EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4104158/16 Held at Aberdeen on 14 & 17 February and on 31 May 2017

Employment Judge: Mr J M Hendry
Members: Mr A W Bruce
Ms N Mandel

Mr William Irvine	**CLAIMANT** **Represented by:** **Mr F H Lefevre – Solicitor**
Ensco Services Limited	**RESPONDENT** **Represented by:** **Mr A Knight - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the application for a finding of unfair dismissal fails and is dismissed.

REASONS

1. The Claimant in his ET1 seeks a finding that he was unfairly dismissed by the Respondent company from his position as B.O.P ('Blow Our Preventer') Superintendent. He alleged that he was unfairly dismissed/unfairly selected for redundancy. He had, he said, been presented with a "*fait accompli*" and there had been no proper consultation. His position was that the principal reason for his dismissal was that he had made a protected disclosure to the Respondent company in relation to an employee's admitted drug use.

2. The Respondent's position was that the Claimant had been dismissed fairly on the grounds of redundancy following consultation and that any disclosure made by the Claimant had no bearing on his dismissal even if was a Protected Disclosure.

Evidence

3. The Tribunal heard evidence from the Respondent's witnesses:
Stephen Shay, Business Unit Asset Manager.
Julian Hall, Vice President E.M.O
And from the Claimant on his own behalf

4. The Tribunal also had regard to the Joint Bundle of documents prepared by the parties (JB1-33).

Facts

The Tribunal found the following facts established or agreed:

5. The Respondent is a large multi- national company operating in the North Sea oil and gas fields and elsewhere throughout the world. They are a global provider of offshore drilling services to the petroleum industry. They operate a fleet of drilling vessels made up of semi-submersible vessels ('Floaters') and surface vessels ('Jackups') which are crewed and then hired out. More recently vessels have been used to provide site accommodation during construction and maintenance.

6. The Claimant was employed by the Respondent as a BOP Superintendent from 6 September 2012 until termination of his employment on 6 May 2016.

7. The Claimant received a contract of employment (JB5). Latterly he earned £5952.14 per month net including employers pension contributions.

8. The Claimant was employed to work within the recently formed Asset Management Team (AMT) of the Respondent's Europe and Mediterranean ("EUM") Business Unit. His role was highly specialised and related to the operation and maintenance of Blow Out Preventers. These are large specialised

mechanical valves used to seal, control and monitor oil and gas wells under pressure to prevent the escape of gas or oil. They are fitted to Floaters and Jackups. The Claimant was expected to regularly travel to vessels requiring his expertise and experience and to try and resolve difficulties that arose with the equipment or to answer queries remotely. He was responsible for overhauling the system to operate and maintain the BOPs and to train personnel in their use.

9. When the Claimant was recruited in 2012 the company had one semi-submersible rig operating within the EUM namely the *Ensco 5006*. They hoped to significantly increase the number of semi-submersible rigs operating within the EUM. This ambition was later abandoned.

10. The Claimant had the specialist knowledge and expertise to support increased use of these type of vessels/rigs. Prior to the Claimant's appointment the Respondent's managers in Aberdeen would rely on the expertise of the manufacturers of the equipment if technical problems arose with BOP's or they would speak to the Claimant's counterpart in other business units throughout the world or contact the company's engineers at their main office in Houston. This was not thought to be satisfactory if there was to be an increase in the use of such sub sea BOP's as they were larger and more complex that their counterpart surface equipment. The Claimant was also to provide support to the "Jackup" fleet of rigs which used smaller and simpler BOP's located on the structure above the sea.

11. The Claimant was dedicated and hardworking. He overhauled and improved the Respondent's training of personnel in the use of BOP's and the procedures for maintaining the equipment to a high standard. He was well regarded in his area of expertise.

12. There was a substantial downturn in activity in the North Sea throughout 2015 and 2016 due to the falling price of oil from historic high prices. Drilling activity and maintenance work slumped. The Respondent was unable to implement the plan to increase the use of semi-submersible rigs.

13. In 2015 the EUM Business Unit made a number of redundancies. The Claimant's post was not put at risk of redundancy. Following the redundancy exercise a senior Manager Mr Julian Hall V.P. E.M.O. addressed a 'townhall' meeting of staff in Aberdeen where he expressed the view that he thought that the worst was over and that the company had the workforce it needed for the future. The Claimant interpreted this as meaning there would be no further redundancies.

