



RM

# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J. Dunderdale  
**Respondent:** Intertek Testing Management Limited  
**Heard at:** East London Hearing Centre  
**On:** 5-6 September 2019  
**Before:** Employment Judge Massarella  
**Representation**  
**Claimant:** In person  
**Respondent:** Mr K. Charles (Counsel)

## JUDGMENT

The judgment of the Tribunal is that:-

1. the Respondent unfairly dismissed the Claimant.

## REASONS

### The proceedings

1. The Claimant's employment began on 4 April 2011 and terminated on 31 December 2018. By an ET1 presented on 30 April 2019, after an ACAS early conciliation procedure between 27 March and 25 April 2019, he complained of unfair dismissal. A Notice of Claim was sent to the parties on 7 May 2019, the case was listed for one day on 5 September 2019 and directions given.

2. In its ET3 the Respondent pleaded that the reason for the dismissal was redundancy. By letter dated 13 May 2019, it applied for a preliminary hearing to consider whether the Claimant's claims should be struck out as having no reasonable prospects of success; alternatively, whether a deposit order should be made on the ground that they had little reasonable prospects of success. By letter of 8 July 2019 I refused that request and extended the hearing to two days.
3. On 16 July 2019 the Respondent applied to amend the grounds of resistance to include an alternative reason for dismissal: Some Other Substantial Reason within the meaning of s.98(1)(b) Employment Rights Act 1996 ('SOSR'). I allowed that amendment in a response dated 14 August 2019, having first considered the Claimant's written objection.

### **The Hearing**

4. At the full merits hearing I had an agreed bundle of documents, running to some 320 pages.
5. I heard evidence from the Claimant. He also relied on a written statement from Mr Clive Tang, a former colleague of his within the Respondent organisation. Mr Tang did not attend to give evidence and I explained to the Claimant that I was likely to give his statement little weight in his absence.
6. For the Respondent I heard evidence from Mr Colm Deasy (Group Treasurer) and Ms Humaira Syed (Head of Tax – Corporate and Europe, Central Asia, Africa and the Middle East).

### **The issues**

7. After discussion with the parties, it was agreed that the issues for determination were as follows.
  - 7.1. The Respondent accepts that the Claimant was dismissed.
  - 7.2. What was the reason for the dismissal? The Respondent contends that it was redundancy, alternatively SOSR. The Claimant maintains that there was no genuine redundancy situation and that the dismissal was engineered to remove him from the business because his 'face did not fit'.
  - 7.3. Did the Respondent follow a fair procedure in dismissing the Claimant? Did it consult adequately with the Claimant about his potential dismissal? In particular, should the consultation period have started earlier?
  - 7.4. Was sufficient consideration given to identifying an alternative role for the Claimant? In particular, should he have been considered for the newly created role of Project/Operational Tax Manager, which the Claimant considered had similarities with his role?
8. The Claimant confirmed that there were no other roles for which he ought to have been considered. He accepted that he would not have accepted a junior tax analyst role, which was an entry-level role at a modest salary, suitable for a new graduate.

## Findings of fact

### The Respondent organisation

9. The Respondent provides assurance, testing, inspection and certification services to businesses around the world. By way of example, it tests physical materials to ensure that they meet regulatory requirements; it tests manufacturing processes for risks such as fire; and it audits supply chains. It has recently moved into the area of sustainability, checking manufacturing processes for issues of concern such as modern slavery and bribery.
10. Globally it employs around 40,000 people. There are just over 100 regional offices around the world, including in India, China, the US and Europe. Its central operation in the UK is relatively small, however, employing around 50 people. The Group Tax department in the UK was also small, somewhere between four and seven employees, depending on the relevant time.
11. There was a significant restructuring in 2017/2018. Before then Mr Franco Scialo was Head of Tax. Two employees reported to him: Mr Parmjit Johal as Regional Head of Tax for UK, Central Europe and Asia; and Mr Jeremy Barnett as Head of Tax for the rest of the world. In 2017 both Mr Johal and Mr Barnett resigned. Mr Deasy decided to merge their regions into one super-region and create a new more senior regional Head of Tax to be supported by a junior role. This restructuring led to Mr Scialo being put at risk of redundancy and he eventually left the business in March 2018. Ms Humaira Syed was recruited to the new, combined role. Mr Shalinder Singh was promoted to the role of Group Reporting and Global Transfer Pricing and reported directly to Mr Deasy.
12. The Claimant asserted in his statement that Ms Syed was single-handedly responsible for the departure from the company of most of the original members of the Group Tax department. I reject that suggestion: Mr Scialo had decided to leave before Ms Syed joined; Ms Kelly-Ann Palmer was on maternity leave when Ms Syed joined and never worked with her, having accepted another role; Ms Temi Ayodele returned from maternity leave and accepted a higher paid role elsewhere, as did Shalinder Singh, the Respondent having declined to match the higher salaries they had been offered elsewhere. Mr Tang only reported to Ms Syed for a month, some of which spanned the Christmas period, and handed his notice in on 1 January 2019.
13. When Ms Syed and Mr Singh joined the organisation, Mr Deasy asked them to take time to consider whether the structure of the department could be improved upon. He gave them a timeframe of around six months to complete this review. There is a lack of documentation relating to this exercise: I consider the Claimant's criticism - that an organisation of the size of the Respondent ought to have documented an exercise which was likely to impact directly on its employees with greater thoroughness than the Respondent did in this instance – to be valid.

