EMPLOYMENT TRIBUNALS

Claimant: Mr R Sergent

Respondent: Motus Group (UK) Ltd t/a Pentagon Group

Heard at: Manchester (by CVP) **On:** 18 June 2021

Before: Employment Judge Phil Allen
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Mr J Tunley, Counsel

JUDGMENT

The judgment of the Tribunal is that:

- The claimant was not unfairly dismissed. The unfair dismissal claim does not succeed and is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent for over 24 years, from 10 June 1996 until his employment terminated on 25 August 2020. In the last seven years of his employment the claimant was employed as Used Car Sales Controller.

2. The claimant alleged that his dismissal was unfair. The respondent alleged that his dismissal was fair by reason of redundancy and/or some other substantial reason (business reorganisation).

Claims and Issues

3. At the start of the hearing I outlined to the parties what I believed to be the List of Issues which needed to be determined. The parties agreed that what I had outlined did represent the List of Issues which I needed to decide. The List of Issues was as follows:

1.1 What was the principal reason for the claimant's dismissal and was it a potentially fair reason under section 98 Employment Rights Act 1996? The respondent relies upon: redundancy; and/or some other substantial reason (being a business reorganisation).

1.2 Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant, in accordance with equity and the substantial merits of the case? Relevant to this issue will be, whether:

1.2.1 the respondent adequately warned and consulted the claimant;

1.2.2 the respondent adopted a reasonable selection decision, including its approach to a selection pool and any scoring within the pool;

1.2.3 the respondent took reasonable steps to find the claimant suitable alternative employment; and

1.2.4 dismissal was within the range of reasonable responses.

1.3 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed? If so, should the claimant's compensation be reduced and by what percentage?

1.4 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? Did the respondent unreasonably fail to comply with it? If so, is it just and equitable to increase any award payable to the claimant and by what proportion?

1.5 What remedy should be awarded (if the claimant succeeds in his claim)?

4. It was agreed with the parties that the third and fourth issues, that is whether the claimant would have been fairly dismissed in any event (commonly referred to as **Polkey**) and the application of the ACAS Code, would be considered alongside the other liability issues. The final issue, that of remedy, would only be determined if the claimant's claim succeeded.

Procedure

5. The name of the respondent was changed with the agreement of the parties to be Motus Group (UK) Ltd t/a Pentagon Group.

6. The claimant represented himself at the hearing. Mr Tunley, counsel, represented the respondent.

7. The hearing was conducted remotely by CVP video technology. Both parties and all witnesses attended remotely and gave evidence via video technology.

8. I was provided with an agreed bundle of documents which had been prepared in advance of the hearing. The bundle ran to page number 66, but in fact, because it included a number of pages which were given sub-numbers, it contained 106 pages. Where a number is referred to in brackets in this Judgment, that refers to the page number in the bundle. I read only the pages in the bundle which were referred to in individual witness statements or to which I was referred in the course of the hearing.

9. I was provided with a witness statement from the claimant, and witness statements from the following witnesses called on the respondent's behalf: Mr Lee James, the respondent's New Car Sales Manager; Mr Graham Woods, the respondent's Brand Director for Pentagon Ford sites at Warrington, St Helens and Runcorn; Ms Jayne Gausden, the respondent's Group HR Manager; and Mr Roy Skelland, who was the claimant's immediate line manager at the time of his dismissal. I read the witness statements prior to the start of the hearing.

10. I heard evidence from each of the respondent's witnesses, who were cross examined by the claimant, before I also asked questions. The only exception to this was Mr Skelland, who did not attend the hearing, and therefore his evidence was given very limited weight. I then heard evidence from the claimant, who was cross examined by the respondent's representative, and I also asked him questions.

11. After the evidence was heard, each of the parties was given the opportunity to make oral submissions. At the start of the hearing the respondent's representative had provided a skeleton argument document. That was provided to the claimant so that he had time over the extended lunch break in which to read and consider it. The respondent's representative gave his submissions verbally but referred to the skeleton argument document whilst doing so.

12. At the end of the hearing judgment was reserved and accordingly I provide the Judgment and Reasons outlined in this document.

13. I was grateful to the claimant and the respondent's representative for the manner in which the hearing was conducted, which was entirely appropriate.

Facts

14. The claimant was a loyal and long-serving employee. His employment at the Warrington dealership started as a Site Maintenance Operative on 10 June 1996 and he worked at the site for over 24 years. The claimant worked in various roles and departments in his lengthy employment. In his evidence he confirmed that he had undertaken: five years in car sales; ten years in commercial and fleet; and, for the last seven years of his employment, he was the Used Car Sales Controller.

