EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	AND	Respondent
Alen Bicskei		NICE Systems UK Limited

Heard at: London Central Employment Tribunal **On:** 4 and 5 March 2024

Before: Employment Judge Coen

Representations

For the Claimant: In person
For the Respondent: Mr. J. Cook, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. the claimant's claim for unfair dismissal succeeds; and

2. in accordance with the principles set out in **Polkey v A E Dayton Services Limited [1987] IRLR 503, HL** the claimant would have been dismissed in any event nine months after the date of his actual dismissal.

WRITTEN REASONS

Introduction

1. The final hearing (which was also the first hearing in the case) took place over two days (4 and 5 March 2024) at London Central Employment Tribunal via Cloud Video Platform. The claimant appeared in person and the respondent was represented by Counsel. The claimant gave evidence. Joe Larkin, VP Cloud Operations, NICE Systems, Inc., and Bradley Smith, Director of Professional Services, Actimize UK Limited (a company connected with the respondent), gave evidence for the respondent. The hearing was also attended by the respondent's solicitor, a member of the public and two members of the respondent's HR team.

2. By way of background, the claimant was employed by the respondent between 10 October 2011 and 7 July 2023. By a claim form received by the Tribunal on 5 November 2023 the claimant brought a claim for unfair dismissal against the respondent. The respondent's defence was that the dismissal was for a fair reason, being redundancy.

3. As the claimant was unrepresented, I spent additional time explaining procedure and the statutory tests. One of the witnesses had a back injury and I ensured, therefore, that regular breaks were taken over the two days.

4. On the first day, I spent time reading the witness statements before hearing evidence. As the giving of evidence did not finish until approximately 3pm on the second day, I did not have sufficient time to deliberate and give an oral decision. At the end of the hearing I heard short oral submissions and directed that written submissions be provided by the parties. I considered liability issues only but heard submissions in respect of Polkey.

5. Joe Larkin, one of the respondent's witnesses, gave evidence from the US, which I understand to be on the approved list for the purposes of giving evidence from overseas.

Facts

6. The claimant commenced employment with the respondent on 10 October 2011.

7. The respondent operates a global software development business providing information security certifications to customers. It also provides its customers with technology, including customer experience management and digital and workforce engagement management software. The respondent's products consist of applications which assist customers in running their businesses, through functions such as call recording, schedule management, performance management, sales compensation management, analytics, and robotic automation.

8. On commencement of employment, the claimant was engaged as a systems administrator. From April 2012 his job title was Hosting Systems Engineer, Global Hosting, and from January 2014 it was Cloud Security and Compliance Engineer, Global Hosting. From January 2015 the claimant's job title was Manager of Security and Compliance Cloud Services. This latter change in job title related to a move by the respondent away from colocation data centres to a cloud structure for storage of customer data. This required the use of different technology and tools from major cloud providers such as Amazon, Azure and Google.

9. The claimant's evidence was that his role as a manager included both internal and external facing duties. The internal duties involved working with other information security units in the business and the external duties involved managing and coordinating all audit and control compliance work with the respondent's subscribers and auditors.

10. In February 2016 the respondent's business outsourced support to Pune, India. As a result, the respondent had two team members reporting to him from Pune. In February 2016 the claimant's only UK team member left the business and the claimant started to work from home.

11. From 2016 onwards the claimant worked flexibly, primarily at home. His evidence was that the main reason for working from home was that his team members were based in India and that he had no need to attend the London office on a day-to-day basis. His evidence (which was not disputed by the respondent) was that he attended the London office on an as-needed basis for customer or auditor meetings, and the US and Indian offices a couple of times each year for team meetings and customer audits. At no point was the claimant designated a remote worker by the respondent.

12. Between February 2018 and January 2023 the claimant's line manager was Eyal Lubin, VP Cloud Services.

13. On 2 June 2021, following the COVID-19 pandemic, the respondent (via its CEO, Barak Eilam) sent an internal email (entitled 'Together in Our Offices, Once Again') explaining that the future mode of operation would be a hybrid working model (envisaging three days in the office and two days working remotely per week) with the three office-based days being defined in advance by the divisional management team.

14. An email on 2 June 2021 from John O'Hara to all UK staff expressed the hope that the London teams would be back in the office from 4 October 2021. A subsequent email from Human Resources to all UK employees dated 23 July 2021 announced a delay to the hybrid working model owing to the COVID-19 pandemic and confirmed that home working would continue for the coming months.

15. On 15 Nov 2021 the respondent (by an email from Barak Eilam entitled 'It's time to get together again – introducing NICE-FLEX') announced the introduction of a global hybrid working policy called 'NICE-FLEX'. Recipients were informed that the NICE-FLEX work mode involved three days of working remotely and two days of working from the

office, each week. The email stated that the “decision about which days you will meet in the office is in your hands. Every team will decide, together with their manager, regarding their 2 days of office-based work”. The policy wording, therefore, required two days working in the office every week, with an element of managerial discretion as to which two days they would be.

16. On 2 March 2022 employees were sent (in an email from Human Resources entitled ‘NICE to see you! - London Office’) guidelines for the move to flexible hot desking spaces with effect from 21 March 2022. The email said that “together with your manager and team-mates, you will decide (if you haven’t decided yet) about which two days per week you will come to the office. Employees who wish to come to the office for more than two days a week are welcome to do so”.

17. On 21 March 2022 the London office re-opened following the COVID-19 pandemic.

18. The respondent’s evidence (which I accept) was that the hybrid working policy was not being strictly enforced in 2022 and that strict enforcement did not take place until 2023.

19. From June 2022 the claimant’s job title was Manager, Cloud Information Security, Cloud Operations. The respondent’s evidence was the claimant had day-to-day responsibility for the security of the Cloud environment and that his daily activities included maintaining the various security processes which were in place, ensuring that the respondent’s security certifications were up to date, and that all relevant statistics were recorded. At that point, the claimant managed a team of around six security engineers based overseas whose roles were to carry out the technical tasks required to carry out the security processes and to address any issues which arose.

20. In October 2022 the claimant became aware that he and his partner were expecting a baby.

21. In October 2022 the respondent’s Customer Engagement One (CXOne) business unit merged with its Workforce and Customer Engagement business unit (WCX) to create a single customer engagement division known as NICE CX. An email from Barry Cooper (President of the new NICE CX division) dated 17 October 2022 stated that "today we announced the creation of NICE CX, bringing together two formidable forces under one Powerhouse. The new organization creates a mighty unified CX division of 5,500 Professionals sharply focused on realizing TRANSFORMATIONAL CXi”. The email continued as follows: “CXi is our vision and framework for how organizations will master Customer Experience Interactions with their consumers. We are the CXI leader for both Best of Suite and Best of Breed and we will continue to win CXi across multiple dimensions: serving ALL Market Segments, Digital AND Voice, Agent AND Agentless, Mastering Migrations AND Competitive Displacements with Cloud Solutions AND Deep Domain Experience". The announcement provided details of a new global leadership team. A further email from Barak Eilam (the respondent’s CEO) dated 17 October 2022 entitled ‘NICE CX Powerhouse’ provided that the new CX division would be led by Barry

Cooper. In his evidence the claimant suggested that the merger changed leadership but that, underneath, the organisation remained unaffected by the restructuring and that there were no notable changes. He also indicated that the corporate communications about the merger were a visionary statement and were disconnected from the reality of working lives, and that the merger was simply a bridge between two products. It was not possible for me to conclude on the available evidence whether that was indeed the case.