14. The market conditions did not however improve and a number of the Respondent's rigs became idle. In addition the market did not look likely to improve in the short term and the Respondent's managers were pessimistic about future business for vessels as contracts came to an end. Throughout 2016 market conditions did not improve and a further reduction in headcount was required. A large number of the vessels came out of contract with little or no prospects of securing future work. The need for further cost saving was discussed between senior managers over a period of some months in early 2016.

15. Mr Shay was instructed to reduce the head count by his head office because of the prevailing and anticipated future market conditions. He noted the current deployment of vessels and the likely future work. He concluded that drilling activity was reduced and likely to remain so for some time. He noted that the company had not deployed as many submersible rigs as envisaged before the downturn. In addition he looked at the whole organisation including senior posts such as the Claimant's. At that point there were three Superintendents in his division. The Claimant, a Superintendent who dealt with Mechanical Engineering matters and the one who was an Electrical Engineer. Mr Shay considered the roles performed by the three Superintendents and whether there was any 'cross over' in skills and duties.

16. Mr Shay considered whether it would be appropriate to consider the role of BOP Superintendent along with the other two roles and then seek to make redundancies from that pool. He came to the view that it would not be appropriate as the posts stood alone as they were distinct specialisms requiring different qualifications and experience. The post the claimant filled was, in his mind, only superficially similar to that of the Mechanical and Electrical

Superintendents. Each discipline dealt with a different area and required different experience, skills and expertise. The roles of Mechanical and Electrical Engineering had become increasing specialist with more sophisticated technology being used on vessels.

17. Mr Shay considered the other two roles and concluded that the company could not dispense with them but that the Claimant's role could possibly be dispensed with. He looked to restructure the workforce in this way and decided to progress the possible redundancy of the Claimant and other cost saving proposals after discussing these in general terms with other senior managers. He contacted HR to assist him in this process. He was familiar with the process of making redundancies through being involved in earlier redundancy consultations.

18. The Respondent employed a trainee engineer 'GP'. He was mentored by the Claimant but line managed separately. He was engaged to the daughter of one of the most senior managers in the company, Mr Brady. She suddenly became ill and died in 2015.

19. Just before Christmas 2015 GP telephoned the Claimant to wish him a Happy Christmas and to thank him for the support he had received especially following his fiancee's death. He told the Claimant that after her death he had 'gone off the rails' and had taken illicit drugs for some months. The Claimant was concerned at hearing this and asked him if he was 'clean' and was re-assured that he was. The Claimant believed GP that he was no longer taking drugs. He took no immediate action.

20. In early 2016 the Claimant became aware of an incident involving GP when he was working offshore. He had been involved in a serious 'near miss'. He resolved to mention the disclosure of drug taking to Mr Shay his line Manager which he did after a routine management meeting on the 18 January. Mr Shay told him that the matter was serious and that the Claimant would have to be tested for illicit drugs. Mr Shay immediately informed the HR department about the matter. GP was allowed to finish his four week rotation offshore and was tested in about March 2016. The test was negative. The Claimant was unaware of this.

21. By mid March Mr Shay was ready to proceed with the Claimant's possible redundancy and that of others. However, as the Claimant was on holiday he awaited his return.

22. On 28 March 2016 Mr. Shay spoke to the Claimant to give him warning of the redundancy consultation he was about to enter and to hand him a letter prepared by the head of HR, Mr McAuslin, about the process. He advised him that the company was looking to make some cost savings and that his position had been identified as one which might be at risk of redundancy. He was invited to attend a meeting the following day to discuss the matter in further detail. He was advised that he was entitled to be accompanied at the meeting. When pressed by the Claimant who wanted to know how likely it was that he would be made redundant Mr Shay indicated that he thought it was likely the Claimant's position would be made redundant. He told him that there appeared to be no alternative posts to redeploy him to.

23. At the meeting Mr Shay handed the claimant a letter prepared in advance by the HR Department (JB6). The Claimant gave Mr Shay the impression that he was resigned to redundancy and that he was looking forward to "semi-retirement". The Claimant told Mr Shay that he had expected to be made redundant in February.

24. The letter given to the Claimant rehearsed the significant slowdown in business caused by lower oil prices and the need to take action including restructuring and redundancies. Mr McAuslin wrote:

> "*The company has looked at ways of avoiding dismissals, reducing the number of employees to be made redundant and ways of mitigating the consequences of the redundancies. Upon completion of this analysis, we must regrettably inform you that you have been identified as a candidate for redundancy. No final decision has been taken in this respect and the company would now like to enter into individual consultation with you.*
>
> *The preliminary analysis has identified that we have no further requirement for your position and that you do not work interchangeably with any other employee so there is no pool in respect of your role for selection purposes; however, we can discuss this further when we meet……At our meeting we*

> *can also discuss the following issues which will be relevant should your position be confirmed as redundant. Please note however, that these discussions will be of a preliminary nature only, as it may be that following consultation you will not be a candidate for redundancy.*"

25. At this time a number of other redundancies were being considered. It was also planned to move the purchasing department to Dubai to save cost.

