Neutral Citation Number: [2023] EAT 131

Case No: EA-2021-001244-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 10 October 2023

Before:

HER HONOUR JUDGE KATHERINE TUCKER

- -

Between:

MR Z VALIMULLA	**Appellant**
- and -	
AL–KHAIR FOUNDATION	**Respondent**

- -
- -

Mr Jeffrey Jupp, Counsel (instructed by **Free Representation Unit**) for the **Appellant**
Mr Edmund McFarlane (instructed by **Peninsula Business Services Ltd**) for the **Respondent**

Hearing date: 10 October 2023

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JUDGMENT

SUMMARY

UNFAIR DISMISSAL

The Claimant worked as a Majid Liaison Officer (MLO), involved in raising funds for the Respondent charitable organisation. He was based in the North West of England. Three other employees performed the same or similar roles in different geographic locations. During the Covid 19 pandemic the Claimant was dismissed as redundant. For the purposes of redundancy selection, the Claimant was placed in a pool of one. An Employment Jjudge found that his dismissal was fair, accepting the Respondent's case that the Claimant's role was 'unique'.

The Claimant appealed and contended that the Tribunal had made insufficient findings of fact relevant to the fairness of the employer's approach to pooling for the purposes of redundancy selection, and, because the Tribunal failed to address a material issue, namely, the Claimant's complaint that he was not consulted in relation to being placed in a pool on his own.

The appeal was allowed. The Tribunal appeared to have accepted, without more, the Respondent's case that the Claimant's role was unique, notwithstanding the evidence that other employees performed the same role, albeit at other geographical locations. The Tribunal did not appear to have considered whether the Respondent had genuinely applied its mind to the question of pooling, nor the reasonableness of the approach taken in this particular case. *Capita Hartshead Ltd v Byard* [1995] IRLR 433 and *Taymech v. Ryan* [1994] EAT/663/94 considered and applied.

On the question of consultation, the Tribunal did not address this issue. Consultation is a key aspect of a fair redundancy process. To be meaningful it must take place at a time where it can potentially make a difference, and in such a way that responses to a *proposal* are considered and reflected upon, prior to a decision being made. *Mogane v Bradford Teaching Hospitals NHS Foundation Trust* [2023] IRLR 44 considered and applied.

HER HONOUR JUDGE KATHERINE TUCKER:

1. This appeal is against a decision of the London South Employment Tribunal, Employment Judge Wright, made on 22 September 2021. The Judgement was sent to the parties on 28 September 2021. In this Judgment, I will refer to the Appellant as the Claimant and to the Respondent as the Respondent, as they were before the Tribunal.

2. The Tribunal dismissed the Claimant's claim of unfair dismissal. The Claimant now appeals against that decision.

The background facts which were relevant to the Claimant's dismissal and to the Tribunal's decision

3. The Respondent is a faith-based charity, established in 2003. It, primarily, receives digital, financial donations which it then distributes. It is a relatively small business, with a head office of 40-50 staff and around 100 seasonal workers. At the time of the ET hearing, there were six branch offices. Team members moved between them frequently. The peak time for donations to be made to the Respondent is during Ramadan.

4. The Claimant began working for the Respondent in February 2018. He was employed as a Masjid Liaison Officer ("**MLO**") and, at the time of his dismissal, worked at the Bolton branch. Nationally, four other MLOs were employed by the Respondent. The role of a MLO involved fundraising in the community, for example through schools and mosques.

5. The Tribunal heard evidence that the charity market can change and that charitable organisations must respond to those changes. In March 2020, the UK entered a period of lockdown as a result of the Covid 19 pandemic. The Respondent noticed a downturn in contributions whilst places of worship were closed. The evidence of Mr Khan, the Head of Branches, stated that all the Officers assigned to collecting revenues from places of worship were placed on furlough. The Claimant was placed on furlough.

6. The evidence before the Tribunal from Mr Rodman (HR Manager) and Mr Khan, was that there had been discussions in June and August 2020 about the business, and a discussion regarding potential redundancies.

7. In Mr Khan's department, four employees were identified as being at risk of redundancy. The Claimant was one of those four. After the Claimant's role was identified as being at risk of redundancy, three consultation meetings took place. At the first of those, the summary of the business case for the need to restructure was read out from a script (described as a redundancy consultation meeting script). In addition, at the outset of the first meeting, the Claimant was informed of some of the difficulties the Respondent was experiencing financially, including the fact that they were receiving donations online, not through officers. The notes of the meeting stated that the Claimant's role was at risk of redundancy, that the proposal was that, whilst some regional hubs would remain (for example, in Birmingham) other branches, (for example, Leicester) would close, and that there would be two regional hubs.

8. The Claimant stated that he should have an opportunity to 'defend' his role. He was informed that he could do so at the second meeting. At the second meeting, the Claimant put forward a business case as to how his role could continue. The Tribunal found that that proposal was considered, but was not accepted. One further meeting took place. The Claimant was then dismissed.

9. The Claimant lodged a claim of unfair dismissal with the Employment Tribunal.

The Tribunal decision

10. The Judge set out the background facts and the fact that the Claimant did not accept that there was a genuine redundancy situation. The Judge found that, contrary to that position, there was a genuine redundancy situation. The Judge concluded that the process was not so flawed so as to render the dismissal unfair. The Judge recorded the fact that the three

consultation meetings had occurred, that the outcome of redundancy process was communicated to the Claimant, and that his contract ended in effect from October 2020.

11. The Tribunal found as follows:

> **17. "The claimant criticised the consultation process and said that it was not effective consultation. In particular, the claimant criticised Mr Khan for his comments in the first consultation meeting in which he told the claimant it had been decided his role would 'disappear'. It is accepted that this was loose or sloppy language. It did appear to the claimant that the decision had already been taken and that the redundancy was a fait accompli. Ms Rudman attempted to mitigate this impression by adding that it was proposed that the role would be deleted.**
>
> **18. Out of 14 proposed redundant roles, nine in the end resulted in the role being deleted. Furthermore, there was a proposal to close the Leicester branch, due however to representations made, that decision was reversed. On balance, the Tribunal finds that the respondent's position was not entrenched, and it was open to consider representations made during the consultation process. If there is a proposal to delete a post, then of course the respondent must have in its mind that it could manage without position. The proposal was that the role of Masjid Liaison Officer would be delete.**
>
> **19. The claimant takes issue with the selection criteria and selection pool. There was no selection criteria. The Tribunal was told the claimant's role was unique and so he was in a self-selecting pool of one. Whilst that may have been the case, those factors could have been made expressly clearer to the claimant in the course of the process.**
>
> **20. In considering alternatives to redundancy, the claimant put forward a business case as to how his role could continue. The Tribunal finds the respondent did consider the claimant's proposal, even if ultimately it did not accept it.**
>
> **21. In respect of alternative work, there were two vacancies in Croydon. The claimant also referred to Zaid Musa being offered work after his employment had ended. Mr Zaid Musa was a zero hours worker, who had worked for the respondent for 'years' and who came in on an as required basis. Furthermore, he worked in the warehouse. In light of that, the Tribunal finds that the vacancies which existed at the time the claimant was going through the redundancy process were discussed and rejected due to the location.**
>
> **22. The claimant also criticises the respondent in that he was treated inconsistently with other members of staff. It is not clear what the issue he takes is as he has not identified the other staff.**

> **In any event and taking the claimant's claim at its highest, even if there was a difference in treatment, the claimant's role was unique, with the result that accounted for any difference in treatment.''**

12. The Judge identified the relevant legislative provisions: s.94, s.98 and s.139 of Employment Rights Act 1996 (ERA 1996), identified the legal principles to be applied in assessing the fairness of a dismissal and specifically one involving redundancy, for example referring to *Williams v Compair Maxam Ltd* [1982] IRLR 83 and *R v British Coal Corporation and Secretary of State for Trade and Industry, ex parte Price and Others* [1994] IRLR 72.

13. The Tribunal' conclusions were set out as follows:

> **33."This employer, like many others during the pandemic was in an invidious position. It had to change its working model overnight. It was clear from the evidence given that the staff involved in the redundancy process were compassionate and fully appreciated the impact of the difficult decisions they had to take. After a re-organisation in 2019, there was in effect a further 'cull' in 2020. The pandemic and the impact of it could not be predicted and from March 2020 there was immeasurable uncertainty.**
>
> **34.Unlike all of the other staff, the claimant was not branch based and even though he worked from home, he could not continue in his role during lockdown and he was placed on the CJRS. The respondent changed its business model and during the summer of 2020, it came to the conclusion that the role the claimant performed could be deleted.**
>
> **35.The Tribunal accepts the redundancy was genuine. Due to events outside of either party's control, it was no longer possible for the role of Masjid Liaison Officer to operate by fundraising in the community. At the time, it appeared to the respondent (and it was reasonable for it to take that view) that it was impossible to say when, if ever, the role could continue in the future as it had in the past.**
>
> **36. The respondent was in a position akin to an employer whose factory has been destroyed in a fire and who decides to make its staff redundant. The requirement for the work of the particular kind the claimant performed had ceased or diminished. Furthermore, it was reasonable to conclude it was expected to cease or diminish. The respondent could see no prospect of a return to community**

fundraising in the manner the claimant had previously performed resuming; and that was a reasonable view.

37. The claimant criticises the respondent for not allowing him to continue on the CJRS. By September 2020 the terms of the CJRS had changed and there was now a cost to an employer. In addition, there were repeated statements made that the Scheme would end on 31/10/2020. Had the respondent allowed the claimant to continue on the CJRS and had as expected, the scheme ended on 31 October 2020, what was the respondent to do then. The claimant's role no longer existed through no fault of either the claimant or the respondent. A redundancy situation would still have existed.

38. The Tribunal makes no conclusion on the respondent re-hiring the claimant further to the announcement made on 5 November 2020 when the country was in a second lockdown, as the claimant did not take this point.

39. Mr Khan did have an open mind in respect of the proposals the claimant made, and the consultation was effective. The process does not have to be perfect and overall, the process was reasonable and therefore ultimately it was fair. It is noticeable that the claimant criticises both the respondent's process and the genuineness of the dismissal, yet he did not appeal against the decision to dismiss him. In particular, if the process is criticised, then it would be logical to have appealed to the CEO. The claimant also had the option of raising a grievance in accordance with his contract of employment and he did not exercise that option.

40. This was a small employer with 40 full-time staff. It did not have unlimited resources. Had the claimant been retained, there was a cost to the respondent, even under the CJRS. The decisions taken and the process followed which resulted in the claimant's employment being terminated were within the range of reasonable responses which an employer could take, particularly during the pandemic.

41. For those reasons, the Tribunal finds the dismissal was fair by reason of redundancy and the claimant's claim fails and is dismissed.''

14. The passages set out above, particularly paragraph 19 of the Judgment, make it clear that the Employment Judge accepted the Respondent's case that the Claimant's role was 'unique', and that the Claimant was in a self-selecting pool of one**.**

The legal principles relevant to the Tribunal's decision

15. Redundancy is a potentially fair reason for dismissal. Whether there is a redundancy situation is determined by the application of s.139 Employment Rights Act 1996 (ERA 1996). Once a decision has been made that the reason for dismissal was redundancy, the Tribunal's task is only partially completed. The Tribunal must then go on and determine whether the particular dismissal for that reason was fair or unfair.

16. In carrying out that assessment, and pursuant to s. 98 (4) of the ERA 1996, the Tribunal is required to consider all the circumstances, including the size and administrative resources of the employer, and the substantive merits of the case. The question to be answered is, ultimately, whether the employer treated the potentially fair reason as a sufficient reason for dismissing the particular employee concerned in the particular circumstances of the case.

17. In redundancy cases, employers are afforded a wide discretion in respect of business decisions which may lead to a redundancy situation. However, the law also requires that employers do not act arbitrarily in making those decisions insofar as they may lead to dismissal of staff. Where decisions may lead to redundancies, obligations to consult will be engaged and employers are required to adhere to some basic principles of fairness. Depending on the scale of proposed redundancy, however, other legislation may impose other specific requirements. There is, however, no one set or fixed manner in which an employer can fairly dismiss an employee for redundancy.

18. These principles are clearly articulated in relevant authorities. In *British Aerospace plc v Green & ors* [1995] IRLR 433 (CA), LJ Waite said, at paragraph 2 of the Judgment, that:

> "It has been accepted from the outset of the unfair dismissal jurisdiction that the concept of fairness, when applied to the selection process for redundancy, is incapable of being expressed in absolute terms. There are no cut and dried formulae and no short cuts. The recognised objectives include the retention within the reduced workforce, once the redundancies have taken effect, of employees with the best potential to keep the business going and avoid the need for further redundancies in future; as well as the need to ensure that qualities of loyalty and long service are recognised and rewarded."

19. In the same case observations were made regarding the processes adopted for selecting the staff to be made redundant. Each system has to be examined on its own inherent fairness. LJ Millett said:

> "25. That is sufficient to dispose of the appeal, but I wish to make my view clear that documents relating to retained employees are not likely to be relevant in any but the most exceptional circumstances. The question for the industrial tribunal, which must be determined separately for each applicant, is whether that applicant was unfairly dismissed, not whether some other employee could have been fairly dismissed. If the applicant can show that he was unfairly dismissed, he will succeed; if he cannot, he will fail. It will not help him to show that by the same criteria some other employee might not have been retained. The tribunal is not entitled to embark upon a re-assessment exercise. I would endorse the observations of the Employment Appeal Tribunal in Eaton Ltd v King and others [1995] IRLR 75 that it is sufficient for the employer to show that he set up a good system of selection and that it was fairly administered, and that ordinarily there is no need for the employer to justify all the assessments on which the selection for redundancy was based."

20. Similarly, in *Capita Hartshead Ltd v Byard* [2012] IRLR 814, it was held that there is no legal requirement that a pool of staff from whom selection for redundancy was to be made should be limited to those doing the same or similar work. Additionally, it was held that the ET should scrutinise with care the reasoning the employer adopted and whether the employer had properly turned their mind to the issue of the pool of employees for the purposes of selection for redundancy. This does not mean that the process of identifying a 'pool' should always be used. Ultimately, the issue is whether the decision to do so is one that came with in the band of reasonable responses open to a reasonable employer:

> "20. The Courts have laid down four important decided principles, which show the correct approach of the Employment Tribunal and this Appeal Tribunal to this statutory test. First, it is settled law that:-
>
> > **"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 [18].
>
> 21. Second, this principle applies to the approach to be adopted by an Employment Tribunal to the manner of the selection of a pool from which employees are to be considered for redundancy. Thus Judge Reid QC explained when giving the judgment in this Appeal Tribunal in **Hendy Banks City Print Limited v Fairbrother and Others** (UKEAT/0691/04/TM) when he said in a passage which echoes the approach of Lord McDonald MC sitting in this Appeal Tribunal in **Green v Fraser** [1985] IRLR 55. that:-

> **"[9]...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."**

22. Third, the Employment Tribunal in determining how they perform their task of applying the statutory test is not bound by any rigid rules. Eveleigh LJ explained in **Thomas & Betts Manufacturing Ltd v Harding** [1980] IRLR 255 in relation to a contention that there was a rule as to which employees should be selected for consideration for redundancy that:-

> **"9. …I myself deprecate that attempts that are made in these industrial relations cases to spell out a point of law developed upon precedent to create rules that have to be applied by the … Tribunal in considering the straightforward question of fact which is provided for in [the predecessor of section 98(4) of the ERA] … That is the approach to the question that was required by the … Tribunal, and that is the approach the Tribunal adopted. As I say, the attempt to erect rules of law in cases of this kind is to be deprecated..."**

23. Fourth, the Employment Tribunal is an industrial jury and it is important to bear in mind the following general remarks of Lord Denning MR in **Hollister v National Farmers' Union** [1979] ICR 542 at 552, 553:

> **"In these cases Parliament has expressly left the determination of all questions of fact to the [employment] tribunals themselves ….It is not right that points of fact should be dressed up as points of law so as to encourage appeals. It is not right to go through the reasoning of these tribunals with a toothcomb to see if some error can be found here or there – to see if one can find some little cryptic sentence."**

…

26. Turning to the statement of Mummery J in the **Taymech [v Ryan** [1994] EAT/663/94] case, it is important to bear in mind two matters. The first is that it only applies where the employer has (with our emphasis added) "*genuinely applied his mind to the problem of selecting the pool from which the person to be selected for redundancy*". As we will explain from paragraph 28 below, this approach has been held by Mummery J and others to mean that the Employment Tribunal has an obligation to scrutinise whether the employer has applied the statutory requirement when selecting the pool of employees from whom the employer will select who is to be made redundant.

27. The second matter is where the employer has genuinely applied his mind to the selection of the pool, then his decision will be "*difficult*" but not *impossible* to challenge. Many of the able submissions of the Respondent seemed to ignore both these aspects of Mummery J's comment.

28. As we have explained in paragraph 26 above, the Employment Tribunal has duty to scrutinise the way in which an employer selected the pool. The **Taymech** case shows that is precisely what Mummery J did when he proceeded to add after the passage quoted in paragraph 7 that:-

> **"This is a case where the Tribunal concluded that the employers had not even applied their mind to the question of a pool consisting of people doing similar administrative jobs…The Tribunal was entitled to come to the conclusion that they did about the other work done by Mrs Ryan and that this is a case where the employers should have applied their minds to the creation of a pool for the purpose of deciding who to select for redundancy. As they did not go through that process they have not made a fair selection for the purposes of section 57(3) and therefore the Tribunal were entitled to come to the conclusion that this was not a case of unfair selection for redundancy."**

…

30. Similarly, in the case of **Lomond Motors Limited v Clark** (UKEATS/0019/09/BI) Lady Smith sitting in this Appeal Tribunal in Edinburgh noted that the Employment Tribunal had considered that there should be a pool of three people but this was regarded as incorrect by this Appeal Tribunal because one of the people did not have the requisite experience to cover one particular site (see paragraph 35).

31. Pulling the threads together, 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

(a) "*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 [18];
(b) "*[9]...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);
(c) *"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** [1994] EAT/663/94);
(d) 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
(e) 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.

32. The majority of the Employment Tribunal in this case adopted precisely this approach by scrutinising the pool selected by the Respondent from whom the candidate for redundancy would be selected. As we have explained the majority of the Employment Tribunal did not accept Mr Pearce's view of the risk that the Respondent would lose business if a Scheme Actuary was to be changed, because a majority of the Employment Tribunal found that this risk was "*slight*"[64]. There was an evidential basis for this as the Employment Tribunal noted that "*Mr Pearce had accepted a number of cases where the Scheme Actuary had been changed without the Respondent losing the client*" [60]. This conclusion meant that the majority of the Employment Tribunal concluded that the Respondent had not genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy.

33. This was after all the approach of the Employment Tribunal in the **Taymech** case, which led Mummery J to his decision that there was no arguable point of the proposed appeal. In other words, the majority of the Employment Tribunal was acting consistently with the statutory duty as set out in section 98(4) of the ERA and with the approach set out in **Williams** and **Hendy Banks** (supra) in deciding that the Respondent acted unfairly in not including other Scheme Actuaries in the pool out of which the person to be selected for redundancy was to be chosen."

21. In a similar vein, see *Mogane v Bradford Teaching Hospitals NHS Foundation Trust* [2023] IRLR 44, where the EAT stressed the importance of consultation during the

selection of employees for dismissal by reason of redundancy. See in particular [22] to [25]:

> "22. In discussion between this tribunal and Counsel, both agreed that the question of when consultation should occur is key to the decision. In collective redundancy cases, it has been held that this should occur at a formative stag. This is shown through **Williams** and the development of case law from it. It provides for consultation at a stage of a process at which the employees representative might have an effect on the decision. Neither Counsel pointed to any authority on the question (as it applies to consultation where there is no collective redundancy situation) which specifically deals with the time at which consultation should commence other than making reference back to **Williams** and following cases.
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> 23. Mr Boyd agreed with the judge that the principles that underpin the fairness of consultation and selection processes were set out to mitigate the impact of a redundancy situation. Further that they would indicate an approach which was not to act arbitrarily between employees. Mr Ohringer suggested that principles arising from the authorities on consultation overall as:
> (i) a search to reduce the impact of redundancy.
> (ii) how redundancies are to be achieved in terms of scoring;
> (iii) testing that scoring; and
> (iv) identifying who is to be dismissed.
>
> 24. In our judgement, the principles set out in **Williams**, as restated effectively by Lord Bridge in **Polkey**, have withstood the 40 years since they were outlined unscathed; they stand the test of time as good industrial relations practice. Further, we conclude that, with appropriate adaptation, they should be applied to all redundancy situations, not just those involving collective redundancies. Of course, the words of the statute remain the basis of the law and a departure from those principles, as set out in or adapted from **Williams**, is possible where it is reasonable to do so. However, it is important that, where a Tribunal deviates or departs from those principles, the reasons for taking a different course are spelt out. It seems to us that the formative stage of a redundancy process is where consultation ought to take place according to the principles in **Williams** and the cases developed from it. The reason for consultation to take place at a formative stage is because that means that a consultation can be meaningful and genuine. That must mean that consultation, for a process to be fair, should occur at a stage when what an employee advances at that consultation can be considered and has the potential to affect the outcome.
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> 25. In terms of appropriate pool of employees, in our view, the authorities show a tribunal cannot and should not easily interfere with an employer's decision as to the pool. However, the question that the tribunal must answer in terms of reasonable responses is not just, is there a rational explanation for this pool? But the question: is it a pool that a reasonable employer could adopt in all the circumstances?"

22. Further, in *Mogane,* the EAT noted the importance of ensuring that consultation takes place at a point when it can be meaningful, concluding on the facts of that case that it had not. HHJ Beard stated:

> "30. Therefore the decision on pool and as a consequence that the Claimant should be dismissed was complete long before any meetings took place about her selection or any consultations took place.

> This resulted, in our judgment, in an arbitrary choice; a choice related solely to the question of the ending of the fixed term (contract) and it also related, in that sense, directly to the Claimant.
>
> 31. … In terms, the consultation was not at the stage where the Claimant could influence or potentially affect the outcome. The Tribunal does not explain the reason why that decision, which prevented that consultation, was reasonable in these circumstances. The only explanations it gives are tautologous; in other words, the reason why the Claimant was selected was because of the need to renew her contract and the need to renew her contract was the reason why the Claimant was selected for redundancy. There was no specific explanation as to why it was reasonable to select that sole criterion, without any consultation. That sole criteria resulted in the fait accompli of the Claimant being dismissed from her role. This meant that if the consultation which did take place on redeployment was unsuccessful (as it turned out to be), it meant that the Claimant would be dismissed. On that basis the appeal succeeds on grounds 1 to 4.
>
> 32. As to ground 5 given the size and resources of that employer, an explanation was necessary for that approach to be taken. In deciding what was reasonable, the Tribunal should have been assessing that explanation. All of that is entirely missing from the Employment Tribunal's Judgment. Even reading the Judgment as benignly as possible, it is not possible to accede to Mr Boyd's suggestion that the Tribunal's reasoning for its decisions on the relevant issues is apparent for the reasons we have just explained. There is no clear, or even unclear, exposition of the law in terms of reasonableness as it relates to consultation and pooling, which were specific issues which the Tribunal were asked to address. There is no specific application of the law to the facts addressing those specific issues or even a tying-in of those issues to the facts and the law. I am sorry to say that, it appears, given its overall task with regard to the various claims (which was no doubt, as Mr Boyd portrayed it, a herculean one), the Tribunal lost sight of its specific task in respect of providing reasons on this aspect when considering whether the dismissal was fair or unfair. We fully understand the difficulty faced by Employment Tribunals when faced with claims which span multiple jurisdictions and where during the process of a hearing more emphasis is placed on particular aspects than others. The complexity of preparing a judgment in such a case should never be underestimated and we are entirely sympathetic to the difficult task the Tribunal below faced.
>
> 33. We have come to the conclusion that the factual circumstances described, which are (as we set out) that the Claimant was, effectively, chosen to be the employee dismissed before any consultation took place that this appeal must succeed and, further, that we can decide that this dismissal was unfair. The authorities which we have referred to from **Williams**, **Polkey**, **Rowell**, **Freud v Bentalls** and **De Grasse**, show that the absence of meaningful consultation at a stage when the employee had the potential to impact on the decision is indicative of an unfair process. Without an explanation as to why such a step would be reasonable in the particular circumstances the Tribunal has not provided sufficient reasons to explain its decision."

The grounds of appeal

23. In this case the Claimant advanced three grounds of appeals.

1. Error of law pooling – insufficient findings of fact on the issue of pooling. It was submitted that the Tribunal erred in law because it made insufficient findings of fact to properly deal with the issue of whether the Respondent acted reasonably in not pooling the Claimant with the other four MLOs.

2. The ET erred in law in that it did not address the Claimant's complaint that he was not consulted in relation to being placed in a pool on his own, a material issue.

3. Error of law – finding of fact for which there was no evidence. It was submitted that there was no evidence to support the finding of fact (at para. [21] of the Judgment) that the Claimant had ever been offered, let alone rejected, any role in Croydon.

Submissions

24. As to Ground 1, my attention was drawn to the particular statements made in Claim Form, read together with paragraph [22] of the witness statement. It was argued that the Claimant should have been considered for redundancy along with others, and further that he had not been adequately consulted. It appears to be common ground that this was not addressed by the Respondent in their response. It was submitted by the Claimant that the Tribunal failed to make necessary findings; the Claim Form supports the submission that those complaints were made and should have been considered by the ET, but were not. For example, the Claimant's witness statement stated that "… *the whole process I saw no evidence others were put at risk of redundancy."*

25. It was submitted that Mr Musa managed four others undertaking a similar role as the Claimant, yet those individuals were not put in the pool for redundancy with the Claimant. It was submitted by the Claimant that the fact finding and analysis of both cause and criteria was inadequate; that the Tribunal failed to make necessary and relevant findings on what the Claimant's role involved, what the other (similar) roles involved, identifying material differences and similarities and failed to adequately address whether the Respondent considered pooling; whether the Respondent's approach to that issue had been fair, in particular by a consideration of the reasons for placing the Claimant in a pool of his own rather than with the other MLOs. It was submitted that it was necessary to undertake this analysis. It was submitted it was clear from [13] that the Tribunal took the Respondent's assertion that the Claimant's role was unique at face

value, without scrutinising or making any relevant findings. The ET failed to address key issues.

26. The Respondent submitted, first, that there is no statutory obligation to use a pooling mechanism in order to select employees for redundancy fairly. My attention was drawn to the passage in *Green,* paragraph [1] to [2] and further on at [13]. It was submitted that the redundancy process should be considered as a whole, and discretion should be afforded to an employer in respect of pooling. In respect of Ground 1, it was submitted that the Tribunal legitimately concluded the Claimant's role was unique and that this was a strong indicator that the Tribunal had considered the pool of one to be reasonable.

27. There is a degree of overlap in the grounds of appeal. Whilst, to some extent, the Tribunal had been critical of the Respondent, but the Tribunal clearly accepted the Respondent's case that there had been adequate consultation. It was also submitted that the case advanced before the EAT had been broader than that before the Tribunal. As to Ground 2, consultation is a key requirement of the redundancy process. As with pooling the question of fairness must be looked through the prism of redundancy and as a whole.

28. As to Ground 3, it was submitted that there had been two vacancies. This conclusion was set out at paragraph [21] of the Judgment and the Respondent accepted that there was no finding of that fact. At paragraph [9] of the ET3 it was explained why the Claimant's role was at risk of redundancy. To that extent that Ground 3 was conceded, the Judge's notes of evidence regarding an assertion by one of the Respondent's witnesses that there was a discussion led to, at best, a misunderstanding and the Judge had failed to make a relevant finding on whether an alternative role were offered, and the chance of it being accepted.

Conclusions

29. I consider that grounds 1 and 2 are well founded. The Claimant was identified as being at risk of redundancy as part of a nationwide redundancy process which affected a number of employees. He performed a particular role (MLO) in one particular geographical location. Other employees performed the same role in other geographical

locations. He was informed that his role was at risk of redundancy. Some staff in other locations were also identified as being at risk of redundancy. It was not immediately apparent from the written evidence before the Tribunal whether the Claimant's role was at risk of redundancy because the requirement of the business for employees to carry out work of a particular kind (the work undertaken by a MLO) had role ceased or diminished, or because the requirement of the business for employees to carry out work of a particular kind in the place where the employee was employed by the employer (the MLO role in Bolton) had ceased or diminished. However, more significantly, the Judge clearly found at [36] of the Reasons, that the Respondent had established that the requirement for work of the particular kind had ceased or diminished. The Judge did not find that the reason for the redundancy arose from a reduction in the need for that specific work to be done at a particular location. The Judge does not set out in his reasons why that had been established, saved to note it had been due to events outside the parties control and it was no longer possible for an MLO to operate in the community. The conclusion of judge at [35] to [37] of the Reasons only goes so far to answer the question of whether the employer had established that there was a genuine redundancy situation. The Judge did not appear to go on to ask the next question of whether the selection of this particular employee for that reason was fair or unfair. The Judge was required to consider the Respondent's selection process. In this case the Respondent had used a process of identifying the Claimant for redundancy by use of a pooling system and by placing him in a pool of one. The Judge needed to consider whether the approach adopted by the employer on the particular facts of the case was fair, and, in particular whether the Respondent had put its mind to the selection process. The Tribunal was required to consider whether the approach adopted came within the band of reasonable approaches a reasonable employer could have adopted.

30. It was submitted on behalf of the Claimant, that the Judge would have been required to consider what the Claimant's role was, the similarities and differences between the roles of other MLOs, whether it had considered pooling, how, and the rationale for its decision. I accept that the Judge needed to undertake this analysis in order to assess fairness and the reasonableness of the employer's approach. The Judge gave no reasons for why the

Respondent's assertion that the Claimant's role was 'unique' and that therefore a pool of one was appropriate was accepted.

31. Whilst I accept the Respondent's submission that there is no singular process through which an employer can fairly select employees for redundancy, and that fair selection may take place through different processes and in different ways, an employment tribunal is required, in assessing fairness of a dismissal for redundancy, to scrutinise the Respondent's approach. It must, as set out in *Capita Hartshead Ltd v Byard* [1995] IRLR 433 and *Taymech v. Ryan* [1994] EAT/663/94 apply the litmus test of reasonableness to the process and decision making of the employer. As set out above, this requires a Tribunal to consider whether the employer genuinely applied their mind to the question of the pool from which employees should be selected and to determine whether the pool selected came within the range of reasonable approaches open to a reasonable employer.

32. Ground 2 is closely linked to the first ground. In this case, consultation only appears to have taken place after what was the key decision had been made, namely the identification of the pool of one. The Employment Judge stated that consultation was 'effective'. In context, it is not clear precisely what that meant. In my judgement, what was required was that consultation should be meaningful. It may be that that is what the Judge intended to convey. However, it was unclear how, on the facts, consultation was meaningful given the significance of the pool in this case.

33. Three consultation meetings took place. What is not clear, and what was lacking, is what was, in truth, consultation regarding the key issue in this particular case: consultation about why he, alone, was placed in a pool of one and selected as being at risk despite the other MLOs performing similar work at different locations; why he, in Bolton, was selected for redundancy, and others were not. Particularly, the Claimant was able to put forward a proposal, but it is not clear how the Claimant was consulted about why he was selected and placed in a pool of one, despite the other MLOs performing similar work at different locations. As a result of the timing of the key decisions, the consultation that did take place, took place after the time the Claimant could make

meaningful proposals about him being placed in a pool of one. It took place after the decision had been made for him to be considered alone. Consequently, it is difficult to see how consultation could be meaningful in respect of that important issue.

34. Meaningful consultation does not mean simply informing staff about a decision or proposal, giving them opportunity to make representations, and then putting into effect the proposal or decision which had, in truth, already been made. Meaningful consultation means setting out a provisional proposal, along with the rationale, and providing an opportunity for feedback, comments or observations. A decision maker should consider the responses elicited through consultation with an open mind, considering whether they alter the initial proposal and why that is, if not, why not, but only then making a decision.

35. On the facts of this case, the Claimant expressly raised the point that he had not been consulted about being placed in the pool of one. The Judge accepted that he was in a pool of one. The Judge did not however determine the material issue of whether the Claimant was consulted about that matter. I consider Ground 2 to be well made.

36. It was common ground that the evidence referred to in Ground 3 was not before the Tribunal and this ground was not opposed. In any event, the factual issues within it are likely to be considered in any remedy hearing. I say no more about it.

37. As to disposal, the Claimant's representative invited me to substitute a finding on Ground 2 and remit the case on Ground 1. The Respondent invited me, if either grounds were successful, to remit both Grounds 1 and 2 to the Tribunal. On the question of remission I considered *Jafri v Lincoln College* [2014] ICR 920 and *Sinclair Roche &Temperley v. Heard* [2004] IRLR 763 EAT.

38. In respect of Ground 2, in view of the lack of <u>any</u> meaningful consultation regarding this key issue in this case, namely why the Claimant was placed in a pool of one, despite other staff performing the same role, albeit at different locations, I consider that there can be only one outcome, namely that the dismissal was procedurally unfair. The authorities

are clear: consultation is a necessary ingredient of a fair process. There would need to be particular reasons why a redundancy dismissal where consultation had not taken place about an issue which was key to selection could be fair. No such circumstances appear to have been found to exist in this case. However, that leaves for determination a considerable number of issues which the Claimant conceded need to be remitted to the Tribunal including, what the outcome may have been had consultation taken place, any *Polkey* reduction and other issues relevant to remedy.

39. On the question of whether remission should be to the same tribunal, I note that this was a relatively short case. There is (at least) a reasonable possibility the Judge would not have any or any detailed recollection of the evidence heard. In addition, the Claimant raised some concerns about remitting the case to the same Judge, in light of the apparent acceptance, without analysis, of the Respondent's case about the Claimant's position being unique, giving rise to a concern that the Judge may be given a second opportunity and reach the same conclusion but to provide more detailed reasons for that decision. In my judgment, there is no reason to doubt the professionalism of the Tribunal. However, on balance, I consider it appropriate to be remitted to a different judge particularly given the very real possibility that the Judge will not have a detailed recollection of the case. Further, additional delay is more likely to be avoided if the case is not required to be heard by one particular judge.

40. I allow the appeal in relation to Grounds 1 and 2, I substitute the decision in relation to Ground 2, and remit the case in respect of Ground 1.