22. CXOne was based in Sandy, Utah and provided products for cloud-based telephone and messaging facilities. The CXOne product is termed Best of Suite. The product suite of WCX was referred to as Best of Breed and was based on older technology. The respondent's evidence was that the merger sought to combine the comprehensive features of Best of Breed products into Best of Suite products and that, following the merger, various elements of each business unit began to be consolidated. In particular, the WCX unit was required to purchase the same technology from third party providers as the CXOne unit (for example, a product called 'Rapid 7'). The business units also began to align in relation to regulatory requirements (by upgrading licences and compliance attestations (for example, in relation to best practice for use of cardholder data)). The claimant disputed this view in his evidence suggesting that while new purchases may have been made, they were superficial and did not go to the heart of the business. Again, it is not possible for me to make findings to support these views, given the lack of documentary evidence for these assertions.

23. In January 2023, Joe Larkin (VP of Cloud Operations, NICE Systems, Inc.) took over from Eyal Lubin (VP Cloud Services) as the claimant's line manager. Joe Larkin had been employed by the respondent for more than 20 years, of which 17 had been spent in management positions. His role entailed overall responsibility for the day-to-day operations of the respondent's cloud environment, being a global network of hardware and software which facilitated the provision, monitoring, security, maintenance and upgrades of customers' licensed software solutions.

24. In January and February 2023 Joe Larkin conducted a general review of the Cloud Operations function. His evidence was that he did this to find his bearings in a new role and a new function, to develop a more complete understanding of the function for which he was now responsible, to consider how it was delivering against the objectives within its remit, and whether any potential improvements could be made, including any organisational changes. A particular focus of his review was ensuring that the CX Division facilitated the integration of the CXOne and WCX business units. This integration required ensuring that cloud security personnel were providing specialist input into sales and customer engagement processes, meaning that it was necessary for security leadership to provide the sales team with the required support.

25. In cross-examination Joe Larkin confirmed that there was a handover period with his predecessor, Eyal Lubin, and that he started taking the majority of managerial decisions on his own from mid-late February 2023.

26. During an introductory call with the claimant on 9 January 2023 the claimant told Joe Larkin that he was “50% quitting”. This comment was based on the claimant’s perception that he was, generally, inadequately compensated (his salary having been stagnant since 2015) and that he was not sufficiently remunerated to take on customer-facing duties in addition to technical duties. The claimant’s view of the “50% quitting” comment was that it was a “glass half-empty/glass half-full" comment, in that he was expressing a level of dissatisfaction with his role but that he was not saying that he would leave employment or that he would be happy to be dismissed.

27. Joe Larkin said that he was rather taken aback by the claimant’s comment. As a result of the claimant’s comment, Joe Larkin concluded that the claimant was a “flight risk” and he indicated that he believed there to be significant potential that the claimant would leave the respondent’s business. In cross-examination Joe Larkin explained that security was an important aspect of the business and that, as a leader, he had to protect the business and take seriously someone’s comments about leaving the business. In cross-examination, Joe Larkin also confirmed that he thought that, despite the claimant’s new baby and the fact that he held share options in the respondent, there was a large chance that the claimant could leave the business. In addition, Joe Larkin’s view (expressed in cross-examination) was that he never had a sense that the claimant was financially insecure to the extent that it would impact on his ability voluntarily to leave the respondent’s employment.

28. In February 2023, attendance reports indicated that the claimant did not attend the office at all. On 14 March 2023, Joe Larkin emailed the claimant and other managers to explain that they needed to take seriously the requirement to attend the office.

29. In February 2023 Joe Larkin expressed concerns with colleagues about aspects of the claimant's behaviour, predominantly around his interactions with others, including customers. Joe Larkin’s evidence was that he considered the claimant’s communication style to be blunt, condescending, and lacking tact. In oral evidence he confirmed that the claimant had a tendency to be a “straight shooter” (implying that he was direct), that he was sometimes sarcastic, and that people could not navigate his communication style. He also said that if the claimant had to say something he did not believe, he would not exercise discretion in answering. Joe Larkin’s further evidence was that he recognised that the claimant was an amazing software engineer and that the soft skills aspects of his work were less developed than his technical skills. He also confirmed that he liked the claimant personally.

30. Joe Larkin confirmed that he did not discuss these aspects of the claimant’s interpersonal skills directly with the claimant. He said that this was because he was being careful in a sensitive area and because he was finding his feet in a new environment in circumstances where the claimant and Joe Larkin had only worked together for a short time. He also stated that he did not wish to make hasty decisions.

31. In February 2023, Joe Larkin was informed by other members of staff that elements of the claimant’s role had previously been informally reassigned to others within the

business on the basis of perceived shortcomings in the claimant's communication style. Joe Larkin's view was that there was a clear concern that the claimant could do damage to customer relationships as it was never clear what he would say to customers.

32. The claimant's evidence in relation to this issue was that he found it difficult to satisfy certain elements of his role as he felt at times a strong conflict of interests between his role in information security (which was, in part, a compliance role) and the need to ensure customer satisfaction. The claimant's further evidence was that he closed all years as a 'Successful Performer' and that he had annual bonuses every year.

33. A review of performance for 2022 was carried out in March 2023 with Joe Larkin assigned as manager. The review process involved Joe Larkin populating an appraisal form with comments (which he did on 31 March 2023) with the claimant subsequently adding comments. The claimant signed the form on 31 March 2023 and the form was countersigned by Joe Larkin on 10 April 2023. The claimant scored 3 out of 5 for 'Execute with Excellence', 'Adapt Rapidly with Resilience', and 'Partner for Success', 4 out of 5 for 'Keep Aiming Higher', and 2 out of 5 for 'Earn our Customers' Admiration'.

34. Under 'Managerial Skills', the general comments from Eyal Lubin (the claimant's manager for much of the review period) were: "Highly knowledgeable with very string security background, good collaboration with other security teams, always aiming higher, never compromise on setting higher targets". Areas identified for development were: "Improve team motivation by building clear strategy and security operating model that is both challenging and achievable for NICE in 2023, Improve customer facing skills. Need to focus on expedite delivery and meeting commitments by taking ownership and escalate in advance if needed". A note from Joe Larkin indicated: "Per Alen, he decided he isn't compensated well enough for his customer facing skills, and massaging messages to customers to cover our security gaps, so had Eyal take on much of that work".

35. An additional comment from Eyal Lubin at the end of the document was: "Alen had solid performance in 2022. Under his management the security team continued to operate standard security standards. In 2023 Alen needs to continue an drive the team while balancing ESAT and motivation engagement scores".

36. In March 2023, following discussion with the claimant, Joe Larkin allowed the claimant to work fully remotely until the birth of his child (expected in June 2023).

37. On 15 March 2023 the claimant emailed Rosie Cerqueira (HR Business Partner) and Joe Larkin to say: "Fast-forwarding a month or two – what are my options? I've been working from home since 2016 (when our last UK security engineer resigned), visiting friends in the office twice or so a month after that until Eyal laid them off in 2020. Not sure what benefit a commute would bring?"

38. Joe Larkin responded on 15 March 2023 to say: "There aren't really options. If you're not already classified as a remote employee, the expectation is that you will be in office 2 days a week. There are other Cloud team members in the office as well as Services,

Support, Sales, and Regional leadership. I myself need to take 3 different trains in each direction of the commute and don't have a single employee in the Hoboken office. But it's the policy and it's now tracked for attendance. Each office has a site leader who needs to address the attendance in their office as well, so it's not just the managers of the employees. So there's no looking the other way anymore".