15. I heard considerable evidence about the way in which the respondent's business was configured and the connection between its sites at Warrington, St Helens and Runcorn. In summary, the three sites all operated as Pentagon Ford

sites and Mr Woods, as Brand Director, oversaw all three. They also all shared HR and administrative functions based in St Helens. However, each of the sites was operated as a single and separate cost centre and the evidence I heard from Mr Woods was that separate accounts were prepared for each of the sites and, when he reported to Head Office, information about each site was provided separately. Everyone who was employed was allocated to a given site and worked primarily at that site, albeit that the claimant in his evidence quoted examples of where employees from different sites had worked together or assisted other sites.

16. At the Warrington site, the respondent operated both a Used Car Business and a New Car Business (as well as other parts of the business which are not material to this decision). The operation of those elements overlapped. Each employee was assigned to one part or the other and principally undertook their duties for one part of the business or the other. The claimant in his witness statement described himself as the Used Car Sales Controller. The contract under which he was employed, dated 30 September 2013, recorded him only as Sales Controller (31a).

17. Within the Used Car Sales business at Warrington the management consisted of: the Used Car Sales Controller; the Used Car Business Manager; and the Used Car Sales Manager. Mr Woods gave evidence that the three roles differed from each other and explained the responsibilities of each role. The claimant's evidence was that he accepted that the roles of Used Car Business Manager and Used Car Sales Controller differed, but he believed that in practice the day-to-day work undertaken was interchangeable between the two roles. The respondent did not agree. Based upon Mr Woods evidence, I accept that the roles were different and had different responsibilities within the respondent's structure/operation, even if the role-holders could, and did, often undertake similar duties on a day-to-day basis.

18. At the other sites in Runcorn and St Helens, the Used Car Sales operation had the same three management roles. In early 2020, the Used Car Business Manager in Runcorn left and was not replaced. From his departure, there were only two people in post in the Used Car management at Runcorn: the Used Car Sales Controller and the Used Car Sales Manager.

19. In the New Car Sales business at each site there were comparable management roles. That included the role of New Car Sales Controller. That is a role which was comparable to the claimant's role, but dealing with new cars rather than used cars. Mr Woods' evidence was that the knowledge required differed between new and used cars. The claimant's own evidence was that he had in the past sold new cars, but not during the years preceding the termination of his employment.

20. The context of the redundancy exercise undertaken by the respondent was the COVID-19 pandemic, which it is not necessary for me to describe in this Judgment. A letter was sent from the respondent's Chief Executive Officer to employees in the Group on 18 May 2020 (33aa) which: highlighted the impact that COVID-19 had on the respondent's business; highlighted measures that the respondent was taking to reduce their costs; and explained that the respondent would be commencing a significant redundancy programme. There was no dispute that the programme ultimately affected a significant number of employees, both at Warrington and throughout the respondent's business.

21. Whilst Mr Woods was the ultimate decision-maker, he delegated responsibility for the redundancy process at Warrington to Mr James. Mr James prepared a business case for the proposed redundancy affecting the role of Warrington Used Car Sales Controller (32). That document highlighted the background economic factors. It also detailed that Used Car Market predictions were that sales would reduce by up to 20% over the following 12 months. It proposed a change in structure which would mean that the Used Car Sales Controller role became *"surplus to requirements due to the drop in volume"*. It stated that the workload would be absorbed by the Used Car Sales Manager and the Used Car Business Manager.

22. On 20 May 2020 Mr James undertook a first consultation meeting with the claimant. This was conducted by telephone. The respondent's evidence was that this was how consultation was conducted in the circumstances of the pandemic. The claimant did not necessarily agree to meetings taking place by telephone, but he understood why they were conducted in that way. Notes were provided (33a), which recorded that Mr James followed a script and recorded relevant answers in the notes where the claimant responded to what Mr James said when following the script. It was not in dispute that Mr James read out the business case (referred to in the previous paragraph) in the meeting. The claimant said that he was interested in redeployment should an opportunity arise, depending on the role. He asked whether it was just his role that was affected, and it was confirmed that the whole site was being looked at.

23. Following the meeting, a letter confirming what had been discussed and providing details of the next meeting, was sent to the claimant on 20 May 2020 (34). That letter confirmed that the claimant's position was potentially at risk of redundancy.

24. The claimant's evidence was that, shortly after the first consultation meeting, he spoke to his line manager, Mr Skelland. Mr Skelland told him *"not to worry as you'll be pooled for the current unadvertised role of Business Manager at Runcorn".* That is the role which had remained vacant after the previous role-holder had left. In his statement provided to the Tribunal, Mr Skelland disputed that account. When cross-examined about this, the claimant was adamant that his evidence was correct and what he stated was what Mr Skelland had told him. Having heard the claimant's evidence, and having only heard the claimant's evidence under oath of the two people who were involved in this conversation, I find that Mr Skelland did say to the claimant what the claimant stated in his evidence. However, Mr Skelland was on furlough at the time (as indeed was the claimant), and he was not actively involved in the redundancy exercise. What Mr Skelland told the claimant at the time, reflected what was expected to be the case within the business (as the claimant himself evidenced), which was based upon his/their expectation that the role of Business Manager at Runcorn would be advertised as it was a vacant role. As a result of decisions made around the respondent's redundancy/reorganisation exercise, that role was never advertised or filled.

25. A second consultation meeting took place on 26 May 2020 also conducted by Mr James and undertaken by telephone. Notes were provided (36a). They recorded the claimant as *"again"* asking why the Runcorn Used Sales Car Controller was not at risk of redundancy, suggesting the question had also been asked in the first meeting (but that had not been recorded in the notes). The notes recorded that the response was *"explained as it was a different business it was different".* The

document also recorded that the claimant suggested that, as another named employee was close to or considering retirement, that would be a way of averting redundancy. At the end of the notes it recorded that there were no further questions, other than the claimant's question about the Runcorn Sales Controller role and redundancy pay.

26. There was no dispute that the claimant challenged the amount of redundancy pay which was proposed at the time. Ultimately, as a result of his challenge and subsequent grievance, the respondent increased the amount of redundancy pay.

27. The outcome of the meeting was confirmed in a letter of 26 May 2020 (37). That letter informed the claimant of the details for a third consultation meeting and made clear that the outcome of that consultation meeting could be termination of the claimant's employment by reason of redundancy. The letter also enclosed a list of vacancies available within the respondent's Group. There was no dispute that the claimant was not interested in these vacancies, as they were all either: based in the south of England; more junior than the claimant's role; and/or based in Derby.

28. The claimant exchanged emails on 27 May 2020 with Ms J Bate, Business Support Manager, regarding the second consultation meeting and the documentation that followed. The claimant quoted four areas in which he felt the notes contained discrepancies. Ms Bate responded to those issues by email. The four issues raised by the claimant were as follows:

(1) He stated that he had not selected telephone as his method of communication. That was acknowledged by Ms Bate, as the meetings were conducted by telephone due to the situation;

(2) He challenged that there had been a discussion about the redundancy in more detail;

(3) He said that he was not offered the opportunity to discuss any ideas, suggestions or proposals; and

(4) He disputed that they had discussed current vacancies, he said he was bluntly told there were no jobs.

29. Ms Bate recorded in her email that there were at that time no jobs within the Warrington CMA, which was terminology used to cover the Warrington, St Helens and Runcorn locations. The claimant in a subsequent email contended that jobs in the Warrington CMA were not mentioned in the meeting. His email in response did not expressly refer to the possibility of working in roles at other locations.

30. On 31 May 2020 the claimant wrote to Ms Bate raising a grievance (41aa). The primary focus of the grievance document was the redundancy package. However, the grievance document also addressed the claimant's selection for redundancy. He explained why he believed that selection should have been undertaken differently and from different pools. He also criticised the quality of the consultation and the length of the meetings. He said he felt that two calls totalling 15 minutes was a tick box exercise and that it resulted in him being "*discarded*" *"flippantly"* after 24 years. There was no evidence heard or presented which showed that the grievance had been addressed or responded to.

31. The claimant's final consultation meeting took place on 1 June conducted by Mr Woods. There was no dispute that Mr Woods was ultimately the decision maker about the termination of the claimant's employment. The meeting was conducted by telephone. I was provided with typed notes prepared by Mr Woods (41a). The typed notes showed that the meeting was relatively brief. The claimant was asked whether he had any new questions and he said he did not. That is, in the meeting before the decision maker (and most senior manager) at which a decision was to be made, the claimant did not raise any of the issues he had raised previously nor did he refer to anything raised in his email or grievance letter.

32. In the meeting, the claimant was informed that he was redundant. This was subsequently confirmed in writing (42). The claimant was initially told that his employment would terminate on 31 July 2020. In writing on 5 June 2020 (44), the termination date was varied, without objection, to 25 August 2020.

33. The respondent had a redundancy policy. It stated (31n):

> *"For the consultation to be meaningful and in good time before any proposed dismissals, the Company commits to a minimum period of 14 calendar days consultation prior to any dismissal, effective from the date individual consultation begins, i.e. from the date of the first meeting until the date of dismissal. During the consultation period a minimum of 2 meetings must be performed."*

34. There was no dispute that the length of time for which the respondent consulted with the claimant lasted for only 12 days and not the 14-day minimum set out in the policy. Three meetings were held.

35. The decision letter (42) confirmed that if the claimant wished to appeal he should write to Ms Gausden within seven days of receipt of the letter. The claimant emailed Ms Gausden on 26 June 2020 (that is well outside the seven-day period) (46). He asked that the email be accepted as an appeal against redundancy and explained that he was seeking advice on his selection. The email contained no detail of the basis upon which the claimant wished to appeal. Ms Gausden responded on 29 June 2020 to say that the right of appeal ended on 8 June 2020, in accordance with the seven-day period.

36. On 20 October 2020 (49) the claimant sent a lengthier appeal letter to the respondent which highlighted why he felt that the redundancy was unfair.

37. The evidence of Ms Gausden was that if the appeal had been raised within a few days of the seven-day deadline it would have been addressed as an appeal. However, because the appeal was raised so far outside the seven-day period it was not treated in that way. Ms Gausden did write a letter responding to the points raised in the appeal letter, on 6 November 2020 (52).

38. After the claimant was given notice of termination, but before his employment terminated, some further relevant vacancies did arise. These vacancies were advertised externally. The claimant's attention was not specifically brought to the adverts or to the existence of the vacancies. The role of experienced Motor Industry Business Centre Manager at Warrington was advertised between 14 July and 11 or

14 August 2020. The role of Sales Controller in Derby was advertised between 9 July and 5 August 2020.

39. Ms Gausden's evidence was that the claimant had been advised that any future vacancies would be advertised on the respondent's website and, if he was interested, he could ring or apply for them. Her evidence was also that because of the claimant's response to the vacancies in Derby discussed during consultation, the respondent did not believe he was interested in a role in Derby.

40. The claimant's evidence in the hearing was that he was not interested in junior roles in Derby. However, he said the position was different for a managerial role such as a Sales Controller. In his witness statement for the Tribunal hearing the claimant, with reference to the list of vacancies that existed at the time of his consultation meetings, said *"all of which were based too far away to realistically be considered".* He did not explain in his statement that it was a combination of distance and seniority which made such roles unsuitable. The respondent's case was that the respondent would not have accepted a role in Derby at the time. The claimant's evidence was that he currently works in Blackpool, which he said showed that he would have done so.

41. Mr Woods' evidence was that the claimant did not have the experience to fulfil the experienced Motor Industry Business Centre Manager role at Warrington, as that role required someone with considerable experience as a Business Centre Manager because of issues which had arisen. The claimant's evidence was that he had previously had some experience of being in charge of a Business Centre, but not that he had previously fulfilled a Business Centre Manager role. I accept Mr Woods evidence that this was not a suitable alternative role for the claimant which the respondent should have offered to him.

42. The claimant saw these external adverts at the time and took screenshots of them. He made no attempt to apply for the roles or to put himself forward for them. In his evidence at the Tribunal hearing, the claimant said he did not wish to apply for those roles and he explained why, that is because of the process conducted by the respondent which he had been through and with which he did not agree. It is not in dispute that the claimant chose not to apply for the roles available, and therefore it would have made no material difference whether those roles had been highlighted to the claimant during his notice period by the respondent.

43. Based upon the claimant's clear statement in his witness statement as recorded at paragraph 40 and the fact that he did not apply for the Sales Controller comparable role in Derby at the time despite being aware of it, I find that the claimant at the time was not interested in accepting a vacancy in Derby irrespective of its seniority or what that vacancy was.

Pools

44. The individual who filled the Used Car Sale Controller role in Runcorn was neither placed at risk of redundancy nor made redundant. As recorded above, during consultation, the claimant challenged why the Runcorn Used Car Sale Controller was not made redundant and/or why he was not pooled for that role.

45. In the Tribunal hearing the claimant contended that the three Sales Controllers at Warrington, St Helens and Runcorn should have been placed in a pool together, with the successful one filling the role in Runcorn. At both St Helens and Warrington the Used Car Sales Controller post was made redundant, leaving two other managerial roles in Used Cars at the branch. In Runcorn, there was no used Car Business Manager in post, and the decision was made not to make the Used Car Sales Controller post redundant as there were only two Used Car Managers in Runcorn. The claimant's contention was that he should have had an opportunity to be considered for the same role as he fulfilled in Runcorn, as that role-holder was retained. The respondent's position was that it decided not to make that role redundant in Runcorn, because there were only two managers in post in Used Cars in any event, and therefore it decided that the person in post as Used Car Sales Controller in Runcorn was not at risk of redundancy (or made redundant).

46. The claimant also contended that all Sales Controllers should have been pooled together, with those remaining in employment selected on an objective basis. He contended that the respondent should not have distinguished between Used Car Sales Controllers and New Car Sales Controllers, highlighting that his contract did define him as a Used Car Sales Controller. The New Car Sales Controllers were not made redundant or placed at risk. The respondent contended that they were not required to pool the roles as proposed.

47. During the Tribunal hearing the claimant also contended that he undertook the same duties as the Used Car Business Manager at Warrington and therefore he contended that he should have been pooled with him. He also contended that the three Used Car managerial roles at Warrington should have been placed in a pool and a selection exercise undertaken for the two managers to be retained at Warrington in Used Cars.

48. Ms Gausden gave evidence that the respondent did consider other approaches to pools and redundancy and, in particular, did consider pooling across sites, but decided not to do for business reasons. The respondent looked at the redundancy situation on the basis that Warrington was an autonomous site and operated as a separate business with separate dedicated sales teams.

49. It was not in dispute that more than 20 redundancies were proposed across the company as a whole. It was also not in dispute that fewer than 20 redundancies were proposed at the Warrington site.

The Law

50. For a claim for unfair dismissal, the starting point is section 98 of the Employment Rights Act 1996.

> *"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
>
> *(a) The reason (or if more than one, the principal reason) for the dismissal, and*

(b) That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it

(c) is that the employee was redundant...

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case."

51. Section 139 of the Employment Rights Act 1996 defines redundancy (as is relevant to the issues in this claim):

"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 – … the fact that the requirements of that business – … 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."

52. It is generally not open to an employee to claim that his dismissal is unfair because the employer acted unreasonably in choosing to make workers redundant. The Tribunal is not to sit in judgment on the business decision to make redundancies.

53. In determining whether a redundancy situation exists, ***Safeway Stores plc v Burrell*** *[1997] ICR 523* tells us, a Tribunal must decide:

a. Was the employee dismissed?

b. If so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?

c. If so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

54. The question is whether there has been a diminution or cessation in the requirement for employees to carry out **work of a particular kind**. This is not a test which requires the respondent to cease doing that work, it is focussed on whether there is a reduced requirement for employees to carry out the particular kind of work.

55. In ***Williams v Compair Maxam Ltd*** *[1982] IRLR 83*, the EAT set out the standards which should guide the Tribunal in determining whether a dismissal for

redundancy is fair under section 98(4). Browne-Wilkinson J, expressed the position as follows (including only the factors relevant to this case):

> *"… there is a generally accepted view in industrial relations that… reasonable employers will seek to act in accordance with the following principles:*
>
> *(1) The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.*
>
> *(2) ….*
>
> *(3) … the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.*
>
> *(4) The employer will seek to ensure that the selection is made fairly in accordance with these criteria ….*
>
> *(5) The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.*
>
> *… The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim."*

56. The House of Lords in ***Polkey v AE Dayton Services Ltd*** *[1987] IRLR 503* summarised the relevant procedures required in a redundancy dismissal in the following terms:

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

57. In ***Langston v Cranfield University*** *[1988] IRLR 172*, the EAT held that so fundamental are the requirements of selection, consultation and seeking alternative employment in a redundancy case, they will be treated as being in issue in every redundancy unfair dismissal case.

58. On pools for selection, in ***Capita Hartshead Ltd v Byard*** [2012] IRLR 814, having reviewed the case law, Silber J at para 31 gave this summary of the position:

> *"Pulling the threads together, the applicable principles where the issue in an unfair dismissal claim is whether an employer has selected a correct pool of candidates who are candidates for redundancy are that:*

(a) *"It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted" (per Browne-Wilkinson J in Williams v Compair Maxam Limited);*

(b) *"…the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn" (per Judge Reid QC in Hendy Banks City Print Limited v Fairbrother and Others (UKEAT/0691/04/TM);*

(c) *"There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem" (per Mummery J in Taymech v Ryan EAT/663/94);*

(d) *The Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has "genuinely applied" his mind to the issue of who should be in the pool for consideration for redundancy; and that*

(e) *Even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it."*

59. The respondent's representative placed reliance upon ***Wrexham Golf Co Limited v Ingham*** *EAT/0190/12* in which it was said:

> *"No judgment should be read as a statute. There will be cases where it is reasonable to focus upon a single employee without developing a pool or even considering the development of a pool."*

60. On consultation, the EAT in ***Mugford v Midland Bank*** *[1997] IRLR 208*, summarised the state of the law as follows:

> *"It will be a question of fact and degree for the [employment] tribunal to consider whether consultation with the individual and/or his union 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."*

61. Glidewell LJ said in the case of ***R v British Coal Corpn and Secretary of State for Trade and Industry, ex p Price*** *[1994] IRLR 72*:

> *"It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person*

or body whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in R v Gwent County Council ex parte Bryant, reported, as far as I know, only at [1988] Crown Office Digest p 19, when he said:

'Fair consultation means:

(a) consultation when the proposals are still at a formative stage;

(b) adequate information on which to respond;

(c) adequate time in which to respond;

(d) conscientious consideration by an authority of the response to consultation."

62. Section 98(4)(a) of the Employment Rights Act 1996 makes clear that the size and administrative resources of the employer's undertaking are factors which should be taken into account when considering whether the dismissal is fair or unfair in all the circumstances of the case.

63. The respondent relied upon the case of ***USDAW v WW Realisations 1 Ltd*** *[2015] IRLR 577* in highlighting that an individual establishment is the unit or entity to which the workers made redundant are assigned to carry out their duties.

64. In **Polkey** the House of Lords held that the fact that the employer can show that the claimant would have been dismissed anyway (even if a fair procedure had been adopted) does not make fair an otherwise unfair dismissal. However, such evidence (if accepted by the Tribunal) may be taken into account when assessing compensation and can have a severely limiting effect on the compensatory award. If the evidence shows that the employee may have been dismissed properly in any event, if a proper procedure had been carried out, the Tribunal should normally make a percentage assessment of the likelihood and apply that when assessing the compensation. In applying a **Polkey** reduction the Tribunal may have to speculate on uncertainties to a significant degree.

65. In paragraph 1 of the ACAS Code of Practice on Disciplinary and Grievance Procedures it says "*The Code does not apply to redundancy dismissals".*

66. In his skeleton argument, the respondent's representative relied upon **USDAW**, **Capita Hartshead**, and **Wrexham Golf Co** cases as cited above. His oral submissions addressed the facts and did not rely upon any other cases. The claimant also did not refer to any law in his submissions, which focussed upon the facts of the case.

Applying the Law to the Facts

The principal reason for dismissal

67. The first issue identified was what was the principal reason for the claimant's dismissal. The respondent submitted that the principal reason for the claimant's dismissal was redundancy. I find that was the case. In the context of the COVID-19 pandemic the respondent made business decisions to address the shortfall in

income, which included reducing the number of employees and, in particular those employed in Used Car sales. Those decisions included the proposal to remove the role of Used Car Sales Controller at the Warrington branch, as was evidenced by Mr James and the Business Case document (32). That was a diminished need for employees to carry out the role which the claimant fulfilled at Warrington. The claimant's dismissal was because of that reduced requirement. When Mr Woods made the decision to dismiss the claimant, the reason for his decision was redundancy.

68. The respondent did submit in the alternative that the reason for dismissal was some other substantial reason, being a business reorganisation. The redundancy of the claimant occurred in the context of a number of redundancies across the respondent's business and at the Warrington site. As I have found that the reason for dismissal was redundancy, I do not need to consider this alternative reason.

Whether the respondent acted reasonably

69. The second question as outlined at issue 1.2 above, is whether the respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant, in accordance with equity and the substantial merits of the case. That is the issue which needed to be determined. However, I first addressed each of the sub-issues identified at 1.2, each being relevant to this over-arching determination.

Consultation

70. Sub-issue 1.2.1 was whether the respondent adequately warned and consulted the claimant? The claimant was warned about his proposed redundancy and a process of consultation was undertaken. Three consultation meetings were conducted, and the issues raised by the claimant in the meetings were considered and responded to. The claimant was critical of the brevity of the consultation meetings and the process generally.

71. It is certainly understandable that the claimant felt that the length of the consultation meetings was very brief, when viewed in the context of his lengthy and loyal service with the respondent. That is what he criticised in his grievance (41cc). However, the reason for the proposal was explained to him, and he was given the opportunity to raise anything he wished to in the meetings. The claimant was given adequate information to respond to the consultation, time to respond, and consideration was given to the matters he raised. In the 1 June meeting the claimant raised very little, when he had the opportunity to do so in a meeting with the ultimate decision maker.

72. The respondent failed to undertake consultation for what it described as the "*minimum period*" in its policy. That is, the respondent did not adhere to its own policy. Nonetheless, three consultation meetings were undertaken. Whilst a breach of an employer's own procedures can render a dismissal unfair, in the circumstances of this case I find that the fact that consultation was undertaken for twelve days rather than fourteen does not render it unfair. In the overall picture and applying what is said in **Mugford** and **British Coal Corpn** as I have cited them above, I find that the consultation was fair, genuine and meaningful.

73. The claimant placed considerable emphasis upon the fact that the respondent was one company, and/or the respondent and its associated companies operated as one group. He contended that they should have consulted for at least 30 days as more than 20 redundancies were proposed across the company/group. The 18 May communication (33bb) showed that the redundancy occurred in the context of group-wide decisions. Warrington did have strong links with other sites and there were factors which as part of a broad picture might suggest it was not its own establishment: the fact that it worked closely with other sites; that it was part of a national organisation; and that it had strong local links with St Helens and Runcorn, sharing accounts and HR functions at St Helens; and all three locations were under the ultimate management of Mr Woods. However, based upon the evidence heard (see in particular paragraph 15 above) and applying ***USDAW*** I find that the Warrington site was its own establishment, having its own accounts and management structure, and having employees assigned to it. In any event, for the purposes of this claim and for the issues to be determined, there was no claim for a protective award in relation to a failure to collectively consult. As I have already confirmed, I find that the consultation with the claimant was fair. Whilst it clearly would have been possible for the claimant to have been given more time between meetings and there could have been more consultation meetings, the consultation in this case in my view was not inadequate.

74. The respondent's representative accepted that it was not ideal that redundancy consultation meetings were conducted over the phone. I agree. The claimant's perception of those meetings and the limited issues he felt able to raise may, to some extent, reflect the fact that consultation conducted by telephone is unlikely to be as full and thorough as consultation in-person. However, in the context of the pandemic and the circumstances as they applied at the time that consultation was undertaken, I do not find that consultation being conducted by telephone resulted in the dismissal being unfair.

Selection

75. Issue 1.2.2 was about selection. The respondent identified the claimant's role of Used Car Sales Controller at Warrington as being the sole unique role placed at risk of redundancy. He was not selected from a pool. Selection was not undertaken (save for identifying his role as being at risk). Ms Gausden evidenced that the respondent did apply its mind to selection and pools, and did consider other pools (see paragraph 48).

76. Each of the alternative approaches to redundancy selection and pools proposed by the claimant (see paragraphs 44-47 above) could have been approaches to selection and pools which the respondent could have taken. Any dismissals following any of those proposed approaches would have been likely to have been fair. The claimant was able to raise the possibility of an alternative approach in his consultation, as he did for his proposed pooling with the Used Car Sales Controller in Runcorn, but the respondent was not obliged to do what the claimant proposed.

77. It is not the Tribunal's role to determine which of the approaches to selection or pools would have been the fairest. There were different approaches to selection available to the respondent. The question is not whether it would have been fairer for the respondent to have acted in an alternative way. It is whether the selection pool

for the redundancies was one that fell within the range of reasonable responses of a reasonable employer.

78. I find that the respondent genuinely applied its mind to the issue of who should be in the pool. I also find that the identification of the claimant's unique role as Used Car Sales Controller at Warrington as being at risk of redundancy fell within the range of reasonable responses of a reasonable employer. The decision not to pool the role with other roles, including those at other locations or those responsible for New Cars and/or other Used Car managers at Warrington, was one that a reasonable employer could reasonably take.

79. The claimant fulfilled a unique role at his location. The respondent selected that unique role at his location as being at risk (in the same way as it did in St Helens). There was a sensible rationale for the different approach in Runcorn. The respondent did not consider the claimant's role and that of the Used Car Business Manager (Warrington) to be interchangeable. The respondent was not required to pool those two roles in order for the redundancy to be fair, irrespective of the claimant's views about work on a day-to-day basis.

Suitable alternative employment

80. Issue 1.2.3 has required careful consideration, that is whether the respondent took reasonable steps to find the claimant suitable alternative employment? I accept the respondent's contention/evidence that during the consultation period and at the end of the consultation, the respondent had given the claimant a full list of vacancies and the claimant was not interested in any of the vacancies at the time. However, the more difficult issue arose from the vacancies which occurred after the claimant was given notice of redundancy, but whilst he was still employed. The respondent undertook no proactive steps whatsoever to bring those vacancies to the claimant's attention or to explore with the claimant whether he wished to be considered for (or was interested in) those vacant roles. It would always be best practice for an employer to do so, whether or not it thought an individual was unlikely to want to accept the role(s). This applied to two roles: the Business Centre Manager role in Warrington; and the Sales Controller role in Derby.

