things:

Our client has explained to us the circumstances of the termination of his employment and has raised some significant concerns as to his unfair selection for redundancy as well as the procedural issues within the redundancy process adopted. Accordingly, we are instructed to provide our client's ***written notice to appeal*** *the decision to make and redundant, upon the basis that:*

1. *You have unfairly relied upon the "likely impact" of Brexit as a reason for our client's redundancy;*

2. *You did not adopt a fair selection process basis when identifying the appropriate pool for potentially redundant employees;*

3. *You failed to consult with our client fairly;*

4. *You did not properly explore how the organisation can restructure or plan for the future, in an attempt to avoid our client's redundancy, nor did you search for and/or offer suitable alternative employment within the organisation or consider redeployment within the organisation;*

5. *You did consider our client's proposals to avoid redundancy, which was submitted to you by email on 19 and 28 August 2020; and you failed to provide any substantive written feedback in respect of these proposals to avoid redundancy.*

It is noted that within this correspondence you had omitted to notify our client of his right to appeal the outcome of the redundancy decision or the appeals process, however, we trust that a further meeting shall be scheduled with our client in order to consider our client's appeal and that this meeting shall be held by someone senior to the person who held the previous meeting(s). Our client shall be attending any meeting scheduled with the trade union representative or a work colleague, to be confirmed upon notice of the proposed meeting's date.

…

41. Neschen appointed a firm of solicitors called Winkworth Sherwood LLP to respond to Tolhurst Fisher's letter and they did so on 16 September 2020 [162]. They stated, amongst other things:

…

Redundancy Selection, Scoring and Pooling

Your client is the only UK employee of our client. As such there is no selection, scoring or pooling process appropriate as there is no other UK employee to consider. The employees and other European jurisdictions are of course subject to their own local employment laws.

Redundancy of the Role

The UK as a territory has been loss-making for a number of years with a related reduction in clients. This trend will not be reversed in the current circumstances of Covid-19, Brexit and a general economic downturn. The Company cannot sustain a full-time role in a loss-making territory in the medium to long term and there are no other UK roles.

Suitable Alternative Employment

During the redundancy consultation process your client was asked whether he would consider taking responsibility for another sales territory outside the UK and he declined this potential suitable alternative role. There were no other suitable alternative roles available.

Appeal

As you would appreciate, there is no statutory right of appeal in a redundancy dismissal.

…

42. Tolhurst Fisher responded to these points in a letter dated 27 October 2020 [172]. They stated amongst other things:

…

<u>Redundancy of the role</u>

I am instructed by my client that during the consultation meetings your client had stated that the UK market had been loss-making for a number of years, however when my client enquired as to whether Neschen intended to withdraw from the UK (and Irish market), your client confirmed that it would not. My client enquired further as to who would fill his position and/or serve his customer base and your client was unable to answer this question, as no decision had yet been made. It is my client's position that there will still be a role available to service in the UK market and that your client has acted unfairly by refusing to consider him for this position.

Further, whilst it is your client's position that your client cannot sustain a "full time role", my client had made written proposals on 28 August 2020 that his services be retained on either a Part-time/Consultancy basis or on a Sales Agency Basis. This correspondence was sent to your client at its request following the second consultation meeting, however, to date no response to these "Revised Alternative Proposals" have been received.

Whilst it is your client's assertions that they cannot sustain a full time role in a loss-making territory, your client failed to give any real consideration to my client's proposals to avoid redundancy, nor did your

client put forward any real proposals for my client's redundancy to be avoided.

Suitable alternative employment

It is not correct that my client declined a potentially suitable alternative role in another sales territory. I am instructed by my client that during the second consultation meeting on the 20 August 2020 your client had asked my client where he saw himself working and whether he could see himself replacing anybody else within the team. My client commented that they (members of the team) all live in other areas at which point your cl the roles filled in South America, Singapore and the Czech Republic to which my client confirmed that he did not wish to relocate to those areas.

It is my client's position that he was not given the full opportunity to consider covering another sales territory, upon the basis that he could do this on a remote basis as his colleague in Germany does when servicing the Australian market.

It is refuted that your client had put forward a potential suitable alternative role and that this offer was put forward upon the basis of asking my client as to whether he could see himself bumping into another colleague's role and replacing them in their area it is further noted that my client recalls that during the consultation that your client had commented that they cannot remove high performers in order to replace my client and accordingly it is argued that this was not a genuine suggestion from your client in order to avoid my client's redundancy.

As aforementioned, my client had put forward a list of these "Revised Alternative Proposals" on 28 August 2020, which in part responded to the questions raised in Mr Wienzek's email of 20 August, as well as setting out his further proposals to avoid redundancy. Within this correspondence my client confirmed his willingness to travel around the globe to fill the International Business Development Role he had previously suggested.

