



# EMPLOYMENT TRIBUNALS

**Claimant:**  
Mr S Schwarz

And

**Respondent:**  
ConSol Partners Limited

**Heard by:** CVP

**On:** 17 & 18 August 2021

**Before:** Employment Judge Nicolle

**Representation:**

Claimant: Mr J Boyd of Counsel  
Respondent: Ms K Balmer of Counsel

## JUDGMENT

1. The claim for unfair dismissal succeeds but the compensatory award is subject to a reduction of 50% under Polkey.

## REASONS

### The Hearing

1. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.
2. In accordance with Rule 46, the Tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended the hearing.
3. The parties were able to hear what the Tribunal heard.
4. The participants were told that it is an offence to record the proceedings.
5. From a technical perspective, there were no major difficulties.
6. There was an agreed bundle of 409 pages. Additional documents were added during the hearing comprising the Respondent's July and August 2020 business review documents.

7. Brian Van Aken, former Chief Executive Officer of the Respondent (Mr Van Aken), Margaret Keane, director and sole shareholder of The Keane, Sisters Limited T/A Outsourcing HR (Ms Keane,), Jeff Whittall, Group Finance Director (Mr Whittall) and Tim Anderson, Chief Financial Officer of the parent company of the Respondent Empresaria Group plc (Mr Anderson) gave evidence for the Respondent. The Claimant gave evidence.

8. Counsel for both parties made submissions but given the time I reserved my decision.

### The Issues

9. The only issue I needed to determine was whether the Claimant's dismissal for redundancy was fair or unfair. The Claimant acknowledged the existence of a redundancy situation but contended that his selection for redundancy and the process followed was unfair.

10. At paragraph 21 of his particulars of claim the Claimant had reserved his position in relation to entitlement to a bonus payment. However, Mr Boyd confirmed that this claim was no longer being pursued and therefore it is dismissed on withdrawal.

### **Findings of Fact**

#### The Claimant

11. The Claimant was employed by the Respondent from 26 August 2009 until his dismissal on the grounds of redundancy on 25 September 2020. At the end of 2013 he was promoted to Associate Director. In 2015 he was further promoted to the role of Contractor Sales Director. He remained in this role at the time of his redundancy.

12. The Claimant's contract of employment dated 26 August 2009 provides at clause 2.1 that he would be employed in the capacity of managing consultant.

#### The Respondent

13. The Respondent is a subsidiary of Empresaria Group plc. It is a recruitment company which provides permanent and contract staffing solutions in the technology domains of artificial intelligence, autonomous driving, Fintech, Blockchain/Crypto Currency and Robotics.

14. The Respondent provides both temporary and permanent appointees to its clients. Temps are handled by the Contract Team and permanents by the Permanent Team. This involves the placement of a range of IT specialists to include software engineers and project managers with clients. Contractors are charged at between £300 - £1,500 per day to the client.

#### The Respondent's Management Team

15. In December 2019, the founders of the business exited, and Mr Van Aken was appointed as CEO.

16. At the time of Mr Van Aken's appointment the Respondent's Senior Leadership Team comprised of seven senior Directors, namely the Claimant, Mr Whittall, Russell Beswick, Head of Learning and Development, Ben Wallin, Director Permanent Recruitment (Mr Wallin), Steve Pikett, Global Director, Technology Recruitment – EMEA US and APAC (Mr Pikett) and Daniel Cox, Director, Contract (Mr Cox) and collectively referred to as the Management Team.

#### Transition from a 360° to a 180° model

17. Mr Van Aken decided that the Respondent's business would be more efficiently operated by transitioning from the existing 360° model to a 180° model.

18. Under the 360° model there was no demarcation between responsibility for the client and delivery (the sourcing and provision of candidates). The 360° process can be summarised according to the following steps:

- a. new client identified;
- b. assessment of the client's needs;
- c. sourcing of an appropriate candidate pool comprising typically between three and five;
- d. forwarding of proposed candidates for the client's consideration;
- e. candidates to interview which includes prepping both the client and candidates prior to interview;
- f. debriefing both client and candidate subsequent to the interview;
- g. preferred candidate chosen by the client;
- h. onboarding to include negotiating and finalising rates, contract, start date and compliance issues; and
- i. post sales matters to include references and checking with both client and candidate that all is going well.