81. In the circumstances of this case, however, I do not find that the failure to undertake proactive steps to bring those vacancies to the attention of the claimant did render the dismissal unfair. That is because:

a. the claimant was in fact aware of both of the vacancies;

b. the claimant took no steps himself to put himself forward for the roles or indicate that he was interested in them, when (as Mr Gausden evidenced) he had been told he could do so;

c. I accept Mr Woods' evidence that the claimant was not suitable for the particular Business Centre Manager vacancy which existed (see paragraph 41); and

d. I have found that the claimant was not in fact interested in accepting a vacancy in Derby at the time (see paragraph 43), as evidenced by the fact that he did not apply for the role or put himself forward for it.

Fair dismissal

82. In light of the fact that the claimant's role had ceased to exist and that it had not been possible to identify alternative employment for him, I do accept that dismissal was within the range of reasonable responses for the respondent. I also accept the respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. I find that Mr Woods' decision to dismiss the claimant by reason of redundancy on 1 June 2020, was fair in accordance with equity and the substantial merits of the case.

Polkey

83. As I have found that the dismissal was fair, it is not necessary for me to determine whether the claimant could have been fairly dismissed in any event (issue 1.3). However, it is appropriate for me to record my findings on two things:

a. Had I find that the respondent's lack of proactivity in bringing to the claimant's attention vacancies during his notice period rendered the dismissal unfair, I would have found that the claimant would have been fairly dismissed in any event as a result of the fact that he did not put himself forward for any of the roles despite being aware of them (and therefore any compensatory award would have been reduced by 100%); and

b. The respondent's representative in his submissions placed some emphasis on his contentions that the claimant would not have been appointed to the alternative roles in any event, when addressing the issue of whether the claimant would have been fairly dismissed even if a fair procedure had not been followed. I do not accept those arguments, I cannot see why the claimant would not have been appointed to the vacant role of Sales Controller in Derby had he wished to be considered for it, or at least I was given no evidence that any failure to appoint him to that vacant role would have been fair.

ACAS Code and appeal

84. As the respondent's representative quite correctly submitted and as is recorded at paragraph 65 above, the ACAS Code of Practice on Disciplinary and Grievance Procedures (issue 1.4) does not apply to redundancy dismissals. In those circumstances any failure to comply with it, such as not arranging an appeal hearing, would not lead to an increase in any compensation awarded.

85. Whilst I note that the ACAS Code does not provide a time limit for appeals, I agree with the respondent's representative's submission that an employer is able to set a time limit for an appeal. In circumstances where the respondent had dismissed an employee with 24 years' service, I would have expected it to have been very flexible when applying such a time limit. Nonetheless, in circumstances where the claimant did not appeal in time or close to the time provided, he did not raise any grounds of appeal until over four months after he had been dismissed, and where those grounds were in any event addressed in writing (albeit not following a hearing), I would not have found that the respondent *"unreasonably"* failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures (even had it

applied), nor would I have increased any award. Whilst not specifically argued by the claimant, I also do not find that the lack of an appeal hearing in the light of the delay in the claimant appealing, otherwise rendered the dismissal unfair.

What redundancy means

86. At the end of the claimant's witness statement he highlighted the difficulties which he has found in finding other work. In that statement he said he believed that prospective employers were questioning why a twenty four year loyal hardworking employee would be made redundant. Such a view (if it exists) is unfortunate and presents a fundamental misunderstanding of redundancy. There was nothing in this case which suggested that the claimant was not a loyal hardworking employee who provided considerable service to the respondent over a long period of time. Unfortunately, the decision made by the respondent, in these very difficult times, was that it needed to reduce costs and their workforce to address the reduction in income/business. In those circumstances the claimant's role at the Warrington site was identified as one placed at risk of redundancy. The fact that the claimant was made redundant in those circumstances did not reflect negatively on the claimant at all, but rather it reflected the tough business decisions which the respondent needed to make (as many employers have needed to recently).

Summary

87. For the reasons I have explained above, I find that the dismissal was not unfair. The claimant was dismissed by reason of redundancy and, in all the circumstances, the respondent acted reasonably in treating that as a sufficient reason to dismiss the claimant.

Employment Judge Phil Allen
1 July 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
2 July 2021

FOR THE TRIBUNAL OFFICE