EMPLOYMENT TRIBUNALS

Claimants: Mr J Mildenhall

Respondent: Micro Focus Ltd

Heard at: Exeter, in person **On:** 17, 18, 19 May 2023

Before: Employment Judge Volkmer
Ms Lloyd-Jennings
Mr Ley

Appearances

For the Claimant: Ms Hornblower (Counsel)

For the Respondent: Mr Milsom (Counsel)

JUDGMENT

JUDGMENT having been sent to the parties on 5 June 2023 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.

REASONS

Background

1. The Claimant made an ACAS early conciliation notification on 27 June 2022 and the certificate was issued on 29 June 2022. By a claim form presented on 30 June 2022 the Claimant brought the following complaints:

   (a) unfair dismissal;

   (b) a redundancy payment;

   (c) a protective award for failure to consult under s. 188 of Trade Union and Labour Relations (Consolidation) Act 1992 ("*TULR(C)A*").

2. The Claimant's claim for a redundancy payment was formally withdrawn at the beginning of the hearing and was therefore dismissed upon withdrawal.

3. The Claimant accepted that the reason for his dismissal was redundancy but took the position that his redundancy selection was unfair. He further alleged that the Respondent was under an obligation to collectively consult but did not do so. The Respondent resists the Claim on the basis that the redundancy selection was fair, and on the basis that it had no collective consultation obligation.

4. The Tribunal considered a Hearing Bundle of 309 pages, and a number of supplementary documents which were added into the main bundle.

5. The Tribunal heard oral witness evidence from the Claimant, Mrs Lucy Friend and Mr Sigurjohn Luthersson.

The Issues

6. A case management hearing took place on 7 December 2022, and Employment Judge Livesey set out the issues for the Tribunal to determine in the Case Management Order. Those issues were adopted by the Tribunal and are as follows.

1. Unfair dismissal

1.1 There was no dispute that the Claimant was dismissed and that it was for a potentially fair reason under s. 98 (2) of the Employment Rights Act 1996, namely redundancy.

1.2 Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant. The Tribunal will usually decide, in particular, whether:

1.2.1 the Respondent adequately warned and consulted the Claimant. He complains that the consultation process was pre-determined and that there was:

1.2.1.1 a lack of any detailed explanation as to why the Claimant's position was redundant;

1.2.1.2 a failure to respond to any of the Claimant's concerns as to why he considered his selection for redundancy to be unfair;

1.2.1.3 a failure to provide any explanation as to why the combined role had been given to Mr De Nazareth; and

1.2.1.4 confirmation of him as a leaver with Respondent's IT department very shortly after the commencement of the consultation process.

He further complains that he was notified that Mr De Nazareth had been appointed to the consolidated role (and that he would not have a role going forward) before the commencement of any formal consultation process (i.e. that the outcome was pre-determined) and that Mr De Nazareth was confirmed in the new role on organisation charts, and taking over responsibility for the Claimant's team, before the commencement of any such process;

1.2.2 the Respondent adopted a reasonable selection decision, including its approach to a selection pool. The Claimant specifically complains that:

1.2.2.1 there was a failure to give any consideration to identifying the appropriate selection pool of those employees who would be affected by the redundancy (and specifically the exclusion of Mr De Nazareth from the pool);

1.2.2.2 the Respondent appointed Mr De Nazareth to the consolidated role, (managing the 'Business Intelligence and Reporting Team'), on the basis that he was liked by the Head of Sales, and without any form of selection process;

1.2.3 the Respondent took reasonable steps to find the Claimant suitable alternative employment?

1.3 Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?

1.4 Did the Respondent adopt a fair procedure? The Claimant asserts that there was;

1.4.1 a failure to consider and explore alternative vacancies for the Claimant;

1.4.2 a failure failure to follow its own redundancy policy, which included:

1.4.2.1 a requirement that "*the basis for including the grounds [of dismissal] in the written notification will be notified to you sufficiently in advance of the meeting to enable you to have a reasonable opportunity of considering your response*";

1.4.2.2 a right for the Claimant to accompanied at redundancy meetings; and

1.4.2.3 a right of appeal.

1.5 If it did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?

2. Protective award

2.1 Did the Respondent propose to dismiss 20 or more employees within 90 days at the same establishment?

2.2 The Respondent challenges the test on all three issues; numbers, time frame and establishment.

3. Remedy

Unfair dismissal

3.1 The Claimant does not wish to be reinstated and/or re-engaged.

3.2 What basic award is payable to the Claimant, if any?

3.3 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

3.4 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.4.1 What financial losses has the dismissal caused the Claimant?

3.4.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

3.4.3 If not, for what period of loss should the Claimant be compensated?

3.4.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

3.4.5 If so, should the Claimant's compensation be reduced? By how much?

3.4.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the Respondent or the Claimant unreasonably fail to comply with it? If so is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?

3.4.7 Does the statutory cap of fifty-two weeks' pay or £93,878 apply?

Credibility of Witnesses

8. I will begin by making some comments on the Tribunal's general view on the credibility of the witnesses.

9. The Tribunal panel found the Claimant to be a wholly credible witness. The Tribunal found the Claimant's evidence which was internally consistent, the Claimant gave concessions where appropriate (such as if he could not remember whether something had been said or not, or conceding a point that was not necessarily in his favour). The Claimant was at pains to be precise and gave detail and context which the Tribunal considered strengthened the credibility of his evidence. The Claimant's evidence was also strengthened by contemporaneous notes, in email format, taken during the time period in question.

10. In relation to the credibility of Ms Friend, the Tribunal found that Ms Friend's evidence was affected by her desire to give evidence which was favourable to the Respondent, rather than focussing on answering truthfully as to matters within her knowledge. When questioned about the Claimant's level within the organisation compared to that of David De Nazareth, and why there was a difference between the Grounds of Resistance and Ms Friend's evidence, she was not able to convince the Tribunal that even this straightforward fact was within her own knowledge. When the inconsistency between the Grounds of Resistance and her evidence was put to her, Ms Friend asked if she could speak with her lawyer. Ms Friend stated in her written statement that she could "*confirm that the table at page 278 shows the total number of people made redundant, redeployed or who left voluntarily throughout the whole of Micro Focus' operations in the UK*". However, on further questioning it transpired that this was a meaningless assertion because the table had been compiled by someone else, Ms Friend stated that "internal legal" had created the tables at pages 179 and 278 of the Hearing Bundle. Ms Friend had no knowledge of how they were compiled or which data they were drawn from, or indeed whether that data was accurate. When Ms Friend was again directly asked if she knew whether the tables were accurate, she responded "*I believe they're accurate*", she was then asked what that was based on and she simply repeated her answer. It was put to her that she had not seen the information behind them

and asked how she could say that they were accurate, Ms Friend said "*I don't know*". This greatly undermined Ms Friend's credibility overall. It was clear that Ms Friend had been put in an awkward position in giving evidence, in particular regarding the collective consultation obligations, as none of the facts relevant to collective consultation were within her own knowledge.

11. The Tribunal panel found Mr Lutherson to be generally credible as witness. The Tribunal found Mr Lutherson to give evidence which was internally consistent, Mr Lutherson gave concessions where appropriate (such as if he could not remember whether something had been said or not, or conceding a point that was not necessarily in his favour). The Tribunal considered that the Claimant's evidence and/or recollection was more accurate in relation to certain details because it was consistent with contemporaneous notes taken at the time of the relevant events.

Findings of Fact: Background

12. The Respondent is a large international IT company which provides software solutions, technology and support to large corporations. The Claimant had previously worked for the Respondent between 2009 and 2014. In October 2015, the Claimant was contacted by Mike Steinmetz who asked him if he would return. The Claimant became an employee of the Respondent for the second time on 1 December 2015 in the role of Business Intelligence Manager.

13. Following the acquisition of Hewlett Packard Software by the Respondent (a reverse takeover), the Claimant was promoted to run Business Intelligence and Reporting within the sales division. At the time, he had around 30 employees reporting to him across four teams.

14. From February 2020 another employee at the Respondent, David De Nazareth, was responsible for the Analytics team. There was overlap between the work of Mr De Nazareth's team and the work of the Claimant's team. In January 2021, there was an attempt to separate the work with Mr De Nazareth's team focussing on sales, and the Claimant focussing on renewals of business.

15. It is agreed between the parties that the Claimant was a good performer. The Claimant and Mr De Nazareth both reported to the same manager, Sigurjohn Luthersson. However, Mr De Nazareth was a "Director" by title, and the Claimant was not.

16. In September 2021 a large-scale reorganisation across the whole of the Respondent's Support Operations organisation was announced. This included the Sales Division, within which the Claimant worked. This was put forward as a cost reduction exercise, with the aim of reducing costs by 50% across Support Operations (which the Sales Division formed part of). In November 2021, the Respondent announced that the aim was to "*Remove $400 to 500 million of gross annual recurring cost*", and additionally said that it would spend $200 million to deliver these savings which was referred to by the CFO as severance. This finding is based on the Claimant's witness evidence.

17. Mr Luthersson, as the Vice President of Global Support Operations, was tasked with deciding how this cost saving would be made within his function of Support Operations. There was flexibility as to how the cost saving would be made within Mr Luthersson's remit, but it was inevitable that some redundancies would be required to make such a large saving. This was reflected in the large provision made for "severance".

18. The Claimant's evidence was that during a remote meeting/call in November 2021, Mr Pecquereau performed a 'screen share' in which he showed those on the call a document he had created and referred to as his 'master spreadsheet' (page 169 of the Hearing Bundle). This was an Excel document, listing all of the employees within Mr Steinmetz' organisation (Mr Steinmetz was Mr Luthersson's manager). Listed next to each employee's name was information relating to the employees' salary and the proposed outcome for the employee (i.e. continued employment, a move to another department, or redundancy – denoted by "IN", "OUT" and "TRANSFER"), and if redundancy, which redundancy wave the employee was due to leave in. The Claimant's evidence was that this was challenged by an American employee, Mr Davies, during the call. Mr Luthersson and Mr Nabial stated that the Respondent's Human Resources team had made the decision that, rather than identifying roles at risk, they would be submitting specific named employees to be made redundant – being on the list would mean the employee would be made redundant as part of one of the waves of redundancy.

19. Mr Luthersson's evidence, when asked about what was said on the call, stated that he could not recall Mr Davies challenging this. Mr Luthersson denied that the spreadsheet was a firm proposal, his evidence was that this was just the beginning of the planning and process.

20. Without any evidence to the contrary, and for reasons of overall credibility, the Tribunal preferred the Claimant's evidence on what took place on the call. However, it considered that Mr Luthersson was credible regarding the stage of the process in terms of the spreadsheet at that time. This is supported by the fact that the Claimant was marked as "IN" at that stage.

21. Mr Luthersson's evidence was that there was an intense period of planning at the end of December 2021 and by mid January, before a meeting which took place on 14 January 2022, a proposal to consolidate certain teams within his remit had solidified.

22. A second "master spreadsheet" was created in March 2022, and is at page 172 of the Hearing Bundle. This was after the time at which the proposals had been solidified.

Collective Consultation: The facts

23. There was a complete lack of factual evidence put forward by the Respondent in relation to collective consultation requirements. Mr Luthersson did not give evidence relevant to this point. Ms Friend's witness statement referred only briefly to the topic.

24. At paragraphs 35 and 36 of her Witness Statement, Ms Friend stated that she could "*confirm that the table at page 278 shows the total number of people made redundant, redeployed or who left voluntarily throughout the whole of Micro Focus' operations in the UK*". However in cross examination it became clear that Ms Friend had no knowledge whatsoever in relation to the table at page 278. She did not know who had compiled it (stating it was internal legal, but not referring to an individual by name), she did not know where the data had come from, and she could not attest to the accuracy of the table. Moreover, on her account, it is a table of those who were actually dismissed, rather than proposals. The s188 duty, of course, relates to the number of employees it is proposed will be dismissed or affected by the dismissals. There was no documentation, such as HR asking business areas to report planned redundancies to one individual keeping track of numbers of employees affected. There were no board minutes showing any record of the Respondent tracking the number of employees affected. When it was put to Ms Friend that this lack of documentation was tricky to reconcile with taking a position that the number of employees affected had been considered and was under 20, she simply responded "*no*".

25. Ms Friend's evidence is that the outcome of the exercise was that 20 employees were dismissed between 3 January and 29 April 2022, and that they were employed by different entities, and she therefore says that the threshold was not met. However, as set out above, the Tribunal determined that it could not put any weight on this because Ms Friend based her evidence on a table in relation to which she cannot say where the data had come from, whether such data is accurate, or how employing entity information has been established.

26. There was simply no documentary evidence before the Tribunal that collective redundancy obligations had been considered by the Respondent before the commencement of these proceedings.

27. The Tribunal are left with a single table put forward at pages 179 and 278, showing what the Respondent says is the outcome of the process, with nothing upon which to assess its provenance, the process for putting it together, the date on which it was created, the accuracy, or the source of the data. There is no documentary evidence put forward by the Respondent at all regarding the number of employees affected by the proposals across the whole of the Respondent's business in the UK before the outcome was reached.

28. Whilst it is the Claimant's burden of proof, all Claimants will inevitably be at a disadvantage in relation to the factual background to which they are not privy in relation to the decision making process which has taken behind closed doors. It appears to the Tribunal that the Respondent has sought to take advantage of this. The Respondent states that the Respondent's redundancy plans were tracked in order to ensure compliance with s188, but put forward not a single witness with knowledge of such a process. As such it is a bare assertion, unsupported by any evidence.

29. The Claimant is at a distinct disadvantage here. However, he is acknowledged even by the Respondent to be a subject matter expert on data, and to be extremely good in this field. Mr Mildenhall has given evidence on this matter.

He has painstakingly tracked names and information through the spreadsheets at pages 269, 272 and the Summary Table put forward by the Respondent at page 278 and done his own research on LinkedIn.

30. In circumstances where the Claimant has given sworn evidence from his own knowledge in relation to his calculations, the Tribunal prefers the Claimant's evidence. The Claimant's assessment at paragraph 77(b) of his witness is that at least 45 UK employees were affected. The Tribunal finds this consistent with the scale of the wider cost saving exercise ($400m to 500m) and proposed severance of $200m. The "master spreadsheet" at page 172 was created in March, when the status of the cost cutting had reached a firm proposal in mid-January. This spreadsheet only covers one business area (that led by Mr Steinmetz), which the Tribunal accepts based on the Claimant's evidence leaves 1,000 UK staff unaccounted for. The Tribunal considers that the number may well be higher than the 45 identified by the Claimant if the remaining 1,000 UK employees were also considered. It is clear that for 45 employees identified by the Claimant in fact be affected, there must have been a proposal which related to that beforehand. This is in line with Mr Luthersson's evidence that he formulated a strategy for the area for which he was responsible, which crystallised in early January 2022.

31. The Tribunal finds that the Respondent was simply not keeping track of the number of its employees potentially affected by redundancy proposals, this finding is based on the fact that no evidence has been put forward of such a tracking exercise and the Tribunal considers that if the Respondent had been keeping track it would have adduced evidence of the same.

Collective Consultation: The Law

32. Section 188(1) TULR(C)A provides as follows:

"where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals."

33. For the purposes of any proceedings under TULR(C)A where an employee is or is proposed to be dismissed, it shall be presumed that he is or is proposed to be dismissed as redundant unless the contrary is proven (section 195(2) TULR(C)A).

34. A redundancy dismissal is a dismissal for any reason "*not related to the individual employee concerned or for a number of reasons all of which are not so related*" (section 195(1) TULR(C)A).

35. "Employer" is defined in section 295(1) TULR(C)A as follows: "*employer, in relation to an employee, means the person by whom the employee is (or, where the employment has ceased, was) employed.*"

36. If several associated employers all operate from one set of premises, even if their combined operation can be regarded as one establishment, nevertheless each employer's batch of redundancies must be considered separately (*E Green & Son (Castings) Ltd v Association of Scientific, Technical and Managerial Staffs [1984] IRLR 135, EAT*). The result is that two sister companies might declare in excess of 20 redundancies at a particular establishment, but if neither company proposes to dismiss more than 19 employees then neither of the companies will become obliged to consult under TULR(C)A. The group as a whole might have declared more than 20 redundancies at the same establishment, but no single employer has declared 20 or more redundancies at that establishment.

37. The obligation for collective consultation is triggered by the proposal, not the number of individuals who are in fact dismissed.

38. The duty to consult does not arise merely because redundancy dismissals are contemplated, nor even because redundancy dismissals are probable, “proposed” means something much more certain and further along the decision-making process than the verb “contemplate”. There must be a 'fixed, clear, albeit provisional intention' to make collective redundancies.

39. The ECJ in *UQ v Marclean Technologies SLU (C-300/19) [2022] IRLR 548* ruled that under the Directive, an employer proposing redundancies must look backwards and forwards for 90 days to determine whether there are sufficient redundancies to trigger the collective consultation obligations. Following Marclean, an employer who has proposed fewer than 20 redundancies and then subsequently proposes further redundancies within 90 days (making the total 20 or more) should as far as possible consult collectively with the first group as well as the second (although in practice there may be a limit on how much can be done, depending on how far the first redundancy exercise has progressed).