19. The 360° model was predicated on having responsibility for the client relationship. This therefore did not involve a distinction between having responsibility for the candidate or client side of the business.

#### The 180° model

20. The move to a 180° model was intended to create a clear line of demarcation between Sales, with primary responsibility for clients and business development and responsibility for the development and liaison with candidates being with Delivery. Even with a 180° system there is an element of overlap between Sales and Delivery in relation to certain parts of the process.

21. The migration from the 360° to 180° model took place in late February/early March 2020. Nevertheless, during the summer of 2020 something of a hybrid system existed given that there were several clients both on the Sales and Delivery side which continued to be managed on a 360° basis. For example, it was accepted that Huawei France was 360° and handled exclusively by Delivery. The Claimant contends that this was also the case for Ericsson Denmark. He further says that there were certain clients which were 360° within Sales to include Huawei Germany and Huawei Norway.

22. The Claimant became responsible for Sales and Mr Cox Delivery.

23. The Claimant says that notwithstanding the migration to a 180° system there continued to be significant overlap and collaboration between the two teams. He says that Delivery continued to speak with clients.

24. It is relevant to consider the Claimant and Mr Cox's respective previous career histories with the Respondent. Mr Cox joined the Respondent in 2011 and formed part of the Claimant's then team. Between 2015 and 2017 he led one of the five sub teams under the Claimant's management before being promoted to Associate Director. His job titled changed to Contract Director in 2018 but his duties and responsibilities remained the same.

### Sales and Delivery Teams

25. After splitting the Sales and Delivery function the Sales Team under the Claimant comprised eight people and there were 15 in the Delivery Team. The employees in the Sales Team received higher average salaries than those in Delivery who tended to be more junior.

### Mr Wallin

26. Mr Wallin has responsibility for the Permanent Team. A particularly significant element of this team was the automotive industry and specifically the provision of IT specialists with expertise in automated driving systems.

### Alex Banks

27. In May 2020 Alex Banks (Mr Banks) was recruited as Contract Compliance Manager within the Sales Team. His appointment took place notwithstanding the Covid 19 related downturn in the Respondent's business given the importance attached to ensuring that its systems and maintenance of contracts were efficient.

### Remuneration

28. The Claimant had the second highest remuneration, after Mr Van Aken, of the Management Team. His basic salary being £115,000 but total on target remuneration was approximately £200,000. The approximate total remuneration of Mr Cox being £180,000, Mr Wallin £170,000 and Mr Pikett £120,000. Mr Van Aken said that whilst relevant the respective remuneration level of the Management Team was not a significant factor in the decision as to whom should be selected for redundancy.

### Similarity of the roles between the Claimant, Mr Cox and Mr Wallin

29. Mr Van Aken accepted in evidence that they could all do each other's jobs, in other words there was a high degree of interchangeability. Nevertheless, he maintained that the roles as they existed as at August/September 2020 were very different and that the Claimant's position was unique.

30. Mr Whittall gave evidence, albeit not in his witness statement, that the roles were very different. He says that the Claimant had managed a small team and had responsibility for client development. Mr Cox had a greater level of people management responsibility with a larger team and more junior employees. His primary responsibility was for building candidate pools. Mr Whittall says that Mr Cox's people management skills were stronger than the Claimant's. This is disputed by the Claimant.

31. Mr Whittall says that Mr Wallin's role involved very specialist technical expertise. Again, this is disputed by the Claimant who says that he has the required level of technical expertise and in particular was responsible for recruiting Nick Whelan who has responsibility for automotive clients and formed part of his team for approximately 18 months.

32. The Claimant says that he could have performed Mr Wallin's role. He says that between 2014 and 2018 Mr Wallin and the Permanent Team sat within his division. He says the skills between the respective teams are fundamentally the same.