As previously requested, your client is required to provide a substantive response to my client's Revised Alternative Proposals".

Appeal

For completeness when referring to my client's "right of appeal" I made no reference to any statutory right of appeal. I would however refer to the ACAS guidelines which recommends that it is good practice to offer an employee the right of appeal in order to enable disputes to be resolved internally without the recourse to solicitors and/or the employment tribunal.

Under the circumstances, had your client offered my client the opportunity to appeal the decision to terminate his employment a

number of questions raised within this correspondence could have been answered by your client directly.

Whilst your client's refusal to offer my client the opportunity to appeal the decision to dismiss is not automatically unfair, it is indicative of their behaviour thus far.

43. On 1 November 2020, Mr Matt Manteit started working for Neschen as an International Sales Manager. Mr Manteit is a native English speaker with elementary proficiency in German [202]. In his witness statement at paragraph 37 Mr Wienzek states that Mr Manteit manages the Graphics products and services in the UK and Ireland and is based in the company's German headquarters and is also responsible for a total of nine countries, including the UK and Ireland. He was recruited before Mr East's employment ended, although after his redundancy consultation period had completed. He states that he was recruited to take over the duties of another member of the German-based sales team who is due to retire and that is why Mr Manteit has a much broader role that Mr East's role. Under cross-examination, Mr Wienzek confirmed that Mr Manteit had been known to Neschen since May 2018, but there had not been a role available to him and he went to work for a competitor. His role not only covers the United Kingdom and Ireland but also Scandinavia and South Africa and other countries. This will include Australia which made sense because he is Australian. Under cross examination he confirmed that Mr Manteit does the work of a regional sales manager, and his role was no different to that of Mr East. He thought that he might become a head of department at some time in the future. He knew before Mr East was dismissed that his work had to continue; it had to be covered by someone else. He accepted under cross examination that when thinking about how it should continue, he realised that could not happen without hiring another person. He then qualified this to say that this was to replace Mr German Kallmeyer, another regional sales manager who was due to retire, and not Mr East. However, he also said that Mr Kallmeyer was still working for Neschen and would be retiring in about two years. He said that a new sales person would need at least one year in position to learn the role. That may be the case, but the obvious inference to draw from Mr Wienzek's evidence was that the operative reason for hiring Mr Manteit in the short to medium term was to replace Mr East and not Mr Kallmeyer. How could it be otherwise if Mr Kallmeyer is still employed and was not expected to retire for another two years and there was a more pressing need to cover Mr East's work?

44. When he was asked whether it was reasonable to enable Mr East to apply for the position, he replied that it was difficult to say, and he got the impression that it would be the best solution to recruit Mr Manteit. He accepted that in theory Mr East could have been invited to apply for the role and then for Neschen to decide who was best suited. In other words for both men to compete for the position. Mr Wienzek said he could have considered him if he had been happy to work in other countries. He further confirmed that the redistribution of countries between people was common depending on Neschen's business needs. On re-examination, Mr Wienzek said there was no justification for continuing to have a person based in the United

Kingdom to handle sales. The volume of sales had dropped. It was also clarified that Mr Manteit covered only seven countries at most. At the point when Mr East was dismissed, he only covered the United Kingdom and Ireland. The main difference, other than the travelling and geographical extent was that Mr Manteit worked only in the Graphics side of the business whereas Mr East worked in both Documents and Graphics.

45. In paragraph 38 of his witness statement, he goes on to say that Mr East's remaining duties for Neschen's UK clients and of their Documents products were distributed amongst other existing employees in the sales team in their German head office. In paragraph 39 of his witness statement, he says that Neschen have no remaining employees in the United Kingdom and there are no plans to recruit any further United Kingdom or Ireland-based employees or to establish any business or company in the United Kingdom or Ireland.

46. In his oral evidence, Mr Wienzek accepted that at the time when Mr East was dismissed, the proposed restructuring of the business had not taken place; it occurred after his dismissal. He also confirmed in his evidence that prior to his dismissal Neschen had five regional sales managers and that there were five regional sales managers after his dismissal, as indicated on the company's website [206-207].

47. On 6 January 2021 Mr Wienzek and Ms Gertz wrote to Mr East in response to his request as to when he would be receiving his statutory redundancy payment [189]. The gist of the letter was that as he was disputing, via his solicitor, that he had been made redundant, they had not made the payment pending confirmation that his redundancy was agreed as a statutory redundancy payment is only payable in a redundancy situation.