### The Claimant's role

14. At the time of his dismissal the Claimant was employed as a Global Indirect Tax Specialist. He delivered specialist indirect tax advice and support to Intertek

Group companies. An indirect tax, such as VAT, is a tax collected by an intermediary, such as a retail store, from the person who bears the ultimate economic burden of the tax, such as the consumer. Other countries have taxes which are similar to VAT, for example Canada has a Harmonised Sales Tax.

15. I find that, at the material time, the Claimant's work was almost exclusively concerned with VAT or VAT-equivalents. I was taken to a 'To Do' list which he had prepared as a summary of his objectives for 2018. He confirmed that, of the 19 categories of activity referred to, only one was not related to VAT or a VAT-equivalent.
16. There was no issue about the quality of his work. The 2017 appraisal which was in the bundle was positive and the Respondent did not dispute that the Claimant contributed significant financial benefit to the company in that year.
17. Ms Syed reviewed the Claimant's role, which was focused on providing VAT advice to local finance teams around the world. However, the Respondent's guidance to the business (the Tax Management Framework) expressly made local finance managers responsible for their own VAT, including their own VAT returns; the Claimant had minimal involvement in the preparation, review or oversight of those returns. Ms Syed observed that, in practice, when a difficult issue arose, local finance might deal with it themselves; they might approach the local regional tax team; or they might approach the Claimant, who often sought to resolve the issue by instructing external advisers. Those external advisers would often be based in the region itself, since the need was for expertise in the local jurisdiction.
18. Mr Deasy gave the example of the Claimant being approached by the Respondent's French team with an enquiry, which the Claimant resolved by instructing Ernst and Young in France, who advised him and whose advice he then relayed back to the region. Ms Syed questioned why this process could not be carried out without the need for central involvement.
19. Mr Deasy was also concerned that this reliance on a central resource made local finance managers complacent about their own responsibilities.
20. Moreover, as new indirect taxes arose around the world, it made less sense for advice to be given centrally. The process of devolution had already largely occurred in some regions. For example, in the UAE and Saudi Arabia, when VAT had been introduced, a local finance coordinator had been put in place and local VAT advisers engaged. Although the Claimant remained part of the overall team, technical VAT input was provided locally.
21. Ms Syed came to the provisional conclusion that the Claimant's role might no longer be necessary.

#### The decision to create a new role

22. In the course of her review Ms Syed identified three areas which she considered were being neglected by the Respondent.
  - 22.1. Research and development: there are around 27 countries around the world whose governments give some form of tax incentive for work undertaken in the name of research and development.

- 22.2. Withholding taxes: these are essentially taxes deducted when money is moved from one country to another.
- 22.3. Employment taxes: this requires expertise in matters such as the distinction between a self-employed contractor and an employee.
23. Ms Syed considered that, if resources were put into these three areas, they could generate considerable revenue.

Planning meetings in August and September 2018

24. Mr Deasy and Ms Syed had a meeting in August 2018 at which a new role, focusing on the three potential areas of growth, was canvassed. At that early stage a job description had not been drawn up and no title created. It would eventually become the role of Project/Operational Tax Manager.
25. The Claimant contended in these proceedings that this new role was essentially the same as his role. He relied on a number of adverts placed by recruitment agencies used by the Respondent, which he said were for an indirect tax specialist with only basic experience of employment and withholding taxes. When they were drawn to Ms Syed's attention she identified that they did not correspond with the job description. The explanation that she was given by the agencies was twofold: (1) that the adverts were composites of more than one role and (2) that they were deliberately couched in more general language so as to attract potential applicants, who would then be filtered towards specific roles.
26. I find that the job description was a more accurate guide to the nature of the new role than the advertisements and I reject the Claimant's contention that the new role was essentially the same as his existing role. Although indirect taxes (including VAT) was one element of the new role, the three new areas which Ms Syed had identified were also identified as elements of the role. It was a wider role than the Claimant's role.
27. Mr Deasy and Ms Syed also discussed her view that there was no longer a need for a centralised VAT adviser. It was agreed at that meeting that Ms Syed would contact HR to explore what would be involved if the Claimant's role were put at risk of redundancy. There was an exchange of emails between Ms Syed and HR around 14 August 2018. They contain a reference to a termination date in September. I accept Ms Syed's explanation that this did not indicate that the Respondent had decided to make the Claimant redundant in September; rather it was a date which HR used for the purposes of illustrating what the redundancy package would be, i.e. a notional calculation date.
28. A planning meeting took place on 14 September 2018, attended by the Chief Finance Officer, Mr Ross McCluskey. At that meeting Ms Syed gave a PowerPoint presentation, explaining the opportunities which could arise by focusing on the three new areas. Ms Syed estimated, for example, that the value to the company of pursuing research and development claims could be between £6m and £12m over three years.
29. Mr McCluskey agreed that they could recruit for the new role. It was also agreed that Mr Deasy would consult with the regions as to whether they considered that they had sufficient resource locally to deal with VAT or whether

they were wholly reliant on the central team, including the Claimant. Mr Deasy consulted with the regional CFOs during October and November 2018, either by phone or by Skype. The feedback he received was positive towards the Claimant, who was held in high regard, but the regions did not consider that central support for VAT was necessary; they considered that they had the internal resources to deal with it themselves.

The alleged plan to manage the Claimant out of the business

30. It was part of the Claimant's case that his dismissal was engineered because 'his face did not fit' or because he was being 'managed out of the business'. He relied on three principal matters in support of that contention: the removal of work from him; the lack of a salary increase; and the proposal to assign part of his role to Ms Palmer.
31. He asserted that work was taken away from him by Ms Syed and Mr Deasy for no good reason. I reject that assertion. The Claimant gave an example of an international trade audit, on which he said he would normally lead, but which Ms Syed took over herself. The Claimant himself accepted that there had never been an audit of this sort at the Respondent; he had certainly never led on one. By contrast, Ms Syed had experience of such audits and was better placed to deal with such a sensitive and important process. There was plainly a sound basis for the decision.
32. The Claimant gave a second example of a complex VAT issue in Ghana, which he had been working on. Mr Deasy explained that the issue had been going on for a long time and that he was given an instruction by his own managers to bring it swiftly to a conclusion. Accordingly, he took personal control of it; it was the only occasion on which he took work away from the Claimant (indeed, from the whole team). I accept the explanation for his action - indeed the Claimant himself accepted it in the course of questioning.
33. The Claimant also said that he was not given an annual cost of living salary award in March 2018. That was not disputed: Mr Deasy explained that he had a limited budget and assigned it to support the promotion of Ms Palmer as she was paid under the market rate. The Claimant by contrast was paid towards the top of the market rate. The only other member of the team to be given rise was Mr Tang, who was given an increment of 1%. I am satisfied that there was a rational basis for Mr Deasy's decision, which was not designed to promote the Claimant's exit from the business.
34. As for the Claimant's assertion that the Respondent intended to assign part of his role to Ms Palmer on her return from maternity leave, it is right that in an email to the Claimant of early January 2019 Ms Palmer wrote that Ms Syed had told her that she would be 'assisting with indirect tax queries', i.e. the Claimant's area of expertise. However, I find that that work was different from the work undertaken by the Claimant: the role proposed to Ms Palmer was as UK Tax Manager, in the context of which she would have responsibility across all taxes, including VAT, but only within her own region. This was a 'local' responsibility, not the centralised responsibility which was the Claimant's domain.

The meeting of 21 November 2018

35. A meeting took place on 21 November 2018 with each member of the tax team, including the Claimant. At his meeting with the Claimant, Mr Deasy explained the proposal outlined above. He explained that he was proposing to create a new role specialising in the three new areas; and that he was considering using external advisers within the regions to support on indirect tax matters. He informed the Claimant that he was at risk of redundancy and that there would be a formal consultation process. He told the Claimant that he could make representations to counter the proposal and that part of that process would involve looking for suitable alternative roles for him. With regard to alternative roles he said this:

‘I would encourage you to take a serious look at the tax roles that have been advertised, the role we have created, it might be that you think you want to apply for this.’

36. On 22 November 2018 Ms Syed emailed to Mr Deasy a draft job description for the new Project/Operational Tax Manager.

First consultation meeting on 3 December 2018

37. On 29 November 2018 Claimant was invited to attend the first consultation meeting with Mr Deasy and Ms Sarah Pitt (HR), which took place on 3 December 2018. At the meeting the Claimant confirmed that he was content to proceed without a representative. He did not challenge the business case for the creation of the new role and the elimination of his role, which was explained to him again, saying at one point: ‘Yes I understand the rationale behind this proposal and it makes sense. I don’t really have any questions relating to the business case itself, more just around the process’.

38. His focus was on the proposed redundancy terms including the notice period; he also wished to understand how long the process would take, so that he could start to look elsewhere for employment. It was explained to him that the Respondent operated a statutory redundancy scheme with no contractual enhancement; as he would be a ‘good leaver’ any share entitlement would be paid *pro rata* and any bonus honoured within the usual period, if achieved. The Claimant said that he would look at the alternative roles.

39. A copy of the job description for the new Project/Operational Tax Manager role was sent to him on 5 December 2018, together with draft redundancy figures.

40. On 10 December 2018 the Claimant sent an email to Ms Pitt about the new role:

‘I would certainly like to express an interest in the role as I consider I meet the required indirect tax skill set, however, I have limited experience working with withholding and employment taxes. Is this a prerequisite for the position or would training be considered?’

41. Ms Pitt sought the views of Mr Deasy and Ms Syed. In an email of 12 December 2018 Mr Deasy replied to Ms Pitt (copying in Ms Syed, but not the Claimant):

‘Experience is strongly desired – this person needs to lead and educate the business in these areas.’

42. On 13 December 2018 Ms Syed replied to Mr Deasy and Ms Pitt (but not the Claimant):

‘experience and exposure to withholding and employment taxes is essential for this role. This is a wider tax role than just indirect taxes.’

43. The email sent later the same day by Mr Deasy to the Claimant in response to his enquiry said this:

‘Hi John

The new operational/project tax manager is quite a bit more than indirect taxes alone – and we will be looking for someone who has enough experience to frame the global opportunities from day 1, and based full time in Brentwood.’

I note that Mr Deasy did not say in this email to the Claimant that experience of withholding and employment taxes was essential.

44. On 17 December 2018 the Claimant was invited to a second consultation meeting. Attached to the email was a copy of the latest vacancy list.

Second consultation meeting on 18 December 2018

45. The second consultation meeting took place on 18 December 2018, attended by the Claimant, Mr Deasy and Ms Pitt. At that meeting the Claimant, while acknowledging that he could see the business case for the changes, argued that it would be unusual in a large company such as the Respondent not to have central support in respect of VAT. Mr Deasy explained that support would continue to be provided but by instructing external advisers directly from the regions, rather than centrally. The Claimant stated that he could see the rationale for that. In the course of cross-examination he accepted that he did not challenge the underlying business case at this meeting.

46. The discussion then turned to the new Project/Operational Tax Manager role. Mr Deasy asked the Claimant if he had experience in the areas of withholding taxes, research and development and employment taxes. The Claimant said that he had no experience in the areas of research and development or withholding taxes; he had some experience of employment taxes, but not in the last twenty years.

47. Mr Deasy asked the Claimant if he would like to be considered for the role and be interviewed for it. He said that he did not want to waste the Claimant’s time if it was not a suitable role for him. He pointed out that Ms Syed would be the recruiting manager and would consider him alongside other candidates if he applied. The Claimant said that he would have to think about it and that he had sensed from Mr Deasy’s email that he might not be eligible for the role. Ms Pitt intervened to say the following:

‘... Humaira [Syed] as the recruiting manager would interview all applicants and assess the level of experience in relation to the requirements of this new role. She would use the job description and



knowledge of what this role would entail to be able to compare the experience of John and other candidates to this.'

48. Mr Deasy then adjourned the meeting to have a private conversation with Ms Syed. He asked to see copies of the CVs that had already been submitted thus far.
49. He resumed the meeting and picked up the issues which had previously been discussed. With regard to the business case, Mr Deasy explained that there were essentially two business models: decentralising the responsibility for indirect taxes, including VAT; or centralising it with a much bigger team. He expressed the view that the second option would not work for the Respondent and the Claimant said that he understood.
50. As for the new role Mr Deasy told the Claimant that there were already applicants better qualified than the Claimant [original format retained]:

'each one of them has warranty, employment, VAT experience which is what we are looking for. A couple of them already have global roles already so are already doing the role essentially ... my sense is that it probably would not be a good use of your time to pursue [the role]'.

Notwithstanding this, the Claimant replied:

'I have expressed an interest and I would still maintain that interest. It is for [Ms Syed] to look at that and decide'.

Mr Deasy then said:

'From what you have told me with your past experience in VAT and Finance, I don't think there is sufficient overlap there and don't want to drag out and waste your time there.'

Later in the meeting Mr Deasy said:

'Based on the experience you have outlined to us and your background comparing that to the requirements of the role then no it wouldn't be a suitable alternative role as we need someone who has that experience from the off to be able to drive the business forward in those areas.'

51. I find that Mr Deasy made it plain to the Claimant that, if he insisted on applying for the new role, he would be unsuccessful. There were no other roles which the Claimant would have considered applying for.
52. Mr Deasy then confirmed that the Claimant's role would be made redundant on 31 December 2018 and that he would not be required to work his three months' notice, but would be paid in lieu. The remainder of the discussion - dealing with issues such as the handover of work and the organisation of a celebration to mark his contribution to the Respondent - was predicated on the assumption that the Claimant would be leaving the business. The Claimant did not apply for the new role.

#### The dismissal letter

53. On 21 December 2018 Mr Deasy sent a letter to the Claimant confirming his redundancy. The Claimant's employment terminated on 31 December 2018. He was given the opportunity to appeal against his redundancy dismissal but did not do so. The Claimant explained that, in the circumstances, there was no point as it was clear to him that the Respondent wanted him out of the business.
54. The Claimant has been unable to find a new permanent position since leaving the Respondent. He put himself forward for contract work through agencies. He obtained a three-month contract from 11 January to 18 April 2019 but, at the date of this hearing, had not been able to find other work.
55. In the event, the Respondent did not appoint any of the candidates who had applied in December 2018 to the role of Project/Operational Tax Manager. At the date of the hearing the role remained vacant.

## The law

### Unfair dismissal

#### *Redundancy*

56. S.94 of the Employment Right Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by her employer.
57. S.98 ERA provides so far as relevant:
- (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
    - (a) the reason (or, if more than one, the principal reason) for the dismissal, and
    - (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
  - (2) A reason falls within this subsection if it—
    - ...
    - (c) is that the employee is redundant ...
    - ...
  - (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
    - (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
    - (b) shall be determined in accordance with equity and the substantial merits of the case.
58. A redundancy situation is defined by s.139 ERA.

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

59. An employee may argue that a dismissal for redundancy was unfair either because redundancy was not the real reason; or because, although a redundancy situation existed (and the employee was not selected for an automatically unfair reason) the dismissal was nevertheless unreasonable under S.98(4) ERA.

60. It is not for Tribunals to investigate the commercial reasons behind a redundancy situation (*Hollister v National Farmers' Union* [1979] ICR 542).

61. In many redundancy dismissals, the starting-point will be the familiar guidance in *Williams v Compair Maxam Ltd* [1982] IRLR 83 EAT (at para 18 onwards).

'18. For the purposes of the present case there are only two relevant principles of law arising from that subsection. First, that it is not the function of the Industrial 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. The second point of law, particularly relevant in the field of dismissal for redundancy, is that the Tribunal must be satisfied that it was reasonable to dismiss each of the applicants on the grounds of redundancy. It is not enough to show simply that it was reasonable to dismiss an employee; it must be shown that the employer acted reasonably in treating redundancy 'as a sufficient reason for dismissing the employee', i.e. the employee complaining of dismissal. Therefore, if the circumstances of the employer make it inevitable that some employee must be dismissed, it is still necessary to consider the means whereby the applicant was selected to be the employee to be dismissed and the reasonableness of the steps taken by the employer to choose the applicant, rather than some other employee, for dismissal.

19. In law therefore the question we have to decide is whether a reasonable Tribunal could have reached the conclusion that the dismissal of the applicants in this case lay within the range of conduct which a reasonable employer could have adopted. It is accordingly necessary to try to set down in very general terms what a properly instructed Industrial Tribunal would know to be the principles which, in current industrial practice, a reasonable employer would be expected to adopt. This is not a matter on which the chairman of this Appeal Tribunal feels that he can contribute much, since it depends on what industrial practices are currently accepted as being normal and proper. The two lay members of this Appeal Tribunal hold the view that it would be impossible to lay down detailed procedures which all reasonable employers would follow in all circumstances: the fair conduct of dismissals for redundancy must depend on the circumstances of each case. But in their experience, there is a generally accepted view in industrial relations that, in cases where the employees are represented by an

independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:

1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.
2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.
3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.
4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.
5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

The lay members stress that not all these factors are present in every case since circumstances may prevent one or more of them being given effect to. But the lay members would expect these principles to be departed from only where some good reason is shown to justify such departure. The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim.'

62. In carrying out a redundancy exercise, an employer should begin by identifying the group of employees from which those who are to be made redundant will be drawn. This is the 'pool for selection' and it is to these employees that an employer will apply the chosen selection criteria to determine who will be made redundant.
63. However, an employer who omits to consider the question of pooling will not necessarily be acting unreasonably. In *Wrexham Golf Co Ltd v Ingham* EAT 0190/12 the Claimant worked as club steward. The Respondent decided that, to save money, it would combine its bar and catering functions, and the club steward's duties could be divided among other staff, so the Claimant would be redundant. The Tribunal concluded that the dismissal was unfair because the Respondent had failed to consider the issue of a pool, and whether other bar staff should also have been placed at risk. On appeal the EAT noted that the word 'pool' is not found in s.98(4) ERA and held:

'there is no rule that there must be a pool: an employer, if he has good reason for doing so, may consider a single employee for redundancy ... there will be cases where it is reasonable to focus upon a single employee without developing a pool or even considering the development of a pool.'

The question which the Tribunal ought to have considered was whether, given the nature of the job of, it was reasonable for the Respondent not to consider developing a wider pool of employees.

64. In *Morgan v Welsh Rugby Union* [2011] IRLR 376 the EAT held (at para 30) that the guidance provided in *Williams* may not be of assistance where an employer has to appoint to new roles after a reorganisation.

**'Where an employer has to decide which employees from a pool of existing employees are to be made redundant, the criteria will reflect a known job, performed by known employees over a period. Where, however, an employer has to appoint to new roles after a re-organisation, the employer's decision must of necessity be forward-looking. It is likely to centre upon an assessment of the ability of the individual to perform in the new role. Thus, for example, whereas *Williams*-type selection will involve consultation and meeting, appointment to a new role is likely to involve, as it did here, something much more like an interview process. These considerations may well apply with particular force where the new role is at a high level and where it involves promotion.'**

65. The EAT further held (at para 36) that the real issue is the application of s.98(4) ERA:

**'To our mind a tribunal considering this question must apply s.98(4) [ERA]. No further proposition of law is required. A tribunal is entitled to consider, as part of its deliberations, how far an interview process was objective; but it should keep carefully in mind that an employer's assessment of which candidate will best perform in a new role is likely to involve a substantial element of judgment. A tribunal is entitled to take into account how far the employer established and followed through procedures when making an appointment, and whether they were fair. A tribunal is entitled, and no doubt will, consider as part of its deliberations whether an appointment was made capriciously, or out of favouritism or on personal grounds. If it concludes that an appointment was made in that way, it is entitled to reflect that conclusion in its finding under s.98(4).'**

66. In *Darlington Memorial Hospital NHS Trust v Edwards and Vincent* (EAT/678/95) HHJ Hull said:

**'If these are new posts with a different job description from anything which the various applicants brought to them, then it seems to us that the employer is most certainly not under a duty to carry out something very like the exercise which he has to carry out in deciding who to select for redundancy. On the contrary, if he is to be allowed to manage his business, he must select as he thinks right. If he tells the employees that they will be allowed to apply for new jobs, as was manifestly the case here, then of course he will be required to carry out the exercise in good faith. If they are to be allowed to apply their applications must be considered properly. If the criteria are different from the old jobs so be it, that was part of the original occasion of redundancy, it was as much reorganisation as redundancy, although redundancy was the result. But to say that they are the same process and that it must be based on similar principles is quite simply, in our view, wrong. It may be, we are not going to decide this, that the duty goes beyond [good] faith, and it may be said that there is some sort of duty of care, but there it is, it is something which the employer has said he will do and he must do it. He must consider the applicants.'**

### *Polkey*

67. Where a Tribunal finds that a dismissal was unfair, it must go on to consider the chance that the employment would have terminated in any event, had there been no unfairness (the *Polkey* issue).

68. In *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274 the EAT (Langstaff P presiding) noted that a *Polkey* reduction has the following features:

**'First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between the two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer would have done) ... The Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand.'**

### Submissions

69. On the second day of the hearing I heard oral submissions from the Claimant and from Mr Charles. As the Claimant was in person, I reversed the usual order so that he would have the benefit of hearing the arguments made by Mr Charles, which might assist him in formulating his own arguments. I then offered Mr Charles an opportunity to respond to such points as he considered necessary, having heard the Claimant.
70. Mr Charles argued that the requirement for employees to carry out work of a particular kind had clearly ceased or diminished, given the Respondent's proposal to complete the process of devolving the work currently undertaken by the Claimant to the regions. The Respondent no longer required a central VAT specialist, which is what all the evidence suggest the Claimant was.
71. The Respondent contended that there was a genuine redundancy situation and that the Claimant was dismissed for redundancy. It relied on:
- 71.1. s.139(1)(b)(i) ERA: that the Respondent's requirements for employees to carry out work of a particular kind had ceased or diminished or were expected to cease or diminish; and
- 71.2. s.139(1)(b)(ii) ERA: that the Respondent's requirements for employees to carry out that work in the place where the employee was employed had ceased or diminished or were expected to cease or diminish.
72. It was not in dispute that the Claimant was the only individual carrying out the role and so it was reasonable to treat him as a pool of one. Mr Charles submitted that the Claimant's case that the whole process was engineered because his face did not fit should be rejected. In terms of consultation, it began at precisely the right point, which was when Mr Deasy and Ms Syed had completed their process of review and had a concrete proposal which could meaningfully be consulted upon. It would have been premature to consult earlier. As for the new role, the Claimant was not prevented from applying for it but the Respondent realistically took the view that he did not have the requisite experience.
73. The Claimant submitted that that there was an agenda to remove him from the organisation, perhaps because he was perceived as not being dynamic enough. He argued that this was consistent with the fact that other staff were pushed out of the business within a short period. There was a lack of evidence to support

the fact that any proper review had taken place of his role; work was taken away from him; and the consultation process was simply the Respondent going through the motions. Mr Deasy and Ms Syed had made their minds up and never seriously considered him for the new role; they wanted him out of the organisation. The Claimant believed that he could have done the new role.

74. I had regard to those submissions both in making my findings of fact and reaching my conclusions.

## Conclusions

### The reason for the dismissal

75. The Respondent had investigated whether there was an ongoing requirement for a UK-based, centralised VAT specialist and concluded that there was not. It formed the view that, insofar as these functions had not already been devolved to the regions, that process of devolution should now be completed. Not only was that consistent with its policy that the regions should be responsible for their own VAT, but the regions had themselves confirmed that, much as they respected the Claimant, they were not dependent on him for advice. When they required specialist advice, they either already instructed external advisors themselves, or were capable of doing so.
76. Once the Respondent had reached this conclusion, it formed the view that the requirement for an employee to perform the Claimant's role as a specialist VAT adviser, based in the UK, had already diminished and was expected to cease altogether.
77. I am satisfied that the Respondent has shown that there was a redundancy situation and that the sole reason for the Claimant's dismissal was redundancy. For the reasons I have already given, I reject the Claimant's contention that the reason for his dismissal was because his 'face did not fit' or was otherwise for an impermissible reason.
78. Because I have found that there was a genuine redundancy situation, it is not necessary to consider the Respondent's alternative case that the dismissal was for 'some other substantial reason'.

### Did the Respondent act reasonably in not creating a wider pool?

79. The Claimant accepted in the course of oral evidence that he was the only person carrying out his role. He did not identify any other employee who ought to have been included with him in a pool for redundancy selection. I find that it was within the band of reasonable responses for the Respondent to treat him as a pool of one and not to cast the net wider to include employees who had different responsibilities and areas of specialisation from his.

### The consultation process

80. In terms of the timing of the process, although the proposal had largely been formulated by September 2018, Mr Deasy then (quite properly in my view) took soundings from the regional CFOs to assess the impact the proposal might have on them. Given the number of regions, and Mr Deasy's other responsibilities within the organisation, it was reasonable for that process to last through October and most of November 2018. Once he had satisfied himself

that the proposal was workable, the consultation process began. The Respondent entered into that process at the point when they had explored and settled on a plan on which they could meaningfully consult. That was a reasonable approach.

81. The Claimant was given a clear warning at the meeting of 21 November 2018 that he had been provisionally selected for redundancy. He was then invited to two formal consultation meetings on 3 and 18 December 2018. I conclude that, in the course of those meetings, it was explained to the Claimant why the proposal meant that his role was no longer needed and he was given an opportunity to comment on, or challenge, those reasons. Again, he acknowledged the logic of devolving responsibility for VAT back to the regions, with appropriate external support. Furthermore, the rationale for the creation of the new role was clearly explained to him and he was given a full opportunity to comment on, or challenge, it. In that respect the Respondent acted reasonably in consulting with the Claimant.

#### Consideration of alternative employment

82. The only alternative role which the Claimant would have considered was the Project/Operational Tax Manager.
83. The Claimant was encouraged by Mr Deasy at the first consultation meeting to consider applying for the new role. He was sent a job description and, in response to his email enquiry seeking clarification, was not told that experience of R&D, withholding and employment taxes was essential. At the second consultation meeting he was asked again whether he wished to be considered for the role and Ms Pitt explained in detail what process would be followed if he did.
84. Having told the claimant that he could apply for an alternative role, and set out in terms how his application would be dealt with, a reasonable employer would have treated his candidacy in the same way as that of any other applicant: without predetermination, assessing it carefully by reference to the same criteria as were applied to other candidates, as part of an orderly and transparent selection process.
85. At the meeting of 18 December 2018, the Claimant initially stated that he wanted to think further about the new role. A reasonable employer would have accepted that indication and left the matter there, to be determined in due course by the delegated recruiting manager (Ms Syed). Instead, Mr Deasy left the meeting and took private, informal soundings from Ms Syed, which he said were unfavourable to the Claimant. According to Mr Deasy, he then conducted his own informal review of the applications already received, made a summary assessment of them - even though he was not the recruiting manager - and told the Claimant that he could not compete with them. Other than Mr Deasy's brief comments, recorded in the notes of the meeting, that the other candidates were better qualified than the Claimant, there are no notes of his discussions with Ms Syed. His approach lacked all transparency.
86. Despite this, the Claimant then stated clearly that he wished to be considered by Ms Syed. Mr Deasy brushed this aside. The fact that his ostensible motive



for acting as he did was because he did not want to waste the Claimant's time, did not make his conduct any less unreasonable.

87. If the Claimant had then insisted on making an application, he would have done so in the knowledge that he had already effectively been ruled out, by both the recruiting manager (who he had been assured by Ms Pitt would consider his application fairly alongside those of other applicants) and by her manager. In the circumstances, it is understandable that he did not go on to make a formal application.
88. I conclude that the Respondent acted unreasonably in not properly considering the Claimant for the new role by following the approach outlined to him by Ms Pitt. The procedure which Mr Deasy adopted was one which no reasonable employer would have adopted.
89. For the reasons set out above, I have concluded that the dismissal fell outside the band of reasonable responses.

### *Polkey*

90. There is then the question of what the chances were of the Claimant's being appointed to the new role, had the Respondent gone through a fair procedure. That is a separate question which will be determined at the remedies hearing.
91. My preliminary view is that they may not have been high. In the course of the consultation meetings the Claimant acknowledged that he did not have specific experience in two of the three new areas which were elements of the new role and that his experience in the third was historic.
92. On the other hand, the job description contained other requirements, including indirect tax, of which he did have experience. Furthermore; and despite Mr Deasy's conviction that the other candidates were better suited than the Claimant for the role, none were appointed. Indeed, no appointment had been made nearly a year later. I have heard no detailed evidence as to why that was, only a generalised assertion that it was consistent with an unwillingness on the part of the Respondent to appoint a candidate who could not meet its expectations.
93. It would appear possible that the Respondent might have dismissed the Claimant fairly, had it gone through a fair procedure. However, that is by no means my concluded view and the parties may address me further in argument (and by way of evidence, if appropriate) on this issue at the remedies hearing.
94. An issue will also arise as to how long it would have taken the Respondent to go through a fair procedure.

### **Remedy**

95. The case will be listed for a remedies hearing, with a time estimate of one day. By no later than 7 days after this judgment is sent out, the parties are to provide to the Tribunal their dates to avoid from March 2020 onwards, marked for my attention. The hearing will then be listed and I will give directions, including for disclosure of documents relating to the other candidates, such as application forms, interview notes and outcome letters.

Employment Judge Massarella

14 January 2020