EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	and	**Respondent**
Dr Hamid Mirab		Mentor Graphics (UK) Limited

Held at: Watford **On:** 8-10 February 2017

Before: Employment Judge Southam

Appearances:

Claimant: Mr Mark Stephens, Counsel
Respondent: Mr Thomas Kibling, Counsel

RESERVED JUDGMENT

1. The claimant's dismissal from his employment was not unfair.

2. The claim is dismissed.

3. The provisional remedy hearing listed to take place on 24 March 2017 is vacated.

REASONS

Claim and Response

1. The claimant presented this claim to the tribunal on 3 June, 2016. He did so having entered into early conciliation with ACAS, by sending them the requisite information about the intended claim on 5 April, 2016. The ACAS certificate of early conciliation was issued by email on 5 May.

2. In the claim, the claimant presented a single complaint about unfair dismissal. He had been employed by the respondent from 15 February, 2013 until 29 February, 2016. His last employment was as a Sales Director. The claimant asserted that he had been successful in his role. He acknowledged that the reason for his dismissal was purportedly that he

was redundant, but he denied that redundancy was the true reason for his dismissal. He alleged that the respondent requested the dismissal of a colleague and that the claimant refused to engineer, in the case of the colleague, what would have been an unfair dismissal. The claimant contends that that was the reason for his selection for redundancy. The claimant said that his position in the company was significantly changed, in particular by the removal of five out of six direct reports, and that he was, in effect, relegated to the role of an Account Manager. Nevertheless, he was treated as if his role had not changed and, when a redundancy process began, he was placed in a pool of one. He was dismissed for redundancy. He contends that the respondent failed to have any or any reasonable regard to his views or to information he provided before or after the termination of his employment and that the respondent failed to make any or any reasonable effort to redeploy him within the business. He said also that the respondent failed to identify any reason why it needed to make cost savings, that the adoption of a pool of one was not within the range of reasonable responses in the circumstances, that there was not a fair and genuine consultation with the claimant in relation to the composition of the pool, the reasons for his selection or in relation to any alternatives to dismissal. The claimant contends that the respondent did not fairly or genuinely consider his appeal.

3. The claim is resisted. In a response filed with the tribunal on 11 July, the respondent stated that, in 2014, it undertook a review of its worldwide activities. The respondent wanted to expand sales growth in the automotive sector and a dedicated sales channel was created. The claimant's prior experience was in relation to the non-automotive sector and he was therefore allocated to work in the general sales channel. They agree that as a consequence of those changes, the claimant had a reduced number of direct reports. Two of his original direct reports were transferred to the automotive sector. The claimant's role, grade and pay structure were left unchanged. However, the respondent discussed, they say, with the claimant, in early 2015 whether or not the claimant should adopt an Account Manager role with a personal revenue target in place of his existing role, but the claimant objected. Thereafter, the respondent contends, the sales performance of the general sector diminished and it was necessary to review all expenditure. It was decided that the claimant occupied a level of management not replicated in the automotive sector and, they say, they consulted with the claimant over the removal of his role. He was dismissed by reason of redundancy with effect from 1 March, 2016.

4. The respondent denies that redundancy was not the reason for the claimant's dismissal. They admit that it was suggested that the role occupied by Thomas Cardon in France should be replaced by a role in central Europe. They say that the claimant supported the decision although, in the end, the respondent did not proceed with it. They agree that the scope of the claimant's role narrowed in 2015. They deny that they failed to have regard to the claimant's views, although they disagreed with them. They insist that the general sales channel had a poor sales performance and there was a real need to make savings. It was reasonable to consider that the claimant was occupying a unique role, that

the claimant's duties were significantly different from those of the Account Managers reporting to him, that his pay and other compensation were significantly different from those of the Account Managers reporting to him and that the account managers are based in other jurisdictions. They contend that there was a genuine and meaningful consultation between 3 and 29 February, 2016. They say that the respondent sought to encourage the claimant to consider the possibility of redeployment within the group of companies of which the respondent is part, but that the claimant adamantly declined to consider it. They insist that they did fairly and genuinely consider the claimant's appeal and that his experience and qualifications were not material to the decision to consider his post to be redundant.

5. On the basis of those contentions, the respondent denies the complaint about unfair dismissal and insists that claimant was fairly dismissed by reason of redundancy. In the alternative they would say that the reason for the claimant's dismissal amounted to a substantial reason of a kind such as to justify the dismissal of the claimant and that they acted reasonably in treating the reason for his dismissal as the reason. They further contend that, if the tribunal should find that the dismissal was unfair, the claimant would still have been dismissed in any event and any compensation should be reduced accordingly.

Case Management

6. This case was listed, in accordance with standard practice, since the only complaint was a complaint of unfair dismissal, for a one-day full-merits hearing on 16 August, 2016. After the filing of the response, and when the file was referred to an Employment Judge for initial consideration, Employment Judge Gumbiti-Zimuto directed that the parties be asked to say whether or not they thought that the original one-day allocation was sufficient for the determination of everything that would need to be decided. The response from the claimant’s representatives was that, in addition to the claimant, they anticipated that there would be seven other witnesses to give evidence (including respondent witnesses) and that three days would be required. In fact, the respondent said that it intended to call only three witnesses and they thought that a two-day allocation would be sufficient.

7. The hearing was first postponed until 6 October, 2016 and then further postponed to accommodate a three-day allocation. After consultation with the parties, the hearing was listed for three days at Reading on 8-10 February, 2017.

8. An application by the claimant for witness orders in respect of certain employees of the respondent was refused on the basis that the respondent's own refusal to call those witnesses was not a sufficient basis for the making of witness orders. A second application for witness orders was also refused because it was clear that from the description of the evidence they were likely to give, that they would be hostile to the claimant's case and that the purpose of requiring them to attend was to

cross-examine them. That was said to be an inappropriate basis for the making of witness orders.

9. The day before the hearing, the tribunal proposed to postpone the hearing because of the lack of judicial resource at Reading. The respondent objected on the basis that two of their witnesses had travelled extensively to attend the hearing. The order to postpone the hearing was reversed but the venue for the hearing was changed to Watford, where the parties could be accommodated.

The Hearing

10. The parties attended for the hearing with their witnesses at the appointed time and place. The hearing was listed before me. The parties were represented as indicated above. After I had read the witness statements and some of the documents, I heard an application on behalf of the claimant for specific disclosure of certain documents. There were four categories of document. I granted the first of the requests but none of the others. It seemed to me that it was potentially relevant to the question of selection for redundancy for me to know the salary of one of the claimant's colleagues. I could see little relevance in seeing the comparative job descriptions of someone who had been dismissed two years earlier and his successor, where the argument was that the respondent had a practice of procuring dismissals of employees on the basis of redundancy, where no redundancy situation existed. I could see no relevance in knowing the value of contracts secured by the colleague whose salary was to be disclosed, because, in isolation, those figures would tell me nothing about the work that particular colleague undertook. Lastly, whilst the subject matter of the respondent's attitude to a colleague of the claimant called Thomas Cardon was relevant to the case, I was assured that there were no documents in the category sought by the claimant, and in those circumstances, there was no point in me making any order for disclosure.

11. Thereafter, I heard evidence. Mr Kibling called, as witnesses for the respondent, Daniel MacGillivray, Global Sales Director, Dr Amit Geva, Regional Human Resources Director for Europe, the Middle East and India, and Joseph Spiro, HR Business Partner, an employee of the respondent based in the UK. The claimant gave evidence. There was an agreed bundle of documents, and a supplementary bundle. In these reasons, references to page numbers are to the page numbers of the agreed bundle. References to documents in the supplementary bundle will appear as S/xx.

Issues

12. At the start of the hearing I agreed with the representatives what were the issues that I would have to determine once I had heard the evidence and the parties' submissions. They are as follows:

    12.1 Has the respondent established the reason, or if there was more than one, the principal reason, for the claimant's dismissal? The tribunal is required to determine what were the facts and/or beliefs

which caused them to dismiss him. Was the reason, or principal reason, that the claimant was redundant or that there was a business reorganisation, as the respondent alleges? Were these, or either of them, only ostensible reasons for the dismissal, as the claimant alleges?

12.2 Whatever the reason, does it amount to a potentially fair reason by reference to section 98 Employment Rights Act 1996?

12.3 If the reason for the claimant's dismissal was redundancy or a business reorganisation, was the dismissal fair? In particular: did the respondent properly consult, fairly select, and were there reasonable efforts made to avoid dismissal?

12.4 If the reason was not redundancy, did the ACAS Code of Practice apply? If so, was it complied with?

12.5 If the claimant was unfairly dismissed, was his dismissal inevitable? If not, should a Polkey reduction be applied?

Relevant Law

13. In reaching my decisions, I considered and applied where appropriate the following statutory provisions and case-law:

13.1 Section 98(1) Employment Rights Act 1996 provides that it is for the employer to show the reason for the dismissal and that it is one of the potentially fair reasons set out in Sections 98(1)(b) or 98(2) of that Act. A reason that the employee is redundant is one of those reasons and is provided for at Section 98(2)(c).

13.2 Section 139 Employment Rights Act, 1996 provides

> "….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) ….[not material]
>
> (b) the fact that the requirements of [the employer's] 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".

13.3 When the requirement in section 98(1) has been fulfilled the determination of the question whether the dismissal is fair or unfair 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 is to be determined in accordance with equity and the substantial merits of the case: section 98(4) Employment Rights Act.

13.4 In Williams v Compair Maxam [1982] IRLR 83 the EAT held that it was generally accepted that, where employees are represented by a union recognised by the employer, reasonable employers will seek to act in accordance with the following principles. The employer will seek to give as much warning as possible of impending redundancies. The employer will seek to agree with the union the criteria to be applied in selecting employees to be made redundant. The criteria will be those which do not depend on the opinion of the person making the selection but which can be objectively checked. The selection will be made fairly in accordance with those criteria. Lastly, the employer will seek to see whether he can offer the employee alternative employment. However, in Rolls–Royce v Dewhurst [1985] IRLR 184, it was held that a breach of those guidelines is not a ground in itself for a finding of unfair dismissal. In Simpson & Son v Reid and Findlater [1983] IRLR 401 it was said that those guidelines are not principles of law but standards of behaviour where substantial redundancies arise where there is a recognised union. They were not intended to be considered in every case, being ticked off as if on a shopping list, giving rise, where one has not been complied with, to automatic unfairness.

13.5 Mr Kibling invited me to consider the decision in Barratt Construction v Dalrymple [1984] IRLR 385. In that case, an Industrial Tribunal had been satisfied that the claimant's dismissal followed a genuine redundancy and that his selection for redundancy as one of a group of 10 employees was fair. However, they concluded that the employer could have done more to try to find alternative employment for the claimant and should have considered the possibility of offering him employment in a subordinate capacity and, as the employer was part of a larger group, should have made enquiries to see whether there was a vacancy for him in any of the other companies. That approach was held by the Employment Appeal Tribunal to be wrong. A reasonable employer will not make an employee redundant if he can employ him elsewhere even in another capacity. The tribunal exceeded its function in postulating that the employer should have canvassed the possibility of employing the claimant in other independent companies and that there was an obligation on them to offer employment in a junior capacity if it was available. No suggestion was ever made by the claimant that he would be interested in a more junior appointment until he gave evidence before the tribunal. Where an employee at a senior management level, who is being made redundant, is prepared to accept a subordinate position, he ought in fairness make this clear at an early stage so as to give his employer an opportunity to see if that is a

feasible solution.

Findings of Fact

14. Having heard the evidence, I reached the following findings of fact:

14.1 The respondent is a UK company which is part of a worldwide group based in the United States called Mentor Graphics Corporation. In the United Kingdom, the respondent employs some 113 employees. Worldwide, the group has a turnover of more than $1 billion and some 5000 employees. Its activities are organised on a global basis according to activity, rather than geography. This means that staff employed in connection with a particular function may be found in different parts of the world, and are employed according to different employment law systems, and may have line managers working in different territorial jurisdictions.

14.2 One of its divisions is concerned with embedded systems, which entails the supply of hardware and software components to original equipment manufacturers for installation in their own products.

14.3 The claimant began employment with the respondent, in the United Kingdom on 15 February, 2013, and he was employed as a director of sales, for embedded systems, in the respondent's Europe, Middle East and Asia Region (EMEA). He did not apply for the role initially, but was invited to apply and did so. At the time the Embedded Systems Division of Mentor Graphics Corporation had a discrete sales force of its own, led by Daniel MacGillivray, Director of Worldwide Sales, Embedded Systems Division. The products generated by the division had applications in several different areas of activity. Those included automotive, medical, defence, industrial and aerospace applications. The claimant would report to Mr MacGillivray. A chart at page 73 indicated line responsibilities. The claimant is shown as leading the sales team for that region. There are six individuals reporting to him, shown in the chart. Of those, three were account managers and three were engaged on more technical matters.

14.4 The claimant was to be paid a salary of £102,000 per annum, and a further variable element of up to £68,000 per annum if sales targets relating to the team he managed were met. It was a senior role. He came with an impressive track record as explained by Mr MacGillivray in an announcement to the company, seen at page 61.

14.5 The claimant himself did not have any direct experience in the automotive sector. He had not worked for an original equipment supplier in the automotive sector. He specialised in products relating to safety and security. Mr MacGillivray accepted in cross examination that safety and security products are equally relevant to applications in the automotive sector as they are to other sectors.

14.6 Glenn Perry was, and may still be, the Vice President and General Manager for Embedded Software Worldwide. As such, he was responsible ultimately for the production of the products which it was the responsibility of the sales team to sell worldwide. He took a legitimate interest in the activities of the salesforce. He alone was responsible for approximately 500 staff.

14.7 The claimant was successful in his work. The division as a whole was successful in penetrating the automotive market, and less successful in other areas. I was not told whether that reflected a burgeoning market in products for the automotive sector generally, or whether the Mentor Graphics Corporation staff were particularly successful in competing with others in supplying to that particular sector. The result of this success was that, by February 2015, some 70% of sales of embedded systems were to the automotive sector.

14.8 The claimant's success is reflected in appraisals, normally prepared some months after the end of the year end. His Performance Review Summary of the year ending 31 January, 2014, prepared in June 2014, pages 64-5, shows that he was awarded a mark of five, where six is the highest mark and where five means that the employee has "excelled". The review is entirely positive. His professional goals for the next year were to use his experience in safety, security and a product called hypervisor to drive sales in his region. Although this was issued in June 2014, it reflected his first year in the company.

14.9 Quite early in the claimant’s employment, in 2013, he and Mr Perry attended a meeting on behalf of Mentor Graphics Corporation. One of the claimant's technical reports, Vitaly Bordyug was observed by Mr Perry not to be sufficiently engaged in the business of the meeting and to be using social media during the meeting. Although the claimant had some responsibility for this individual, he also reported to a technical manager, Joe Hamman. I am told and accept that Mr Perry contacted Mr Hamman and said that something must be done about Mr Bordyug. Later he left the business, and there was a replacement with a different job title. The claimant was informed by an HR manager in Germany, where Mr Bordyug was employed, that to make his position redundant was the easiest option to procure his dismissal.

14.10 In due course, there would be a sub-division of the Embedded Systems Division. Before the subdivision, the claimant had disagreements with Glenn Perry over the development of a customised support programme to provide Guaranteed Service Levels, something which had assisted the claimant in his negotiations on behalf of the company with Bosch, and which were ultimately successful in securing additional business for the company. The claimant also disagreed with Mr Perry over the legality of open source software. Mr Perry was under the impression that software that is available to the public can generate

royalties if added to or modified. The claimant explained to Mr Perry that this was not the case, but Mr Perry was reluctant to accept this. Mr Perry had driven the acquisition of XS Embedded (a German company) on his understanding that the company would be able to receive royalties from proprietary additions to open source software used by that company and excluded the claimant from meetings relating to automotive business. He also excluded the claimant from emails relating to automotive business.

14.11 I am told and accept that sales in the Embedded Systems Division as a whole, worldwide, were lower than forecast in 2013 and 2014 following previous years of strong performance. Investors in the stock market demanded more. In response, the corporation adopted a global strategy in relation to embedded systems. They believed that the automotive sector was right for further growth. It was believed that ever more car manufacturers would want to equip their vehicles with greater levels of technology in the future, and it was with this in mind that the respondent acquired two small companies already active in that particular sector. They were XS Embedded GmbH (see above) and Monta Vista Automotive. XS Embedded was acquired in July 2014. Monta Vista was acquired in February 2013, just before the claimant joined the respondent. A colleague of the claimant, Sou Bennani, who previously worked for Monta Vista, joined the company on the acquisition of that company and became responsible for automotive accounts in Europe, including a company called Continental in Germany.

14.12 The strategy adopted, which would come into effect at the start of the accounting year beginning on 1 February, 2015, was to divide the salesforce of the division, in effect, into two subdivisions: automotive and general. On the face of matters, there was a third subdivision: semiconductors, but, at least as far as the EMEA region was concerned, the personnel were the same in relation to semiconductors as they were in relation to general embedded products. The consequence of the change, so far as the claimant was concerned, was that, of his six direct reports, Thomas Pfuhl and Sou Bennani were assigned to the automotive division and reported to a new director of sales Serkan Arslan, based in Stuttgart. The claimant retained only Thomas Cardon, based in France. The fate of the three technical reports was not explained to me: these changes were reflected in organisation charts at pages 88 and 89.

14.13 I was presented with two pieces of evidence showing the extent to which Mr Perry became involved in the activities of the sales team. In an email chain of 5 February, 2014, he commented that Thomas Cardon continued to un-impress, and he asked Mr MacGillivray if he was keeping him on for another year, and, if so, why? This is at page 62. The claimant asserts that he resisted pressure from Mr Perry to have Mr Cardon dismissed. He was not alone. The group HR adviser in France also said that an employee cannot be dismissed there without reason. Like the claimant Mr Cardon was

transferred away from automotive sales, and he stayed with the company. The claimant was involved with Mr MacGillivray in arranging this.

14.14 In connection with the mechanics of the subdivision, the claimant was asked at the end of March 2015 to produce a planning worksheet for the year ending 31 January, 2016 for General Embedded and Semiconductor Sales, and, having produced it, to break the worksheet down into three separate territories: the North, Germany and the South. Mr MacGillivray, who asked the claimant to do this work, told him that Glenn Perry wanted to understand the account ownership in detail for every person on the team: see page 93.

14.15 In March 2015, Mr MacGillivray made an announcement to the claimant and his colleagues explaining the subdivision: see page 92. He said that, in an effort to tighten the alignment with the division's automotive strategy and to increase the focus on general embedded markets, the division would be vertically organised into Automotive, General Embedded and Semiconductor teams in the year ending 31 January, 2016. There would be separate leadership of these separate teams. Mr MacGillivray himself, having previously been responsible for all sales teams, would now only be responsible for sales teams engaged in general embedded systems and Semiconductor sales. A new director of worldwide sales, Markus Kissendorfer was appointed to be responsible for automotive sales.

14.16 The claimant was very unhappy about what he saw as a demotion. On 31 March, he sent an email to Mr MacGillivray, page 93, in which he said:

> "We need to speak about this. I gave up a very good job with EMEA wide responsibility and I am not prepared to just become an AM [Account Manager], selling below par, non-competitive products. If Mentor is doing this so I quit, I will be suing the company and according to an employment lawyer, I have a very good case!"

14.17 The claimant did not resign his employment because of these changes. There is no doubt that the change made a substantial difference to his responsibilities. He was now required to concentrate on sales to the general sector and would not derive commission from the efforts of those engaged in sales to the automotive sector, which was now an entirely separate team. In addition to that, he had fewer account managers generating sales. In fact, the claimant accepted the change and continued in his employment.

14.18 The appointment of Mr Arslan as Director of Sales in the automotive subdivision was not a success. Having joined the company on 3 January, 2015 he left on 23 May in the same year and was not replaced.

14.19 The claimant's Performance Review Summary of the year to 31 January, 2015 is at page 200-201. The claimant is again shown as having achieved a score of 5 and the comments are universally complimentary. One of his major successes included the development of potential customers for safety and security products and establishing credibility with several potential automotive customers who require the product called hypervisor. Although this review was prepared in August 2015, it spoke of the claimant's results in the year immediately prior to the subdivision of the embedded products division which occurred at the beginning of that year.

14.20 In August 2015, the corporation recruited Gregor Braun to work with the claimant in general embedded system sales in Europe. He would be based in Germany. His salary was significantly less than the claimant's salary, paid in Euro. His basic salary was €84,000 and he was entitled to earn an additional €56,000 if his earnings for the company were on target. The requisition form for the recruitment showed the hiring manager as Mr MacGillivray: see page 153A. In a later document, at page 202A, the claimant was shown as Mr Braun's new manager. The claimant said that this was solely so that he could sign off Mr Braun's expenses, but the document itself stated that the reason for it was to correct the reporting line so as to show Mr Braun reporting to the claimant.

14.21 Mr MacGillivray regularly reviewed the expectations of the sales team in relation to business prospects. An example of a spreadsheet used at his request included pages 203 and 204, and showed the claimant, Mr Braun and Mr Cardon all with sales in the pipeline. This demonstrated that the claimant had accounts for which he was personally responsible. I was told and accept that the claimant's commission, or additional salary, was based entirely on the performance of the team as a whole, and he was not judged on his own sales performance at all. The display of information at page 204 shows that he nevertheless had individual responsibility for some accounts. There was a similar document for the quarter beginning 1 February 2016 at page 205. Again, the claimant is shown having accounts in his own name, for which he was responsible.

14.22 Towards the end of 2015, Mr Perry, in a speech called the Town Hall Speech, announced that the embedded systems division was doing very well and would be contributing to the overall profits of the group and in so doing making up for other divisions.

14.23 In November 2015 Mr MacGillivray worked with Mr Spiro on a proposal to remove the position occupied by the claimant as Director Sales in the EMEA Area. They developed a document together which had to be sent to the head office in the USA for the purposes of stock exchange requirements. That was because the potential liability from making a person redundant was a matter that had to be made public. This document, at page 207, recited the

division of the salesforce for embedded systems into two separate channels, as they were described. It stated that the majority of the existing business was in automotive, and general embedded was a smaller, emerging segment of the business. The document stated that the claimant had been responsible for a small team of two and for growing the general embedded business to meet assigned objectives. It said that it had become clear that there was insufficient business opportunity in the region and growth objectives were not being met. Given the small size of the team and the business opportunity, the Sales Director position was not required. It would be eliminated and replaced by an Account Manager position for Northern Europe, where the business opportunities are more significant.

14.24 Although Mr MacGillivray denied it, there is no doubt in my mind that this amounted to a decision to make the claimant's post redundant. By this stage no consultation had taken place with the claimant. However, the document did say that the company and its subsidiaries would investigate whether any alternative open positions exist which any impacted employee, meaning the claimant, could fill and would consider such an employee for relevant positions which became available prior to termination.

14.25 Bearing in mind that the company's financial year ends on 31 January in each year, towards the end of January 2016, there was email correspondence between Mr Spiro in the UK and Mr MacGillivray in the United States concerning the proposal to make the claimant's position redundant and about the need to speak to him about that: see pages 213-214.

14.26 In the hearing bundle at pages 215-224, there are various extracts from spreadsheets relating to targets, called quotas, and actual performance as compared with quotas. The documents are difficult to follow and it is clear that they were not explained to the claimant as part of any consultation with him. In the case of the performance results, the report was dated 31 January, 2016. It was therefore not available to Mr MacGillivray and Mr Spiro in November when they were developing the proposal for redundancy, although I accept that by reason of his close involvement in performance management Mr MacGillivray would have been aware of the relevant figures as the year progressed. These documents appear to suggest that the claimant had an individual quota of $1.5 million of sales and Thomas Cardon had a quota of $1.8 million of sales. There is a note against the claimant's name that he has a team quota for Europe of $3.3 million, which is clearly the total of the two individual targets. In the later part of the document, Mr Cardon appears with his target of $1.8 million, the claimant with his territory target, shown as $3.425 million, and Gregor Braun target of $750,000. In terms of target attainment, Mr Cardon is shown as having achieved 53% of his individual target, and the claimant 46% of his team target.

14.27 An early version of an organisational chart following the subdivision at page 89 show the claimant as a manager, responsible for one further member of staff Thomas Cardon. A later version (page 163) of the organisational chart for the general embedded subdivision shows the claimant and Mr Cardon as both reporting to Mr MacGillivray, as if on the same level. Lastly, a further version of the organisation chart at page 211, shows the claimant, Mr Cardon and Mr Braun all individually reporting to Mr MacGillivray. Mr Cardon and Mr Braun are referred to as Account Managers, and the Claimant as Sales Manager/Account Manager.

14.28 The claimant was placed at risk of redundancy in a telephone call on 3 February, 2016 in which he, Mr Spiro and Mr MacGillivray were participants. The claimant knew in advance that he was to talk to Mr MacGillivray, but the involvement of Mr Spiro was a surprise to him. There was no minute of this meeting but Mr Spiro wrote to the claimant the same day to tell him that he was now at risk of redundancy: page 227. He said that there had been a review of the business strategy of the general embedded sales channel and a decision had been made to reduce operating expense. No final decision had been made, he said, but the likely impact was that they would no longer require a director of sales. He said this was a unique role within the business and he was therefore advising the claimant that his position was at risk of redundancy. There would be a period of consultation, the purpose of which was to discuss the basis for proposing that the position was at risk of redundancy and to consider ways in which redundancy could be avoided. The claimant was asked to consider if there were any ways of avoiding redundancy that he could suggest. In effect, as the claimant conceded, he was being asked for his ideas about that. There was to be a formal consultation meeting and the claimant would be entitled to bring a colleague or union representative. The date of the proposed meeting was not given.

14.29 The claimant had purchased tickets to attend the respondent's annual sales conference and, the same day, he sought the advice of Mr MacGillivray about whether he should attend. Mr MacGillivray was of the view that he should not attend but he said that he would not share the claimant's situation with anyone at the meeting. The claimant replied asking if that meant that he was not going to be seriously considered for an individual contributor role, thus distinguishing his position of director of sales in respect of which he was assessed for his commission on the performance of the team from that of an individual account manager, who would be assessed on his own performance alone. Mr MacGillivray replied there was no guarantee that there would be an additional position approved for Europe, despite what had been said in the document presented in November (page 207). This email chain is at page 228.

14.30 A further email chain at pages 230-232 provides evidence of Mr MacGillivray's thinking. The email exchange starts with a discussion between the claimant and Mr Spiro which is then

forwarded to Mr MacGillivray. He said that the situation was “cut and dry”. The claimant was given a low number for all of Europe in the year 2015-16 and finished at 46%. He said the weak business should justify the decision to eliminate the manager position in that region. Mr Spiro replied that the claimant was at risk because the company was eliminating a UK headcount, the reason for which was cost reduction. The fact that he was at 46% of his quota was not directly relevant but supported the case that his position was not economically viable. Mr Spiro asked Mr MacGillivray how the channel finished in the year. Mr MacGillivray said that overall it was 97% of target, but Europe was the weak region.

14.31 The first formal consultation meeting was held, by telephone, on 9 February. The claimant asked Mr Spiro if the meeting was to be recorded and he was told that it would not be. He was not told that it was not acceptable for the claimant to record the meeting and the claimant did just that. He produced a transcript of the call at pages 237-244 and the parties adopted this transcript as the record of the meeting.

14.32 Although Mr MacGillivray was present during this telephone meeting, he made virtually no contribution to the discussion, and the only interventions he made appear on page 241 and 242. Mr Spiro propose the agenda for the meeting. He suggested they discussed reasons for the redundancy, selection, ways to avoid the redundancy and what payments would be made should the claimant be made redundant. Mr Spiro told the claimant that the division would like to save costs and “had decided” that the particular position was no longer required. There would be a cost saving. The claimant said that he did not understand that it was a unique position nor did he accept that the division needed to save costs, based on what Mr Perry said in his quarterly Town Hall Speech.

14.33 The claimant discussed the history of his employment before the sub-division of the embedded systems division and said that he was shocked and surprised. He had left a very good position (in his previous employment) and when he took over, the state of the business was not very good. Everyone was demoralised. He said that revenue grew because of his efforts. He then referred to the removal of the automotive section and asked why it had happened. Mr Spiro said that it was not relevant because it had happened more than a year previously.

14.34 The claimant then argued that, after the subdivision, the first year was to be an "investment" year and he worked very hard to build a pipeline. He said that he should be given back the responsibilities of resources that he had previously, including the automotive business. He wanted that matter put to the vice president of sales but he said that what had been done, had been done with malicious intent. In effect, it was engineered.

14.35 There was a discussion about whether the decision to make the position redundant was a decision relating to the group as a whole or just the UK company. Mr Spiro said he was concerned only with the UK company. He later clarified this to say that, in the widest sense the company had decided to cut costs, and the way they had decided to do that was to lose this position in the UK company. The claimant said that the decision to cut costs was not backed by any data. Mr Spiro said that there would be a saving of the claimant's salary. He then confirmed the claimant's position was selected because it is unique therefore no selection process was required.

14.36 Mr Spiro then moved the discussion onto identification of suitable alternative employment. He promised to send the claimant details of existing vacancies within the company on a worldwide basis. The claimant said that he should be reinstated to the position and responsibilities that he held the end of the previous fiscal year. He was told that that position did not exist. The claimant said that such a position should be created. Then, for the first time, Mr MacGillivray intervened in the meeting and asked the claimant if he wished to move to automotive. The claimant said he wanted to be responsible for the automotive accounts for which he had been responsible previously, such as Bosch. Mr MacGillivray said that automotive was now in a different channel. The claimant wanted to raise the matter with the senior director now responsible for that part of the business. Mr MacGillivray insisted there were good business reasons for the decision. The claimant argued that he had worked hard in the previous year, that he had built a pipeline of prospective sales, that he had trained Mr Braun and now he was to be made redundant. He plainly thought that the decision was not fair. When Mr MacGillivray suggested that the claimant himself could not be happy with the revenue he had generated in the year, Mr Spiro corrected him to say that the selection was not about performance. He said it was a legitimate decision to reduce cost and was not about performance.

14.37 The claimant still sought an explanation as to why the automotive sector had been removed from him. As the meeting drew to a close he was particularly concerned to obtain an explanation about that. He did not receive an answer, but Mr Spiro appeared to offer to obtain an explanation. After that, they discussed payments and there was discussion about a possible settlement in excess of the statutory redundancy entitlement. Thereafter the meeting closed.

14.38 Following that meeting, Mr Spiro advised the payroll department by email (page 245) that there was a possibility that the claimant may leave at the end of the month. His salary would be automatically generated within a day or so of his email of 11 February, but a manual instruction could be made later in the month if there were any changes in the event that the claimant was made redundant.

14.39 Mr Spiro then wrote to the claimant on 18 February, page 253-255, in which he confirmed the matters they had discussed at the

meeting on 9 February. Nothing that he said in that letter will have come as any surprise to the claimant and Mr Spiro proposed a further consultation meeting at Newbury on 29 February.

14.40 On the same day, Mr Spiro sent the claimant an email containing a link to an internal website which would provide the claimant with information about vacancies within the company worldwide. The version of this document shown to me (page 257) was produced later, on 16 June, 2016. It showed 275 open jobs worldwide, but only 10 in the UK. The position in February 2016 is likely to have been different, but the claimant accepted that there would have been a substantial number of vacancies worldwide, similar to 275, but he was only interested in vacancies in Europe. He did look at the information made available to him in February, but found no suitable vacancies.

14.41 On 21 February, the claimant sent an email to Mr Spiro, page 255-256. In this email, the claimant provided some notes that he had made which, it is now clear, were derived from his recording, although the claimant did not say in this email that he had recorded the meeting. What he said was that he had taken notes. In this email, he suggested that the decision to remove the automotive business from him was unethical behaviour and that it was likely to lead to an unfair dismissal if the respondent proceeded with his redundancy. He also took issue with several other points.

14.42 The second consultation meeting took place on 29 February as planned. The claimant and Mr Spiro were present in person and Mr MacGillivray was present by telephone. Mr MacGillivray provided answers to the claimant's questions about the reasons for the subdivision a year earlier. He said that the channels were separated in order to allow growth. They brought someone in who knew automotive. They hired in Germany. The claimant was a better match for the other business. Mr MacGillivray conceded that Mr Perry is powerful and influences decisions but said that "channel decisions are mine". He did not need approval for the decision to assign the claimant to the general embedded systems channel. Mr MacGillivray also said that the bulk of the business in automotive was in Germany and the claimant does not speak German. The claimant said he respected what Mr MacGillivray said but disagreed. It is not clear with what part of that statement the claimant disagreed. When asked why the claimant was singled out for redundancy Mr MacGillivray said that the claimant was the only one in the team who had a team plan. Everyone else has an Account Manager plan. The claimant had refused to take such a plan and, he added, had threatened to sue the company. He said that he had kept the claimant in the same role. Mr MacGillivray agreed that if there was a vacancy for an Account Manager he could apply but the previous year he had refused. When Mr Spiro asked the claimant why he thought that it was an unfair dismissal, he said that because of the changes, the situation was engineered. The first year after the subdivision was to be an investment year. 70% of the revenue

of the entire division had gone. Anyone would be able to see the situation was engineered. Finally, when the claimant was asked if he had looked at the vacancies, he replied that he did not. Mr Spiro said that they had not avoided redundancy. The claimant's notice started that day. He was told that he could appeal.

14.43 Mr Spiro confirmed the decision to dismiss the claimant by a letter dated 1 March, 2016, page 273. He set out the history of the consultation which he maintained had taken place. The company's conclusion was that they no longer required a Director of Sales for the embedded channel, which was a unique role within the business. The appropriate course was to dismiss the claimant on the ground of redundancy. He explained what payments the claimant would receive and his right to appeal.

14.44 The claimant did appeal against his dismissal. He did so by email sent to Amit Geva on 3 March, page 275. The basis of his appeal was that the automotive business had been removed from him and he was in effect demoted to the position of Account Manager. However, he said, the dismissal was not merely engineered. He could prove, he said, that he had tried to protect an employee who was being unfairly dismissed and he was singled out and demoted. He wanted to know why the company allowed a General Manager to bully him and ruin his career and in the process create stress for him and his family. He attached a copy of an email he sent to Mr Spiro on 21 February, which is the document already referred to at page 255-256.

14.45 The claimant's appeal was considered by Dr Geva. A telephone hearing was set up to take place on 8 March. There are no notes of the appeal hearing, and the only record appears in the decision by Dr Geva sent by email to the claimant on 20 March, page 284-285. Dr Geva said that after carefully reviewing the claimant's appeal, he could not find evidence to support overturning the decision. He dealt with the suggestion that Mr Perry had influenced the decision to end the claimant's employment. After reciting some of the points the claimant made in this respect, Dr Geva said that he did not receive any evidence to support those allegations. Furthermore, he said, he could not see any connection between those points and the elimination of the claimant's position. He rejected the suggestion that the claimant should have been compared with Account Managers in other areas outside the UK. He said that the company was only required to consider positions in the UK. As to the suggestion that the claimant was in reality an Account Manager, he related what Mr MacGillivray had apparently told him about the claimant having rejected such a role previously and that he had threatened legal action. His view was that the claimant's role was a unique role, the role had been made redundant and the claimant had lost his job as a result of that.

14.46 The claimant replied to Dr Geva's decision by an email of his own on 21 March, page 283-284.

14.47 As mentioned at the start of these reasons, the claimant approached ACAS to begin the process of early conciliation on 5 April, the ACAS certificate of early conciliation issued on 5 May and the claimant commenced these proceedings in the tribunal on 3 June, 2016.

Conclusions

15. I now give my conclusions. I do so in relation to the issues that I had to decide, applying, as necessary, the above provisions of law to the facts that I found.

Reason for Dismissal

16. The first question I have to decide is the reason for the claimant's dismissal. Throughout these proceedings, the claimant has made much of the subdivision of the embedded systems division into two sales channels. I am prepared to accept much of the claimant's case in this respect. It is clear to me that Mr Perry is a man of substantial power and influence within the wider organisation that is Mentor Graphics. Examples of the wielding of such power appear in my findings of fact above at paragraphs 14.9, 14.13 and 14.14. I also accept that Mr Perry had disagreements with the claimant over at least two matters, the promotion of guaranteed service levels and the extent to which open source software could be exploited. He also had concerns about Mr Cardon. It is also clear to me that the automotive business was the jewel in the crown of the embedded systems division. That part of the business generated 70% of the profits during the time the claimant was responsible as Director of Sales for the entire division. The group's success in penetrating the automotive sector was a reason for, or possibly driven by, the acquisition of two businesses already active in that sector. I therefore accept and find that Mr Perry had a strong influence in the decision to subdivide the sales team. I also accept that Mr Perry probably did not particularly like the claimant. I am not prepared to so find, but I accept that it is a possibility that he proposed that the claimant should be placed in charge of the general embedded systems sales channel. I do not find that any resistance on the claimant's part to the idea that Mr Cardon should be dismissed played any part. In the end, there was a solution which, I must infer, satisfied Mr Perry. There was no evidence to suggest that, a year later, the claimant's part in that matter was regarded as a reason to dismiss him.

17. However, all of those factors are relevant to the decision to subdivide the sales team of the embedded systems division. They are not reasons for the claimant's ultimate dismissal one year later. Mr Perry's interests lay in maximising sales of the division as a whole, including general embedded systems. If the claimant had been successful in his new role after January 2015, I am sure that Mr Perry would have been pleased. He did not in any way, at least on the evidence presented to me, seek to procure the dismissal of the claimant at the time of the subdivision in January 2015. The model agreed was to have two separate sales subdivisions, each headed by a Director of Sales. The appointment of Serkan Aslan was not

a success. He lasted little more than four months. Between May 2015 and November 2015, when the restructure plan that affected the claimant was devised, the automotive sales channel existed without a Director of Sales. Given the imbalance in revenue between the two sales channels, it is almost inconceivable that close observers of the structure of that part of the business would not notice that the more successful subdivision was achieving its results without the need for a Director of Sales. It is therefore logical that the business would think very carefully about whether or not it needed to have a Director of Sales in relation to the general embedded systems sales sub-division.

18. In my judgment, this is a much more likely and feasible reason for the claimant's dismissal, than that Mr Perry was determined to remove the claimant from the company. I cannot rule out the possibility that Mr Perry and/or others wanted to place the claimant in a position where he was likely to fail. This seems to me to be an inherently unlikely proposition however. Any business wants to succeed by maximising sales. What is more likely is that, based on his success as Director of Sales in the combined division, the claimant was perceived as someone who could develop the general embedded systems sales division into a more successful business sector. The automotive subdivision did not require the claimant's special expertise because it was already successful.

19. My judgment as to the reason for the claimant's dismissal is therefore that the business decided that it no longer required a Director of Sales in the general embedded system sales division and that that decision was particularly underlined by continuing relatively poor sales in that subdivision and the fact that the more successful automotive subdivision did not have such a position. The consequence of those factors was to lead to a decision to dispense with the claimant's role. In my judgment, that was the reason for his dismissal.

20. I should add that I am not impressed with the argument that the claimant should have been treated as if he were an Account Manager. It is true that the claimant was shown in records of the sales pipeline as being responsible for a number of individual accounts. However, his remuneration package was never changed and his performance was always assessed on the achievements of his team, albeit the size of the team was reduced after the subdivision of the sales team. He specifically rejected the suggestion that he might become an Account Manager, in his email of 31 March, page 93. The reduction in the size of his team carried with it a corresponding reduction in his quota, or target. I do not agree that the claimant was, in effect, an Account Manager. I accept that, if my view were otherwise, a decision to remove an unoccupied position of Director of Sales would have no implications with respect to the claimant's employment. It would not amount to a reason for his dismissal. However, the respondent plainly did not see it in that way and nor do I. The claimant still held the position, even if the duties of the position and its responsibilities were reduced, and the decision to remove that role was the first step in the claimant's dismissal and was undoubtedly, in my judgment, the reason for it.

Reason Potentially Fair?

21. The next question can be dealt with more briefly. It is whether or not the reason so identified as the reason for the claimant's dismissal is a potentially fair reason under Employment Rights Act 1996. Where it is submitted that the reason is that the employee was redundant, it is necessary to test the assertion of redundancy by reference to section 139 of the same Act. The text of the section is set out above. The question is whether or not the respondent's requirements for an employee to carry out work of a particular kind had ceased or diminished or were expected to cease or diminish. In my judgment that test is satisfied in this case. It is not necessary that the employer has to establish financial difficulties or even the need to make economies. It is sufficient if there is a decision by those responsible for the business to dispense with a particular role. The role of Director of Sales was distinct from the role of Account Manager. I did not hear much about this, but I infer that the role of the director was to motivate and encourage the Account Managers, because the Director of Sales would be rewarded by their efforts. It was a distinct role and the respondent's decision to dispense with it represents a decision to cease a requirement for an employee to carry out work of that particular kind. The section 139 test is therefore satisfied and the reason is therefore a potentially fair reason by reference to section 98. The reason that the claimant lost his job was, as a matter of causation, because the respondent took the decision to dispense with the role of Director of Sales in the general embedded systems sales channel.

Reasonableness

22. The next question I have to decide is whether the dismissal was fair. The respondent must act reasonably. I am required to consider whether the respondent properly consulted the claimant, whether they made a fair selection and whether they made reasonable efforts to avoid dismissal.

23. The first point to make in relation to this is that, notwithstanding that the respondent is a company registered in the United Kingdom, which represents a comparatively small part of the overall business operated by the group of which it is a part, the claimant was regarded as part of a global structure. His colleagues and subordinates worked in different legal jurisdictions across the world. In the appeal, Dr Geva was quite wrong to say that the respondent was only required to consider positions in the UK. The context for that comment was a submission related to selection. The claimant submitted that his position should be compared with that of Account Managers in other jurisdictions. I would have agreed with the submission if it was accurate to say that the claimant should have been regarded as an Account Manager. That was not the case, in my judgment. In terms of selection, the claimant was entitled to be compared and placed in a pool with any other Director of Sales in the embedded systems division, viewed as a whole, including individuals working in different countries. However there were no other Directors of Sales in that division. In my judgment, the respondent was entitled to regard the claimant as occupying a unique position. Put another way, the adoption of a pool of one was not outside the range of reasonable selection options. Under UK

law they were not required to place the claimant in a pool with anyone else, wherever they might have been based. The question of selection therefore does not arise.

24. I still have however to consider the question of consultation. The criticism that is made of the respondent is that the decision was made at a global level in November 2015 to dispense with the position of Director of Sales. That decision was undoubtedly made without any consultation with the claimant. I disagree if it is suggested that the claimant should have been involved in consultation before that decision was made. That is a business decision and is essentially a decision for the employer to make. Often, decisions of that nature affect a number of employees with multiple potential redundancies. In this particular case, only one employee, the claimant, was likely to be affected. That consideration does not, in my judgment, affect the right of the employer to make a decision for itself about dispensing with a particular position. Consultation with the employee who is affected by that decision is something that must follow the making of that decision. Furthermore, consultation is a requirement of UK law and needs to occur locally, not globally.

25. There were two aspects of the evidence which are relied upon in support of the proposition that there was no real consultation with the claimant in this case. The first was the decision that the claimant should not attend the annual sales conference. The second was that the payroll department was informed that the claimant may leave at the end of March 2016. As regards the first, the question about whether or not the claimant should attend the sales conference came from him. It was the claimant's response to the fact that his employer was consulting with him about the possibility of his being made redundant. Mr MacGillivray's response to the claimant's question was a balanced one, that reflected the likelihood of the claimant's redundancy, but it did not indicate that he had a closed mind to the possibility of the claimant's redeployment, only that it was not likely that he would hold the position of Director of Sales for much longer. The suggestion that he should not attend the sales conference was almost inevitable given those particular circumstances.

26. The decision about informing payroll was made in cautious terms. They were told that there was a possibility the claimant would be leaving the company. As such, that information did not necessarily indicate a closed mind on the part of the respondent in the UK to the possibility of redeployment. I do not think that there was anything sinister about that.

27. There were in effect two consultation meetings, on 3 February and 9 February and there was a third meeting on 29 February. Given the narrow effect of the decision made in November, it is difficult to see that the respondent could have done anything more in terms of consultation with the claimant. There was no attempt to pretend otherwise than that the decision to remove the particular role placed the claimant at risk of redundancy. His redundancy was a likely outcome, and the focus of consultation should have been in relation to redeployment, as to which see below.

28. The respondent did not fail to consult with the claimant. They engaged in discussions with him about the matters that concerned him. These were primarily matters relating to the subdivision of the sales teams a year earlier. Mr Spiro was not particularly well equipped to answer the claimant's questions about that. Mr MacGillivray dealt with the matter at the third meeting on 29 February. It is clear from the notes of the three meetings that the claimant had every opportunity to say what he wanted to say and, in my judgment, he was provided with clear explanations of the reason for the decision to make the position redundant and, in the end, the reasons for the original subdivision.

29. Lastly, I must consider the extent to which the respondent in the UK made efforts to find alternative employment for the claimant. The possibility of alternative work was not restricted to jobs in the United Kingdom. The claimant himself said he was willing to consider alternative work anywhere in Europe. That is reasonable but realistic. The claimant was provided with a jobs vacancy list showing in the region of 275 vacancies worldwide. I cannot be certain about this because the list that I was shown was produced four months later. I infer that the list provided to the claimant in February would have contained a similar number of vacancies. In June, there were only 10 such vacancies in the UK and none of them were of interest to the claimant. Although he told me that he did consider the vacancy list, he told Mr Spiro at the meeting on 29 February that he had not read it.

30. There is no sign that the claimant ever offered to take an account manager position, although it must be said there were no such vacancies. It might have been possible for the respondent in the UK to consider within the wider company the possibility of “bumping” someone like Gregor Braun, but the claimant himself did not suggest it. I did consider the decision in Barratt Construction v Dalrymple [1984] IRLR 385 in this respect. That case suggests that the onus was not on the respondent to suggest to the claimant that he might wish to take a more junior position. Of course, if the claimant himself had suggested it, the respondent would have been bound to consider that suggestion. I do not think that the respondent could have done any more in this respect than they did do.

31. I should say something finally about the appeal, because Mr Stephens made a submission about it. I agree with the submission that the appeal was a superficial exercise. Dr Geva brought no independent judgment to the process and listened only to the claimant and Mr MacGillivray. He was wrong about one important aspect. None of this helps the claimant if, as I find, the dismissal was not unfair. The appeal is only relevant if the original process was unfair, and I do not hold that it was.

Decision

32. For all of those reasons, I have reached the conclusion that this was not an unfair dismissal. The claim must be dismissed. It is not necessary for me to consider the issues at paragraphs 12.4 and 12.5 above. The remedy hearing on 24 March is not required.

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Employment Judge Southam

Date: 21 Mach 2017

JUDGMENT SENT TO THE PARTIES ON:

21 Mach 2017

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FOR THE TRIBUNAL OFFICE