Applicable law

48. The circumstances under which an employee is dismissed are set out in section 95 of the Employment Rights Act 1996 (the "Act") as follows:

> *"(1) for the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2)…., only if) –*
>
> *(a) the contract under which he is employed is terminated by the employer (whether with or without notice),*
>
> *…*

49. The fairness of a dismissal is set out in section 98 of 1996 Act 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 –*
>
> *(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 requirement 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,

(b) shall be determined in accordance with equity and the substantial merits of the case."

50. Redundancy is defined in section 139 (1) of the Act as follows:

For the purposes of this Act and employee who is dismissed shall be taken to be dismissed by reasons 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.

51. Confusion can arise as to the difference between a 'redundancy' and a 'reorganisation'. Often employers are uncertain as to whether the changes they are planning to make to working structures simply amount to a reorganisation or will give rise to a redundancy situation; in which case a proper redundancy exercise must be undertaken, and redundancy payments will need to be made. However, redundancy and reorganisation are not necessarily mutually exclusive. 'Redundancy' is a technical, legal definition, while 'reorganisation' simply means a change in working structures and has no specific legal meaning. As the EAT put it in **Corus and Regal Hotels plc v Wilkinson EAT 0102/03**:

Each case involving consideration of the question whether a business reorganisation has resulted in a redundancy situation must be decided on its own particular facts. The mere fact of reorganisation is not in itself conclusive of redundancy or, conversely, of an absence of redundancy.

52. A particular reorganisation may therefore involve making redundancies if the definition of redundancy is met; or it may not — where, for example, work is redistributed more efficiently without the need for a reduction in the number of employees doing a particular kind of work. Conversely, redundancy may occur without the business being reorganised at all. The EAT accepted in **Barot v London Borough of Brent EAT 0539/11** that:

a reorganisation of a business that involves simply reshuffling the workforce may not create a redundancy situation if the business requires just as much work of a particular kind in question and just as many employees to do it, even if individual jobs disappear as a result.

There, it upheld an employment tribunal's decision that the significant restructuring of the Council's Children and Families Directorate entailed a reduction in the kind of work being done by B. The reorganisation involved a reduction in lower level, 'number-crunching' tasks and an increase in capacity for more senior and strategic work, which the tribunal was entitled to find met the statutory definition of redundancy.

53. Although business restructurings are often precipitated by financial crises and economic downturns, not all amount to redundancy. What is crucial, as the **Barot** case affirms, is whether the restructuring essentially entails a reduction in the number of employees doing work of a particular kind as opposed to a mere repatterning or redistribution of the same work among different employees whose numbers nonetheless remain the same. So where, for example, a senior employee is dismissed because his or her work is to be done in future by an employee of lower status, the reason for dismissal will not be 'redundancy', although it may be for some other substantial reason of a kind such as to justify the dismissal within the meaning of section 98(1)(b) of the Act (**Pillinger v Manchester Area Health Authority 1979 IRLR 430, EAT**). In contrast, where the purpose of a reorganisation is to reduce the size of the workforce overall as a reflection of the diminished business need for particular kinds of work, this will constitute redundancy.

54. Reorganisation is often difficult to draw in practice. Indeed, the following cases illustrate just how subtle the distinction can be:

    a. **Excel Technical Mouldings Ltd v Shaw EAT 0267/02**: E Ltd.'s structure was headed by a general manager, S, and immediately below him were six subordinate managers. When the company ran into severe financial difficulties, it decided to alter the management structure, resulting in a 'triumvirate' at the top made up of two of the previous subordinate managers and an external part-time consultant, and the retention of five of the previous six subordinate management positions immediately below. S, however, was dismissed, and his job functions were reabsorbed by the managerial team. An employment tribunal ruled that there was no redundancy because there had been no overall reduction in the number of managerial employees. On appeal, the EAT upheld that decision. It noted that the tribunal had identified the work of the particular kind carried out by S as being 'managerial work' and concluded that this type of work had neither ceased nor diminished. Although there had been a reshaping of the management structure and a consequential reshuffling of responsibilities, the work of the seven full-time managerial employees before the restructuring was still being carried out by seven employees after the restructuring.

    b. **Corus and Regal Hotels plc v Wilkinson EAT 0102/03**: CRH plc embarked on a restructuring exercise of its hotel business involving the substitution of the post of general manager — held by W — with that of resident manager and the creation of the new position of area general manager. CRH plc contended that this restructuring rendered W redundant. An employment tribunal upheld W's claim of unfair dismissal on the basis that the business requirements for employees to carry out W's work had not ceased or diminished even though the identity of the persons carrying out his work had changed. The EAT approved that decision on appeal, ruling that the tribunal had not simply been influenced by the fact that the same number of (or indeed more) employees were employed after the reorganisation than before it, but also, crucially, by the fact that they were doing the same work as before. W was not therefore redundant and his dismissal for that reason was unfair