33. The Claimant says that in effect it is all sales whether Delivery or Sales. He says it is all interchangeable.

### Organigrams

#### The Permanent Division

34. An organigram as at 2 March 2020 showed Mr Wallin as the Director with responsibility for a team comprising 20 employees. It continued to operate on a 360° model.

#### Contract Sales Team

35. This undated organigram shows the Claimant as Contract Sales Director (EMEA) having responsibility for a team comprising approx. eight employees with several vacant roles.

#### Contract Recruitment Team

36. This undated organigram shows this Mr Cox having responsibility for a team comprising of 13 other employees.

### Job descriptions

37. An undated document (pages 74-76 in the bundle) has job descriptions for the roles of Senior Director of the Permanent Division (Mr Wallin), Senior Director Recruitment-Contract (Mr Cox) and Senior Director of Sales-Contract (the Claimant). The Claimant says that he had not seen this document prior to disclosure.

38. Under headings of general description, core specific focuses, collaboration and focus, direct reports and team structure, weekly and monthly responsibilities. It summarises the principal responsibilities of each position. Key elements are as follows:

#### General description

Permanent: 360 focused, niche permanent recruitment team.

Recruitment contract: responsibility for a team of delivery consultants focused on providing and caring for candidates for all contract related positions.

Sales: business development, client acquisition and finding new contract positions.

#### Core specific focuses

Permanent: markets of SaaS, automotive, digital and AI.

Contract: driving a 180°/delivery focused strategy on candidate attraction, screening, pipelining and retention activities to support the Contract Sales and account managed clients' needs.

Sales: driving 180° client business development. Support and align with the recruitment delivery strategies.

#### Redundancy situation

39. It is not disputed that as a result of Covid 19 there was a significant downturn in all aspects of the Respondent's business. The Respondent gave consideration to and implemented a series of cost cutting measures from March 2020 onwards. This included Mr Van Aken taking a 20% salary reduction. Further, several redundancies were made, and vacant positions not filled. Nevertheless, the duration and impact of the pandemic was such that the Respondent considered it necessary to make redundancies amongst the senior Management Team.

40. Whilst the Claimant had initially argued that his redundancy process was a sham he accepted that a genuine redundancy existed given the Respondent's financial situation and the downturn in its core business. Therefore, whilst the bundle and the witness evidence of Mr Whittall included significant material to demonstrate the existence of a genuine redundancy situation, I need not consider this for the purposes of this judgment.

#### Those at risk of redundancy

41. In late August 2018 the positions of Mr Pikett and the Claimant were identified as being at risk of redundancy. Mr Van Aken says that both were performing unique roles and as such it was not necessary to consider them as part of a pool of candidates and adopt selection criteria. This is challenged by the Claimant.

42. I was referred to the Respondent's business review document of June 2020. This referred to the redundancy of two directors being proposed. Specific to the UK there was reference to the redundancy of a senior leader, but the name of the individual was not stated.

43. This document also referred to shifting the 180° model in UK to a pod/blended approach. Still Sales/Delivery, but sector alignment and reporting more consistent. Mr Van Aken explained this as being a reference to a greater degree of collaboration being

required between the Sales and Delivery sides of the business. He did not accept that this involved a reversion to the pre- February 2020 360° model. Mr. Whittall says that this involved harmonisation between the teams rather than merging with individual responsibilities remaining unaltered.

#### The consultation process relating to the Claimant's redundancy

44. Mr Van Aken conducted an at risk of redundancy virtual meeting with the Claimant on 2 September 2020. Ms Keane and Jo Stanley, of LMA Recruitment Ltd an associated company of the Respondent, (Ms Stanley) attended as note taker.

#### First consultation meeting

45. This took place via MS teams on 4 September 2020. Ms Keane and Ms Stanley were again in attendance. Mr Van Aken explained to the Claimant that following a preliminary review his role as Contracts Sales Director had been identified as unique within the business and was provisionally at risk of redundancy.

