EMPLOYMENT TRIBUNALS

Claimant: Mr D MacDonald

Respondent: Mitie Technical Facilities Management Limited

Heard at: **Leeds** **On:** **25, 26 and 27 July 2018**

Before: **Employment Judge Licorish (sitting alone)**

Representation
Claimant: in person
Respondent: Ms J Ferrario, Counsel

RESERVED JUDGMENT

1. The claimant was not unfairly dismissed by the respondent. That complaint is dismissed.

2. The respondent did not breach the claimant's contract of employment in respect of the calculation of his overtime payments from 1 August 2012 until the termination of his employment. That complaint is dismissed.

3. According to the claimant's contract of employment applicable at the date of termination, the respondent was not entitled to dismiss the claimant with a payment of lieu in notice.

4. In choosing to make a payment in lieu of notice to the claimant, the respondent accepts that it should have compensated the claimant for the loss of use of his company vehicle during that six-week period.

5. The respondent also breached the claimant's contract of employment by not compensating him for overtime he would have earned during his notice period.

6. If, within 28 days of receiving this Judgment, the parties have been unable to agree compensation in respect of the successful breach of contract complaints, they must inform the Tribunal accordingly. They should set out the continuing areas of dispute, and provide a time estimate and any dates of unavailability in the following six months. A remedy hearing will thereafter be listed.

REASONS

1. The claimant started to work for Norland Managed Services Limited (Norland) as an air conditioning electrical engineer on 28 February 2011. His employment transferred to the respondent limited company on 1 August 2012 under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). Following a reorganisation of part of the respondent's business, as a result of which certain air conditioning engineering services were outsourced to another company, the claimant was dismissed with a payment in lieu of notice (PILON) on 18 August 2017.

2. By a claim form presented to the Tribunal on 15 December 2017, following a period of early conciliation from 17 October to 1 December 2017, the claimant complained that he was unfairly dismissed according to regulation 7(1) TUPE or, in the alternative, because his role was not genuinely redundant, and/or the process followed by the respondent was not fair or objective. The claimant also complained of breach of contract in respect of the calculation of his overtime pay throughout his employment by the respondent, and the calculation of his PILON.

3. Following a preliminary hearing in April 2018, which determined that there was no relevant TUPE transfer in respect of the outsourcing arrangement in 2017, all claims against a named second respondent were dismissed, as well as a claim against the respondent under regulation 7(1) TUPE for automatically unfair dismissal based on the contended 2017 transfer.

4. The claimant's complaints are largely denied by the respondent. Its primary position is that the claimant was fairly dismissed by reason of redundancy. It concedes that the claimant should have been compensated for the loss of personal use of his company vehicle during what would have been his notice period, but the parties are unable to agree on how any compensation should be calculated. It denies that the claimant should also be compensated any overtime pay because overtime was not guaranteed.

The evidence

5. During the hearing, for the respondent I first heard from Stephen Ross (Lloyds Banking Group regional manager), Brian Lawley (project manager), Graham Clayton (former engineering account director) and Mark Jenkins (account manager). I then heard evidence from the claimant. All the witnesses' written statements were read in private by the Tribunal before the respondent called its first witness.

6. I was also provided with an agreed bundle of documents (initially comprising 312 pages). I read the pages referred to in the witness statements, during the witness evidence and in written submissions. Additional documents were added to the bundle by consent or with my permission during the course of the hearing, based on their relevance to the issues. References to page numbers in these Reasons are references to the page numbers in the complete bundle of documents before the Tribunal.

7. The claimant's evidence finished sufficiently late on the last day of the hearing with the effect that the parties agreed to provide written submissions and replies prior to the Tribunal reaching a reserved decision.

The complaints and issues

8. This hearing was listed to determine liability only. At the beginning of the first day of the hearing the live complaints and issues were discussed and appeared to have been agreed, based on a draft list produced by the respondent. Among other things, during our discussion the claimant confirmed that he pursued complaints of "ordinary" unfair dismissal and breach of contract only. Legal submissions contained in his written statement also appeared to confirm that this was the case. Nevertheless, towards the end of the first day of the hearing, and during the claimant's cross-examination of Stephen Ross, it became evident that the claimant also continued to pursue a complaint of unfair dismissal under regulation 7(1) TUPE, based on the transfer from Norland to the respondent in August 2012.

9. At the beginning of the second day, having reviewed the case file, I established that there was indeed a such complaint pleaded by the claimant that had not been withdrawn or otherwise disposed of by the Tribunal. However, I determined that this would change the position only in terms of adding further steps to the issues to be determined, and considering any further submissions on those issues.

10. Otherwise, the respondent continued to maintain that the sole or principal reason for the claimant's dismissal was a genuine redundancy situation. If I was not persuaded by that contention and concluded that the sole or main reason for the claimant's dismissal was the 2012 transfer, a genuine redundancy situation or change in job function is capable of amounting to an economic, technical or organisational (ETO) reason entailing changes in the workforce. If the respondent was successful in any argument in this respect, the issues already defined in the ordinary unfair dismissal complaint relating to the fairness of the dismissal would thereafter fall to be determined.

11. In addition, the claimant's regulation 7(1) complaint was pleaded on the basis that since the 2012 transfer there had been "*persistent and relentless attempts to vary his terms and conditions without success*". Both parties had already addressed in evidence discussions relating to the claimant's Norland terms and conditions during his employment by the respondent as part of the breach of contract complaint. In any event, Stephen Ross in his witness statement had also addressed the claimant's specific contention about the reason for his dismissal being the 2012 transfer.

12. Following a short adjournment, both parties confirmed that they were content to carry on with the hearing based on my analysis of the issues above. Having further taken into account the contentions made during the hearing and submissions presented, I therefore summarise the issues to be determined as follows:

    12.1 Was the sole or main reason for the claimant's dismissal the TUPE transfer from Norland to the respondent on 1 August 2012?

    12.2 If so, was the sole or main reason for the dismissal an ETO reason entailing changes in the workforce?

    12.3 If not, then the dismissal was automatically unfair.

12.4 If the sole or main reason for dismissal was not the 2012 transfer, what was it? The respondent says it was for redundancy.

12.5 If the sole or main reason was redundancy, did the respondent follow a fair procedure? That is to say, did the respondent:

12.5.1 warn and consult affected employees, including the claimant?
12.5.2 adopt a fair basis on which to select for redundancy?
12.5.3 take such steps as were reasonable in identifying suitable alternative employment?

12.6 If so, was the decision to dismiss within the range of reasonable responses?

12.7 If the respondent adopted an unfair procedure, was there a chance that the claimant would have been fairly dismissed in any event (the **Polkey** issue)?

12.8 Did the respondent breach the claimant's contract by calculating his overtime pay according to a basic 40- rather than 35-hour week from 1 August 2012 until the termination of his employment?

12.9 Did the respondent breach the claimant's contract of employment by dismissing him with a payment in lieu of notice?

12.10 If so, has the claimant suffered any loss? The claimant accepts that he received a payment in lieu of 6 weeks' basic salary, but argues that in the circumstances he should have been compensated for the loss of use of his company vehicle (including a fuel allowance) and the overtime hours he would have worked during his notice period.

Factual background

13. The following background is relevant to the issues to be determined. During the hearing, the parties were also in dispute in respect of a significant number of matters. As a consequence, where I heard or read evidence on matters on which I make no finding, or do not make a finding to the same level of detail as the evidence presented to me, that reflects the extent to which I consider that the particular matter assisted me in determining the identified issues.

14. The respondent is part of the Mitie group (Mitie). Mitie provides outsourced services to a number of private and public sector clients. In 2012, the respondent won a contract to provide facilities management services to the Lloyds Banking Group (LBG) for an initial five-year period. As a result, the claimant's employment transferred to the respondent on 1 August 2012. The claimant had previously been employed by Norland as a mobile air conditioning electrical engineer.

15. The claimant started to work for Norland on 28 February 2011. His statement of the main terms and conditions of his employment issued at the time (at pages 45 to 49) contains the following relevant information:

"*5. Hours of Work*

BASIC HOURS AND DAYS

(a) Your days of work will be Monday to Friday, 5 days per week.
(b) Your contractual hours of work are 40 hours per week, either 7am to 3pm, or 1pm to 9pm, excluding an unpaid lunch break of 1 hour a day.
(c) The Company may seek you to work in excess of normal working hours. Where payment is agreed in advance, it will be in accordance with the following scale:
Hours less than full time equivalent 1 x basic pay
Additional hours Monday to Friday 1½ basic pay …
Additional hours on a Sunday … [or]
Bank Holiday … 2 x basic pay

7. Place of Work

Your normal place of work will be LBG, Trinity Road, Halifax HX1 2RG. Due to the nature of our business, you may be required to work in any of our client's premises, or transferred on a temporary or permanent basis to another location within reasonable travelling time of your home and/or existing place of employment.

