EMPLOYMENT TRIBUNALS

Claimant: Mr John Richard Bell

Respondent: William Lacey Group Limited

Heard at: Watford **On:** 23rd and 24th June 2022

Before: Employment Judge Dick

Representation:
Claimant: Mr Andrew Scott (counsel)
Respondent: Mr Matthew Curtis (counsel)

RESERVED JUDGMENT

1. The Claimant was not unfairly dismissed by the Respondent. The claim for unfair dismissal is dismissed.

REASONS

Key to references: [x] = document from agreed bundle; {x} = paragraph number in witness statement (of the witness I am referring to unless otherwise recorded).

INTRODUCTION

1. The Claimant was employed as "Head of Design/Director" by the Respondent, a company which procures land and builds homes upon it. On 2nd October 2020, during the COVID-19 pandemic, the Claimant was informed that his role was being considered for redundancy. Following a consultation, he was dismissed on 20th November 2020. An appeal process followed, in which, though the appeal was upheld in part, the original decision to dismiss the Claimant was allowed to stand. The Claimant claims that the dismissal was unfair.

CLAIMS AND ISSUES

2. Following discussions with the parties before the evidence began, I identified the following issues:
    a. What was the reason for dismissal? The Respondent asserted it was redundancy.
    b. Was the dismissal fair or unfair, i.e. did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? In particular:
        i. Was the Claimant adequately warned and consulted.
        ii. Did the Respondent make a reasonable selection decision.
        iii. Did the Respondent consider reasonable alternatives to redundancy.
        iv. Was dismissal within the range of reasonable responses.
    c. If unfair, should there be a reduction to damages for future loss to reflect the fact that employment would have ended fairly in any event (following *Polkey* v *A E Dayton Services Limited* 1988 ICR 142).

3. During the course of proceedings, after hearing submissions from the parties, I decided that any other aspects of remedy (i.e. relating to any award ultimately made by the Tribunal) would be dealt with at a later hearing, should one be required.

PROCEDURE, EVIDENCE etc.

4. The case was heard over two days on the Cloud Video Platform, all the participants (bar me) attending remotely. I am pleased to record that there were no significant technological problems and that all those appearing over CVP were able to participate fully, a few hitches along the way being solved by counsel trying different computers.

5. At the beginning of the hearing, in order to establish the issues which I have set out above, I confirmed that the following matters were not in issue:
    a. The claim and response were in time and the parties were correctly identified.
    b. The Claimant had been employed for more than two years.
    c. The Claimant had been dismissed, i.e. the Respondent had terminated his employment.
    d. Re-instatement/re-engagement was not sought.

6. Before the evidence was heard I explained the procedure to the parties and told them that I would read the witness statements but they should not assume that I had read any of the documents in the joint bundle unless I was specifically referred to them in the course of evidence or submissions. I also explained the law that I would be applying (as set out below) and explained that, as the burden would be on the Respondent to establish the reason for redundancy, I would hear the Respondent's case first.

7. After taking time to read the statements, I heard evidence from the following witnesses for the Respondent: Martine Robins, Michaela Gartside and Christopher Lacey. In each case the usual procedure was adopted, i.e. their written statements stood as their evidence-in-chief and they were then cross-examined. I then heard evidence from the Claimant followed by submissions from both counsel. Finding insufficient time in which to complete my judgment by the end of the hearing's allotted time, I reserved judgment. I set a provisional date for a remedy hearing should I find that the Claimant's dismissal was unfair. That hearing has since been vacated and given my findings it will not be re-listed.

FACT FINDINGS

8. I find the following facts on the balance of probabilities. I have indicated where there were material disputes as to the facts between the parties; where I have not done so, the material facts were not in dispute. Where I relay evidence given by witnesses, unless I say otherwise it was not disputed and I have accepted it.

9. The Claimant was originally employed by the Respondent as an architect in 1994. By 2019 he was one of two directors of the company, the other being the CEO Mr Christopher Lacey. The Claimant's job title by now was "Head of Design/Director". The Claimant formally reported in to Mr Lacey, though as Mr Lacey made clear, Mr Lacey headed the land procurement side of the business, with the Claimant heading the design team. By now the Respondent's principal business was in procuring land and building homes upon it; this process involved obtaining planning permission for and designing the homes. Land was procured with the assistance of specialist "land managers", who until 2016 were directly employed by the Respondent but after that were engaged on a freelance basis (i.e they were self-employed and paid a daily rate). The land procurement team would work with the design team, headed by the Claimant, as planning permission was obtained. Once it was obtained, the design team, as the name implies, worked on designing the homes and alongside the construction team project-managing the build.

10. By the start of 2020, Mr Lacey told me, the Respondent's business model had proved less and less profitable, and substantial losses were forecast. The potential for redundancies was discussed by the Respondent's board (of which the Claimant was a member) from March 2020. The advent of the COVID-19 pandemic made what was already a precarious situation for the Respondent considerably worse. The Claimant and Mr Lacey initially took salary cuts and many employees were "furloughed", including, from April 2020, the Claimant. As some sites began to re-open, with the prospect of new work on the horizon, the Claimant returned to full-time hours in July 2020. The new work however failed to materialise, with the Respondent experiencing a number of planning refusals which, as Mr Lacey put it, "annihilated the pipeline of work".

11. During a board meeting on 4th September 2020, at which the Claimant and Mr Lacey were present, redundancies, particularly in the construction side of the

business, were discussed. (Note that the Claimant did not consider that he worked in construction – see below.) The parties agree that Mr Lacey raised with the Claimant the possibility of the Claimant working as a consultant (i.e. self-employed). Mr Lacey's recollection was that he had raised this as a possibility "post-redundancy", whereas the Claimant's recollection was that this came as a shock to him and that his own redundancy had not yet been mentioned. I find that, at this point, the Claimant may not have realised that his role in particular was at risk, though he would have been aware that redundancies in general were in the offing.

12. A document dated 29th September 2020, which the Claimant agreed he would have received, records that letters were to be sent to all "direct employees" on 2nd October informing them that their roles were at risk of redundancy. It may be that, as the Claimant says, this still did not lead him to conclude that his role in particular was at risk, but little turns on that given the letter sent to him a few days later.

13. On 2nd October 2020 the Respondent informed the Claimant by letter [137] that the company was considering making some employees within construction redundant and that his post was one of those "at risk". There was no dispute that the Claimant now understood his job to be at risk, even though he considered himself not to work in the construction department. Mr Lacey's evidence under cross-examination, that in fact all employed staff were told they were at risk on 2nd October, was not challenged.

14. A consultation process was to follow. On 18th October the Claimant wrote to Mr Lacey, challenging the selection of his role as one of those at risk. On 22nd October Mr Lacey wrote back [139]. There were not, he said, sufficient construction projects to be able to support an in-house construction team. It was the Claimant's case that some of his concerns were not answered in Mr Lacey's letter. The main focus of the Claimant's letter of 18th October had been that his role was wider than construction, that there might in any case be more construction work later and that he had skills which could contribute. He also asserted that much of his work was still there, but being done by consultants. In my judgment, while it may not have answered the Claimant point-by-point, Mr Lacey's letter of 22nd October did address the key point that there had been a significant reduction in the work for the construction department and that the Claimant's job was one of those primarily associated with construction. It is right to say that it did not directly address the "consultants" point, which I deal with below in more detail.

15. On 27th October a consultation meeting ("the first meeting") took place between Mr Lacey and the Claimant. The minutes of this meeting [146] show that the Claimant told Mr Lacey he had not answered all of the points in his letter, and specifically raised the issue of "outsourcing" as well as making clear his assertion that he did more than just design – Mr Lacey's reply was to the effect that that other work would not be a full-time job. He also told the Claimant that he was free to raise any new matters with him. The meeting lasted 25 minutes. Although in his witness statement the Claimant says little of substance was discussed, and criticism was made through his counsel of the length of the

meeting, I find that the minutes show that in those 25 minutes the Claimant had the opportunity to raise his concerns with Mr Lacey and that Mr Lacey responded to those concerns which the Claimant did raise.

16. A further meeting took place on 20th November 2020 ("the second meeting") [156]. The minutes do not record how long it went on, but from the amount of information recorded I conclude that it must have been fairly lengthy. The Claimant was told at an early stage of the meeting that a decision had been reached, i.e. that he was to be dismissed for redundancy. There followed a discussion where the Claimant raised again the points that I have mentioned above. He also raised the prospect of working fewer hours, which is not something that he had explicitly raised before, and suggested that he could work half of the hours then worked by Mr Turner, a freelance Land Manager. Mr Lacey's response (if any) to that particular suggestion is not recorded in the minutes. Mr Lacey's evidence was that he considered the Claimant's offer to work reduced hours as "throw-away" comment since the Claimant had not provided a detailed proposal; in any case he (Mr Lacey) had not ignored the suggestion, but rather did not consider reduced hours to be viable – see {16} and {19}. I accept Mr Lacey's evidence on that point. See further paragraph 27 below.

17. The same day, the Claimant was sent a letter confirming that his employment would be terminated on the grounds of redundancy [159]. The letter said that the possibility of "alternative employment" had been considered. There was no specific reference to a reduction in hours.

18. Mr Lacey had been advised throughout the consultation process by an external HR advisor, Mrs Martine Robins. Mrs Robins said that she agreed with Lacey's view that the Claimant's role was redundant due to the reduction in work for him and because he would not have been suitable to carry out the Land Manager's role. I do not attach any significant weight to this since it is clear that the information Mrs Robins had had come from Mr Lacey – what is important, in my judgment, is the view formed by Mr Lacey and basis for that view. Mrs Robins' role was to advise on the process rather than to take part in the decision making. Where her evidence was of assistance was in identifying the issues which Mr Lacey had considered. In cross-examination, when asked about the consideration given to contract workers (i.e. such as Mr Turner) Mrs Robins said that she and Mr Lacey had talked about all the roles in the organisation and whether they were needed "going forward". Mr Lacey and the board (not Mrs Robbins) had decided some positions (including the Claimant's) were to be made redundant as they were just not needed anymore. She and Mr Lacey had considered every employee with regard to forecasts and numbers, work in "the pipeline" and what activity was on the horizon. She and Mr Lacey had discussed other roles for the Claimant, including as Land Manager, and Mr Lacey had come to the conclusion that the Claimant was not equipped for that role; they discussed the basis for that opinion. They had discussed other potential work on the horizon that the Claimant might do in his current role or in a slightly different role. "Bumping" (i.e. giving the Claimant someone else's job) had not been discussed. Mrs Robins believed (i.e. having been told by Mr Lacey) that consultancy work for the Claimant had been discussed by the

board, in the context that the design work would be reducing considerably but there might still be the odd "pocket" of such work. The Claimant's role, she said, was considered a stand-alone role – he was not doing a similar role to anybody else in the business. Mrs Robins agreed that the Respondent did not have a redundancy policy.

19. On 24th November 2020 the Claimant sent a letter appealing Mr Lacey's decision. He set out his complaints, which were in substance the same as those I have recorded above which he had raised throughout the process. The Respondent engaged Mrs Michaela Gartside, an external HR consultant, to consider the appeal.

20. On 3rd December 2020 Mrs Gartside conducted a "Redundancy Appeal Meeting" with the Claimant over video conferencing. The meeting lasted 1 hour and 35 minutes, during which the Claimant submitted a prepared statement setting out in full the grounds of his appeal and discussed the case in some detail with Mrs Gartside. On 7th December Mrs Gartside spoke to Mr Lacey about the case.

21. Mrs Gartside wrote a letter on 14th December 2020 dealing with the Claimant's appeal. She found that there would be a permanent reduction in the construction work which the Claimant supported in his role and also that there would be a reduction in development, which would also reduce the amount of work for the Claimant. Though there was work for the Claimant during his notice period, that work was associated with projects which would soon come to an end. Mr Lacey had confirmed to her that the contractor Mr Turner's billable hours had been reduced over the last few months and that he would only be used "as required and in relation to his specific Land Manager activities from January 2021". She therefore concluded that the Claimant's role was redundant.

22. Mrs Gartside went on to consider the procedure followed by the Respondent, concluding that the process was properly conducted save for the fact that the decision was communicated at the second meeting without any further consultation on the Claimant's proposal about reduced hours made at that meeting (albeit that the Claimant had not made specific proposals on how this may work, costs etc.). Mrs Gartside wrote that on this basis the appeal was "partially upheld", though she made clear that the decision stood. In her written evidence Mrs Gartside said that she had taken account of letters and meeting minutes (i.e., those which I have referred to above), as well as the Claimant's oral and written submissions. She considered that the Claimant's role was genuinely redundant and that the Respondent had good reason to conclude that the Claimant could not move into the role of Land Manager. She had partially upheld the appeal as she felt that the final meeting with the Claimant may have been a little rushed and could have been adjourned for further consideration. She was nonetheless convinced that even if that had happened, the ultimate outcome would have been the same, there being no "opportunity for reduced hours". This, she said in her oral evidence was why she had not "referred it back to management". She agreed that after speaking to Mr Lacey she had not gone back and spoken to the Claimant.

23. In his oral evidence, Mr Lacey explained his reaction to Mrs Gartside's decision to partially uphold the appeal. He disagreed with it, he said. Before he sent the letter of 20th November to the Claimant, he had given the matter consideration and simply did not consider that it was realistic for the Claimant to have taken on the role of Land Manager (i.e. to have taken on some of Mr Turner's work). He did not reconsider the point on receipt of Mrs Gartside's decision, though in my judgment no material facts had changed over that time that might have changed the result had he reconsidered his decision.

24. There was no dispute that the Claimant was given the required period of notice and that he remained in employment and was paid until the end of that for the period.

25. A number of the Respondent's other employees were also made redundant at the same time as the Claimant. The number of people employed by the Respondent (i.e. not including contractors) reduced from approximately 11 to 5. Two of the employees left were part-time and some remained on furlough.

26. As will be clear, one issue was what sort of overlap there had been between the work the Claimant was doing and the work done by Mr Turner. Mr Turner was appointed in early 2019. The Claimant took issue with the fact that he (the Claimant) had been furloughed in April 2020 whereas Mr Turner continued to work. He said that Mr Turner had worked mostly on projects (i.e. in the Claimant's realm) rather than on land buying and had moved from two to three days per week. The Claimant's most recent job description (August 2019) was produced in evidence as a late addition to the bundle by agreement. The Claimant had put ticks against those aspects which he said overlapped with his role. Under the heading "Main purpose of the job", he ticked 5 out 8 of the points, which consisted of somewhat nebulous goals such as "Profitably to ensure a sustainable business for the future." Under the more specific heading "Key Tasks" he ticked all or part of 10 of the 18 rather more specific points, which delt with such things as assisting with the procurement of design drawings. Only one of the points under the other headings "People Management", "Other Duties" and "Governance" was ticked; the latter would clearly not have applied to Mr Turner as he was not a director. Mr Lacey's evidence was that, though there might have been some overlap between their roles (such as Mr Turner being asked, when the Claimant was on furlough, to obtain a second quote for some design work for which the Claimant had obtained the first quote), Mr Turner's primary work was as a land buyer, a highly specialised role for which the Claimant did not have the skills and experience, as indeed the Claimant fairly conceded in his evidence was the case. The Claimant also accepted that Mr Turner's role as land buyer was essential to the company, though he suggested that Mr Lacey could have taken some of the decisions taken by Mr Turner.

27. Mr Lacey was cross-examined at some length about the overlap between the work of Mr Turner and the Claimant. I understood his position to be that considerably less than one day per week of the work Mr Turner was doing might also have been done by the Claimant (i.e. would have been within the

Claimant's competency/expertise/experience); even this would have been on an "as and when basis". So, he had given thought to the Claimant working (considerably) reduced hours. Though the Claimant had made the suggestion in the second meeting that he could take on the Land Manager role, Mr Lacey did not consider that to be viable – the Claimant, he thought, might as well have said he could take the surveyor's role (for which there was no suggestion that the Claimant was suitable) – there was a similar (i.e. small/insignificant) overlap between that role and the Claimant's. Neither would have been workable in his view. Mr Lacey remained steadfast in his view that the bulk of Mr Turner's work was land buying, that is, work which in his view the Claimant was not suited for. The Claimant's complaint that others (i.e. Mr Lacey) were doing his work is put into some context, in my judgment, by an email of 19th May 2020 in which Mr Lacey says "I'm surprised that you say that tasks that you usually undertake are being actioned by others. Could you clarify what these are so that I can explain who is doing what and why? Things are fairly quiet at present apart from the land acquisition and tender departments." Mr Lacey's uncontested evidence was that the Claimant had not responded to this request (though it should be noted that this was before the redundancy process). Ultimately, I accept Mr Lacey's evidence to the effect that what overlap there was between the Claimant's and Mr Turner's roles was limited to the extent he described.

28. Another issue was the description of various "teams" within the company. The witnesses variously referred to the land/procurement team, the construction team and the design team. In cross-examination, it was put to Mr Lacey that there was a change between his letter of 2nd October, which said only that employees "within construction" were at risk, and his letter of 22nd October which used the looser term "primarily associated with construction" (albeit that there was no dispute that the first letter explicitly did say that the Claimant's post was at risk). The distinction was, on the Claimant's case, significant because he maintained that his role was "far broader" (per his 18th October letter) than construction. Mr Lacey's response, which I accept, was that the whole company, with the exception of land, was involved with construction. His evidence was also that there was no formal division between departments – design, he said, would have been part of construction ordinarily and land sometimes. This is in the context of a company with, before the Claimant's and others' redundancies, approximately 11 employees (including administrators) on Mr Lacey's recollection. When asked in cross-examination to list the departments Mr Lacey had not said construction; this, he said when asked, was because construction washed over pretty much all of the business save for land. The effect of his second letter, said Mr Lacey, was, if he recalled correctly, that every employee except himself was at risk, since those involved in land were contractors not employees.

29. Regarding the overall decision that there was a redundancy situation which applied to the Claimant, Mr Lacey's evidence, which I accept, was that the Respondent had decided to change its "business model", focussing on buying land for development then either selling it on for profit or engaging contractors to carry out building work. In either scenario, there would now be minimal work for an in-house design team; what remained of such work could be dealt with by Mr Lacey or freelancers/consultants. Fundamentally, he said, the Claimant's

core role was as head of design. With no construction work in the "pipeline", Mr Lacey formed the view that there was a diminished or no need for the work carried out by the "design/construction" team. I find that Mr Lacey took the view (as he was entitled to) that the Claimant's work was associated "primarily" with construction, as he put it in his letter of 22nd October [143] and I find that Mr Lacey's view was genuinely held, that point not in any case being in serious dispute. The Claimant accepted in cross-examination that there was a reduced workload and a reduced "pipeline" in the time leading up to his dismissal. He was taken to board minutes showing such concerns were there as early as October 2019 [60]; by March 2020, he agreed that what had been a shortfall in profits was now a shortfall in covering overheads, i.e. a move into losses. Redundancies were mentioned as early as the board meeting of March 2020 [70]. The Claimant agreed that the situation worsened after that. The April minutes note a reduction of work for freelance staff. Broadly, the Claimant accepted that by June 2020 significant cuts needed to be made if the company was to remain viable.

30. So far as alternatives to redundancy were concerned, the Claimant accepted that the Respondent had taken significant measures short of redundancies to cut costs. He agreed that the redundancies which were made amounted to pretty much a "gutting of the company whether you called it construction or not". The Claimant honestly and fairly conceded that he did not think that even if any of the staff who had in fact been retained had taken voluntary redundancy then his role could have been saved; likewise he agreed he could/should not have taken any of the roles of those employees who remained. He also agreed that there was a benefit to the company in having external consultants rather than employees because, as counsel for the Respondent put it, the tap could be turned on and off. Other options, such as cuts in overtime would not have been significant, so he accepted counsel's characterisation that essentially it came down to whether he (the Claimant) should have been kept on at reduced salary.

31. In cross-examination Mr Lacey agreed that he had not specifically offered anybody the chance to take voluntary redundancy or reduce their hours, though he did consider he had made it clear that any suggestions anyone had would be considered. It is clear, in my judgment, that reduced hours for other employees would not have solved the issue of the Claimant's redundancy given the particular nature of his role – the decision was taken not just for the sake of cutting costs, though clearly that was a significant concern, but because the demand for the sort of work the Claimant was doing had/would diminish because of the decisions made to change the sort of work the Respondent was doing.

LAW

Unfair Dismissal

32. S 94 Employment Rights Act 1996 ("ERA") confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under s 111. The employee must show that he was dismissed by the

employer (see s 95), but in this case the Respondent admits that it dismissed the Claimant.

33. S 98 ERA deals with the fairness of dismissals in two stages. First, the employer must show that it had a potentially fair reason for the dismissal within s 98 (1) and (2). Second, if the employer shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason. So far as the first stage of fairness is concerned, S 98 ERA provides, so far as is relevant:

> (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,…

So in this case it is for the Respondent to prove that the principal reason for the Claimant's dismissal was redundancy (i.e. a reason falling within ss (2)). Redundancy is defined by s 139 ERA, which provides, again so far as is relevant:

> (1) … an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—…
>
> (b) the fact that the requirements of that business— for employees to carry out work of a particular kind… have ceased or diminished or are expected to cease or diminish.
>
> …
>
> (6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.

34. In *James W Cook and Co (Wivenhoe) Ltd* v *Tipper and ors* 1990 ICR 716, the Court of Appeal stressed that Employment Tribunals are not at liberty to investigate the commercial and economic reasons behind a decision to close (i.e. to create a redundancy situation). In short, as the authors of the IDS Employment Law Handbooks put it (Vol 9, 8.4) a Tribunal is entitled only to ask whether the decision to make redundancies was genuine, not whether it was wise.

35. The second stage of fairness is governed by s 98 (4) ERA:

> (4) … 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.

36. In deciding fairness, I therefore must have regard to the reason shown by the Respondent and to the resources etc. of the Respondent. In general, my assessment of fairness must be governed by the band of reasonable responses test set out by the EAT in *Iceland Frozen Foods Ltd* v *Jones* 1983 ICR 17. In applying s 98(4), it is not for me to substitute my judgment for that of the employer and to say what I would have done. Rather, I must determine whether in the particular circumstances of this case the decision to dismiss the Claimant fell within the band of reasonable responses open to a reasonable employer.

37. In the specific case of redundancy, in *Williams and ors* v *Compair Maxam Ltd* 1982 ICR 156, the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. These are summarised at Vol 9 8.81 of the IDS Employment Law Handbooks:
    - whether the selection criteria were objectively chosen and fairly applied
    - whether employees were warned and consulted about the redundancy
    - whether, if there was a union, the union's view was sought, [not an issue in this case] and
    - whether any alternative work was available.

38. In the same case the EAT made two other points which I also take into account. First, the guidelines are not principles of law but standards of behaviour that can inform the reasonableness test under s 98(4). A departure from these guidelines on the part of the employer does not lead to the automatic conclusion that a dismissal is unfair. Secondly, the guidelines represent fair industrial relations practice in 1982 and are not immutable. The overriding test is whether the employer's actions at each step of the redundancy process fell within the range of reasonable responses.

39. In *Polkey* v *AE Dayton Services Ltd* 1988 ICR 142, HL, Lord Bridge, in relation to redundancy dismissals held that "the employer will not normally act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by deployment within his own organisation". Failure to follow correct procedures was likely to make an ensuing dismissal unfair unless, in exceptional cases, the employer could reasonably have concluded that doing so would have been 'utterly useless' or 'futile'.

40. In the event that the dismissal was unfair, I would go on to consider whether any adjustment should be made to the compensation on the grounds that if a fair process had been followed by the Respondent in dealing with the Claimant's case, the Claimant might have been fairly dismissed, in accordance with the principles in *Polkey*.

CONCLUSIONS

41. In light of my findings at paragraph 29 above, I find that the Respondent has proved that the reason for the Claimant's dismissal was redundancy, i.e. a reason falling within s 98(2) ERA. The reason for the dismissal was wholly attributable to the fact that the requirements of the business for employees to carry out work of the kind done by the Claimant had diminished (and was expected further to diminish) due to the reduction of work in the "pipeline" and the decision to concentrate on the land side of the business. The fact that the Respondent had at some point considered taking the Claimant on as consultant does not mean that the need for the work he was doing had diminished – a consultant would of course not necessarily work full time.

42. Taking account of the modest size and administrative resources of the employer's undertaking at the time the decision was made and having regard to the reason shown by the employer, for the reasons given below, in all the circumstances the Claimant's dismissal was fair in my judgment. In treating redundancy as a sufficient reason for dismissing the Claimant, the Respondent acted reasonably, within the band of reasonable responses open to the Respondent. This applies both to the decision to dismiss the Claimant and to the process by which that decision was made. A significant proportion of the evidence might be said to have gone to the issue whether the decision to dismiss was unfair (i.e. what is sometimes termed substantively unfair) and in particular whether the Respondent might have reduced the Claimant's pay or hours and/or given him some of the work that the freelancer Mr Turner was doing instead of dismissing him. In his submissions, however, Mr Scott for the Claimant told me that this was a case about procedure, conceding that it was the prerogative of the employer to make decisions in the interests of the business, and focussing his submissions on the procedure. I took this be a choice not to take issue with the Respondent's decision to keep Mr Turner on as Land Manager. If so, this was a concession that, in my judgment and in light of my findings at paragraphs 26 and 27 above was wisely made, but for the avoidance of doubt, I have nevertheless considered both substantive and procedural aspects of the alleged unfairness in coming to my decision.

43. The decision to effectively close the construction side of the business was in my judgment genuine, and a business decision the Respondent was entitled to take in the difficult circumstances in which the company found itself. The decision was only taken after other cost-cutting measures had been taken which had not, unfortunately, resolved the problem. It is not for me to consider whether or not the decision was wise, though I have seen nothing to suggest anything other than that the management were making decisions in good faith

in difficult circumstances. While that alone would not make a dismissal fair, the following other considerations do also lead me to the conclusion that it was fair.

44. The Claimant was warned of the possibility of redundancy and was consulted, being given the opportunity to make alternative suggestions. Whilst it is true that on a formal reading of Mr Lacey's letters there is some ambiguity about which roles were at risk (i.e. was it construction or construction-related), it is equally clear that the Claimant understood from the outset that his role was one of those at risk and also understood the reasons for that.

45. With regard to the first meeting, while criticism was made on behalf of the Claimant about the length of the meeting, I accept the submissions made on behalf of the Respondent that the meeting must be viewed in the context of it being a discussion between two directors who were intimately familiar with the workings of the business; the Claimant in particular was already well aware of the parlous financial state of the business and that redundancies were being considered, even if it hadn't occurred to him until then that that might include his own. In that context, it would have been surprising if the meeting had taken anything as long as the later meeting with Mrs Gartside, who as an external consultant was coming afresh to the situation.

46. The Claimant was able to make representations in writing, which, having heard from Mr Lacey, I am satisfied were considered in good faith. The Claimant had the opportunity, in both meetings and between the meetings, to offer any proposals that might avoid redundancy; he did not offer any specific suggestions along those lines.

47. While Mr Scott for the Claimant criticised the Respondent's lack of a redundancy policy, given the size of the company I do not consider that necessarily to have been a failing. It is significant in my view that the Respondent took advice from an external consultant during the process. That of course would not afford a defence if the wrong advice had been given, but it does inform my conclusion, having heard from the consultant, that the consultation process was carried out in good faith.