55. To establish some other substantial reason as the reason for dismissal where there has been a business reorganisation, the employer does not have to show that a reorganisation or rearrangement of working patterns was essential. In **Hollister v National Farmers' Union 1979 ICR 542, CA**, the Court of Appeal said that a 'sound, good business reason' for reorganisation was sufficient to establish some other substantial reason for dismissing an employee who refused to accept a change in his or her terms and conditions. This reason is not one the tribunal considers sound but one 'which management thinks on reasonable grounds is sound' — **Scott and Co v Richardson EAT 0074/04.**

56. It is not for the Tribunal to make its own assessment of the advantages of the employer's business decision to reorganise or to change employees' working patterns. In fact, the employer need only show that there were 'clear

advantages' in introducing a particular change to pass the low hurdle of showing some other substantial reason for dismissal. The employer does not need to show any particular 'quantum of improvement' achieved (**Kerry Foods Ltd v Lynch 2005 IRLR 680, EAT**). In that case, the advantage to the employer in introducing a new rota for managers was sufficient to show some other substantial reason for dismissing a manager following his refusal to accept new terms and conditions that included a move to a six-day week and a reduction in his holiday entitlement.

57. A business reason behind a "some other substantial reason" dismissal does not need to be particularly sophisticated or strategic so long as it is genuine and rational.

58. As long as it is not a section 98(2) of the Act reason, any reason for dismissal, however obscure, can be pleaded on grounds of some other substantial reason, with the proviso that it must be a substantial reason and thus not frivolous or trivial; and must not be based on an inadmissible reason such as race or sex (**Willow Oak Developments Ltd t/a Windsor Recruitment v Silverwood and ors 2006 ICR 1552, CA**). However, while the reason for dismissal needs to be substantial, it need not be sophisticated — merely genuine. For example, in **Harper v National Coal Board 1980 IRLR 260, EAT**, H was dismissed because he sometimes attacked fellow employees during his epileptic seizures. The employer held inaccurate beliefs concerning people suffering from epilepsy in general. The tribunal found dismissal to be fair either on the ground of capability or for some other substantial reason. The EAT said that an employer cannot claim that a reason for dismissal is substantial if it is a whimsical or capricious reason which no ordinary person would entertain. It stated that where, however, the belief is 'one which is genuinely held, and particularly is one which most employers would be expected to adopt, it may be a substantial reason even where modern sophisticated opinion can be adduced to suggest that it has no scientific foundation'. The EAT therefore upheld the tribunal's decision.

59. The employer is required to show only that the substantial reason for dismissal was a potentially fair one. Once the reason has been established, it is then up to the Tribunal to decide whether the employer acted reasonably under section 98(4) of the Act in dismissing for that reason. As in all unfair dismissal claims, a Tribunal will decide the fairness of the dismissal by asking whether the decision to dismiss fell within the range of reasonable responses that a reasonable employer might adopt. Depending on the circumstances, this may involve consideration of matters such as whether the employee was consulted, warned, and given a hearing, and/or whether the employer searched for suitable alternative employment.

60. In other words, to amount to a substantial reason to dismiss, there must be a finding that the reason could, but not necessarily does, justify dismissal (**Mercia Rubber Mouldings Ltd v Lingwood 1974 ICR 256, NIRC**). Whether the reason, once established, justifies dismissal is to be answered by the Tribunal's overall assessment of reasonableness und section 98(4) of the Act. In **Gilham and ors v Kent County Council (No.2) 1985 ICR 233, CA**, the County Council had to reduce expenditure in line with government policy or face serious financial penalties. Consequently, G was

offered a contract which meant less pay. She turned it down and complained that she had been unfairly dismissed. The Tribunal held that the Council had not made out a substantial reason for dismissal because it did not consider the reason put forward as one that reasonably justified dismissal in the circumstances. However, the Court of Appeal held, obiter, that the Tribunal had fallen into error in law by confusing the test for establishing a reason for dismissal with the test of reasonableness under section 98(4). The Court said that it was impossible to argue that the stated reason for dismissal, the Council's need to reduce its expenditure, was not some other substantial reason that could potentially justify dismissal. In **Cobley v Forward Technology Industries plc [2003] EWCA Civ 646** the Court of Appeal confirmed that identification of a substantial reason for dismissal does not require consideration of fairness, which falls to be considered at a later stage.