14. Vehicles
… A vehicle is deemed necessary for this post. Cars are provided in accordance with company vehicle policy …

16. Termination of Employment

NOTICE

… notice by the employer will be 1 week per full year of service … up to a maximum of 12 weeks …
An exception to the forgoing is summary dismissal on the grounds of gross misconduct, in which case no notice will be given and the dismissal will be with immediate effect."

16. The claimant signed the statement on 27 February 2011 but on his copy made the following handwritten amendment: "*vehicle personal use is covered by my paying tax on vehicle & fuel card (PAYE) & I'm paid door to door ie home to home. See attached email*." No contemporaneous email is contained in the bundle. At around this time Brian Lawley, the claimant's line manager, completed an employee data form to the effect that he would be working an 8-hour early shift, and late shift if required (page 44.1).

17. On 29 May 2012, prior to the transfer of his employment to the respondent, the claimant sent an email exchange to Mr Bhatti in Norland's HR department, copied to Brian Lawley (page 50):

"*The T&Cs that you sent me are inaccurate because they do not define a few points.*

1) I am paid door to door i.e. Home to Home.
2) My normal place of work is Trinity Road however I am a mobile engineer & as such can be deployed at the discretion of my line manager.
3) My normal hours of work are Monday to Friday 06:00 to 14:00 with ½ hour unpaid for lunch …

4) I have a company vehicle … I have full private use of this vehicle for which I am taxed on the van & the fuel card …

The above were agreed with HR & Rob Cox (PRS employment agency) prior to me joining Norland. Happily Norland have always honoured these agreements. Please make sure that Mitie are aware of this."

18. Brian Lawley (the claimant's line manager) recruited the claimant and considers that "*he had gone behind [his] back*" in terms of negotiating the door-to-door payments and company vehicle arrangement. However, in evidence the claimant confirmed that his employment agent negotiated directly with Norland's HR department in this respect. Mr Bhatti replied to the claimant's email to confirm that he had amended the claimant's terms and conditions to reflect the door-to-door payment and company van arrangement, but next to point 3 of the claimant's email restated paragraph 5(b) of the claimant's statement of terms and conditions as his contractual working hours. The information passed to the respondent summarises the claimant's work shift pattern as "*40 hours per week … excluding a paid lunch. Break of 1 hour a day. Paid from Door to Door*", with no guaranteed overtime (page 52 to 54).

19. Contrary to what he told Mr Bhatti at the time, the claimant never suggested in evidence that he had negotiated a half-hour rather than one-hour unpaid daily break via his employment agent before he started to work for Norland, or specifically travel time as overtime. In fact, in response to the Tribunal's questions, the claimant explained that when he started to work for Norland he was on site for 8 hours each day, took half an hour for lunch and submitted a time sheet for 37.5 basic hours a week. He says that was the way in which the other engineers appeared to work at Trinity Road and he wanted to "*fit in*". In cross-examination, however, the claimant conceded that no other electrical engineer had the same contract as him because they had worked on the LBG contract for years with other companies prior to the transfer of their employment to Norland.

20. The claimant also proceeded to claim all travel time from home to his Trinity Road base or any other location as overtime. All of his timesheets were countersigned by his day-to-day supervisor, George Broll, and Brian Lawley.

21. During the consultation period prior to the transfer of his employment, however, the claimant says that he started looking into his "*rights*". He effectively concluded that his contract meant that he was required to be on site for 8 hours each day during specified times, and within those times take an hour's unpaid lunch break. He therefore decided that his basic hours were in fact 35 per week, and he could claim for any time worked over and above those hours (including travel time) as overtime. Following the transfer of his employment in 2012, the claimant proceeded to submit timesheets in this way and they continued to be signed off by George Broll and Brian Lawley.

22. A staff consultation form completed by the claimant and given to the respondent's Mr Williams dated 6 July 2012, states that the claimant's "*contracted working hours per week*" are 40, overtime rates apply "*after 1st 8 hours worked*", "*contractual overtime*" is 7.5 hours per week, and he is "*paid travel at overtime rates*" (emphasis added, pages 61 to 63). The claimant says that there was no further discussion about the information he had provided. A subsequent confirmation letter sent to the claimant on 7 August 2012 confirms

his hours of work as 40 per week and that he is entitled to a company van and fuel card (pages 68 to 70). There is no mention of guaranteed overtime or of any changes to the claimant's right to notice.

23. Sample timesheets from July 2017 were added to the bundle during the hearing (at pages 318 to 323). These show that the claimant was indeed recording his contracted hours at 35 per week, and any "*variance*" (including travel time) as overtime. During cross-examination, the claimant was asked why he did not simply leave home at the beginning of his shift if his travel time counted as working time. The claimant stated: "*because I took it [his contract] to mean that I had to be on site at the start of the shift.*" However, the Tribunal later asked the claimant why he did not begin each week recording travel time as working time at basic rate, and claim overtime after he reached 35 hours. At that point, the claimant stated that Brian Lawley had told him to claim all travel time as overtime.

24. On balance, the Tribunal was not persuaded by the claimant's allegation regarding Brian Lawley. Not only was this inconsistent with what the claimant had said previously (that is to say, it had been his interpretation of his contract that all travel time was overtime), but also this was such an important area of dispute between the parties. Nevertheless, in the contemporaneous documentation before the Tribunal the claimant makes no reference to any express instruction, either during his discussions with Norland HR prior to the transfer of his employment, or with Stephen Ross and Brian Lawley when matters came to a head in 2017. The claimant's arguments raised during his discussions with his managers are that:

    24.1 there had been a long-standing error in this respect, but he had come to rely on these payments (quoted in emphasis at paragraph 36 below), and

    24.2 payment for travel time as overtime had become custom and practice (quoted in emphasis at paragraph 40 below).

    Moreover, the claimant did not put his allegation to Brian Lawley during the hearing, even though he spent some time questioning Mr Lawley about the contention that he had been underhand in negotiating additional benefits before he started work.

25. Brian Lawley states that the claimant was difficult to work with and not a team player, although it was accepted by the respondent that there was no fault with the standard of his work. Both parties referred to numerous disputes which arose about the interpretation of the claimant's terms and conditions. The claimant says that immediately after the transfer he was asked to sign a standard Mitie contract, but he refused pending clarification about various matters which were never revisited.

26. In around February 2013, the respondent underwent a restructuring exercise, as a result of which three regional air-conditioning electrical engineers (known as regional ACs) in Leeds and Halifax, including the claimant, were placed at risk of redundancy. In the event, a Leeds-based engineer left voluntarily, with the effect that compulsory redundancies among the regional ACs were deemed no longer necessary. During the 2013 redundancy exercise, Brian Lawley explained that electrical engineers were also placed at risk but as part of a separate pool, and some were made redundant. From around this time the

claimant worked mainly in Leeds, but also continued to cover LBG's Halifax site.

27. In around 2015 the claimant says that Brian Lawley asked him to go on call. The claimant was willing to discuss a change to his job, but eventually refused because the respondent tried to "*discriminate against*" him regarding the payment of expenses. In cross-examination, the claimant stated that generally during discussions with management he "*didn't fancy being the football in the game*".

28. The claimant also raised a grievance against Brian Lawley in December 2016 for bullying and harassment. That related to complaints from another engineer and supervisor about allocation of work to the claimant. When Mr Lawley tried to raise the matter with the claimant, he in turn made a formal complaint against Mr Lawley. The claimant's grievance was not upheld.

29. The evidence before the Tribunal thereafter details events which took place from the beginning of 2017. The respondent maintains that the claimant's claims for overtime based on a 35-hour week went unnoticed until Stephen Ross began to talk to the claimant about the way in which he worked in early 2017.

30. In January and February 2017, the claimant raised an issue with his managers following the respondent's adoption of a paperless system to allocate and process jobs using Samsung PDAs. In summary, the claimant's planned air-conditioning maintenance work would peak in January and July each year. That work was required for compliance reasons. Whilst the respondent maintained a paper-based system, the claimant would during these peak times complete each job as best he could, or he would do so at a later date. However, the PDA would produce the necessary compliance certificate only when all of the work had been completed and (as the claimant put it) boxes had been ticked in the correct order.

31. The claimant told his managers that he did not have the capacity to do all of the compliance work during peak times, particularly as LBG also imposed restrictions on when most of that work could be done. For example, LBG's "tech rooms" could be accessed only after 10pm. In the claimant's view, the bulk of this maintenance work needed to be done out of hours and by the book, otherwise the respondent would be failing to deliver on its service level agreements and/or "*committing fraud*" by issuing certificates without completing the necessary checks beforehand.

32. Following discussions, on 9 March 2017 Stephen Ross (LBG North regional manager for engineering services) asked the claimant to start to work a later shift. The claimant refused as he saw this as "*working for no reward by altering shift patterns to suit*" (page 84). In fact, such work would have attracted an unsociable hours payment at 1.33 x basic rate. In cross-examination the claimant says he believed that he should be paid at time and a half, even though he was not at that time on a Norland nightshift contract.

33. Mr Ross met with the claimant again on 5 April 2017. A meeting had been scheduled for the following day, but Mr Ross brought forward the meeting as it clashed with a personal appointment. By this time, Mr Ross's preferred option was for the claimant to work between 1pm and 10pm, incorporating an hour's

unpaid break and some travel time, plus an hour's travel time paid as overtime. At this point the claimant was claiming 3 hours' a day travel time as overtime (page 317). Brian Lawley and Nicola Still (the respondent's HR business partner) met with the claimant again on 6 April 2017. The claimant says the meeting "*collapsed*" because HR could not find a copy of his original Norland contract (page 85).

34. In an email to Nicola Still dated 7 April 2017, the claimant accused Mr Ross and Mr Lawley of *"[abusing] their authority in a crude attempt to bully me into discussing unfavourable changes to my working conditions … I will not tolerate such bad behaviour*." The claimant also refers to his managers "*attempting to inflict unfavourable & illegal changes to my working conditions*" (page 83). Put simply, having researched TUPE, the claimant believes that his Norland terms and conditions were (as he put it in his submissions) "*protected for life*".

35. Brian Lawley eventually set out the respondent's position in a letter to the claimant dated 4 May 2017 (pages 86 to 87):

> "*Your weekly contractual hours are 40 hours per week, excluding 1 hour's lunch as per your contract of employment.*
>
> *To accommodate your 40 hours per week your working hours will be for the 2 shift pattern as per your contract of employment (each shift pattern is to be agreed with your line manager) 6:30 – 3:30 or 12:30 – 9:30. (This is to enable you to achieve 40 hours per week and to take your unpaid … lunch break.)*
>
> *You will remain entitled to be paid door to door as per your contract of employment, there is also potential to receive an additional 1 hour's overtime per day (at your contract of employment rate) to assist with travel time (to be agreed with your line manager) …*
>
> *You currently claim 15 hours a week overtime for travel door to door, with effect from 22nd May 2017, we will continue to pay door to door … however this travel time is to be undertaken during your normal working hours unless previously agreed with your line manager."*

36. By email on 18 May 2017, the claimant replied to Brian Lawley and Stephen Ross (pages 88 to 90). He thought that the respondent was interpreting his contract of employment "*differently to suit*" and he would continue to work as he had been. He also copied in the respondent's CEO, who declined to get involved (page 92). The letter to Brian Lawley attached to the claimant's email stated that he would take legal action if the respondent tried to implement changes to his working hours or arrangements for claiming travel time. The claimant also refers to travel time booked as overtime as an "*internal accountancy error*", the payment for which he had come to rely upon financially (emphasis added). Finally, the claimant accused Mr Lawley and Stephen Ross of "*abysmal behaviour*" and "*malicious bullying & harassment*" (page 91). The claimant also claimed as overtime the three hours he says he spent writing that letter (page 93).

37. The claimant's letter was treated as a formal grievance and passed to Patrick Greene, regional operations manager, to deal with (page 95). The claimant subsequently annotated the minutes of the grievance meeting which took place on 8 June 2017. This is because the notetaker had been asked to concentrate

on recording the claimant's answers. He sent those notes to Mr Greene (pages 99 to 107). The claimant says he composed these notes from a recording of the meeting, which lasted two hours. Neither set of notes shows that the claimant obtained Mr Greene's permission to record the meeting or otherwise told him that he was doing so.

38. By letter on 30 June 2017 Mr Greene decided not to uphold the claimant's grievance, largely on the basis that the purpose of the discussions with Stephen Ross and Brian Lawley was to realign the claimant's working hours with those contained in his Norland contract. In Mr Greene's view, therefore, the proposals were not in breach of TUPE (pages 110 to 111). Mr Greene also checked and confirmed in the minutes of the meeting that PDAs contained a comments section where tasks which had not been completed could be recorded. The claimant's subsequent notes do not contradict Mr Greene's finding. The claimant simply restates that he had identified an implication of using PDAs which could be potentially embarrassing for the respondent (pages 100 and 102).

39. In the meantime, Stephen Ross asked HR what would happen if the claimant refused to work under the new contract. By email on 22 May 2017, Nicola Still replied (page 109):

> *"… we require [the claimant] to work the hours as stated in his contract … as long as we have a good business reason to change [the travel time], which it is no longer economic and viable for the business, then we can change his travel time …*
>
> *In order to resolve this we can serve notice on his current contract which is 6 weeks in line with statutory notice, and issue him with a new contract and this must be done back to back."*

40. On 4 July 2017, the claimant appealed Mr Greene's grievance decision (pages 113 to 117). In summary, the claimant's grounds were:

    40.1 There had been no fair and meaningful consultation. The respondent was effectively seeking to impose a pay cut of more than 30% and increase the claimant's working hours by just over 12%.

    40.2 The short timescales for the claimant to consider any proposals amounted to bullying and harassment, and he was essentially being punished for refusing to work overtime hours for basic pay.

    40.3 The respondent's interpretation of the meaning of the claimant's contract was wrong, and it was in fact seeking to impose detrimental changes to his contractual hours.

    40.4 Stephen Ross overruled an agreement with Brian Lawley and George Broll in early 2017 that the claimant would work a 10pm to 6am shift at time and a half to cover the after-hours work for LBG. This led to the meeting on 9 March and the claimant's eventual grievance.

    40.5 Claiming all travel time as overtime had become *"'Custom & Practice' which is notorious & consequently now part of [his] T & Cs … [and] pretty much set in stone* (emphasis added)".

41. Stephen Ross and Nicola Still met with the claimant on 3 July 2017. On 5 July, by letter Mr Ross gave the claimant 6 weeks' "*statutory notice as per [his] contract*" expiring on 21 August 2017 (page 118 to 119). Mr Ross explained that after that date, unless they could otherwise reach agreement, new terms and conditions would apply. In summary, the respondent expected the claimant to work a basic 40-hour week, according to his existing contract, comprising a 2-shift pattern to be agreed with his line manager. Mr Ross further confirmed that owing to "*budget constraints*" the respondent was unable to pay all daily travel as overtime, therefore travel time would become part of the claimant's basic working shift. The claimant explained to the Tribunal that he had no intention of accepting the new terms.

42. In the meantime, the LBG contract was due to expire at the end of July 2017, but the respondent was able to negotiate an extension until 2023. Stephen Ross explained in evidence that in around April 2017 the respondent's budgets were set and he was faced with what he described as a "*significant challenges*". Part of the agreement was to reduce costs by £6 million overall (known as Project Oak). Mr Ross was required cut costs in his geographical area by £150,000.

43. Stephen Ross proposed to subcontract some of the air conditioning work, including ad hoc reactive as well as planned preventative maintenance work, to another company (pages 120 to 122). This proposal affected the claimant to the extent that approximately 30% of his job would disappear. Projected savings for the respondent included a 60% reduction in P2 overtime (funded by money already accounted for in the contract with LBG) and an increase in P6 overtime (funded separately by LBG on a bid-by-bid basis throughout the life of the contract).

44. Stephen Ross explained that at that time the claimant was a member of the Central North team of engineers providing facilities maintenance services at six LBG sites in Leeds and its Normanton data centre. That team comprised five engineers, one regional AC (the claimant) and a fabric engineer. A Central South team covered Halifax (page 127). Mr Ross intended to merge and create a single Central team under one supervisor, remove both regional AC posts and create two semi-skilled nightshift positions. The new roles would enable costs savings on the overnight shift, the salary for which at that time attracted an unsociable hours premium (page 129).

45. Overall there were two other regions in Stephen Ross's geographical area: South West in Birmingham and North West in Manchester. In total, all four regional AC roles and a semi-skilled role would disappear, and two new building engineer roles were to be created, based in Birmingham and Manchester. The number of dayshift engineers would in total reduce from 28 to 25 (page 133). Mr Ross identified the new North West role as a suitable equivalent-grade post for the claimant and which was also near to his home, whereas the semi-skilled nightshift roles would involve a step down. The number of fabric engineers would also reduce under the new structure.

46. Stephen Ross presented his proposal and the reasons for it to all the affected employees in his area at LBG's Normanton data centre on 10 July 2017 (pages 123 to 140). The presentation included an explanation about the consultation process, the potential for redeployment, and a proposed timetable. It also

invited applications for voluntary redundancy. Finally, at risk employees were referred to the respondent's employee assistance helpline.

47. By letter on 12 July 2017, Stephen Ross advised the claimant that his role was at risk of redundancy, summarised the reasons for the proposed restructure, and explained the consultation process (pages 153 to 154). However, whereas that letter suggested that selection for redundancy would be made according to defined criteria yet to be determined, at risk employees had been told at the Normanton meeting that because all four regional AC jobs were proposed as redundant, the respondent would use a selection process to fill any vacancies in the new structure. The claimant was also told that Brian Lawley would conduct his consultation meetings.

48. Prior to the first consultation meetings, Brian Lawley asked everyone at risk to complete a job preference form which detailed vacancies with the respondent. By email on 13 July 2017, Mr Lawley chased the claimant for a response. The claimant replied: "*I have no particular preference … If it is essential to the process you may draw them out of a hat & number them accordingly*" (page 156). The claimant did not return the form.

49. When he received the invitation to his first meeting, the claimant also told Mr Lawley that it was insufficient notice to be able to arrange a companion. In response, Mr Lawley offered to rearrange the meeting to a later date. The claimant responded: "*my being accompanied is unlikely to change the outcome of this farce. Therefore I respectfully suggest that we get on with it*" (pages 159 to 160).

50. Brian Lawley followed and completed a proforma document during the first consultation meeting with the claimant on 14 July 2017 (pages 161 to 167). The claimant later complained during his appeal that parts of the form are incomplete, but accepted in cross-examination that the blank spaces relate to comments, questions and suggestions raised by employee during the meeting. The claimant confirmed that he made no comments or suggestions during that meeting. In summary, Mr Lawley explained the consultation process, the business reasons for redundancy, the interview process, and asked the claimant to suggest ways in which redundancies could be avoided. Mr Lawley also gave the claimant an alternative employment form, explained how he should search for and apply for any vacancies, and gave guidance on CV writing. He also obtained the claimant's consent for his details to be shared amongst Mitie HR more generally. After the meeting, Mr Lawley also forwarded a link to vacancies within the respondent (page 168).

51. The claimant also recorded this meeting without Brian Lawley's knowledge or consent. There was no transcript in the bundle of documents before the Tribunal. In cross-examination, the claimant first explained that this was because he did not consider that a transcript would have added anything to the information contained in Mr Lawley's proforma. Later, however, he claimed that during the meeting he queried Mr Lawley's involvement in the redundancy process owing to his outstanding grievance appeal. The claimant thereafter changed his explanation as to why the recording of the first consultation meeting was not transcribed. The Tribunal found this change of explanation to be wholly unconvincing.

52. Although he had not registered any interest in the proposed new building engineer's vacancy, Brian Lawley told the claimant later the same day that he had been put forward for interview in any event (page 169). Mr Lawley explained that the purpose of the interview was "*to identify skills and ability which will score for roles which may come available*". The claimant was given a detailed job description and told that the successful applicant would be employed on the respondent's standard terms and conditions (pages 143 to 146).

53. On 15 July 2017, the claimant independently applied for an air conditioning engineer's job in Manchester with Mitie's national mobile services (page 173).

54. On 18 July 2017, the claimant was interviewed for the building engineer role by Mark Jenkins (account manager), Gary Morley (critical engineering manager) and Nicola Still. Mr Jenkins also interviewed one other regional AC at risk of redundancy. The panel were given scoring guidelines and a summary of the six competencies to be assessed: planning and organising, collaborative work, communication and interaction, problem solving and initiative, procedures, and personal drive and development (pages 141 to 146). The scoring guidelines define three bands: scores of 1 to 3, 4 to 7 and 8 to 10. Each candidate was asked the same questions (pages 147 to 152). Mr Jenkins explained that he knew the interviews were for an engineering role, but not specifically the building engineer post. He also explained to the Tribunal that he had used the same assessment guidelines to interview for a range of engineering vacancies within Mitie. He had conducted over 20 interviews in the previous 4 years.

55. Generally, Mark Jenkins says that the claimant came across as unenthusiastic about taking part in the interview and required heavy prompting at times. In cross-examination, Mr Jenkins explained that when he thought the claimant was struggling he would give him general examples to show the quality of answers the panel were looking for to try to help him through the process.

56. More specifically, all the panel members scored the claimant poorly on the collaborative work question. He was asked to give a recent example of "*when you have led others enabling them to go the extra mile*". The claimant replied that he had "*worked over*" to repair a lighting fault even though Stephen Ross had banned him from working overtime (as recorded by Gary Morley). In cross-examination, the claimant suggested to Mr Jenkins that he had deliberately misinterpreted the claimant's answer, but objectively assessed I was not persuaded that this was the case. The claimant was also asked how he would deal with a faulty generator. Mr Jenkins thought that the claimant's reply showed a limited understanding of meeting client's expectations and service delivery. Gary Morley recorded the claimant's answer in this respect as "*escalate up through food chain … keeping ringing until some idiot answers*" (pages 179 to 196). Although the claimant cross-examined Mr Jenkins on the basis that his mark for this question was unjustifiable, the claimant in cross-examination accepted that his language was inappropriate for a job interview.

57. Overall, the claimant scored 55 out of 100. The panel had a "sore thumbing" discussion at the end of his interview, but their recorded marks were fairly consistent. The other candidates scored 88, 76 and 73. One candidate subsequently withdrew his application. As a result, the Manchester and Birmingham jobs were offered to the other two remaining higher-scoring regional ACs (pages 198 to 199).

58. On 19 July 2017, the claimant completed the alternative employment form. Among other things, he stated that he was interested in refrigeration, air conditioning, electrical and mechanical jobs, subject to the package, and was willing to commute "*door to door nationwide*" (page 200). Brian Lawley passed the form and the claimant's CV (pages 261 to 264) to Stephen Ross and HR.

59. On 20 July 2017, the claimant met with Graham Clayton, the respondent's engineering LBG account director, to discuss his grievance appeal. Mr Clayton rejected the claimant's appeal on 27 July 2017. Neither party said much about this process in evidence. Mr Clayton's unchallenged evidence was that the claimant appeared to be accepting of what he had to say, and as far as he was concerned the managers involved had properly taken and acted on HR advice.

60. Brian Lawley held a second consultation meeting with the claimant on 28 July 2017 and Nicola Still took notes (pages 201 to 207). Among other things, the claimant stated that there were no suitable jobs available in Mr Lawley's area. However, because another regional AC had taken voluntary redundancy, he thought that there was enough capacity for him to continue to work in Leeds and Halifax. Mr Lawley told the claimant to put his proposal in writing to Stephen Ross. The claimant also flagged up the issue of payment for overtime, and his van and fuel card, if he was not required to work his notice. Mr Lawley told the claimant that he would not be paid for any overtime, but he would check the position regarding the company van.

61. The claimant recorded this meeting without Brain Lawley's permission or knowledge (pages 208 to 223). In cross-examination, the claimant accepted that the respondent's notes are not verbatim or comprehensive, based on the length of his own transcript. Among other things, according to the transcript Brian Lawley also confirmed that if the claimant was unable to secure another job he would be made redundant on 14 August 2017. The claimant further commented that he thought the respondent was "*ripping everybody off, not just [him]*" in choosing to dismiss all those who had been made redundant with a PILON. There was also a lengthy discussion about why the claimant thought that his role was not redundant, and also his proposal to be retained on the night shift.

62. On 31 July 2017, the claimant emailed a letter to Stephen Ross setting out his proposed alternative to redundancy (pages 224 to 225 and 228). Put simply, the claimant thought that the respondent should retain a "*competent and flexible engineer*" rather than subcontract "*to a third party of questionable ability*". He therefore proposed to work a full-time night shift covering LBG's Leeds and Halifax sites. Most importantly, he believed that because 80% of the air-conditioning work at these sites had to be completed out of hours, and the remaining 20% at any time, a permanent in-house night shift position provided the most sensible solution and would offer some savings on P2 overtime.

63. The claimant's third consultation meeting took place in 8 August 2017 (pages 229 to 233). The claimant once again recorded the meeting without the respondent's consent or knowledge (pages 234 to 253). The first part of that meeting involved a lengthy discussion between Stephen Ross and the claimant about his proposal.

64. In summary, Mr Ross concluded that an in-house night shift position would involve higher costs, mainly because the respondent paid unsociable hours work at time and a third, plus the associated costs of holiday cover and pension payments. He explained that many of the claimant's points had been factored into the subcontractor's proposal. He thought that the claimant had raised some valid issues, but the respondent would be obliged to revisit the entire restructuring process if it were to retain only one regional AC. Essentially, Mr Ross was able to employ semi-skilled engineers and use a contractor, and save £139,000 per year. At the end of their discussion, according to his transcript of the meeting the claimant commented that Mr Ross had "*come up with a reasonable discussion on each [of his points]*" (page 243).

65. The redundancy-consultation part of the meeting with Brian Lawley followed on from this discussion. The claimant confirmed that his application to work for Mitie's national mobile service had been unsuccessful, and he was not interested in applying for any other job with the respondent. As a consequence, the claimant was advised that his employment would terminate if the position did not change. According to his transcript, the claimant stated at the end of the meeting that there were "*no hard feelings*" towards Mr Lawley or Stephen Ross on his part.

66. Prior to the meeting, Stephen Ross had also emailed Mitie's redeployment teams nationally to ask whether there were any opportunities elsewhere within the wider group (page 281). In evidence, Mr Ross explained to the Tribunal that he did this because he had decided to reject the claimant's proposal, and at that time the respondent had no other suitable vacancies. He was advised by HR that it was usual to do this once it had been established that, in the absence of identifying another role, an employee was likely to be made redundant. No suitable vacancies were identified by Mitie's redeployment teams.

67. As the claimant was about to go on holiday, and he saw no point in meeting Brian Lawley again beforehand, his final meeting was held over until 16 August 2017. The claimant handed back his company van on that day and was not required to return to work thereafter. The claimant's employment terminated on 18 August 2017 (page 270). He was paid 6 weeks' basic pay in lieu of notice (page 271).

68. By letter on 22 August 2017, the claimant appealed the decision to terminate his employment to Graham Clayton (pages 273 to 275). The claimant cited the following 26 grounds of appeal. They are each summarised here because the claimant maintains that Mr Clayton failed to deal with all of the grounds:

    68.1 The pool for selection should have included electrical engineers in the Leeds area. As a result, the claimant believes he had been specifically targeted.
    68.2 He was unfairly selected as no selection criteria matrix was used.
    68.3 Any selection criteria used was not fair or transparent.
    68.4 He thought his role should have transferred to the subcontractor via TUPE.
    68.5 The redundancy process was started and handled in order to manage him out of the business, because he had raised a grievance against Stephen Ross and Brian Lawley.
    68.6 Mr Ross and Mr Lawley's involvement while his grievance appeal remained live meant that they were prejudiced against him.

68.7 The failed attempts to change his terms and conditions since the transfer of his employment in 2012 had "*contributed towards [him] being made redundant"*.

68.8 There was a deliberate failure not to offer him suitable alternative employment.

68.9 He received no feedback in respect of his application to join Mitie's national mobile team.

68.10 He was required to return his company van in breach of contract.

68.11 There is no PILON clause in his contract of employment and he suffered financial loss as a result of his dismissal without notice.

68.12 The redundancy consultation forms were not completed properly or at all, which shows that the process was a sham.

68.13 The process was a tick-box exercise designed to manage him out.

68.14 He was made redundant within weeks of raising a grievance about bullying and harassment.

68.15 His grievance was not dealt with properly or at all.

68.16 Numerous complaints about unlawful deductions from wages have been ignored and contributed to the bad feeling towards him.

68.17 His managers have been persistently dishonest.

68.18 His managers tried to browbeat him into accepting new terms and conditions.

68.19 His proposal to avoid redundancy was unreasonably dismissed.

68.20 Another factor in the decision to dismiss him was the fact that he had raised allegations of "*fraud*", namely the incompetent management of routine and mandatory planned preventative maintenance.

68.21 His was given inadequate and insufficient time to deal with the redundancy process.

68.22 Five working days was insufficient time to formulate his appeal.

68.23 The treatment he has received has been extremely stressful.

68.24 His redundancy documentation makes no mention of the "*substantial sums*" owed to him.

68.25 It is clear that the decision to make him redundant had already been made prior to the consultation process.

68.26 There was no genuine redundancy situation.

69. Prior to meeting with the claimant, Graham Clayton obtained Stephen Ross's comments on the claimant's letter (pages 276 to 279). Mr Ross also attached the relevant consultation documentation to this reply. Mr Clayton's unchallenged evidence was that the appeal meeting with the claimant, which took place on 14 September 2017, was cordial and the claimant took no issue with his involvement. The meeting lasted over 2 hours (pages 286 to 291). The claimant also covertly recorded that meeting but did not transcribe it. In cross-examination the claimant accepted that, based on his other transcripts, his notes of this meeting would have run to over 40 pages, and that the respondent's notes do not capture the entire conversation. Based on the claimant's initial explanation for not transcribing the first consultation meeting, the Tribunal inferred that this was because it would add very little to or even undermine his case.

70. Graham Clayton explained to the Tribunal his understanding of his role in the claimant's appeal. He was to consider the claimant's representations and decide, following investigation, whether to uphold or reverse the decision to dismiss. Most importantly, Mr Clayton says that he was not persuaded that the claimant had been "*victimised*". The claimant was one of a number of

engineers whose jobs had disappeared because it was cheaper to outsource those services rather than keep them in house.

71. During the appeal meeting, according to the respondent's notes, Graham Clayton appeared to shut down any conversations about the claimant's previous allegations of bullying and harassment, and his Norland terms and conditions. However, Mr Clayton explained that there was indeed some discussion, but he did try to move on the meeting because he had already discussed those matters at length with the claimant as part of his grievance appeal.

72. By letter on 25 September 2017, Graham Clayton upheld the decision to dismiss the claimant (pages 292 to 294). The claimant complains that the letter does not address his appeal points in turn. Mr Clayton explained during his evidence (and the Tribunal accepts) that he decided to identify and summarise a number of subject areas in the claimant's letter because some of his points simply repeated the same grounds.

73. In July 2018, the respondent paid the claimant the sum of £434.77 in lieu of the loss of use of his company van during what would have been his notice period (pages 311 to 312). This calculation was based on the claimant's P11D statement for 2016/2017 which valued the taxable benefit of his company van as £3,170 and the fuel charge as £598. The claimant later returned the payment to the respondent as he believed it to be wrongly calculated.

The relevant law

74. The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), as amended, provides:

> *7 Dismissal of employee because of relevant transfer*
>
> *(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part 10 of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer.*
>
> *(2) This paragraph applies where the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer.*
>
> *(3) Where paragraph (2) applies—*
>
> *(a) paragraph (1) does not apply;*
> *(b) without prejudice to the application of section 98(4) of the 1996 Act (test of fair dismissal), for the purposes of sections 98(1) and 135 of that Act (reason for dismissal)—*
> *(i) the dismissal is regarded as having been for redundancy where section 98(2)(c) of that Act applies, or*
> *(ii) in any other case, the dismissal is regarded as having been for a substantial reason of a kind such as to justify*

the dismissal of an employee holding the position which that employee held.

(3A) In paragraph (2), the expression "changes in the workforce" includes. Change to the place where employees are employed by the employer to carry on the business of the employer or to carry out work of a particular kind for the employer (and the reference to such a place has the same meaning as section 139 of the Act)."

75. Section 98 of the Employment Rights Act 1996 (ERA) states:

"*(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 … is that the employee was redundant ..."

76. Section 139 of the ERA defines redundancy:

"(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—

…

(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."

77. The reason for dismissal in any case is the set of facts known to the employer or may be beliefs held which cause it to dismiss the employee.

78. Whether an employee is redundant under section 139(1)(b) of the ERA, according to **Murray & Anor v Foyle Meats 1999 ICR 827**, involves two questions of fact. In this case, have the requirements of the business for employees to carry out work of a particular kind ceased or diminished? If so, was the employee's dismissal wholly or mainly attributable to that state of affairs?

79. If an employer can show that dismissal was for a potentially fair reason, section 98(4) of the ERA states:

"*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."

80. The case of **Polkey v A E Dayton Services Limited [1998] ICR 142** explains that generally employers will not have acted reasonably in treating a potentially fair reason as a sufficient reason for dismissal unless and until they have taken certain procedural steps which are necessary in the circumstances of that case to justify that course of action. More specifically, in redundancy cases, **Polkey** states:

> "*The employer will not normally act reasonably unless he warns and consults any employees affected or their representatives, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation*."

81. In **Langston v Cranfield University [1998] IRLR 172** the EAT explained that requirements in respect of consultation and redeployment are so fundamental that they will be treated as an issue in every unfair redundancy case. For this reason, Tribunals will be expected to consider each of those requirements even if they have not been raised specifically by the claimant. However, in applying the test of reasonableness in section 98(4) ERA, if the Tribunal is satisfied that the employer adopted an unfair procedure, in assessing liability and according to **Polkey** it is not then permitted to ask whether it would have made any difference to the outcome if all appropriate procedural steps had been taken.

82. In considering the issue of fairness (relating not only to the decision to dismiss but also the procedure adopted), as explained in **Williams & Others v Compare Maxim Limited [1982] ICR 156** in relation to redundancy cases, the Tribunal must only consider whether the employer's actions "*lay within the range of conduct which a reasonable employer could have adopted*".

83. Usually, redundancy consultation and selection will involve the assessment of past performance. However, if a business is to be reorganised with the result that existing jobs will be replaced with new ones, it is accepted that the redundancy process must be forward looking, in which case an employer may rely on an interview process in order to assess an employee's ability to carry out any new role (**Morgan v Welsh Rugby Union [2011] IRLR 376 EAT**). In such cases the Tribunal should consider how far the interview process was objective, but should also bear in mind that an employer's assessment of which candidate will perform best in any new role is likely to involve a substantial element of judgement. Ultimately, the Tribunal should consider how far the employer established and followed through its procedures when making an appointment, and whether those procedures were fair in accordance with section 98(4) of the ERA.

84. The **Polkey** issue becomes relevant at the stage of assessing compensation. That case explains that any award of compensation may be nil if the Tribunal is satisfied that the claimant would have been dismissed in any event. However this process does not involve an "all or nothing" decision. If the Tribunal finds that there is any doubt as to whether or not the employee would have been

dismissed, the **Polkey** element can be reflected by reducing the normal amount of compensation accordingly.

85. Finally, the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 states that claims for breach of contract may be brought before a Tribunal if the claim arises or is outstanding on the termination of an employee's employment. Under ordinary common law principles, the purpose of damages for breach of contract will be to put the employee into the position s/he would have been in had both parties performed their obligations under that contract.

Conclusion

86. The claimant and respondent's representative made a number of written submissions, and the claimant replied to the respondent's submissions. I have considered those documents, but do not set out them out in full. The parties will recognise how the Tribunal has dealt with their submissions in its findings of fact and following conclusion.

87. I would however say at this point that the claimant makes serious accusations in his submissions. Among other things, he accuses the respondent's witnesses of lying under oath, collusion, misleading the Tribunal and tampering with evidence. Many of these accusations were not put to the respondent's witnesses during the hearing. My findings and conclusion are based on an objective assessment of the evidence presented to the Tribunal.

88. The first issue I must determine is whether the sole or main reason for the claimant's dismissal in August 2017 was the transfer from Norland to the respondent in August 2012. The respondent maintains that the sole reason for the claimant's dismissal was redundancy. The claimant's pleaded case is that he was dismissed because the respondent had tried and failed to change his terms and conditions many times following the transfer of his employment. His appeal was also pursued partly on the basis that this had "*contributed*" to his dismissal.

89. In addition, in February 2017, when the claimant suggested that he work a night shift paid at overtime rates, Stephen Ross vetoed his request because the maintenance work was part of the claimant's normal duties. The claimant thought that this was unfair because electrical engineers (not regional ACs) were paid P2 overtime for night work. He says that it "*pushed the wrong buttons in me*". In his words, he was being "*discriminated against*" because he was standing up for his legal rights under TUPE.

90. First, the claimant is mistaken that employees who transfer under TUPE are effectively untouchable. Changes to their contracts of employment or any dismissal may be void or unlawful, but only if the change or dismissal is because of the transfer. In determining the reason for dismissal in a regulation 7(1) TUPE case, the test is not whether the dismissal would have occurred if there had there been no transfer. It is the reason in the employer's mind that counts. The passage of time is not determinative. The chain of causation tends to weaken over time because of the greater opportunity for intervening events to break it. But if no such intervening events occur, the passage of time in itself will not weaken or break the chain.

91. The difficulty for the claimant is that the respondent was following a separate process to deal with the ongoing issue of his terms and conditions, so much so that it had served notice on the claimant's existing contract to break the deadlock they had reached as a result of their meetings. Furthermore, as at 2017 the respondent was effectively trying to persuade the claimant to work to his original Norland contract. The dispute between the parties was about the meaning of his transferred terms relating to working hours and travel time. The respondent otherwise considered that the travel time as overtime arrangement (if one could be established) was no longer financially sustainable in 2017 in the context of Project Oak.

92. I am satisfied (for the reasons stated at paragraph 97 below) that the principal reason for the claimant dismissal was the respondent's need to make financial savings following the 2017 retendering exercise as a condition of retaining the LBG contract. This was a supervening event that took place some five years after the original transfer. Any discussion about the claimant's Norland contract was being dealt with separately. On balance, I therefore accept that the claimant's dismissal was not by reason of the 2012 transfer within the terms of regulation 7(1) TUPE.

93. Further and separately, if I had been persuaded that the sole or main reason was the transfer, I would have then considered whether the dismissal was for an ETO reason entailing changes in the workforce. The claimant submits that TUPE protected his employment for life, and the only way in which he could be fairly dismissed was if LBG "*went bust*". He does not accept that saving labour costs is capable of being a valid ETO reason.

94. An economic reason for dismissal must relate to the conduct of the business concerned. Broader economic reasons are not relevant. There must be also an intention to change the workforce and to continue to conduct the business. In the respondent's case, it was a condition of the ongoing relationship with LBG that it cut costs across the board. It was not the case that the respondent, for example, intended to cut labour costs purely in order to make the business more attractive to a potential purchaser.

95. An employer must also show that the ETO reason for dismissal entailed (i.e., necessitated) either a change in the numbers of the workforce overall, or a change in the functions of members of the workforce. In **Manchester College v Hazel and anor 2014 ICR 989, CA,** Lord Justice Underhill suggested that the phrase "*entailing changes in the workforce*" effectively requires that dismissals be for "*redundancy or redeployment*". In the claimant's case, for the reasons stated below, I would have been satisfied that the claimant's dismissal was for redundancy and hence an ETO reason entailing changes in the respondent's workforce.

96. Turning to the next issue, what was the sole or main reason for the claimant's dismissal? The respondent says it was for redundancy. The claimant contends that there was no genuine redundancy situation, and the ensuing process was designed to manage him out of the respondent's business.

97. The Tribunal accepts that the claimant was dismissed for redundancy. There was no longer any requirement for employees to do work of a particular kind. A decision was taken to delete all regional AC roles from the respondent's structure in Stephen Ross's region, and outsource the ad hoc reactive and

planned maintenance work in order to save money. That is a redundancy situation. The Tribunal is further satisfied that the claimant's dismissal was wholly or mainly attributable to that state of affairs.

98. The claimant stated in evidence that he understood from Stephen Ross's presentation in July 2017 that the respondent "*wanted to get rid of more guys … to save money*" but believes that the work was still there to do. However, the Tribunal must consider the business requirement for employees to do work of a particular kind. In other words, there will be a redundancy situation if an employer decides that it needs fewer employees, even if the level of work remains the same or even increases.

99. During cross-examination, the Tribunal also asked the claimant to clarify why he felt he had been specifically targeted for dismissal. This was because in his witness statement he said that the respondent's motive was to "*hide historical and future fraud*". The claimant replied that it was because he had brought to his managers' attention an unintended consequence of using PDAs. In his view, it was impossible to complete the level of planned maintenance work at peak times and remain compliant, as required by LBG. He thought that he was being penalised because he was being encouraged to sign off work which had not been done. The claimant sees this as fraudulent behaviour on the respondent's behalf.

100. The claimant further maintains that subcontracting the air-conditioning work was not in LBG's best interests. There was some dispute during the hearing about the requirements for the certification of maintenance work. The claimant says that the work is not in fact being completed properly by the subcontractor. In evidence, Stephen Ross suggested that his projected costs savings at the time of the restructure were borne out by the following 12 months.

101. In reply to the respondent's submissions, the claimant also claims that the respondent is fraudulently charging its client twice in terms of its budget for P2 and P6 overtime. I attach little weight to that allegation, most importantly because it was never raised by the claimant during his evidence or put to any of the respondent's witnesses. In any event, on an objective assessment, the claimant misses the point. As the Tribunal understands it, Stephen Ross concluded that he could save money from the P2 overtime budget by using subcontractors and bid for more money from LBG by increasing P6 overtime. That is a commercial decision which the respondent was entitled to make.

102. In cross-examination, the claimant further stated that he thought the redundancy situation was a sham because he did not agree with Stephen Ross's proposal. He accepted this did not necessarily mean that the redundancy situation was not genuine. As the respondent submits, the function of the Tribunal is not to investigate the commercial and economic reasons which prompt a decision, or to investigate the rights and wrongs of that decision to decide whether it agrees or disagrees with the respondent's actions.

103. The Tribunal recognises that is of course possible that an employer, faced with a redundancy situation, may seize upon the chance to dismiss an individual with whom it has a difficult relationship. It does not, however, automatically follow that the principal reason in such a case will be the poor employment relationship rather than redundancy. What matters in such circumstances is whether the employer can show (absent any ill feeling) a

potentially fair reason for dismissal. I am satisfied on balance that even though the claimant's managers admitted that they considered the claimant to be confrontational and difficult to work with, the respondent has done so in this case.

104. Most importantly, Project Oak called for costs savings. A number of engineers and supervisors were placed at risk across Stephen Ross's region, and some were dismissed. It was not only the claimant's role that was identified as at risk and removed. The Tribunal also questions why the respondent would effectively manufacture a redundancy process if it had already given notice to the claimant under his existing contract. That in fact suggests to the Tribunal that the claimant's dismissal for redundancy was not a forgone conclusion, and the respondent recognised that it also had to deal with the dispute about the claimant's contractual hours and entitlement to overtime in any event.

105. The next issue is whether the respondent followed a fair procedure. The claimant was warned about redundancy and was invited to participate in a process that lasted for more than 30 days. He complained about short notice for the first consultation meeting, but declined Brian Lawley's offer of a postponement. The claimant attended a number of meetings during the process, but contends that consultation was not meaningful. In effect, he believes that the respondent had already taken a decision that he would be made redundant, and his managers were biased against him.

106. According to the **Williams** case, employers should give as much warning as possible of impending redundancies to enable affected employees to consider possible alternative solutions and, if necessary, find alternative employment. General guidance on the issue of consultation was set out by the EAT in **Mugford v Midland Bank [1997] IRLR 2008**:

> "*It will be question of fact and degree for the … tribunal to consider whether consultation with the individual … was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy*."

107. Essentially, fair consultation involves the provision of adequate information, following which the employee should be given a fair and proper opportunity to respond and express their views. In response, the employer should then consider the employee's views properly and genuinely (see, for example, **King and others v Eaton Ltd [1996] IRLR 199**).

108. The Tribunal is satisfied that the claimant was given adequate information. Among other things, during his presentation Stephen Ross's went into some detail about his proposals and the reason for the restructure. Brian Lawley also gave the claimant information about vacancies within the respondent (including a detailed job description for the building engineer role) as well as access to redeployment opportunities within Mitie. The respondent also gave its employees placed at risk the option to volunteer for redundancy.

109. As part of the consultation process, the Tribunal is also satisfied that the respondent considered the claimant's views properly and genuinely. At the

start, the claimant was uncooperative. He described the consultation process as a farce and refused to register an interest in any of the vacancies in the respondent's proposed new structure. Brian Lawley did his best and put the claimant forward for interview in any event. The claimant also continues to maintain in submissions that he was told he was going to be made redundant during the first consultation meeting, but accepted during cross-examination that this was not in fact the case.

110. The claimant also suggests that the managers he dealt with during the redundancy process were biased because of his previous grievance. The Tribunal is not persuaded that this was the case. In evidence the claimant stated that at the first meeting he accepted that Brian Lawley's role regarding his individual consultation was purely procedural, and that he was merely presenting documentation to him as part of his job. In cross-examination, the claimant also said that he did not object to Mr Ross's involvement because Graham Clayton had assured him that the reason for Mr Ross's previous discussions with the claimant were "*purely financial*". The claimant further accepted that he would not have sent his proposal to Mr Ross if he had thought that there was "*no hope*".

111. As the consultation process progressed, the claimant appeared to take it more seriously in that he came up with the nightshift proposal. The claimant's own record of the consultation meetings shows that neither Brian Lawley or Stephen Ross rejected that proposal out of hand, and he had lengthy discussions about it with both of them. The respondent submits (and the Tribunal accepts) that the claimant's own transcript shows that the discussions were "*open, free-flowing and explorative in nature*". Indeed, the claimant told Mr Ross at the time that he had presented reasonable answers to the points he had raised and there were "*no hard feelings*".

112. Furthermore, what will affect fairness at an appeal stage to render it defective is whether that process should or could have found a flaw in the original decision to dismiss. In considering the claimant's appeal, Graham Clayton was also aware that negotiating the extension to the LBG contract involved "*drastic [cost savings] … amounting to many millions over the life of the contract*". However, he explained to the Tribunal that if the claimant had presented an alternative suggestion which could achieve the same outcome with minimal impact on other individuals, he would have taken that proposal seriously.

113. The next question is whether the respondent adopted a fair basis on which to select for redundancy. The respondent placed three classes of employee at risk across Stephen Ross's area: regional ACs, supervisors and fabric engineers. The regional ACs and two out of three fabric engineers were to disappear entirely under the new structure. The claimant believes that the regional ACs should have been considered together with electrical engineers, and that the outcome of the interview he attended for the building engineer's vacancy was predetermined.

114. Employers have a great deal of flexibility in choosing a pool from which to select employees for redundancy, as long as they apply their minds to the decision and act from genuine motives. However, it may fall outside the band of reasonable responses to restrict the pool artificially by, for example, not including those doing similar work.

115. Stephen Ross explained the respondent's rationale to Graham Clayton in response to the claimant's appeal (page 276):

> "*Initially consideration was given to extending and placing all Engineers at risk of redundancy, however in consultation with HR, it was decided that as the proposal only affected those identified within the process there was no further requirement to extend to include positions and sites not identified – this was to reduce the impact upon the Engineering team, and not to place additional strain on those Engineers not directly affected by the proposal*."

Mr Ross and Brian Lawley also explained in evidence that the regional ACs and electrical engineers had been considered separately in the 2013 restructure, a decision which had operated to the benefit of the claimant at that time. By comparison, some electrical engineers lost their jobs in 2013.

116. In cross-examination the claimant also accepted that even though 30% of his job was to disappear as a result of the outsourcing arrangement, it did not follow that the remaining 70% of his work was electrical. He did provide holiday cover for electrical engineers on occasion, but otherwise carried out a range of other daily tasks including routine plumbing.

117. In the circumstances, the Tribunal is satisfied that the respondent properly applied its mind to the question as to who should be placed at risk of redundancy, and acted from genuine motives. Although there were other ways in which the respondent could have dealt with the issue, Stephen Ross provided a reasonable rationale for his decision.

118. I next considered the respondent's selection process. First, it was generally accepted that the building engineer's role was not an exact replica of a regional AC's job. Secondly, there were more regional ACs than vacancies. For these reasons the respondent's decision to assess suitability for the new roles by way of interview was not unreasonable and was necessarily forward looking.

119. Within the new structure the claimant was encouraged to apply for vacant positions. He did not take that encouragement seriously and invited Brian Lawley to draw the vacancies out of a hat. He was put forward for interview in any event, told what the respondent was looking for in the form of a detailed job description, and told that the purpose of the interview was to assess his suitability according to his skills and experience.

120. It was also reasonable for the respondent to assess individuals via identified competencies using a detailed marking scheme. Each panel member scored individually and their scores were averaged. There may have some room for argument about the interpretation of a candidate's answers. Indeed, the claimant contends that his answers were deliberately misinterpreted. The Tribunal is not permitted to carry out its own assessment of the claimant's performance. However, considering the questions, the answers that were recorded by the panel and Mark Jenkins' explanation of the scores, there appears to have taken place a genuine assessment of the claimant's performance at interview and a reasonable explanation for his scores. There was no evidence of "*collusion*" as submitted by the claimant.

121. The Tribunal is further satisfied that the claimant was not disadvantaged or targeted in this respect. Although, he had suggested in evidence that Mark Jenkins was unsure about the exact role that the interview was for, the claimant accepted in cross-examination that he knew that the interview was for the building engineer's role. He said that he prepared for the interview by brushing up his CV and arriving on time with an open mind. He did not do any further research because the role included work he was already doing. He says he therefore felt confident.

122. The claimant also accepted that his interview panel was independent, he was assessed along with other applicants (albeit with different panel members), and he appreciated that the interview provided him with the opportunity to "*show off*" his skills. Although the claimant explained that he was not familiar with competency-based assessment, Mark Jenkins also gave him examples of the quality of answers the panel was looking for. The claimant also accepted that his scores were based on how he had reacted to the questions during the interview, rather than his experience generally. The Tribunal is also satisfied that because the claimant did not register any interest in the role, it is likely that Mark Jenkins was right and the claimant did not treat the interview process particularly seriously.

123. The next question is whether a reasonable employer would have thereafter concluded that it was justified in dismissing the claimant. Regarding the building engineer role, this was a competitive process. There were more candidates than available roles. As a result, one or more candidates were bound to be disappointed if they were not selected. There were sufficient successful "at risk" candidates who accepted the building engineer roles. In which case, did the respondent otherwise make reasonable attempts to look for alternative employment for the claimant?

124. As part of his appeal, the claimant contends that there was a deliberate failure on the respondent's part. However, the Tribunal is satisfied that the respondent acted reasonably in looking for alternative employment for the claimant. Most importantly, the claimant had access to and was aware of other vacancies within the respondent, but did not consider any of those vacancies to be suitable. Before he left the respondent's employment, the claimant also had access to vacancies within Mitie and made one application to work on a different contract. He complained that he received no feedback in this regard, although did not ask for it and this matter was outside the respondent's control.

125. The respondent's HR department also circulated the claimant's CV and alternative employment preferences form within Mitie. It did not make assumptions about what the claimant was prepared to accept. Stephen Ross also contacted Mitie redeployment teams nationally once it became clear that there were no viable alternatives to redundancy within the respondent. It was reasonable for the respondent to assume that the claimant could decide for himself which if any vacancies could be suitable rather than being more proactive in identifying vacancies within its organisation or Mitie.

126. In the circumstances, as the respondent had considered and rejected the claimant's nightshift proposal and the claimant had confirmed that there were no other suitable vacancies within its organisation, the Tribunal accepts that the respondent reasonably concluded that the claimant's employment should terminate by reason of redundancy. As a consequence, the Tribunal is satisfied

that the claimant's dismissal was fair, in which case that complaint should be dismissed. Accordingly, the **Polkey** issue also falls away.

127. Turning to the breach of contract complaint, the first question is whether the respondent breached the claimant's contract by calculating his overtime pay according to a basic 40- rather than 35-hour week from 1 August 2012 until the termination of his employment.

128. The relevant express term is contained at paragraph 5(b) of the claimant's contract. The question is: what did the parties agree? The proper approach in determining what an express term means is to identify the intention of the parties by reference to "*what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean*" at the time that the contract was made (quoted in **Arnold v Britton [2015] 1 AC 1619**). A Tribunal must examine all the relevant evidence, including how the parties conducted themselves in practice. However, the relevance of how the parties subsequently conducted themselves is simply one of the factors that may throw light upon what legal obligations were agreed at the time the contract was made.

129. The Tribunal is satisfied that the relevant term in the claimant's contract is unambiguous. He agreed to work 40 hours per week excluding an unpaid lunch break of one hour each day. If the claimant's working hours were 35 per week, his contract would have stated that his shift times included the unpaid break. In terms of the defined shifts, a reasonable person would conclude that they would have to fit in an unpaid break during each day. The respondent explained that, in practice, employees would add on time at the beginning and/or the end of the day to accommodate any breaks they took. Even if the Tribunal had been persuaded the defined shift patterns did introduce an element of ambiguity, it is obvious that this is how the claimant would have needed to work in practice in order to meet his basic hours.

130. It is also notable that at the time of the 2012 transfer, the claimant told the respondent that overtime rates applied after the first 8 hours worked each day (quoted in emphasis at paragraph 17 below), rather than 7.5 or 7 hours, and that his working hours were 40 per week.

131. In practice, however, the claimant chose to work different hours for different reasons. First, he says that he worked the same hours as other Norland engineers to fit in, even though those engineers were on different contracts inherited by Norland. Prior to the transfer of his employment to the respondent, when he brought to Norland's attention the way in which he had been working, he was referred back to the relevant contractual term. He thereafter appears to provide correct information to the respondent during consultation prior to the transfer (that is, his basic hours are 8 per day), but also states that he is entitled to contractual overtime.

132. When the claimant's employment transferred, he unilaterally decided that he had been taken advantage of and was in fact only required to work 35 hours each week. The claimant's timesheets were signed off in any event. The question, therefore, is whether any subsequent variation of the claimant's contract can be implied from the respondent's conduct.

133. This question usually arises in the context of an employer imposing new terms. In such cases, the issue is whether the employee by continuing to work has effectively agreed to a variation. The relevant principles were recently identified in **Abrahall and others v Nottingham City Council [2018] EWCA Civ 396**:

133.1 An offer to vary a contract can be accepted by conduct.

133.2 There is no reason in principle why an employee's conduct in continuing to perform the contract after the employer had made it clear that they wish to modify it may not be reasonably understood as indicating the acceptance of change, but that does not mean that it will always be so.

133.3 The inferences to be drawn depend on the circumstances.

133.4 The inference must arise unequivocally. The employee's conduct by continuing to work must "*only be referable*" to his or her having accepted the new terms. If the employee's conduct is reasonably capable of some other explanation, it cannot be treated as constituting acceptance of the new terms.

133.5 The nature of the contractual change is therefore relevant. For example, if the employer varies the rate of pay and the employee goes along with that without protest, it may be possible to infer after a period of time by their conduct that they have accepted the change.

133.6 However, protest or objection will prevent such an inference being drawn.

133.7 The reference to drawing an inference "*after a period of time*" is not without difficulty. The Tribunal will need to arrive at a decision on the evidence in the particular case.

134. First, the claimant did not explicitly communicate an offer to Norland or the respondent. He simply completed timesheets which were signed off and paid. The arguments he employed when the dispute arose were about contractual interpretation and that he had been working in that way for so long it had become "*set in stone*". When matters came to a head in May 2017, the claimant further referred to an "*accountancy error*" in terms of payment of his travel time as overtime, which suggests to the Tribunal that there had been some discussion about mistakes being made in payroll.

135. Each time the way in which the claimant had been working was explicitly brought to the attention of Norland or the respondent, the claimant was effectively told that he was wrong. The relevant contractual term was confirmed to him before at the point of the transfer of his employment in August 2012. In cross-examination, the claimant said he did not raise this issue with his line manager at or after that time but "*just carried on what [he] had been doing*". When the Tribunal reminded him of his previous evidence, the claimant corrected himself to confirm he in fact "*went to 35-hour basic from there*".

136. In the circumstances, the Tribunal is satisfied that no inference arises unequivocally. The way in which the claimant decided to claim his wages was not picked up on by his immediate managers or the respondent's payroll administrators. The respondent had assumed that the claimant had been working a 40-hour week, he was paid on that basis and overtime calculated at that rate. When Stephen Ross realised what had in fact been happening in

early 2017, the respondent clearly took issue with the claimant's actions and the dispute continued from there. As a consequence, the Tribunal is satisfied on balance that there was no implied variation of the express term in the claimant's contract relating to his working hours.

137. On that basis, the Tribunal is satisfied that the respondent did not breach the claimant's contract by calculating his overtime pay according to a basic 40- rather than 35-hour week from 1 August 2012 until the termination of his employment. That complaint should therefore be dismissed.

138. The next question is whether the respondent breached the claimant's contract of employment by dismissing him with a payment in lieu of notice. The only documentary evidence placed before the Tribunal in this respect is the claimant's Norland contract, which does not allow for termination on payment of a sum in lieu of the notice period. That complaint should therefore succeed.

139. Turning to the question of compensation, the purpose of damages is to, as far as possible, put the claimant in the position he would have been in if he had worked his notice period. The claimant accepts that he received a payment in lieu of 6 weeks' basic salary, but argues that in the circumstances he should have been compensated for the loss of use of his company vehicle and fuel allowance, and the overtime hours he would have worked. (In is submissions, the claimant also mentions loss of the chance to claim interim relief but has not brought a qualifying claim.)

140. The respondent accepted during the hearing that assessing compensation for loss of personal use of the claimant's company van and fuel allowance by reference to the value of those taxable benefits is not the correct starting point, but in its submissions says it is willing to enhance the figure previously paid (but returned) by paying it gross of VAT.

141. The claimant has produced receipts to the effect that he spent almost £800 on fuel from 16 August until 29 September 2017 inclusive. He also claims bus, train and taxi fares, plus a nominal amount of £20 per day from the time he bought a new vehicle. The Tribunal cannot award any sum for the inconvenience he says he was put to, in which case the claimant's contended losses run to over £1,600. The Tribunal <u>may</u> award compensation for consequential loss, but only if it is directly consequential and not too "remote" – that is to say, not simply as a result of choices made by employee to incur expense during the relevant period.

142. The difficulty with the claimant's approach is that compensation should be valued according to loss of <u>personal</u> use of the company van and fuel card. If he had continued to work, for example, is it the case that he would have spent over £800 on fuel in respect of <u>personal</u> mileage over a 6 week period?

143. The most common method of establishing the value of being provided with a company vehicle is to estimate the weekly costs of running a particular type of vehicle based on published RAC or AA estimates (including petrol costs and/or servicing costs) based on estimated personal mileage. The respondent may have its own mileage allowances, and adjustments may need to be made if the employee contributed in any way to the running costs of the vehicle.

144. Turning to the question of overtime during the notice period, the claimant was not guaranteed any overtime under his original Norland contract, but he had been claiming and was being paid for 3 hours per day travel time as overtime. However, the Tribunal accepts that Stephen Ross had served the claimant with notice on that contract which was due to expire on 21 August 2017. Although the claimant says that he did not fully appreciate the implications of Mr Ross's letter, although he did not intend to accept the new terms it is likely that he would have turned up for work thinking that the matter was still in dispute.

145. The effect in law of being served notice is that previous Norland contract would have come to an end, and the working arrangement as defined by the respondent would have applied thereafter. The claimant is likely to have continued to argue that the respondent was acting unlawfully, but the respondent would not acted in breach in applying the new terms because it had given lawful notice under the previous contract.

146. During the hearing, the respondent had conceded that payment for some overtime in respect of the notice period would be due, but unfortunately departed from the position in its written submissions on the basis that the claimant's overtime was not guaranteed. The Tribunal is satisfied that, in accordance with Stephen Ross's notice letter, the respondent would have continued to pay the claimant's 3 hours' per day travel time on 16, 17 and 20 August 2017. During previous discussions, the respondent had suggested that the claimant could claim up to an hour's overtime each day to assist with his travel, to be agreed with his line manager. It is assumed from the respondent's submissions that the respondent intended this arrangement to apply from 21 August 2017.

147. In the circumstances, the parties should try to agree a figure for losses during the claimant's notice period, based on the guidance provided above. The Tribunal can go no further without further evidence and submissions from the parties. If they cannot agree settlement, they have been ordered to inform the Tribunal and provide further information, following which a further hearing will be listed to determine remedy.

Employment Judge Licorish

Date: 25 September 2018