39. Rosie Cerqueira responded on 15 March 2023 to say "Agree with Joe. If you aren't classified as a remote employee – you are expected to go to the office twice a week".

40. The claimant responded on 15 March 2023 as follows: "So there's no looking the other way anymore. Thanks for the confirmation! Well, it's still a building with no people I can talk to so sounds like I've just popped up on the radar as a problem – with either the remote route or the farewell route. I'm actually ok with either (it's just business) so do let me know which queue to join". The claimant's evidence (under cross-examination) was that he wanted to highlight the problems which needed to be addressed and to seek to resolve those problems. His view was that the remote arrangement had been in place for many years, that the HR team were not aware of his circumstances, that it generally took the respondent a long time to formalise HR matters, and that he had an argument for constructive dismissal should disciplinary action be taken. His further evidence was that he was willing to undergo a disciplinary process because he was of the view that it would flush out the issues and clarify that he had legitimate reasons for the stance he had taken.

41. The provisions of the claimant's contract of employment were dealt with in cross-examination. The respondent was of the view that, had the redundancy not taken place, the claimant would have been in breach of his contract of employment had he continued to work remotely. His contract of employment required him to work at the respondent's offices or to carry out work at another location. The claimant argued that the contract had been put in place in 2011 before remote working had become common practice. He also argued that his home would have been 'another location' identified by the contract and that he had previous managerial authorisation to work from home. I make no finding on whether the claimant's employment contract operated to permit home working.

42. On 3 April 2023 the clamant declined a meeting request headed 'Key Bank – Security Issue – Urgent' and added a comment "the request has no technical sense". On 3 April 2023 Yigal Amor (Director, Cloud Strategy Customer Support, NICE Actimize) forwarded the email to Joe Larkin saying: "Meeting has been declined by Alen with the comment below. That's not the collaboration level we need to resolve this matter. I would appreciate your help with this".

43. On 3 April 2023 the claimant sent an email where he sought to show the difference between an insecure data storage environment and a secure data storage environment. He attached a photograph of roaming chickens and, beside it, a photograph of caged chickens. The photographs were intended to serve as a metaphor for data storage and to reflect the claimant's view that "no amount of relabelling or post-deployment cosmetics could reliably convert a roaming hen into a caged rooster". As I understand it, the claimant was seeking to illustrate the idea that simply saying that something operated in a certain

way did not mean that this was indeed the case. In cross examination, Joe Larkin said that he did not understand what the email was getting at and that the chicken email was "not the only reason" for replacing the claimant.

44. Email exchanges within the HR team following the exchange with the claimant on 15 March 2023 focused on establishing whether there was any history of remote working for the claimant. The respondent was of the view that the claimant lived close to the office and that his contract was office based. An email from Sue Exall on 21 March 2023 stated: "There is no specific reason why he worked from home from 2016 other than he did it and he was not told otherwise – links to his comment below, had no team members/manager there and there were no checks then on attendance".

45. On 3 April 2023, Mairead Buckley emailed Rosie Cerqueira about another US-based member of staff saying that if he had not come to the office since 2018 or 2019 and the rest of his team were remote and he was a long distance from the office, it made sense to make him remote. The claimant was then discussed by email (on the basis that he managed the US-based individual in question and did not attend the office).

46. Mairead Buckley confirmed by email on 6 April 2023: "Is still go back to what original expectation was set with employees when they joined the company. I am also very much aware that Ron Rainville nor Eyal insisted on these employees attending the office". The claimant was then discussed by Mairead Buckley saying: "We do need to explore the same history with Alen. I have to say when I was in the UK, I think I seen him about five times in four years we both were QVS based. Barry has the history on Alan so I will check with him too."

47. Joe Larkin responded to this last exchange by email on 6 April 2023 saying only: "We're going to replace Alen. Barry is already aware of this situation". Joe Larkin's evidence was that, at that stage, he knew that he needed to replace the claimant's role with a Director position as he was worried that the claimant might leave and that the reference to 'replacing Alen' was a reference to replacing the claimant's position with a Director position, but not to replacing the claimant himself.

48. Mairead Buckley responded to Joe Larkin and Rosie Cerqueira on 6 April 2023 to say: "If Alen has an office-based contract and never requested remote/had remote approved, you can insist that he comes in 2 days a week and we can see if he complies. We should have a separate process underway to make the change though".

49. The NICE flexible working policy allowed an employee to work from home or change working patterns owing to family commitments (being the care of a child or a dependent adult). The policy required a formal written application and set out a process for considering and approving requests, as well as an appeal process. Much was made in cross-examination of the fact that the claimant never made a request for flexible working under the policy and that he only asked for his options in his email of 15 March 2023. The claimant's evidence was that he believed his request for information about options to be the beginning of a series of discussions with his manager. His evidence was that he did

not submit a request for flexible working as communications at the respondent were generally handled informally.

50. Following his operational review, Joe Larkin confirmed in early April 2023 that he wished to create a Director-level position (Director of Cloud Information Security) within the Information Security team. He wanted the role to provide the seniority and credibility to form the necessary relationships with senior internal stakeholders, the sales function and customers. Given that the CXOne security team and the majority of NICE's customers and sales team were located in the US, Joe Larkin thought it best to base the position there. Consequently, it appeared to Joe Larkin that the manager role which the claimant held would no longer be required as the Director-level position would have a greater set of responsibilities and a US focus. The claimant was also the only Cloud Operations security employee in London. Joe Larkin's evidence was that once he had decided to create a Director-level position in the US he thought it appropriate to postpone any further discussion about the claimant's remote working arrangements until the conclusion of the redundancy consultation process and the decision as to whether or not he would remain with the respondent.

51. On 12 April 2023 Shachar Feldman (Vice President, VRS and WEM Services and Joe Larkin's line manager) wrote to Joe Larkin to say: "We have the approval to hire at a director level to replace Alen. We need to look in the US in one of the offices – Hoboken, Sandy, Richardson or Atlanta (in this order of priority from my perspective). Noa is back Friday – connect with her to open the confidential search".

52. Between 12 and 14 April 2023, an internal email chain approved the confidential recruitment of a US-based Director of Cloud Information Security and the budget was clarified. The budget was USD$200,000 for the Director position with the claimant's base salary having amounted to around £80,000.

53. In April 2023 Joe Larkin asked the claimant to begin briefing a colleague, Gerhard Obenaus, regarding certain work which the claimant had done in relation to RSA tokens. Joe Larkin's evidence was that he asked the claimant to do this on the basis that the claimant's departure from the business was a realistic possibility and that he needed to protect the business so that claimant's knowledge would be retained by the respondent if his employment were terminated for any reason.

54. On 30 May 2023, the claimant's baby was born.

55. On 31 May 2023 the claimant announced (by an internal email) the recruitment of Erich Diener as Director, Cloud Information Security with an expected start date of 26 June 2023.

56. On 9 June 2023 the claimant returned from paternity leave and attended a short return to work meeting, minutes of which were not provided. Following the meeting, he was sent a letter from Joe Larkin dated 9 June 2023 explaining that "there is a management proposal to move your position to the US as well as re-structure the team

for more aligned and efficient business support. It is anticipated that the work presently carried out by yourself will be absorbed by a US based Director of Cloud Information Security and it will be no longer necessary to have your role at your particular level in London. As explained, I am afraid to say that your role has been identified as one which may not be required in the future, meaning that you are being placed at risk of redundancy with immediate effect".

57. The claimant's view of the redundancy was that he did not have any UK-specific duties, that he worked across multiple business units, countries and time zones, that his compensation package included permanent overtime and on-call payments to account for the different time zones where he was prepared to operate, and that the bulk of the Cloud Information Security team worked in India which did not have a compatible working time slot with the Utah office.

58. Joe Larkin's evidence was that he entered the redundancy consultation period with an open mind and did not make a final decision until the consultation was complete. He said that, had the claimant demonstrated both the ability and willingness to fulfil the requirements of the Director role, he could have been persuaded to rescind the offer of employment to Erich Diener and to retain the claimant's role as Erich Diener was not employed at the time of accepting the offer and had not been required to resign from another company so as to join the respondent.

59. On 13 June 2023 the claimant attended a first redundancy consultation meeting with Milena Jankowiak. The notes of the meeting stated that the claimant indicated that the proposed redundancy made sense for the respondent, but that he queried the rationale for moving the role to a more expensive location, the issue with time zones, and asked for further information on the rationale behind the redundancy. The claimant explained that he felt that the process may have started as a result of being asked to come back to work in the office. He also said that he wanted to make the best of the process financially. The claimant asked whether having a PO box address in Manchester would help him with his remote request. In evidence, he explained that some of his colleagues had done this and also explained that he asked because he could not understand the reasons for not being allowed to work remotely as all his colleagues were overseas. He also referred in the meeting to the fact that he felt that the situation may have been caused by the lack of sleep associated with having a newborn baby. He was invited to look at the careers page on the respondent's website and see if he saw any roles which were of interest to him. In response, the claimant said that none of the advertised roles was of interest and that he felt there were no options in the UK these days and that he understood why Joe Larkin was centralising the roles "because not much was happening in the UK post-Brexit".

60. On 20 June 2023 the claimant attended a second redundancy consultation meeting with Joe Larkin and Milena Jankowiak. The main reason for Joe Larkin's attendance was to provide more detail on the business reasons for the redundancy, following a request for this information from the claimant at the meeting on 13 June 2023. Joe Larkin explained that that the plan was to move the role to Sandy, Utah and that the role would sit together with the wider Trust Team from CX. He explained to the claimant that the

purpose of the move was to ensure that teams had better aligned strategies, for future integration efforts, as well as making sure they spoke similar languages and used the same tools. The reason for having a Director-level position was to have the post-holder work closely with sales and sales enablement. Joe Larkin mentioned that most of the customers were in the US, so the role required customer interactions in US time zones. At that meeting the claimant indicated that he would be willing to do the Director role and raised the fact that he felt he was not being remunerated sufficiently. He queried the time zone argument and said that a lot of the work happened in India. He also made general comments on fairness and said that he felt that the process was predetermined. At the end of the meeting, Milena Jankowiak explained that she would be away from Wednesday to Friday of that week and that Jessica Rawlinson-Hunt from Actimize would be covering for her.

61. On 22 June 2023 the claimant read the email sent on 31 May 2023 and became aware that Erich Diener had been appointed. He said that he had not read the email prior to that date as it was sent automatically to a sub-folder in his inbox and that he had not read it because of the birth of his child.

62. On 30 June 2023 the claimant attended a third redundancy consultation meeting with Milena Jankowiak. The claimant indicated that he did not see any suitable roles on the career website. The claimant again said that he felt that the redundancy was not justified.

63. On 3 July 2023 Erich Diener's start date was revised to 10 July 2023.

64. On 4 July 2023 the claimant was sent a letter by Milena Jankowiak where he was told that: "significant changes have been made over recent months in terms of personnel and reporting lines in Cloud Operations, and overall organisational structure. As regards the impact to yourself it has been explained to you regarding a management proposal to move your position to US and re-structure the leadership team under Cloud Operations for a more aligned and efficient business support. To that end, it's been anticipated that the work presently carried out by yourself will be absorbed by a US based Director of Cloud Information Security and it will be no longer necessary to have your role at your particular level in London, UK". The claimant was invited to a further and final consultation meeting on 7 July 2023.

65. On 7 July 2023 a redundancy consultation outcome meeting was attended by the claimant, Joe Larkin and Milena Jankowiak. At the meeting the claimant's employment was terminated with effect from 7 July 2023 and he was informed that he would be paid in lieu of eleven weeks' notice and given a statutory redundancy payment of £8,037.50. The letter provided for a right of appeal within five working days.

66. Joe Larkin's evidence in respect of the claimant's dismissal was that he thought it was in the best interests of the business to proceed with the redundancy proposals and that he was satisfied that it was in the best interests of the business for the role to be based in the US. He said that he was unconvinced that the claimant would have been

able to provide the more senior support required to the sales team or be relied upon to engage with customers or senior stakeholders and therefore he had ruled out the possibility of offering him the opportunity to be promoted and relocated to the US. JL's further evidence was that he wanted to protect the business by ensuring that a suitable candidate was ready to start the role in case the claimant decided to leave immediately upon being place at risk.

67. On 10 July 2023 Joe Larkin announced both the claimant's departure and Erich Diener's arrival, stating that the claimant was leaving to pursue other opportunities after 11 years with NICE: "As Manager of Cloud Information Security, Alen has played an instrumental role in shaping and fortifying our cloud information security practices. His dedication to upholding the highest standards of security has been invaluable to our organization's growth and success". The same notification announced that Erich Diener had joined NICE as Director, Cloud Information Security, based in Sandy, Utah and would be reporting to Joe Larkin.

68. The claimant lodged an appeal against his dismissal on 14 July 2023 on the basis that it was unfair because the reason given for the redundancy was not true. The claimant said that the respondent was unable to demonstrate how exactly "more aligned and efficient" a Director-level role would be from the manager role which the claimant had successfully worked since 2015. He believed that there was no difference between the two job responsibilities (his own and the new Director role). He said that he believed that the real reason for the redundancy related to the claimant's request to work remotely on a permanent basis.

69. The claimant's appeal was heard by Bradley Smith (Director of Professional Services, Actimize UK Limited) on 4 August 2023. Bradley Smith was supported by Jessica Rawlinson-Hunt (HR Business Partner, Actimize EMEA). The claimant alleged in his submissions that Ms Rawlinson-Hunt was impartial, as she had acted for a time in relation to the redundancy process (when Milena Jankowiak was on holiday). That view was not tested in evidence and I have not made findings in that regard. The claimant also asserted that Bradley Smith was not independent as he worked in the same business unit as individuals copied on the chicken email sent by the claimant on 3 April 2023. I was not able to conclude, on that basis alone, that Mr Smith was biased as the fact of working in the same business unit would not of itself have given rise to bias.

70. Notes of the appeal meeting were not provided.

71. On 18 August 2023 Bradley Smith wrote to the claimant upholding his dismissal on grounds of redundancy. The letter stated that the process conducted had been found to be fair and as per the respondent's redundancy procedure. Further reasons were not provided and the letter stated that the decision was final. In his witness statement, Bradley Smith explained that he considered the consultation process to have been fair, and that the business case for redundancy was sound. His evidence was also that he did not accept the claimant's submission that there was no difference between a Manager and a

Director role, with directors often being required to demonstrate more soft skills and play a more strategic role in the business.

72. In his cross examination of Joe Larkin, the claimant sought to show that Erich Diener was not involved in key Information Security decisions taken by the respondent following the claimant's dismissal, as he was not included in a number of emails contained in the hearing bundle. This view was rebutted by Joe Larkin who said that Erich Diener had been consulted prior to the emails having been sent and that there was, therefore, no reason to have copied him. I am not in a position to reach a conclusion on the claimant's assertions as the emails in question were not sufficient, in number or in relation to their content, to enable me to form a view.

Law

Redundancy

73. A definition of redundancy is set out at section 139(1) Employment Rights Act 1996. It provides for redundancy in three broad scenarios: closure of a business; closure of a workplace; and where there is a reduced need for employees to do work of a particular kind. Section 139(1) provides as follows:

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.

74. Section 139(6) provides that the word 'cease' in section 139(1) means either a temporary or a permanent cessation and the word 'diminish' means either a temporary or a permanent diminution.

75. A Tribunal does not generally have jurisdiction to consider the reasonableness of the decision to create a redundancy situation (**Moon and ors v Homeworthy Furniture (Northern) Ltd 1977 ICR 117, EAT**). Tribunals are not at liberty to investigate the commercial and economic reasons behind a decision to close but they are able to ask whether the decision to make redundancies was genuine (**James W Cook and Co (Wivenhoe) Ltd v Tipper and ors 1990 ICR 716, CA**).

76. In the context of section 139(1)(b), **Safeway Stores plc v Burrell 1997 ICR 523, EAT**, held that a tribunal must decide:

- Whether the employee was dismissed
- If so, had the requirements of the employer's business for *employees (i.e. rather than the individual claimant)* to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?
- If so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

Only if the answer at all three stages is 'yes' will there be a redundancy dismissal.

Work of a Particular Kind

77. Section 139(1)(b) refers to 'work of a particular kind' either in the place where the dismissed employee was employed, or in the business, more generally.

78. In **Burrell**, the Employment Appeal Tribunal confirmed that the correct test for redundancy is whether there was a diminution in the employer's requirement for employees generally to carry out work of a particular kind, not just the individual claimant.

79. In **Murphy v Epsom College 1985 ICR 80, CA**, the claimant was one of two plumbers but he also carried out some engineering work. The claimant declined to perform the engineering tasks and the College decided to dismiss him and employ an engineer who would also do some plumbing work. The College still needed two employees, one plumber and one who would do both plumbing and engineering work. On the 'requirements of the business' test, therefore, it appeared that there was no redundancy situation. Both the Employment Appeal Tribunal and the Court of Appeal held, however, that the claimant's dismissal was for redundancy: whereas previously the business required a plumber who could do some engineering, now it required an engineer who could do some plumbing. In this case the employer no longer needed an employee to carry out the work of the particular type done by the claimant and he was, therefore, redundant. The Court of Appeal upheld this finding, saying that a reorganisation creating a substantial change in the kind of work required by the employer can result in redundancies even though the employer's overall requirements for work or employees remain the same.

80. In **BBC v Farnworth EAT 1000/97** a radio producer was replaced by a more experienced producer. The Employment Appeal Tribunal upheld the Employment Tribunal's decision, stating that an employee is redundant when his or her particular specialism is no longer required, even if the employee is replaced by an employee with a different specialism so that the overall requirements of the business for employees have not diminished.

81. In **Robinson v British Island Airways Ltd 1978 ICR 304, EAT**, the posts of 'flight operations manager' and 'general manager operations and traffic' were abolished and a new job of 'operations manager' was created. Both holders of the existing jobs were

considered unsuitable for the new one and were dismissed. The Employment Appeal Tribunal held that the work in the new job was 'in a different league' from that in the old jobs.

82. In **Hakki v Instinctif Partners Ltd (formerly College Hill Ltd) EAT 0112/14**, the new roles created required different skill sets to those that the claimant had demonstrated and involved greater responsibility. The tribunal had permissibly found that the requirement for an employee to do the claimant's old job would be replaced by two different jobs, and that there was therefore a redundancy situation even though the overall work had increased.

Causation

83. Section 139(1) requires the dismissal to be wholly or mainly attributable to redundancy. In **Murray and anor v Foyle Meats Ltd 1999 ICR 827, HL**, it was held that the key word is 'attributable' i.e. that the dismissal must be attributable to one of the three redundancy situations set out in the section. It held that the section asks two questions of fact. The first is whether there exists one or other of the various states of economic affairs mentioned in the section e.g. whether the requirements of the business for employees to carry out work of a particular kind have ceased or diminished. The second question, which is one of causation, is whether the dismissal is wholly or mainly attributable to that state of affairs.

Unfair Redundancy

84. Section 98(1) of the Employment Rights Act 1996 provides:

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 that b) 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.

Section 98(2) provides:

A reason falls within this subsection if it (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do; (b) relates to the conduct of the employee; (c) is that the employee was redundant; or (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

Section 98(4) provides that 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 shall be determined in accordance with equity and the substantial merits of the case.

85. A redundancy dismissal can be unfair because it was not by reason of redundancy but for some other reason that is not potentially fair; or that although a redundancy situation existed the dismissal was unreasonable under section 98(4).

86. In order for a dismissal for redundancy to be fair, the employer must establish that redundancy was the real reason for the dismissal and the Tribunal must find that the employer acted reasonably in all the circumstances in treating redundancy as the reason for dismissing the employee.

Procedural Fairness and Consultation

87. The employer must act reasonably, in all the circumstances of the case, in treating redundancy as the reason for dismissing the employee. In practice this means that there must be procedural fairness. In **Langston v Cranfield University [1998] IRLR 172** the Employment Appeal Tribunal noted that the burden of establishing unreasonableness does not fall on a claimant but is one for the tribunal to consider on a 'neutral' basis.

88. This involves considering whether the decision to dismiss was within the band of reasonable responses that an employer could have adopted. The tribunal must not substitute its own view for that of the employer. **Polkey v AE Dayton Services Ltd [1987] IRLR 503, HL** provides that an employer will normally not act reasonably unless it warns and consults employees about the proposed redundancy, adopts a fair basis on which to select for redundancy, and considers suitable alternative employment.

89. In **Williams and ors v Compair Maxam Ltd [1982] IRLR, 83**, the Employment Appeal Tribunal set out general guidelines on consultation, to include giving as much warning as possible with a view to enabling alternative solutions, consultation with a union, creating selection criteria based on objective matters, consulting fairly, and offering suitable alternative employment where possible.

90. To have a proper consultation, the employer must have an open mind and still be capable of influence about the matters which form the subject matter of consultation. In **R v British Coal Corporation and Secretary of State for Trade and Industry, ex parte Price [1994] IRLR 72** it was noted that: **"**Fair consultation involves giving the body consulted fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely. It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting".

91. The key components of fair consultation were further identified in **British Coal** as consultation when the proposals are still at a formative stage, adequate information on which to respond, adequate time in which to respond, and conscientious consideration of the response to the consultation.

92. Before selecting an employee for redundancy the employer must consider what the pool of employees will be. In deciding whether a redundancy selection was unfair, a tribunal must decide whether the employer's choice of pool was within the range of reasonable responses (**Hendy Banks City Print Limited v Fairbrother and others UKEAT/0691/04/TM**). The selection of a pool will usually involve consideration of a number of factors including: a) what type of work is ceasing or diminishing; b) the extent to which employees are doing similar work; c) the extent to which employees' jobs are interchangeable; d) whether the employer 'genuinely applied' its mind to the composition of the pool; e) whether the pool was agreed with the union or employee representatives. Generally, it is unusual, but not impossible, for there to be a pool of one person. Examples of cases where a pool of one was deemed appropriate included an export manager covering a particular geographical area (**Alvis Vickers Ltd v Lloyd EAT/00785/05**), an employee based in China when the employer decided to outsource the Chinese work (**Halpin v Sandpiper Books Ltd UK EAT/0171/11**) and a golf club steward who was the only employee in that position (**Wrexham Golf Club Co Ltd v Ingham UKEAT/0190/12**).

Polkey

93. Where a dismissal is unfair, the tribunal must also consider whether, by virtue of **Polkey v AE Dayton Services [1987] IRLR 503, HL**, there should be any reduction in the compensatory award to reflect the chance that the claimant would have been dismissed in any event.

94. A Polkey deduction may take the form of a percentage reduction, or it may take the form of a tribunal making a finding that the individual would have been dismissed fairly after a further period of employment. Alternatively, a combination of the two approaches can be used but not in the same period of loss.

95. The question for the tribunal is whether the particular employer (as opposed to a hypothetical reasonable employer) would have dismissed the employee in any event had the unfairness not occurred.

96. Where there is a significant overlap between the factors taken into account in making a **Polkey** deduction and when making a deduction for contributory conduct, the tribunal should consider expressly, whether in light of that overlap, it is just and equitable to make a finding of contributory conduct and, if so, what the amount should be. This is to avoid the risk of penalising the claimant twice for the same conduct.

Contributory Fault

97. A reduction for contributory fault can affect the basic award and/or the compensatory award.

98. Section 122(2) of the Employment Rights Act 1996 provides that where the tribunal considers that any conduct of the complainant before the dismissal was such that it would

be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly. There is no need for the conduct to have caused or contributed to the dismissal.

99. The compensatory award may also be reduced by reason of contributory fault. Section 123(6) of the Employment Rights Act 1996 provides that where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

100. In **Steen v ASP Packing Ltd UKEAT/23/13**, the Employment Appeal Tribunal stated that a tribunal must consider four questions in respect of a reduction in the compensatory award for contributory fault:

a) identifying the conduct which was said to give rise to possible contributory fault;
b) whether that conduct was blameworthy, irrespective of the employer's view on the matter;
c) for the purposes of section 123(6), whether the blameworthy conduct caused or contributed to the dismissal;
d) if so, to consider to what extent the award should be reduced and to what extent it would be just and equitable to reduce it.

101. In assessing any reduction to the compensatory award for contributory fault, a tribunal must consider whether the claimant's conduct was blameworthy and not be influenced by the respondent's conduct (**Steen v ASP Packaging Ltd UKEAT/23/13**).

102. A tribunal can make a deduction for **Polkey** and contributory fault. Where a **Polkey** deduction has been made, a deduction for contributory fault is intended to express the sum by which the compensatory award should be reduced to take account of the claimant's conduct (**Rao v Civil Aviation Authority [1994] ICR 495 (CA)**). If both **Polkey** and contributory fault deductions are to be made, the tribunal must explain why both deductions are being made and the basis for each. It is necessary to avoid any element of double-counting of the same factors in a way which is unfairly detrimental to the claimant (**Wilkinson v Driver and Vehicle Standards Agency [2022] EAT 23**).

103. If a tribunal reduces the basic and compensatory awards by different proportions, it should give its reasons for the differing proportions (**RSPCA v Cruden 1987 ICR 205 EAT** and **Dee v Suffolk County Council [2018] UKEAT/0180/18**).

Analysis

104. It is accepted that the claimant was dismissed by the respondent on 7 July 2023. It is then necessary to consider whether the set of circumstances in the respondent’s business fell within the statutory definition of redundancy.

105. The respondent relied on the provisions of section 139(1)(b)(ii) of the Employment Rights Act 1996 i.e. that the requirements of the business for employees to carry out work of a particular kind in the place where the employee was employed had ceased or diminished or were expected to cease or diminish.

106. The respondent's business is a global software business which provides information security and technology support to business customers. The business operates in the US, UK and in India. In 2022, the CXOne business unit (based in Sandy, Utah) merged with the Workforce & Customer Engagement business (WCX) to form a new business unit known as NICE CX. The merger of the two business units resulted in a requirement to align products used by both businesses. While the claimant indicated that the merger of the two units was effectively a symbolic gesture which operated as a bridge between two products, I was not able to conclude that that was indeed the case.

107. Joe Larkin conducted a review of the Cloud Operations function in January and February 2023 and concluded that he wished to create a Director-level position in the Information Security Team with the holder of the new position having a greater set of responsibilities. The business rationale for the new position was that a higher-level role was required to reflect the need for the post holder to form relationships with senior internal stakeholders, the sales team and customers. It was also proposed that the role would be based in the US, as this was where the majority of the respondent's customers and sales teams were based.

108. The claimant was a manager, meaning that he carried out predominantly technical work with an element of customer-facing work. Evidence provided in the hearing indicated that some of the claimant's customer facing duties were delegated to others and that while he was an excellent engineer, there was a perception that he lacked soft skills. The claimant's performance review referenced this, with the improvement of customer-facing skills having been identified as an area for development.

109. In his evidence the claimant sought to show that the role he carried out was akin to a Director role and that he was already performing that role, despite being designated a manager. I am unable to concur with this, in light of the fact that the claimant's designation was that of a manager, as well as the fact that some of his customer-facing duties had been passed to others. It was also clear from the evidence that there is a material difference between a manager role and a Director role in the respondent's business with a Director role being a more senior and, therefore, strategic role, requiring greater interaction with senior stakeholders, and remunerated accordingly

110. I am, therefore, satisfied that the proposed new Director role was a more senior role than that carried out by the claimant and that it required a different range of skills, including more customer-facing work. I am also satisfied that the claimant was not working as a Director (whether expressly or impliedly) and that the new role was not the same role as the role he was carrying out.

111. The respondent's proposals involved, in summary, the creation of a new role (which included technical work but also had more extensive duties including greater customer facing duties and more strategic work) in a new location (the US). Applying the above to the provisions of section 139(1)(b)(ii) of the Employment Rights Act 1996, Joe Larkin's proposal therefore meant that work of a particular kind (being the technical work carried out by a manager) in a particular place (in this case, London) would be expected to cease or diminish as a result of the proposals. To that extent, a redundancy situation as anticipated by section 139(1)(b)(ii) of the Employment Rights Act 1996 existed within the respondent's business.

112. In reaching this conclusion, I have taken account of the fact that it is not generally permissible for a tribunal to substitute its own views for those of the employer and that the employer is entitled to make its own commercial judgments about the operation of its business. Neither it is permissible for a tribunal to require the respondent to provide a business case for the redundancy.

113. I have also taken account of the fact that the case law (particularly **Murphy**) contemplates within the definition of redundancy situations where a new role with two different skill sets is required, meaning that the original skill set is no longer needed. I have also considered the **Farnworth** case which makes clear that an employee can be redundant when his or her specialism is no longer needed. In this case, the specialism in question is the technical work of a manager performed by the claimant in London.

114. I have also taken account of the fact that I did not make any finding to the effect that any member of staff was, following the claimant's dismissal, performing the claimant's role in London.

115. It is then necessary to consider whether the claimant's dismissal was wholly or mainly attributed to the redundancy situation. To my mind, the claimant's dismissal was not wholly or mainly attributed to the redundancy situation but was attributed to two key perceptions held by the respondent of the claimant, namely that the claimant was likely to leave the respondent's business and that the respondent found the claimant to be difficult to deal with from an interpersonal perspective. To that extent, I consider the claimant's dismissal to have been unfair as he was not dismissed by reason of redundancy.

116. It is clear that the respondent took seriously the fact that the claimant expressed unhappiness with his role. In his evidence Joe Larkin indicated that he was surprised by the claimant's comments about "50% quitting" and that he believed that there was a "big potential" that the claimant might leave the business. To that extent, Joe Larkin considered him to be a "flight risk". Joe Larkin also confirmed in his evidence that the issue of information security was an important aspect of the business and that he had to take seriously the fact that an employee said that they were considering leaving. Joe Larkin's concerns about the prospect of the claimant's departure prompted Joe Larkin to ask a colleague (Gerhard Obenaus) to take over some of the claimant's duties with writing software programmes, with a view to ensuring that technological know-how created by

the claimant would not be lost by the business if the claimant chose to leave. In summary, it was clear from the evidence that the claimant's "50% quitting" comment came as a shock to Joe Larkin, that he felt it was not a comment that could be ignored, and that he felt obliged to act on it.

117. It is also clear that the respondent found the claimant's interpersonal skills difficult to deal with. While it was evident that the respondent's staff appreciated the claimant's technical expertise and considered him to be an excellent software engineer, it was also evident that he was viewed as being difficult to engage with from an interpersonal perspective. This was clear from Joe Larkin's evidence where he confirmed that he was of the view that the claimant was a 'straight shooter' (implying a direct communication style), that others could not navigate his communication style, and that the claimant was so focussed on honesty that he felt compromised when required to balance his duties in the area of information security with the need to ensure customer satisfaction. The evidence indicated that some of the customer-related aspects of the claimant's role had been informally delegated to other members of staff. Joe Larkin also stated that he could not comprehend what the claimant was trying to say in the chicken email sent by the claimant on 3 April 2024. In addition, Joe Larkin referred, in the claimant's performance review, to the fact that the claimant did not want to massage messages to customers. I conclude, therefore, that it is clear that there was a lack of confidence in the claimant's interpersonal skills and his ability to represent the respondent's business, with the claimant's commitment to honesty being perceived by the respondent as being tantamount to a lack of diplomacy.

118. This view of the claimant's interpersonal skills was not confined to Joe Larkin. It was clear from Joe Larkin's evidence that he had discussed the claimant's interpersonal style with other members of staff, who appeared to share his views. The claimant indicated that he did not wish to attend a meeting on 3 April 2023, stating that 'it made no technical sense'. This resulted in correspondence from a colleague to Joe Larkin stating that the response did not demonstrate the level of collaboration expected and asking Joe Larkin for help to resolve it.

119. My view, in light of all of this, is that the primary issues playing on the respondent's mind, in respect of the claimant, were the respondent's perception that there was a significant chance that the claimant might leave his role, leaving a gap in the respondent's ability, as a business, to deal with the technical aspects of information security, and that he was someone who was considered to be difficult to deal with. I do not consider that the claimant's dismissal flowed directly from any one particular event (for example, the chicken email sent on 3 April 2024 or indeed from the correspondence around flexible working) but that it flowed from a shared perception, on the part of the respondent's staff, that the claimant was difficult from an interpersonal perspective as well as Joe Larkin's view, perceived as a threat to the business, that the claimant might leave employment.

120. I have also, in this context, considered Joe Larkin's comment in an email on 6 April 2023 when he stated "We're going to replace Alen. Barry is already aware of this." I accept that these words were brief and made in fast-flowing email correspondence. That said, I

consider them to have been comments made about the claimant himself, rather than his role. The context in which they were made related to discussions with the HR team about the claimant's desire to work remotely. The comment by Joe Larkin was, I believe, intended to express the view that there was little point in discussing the claimant's remote working status as the intention was that he would leave the company. Had Joe Larkin's comments related to the claimant's role rather than to the claimant himself, I cannot see that the comment would have been relevant at the juncture in question i.e. the fact that a redundancy situation arose should have made no difference to the claimant's remote working, on the basis that the redundancy situation would not automatically have resulted in the claimant's departure from the business. To that extent, I view Joe Larkin's comment as a statement of intent as to the fact that the claimant would not be continuing in employment with the respondent.

121. The manner in which the redundancy process was handled by the respondent operates to support my conclusion that the claimant's dismissal did not flow from, and was not attributed to, the redundancy situation. I deal with this below. My comments in respect of procedure are made in a general manner with a view to demonstrating that some of the procedural aspects of the dismissal operate to support a conclusion that redundancy was not the reason for the dismissal. My comments are not made against the backdrop of the requirement for reasonableness set out at section 98(4) (which of course does not apply in these circumstances as I do not consider redundancy to be a reason for the dismissal).

122. My view, for the avoidance of doubt, is that the formation of a pool of one, while unusual, appears to have been reasonable in these particular circumstances. This is on the basis that the claimant was the only Information Security manager based in London and that there was arguably no pool in London beyond the claimant.

123. The arrangement to employ Erich Diener was finalised on 31 May 2023, only days before the claimant's role was placed at risk. While I accept that the redundancy situation described above required the respondent to take steps to recruit a Director to be based in the US, the fact of effecting the recruitment before the redundancy consultation process had concluded is likely to have had an impact on the nature of the consultation carried out. This is because the fact of already having recruited a replacement would have had an effect on the respondent's ability to consider the ways in which the claimant's employment might have been retained (for example, by making changes or adjustments to the claimant's role or duties) and would also have operated to preclude the claimant from applying for the Director role. To that extent, consultation on a proposal is entirely different to consultation on a fait accompli. In short, the prior recruitment of Erich Diener had, to my mind, a material impact on the ability of the claimant to continue to be employed by the respondent.

124. In addition, the respondent appears to have taken limited steps either to tell the claimant that they did not believe that his skill set was suited to the new role, or to ask or encourage him to apply for the new position himself. The job description and details of the new role were not, for example, shared with the claimant and he was not encouraged

to submit an application. Joe Larkin's evidence was that had the claimant demonstrated the ability and willingness to fulfil the requirements of the new role, he (Joe Larkin) would have considered rescinding the offer to Erich Diener (on the basis that Erich Diener was not moving from employment but had resigned from his previous role). It is clear that Joe Larkin did not consider the claimant to be a suitable candidate for the Director role. That said, I do not consider Joe Larkin's comments about rescinding Erich Diener's offer to have been realistic, particularly considering the fact that a corporate search and recruitment process had been carried out, with internal announcements of the new role. To suggest that, after all those corporate steps, the respondent would have considered rescinding the role seems unlikely when the respondent could more easily and more cost-effectively have invited the claimant to apply.

125. The discussions which were had with the claimant in relation to re-engagement were, to my mind, limited. The claimant was referred to the company's website and asked to consider whether there were any vacancies on it which he was interested in applying for. The website had no relevant vacancies. It is not apparent to me that the respondent made efforts to discuss any form of bespoke re-engagement with the claimant, aside from referring him to the website. It is clear that he had a set of skills which is still in use by the respondent, which operates a global business with many staff working remotely. While it may have been the case that the requirement for his skills had diminished in London, it may, for example, have been possible to offer him a similar role in another time zone.

126. The respondent was also keen to find that the claimant was not interested in remaining in the respondent's employment. Much was made, in cross examination, of the fact that the claimant appeared to concur with the respondent's business decision to create a Director role in the US and that he did not appear to wish to remain with the employer. There was no transcript of the consultation meetings held in June 2023 but minutes written up by the respondent's staff. My view of the discussion at the meetings is that the claimant was shocked and confused about the proposal to make him redundant and initially sought to rationalise for himself the reasons for the proposal (by reference, for example, to it being related to where he lived and to the fact that he had just returned from paternity leave and lacked the ability to focus because of a lack of sleep). He did ask for more information about the rationale for the redundancy (which necessitated an additional meeting with Joe Larkin present to explain that rationale). He also enquired about the Director role and expressed the view that he was capable of performing it.

127. It is difficult for me to reach any conclusion on the manner in which the claimant's appeal was conducted. Minutes of the appeal meeting were not provided and the letter provided to the claimant did not contain detailed reasons for dismissing the appeal. While Bradley Smith provided reasons in his witness statement, significant time had passed between the date of the appeal decision and the date of the witness statement.

128. Turning to the issue of **Polkey**, it is necessary for me to consider whether the claimant would have been dismissed in any event and, if so, when. I consider the Polkey issue from a number of perspectives. Firstly, I deal with the prospect of a fair redundancy. Secondly, I deal with the flexible working issue. Thirdly, I deal with the claimant's

interpersonal skills. Lastly, I deal with the prospect of the claimant leaving employment of his own volition.

129. The respondent took the view that there was a redundancy situation in April 2023 and that a new Director needed to be hired in the US. In making a fair decision on the redundancy, the respondent would have been entitled to take a view on the claimant's qualifications and skills and their relevance to business needs. I have indicated above that the claimant was not dismissed by reason of redundancy but for other reasons. Had a fair redundancy process been followed, I do not believe, in contrast to the respondent's belief, that the claimant would automatically have been dismissed. Evidence provided during the hearing indicated that he worked in a business which operated across a number of time zones, that he himself operated in different time zones, and that he was skilled in matters relating to information technology and information security. His team worked remotely in India. The business would have had a continuing requirement for information security professionals. Even taking account of the fact that he was perceived as not having the soft skills required to carry out a Director role, my view is that it is possible that, were a fair process to have been carried out, he could have been offered another role in the business, on the basis of both his skill set and his knowledge of the respondent's business (as evidenced by his length of service).

130. I now consider flexible working. The claimant had been permitted to continue to work remotely until after his return from paternity leave in June 2023. To that extent, the earliest when the respondent could fairly have moved to take steps to dismiss the claimant would have been July 2023. Had the claimant not been dismissed in July 2023, it is highly likely that the issue of the claimant's flexible working pattern would have arisen again. I assume this on the basis that it was clear that the NICE FLEX policy was being actively monitored by the respondent and it would have sought to enforce it. The claimant had indicated in email correspondence that he viewed the office-based aspects of the hybrid working requirements as binary, i.e. that he would either be forced to leave or to comply. He also indicated a willingness to undergo a disciplinary process in respect of those requirements which I understood to reflect his belief that bringing the situation to a head would allow him to defend himself and explain the position he was in.

131. I have not considered the legal aspects of the claimant's contractual situation in respect of the hybrid working policy except to reflect the issues raised in evidence. That said, my view is that the situation is far from clear-cut given that: the claimant had established a course of conduct since 2016 where he did not attend the office and did not appear to have suffered any repercussions; the provisions of his contract did not contain express terms prohibiting remote working; and that he could possibly have adduced sufficient evidence to support a successful application for flexible working to reflect the care of his child. There is also the possibility that the claimant may not have been able to formalise a flexible working request and may have been dismissed as a result. There is a further possibility that the claimant would have chosen to comply with the respondent's stipulations in respect of flexible working (which, as the respondent acknowledged, would have required a short commute to the office two days every week) as he may not easily have been able to find alternative employment.

132. I now consider the issue of the claimant's interpersonal skills. There is the possibility that the respondent would have taken steps to dismiss the claimant for reasons connected with his interpersonal skills. This would have involved effecting a dismissal on grounds of conduct or possibly Some Other Substantial Reason (**SOSR**).

133. My view is that it would have been difficult for the respondent fairly to have dismissed the claimant immediately on grounds of conduct as the matters which occurred (for example, the chicken email, or the claimant's comments about refusing to attend the meeting because it made "no technical sense") were unlikely on their own to have amounted to misconduct. The respondent would likely have been required to deal with any conduct issues over an extended period, via the use of warnings and other disciplinary steps. No warnings were provided in relation to events occurring up until the claimant's dismissal, so it is possible to surmise that in order for this route to be open to the respondent, the claimant's behaviour would have needed to have worsened considerably and the respondent would have required more time to dismiss the claimant on grounds of conduct.

134. A SOSR dismissal would likely have involved a breakdown in the working relationship between employer and employee, possibly on the basis of a personality clash between the claimant and management. I consider that such a route may have been available to the respondent, but that the respondent would have needed to show a greater deterioration in workplace relationships with the claimant to be able to make out the grounds. In the circumstances, the claimant had a long and blemish-free employment history and he was materially performing his role. Were a SOSR dismissal on these or similar terms to have been considered, the respondent would have needed considerably more time for the grounds to be made out.

135. Finally, I have considered the possibility of the claimant leaving the respondent's employment of his own volition. I consider the "50% quitting" comment to be evidence of the fact that the claimant was dissatisfied with his role, in particular with his remuneration relative to his responsibilities. There was certainly a risk that the claimant would leave his employment. However, the claimant's voluntary departure would need to have been considered against the backdrop of the birth of his child, the impact on his stock options in the respondent, the availability of similar work (he indicated during the redundancy consultation meetings that there were limited opportunities in the UK post-Brexit) and the fact that he would lose accrued employment rights. My view is that the claimant might, therefore, only have left employment if the circumstances were such that his departure was involuntary (through, for example, a disciplinary process which might not have concluded in his favour) or were he to have been offered considerably better terms elsewhere.

136. In summary, consideration of the **Polkey** question is, by definition, uncertain. Doing the best I can and taking into account the various ways in which the claimant's employment might fairly have terminated, I consider that the claimant would have been dismissed in any event nine months after the date of his actual dismissal (being 7 April

2024). This, to my mind, adequately balances the chance of him leaving the respondent's employment earlier or later than that time.

Contributory Conduct

137. The respondent indicated that it did not wish to argue contributory conduct in respect of the claimant's dismissal. I understand that the tribunal is required to consider it any event. I do not consider that it would be just or equitable to reduce the claimant's basic award by reason of contributory conduct. This is because I have not found that there was blameworthy or culpable conduct on the part of the claimant and no issue was raised by the respondent in respect of misconduct during the claimant's employment. Similarly, when considering contributory conduct in respect of the compensatory award, I did not find that there was any blameworthy or culpable conduct which contributed to the claimant's dismissal. In the circumstances, the respondent took the view that the claimant's dismissal was by reason of redundancy which does not generally give rise to consideration of conduct (except, for example, when considering selection criteria for a pool of staff, which was not the case here). In addition, given **Polkey**, any reduction applied to the compensatory award in respect of contributory conduct would likely operate to penalise the claimant twice. This is because an element of the **Polkey** analysis involved consideration of the possibility of future misconduct.

138. A case management order will be issued separately setting out preparatory steps for a remedy hearing.

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Employment Judge Coen

Dated: 7 May 2024

Judgment and Reasons sent to the parties on:

24 May 2024

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For the Tribunal Office

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