61. Some other substantial reason is most often invoked where the employer is trying to reorganise the business and/or change the terms and conditions of employment in some way.

Discussion and conclusions

62. I am satisfied that the reason or principal reason for dismissing Mr East was not redundancy but a redistribution of his work to Mr Manteit. I believe that Neschen like many employers was confused as to the difference between a 'redundancy' and a 'reorganisation' and was uncertain as to whether the changes they were planning to make to their working structures simply amounted to a reorganisation or will give rise to a redundancy situation. They erred on the side of caution by believing it was a redundancy exercise and followed a consultation procedure with Mr East. They thought they were undergoing a redundancy exercise when, in reality, it was a reorganisation. I have reached this conclusion for the following reasons:

a. The evidence clearly shows that Neschen had been suffering a significant decline in sales in the United Kingdom and Ireland in the period 2017 to 2020. In 2019, Mr East's role was changed to the effect that he was no longer required to work in regions other than the United Kingdom and Ireland. This was because he needed to focus on building up sales in these countries and also because he had issues with international travel. He did not want to do it anymore. Matters were made significantly worse by the impact of the Covid 19 pandemic and Brexit in 2020. The business was not completely shut down in the United and sales still needed to be managed.

b. The solution was to hire Mr Manteit. On 1 November 2020, Mr Manteit started working for Neschen. This was whilst Mr East was still an employee, albeit on Gardening Leave. He took over Mr East's work albeit based in Germany and included this with other sales management as part of a portfolio of regions. He had language skills which Mr East did not have.

c. Prior to Mr East's dismissal, Neschen employed five people to do the work of sales management including Mr East. After his dismissal, there

was no reduction in the number of people doing that work. His work was given to Mr Manteit. This was a repatterning which involved Mr East losing his job. Whilst Mr Manteit now works in the Graphics business, that was not always the case because this occurred after larger restructuring exercise which Mr Wienzek admitted and not taken place at the time when Mr Manteit was hired and when Mr East was dismissed. Mr Manteit did the same job as Mr East as well as covering other countries in his portfolio. Mr Wienzek confirmed that in his evidence. His role was not significantly different to that of Mr East's.

63. Whilst this was not a redundancy, I am, however, satisfied that Mr East was dismissed for some other substantial reason. His role could be performed by Mr Manteit, who would also be covering other regions. This reduced not only reduced cost but brought in flexibility. Neschen had done this type of redistribution of work before to meet business needs. Given the backdrop of the declining sales in the United Kingdom and Ireland, plus the impact of Brexit and the Covid-19 pandemic, this was a genuine reason. It made economic and practical sense and I can see the clear advantage to Neschen in hiring Mr Manteit. Neschen acted reasonably in dismissing Mr East for that reason. It was within the range of reasonable responses that a reasonable employer might have adopted. On his own evidence and whilst consultation with Mr East had been ongoing, Mr Wienzek admitted that he could, in theory, have offered Mr East the opportunity to apply for the position and compete with Mr Manteit for the role but he did not do that because he had reasonable grounds for believing that there would be no point in doing so. The role would involve Mr East having to relocate to Germany and to operate across several countries. He would have to travel across national borders and Mr Wienzek already knew that international travel was not something that Mr East wanted to continue doing and that was one of the reasons why South Africa had been taken from his portfolio in 2019 and given to someone else. Furthermore, during the second consultation meeting on 28 August 2020, Mr East had emphatically stated that he was unwilling to travel abroad giving the example of moving to Singapore. Mr East was also linguistically challenged and would not be able to operate many of the countries which required the ability to speak the local language (e.g. Czech or Spanish). For example, he does not speak German whereas Mr Manteit does. Finally, I do not think that the failure to allow Mr East an appeal does detracts from the overall reasonableness of Neschen's behaviour in handling the dismissal. He did not have a statutory right of appeal and there had been thorough consultation process where he was encouraged to make proposals to avoid dismissal. He made several proposals which were considered and rejected with reasons. After he was dismissed, Mr East instructed a solicitor to write to Neschen setting out his grounds of appeal. His solicitor acknowledged in subsequent correspondence that Mr East did not have a statutory right of appeal. Notwithstanding that, Neschen's solicitor engaged with Mr East's solicitor and substantively responded to the first letter setting out the reasons for the dismissal. There could be no doubt in Mr East's mind about why he had been dismissed. The dismissal was fair.

64. Finally, as there was no redundancy situation, it follows that Mr East does not have any entitlement to a statutory redundancy payment.

65. For the foregoing reasons, Mr East's claims for unfair dismissal and payment of a statutory redundancy payment are dismissed.

Employment Judge A Green
Date: 11 November 2021