26. The Claimant attended the meeting on 29 March. He was not represented. Mr Shay was in attendance as was Ms Nicola Scott-Emuakpor, HR Adviser. The Claimant indicated that he did not want the redundancy process to drag on. He said: *'Lets get this done'*. He indicated that he was prepared to sign a settlement agreement to obtain enhanced redundancy payment. As a consequence Ms Scott-Emuakpor left the meeting and returned with a draft Settlement Agreement. This was based on a style document prepared by the Respondent's solicitors. The HR Adviser had typed in the Claimant's details (JB 7).

27. The Claimant was given the document. He was disappointed at the figure being offered but wanted to sign it there and then. He was told that he would have to take it to a solicitor and get advice. The Claimant was told that he could clear his desk if he wanted to which he did.

28. The Claimant then cleared his desk and waited until 1 o'clock to see a client who he had arranged to meet beforehand. He said goodbye to staff that he knew and left about 3pm.

29. The Claimant took legal advice. Following such advice he decided he was not prepared to sign the Agreement. His agent Paul Lefevre wrote to the Respondents by e-mail on 15 April (JBp.66):

> "*I am instructed on behalf of the above named following his dismissal from Ensco Services Ltd effective 29 March 2016. Having discussed matters with Mr Irvine he has decided not to sign the settlement agreement. Accordingly we would be grateful if you could now confirm that you will now process Mr Irvine's notice pay, holiday pay and his statutory redundancy pay.*
> *Mr Irvine also requests that you send him a copy of his contract of employment.*"

30. Mr McAuslin responded (JBp.67):

> "*Steve Shay met with William Irvine on 29 March 2016 to discuss a possible redundancy situation affecting William's position at Ensco Services Ltd. At the meeting, it was explained to William that no final decision would be taken with regard to his position until we had the opportunity to fully consult with him about the potential redundancy.*
>
> *Steve explained to William, that in the event that his redundancy was confirmed, he would be entitled to receive a statutory redundancy payment. In addition, in the event that his redundancy was confirmed, the company would be willing to pay an additional ex gratia sum to William, in exchange for William entering into a settlement agreement. William indicated that he wished to discuss the ex gratia payment that the company would be willing to offer him and he requested a copy of the settlement agreement to consider. It was suggested that we should pause the consultation process to provide William with an opportunity to consider the terms of the settlement agreement. It was also indicated that, in the event, that the terms of that agreement were not acceptable to William, the redundancy consultation process would continue. William indicated that this is how he wished to proceed. On 30 March 2016 William indicated to Steve Shay that he considered the terms of the settlement agreement and that he found them to be acceptable and was going to proceed with signing the agreement. William remained in the office as he stated, he wanted to do a handover before he left, and also to allow him to clear out his items and say goodbye to his colleagues. William was permitted to remain at home on paid leave in order to allow him an opportunity to consult with a solicitor about the terms of the settlement agreement.*"

31. The letter went on to indicate that as the offer was not being accepted the consultation process would proceed.

32. Mr Lefevre responded (JBp 69): :

> "*What in fact happened is that Mr Shay met with my client on 28 March and advised my client that he had some bad news that my client was being made redundant. Mr Shay specifically told my client that there were no alternative positions and he would meet with Nicola the following day. He also made it clear that he would get the best deal for Mr Irvine.*"

33. The Claimant received a letter on 28 April from Ms Scott-Emuakpor (JB12) inviting him to a reconvened redundancy consultation meeting on 3 May.

34. The meeting took place on 3 May. Minutes were prepared accurately summarising the discussion (JB 13). The Claimant raised why the B.O.P position was not required. He said that he was busy getting calls seeking advice. He queried why the other Superintendents were not considered. Mr Shay reminded the Claimant about the history of the post and how the company did not have such a role in the past. The Claimant said he felt singled out. Mr Shay told him that it was nothing to do with him personally but the state of the industry. The Claimant raised the drug testing of an employee 'GP'. Mr Shay told him that the issue had been 'raised' to management and did not impact on the decision. There was a discussion about how busy the rigs were and Mr Shat told him that there was potentially '5 rigs coming down'. The Claimant was asked if he wanted another meeting. He said he was happy with what had been covered.