46. The Claimant asked what other roles were at risk of redundancy to which Mr Van Aken said this could not be discussed at present. The Claimant says that he could do all jobs within the business.

47. Following that meeting Mr Van Aken sent the Claimant an email confirming that it was proposed to make his role of Contracts Sales Director redundant. He explained that it was not economically viable to employ a separate manager at his remuneration level to oversee his reduced team.

#### Second consultation meeting on 4 September 2020

48. This was again conducted by MS teams by Mr Van Aken with Ms Keane and Ms Stanley being in attendance. Ms Keane explained that the Respondent considered the roles to be unique and not interchangeable. She went on to say that it was proposed that Mr Van Aken in his role as CEO would take over responsibility for the Claimant's role.

#### Mr Van Aken's email to the Claimant of 10 September 2020

49. Following the second consultation meeting Mr Van Aken clarified that he was capable of absorbing many of the Claimant's client sales and team management roles and that some of the compliance aspects were already being absorbed by Mr Banks.

#### Third consultation meeting on 14 September 2020

50. The same individuals attended. The Claimant asked why Mr Cox had not been selected. He said that he had done Mr Cox's role and that their skills were interchangeable. Mr Van Aken said that he intended to run the entire Sales Team. The Claimant said that he could do Mr Wallin's job and that he had been managing the Permanent Team for years. He said that from a sales management point of view he should have been pooled with Mr Cox and Mr Wallin.

#### Mr Van Aken's email to the Claimant on 17 September 2020

51. Mr Van Aken once again responded in writing to questions the Claimant had raised during the previous individual consultation meeting. He emphasised that the Respondent considered each senior leadership role to be unique and standalone. He said that each of the senior members of the Management Team had to focus on a specific area and apply different skills and approaches to get their jobs done.

52. He said that Mr Wallin's role was distinct as he focuses 100% on niche, perm recruitment in specific technologies such as automotive and works in the "360° model". He said that there was no crossover with the Claimant's role in Contract Sales where he works on a "180° model".

53. He went on to distinguish the Claimant's role from Mr Cox's with the Claimant being responsible for Contract Sales and Mr Cox for recruitment. He said that the roles had different titles as a result of them being unique to each other.

#### Consultation meeting with the Claimant on 22 September 2020

54. This was once again conducted by Mr Van Aken with Ms Keane being in attendance and Natasha Davenport as note taker. The Claimant contended that the redundancy consultation had been a "tick box process".

55. There was reference to a possible alternative position which the Claimant may wish to consider in a junior contract sales role. However, this position was withdrawn with effect from 22 September 2020 and in any event, I find that the Claimant had no serious interest in the role given that it would have involved a significant demotion. I do not consider whether it was offered, or alternatively whether the Claimant was genuinely interested in it, to be a material consideration to the fairness or otherwise of his redundancy.

#### Confirmation of the Claimant's redundancy

56. Mr Van Aken confirmed the Claimant's redundancy in a letter dated 25 September 2020.

#### Appeal against redundancy

57. In a letter dated 2 October 2020 to Mr Van Aken the Claimant appealed against his redundancy on the basis that it was a sham, had a predetermined outcome and that the redundancy process was unfair and engineered deliberately to exit him from the business.

#### Appeal hearing

58. The Claimant attended an appeal hearing with Mr Anderson on 20 October 2020 via MS teams. Ms Stanley attended as note taker.

#### Appeal outcome

59. In a five page letter dated 4 November 2020 Mr Anderson dismissed the Claimant's appeal. He concluded that the Claimant's role was a standalone position which explained why he had not been pooled with any colleagues. He said that he agreed



with the Respondent's assessment that although there are similarities between his role and that of Mr Cox and other members of the senior leadership team, that these similarities are limited. He said that the Claimant's ability (whether real or perceived) to perform the role of another employee is not pertinent to the question of whether his role is standalone.

## The Law

60. There is no dispute between the parties as to the applicable law in this case. The definition of redundancy set out in section 139(1)(b)(i) of the Employment Rights Act 1996 (the ERA) provides that:

“An employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to “... the fact that the requirements of the business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish.”