40. An “establishment” need not have any legal autonomy, nor need it have economic, financial, administrative or technological autonomy' and finally that 'it is, moreover, in this spirit that the Court has held that it is not essential, in order for there to be an “establishment”, for the unit in question to be endowed with a management which can independently effect collective redundancies' (*Rockfon A/S v Specialarbejderforbundet i Danmark: C-449/93, [1996] IRLR 168*, at [34]). Nor is there a need for geographical separation from the other units and facilities of the undertaking – a particular division of a company operating from a particular warehouse in a much bigger site could itself be an 'establishment': *USDAW v Ethel Austin Ltd [2013] IRLR 686*. The question of what amounts to an establishment will always be fact specific

41. Where a declaration is made the Tribunal may also make a protective award pursuant to section 189 TULR(C)A. Where an award is to be made it is punitive rather than compensatory. This includes a consideration of the deliberateness of any default. The starting point is that the maximum award of 90 days’ pay should be made unless there are circumstances making it just not to do so.

Collective Consultation: discussion and conclusions

42. Clearly, the evidence before the Tribunal was not perfect, but the Tribunal considered that there was enough evidence before it to reach a conclusion that the balance of probabilities that there was a proposal to dismiss more than 20 employees of the Respondent, within a 90 day period including 29 April 2022.

43. In making this finding, the Tribunal has taken into account that there may be several different employers, but given the scale of the group operation in the UK, the scale of the cost cutting, the Claimant's analysis of the data, and the evidence given by the Claimant that the Respondent operated as the de facto employer of all UK staff, the Tribunal considers on the balance of probabilities that there was a proposal which affected more than 20 employees of the Respondent. It also notes and takes into account, in making this finding, as per *Marclean*, that there is an obligation to look backwards as well as forwards so that an employer who has proposed fewer than 20 redundancies and then subsequently proposes further redundancies will be caught by the section 188 obligations.

44. In relation to establishment the Tribunal makes finding based on the evidence of the Claimant, who states that the Respondent operated as a de facto employer for all UK staff, with a consolidated payroll, HR system, organisational chart and style of email address. The Tribunal finds that Respondent's UK operations were a single establishment.

45. Therefore, the Tribunal finds that the Respondent did propose to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, which included the date on which the Claimant was dismissed on 29 July 2022. As such, section 188 imposed a duty on the Respondent to collectively consult with affected employees including the Claimant. The parties are in agreement that there was no collective redundancy consultation undertaken.

46. The protected period runs from the date of the first dismissal within the relevant 90 period, which the Tribunal finds is 31 January 2022 based on the summary table at page 278.

Findings of fact relevant to unfair dismissal

47. Mr Luthersson's evidence, which the Tribunal accepted, was that he had decided to consolidate the Claimant's and Mr De Nazareth's teams in late December 2021 or early January 2022. The decision had been made before a meeting which took place between the Claimant and Mr Luthersson on 14 January 2022. Mr Luthersson informed the Claimant that it would be him or Mr De Nazareth who ran the team (page 92). The Claimant stated that he was unwilling to work for Mr De Nazereth.

48. Ms Friend's witness statement at paragraph 28 stated that she understood the scenario that the Claimant and Mr De Nazareth should be pooled for redundancy selection purposes had been considered and discounted in

planning. On cross-examination, she was not able to say who had done this just referring to "the business".

49. Mr Luthersson's evidence, was clear that if Ms Friend had got the impression that pooling Mr De Nazerth and the Claimant had been considered and discounted by him, that she was incorrect in relation to that. Mr Luthersson's evidence was very clear about considerations in selecting Mr De Nazereth for the role. Mr De Nazareth made clear to the Tribunal that, behind closed doors, he went through a process of considering who, of the Claimant and Mr De Nazareth, would be best for the role by speaking to stakeholders including Mr Steinmetz. However he did not consider creating a redundancy pool for the purposes of that selection process. One of those stakeholders with whom Mr Luthersson had discussions with preferred the Claimant for the consolidated role.

50. Around this time, Mr Luthersson's decision was made that Mr De Nazareth would take the role leading the consolidated team. This finding is based on Mr Luthersson's evidence regarding the timeline of his discussions with stakeholders and the content of the discussions he had with the Claimant.

51. Another meeting took place on 17 January 2022 in which Mr Luthersson said that there were other vacancies available with Chris Bernard and Mr Steinmetz. When the Claimant said that there was not enough information, Mr Luthersson stated he would create something to show the Claimant (page 93).

52. The Tribunal finds that on 21 January 2022, in another one to one meeting between Mr Luthersson and the Claimant, Mr Luthersson informed the Claimant that Mr Steinmetz had made decision that Mr De Nazareth would manage all 'Go To Market' reporting going forward. Mr Luthersson denied that this had been said. However the Tribunal preferred the Claimant's account because it was consistent with the Claimant's contemporaneous note at page 95 and with Mr Luthersson's oral evidence that Mr Steinmetz in fact had preferred Mr De Nazareth for the role. In discussions regarding whether the Claimant could take another role within the consolidated team, the Claimant said that he did not want to work for Mr De Nazereth because of his personality and behaviour.

53. The Claimant called Mr Bernard on 22 January 2022 regarding roles but was not given any clarity and was left with the impression that this was a dead end. This finding is based on the Claimant's Witness Statement.

54. On 1 February 2022 Mr Luthersson led a team presentation which included a draft email from Mr Steinmetz confirming team to be 'led by Mr De Nazareth (pages 97 to 99).

55. In a further one to one meeting between Mr Luthersson and the Claimant on 4 February 2022, in discussions about the Claimant's role, Mr Luthersson stated he could not confirm that the Claimant's role was redundant. In discussions regarding alternative roles within the Respondent the Claimant told Mr Luthersson that he "*had no reason to consider another role as for the purposes*

of the conversation he had told me that my role wasn't being made redundant" (page 100).

56. On 8 February 2022, a meeting took place between Mr Luthersson, the Claimant and Mr De Nazereth in which Mr De Nazereth presented organisational chart which showed Mr De Nazereth as heading the new consolidated team, pages 102 to 104.

57. On 28 February 2022 the Claimant's team was moved to Mr De Nazerth's remit.

58. On 8 March 2022 in another one to one, Mr Luthersson showed the Claimant a role in Mr Bernard's team which would be a sole contributor role. This was not an offer of the relevant role, both witness statements refer to "showing" the Claimant the job specification. This cannot be said to be an offer of a role but merely a discussion regarding the possibility of the role. It is clear that the Claimant expressed concerns regarding the funding and the future of the role in that discussion page 108. In a further discussion on 30 March 2022, the Claimant said he would not be interested in it unless there was an element of progression page 110.

59. On 31 March 2022, the Claimant attended a meeting with Mr Luthersson and Ms Friend and was formally placed at risk of redundancy. In this meeting the Claimant stated that Mr Lutherrson had clearly told him that Mr De Nazereth would be getting the job in mid January and for that reason the process was unfair. Ms Friend stated that she would respond in two weeks but did not do so. This finding is based on the Claimant's witness evidence and his contemporaneous note at page 129 regarding what was said.

60. In this meeting, the Claimant was told he would be responsible for searching for alternative roles on the internal career website. The Claimant did so, but was not able to find any suitable alternative roles so did not apply for any.

61. On 4 February 2022, the Respondent's legal team sent Mr Luthersson and email which stated "*I have received notice that your direct report James Mildenhall, is leaving the company*" (page 130).

62. On 13 April 2022, the Claimant attended a further consultation meeting with Ms Friend and Mr Luthersson in which he gave more detailed information regarding why he considered that the decision to make him redundant was pre-determined.

63. On 26 April 2022, the decision to make the Claimant redundant was communicated to him.

Unfair dismissal: the Law

64. The reason for the dismissal was redundancy which is a potentially fair reason for dismissal under section 98 (2) (c) of the Employment Rights Act 1996 ("the Act").

65. The statutory definition of redundancy is at section 139 of the Act. This provides that an employee shall be taken to be dismissed by reason of redundancy if the

dismissal is wholly or mainly attributable to (section 139(1)(b)) "*the fact that the requirements of (the employer's) business for employees to carry out work of a particular kind, or 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*".

66. We have considered section 98 (4) of the Act which provides "…. *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*".

67. In terms of whether it was fair to dismiss C on grounds of redundancy, it was held in *Buchanan v Tilcon Ltd [1983] IRLR 417* that an employer has to prove that their method of selection was fair in general terms and that it was applied reasonably in the case of the specific employee in question.

68. Guidance as to a fair consultation process are set out by the EAT *in Williams v Compair Maxam Ltd [1982] IRLR 83* are relevant:

    68.1 Were the selection criteria chosen objectively and applied fairly?

    68.2 Were the employees warned and consulted about the redundancy?

    68.3 Was the union (or employee representatives) consulted as to the fairest means of dealing with the redundancy?

    68.4 Was there any investigation of whether alternative work could be offered?

69. In *R v British Coal Corporation ex. P. Price [1994] IRLR 72* it was held at paragraph 24: "*proper consultation involves consultation when proposals are in a formulative stage, adequate information on which to respond, adequate time in which to do so, and conscientious consideration of responses is given*".

70. The obligation to consult at an early stage is heightened where there is a pool of one and (a) the reasons for confining the pool are irrational; or (b) the size of the pool leads inevitably to dismissal: *Moogane v Bradford Teaching Hospitals NHS Foundation Trust and anor [2023] IRLR 44*.

71. As per Silber J in *Capita Hartshead Ltd v Byard [2012] IRLR 814*, the applicable principles where the issue in an unfair dismissal claim is whether an employer has selected a correct pool of candidates who are candidates for redundancy are that:
    71.1 "*It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted" (per Browne-Wilkinson J in Williams v Compair Maxam Limited [1982] IRLR 83);*

71.2 "…the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn" (per Judge Reid QC in Hendy Banks City Print Limited v Fairbrother and Others (UKEAT/0691/04/TM);

71.3 "There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem" (per Mummery J in Taymech v Ryan EAT/663/94);

71.4 the Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has "genuinely applied" his mind to the issue of who should be in the pool for consideration for redundancy; and that

71.5 even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it."

72. The ET must not substitute its decision for that of the employer: *Capita Hartshead Ltd v Byard [2012] IRLR 814; Family Mosaic Housing Association v Badmos EAT 0042/13*.

73. An employer who adopts a pool of one without prior consideration as to the size of the pool does not necessarily act unreasonably; rather the entirety of the process must be considered: *Wrexham Golf Co Ltd v Ingham EAT 0190/12*.

74. *Gwynedd County Council v Barratt [2021] EWCA Civ 1322*, the CA confirmed that where the original selection for redundancy is in accordance with a fair procedure, the lack of any appeal or review procedure does not itself render a redundancy dismissal unfair.

Applying the law to the Facts: Unfair Dismissal

75. The parties agree that the reason for dismissal is redundancy, consolidation of the teams was a sensible suggestion.

76. The Tribunal makes a finding that the Respondent did not turn its mind to the appropriate pool for selection for the new role heading the consolidated team. The reason for this finding is Mr Luthersson's evidence, he was clear that if Ms Friend had got the impression that pooling Mr De Nazerth and the Claimant had been considered and discounted, that she was incorrect in relation to that. Mr Luthersson's evidence was very clear about considerations in selecting Mr De Nazereth for the role, but it was clear to the Tribunal that no thought had been given to the appropriate pool for selection. The Respondent simply had not turned its mind to it. Instead it had reached a decision regarding who should lead the team behind closed doors and then presented it to the Claimant as a decision which had already been made (in the meeting on 21 January 2022).

77. It is not the Tribunal's role to substitute the Respondent's decision on pooling with its own. In circumstances where the Respondent had not turned its mind to pooling Mr De Nazereth and the Claimant, the Tribunal finds this was outside

the reasonable range of responses. The Tribunal has regard to the fact that the Claimant was put forward as a possible candidate for the role by Mr Luthersson in the meeting on 14 January 2022, and stated in cross examination that one stakeholder preferred the Claimant for the role. In those circumstances it was outside the range of reasonable responses not to consider the Claimant's inclusion in the pool alongside Mr De Nazereth.

78. The Tribunal finds that the decision regarding whether the Claimant's role was redundant, and that Mr De Nazerth would lead the consolidated team was determined before the meeting on 21 January 2022. It was pre-determined in the sense that Mr Luthersson had made a decision and informed the Claimant of the outcome. It was not presented at a formulative stage for feedback from the Claimant. A final decision had already been made.

79. The Claimant was not given any explanation as to why the combined role had been given to Mr De Nazareth. He was left in the dark regarding the basis on which the selection had been made, such as the stakeholder feedback which Mr Luthersson stated in cross examination had been taken in relation to both the Claimant and Mr De Nazereth's suitability for the new role leading the combined team. Since the decision had been pre-determined, and presented to the Claimant as already having been made, without any information as to how that decision had been reached, the Claimant could not be expected to meaningfully respond to it. He was not given adequate information on which to respond, such as being told the requirements of the consolidated role, or the basis for selection.

80. The Employer's actions must be within the range of reasonable responses. Effectively to say that if there are alternative roles for which the Claimant is suitable, the Respondent must consider the Claimant. The Respondent's considered the Claimant for a role in the structure under Mr De Nazereth but did not offer this to the Claimant because he had indicated he would not work for Mr De Nazereth.

81. There were also discussions about a potential role working for Mr Barnard, but it was not put on the portal or offered to the Claimant. The Respondent indicates that this role could have been created specifically for the Claimant at the same pay, if the Claimant had expressed an interest in it. However, it was never put to the Claimant in those terms. These discussions were not well advanced and the Tribunal accepts the Claimant's view that this was never put to him as a certain proposition.

82. Nevertheless, the Tribunal considers that the Respondent took steps within the reasonable range of those an employer might take in the circumstances. The reasonable steps in this case were to indicate two roles within the consolidated team under Mr De Nazareth. The Claimant in effect took the position that there were no other available roles which were suitable for him. There is no obligation on the Respondent to create one.

83. The Tribunal's finding is that the Claimant's dismissal was unfair because the Respondent did not properly turn its mind to the pool for selection, instead pre-determining that Mr De Nazereth would take the role. The Respondent did not

adequately consult with the Claimant, he was not consulted at a formulative stage, and not given adequate information to respond.

REMEDY

84. There is no dispute in relation to the calculation of losses.

85. The Claimant takes the position that because of a lack of any evidence, other than some vague comments by Mr Luthersson as to Mr De Nazareth working at a 'higher level', there is no way of determining what the outcome of a pool of two fairly conducted would have been, and therefore there should be no Polkey reduction, or that any such reduction is kept de minimis. The Respondent's position is that the Claimant would not have been given the role, even if he had been pooled with Mr De Nazareth for it.

86. The Tribunal must consider the likelihood that the employee would still have been dismissed in any event had a proper procedure been followed.

87. A Tribunal's task when assessing compensation for future loss of earnings will almost inevitably involve a consideration of uncertainties. Any assessment of future loss is by way of prediction and therefore involves a speculative element. A tribunal's statutory duty may involve making such predictions and tribunals cannot be expected, or even allowed, to opt out of that duty merely because their task is a difficult one and may involve speculation.

88. The Tribunal considers that there was a chance, albeit a small chance that the Claimant would have been successful in obtaining the role leading the consolidated team. This is based on Mr Lutherson's evidence that there was one stakeholder who preferred the Claimant for the role. The Claimant lost the opportunity to put himself forward during this process. Further Mr Luthersson's position was that he was very keen to retain the Claimant in an alternative role and had the Claimant shown an interest, he could have created a role within his own budget. Further a role with Mr Barnard could have been created for the Claimant, he had the budget for it and would have employed the Claimant at the same remuneration if the Claimant had more actively pursued it. The Tribunal finds that the effect of the pre-determined process was that the Claimant's lack of interest in particular in the opportunity with Mr Barnard was due to the loss of trust by the Claimant in the Respondent due to the pre-determined process coupled with the absence of an actual offer of an alternative role. Had the process been undertaken fairly, given the Respondents evidence that it wanted to retain the Claimant, taking the chance of being successful in leading the new combined team together with the chance of being redeployed, the Tribunal assess it as a 65% chance that the Claimant would have remained employed by the Respondent if a fair process had been followed. The Tribunal does not asses this as 100% because it considers that there is still a chance that the Claimant would not have been interested in the redeployment with Mr Barnard even without the loss of trust because of his concerns around it being a sole contributor role (ie. without a team) and the lack of potential for progression.

89. The Respondent does not pursue an argument that the Claimant failed to mitigate in relation to external roles but argues that the failure to pursue roles internally was an unreasonable failure to mitigate. The Claimant did take active steps search on the Respondent's portal and found no reasonable role. The Tribunal considers the Claimant's approach regarding internal roles to have been reasonable against a background of a loss of trust caused by the unfair process and the absence of a clear formal offer of employment.

90. No ACAS uplift was sought in relation to the unfair dismissal award.

91. In relation to the protective award, the Tribunal does not consider that the Respondent's argument that it had a genuine and reasonable belief that the threshold was not met can be sustained without a witness to evidence such belief. Ms Friend's evidence being clear that she had no knowledge upon which to base such belief regarding whether the threshold had been met and Mr Luthersson being in the same position.

92. The principle is that protective awards are punitive and should be for the maximum period unless there are circumstances making it just not to do so. The Tribunal concludes that is no reason to depart from the maximum period.

Employment Judge Volkmer
14 July 2023
Reasons sent to the parties on 31 July 2023

For the Tribunal Office