35. Following the meeting the Claimant received a letter dated 4 May from the Respondent (JB 14). It invited the Claimant to a further meeting. It noted the three issues raised as being why the Claimant's role was treated in isolation, why Operations Managers and other staff were not made redundant and the issue of GP's drug abuse. The Respondent stated that the Claimant's redundancy was not connected to the latter issue and that he had been commended at the time for raising it. It set out the Respondent's position that they considered that they were considering the Claimant's post for redundancy because of a significant reduction in workload. The Claimant was told that the next meeting would be an opportunity for the Claimant to put forward suggestions as to how to avoid the role being made redundant.

36. A further meeting took place on 6 May. It was accurately minuted (JB 15). The Claimant queried how the company could operate without a BOP Superintendent. Mr Shay explained that the BOP role was created to primarily support the semi submersibles. The Claimant queried the difficulties that might occur getting advice outwith the region.

37. The Claimant received a letter on 16 May (JB 16) terminating his employment on the grounds of redundancy.

38. The Claimant appealed the decision by email (JB 17). He stated that the redundancy was not genuine and that he had been dismissed because of the issue raised over 'GP' and that the other positions of Electrical and Mechanical Superintendents should have been considered.

39. The appeal was dealt with by Julian Hall. The Claimant attended a meeting to hear his appeal on the 31 May 2016. The Claimant was not represented. The meeting was accurately minuted (JB 19). Mr Irvine said he had been told that he was selected from the three Superintendents because of raising issues about GP'S drug use. He refused to say who had told him this. Mr Hall told him that the decisions around his redundancy had nothing to do with that matter. The Claimant stated that when hired there had been eight 'jack Ups' and now there were eleven. He was advised that the 'rigs are coming down', that the company was struggling and not expanding.

40. During the meeting the Claimant suggested that after taking legal advice he was told that the redundancy 'was a joke'. He was re-assured that the redundancy was not personal. The Claimant queried why no one else was selected and was told that that others had been made redundant and that other departments were being affected. Mr Hall considered the Claimants appeal. He agreed that it was appropriate that the Claimant's post was looked at on its own. He concluded that the issue around GP had no bearing on the decision to make the Claimant redundant which was well founded as a business decision.

41. In the course of the redundancy consultation process there were no other positions which either became available to which the Claimant could have been redeployed.

42. The Respondent wrote to the Claimant on the 7 June giving reasons why the appeal was refused. (JB 20).

43. The Claimant had made efforts to obtain work but was unemployed at the date of the Tribunal hearing.

Witnesses

44. We found the Respondent's witnesses both credible and reliable. They gave their evidence in a straightforward and open way. They evinced no ill will towards the Claimant and confirmed that he was highly regarded.

45. We found it difficult to accept some parts of the Claimant's evidence and where it conflicted with that of Mr Shay we preferred the latter's evidence. His credibility was not enhanced by his insistence that the company did not face a serious downturn in work and we found his evidence that there was a possible conspiracy against him unconvincing.

Submissions

46. Mr Knight had prepared lengthy submissions for the Tribunal. He reminded the Tribunal firstly about the background to the dismissal, the downturn in drilling work, the worldwide nature of that downturn. Against this the allegation that staff were told by Mr Hall that there would be no further redundancies made no sense. He then took us thought the evidence of the worsening trading conditions and the 'cold stacking' ('mothballing') of rigs. He pointed to the day rate of the ENSCO 71 which was normally $191,000 being cut to $40,000 to keep it working. It was against this backdrop that Mr Hall's evidence had to be considered. Neither he nor Mr Shay wanted to lose the Claimant's expertise but in the harsh economic climate they faced hard decisions had to be made. He then took us to the background to the Claimant's employment and the evidence that his role was a specialist one focussed on 'Floaters'.

47. The Respondent's solicitor then took the Tribunal though the evidence relating to the Claimant's redundancy and the conflicts in the evidence between the Claimant and Mr.Shay in particular. He posed the question why would an experienced manager like Mr Shay who had been in contact with the HR department to manage the process (e.g the letter from Mr McAuslin) then just tell the Claimant he was sacked. He then referred to the evidence about GP and why any suggestion that this played a part should be discounted. Mr Irvine might hold the view, contrary to the evidence, that there was no redundancy situation but the

Respondents had a reasonable belief that the work had diminished and was likely to diminish further.

48. Turning to the allegation that the dismissal was automatically unfair Mr Knight made reference to the case of **Chesterton Global Ltd v Nurmohamed UKWAT/335/14.** He suggested that there was insufficient information to amount to a protected disclosure. Mr Knight conceded that if the Claimant's evidence was accepted then a Protected Disclosure had been made as drug taking was a criminal offence and had health and safety repercussions on those working offshore. But if the redundancy was a sham that would mean that a conspiracy had been hatched and that both Mr Shay and Mr Hall were lying. He then touched on credibility and reliability suggesting that both the Respondent's witnesses were credible and reliable. His clients position was that the process of looking into the allegations around GP were initiated by them and not the Claimant. Mr Knight referred the Tribunal to the cases of **Royal Mail Group Ltd v Jhuti UKEAT/20/16** and **Capita Hartshead Ltd v Byard UKEAT/445/11**. Finally Mr Knight submitted that even if the dismissal was held to be unfair for 'procedural' reasons the Claimant's dismissal was inevitable in the circumstances.

49. At the outset Mr Lefevre provided the Tribunal with copies of two cases which showed the approach of Tribunal's at first instance to such matters (**Hunt v Proserve Ltd F714/144** and **Rounce v The Institute of Commercial Management 6205/136** a decision of the Tribunal sitting in Southhampton. The Claimant Mr Lefevre observed was a highly competent and experienced employee with many years experience in the oil industry. The timing of his selection for redundancy was significant. He had been told that the redundancies were over. Shortly after making a Protected Disclosure he found himself targeted for redundancy. The Tribunal should remember when assessing the process followed that this was one of the biggest company in the North Sea. The Claimant was told he was to be sacked. The following day a meeting took place and it was significant that no minutes were taken and a Settlement Agreement with the Claimants name on it could be produced at the 'drop of a hat'. This all pointed to the process being a sham. It was all a 'foregone conclusion'. No evidence was

led from the HR Adviser who attended the meeting and why she had a pre-prepared Agreement available.

50. Mr Lefevre asked the Tribunal to accept the Claimant's account of how the information around GP's drug taking had come to the attention of senior management. It was significant that no drug test had been carried out as this showed the company protecting GP. He was also allowed to finish his rotation on the rig before returning onshore. Neither Mr Shay nor Mr Hall were, in his submission, reliable or credible witnesses. Mr Hall was arrogant and repeatedly avoided answering questions. Even if there was a redundancy situation the dismissal was unfair. It was a *fait accompli*. There was no real consultation or discussion of alternative ways to avoid redundancy. It was also significant that the Tribunal heard that another employee at this time 'Kenny Mac' was given a six figure enhanced redundancy payment unlike the Claimant who was offered only a little more than the statutory requirement.

51. The evidence of the Claimant Mr Lefevre continued was that the Protected Disclosure took place immediately on his return to work after the Christmas and New Year break. The reference to the 18 January on the Agenda form was an error. It can be seen from this that even if GP was tested, and the Claimant knew nothing of such a test, it took place at least two months after the Disclosure. The Tribunal should in all the circumstances find that the true reason for dismissal was the Disclosure.

Discussion and Decision

52. In any case of dismissal the first issue to determine is the reason for dismissal. There are certain reasons that make the dismissal automatically unfair. One of these is where there has been a Protected Disclosure and the employee is dismissed because of that disclosure. The burden of proof is initially on the employer to establish the reason for dismissal. Accordingly although the Claimant says he was dismissed for 'Whistle Blowing' namely bringing GP's admission of drug taking to their attention it is still for the employer to show the reason for dismissal that they relied on.

53. In the present case the employer produced evidence to us that appeared to show that the reason was redundancy and there was certainly ample evidence of a poor economic situation and outlook impacting on the Respondent's business. In those circumstances the burden passes to the employee to show that there is a real issue as to whether it was the true reason (**Maund v Penwith District Council (1984) IRLR 24**.

54. Even if there was a general downturn in work it did not necessarily mean that the Respondents had not dismissed the Claimant because of a Protected Disclosure but to believe this would mean that the company was using the general economic background as a cloak for dismissal when the true reason was the Protected Disclosure.

55. We examined the evidence surrounding this matter and how the information the Claimant had gleaned about GP came to be communicated. The Claimant's evidence was not particularly satisfactory in his account of what happened. We found it difficult to accept, given Mr Shay's contrary evidence which on balance we accepted, that the fact of the employee's drug taking was communicated immediately after the Christmas and New Year holidays as he suggested. The Claimant accepted that he had told Mr Shay about it following a routine meeting and not by email or text when he had first heard the information. It seems to us more likely that he told Mr Shay at some point around the 18 January. This fits with Mr Shay's recollection and is the date indicated in the Claimant's Agenda document lodged for the case management Preliminary Hearing and completed by his representative (JB p29). There was an incentive for the Claimant to persuade us that the earlier date was correct as if he had not reported it on his return to work after the festive period then he was leaving himself open to criticism for not immediately reporting it. This also perhaps fits more closely with the evidence we heard about the timing of the medical test some six or so weeks later in March.

56. The Claimant also confirmed in evidence that he accepted at the time that he believed GP when he stated that the drug taking had ceased and he was 'clean'.

It seems to be the later 'near miss' incident that prompted him to pass on the information to Mr Shay.

57. It is unfortunate that the Respondent's solicitors did not lodge some evidence vouching the date of the test especially after it was suggested in cross examination that it never took place. This would have possibly dealt conclusively with the issue. Despite this we accepted the Respondent's Managers evidence that the employee was tested and the test found to be negative.

58. The impression we were left with was that while important the circumstances surrounding this matter were only in hindsight being given added significance. It also seemed to the Tribunal to be stretching credibility that the father of the employee's fiancée, a senior figure in the company, could have and would have intervened to have the Claimant dismissed. It was noteworthy that the Claimant was unable to give any firsthand evidence that bringing the issue to senior management's attention at the time had led to any adverse comment or criticism of him as one might have expected if indeed he had stirred up a hornet's nest. Claimant may have been unaware. In short our view was that there was ample evidence that redundancy was the true reason for dismissal. There was no direct evidence from the Claimant that he had experienced any anger or upset from senior managers when he imparted this information and given the dangerous environment offshore it would be difficult to understand how anyone could reasonably take issue with his action.

59. The only basis for this assertion the Claimant could suggest was that some other employee, who did not give evidence, told him that he had stirred up a hornet's nest. Any disclosure that an engineer had been taking drugs would be bound to lead to some action being taken to review the situation even if it were just the drug testing processes that all such companies have instituted offshore. It did not mean that the Claimant was being blamed personally. Given the seriousness of drug taking in a safety critical environment this could have been the effect from someone else's perspective but it is no basis for the assertion that his dismissal was related to the matter.

60. The Claimant also relied on the Tribunal drawing an inference from the proximity in time of these events. We do not feel that such an inference is justified given the trading position facing the company and the fact that other steps were being taken at this time to seek further redundancies and cost savings. This was possibly not known by the Claimant who might not have been aware of the full picture or that other redundancies were planned.

61. The unanimous view of the Tribunal is that there is no evidence of any link between the disclosure and the Claimant's redundancy nor any compelling evidence that would allow us to infer such a link. In short we struggled to understand why when the Claimant believed GP was no longer taking drugs (and the later test seemed to confirm this) allied to the fact that there were obvious mitigating circumstances in the tragic death of his fiancée would lead anyone to have taken umbrage at the Claimant's actions. Although dismissed by the Claimant we do accept that Mr Shay had both a strong professional interest in ensuring staff working offshore were drug free and a personal one as his son periodically worked on the vessel on which GP worked.

62. The nature of the alleged conspiracy was also something that appeared far fetched to us in the circumstances. It would have meant that a senior manager probably Mr Brady had put pressure on Mr Shay and then on Mr Hall to target the Claimant in some way for redundancy. In recording our view we acknowledge that at the time the Claimant, no doubt searching around for reasons why he was being made redundant unaware of both of the detailed business situation the company faced and the steps being taken concurrently to make others redundant or to transfer departments elsewhere, might see this as an obvious factor: we do not share that view. We dismissed the idea that the disclosure was connected to the later redundancy.

63. We did not ultimately have to decide if what was told to Mr Shay by the Claimant amounted to a Protected Disclosure. Mr. Knight argued that it was not. We tended to the view that there was sufficient information imparted to Mr Shay to amount to the disclosure of information triggering the protections under the Employment Rights Act. In any event it was not crucial to our decision.

64. We then had to consider if it was a fair dismissal in all the other circumstances.

65. As noted earlier the Respondent argued that the reason for dismissal was redundancy. Redundancy is a potentially fair reason for dismissal in terms of section 98 of the Employment Rights Act 1996 ('the Act'). The Claimant did not accept that there was a redundancy situation and argued that in any event his dismissal was attributable to his Whistle Blowing.

66. The dismissal on the grounds of redundancy arises in terms of section 139 of the Act when it is 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.

67. At this point it should be recalled that the way in which an employer approaches such matters has to be within the discretion afforded to them in their conduct of the procedural and substantive aspects of such a process. As such it is not for the Tribunal to substitute its views for the decisions taken. (**Sainsburys Supermarket v PJ Hitt (2002) EWCA Civ 1588) Iceland Frozen Foods Ltd v Jones [1983] ICR**.

68. The first issue to determine is what was the reason for dismissal. As stated in the case of **Abernethy v Mott Hay and Anderson (1974) ICR 323** the reason is the set of facts known to the employer or beliefs held by him which cause him to dismiss the employee. As we have stated earlier we fully accepted what might be regarded as the wider background or context against which these matters took

place which was the drop in drilling activity in the North Sea and world wide which occurred in 2015/2016. We did not accept the Claimant's suggestion in his evidence that the company's vessels were mostly employed and therefore there was no cause for considering redundancies. We accepted Mr Shay's clear evidence about the effect the downturn had. Rigs/vessels were being mothballed or planned for mothballing ('stacked') and those still employed had to accept lower value work such as acting as accommodation structures or lesser rates. It was no answer to this to say as Mr Irvine did that there was always pressure on the rates charged. This might be the case but in a situation where there is ample work and a limited supply of vessels that pressure would not be the sort of intense pressure that came to bear on the Respondent's managers during this period.

69. We also considered the definition of redundancy which encompasses both a situation where the need for employees has diminished or is '***expected to cease or diminish*** ' Both legs of the test appeared to be satisfied in this case.

70. The Claimant also argued if his dismissal was due to redundancy then it was unfair. Mr Lefevre pointed to what are known as the Compair Maxam principles which he stated had been ignored. The dismissal was he suggested unfair from what could be called a procedural basis. There had been no meaningful consultation before the proposals were disclosed.

71. In addition Mr Lefevre argued that the dismissal was a *fait accompli*. We need however to examine closely the context in which these events occurred. The Claimant suggested that Mr Shay had told him that he was going to be dismissed the evening before the meeting to consult over redundancy. This he said was unfair as it 'jumped the gun' A proper consultation considering ways to avoid redundancy in the first place never took place. We will return to the question of whether Mr Shay went too far and the ramifications of that matter. In support of his position Mr Lefevre referred to the well known case of **Williams v Compair Maxam Ltd (1982) IRLR 83.** In that case, referring to a situation where an independent trade union was recognised for a redundancy to be fair the employer had to give as much warning as possible of impending redundancy to allow

consideration of alternative solutions, agree criteria for selection and look at alternative employment.

72. We would observe that these are not principles of law but standards of expected behaviour and much turns on the particular circumstances of each case.In the present case the Respondent's managers came up with a plan for both redundancies and reorganisation of some departments. We can fully understand why this was not disclosed until fully formulated as a proposal. The first meeting with Mr Irvine was to discuss the plan in so far as it impacted on his role. There was no absolute obligation to discuss the proposals before they were formulated. The forum for consultation was the first and subsequent meetings not discussion before the plan was formulated in secret by Mr Shay. This is not an unusual situation or process for an employer to adopt. The scene is set by Mr McAuslin's letter which tells the Claimant why they have chosen a pool of one. It indicates a process of consultation. It also explains that if chosen then the subsequent meeting would concentrate on matters such as sourcing alternative employment.

73. The Claimant alleged that he, and other staff, had been effectively given a guarantee by Mr Hall that there would be no further redundancies and that this caused him to suspect that his redundancy was a sham. We did not place much weight on this matter as it was clear that the trading position the Respondent faced continued to deteriorate and the Claimant was unaware of the other steps being considered in early 2016 to address this. There is always a balancing act an employer is involved in after a round of redundancies to keep staff motivated and hopeful for the future. Guaranteeing that there would be no further redundancies would be improbable in the circumstances Mr Hall and the company faced but we suspect that he may have put too optimistic a gloss on matters and that the Claimant took from this that the risk of redundancy had passed. It had not. What reinforces our view is that he seemed to believe that his post was essential and unlikely to be dispensed with and this made his redundancy even more surprising when it happened.

74. We also on balance accepted Mr Shay's evidence that at the time the Claimant did not make a 'big deal' as it were about the possible redundancy, had asked for the process to be truncated and had tried to sign the Agreement without legal

advice. Considerable criticism was levelled at the respondent's HR Adviser for not having minuted the meeting with Mr Shay. We are not so critical. The meeting took and unexpected turn was to an extent 'hijacked' by Mr Irvine's insistence on signing a Separation Agreement. Whilst unfortunate that no note of the meeting was made we can understand that it became less pressing to do so when it appeared that the process was being truncated after agreed terms were reached. It appears that the claimant left the meeting intent on signing the Agreement but changed his mind after taking advice.

75. In passing we would comment that the failure to try and find alternative work can render a dismissal unfair. Unfortunately, this matter does not appear from the minutes to have been discussed. It may be that realistically both Mr Shay and the Claimant were aware that there were no such options. In any event no argument advanced in this case that there was in fact any alternative employment available. Little time was spent on the issue in evidence but the Claimant's representative mentioned the issue in his letter responding to Mr McAuslin's email dated 20 April (JB p69) that Mr Shay had told the Claimant that there were no alternative positions. It was not raised as an issue in the ET1.

76. We had some concerns about the fairness of the first part of the redundancy process leading up to the Claimant's dismissal. It seems to us a difficult task for someone in Mr Shay's position to spend some time devising a plan to streamline the organisation, involving as it did the need for redundancies, for him to weigh up the situation and to decide that the Claimant's post was possibly supernumerary to then try and be objective when carrying out the redundancy consultation and possibly reverse his views. It is not impossible and in some small organisations this is what a manager must seek to do. Did Mr Shay go too far? Was he able to distance himself from the plan he had devised and consider the merits and demerits of that plan fairly? We have no doubt that it would have been wiser for the redundancy to have been handled by another manager who could have tested the rationale behind for the Claimant's redundancy without suggestion of such bias. That said we were impressed with Mr Shay as a witness and he seemed to us to be a professional manager who would have been capable of recognising valid alternatives and proposals. No alternatives were in

fact put to him as to how the company could have acted other than to suggest that the Claimant should have been put in a pool with the other Superintendants. The options were in fact severely limited indeed essentially either keep the Claimant's post and find savings elsewhere or dispense with it.

77. We accepted the logic of Mr Shay's reasoning that the Claimant had a post that should be treated on its own merits and that the other two posts were significantly different. The Claimant's role was highly specialised itself and he was employed because of his specialist expertise. The decision to look at the Claimant's post and to dispense with it, in effect returning to the way in which the company dealt with such matters before he was employed, was a decision that fell well within the bounds of the employer's discretion and had sound business reasons for it. Although the consultation process was initially delayed, through the Claimant's own actions in wanting to short circuit matters. It eventually took place. Stepping back and looking at the whole situation, although not perfect, we do not believe that the redundancy process was unfair.

78. We considered that even if we had come to the conclusion that the initial decision taken by Mr Shay was unsafe in some way we were conscious that an appeal can correct any flaws in the earlier process as was decided in the case of **Taylor v OCS Group Ltd (2006) ICR 1602 CA** (a case relating to procedural flaws in a misconduct case) which is equally applicable here.

79. In that case per Smith LJ at paragraphs 47 to 48:

"47. … employment tribunals [must] realise that their task is to apply the statutory test. In doing that, they should consider the fairness of the whole of the disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care. But their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage.

48. In saying this, it may appear that we are suggesting that employment tribunals should consider procedural fairness separately from other issues arising. We are not; indeed, it is trite law that section 98(4) of the

Employment Rights Act 1996 requires the employment tribunal to approach its task broadly as an industrial jury. That means that it should consider the procedural issues together with the reason for the dismissal, as it has found it to be. The two impact upon each other and the employment tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason it has found as a sufficient reason to dismiss.''

80. An appeal did take place examining the issues, such as the appropriate pool, by Mr Hall. He had the seniority to reverse the decision taken by Mr Shay. He conducted a fair appeal and his letter rejecting the appeal is a considered and thoughtful application to the facts of the case before him. We were impressed with his evidence and the appeal would in our view have cured any unfairness caused by the earlier part of the process.

81. Finally if the Tribunal had been persuaded that the dismissal was unfair it would have done so on the basis that Mr Shay had gone too far in telling the Claimant that he was likely to be made redundant before the formal consultation process. We formed the view that the Claimant was almost highly likely, if not certain, to have been made redundant in any event given the dramatic fall off in work particularly drilling and the fact that the company could return to the situation before his employment of dealing with BOP problems in other ways. To an extent it could be said that the Claimant had himself paved the way for his redundancy by the recognised success he had in putting in place a more robust maintenance process for BOP's and the training and development he had arranged for staff to get in their use.

82. Employment Judge: James Hendry
Date of Judgment: 2 June 2017
Entered in register and copied to parties: 2 June 2017