61. Section 98 of the ERA requires the Respondent to show the reason for the dismissal and that it is a potentially fair reason for dismissal within the terms of s.98(1)(b). A dismissal for redundancy is a potentially fair reason for dismissal. Once an employer has shown a potentially fair reason for dismissal, the determination of the question whether the dismissal is fair or unfair, having regard to that reason “... depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case.” (s.98(4) of the ERA).

62. In cases of redundancy, it is well-established law that an employer will not normally be deemed to have acted reasonably unless he warns and consults any employees affected and takes such steps as may be reasonable to minimise the effect of redundancy by redeployment within his own organisation. If there is a selection process, it should be based, as far as possible, on objective criteria and fairly applied.

63. In R -v- British Coal Corporation and Secretary of State for Trade & Industry (ex parte Price) [1994] IRLR 72, Lord Justice Gwydewell approved the following test of what amounts to fair consultation.

- (a) consultation when the proposals are still at a formative stage;
- (b) adequate information on which to respond;
- (c) adequate time in which to respond; and
- (d) conscientious consideration of the response to consultation.”

64. In other words, fair consultation involves ensuring that the person consulted has a fair opportunity to understand fully the matters about which he is being consulted and to express his views and the person consulting him is obliged genuinely to consider, though not necessarily to accept, those views.

65. In Mugford -v- Midland Bank [1997] IRLR 208, the EAT said that it would be “...a question of fact and degree for the employment tribunal to consider whether consultation with the individual was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall

picture must be viewed by the tribunal up to the date of determination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy.”

66. The system for choosing the “pool” must be fair and should generally include all those employees carrying out work of a particular kind in respect of which the requirement for work has diminished. However, the tribunal may not substitute its own view of what the correct pool should or should not have been for that of the employer. The issue is simply whether the employer’s selection of the pool was within the band of reasonable responses.

67. I reminded myself of the principles summarised in Capita Hartshead Ltd v Byard UK EAT/0445/11 which included the reasonable response test being applicable to the selection of the pool. Further, the guidance that it will be difficult to challenge the employer’s selection of the pool where it had genuinely applied its mind to the problem as per Mummery J in Taymech v Ryan EAT/663/94. However, the tribunal is entitled to consider with care and scrutinise carefully the reasoning of the employer to determine if it has “genuinely applied” its mind to the issue of who should be in the pool for consideration for redundancy.

68. A pool of only one employee maybe reasonable, where, on the facts, only one employee conducts the particular kind of work which is no longer needed and/or the work is able of being absorbed into another role see the EAT’s decision in Halpin v Sandpiper Books Ltd UK EAT/0171/11.

69. Mr Boyd referred me to the EATs decision in Blundell Permoglaze Ltd v O’Hagen [1985] EAT 540/84 as authority for an Employment Tribunal looking at the interchangeability of skills, in other words should the pool for redundancy be expanded on the basis that a given category of worker was capable of performing a different role. Nevertheless, I consider that this was very much a case on specific facts regarding specific roles and in any event, is now 36 years old.

### **The parties’ submissions**

#### Claimant

70. Whilst Mr Boyd acknowledged the applicability of the range of reasonable responses to the Respondent’s decision as to the identity of the pool he said that they would need to have genuinely applied their minds. He disputes this and says that they got it spectacularly wrong and as such their decision that the Claimant’s role was unique, and no pool applied, was outside the range of reasonable responses. He contends that there was significant interchangeability of skills between the claimants, Mr Cox and Mr Wallin. He says that Mr Van Aken did not dispute the interchangeability of the skill set between these three employees. Further, he says there was no primary evidence to support a difference between their respective skills. He argues that there should have been a pool of two or three.

#### Respondent

71. The Respondent says that the Claimant’s role was unique. They also say that it was relevant that Mr Van Aken had the relevant experience and skills to be able to

absorb the Claimant's role. Further, it was relevant that the Claimant's role was the highest paid leadership role except for that of Mr Van Aken.

72. Further, the Respondent says that there was a fair redundancy process with meaningful individual consultation and consideration of alternative roles.

73. The Respondent says that if the Tribunal should find that the Claimant's dismissal was in any way unfair that there should be a substantial reduction under Polkey on the grounds that it was highly likely that he would have been fairly dismissed in any event.

## Conclusions

### Genuine redundancy and redundancy the reason for the Claimant's dismissal

74. It is accepted that the Claimant was dismissed on the grounds of redundancy and that a genuine redundancy situation existed.

### Dismissal unfair

### Decision not to include the Claimant in a pool with Mr Cox outside the range of reasonable responses

75. I find that the Claimant's dismissal was unfair on the grounds that the Respondent failed to apply its mind properly to whether, as it contended the Claimant's role was genuinely unique, or whether it should have included him in a pool and then adopted appropriate redundancy selection criteria. I consider that the Claimant should have been included in a pool with Mr Cox but that the pool should not have included Mr Wallin. I reach this finding for the reasons set out below.

76. I am mindful of the need to avoid substituting my judgment as to what constitutes an appropriate redundancy selection pool for that of the Respondent. However, I consider that the Respondent either failed to apply its mind properly to this question, or alternatively did consider the issue but nevertheless reached a decision outside the range of reasonable responses in deciding that the Claimant's role was unique.

77. It was acknowledged by Mr Van Aken that the roles of Mr Cox and the Claimant involved interchangeable skills. Whilst the Respondent suggested that the Claimant did not have the same level of interpersonal team management skills as possessed by Mr Cox no evidence was adduced to support this contention. I therefore do not consider that any evidence exists to support any assertion that the Claimant could not have done the Delivery role and equally that Mr Cox could not have done the Contract Sales role.

78. Whilst the job roles and titles were different after the migration from 360° to 180° working the underlining skills remained the same. Ultimately, I accept the Claimant's evidence that both roles involved selling and the various organisational, knowledge and functional responsibilities associated with a business specialising in the supply of contract and permanent IT specialists. I find that whether primary responsibility was for candidates or clients to a large extent represented different sides of the same coin. These are not fundamentally different roles but rather a reflection of the Respondent's recent change of organisational structure following the initiative arising from Mr Van Aken's appointment.

79. I also consider it highly relevant that the migration from 360° to 180° working and the demarcation between the roles of the Claimant and Mr Cox was of recent inception. Given that less than six months had elapsed at the time of the redundancy it could hardly be argued that their respective areas of expertise, skills and knowledge had significantly diminished even had I not already concluded that the roles were largely interchangeable.

80. I consider that the Respondent has given several different grounds for justifying its decision. This included it being easier for Mr Van Aken to take on the Claimant's role. However, I find that this was less a case of the role of Contracts Sales Director being deleted from the organisation but rather a financial need for the Respondent to make significant cost savings during the pandemic and pursuant to this objective making two members of its seven strong Management Team redundant, namely the Claimant and Mr Pikett. I find that the role of Contract Sales Director and its responsibilities continue to be required within the Respondent's business.

81. I find that from a redundancy selection perspective the first factor the Respondent ought to have considered was whether a pool should have applied. For the reasons already set out I find that their decision that the Claimant's role was unique, and no pool applied was outside the range of reasonable responses. Only then do I consider that the Respondent should have considered how easily the respective roles of the Claimant and Mr Cox could have been otherwise undertaken whether by Mr Van Aken or otherwise.

82. Ultimately, had a selection pool been applied and a choice made between the Claimant and Mr Cox, and had that choice been that Mr Cox had scored less well than the Claimant, it would have been open to the Respondent to have assigned the Claimant to Mr Cox's role. This would have still enabled Mr Van Aken to take on the responsibilities of Contracts Sales Director within his portfolio.

83. I also consider that the Respondent gave mixed statements as to the extent to which the Claimant's perceived high level of remuneration was a factor in his selection. It was variously referred to but equally relegated to a subordinate factor. Nevertheless, I find that it was likely to have been a factor which contributed to the decision that his role should be the one eliminated. I consider that this added to the unfairness as it is likely to have influenced the Respondent to form an early view, given the urgent need for significant cost savings, that the Claimant's role was the one to be eliminated rather than giving more detailed consideration to the respective roles and job responsibilities of the members of the Management Team, the extent to which these were interchangeable, whether a redundancy selection pool should apply and if so who should be within it.

84. Further, I do not consider that Mr Anderson had a sufficient level of day-to-day involvement with the Respondent's operation and business structure to be able to properly assess this question. Whilst I do find that he carried out a full appeal process and then wrote a detailed response letter I do not find that he fully addressed this question with an open mind in considering whether the original decision should have been revisited.

#### The position of Mr Wallin

85. I do, however, find that the Respondent acted within the range of reasonable responses open to it in deciding that Mr Wallin's position was not interchangeable with that of the Claimant. I reach this finding given that he had been and continued to operate in a specific sector of the Respondent's business namely the placement of permanent IT specialists as employees rather than as contractors. I consider it less relevant that he was operating on a 360° basis given my findings above. However, I do consider it carries some relevance as a ground of distinction that he was working in sectors, for example automotive, with a high level of technical expertise in terms of the sector specific IT requirements. Whilst I acknowledge that the Claimant had experience in this area, I nevertheless do not consider that the Respondent's decision to distinguish Mr Wallin's position from that of the Claimant to have been unreasonable.

#### Individual consultation

86. I find that looked at overall the process of individual consultation was fair. Whilst the Claimant contends that the process was preordained and lacked a meaningful dialogue, I nevertheless do not consider it outside the range of a reasonable process of individual consultation. However, I do find that the Respondent throughout the process, to include the various individual consultation meetings between the Claimant and Mr Van Aken and the appeal hearing conducted by Mr Anderson, failed to properly engage with the issue of the selection pool and the failure to include Mr Cox and Mr Wallin.

87. In relation to the above question, I find that the answers given were basically the same whether from Mr Van Aken, Ms Keane or Mr Anderson. I do not consider that any genuine consideration was given to this by either Ms Keane or Mr Anderson to the interchangeability/pool issue but rather they relied on a decision which had already been made. Ms Keane's evidence was that this was not a matter upon which she was asked to advise, and I find that her role in the redundancy process was confined to the procedure to be followed rather than the more substantive question as to whether the Claimant's role was unique within the Respondent's organisational structure and more significantly after the migration from 360° to 180° working.

88. However, I do not find that the arguable failure to have a full and meaningful dialogue during the individual consultation was sufficiently serious to be outside the range of reasonable responses and thereby render the dismissal unfair. The lack of a meaningful dialogue did however mean that the respondent failed to properly engage with the concern the Claimant had raised regarding the absence of a selection pool on the basis that his skills were interchangeable with those of Mr Cox and Mr Wallin and he should have been included in a selection pool with them.

#### Alternative employment

89. I do not consider that the Respondent failed to consider whether the Claimant was suitable for any alternative positions. Given the financial situation facing the Respondent in the pandemic there simply were none and the one which was originally raised, a more junior sales role, was not a position which was ultimately available and, in any event, not one which the Claimant was interested in.

#### Polkey reduction

90. Given my finding that the Claimant's role was interchangeable with Mr Cox and he should have been included in the redundancy pool with him I find that there should be a 50% reduction in the compensatory award. I do not consider it possible to make a finding as to had redundancy selection criteria been applied, and a selection made between them, whether it was more likely that Mr Cox or the Claimant would have been selected for redundancy. Whilst the Respondent suggested that the Claimant had greater client selling skills and Mr Cox had greater team management skills I did not see evidence to support this and reach no findings as to what the likely outcome would have been.

91. Given that the Claimant has already received a statutory redundancy payment he has no entitlement to a basic award.

92. If the parties cannot agree the size of the compensatory award they should contact the Tribunal to list a remedy hearing in due course.

---

**Employment Judge Nicolle**

**27 August 2021**

Sent to the parties on:

28/08/2021

For the Tribunal: