EMPLOYMENT TRIBUNALS

Claimant: Mr D Limburn
Respondent: Resource Consulting Ltd
Heard at: Birmingham (by CVP)

On: 7, 8, 9, 24 February 2022

Before: Employment Judge Meichen

Appearances:
For the claimant: Ms S Bewley, counsel
For the respondent: Mr G Probert, counsel

JUDGMENT dated 24 February 2022 having already been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided. Oral reasons were given at the end of hearing and so these written reasons are based on the reasons given orally.

REASONS

Introduction

1. The claims at the start of the final hearing were for breach of contract and unfair dismissal. However the claimant withdrew the claim of breach of contract and it was agreed that that claim should be dismissed upon withdrawal.
2. Accordingly there is one claim left for me to determine which is unfair dismissal.
3. The respondent's position was that the claimant was fairly dismissed for redundancy.
4. By the time of closing submissions it was rightly conceded by the claimant that there was a genuine redundancy situation. However, the claimant continue to dispute the purported reason for dismissal and he continued to argue that the process followed by the respondent and the decision made was unfair.
5. I was provided with an agreed bundle of documents which ran to in excess of 400 pages.
6. The claimant gave evidence and provided witness statements from five additional witnesses however due to the narrowness of the issues before the tribunal Mr Probert elected not to cross examine the claimant's witnesses. The exception to that approach was Helen Cripps who in the end had to be called to give evidence to deal with one specific point.

7. I take into account therefore that the majority of the claimant's witnesses' evidence has not been challenged. However in my view the evidence provided by the claimant's witnesses was peripheral to the issues which I have to determine.

8. The respondent called 3 witnesses who were all cross examined – Jeetender Thyra, Rachel Allot and Beth O Sullivan.

The issues

9. At the start of the hearing both counsel helpfully collaborated on preparing an agreed list of issues for me to determine. This was as follows:

Unfair dismissal

1. What was the reason for the Claimant's dismissal and was it a potentially fair reason - s.98 Employment Rights Act 1996 (ERA)?
    a. The Respondent contends that the reason for dismissal was redundancy.
    b. In the alternative, the Respondent contends that the Claimant was dismissed for some other substantial reason within the meaning of s.98 (1)(b) ERA, namely a reorganisation carried out in the interests of economy and efficiency.

2. The Claimant contends that the real reason for the Claimant's dismissal was his relationship with the other Director of the Respondent.
    a. The Respondent contends that this is a new position and is not set out in the Claimant's particulars of claim.

3. Having regard to the reason for the dismissal, and regarding the size and administrative resources of the Respondent's undertaking and in accordance with equity and the substantial merits of the case, did the Respondent act reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and was Claimant's dismissal fair or unfair in the circumstances (s.98(4) ERA)), including:

    a. Did the Respondent apply a fair process and/or selection criteria?
        i. In particular, the Claimant refutes the Respondent's contention that his role was unique; and/or
        ii. there was another Operations Director within the company based in the UK who carried out the same duties, role and responsibilities as the Claimant and who should have been considered for redundancy alongside the Claimant.
    b. Was there a reasonable warning and reasonable consultation?
    c. Was there a fair selection process?
    d. Were reasonable efforts made to avoid the Claimant's redundancy and/or find alternative work for him?
    e. Was the Claimant selected for redundancy and/or placed into a pool of one due to issues with the other Director of the Respondent?

i. the Claimant contends that this process was not executed due to the breakdown in relationship between the Claimant and his direct manager.

4. If the Claimant's dismissal was unfair, should compensation be reduced because of:
    a. The rule in *Polkey v AE Dayton Services Ltd* [1987] IRLR 503?

Breach of contract

5. The Claimant withdraws his breach of contract claim.

The law

10. The essential law for me to apply is contained in the Employment Rights Act 1996 ('ERA'). The relevant provisions are sections 139(1) and section 98(1), (2) and (4).

11. Section 139(1) ERA provides as follows:

"(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to— (a) the fact that his employer has ceased or intends to cease— (i) to carry on the business for the purposes of which the employee was employed by him, or (ii) to carry on that business in the place where the employee was so employed, or (b) the fact that the requirements of that business— (i) for employees to carry out work of a particular kind, or (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish."

12. The relevant parts of section 98 ERA provide 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— (a) – (b) [not relevant] (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."

13. In Williams v Compair Maxam Ltd [1982] ICR 156, the Employment Appeal Tribunal ("EAT") gave important guidance on selecting employees for redundancy. That guidance is as follows:

"1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere. 2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria. 3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service. 4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection. 5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment."

14. I have taken into account all of the points on the law which counsel referred to in their submissions. I will not recite them all but in light of the arguments I have heard it seems to me that the following legal principles are particularly relevant:

14.1 It is important to bear in mind that I am only concerned with whether the reason for the dismissal was redundancy, not with the economic or commercial reason for the redundancy itself (James W Cook & Co (Wivenhoe) Ltd v Tipper [1990] IRLR 386). There is no jurisdiction to consider the reasonableness of the decision to create a redundancy situation in the first place (Moon and ors v Homeworthy Furniture (Northern) Ltd 1977 ICR 117, EAT). This is an important principle as I should not trespass on what is a business decision for an employer.

14.2 However, I can examine the evidence available to determine what was the real or principal reason for dismissal and to ensure the genuineness of a decision to dismiss for redundancy. I do not have to accept the reason given for the dismissal; a reason not communicated to the employee at the time could be a reason for dismissal (Hartwell Commercial Group Ltd v Brand and anor EAT 491/92).

14.3 When assessing the reasonableness of the respondent's actions I must apply the range of reasonable responses test. This means that I must be careful not to apply the substitution mindset of considering what I may have done in relation to a particular scenario. Instead I must consider the question of whether the respondent's actions fell within the range of reasonable responses which were open to an employer in the circumstances. I agree with Ms Bewley that this principle applies to all aspects of the redundancy process including pooling and bumping decisions which are key issues in play here.

14.4 If an employer simply dismisses an employee without first considering the question of a pool, the dismissal is likely to be unfair. However, it will be difficult for the employee to challenge pooling where the employer has genuinely applied his mind to the problem because *"The question of how the pool should be defined is primarily a matter for the employer to determine"* (Taymech v Ryan EAT/663/94). There will nevertheless be cases where the choice of pool by the employer is so flawed that the employee selected has been unfairly dismissed (Capita Hartshead Ltd v Byard 2012 ICR 1256, EAT). I accept that such a challenge may legitimately be made where the employer has defined the pool so as to ensure the dismissal of a particular individual.

14.5 Bumping dismissals arise where one employee whose job is redundant is redeployed to another job and the employee in that job is the one who is actually dismissed. However, in Byrne v Arvin Meritor LUS (UK) Ltd UKEAT/0239/02 Burton P said: *"The obligation on an employer to act reasonably is not one which imposes absolute obligations, and certainly no absolute obligation to "bump", or even consider "bumping". The issue is what a reasonable employer would do in the circumstances, and, in particular, by way of consideration by the Tribunal, whether what the employer did do was within the reasonable band of responses of a reasonable employer?"*

14.6 In Mirab v Mentor Graphics Limited UKEAT/0172/17 HHJ Eady QC explained that there was no rule of law that bumping should only be considered where it was raised expressly by the employee. She also said that: *"there is … no rule that an employer must always consider bumping in order to dismiss fairly in a redundancy case, not least as, where this might involve the employee in question being moved into a subordinate and less well paid role, that might not be seen as something that the employer should reasonably be expected to initiate … The question will always be for the ET to determine, on the particular facts of the case, whether what the employer did fell within the range of reasonable responses."*

14.7 Consistent with that approach the EAT has rejected the idea that it is always necessary for a senior employee to tell the employer that he or she is willing to accept a more junior role or a pay cut before the employer is obliged to consider bumping into a more junior/lower paid role (Dial-a-Phone and anor v Butt EAT 0286/03).

14.8 The classic definition of the reason for dismissal is as follows: *"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee"* (Abernethy v Mott, Hay and Anderson [1974] ICR 323, 330). In West Midlands Co-operative Society Ltd v Tipton [1986] AC 536 it was noted that the reason for the dismissal might aptly be termed the "real" reason for it. In the vast majority of cases when determining the reason for dismissal the tribunal must consider the reason which was in the mind of the decision maker.

14.9 However an exception to that usual process was identified in Royal Mail Ltd v Jhuti [2019] UKSC55. The Supreme Court held that the reason for the

dismissal could be a reason other than that given to the employee by the decision-maker, if a person in the hierarchy of responsibility above the employee determined that the employee should be dismissed for a reason, but hid it behind an invented reason which the decision-maker adopted.

15. Part way through the hearing Ms Bewley indicated an intention to argue that the principle in Jhuti could be applied on the facts of this case. That argument had not been apparent to me on reading the claim form. I will nevertheless consider the potential application of Jhuti but I should take into account that the Supreme Court explicitly recognised and stated at para 41 of Lord Wilson's judgment that the facts of Jhuti were extreme and not likely to be of common application. Essentially they apply to cases where a manager has dishonestly constructed a fake reason for dismissal which a different manager then relies upon to dismiss. As explained in Jhuti that means that the reason for dismissal in the mind of the decision maker was bogus.

Findings of fact

16. The claimant began working for the respondent company in April 2006 as a recruitment consultant. All of the evidence which I've heard points in the same direction i.e. that the claimant was an extremely experienced and well regarded employee.

17. In 2017 the claimant was promoted to the role of Operations Director and he remained in that role until 21 November 2020 when his employment was terminated for the stated reason of redundancy.

18. At the time that the claimant was promoted to the role of Operations Director he was also offered the chance to become a statutory director of the respondent. The claimant wished to take up that opportunity. However it never came to fruition and the claimant was never appointed as a statutory director of the respondent.

19. It is relevant that 2017 was a period of some uncertainty as the respondent was the subject of a management buyout by Jonathan Price and others. In the context of that uncertainty the idea to put the claimant in the position of statutory director was never progressed. The claimant did not raise any concern about that until the events which I am concerned with which arose three years later in 2020. By that stage Mr Price was the claimant's line manager as well as being the Chief Operating Officer for the group of companies which contains the respondent.

20. The respondent is a privately owned business serving the recruitment and training needs of the aviation and aerospace sector. The respondent is one of seven subsidiary companies that are owned by a holding company. Although the respondent is a separate legal entity it therefore formed part of this group of companies.

21. The events with which I am concerned took place in the midst of the covid 19 pandemic. I heard evidence which was not disputed and which I accept that the

pandemic had a severe detrimental impact on the respondent's business which as I've mentioned is based in the aviation industry and it was not disputed before me that this industry was particularly adversely affected by the pandemic.

22. On 2 May 2019 the claimant completed a performance review with his line manager Jonathan Price. In that review the claimant recorded that the past year had been challenging and he raised a number of concerns including that he felt he should have more involvement and input into the business. The claimant now identifies the issues which he raised in this performance review as him raising concerns that Jonathan Price was minimising his role and/or excluding him from the business. It appears from the documents that the claimant's concerns were engaged with at the time he raised them. Nevertheless the claimant now explains that he continued to have the feeling that he was being marginalised.

23. The covid pandemic began to have a negative effect on the respondent's business from around March 2020.

24. In May 2020 the respondent made the decision to place the claimant on furlough leave. When explaining that decision to the claimant it was said that the respondent wished to retain the services of the claimant but that furloughing him was a necessary step in the circumstances. The claimant responded by saying that he recognised that the respondent was in a dreadful situation but he also had concerns about the request for him to be furloughed. The claimant asserted that the respondent had not explored any other avenues with him or asked for his input on anything that may constructively assist the business. The claimant's position in summary was, and is, that bearing in mind his experience it would be better for the respondent if he continued working in some capacity. That did not happen however. Instead, the respondent took the decision that the needs of its business were such that the claimant should be furloughed rather than continue working.

25. From the evidence which I have seen and heard in this case it appears that the decision to furlough the claimant on top of his pre-existing concerns that he had been marginalised by Jonathan Price led to the claimant becoming quite intensely suspicious and distrustful of the respondent and their motives. In my judgement this affected the claimant's approach to the redundancy situation which later arose.

26. As the pandemic continued to have a negative effect on the respondent's business the respondent identified that cost savings needed to be made if the business was going to survive. On 30 July 2020 there was a board meeting. At that meeting Jeetender Thyra, who was the Chief Financial Officer across the group, presented a proposal to make cost savings. That proposal vividly identified the detrimental financial impact which the covid pandemic was having on the respondent's business and the aviation industry in general.

27. Mr Thyra made it clear in the proposal document that the respondent was required to make additional cost savings in order to survive. He therefore set

out a cost saving programme for each of the businesses in the group of companies. As far as the respondent was concerned Mr Thyra identified the required level of cost saving and proposed that the claimant's role and one other role was deleted from the company in order to achieve the required saving. In total Mr Thyra's proposal involved the removal of 17 roles from the UK based businesses within the group.

28. Mr Thyra's proposal was approved subject to consultation with affected employees. Accordingly 17 individuals were placed at risk of redundancy and a process of consultation began. It was recognised that the business should fully explore alternative employment across the group but given the impact of the pandemic it was anticipated that the availability of alternatives would be limited.

29. In considering how its proposals would be presented to the affected employees the respondent considered whether the roles identified should be treated as unique or whether there were grounds to create pools. The respondent gave specific consideration to the claimant's role. In particular they considered whether the claimant's role should be pooled with a Director of Operations role at one of the other UK based companies. This role was occupied by Jon Ruckwood. The respondent took the view that the roles were not sufficiently similar and the claimant's role should be treated as unique. The claimant was therefore to be placed in a pool of one.

30. I accept Mr Thyra's evidence that there were a number of important differences between the claimant's role and Mr Ruckwood's role:

30.1 The roles sat in different limited companies.
30.2 The location of the roles was different. The claimant worked from home and Mr Ruckwood was based in the office in Basingstoke, which is some 188 miles from the claimant's home. Mr Ruckwood's role required attendance in that office as he had a team of around 6 or 7 people to manage.
30.3 The roles and responsibilities were materially different. The claimant dealt with engineer recruitment predominantly for two key customers. Mr Ruckwood dealt with the recruitment of flight crews for a wide range of customers and would also recruit engineering apprentices.
30.4 The sector and market base were different – there is a significant difference in knowledge and experience required for the recruitment of engineers versus flight crew.
30.5 The claimant was paid 68% or £33000 more in basic salary than Mr Ruckwood - plainly demonstrating the differences between the roles.

31. As a result of these factors the claimant's role and Mr Ruckwood's role could not be could not be regarded as interchangeable. The claimant did not have the same duties, role and responsibilities as Mr Ruckwood.

32. It is important because of the way in which the claimant's case has been presented that I make clear the following finding of fact. I am entirely satisfied from the evidence which I have seen and heard that the proposal to delete the claimant's role along with others was entirely Jeetender Thyra's proposal. It

was therefore Jeetender Thyra's proposal which led to the redundancy situation which led to the claimant's dismissal.

33. I'm satisfied that the detailed document setting out the reasons for the proposal was entirely Mr Thyra's own work and came about as a result of the extremely difficult financial situation which the respondent and the wider group of companies was in due to the covid pandemic.

34. The claimant has a suspicion that Jonathan Price was ultimately behind this proposal. There is no cogent evidence that that was in fact the case. In my judgement the claimant's belief that Jonathan Price in some way influenced Mr Thyra to put this proposal forward was simply based on speculation.

35. On 3 August 2020 the respondent announced the redundancy proposals arising from the cost saving plan. The respondent announced its intention for there to be a relatively short consultation and selection process which would be concluded by 19 August 2020. This decision was taken in the context of it being made clear that the company regarded it as absolutely critical to reduce costs as soon as possible.

36. The claimant was written to on 6 August 2020 and in that letter the respondent explained why it considered his role to be unique and therefore it was not necessary to undergo a selection process. The respondent made it clear however that they would consult with the claimant to give him the opportunity to ask questions about the restructure and provide alternative ideas or proposals to avoid his redundancy.

37. The first consultation meeting with the claimant took place on 12 August 2020 and was conducted by phone. The consultation process was conducted by Rachel Allot who is the head of HR for the group. In this meeting the claimant questioned the decision not to place him in a pool with others as he believed that there was another position within the company with the same title. This was a reference to Mr Ruckwood's role.

38. The possibility of the claimant applying for other roles was also discussed. The claimant was asked by Ms Allott what salary he might consider for an alternative role. In response to that the claimant said that he felt whatever he said would not be considered so he was wasting both of their time. The claimant went on to say that he was aware that these processes had been rigged by Jonathan Price in the past.

39. The claimant's decision not to engage about possible salaries for a new role was therefore a product of the distrust which he felt for the respondent, the group of companies in general and Mr. Price in particular.

40. I consider the claimant's refusal to discuss an acceptable salary range to be significant. I have to assess the reasonableness of the respondent's approach on the basis of the situation which existed at the time. At the time the claimant declined to answer this perfectly reasonable question, and I agree with Mr Probert's submission that by doing that the claimant was effectively shutting

down any prospect of talks around alternative roles. In particular he was shutting down any prospect of talks about him moving into a role with a reduced salary.

41. I take into account and accept that the claimant was feeling stressed and under pressure at this meeting. But he is an experienced employee who has been involved in redundancy processes before. What is striking is that even after the meeting when he had a chance to compose himself he did not get back in touch with a salary range he might have found acceptable. The respondent was therefore left in the dark about that.

42. Following the meeting Rachel Allott wrote to the claimant on 13 August dealing with a number of issues which had been raised by the claimant. Rachel Allott also advised the claimant that there were no alternative available roles for which he could be considered. It was emphasised that the decision to make the claimant's role redundant was not to do with the claimant or his performance but was as a result of a high level strategic review which had identified the claimant's role as one which would could be deleted in order to achieve cost savings. I accept that.

43. There was then correspondence to the respondent from the claimant on 14 August 2020 when he sent Rachel Allott an email attaching his own notes of the consultation meeting. In his email the claimant raised a wide range of concerns, including that he had not been appointed as a statutory director back in 2017. The claimant concluded his email by saying that he hoped that an amicable agreement/settlement could be reached.

44. Rachel Allott was concerned to receive that email. She felt the notes provided by the claimant were misleading. She postponed the second consultation meeting which had been scheduled to take place on the afternoon of 14 August.

45. On 18 August Rachel Allott sent the claimant a detailed response to the issues which he had raised. Within that response Rachel Allot clearly set out the respondent's reasons for its conclusion that the claimant's role was unique. The reasons why the respondent considered Mr Ruckwood's role to be different to that of the claimant were identified.

46. The claimant did not challenge that the time. Moreover, he also did not challenge it in any detail in his statement for this hearing. This was surprising given the potential importance of this issue and how his case was presented at the hearing (there was an emphasis on an argument that the claimant should have been pooled with Mr Ruckwood or bumped into his role).

47. In his oral evidence when he was asked about possibly taking over Mr Ruckwood's role the claimant said that he would have quite happily taken the significant pay cut, cease working from home and become office based and relocate. I seriously doubted that evidence. I think that if that were true it would have been clearly explained by the claimant at the time and certainly set out in his witness statement. It was not.

48. Moreover, the claimant's assertions also seemed to fly in the face of the clear picture I formed from the evidence which was that he was extremely mistrustful and suspicious of the respondent and the wider group of companies in which Mr Price was a key player. I found it difficult to accept he would have moved, undergone a significant lifestyle change and taken a substantial pay cut to continue working for the respondent group and Mr Price, given the distrust he obviously felt.

49. I note that in his claim form the claimant referred to his position having become "untenable" due to the alleged breakdown in relations with Mr Price. It is not clear how if that was correct it would have been tenable for the claimant to continue working in another Operations Director role given that Mr Price was the Chief Operating Office across the whole group. This reinforced my view that at a very late stage the claimant was making an assertion which was unrealistic and impractical.

50. Rachel Allott sent the claimant a further email on 19 August providing more detail as to the respondent's position on various points raised by the claimant. Overall, the claimant's concerns and questions were answered in what I consider to be a thorough and comprehensive manner.

51. A final consultation meeting then took place with the claimant on 21 August 2020. During that meeting the claimant again referred to the statutory director point and also indicated that he believed the respondent had been involved in *"some very naughty things over the years".*

52. Rachel Allott advised the claimant that he could raise a grievance if he wished to do so. She formed the impression, I think not inaccurately, that the claimant's approach was geared towards getting a financial settlement rather than constructively looking at alternatives to his redundancy.

53. Following the meeting the claimant was sent a letter which confirmed his redundancy. The claimant was advised that his employment would terminate upon the expiry of his notice, on 21 November 2020. The claimant continued to be on furlough until that date.

54. Again because of how the claimant's case has been presented it is important I make the following clear finding of fact concerning Rachel Allott's decision to dismiss the claimant. I am entirely satisfied that she took that decision and that when she did so she had the redundancy situation as the reason in her mind.

55. Again the claimant had a suspicion that Mr Price was behind Ms Allott's decision or influenced her in some way. Again there was no cogent evidence of that. Again I find the claimant's belief was based on nothing more than speculation.

56. The claimant was given the right of appeal against the dismissal decision. However he did not appeal. Again that decision was a product of the claimant's deep distrust of the respondent.

57. Within the claimant's notice period there was rather unfortunate correspondence between the claimant and the respondent on a number of issues such as the return of company property. The claimant appears to me to have taken a rather confrontational approach which again I think reflects his negative feelings towards the respondent.

58. On 19 November 2020 the claimant submitted a grievance letter. The reason why the claimant waited until very near to the end of his notice period to raise his grievance is not clear to me.

59. In his grievance the claimant again referred to his complaint about not being appointed as statutory director back in 2017. The claimant believes that had he been appointed a statutory director he could have influenced the respondent's decision making so that his role would not have been made redundant. This was a very speculative belief. It formed part of the claimant's breach of contract claim which he withdrew early in this hearing.

60. Within his grievance letter the claimant also raised allegations of financial wrongdoing which I do not believe are in any way relevant to the issues which I have to determine. There is no cogent evidence that the claimant's raising of concerns about financial wrongdoing had any influence on the proposal to make his role redundant or his dismissal.

61. Rachel Allot responded to the claimant's grievance initially to suggest that it may be more appropriate for the claimant to pursue his complaints via an appeal against the dismissal. The claimant rejected that suggestion. Again the correspondence around how the grievance was going to be dealt with appears to me to have become unnecessarily confrontational and bad tempered. The claimant's approach was clearly influenced by his deep distrust of the respondent.

62. On the other hand the respondent did not take action on the claimant's grievance as promptly as they should have done. In the end the grievance was never properly dealt with. The claimant had said he wanted it be progressed but he had then declined to provide the respondent with all of the information which they had requested because he felt it might prejudice his tribunal case. In those circumstances the grievance was not concluded.

Conclusions

63. In response to a clear need to save costs as a result of the pandemic the respondent implemented a new structure which involved the deletion of the claimant's role. I find that this was a genuine redundancy scenario within the meaning of s.139 Employment Rights Act 1996. This was rightly accepted by the claimant by the time of closing submissions. The requirement of the business for an employee to carry out the work involved in the claimant's role had ceased.

64. I turn next to the reason for dismissal. In my judgement the facts of this case demonstrate unequivocally that the principles in Jhuti have no application. The reality of this case is that the reason for dismissal was not bogus. That is a crucial point of distinction with the facts in Jhuti. In this case there was a genuine redundancy situation, as the claimant rightly and inevitably conceded in closing submissions. The purported reason for dismissal in this case was not bogus because it was genuine.

65. There is a complete absence in this case of any cogent evidence of the dishonesty and deception which characterised the findings in Jhuti. In particular there was no evidence of a manager dishonestly inventing a reason for dismissal.

66. The reason for dismissal, that is the redundancy situation, was not created by the person whom the claimant alleges was hostile to him (Mr Price). The proposal for the redundancy situation was created by Mr Thyra and not Mr Price. There was no cogent evidence that Mr Price influenced Mr Thyra to formulate the redundancy proposal so as to cause the dismissal of the claimant. I do not accept that he did that. I am entirely satisfied that Mr Thyra's proposal was put together as a response to the urgent need to cut costs in light of the impact of covid on the respondent's business.

67. I accept that redundancy was the reason for dismissal. Again there was no real evidence of any influence being exerted by Mr Price on Ms Allot to dismiss the claimant. I do not accept that he did that. I am entirely satisfied that Rachel Allott made her own decision to dismiss the claimant because of the redundancy situation. It was a genuine decision and the reason communicated at the time reflected the real reason for dismissal.

68. In her submissions Ms Bewley invited me to draw an adverse inference that a malign influence had been exerted by Mr Price from the following matters:

    a. That the respondent had not called Mr Price as a witness.
    b. That the respondent had failed to deal with the grievance.
    c. The fact that the claimant was placed on furlough, in particular rather than permitting him to work as an engineer for one of the respondent's clients, possibly abroad.

69. I don't think there is any basis at all for me to draw any adverse inference from those matters, for the following reasons:

    a. In my judgement the respondent called the relevant witnesses. They called the decision makers – Mr Thyra and Ms Allot. There was quite simply no cogent evidence of either decision maker being inappropriately influenced by Mr Price. If there was that could have been fairly put to the decision makers. The questioning and submissions on this point demonstrated that the reality was that this part of the claimant's case was fuelled entirely by speculation and suspicion on the claimant's part, rather than any cogent evidence. In short there was no case for Mr Price to answer which might have justified calling him as a witness.

b. The grievance had no bearing on the decisions taken by Ms Allott or Mr Thyra. There was no cogent evidence they were motivated by any of the issues raised in grievance. The grievance was not raised until nearly 3 months after dismissal. The claimant, rather strangely, waited until just before the end of his notice period to raise his grievance. If the claimant had raised his grievance earlier it could have been dealt with. Further, it seems clear to me that the distrust the claimant had for the respondent made dealing with the grievance difficult. The correspondence between the parties became confrontational and the claimant was evasive about providing information requested by the respondent because he thought it might prejudice his tribunal case. This was ultimately why the grievance was not concluded.
c. The reason why the claimant was placed on furlough was clear and obvious. It was the impact of the covid pandemic and in particular the urgent need to cut costs in light of the impact of covid on the respondent's business. The reasons why the claimant was not permitted to work for a client were also clear - work throughout the industry had experienced a massive downturn and there were obvious practical problems with the claimant changing workplace, possibly to live and work abroad, during the pandemic. There was no cogent evidence that the claimant being placed on furlough had anything to do with the alleged breakdown in the relationship between the claimant and Mr Price.

70. I therefore do not accept the claimant's case that the real reason for his dismissal was his relationship with Mr Price. Further, I agree with the respondent that this point seems to have been raised rather late in the day and it does not appear to have been pleaded. The claim form makes it clear that the claimant alleges his dismissal is unfair by reason of "procedural unfairness". The alleged breakdown in the relationship between the claimant and Mr Price was referred to and suggested as a reason why the respondent had not pooled the claimant with Mr Ruckwood. However, the reason for dismissal was not challenged. I have considered the merits of the claimant's argument anyway but I would have expected this point to have been raised front and centre in the claim form if it was seriously pursued, especially as the claimant has been represented by solicitors throughout. This reinforces my view that it is in fact clear that the real reason for dismissal was redundancy.

71. I would add that the evidence that there had been a relationship breakdown between the claimant and Mr Price was very thin. It appeared to me that the type of issues raised by the claimant in the performance review on 2 May 2019 were not particularly serious and did not indicate a relationship breakdown which might have led Mr Price to seek to get rid of the claimant.

72. I turn next to questions of fairness. I conclude firstly that the respondent adequately warned and consulted the claimant. The consultation process was relatively short and done by phone. But this was in the midst of the pandemic and I accept there was an urgent need to act quickly in order to ensure the survival of the business. The claimant did not point to any particular problem caused by the relatively short process or the fact it was done over the phone. I

find that the warning and consultation process was reasonable in the circumstances.

73. In my judgement it was clear that although the respondent had formulated its proposals before speaking to employees the decision was not finalised and there was meaningful consultation before the respondent reached a concluded position. The respondent reasonably engaged with the options raised by the claimant before it finalised its approach. It informed the claimant and other affected employees of the proposals and then consulted on them. This was a reasonable approach.

74. The crucial point the claimant made at the consultation stage was that he should have been placed in a pool with Mr Ruckwood. The evidence shows that when that was raised the respondent considered the arguments raised and explained its response to the claimant in detail. This was an example of meaningful consultation.

75. Turning next to selection. The focus of the claimant's argument at this hearing was that he should have been pooled with Mr Ruckwood or bumped into Mr Ruckwood's role. Mr Ruckwood was employed by a different business within the same group of companies as the respondent. On behalf of the respondent Mr Probert did not dispute that the respondent could have pooled the claimant with Mr Ruckwood or bumped him into Mr Ruckwood's role. He accepted, I think rightly, that the question was whether the respondent's decision not to do those things fell within the range of reasonable responses.

76. I find that the respondent adopted a reasonable selection process including its approach to pooling and bumping. In particular I find it was well within the range of reasonable responses for the respondent to treat the claimant's role as unique and not place him in a pool with Mr Ruckwood or bump him into Mr Ruckwood's role. There were clear and cogent factors which the respondent relied upon showing that the claimant's role and that of Mr Ruckwood were different. I accepted the respondent's evidence to that effect and I explained the differences in the roles in my findings of fact. The claimant did not challenge the respondent's analysis at the time or even in his witness statement for this hearing in any detail. The respondent had genuinely applied its mind to the question of pooling, listened to the claimant's representations, explained its approach to him and made a reasonable decision. This was an overall fair approach.

77. There is no evidence that the claimant was placed into a pool of one because of the alleged breakdown in his relationship with Mr Price. I did not accept that he was. The reason why the claimant was placed into a pool of one was because of the differences between his role and that of Mr Ruckwood. It was not done because the respondent wished to ensure the dismissal of the claimant, it was done because the respondent genuinely and reasonably considered the claimant's role to be unique. Similarly there is no cogent evidence that the claimant was selected for redundancy because of the nature of his relationship with Mr Price. That arose because of the proposal formulated by Mr Thyra which he put forward for reasons which had nothing to do with the

relationship between the claimant and Mr Price. The claimant suggested that he was seen as a troublemaker for raising concerns and this may have led to his selection for redundancy and the alleged procedural failings but there was no cogent evidence of that.

78. The possibility was raised in this hearing that the respondent could have bumped Mr Ruckwood and placed the claimant into his role. Given the significant differences between the two roles including the remuneration levels and the different locations I think it was within the range of reasonable responses for the respondent not to do that.

79. Furthermore the claimant did not say at the time what he said at this hearing for the first time which is that he would be willing to relocate and take a big pay cut in order to perform Mr Ruckwood's role. The claimant did not even explain in his witness statement why he would have been willing to take Mr Ruckwood's role and I think this is because it was in fact wholly unrealistic to say that, for the reasons I have already explained.

80. In my view it is salient that at the time the claimant refused to engage with the respondent in discussions about an acceptable salary level. This had the effect of shutting down any prospect of talks around the claimant moving into a role with less salary. I don't see any basis at all on which I could say that it was outside the range of reasonable responses not to bump the claimant into a role with significantly less salary when the claimant would not even say what salary level he would accept.

81. I am satisfied that the respondent took reasonable steps to find the claimant suitable alternative employment. The reality was that in the very difficult circumstances of the pandemic there were no suitable alternative roles available. The respondent acted reasonably in asking the claimant what salary level he would accept but as I explained the claimant did not engage with that discussion.

82. At this hearing the claimant relied on the following options which the respondent could have adopted to avoid his redundancy: to allow him to work as an engineer at one of the of the respondent's clients, lay off, extend furlough, part time work, flexi furlough. I think the respondent acted within the range of reasonable responses in not pursuing any of those options. I accepted the respondent's evidence that there was no demand for engineers during the pandemic and a move to a different business was not practical in the context of the pandemic anyway. Regarding lay off, extending furlough and the other options these would not address the redundancy situation which had arisen. The new structure which the respondent wished to implement involved the deletion of the claimant's job in order to achieve the desired cost saving. That was the business decision which the respondent took and they are entitled to take those sort of decisions in order to work out how best to run their business and, in the context of the pandemic, ensure its survival.

83. My overall decision is therefore that I find that the process followed and the decision made fell within the range of reasonable response and the claimant's dismissal was overall fair. Accordingly, the claim must be dismissed.

84. I should however also note that if I had found this dismissal to be unfair this must be a case where there would a high Polkey reduction. The reasons for that are as follows:

84.1 There was a genuine redundancy scenario which involved the deletion of the claimant's role. The claimant's role did not exist in the new structure and therefore he could not continue in it.

84.2 The only realistic alternative to redundancy for the claimant was to either put him in a competitive pool with Mr Ruckwood or bump him into Mr Ruckwood's role. Of these two alternatives a competitive pool would be by far the most likely alternative. Bumping is not compulsory. There was no evidence that the respondent ever used bumping and it was only suggested on the claimant's behalf at this hearing.

84.3 Although I accept the claimant was generally more experienced than Mr Ruckwood Mr Ruckwood was the incumbent performing the role and he was doing a good job. He had the vital experience and knowledge relevant to the role around recruiting flight crew. I therefore think there would have been a significant chance Mr Ruckwood would have been successful.

84.4 I am very far from convinced the claimant would have taken Mr Ruckwood's role if it was offered to him. The claimant did not explain that he would be willing to do that, as he did at this hearing, either at the time or in his witness statement. At the time the claimant chose to shut down the prospect of talks around accepting a role with less salary, which demonstrates what his mindset was. I think there are very clear reasons why the claimant would not have taken Mr Ruckwood's role including his deep distrust of the respondent, Mr Price and the wider group of companies, the substantial pay cut, his belief that working under Mr Price had become "untenable" and the fact it would have meant a significant lifestyle change involving a relocation of several hundred miles and a change to office working.

85. For those reasons if the claimant had been found to have been unfairly dismissed I would have applied a Polkey deduction of 70%. Further, the claimant's compensation would have to reflect the fact that had he had not been dismissed he could only have remained working in Mr Ruckwood's role with the reduced salary attached to that role.

Employment Judge Meichen

Date 11 April 2022