48. In my judgment Mr Lacey reasonably concluded that despite the Claimant's representations there was no realistic alternative to his redundancy. It was not realistically in dispute that even had the Respondent offered voluntary redundancies, or made other staff redundant who were not in fact made redundant, this would not have helped the Claimant. Mr Lacey was entitled to conclude, given the limited overlap between the work done by Mr Turner and the Claimant, that keeping the Claimant on to cover only that small amount of overlap was not in the Respondent's interests, given his view that this would not have filled even half a day on a regular basis. While stopping the use of freelance workers might well be considered, in general, as an alternative to redundancies, I accept the Respondent's submission that the Respondent reasonably concluded that stopping using Mr Turner as the freelance Land Manager was not a realistic option. As counsel for the Respondent pointed out, the key problem for the business was "pipeline" of work. Securing land was now the priority given the Respondent's new focus and so the Land Manager role

was essential to the company's future. For the reasons dealt with above, I accept that it was within the range of reasonable responses for the Respondent to have concluded that the role was not within the Claimant's skillset. Before resorting to redundancies, the Respondent had tried measures such as furlough, reduced salaries and reduced hours. In short, I find that all reasonable alternatives to redundancy were considered.

49. The point about Mr Turner aside, there was no real issue that the Claimant's role was "stand-alone" and so it follows that in this case there were no issues as to pooling or selection from a pool.

50. So far as the second meeting is concerned, Mr Curtis accepted on the Respondent's behalf that the process may not have been perfect. It is certainly right to say that the second meeting was less of a consultation than a chance for Mr Lacey to relay a decision that had already been made. But, that decision had already been made, I find, after sufficient consultation. After the decision was relayed, the Claimant then did have the opportunity to make further representations. Mrs Gartside felt that it might have been better had the meeting been "adjourned" for Mr Lacey to further consider the Claimant's representations. However, it is clear to me that Mr Lacey *did* consider at the second meeting whether it was practicable for the Claimant to take on the role of the Land Manager or to work at reduced hours, and quickly concluded that it was not practicable; while it may not have taken him long, that might be expected given his intimate knowledge of the business and the fact that the points had at least in part already been considered before the meeting. In my judgment it was within the band of reasonable responses for Mr Lacey not to have taken further time to make the decision. While it might on one view have *looked* better, it would not have *been* better, merely prolonging the inevitable which would not have been in anyone's interests.

51. I must of course consider the process as a whole, including the appeal. Both the merits of the decision and the process used to take the decision were considered by Mrs Gartside in a process which was in my judgment proportionate and fair. Counsel for the Claimant made submissions about whether the process should formally have been a re-hearing or an appeal, but in my judgment detailed consideration of that distinction injects an unnecessary note of formality. The point is that Mrs Gartside heard in detail from the Claimant and then from Mr Lacey and, as is evident from her detailed written reasons, came to an informed view on the matter. I do not accept that it was unreasonable for Mrs Gartside not to have conducted a formal tribunal-style hearing, or not to have given the Claimant a right of reply once she had spoken to Mr Lacey. Mrs Gartside gave detailed reasons for her decision, which was that the original decision should stand, albeit that in her view time for further consideration might have been taken after the second meeting. Whilst I have taken care in this case not to substitute Mrs Gartside's judgment for my own, having heard the evidence I do agree with her conclusions as set out at [179], with one exception – for the reasons given in the previous paragraph, it seems to me that Mr Lacey was entitled to conclude that an "adjournment" of the second meeting would have served no useful purpose. Mrs Gartside did not recommend that Mr Lacey (or someone else) reconsider the decision and in

my judgment it was within the band of reasonable responses for the Respondent to have accepted her advice.

52. Having concluded that the dismissal was fair, I need not go on to consider the "*Polkey*" point (see 2(c) above).

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Employment Judge **Dick**

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Date: 2nd August 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE