Case No: 3332325/2018

EMPLOYMENT TRIBUNALS

Claimant: Mr G Dixon

Respondents: (1) Sheila Farey, (2) Garry Fitzhuh, (3) John Jappy (4) Victor McDonald (sued as trustees of Bedfordshire Golf Club)

HEARD AT: Cambridge Employment Tribunal

ON: 19 & 20 September 2019

BEFORE: Employment Judge Michell

REPRESENTATION: For the Claimant: Ms K Anderson (Counsel)
For the Respondent: Mr S Fennell (solicitor)

RESERVED JUDGMENT

1. The Claimant's unfair dismissal claim is well founded. The Claimant was unfairly dismissed.

REASONS

BACKGROUND

2. The Bedfordshire Golf Club ("the Club") is a golf club operating in Stagsden, Bedfordshire. The claimant worked as the Club's part time (30 hours p.w.) General Manager ("GM") from 30 March 2009 until his dismissal purportedly by reason of redundancy on 30 April 2018 ("EDT"). By a claim form presented to the tribunal on

28 August 2018, the claimant asserted that his dismissal was unfair. The respondent resisted the claim.

HEARING

3. Further to the tribunal's letter dated 2 December 2018, it was confirmed by Mr Fennell at the start of the hearing that the Club was not in fact a corporate legal entity. The parties agreed that the appropriate respondents to the claim were the trustees of the Club. Accordingly, by consent, the name of the respondent was amended as above. No issue was taken by Mr Fennell as regards the sole name on the early conciliation certificate (i.e. the Club).

4. I heard evidence from the claimant. For the respondent, I heard from the first instance decision maker, Mr Simpson (former Club Captain, and co-opted Board member); who was cross examined for some 3 hours; the claimant's line manager, Mr Coppock (Club Chairman and Board member), Mr Bygraves (Club Treasurer), who was not asked any questions; and Mr Godfrey (former Club Captain), who heard the claimant's appeal against dismissal. I was referred to a bundle of papers prepared by the respondent in accordance with the tribunal's directions, running to some 420-odd pages. I also received written submissions from both representatives, to which they both spoke, and for which I was grateful.

5. The issues for me to determine on liability were confirmed as:
    a. What was the principal reason for dismissal? The respondent claimed it was redundancy, or some other substantial reason (SOSR)- namely, as Mr Fennell explained in his submissions, "the plan to take control of the GM position [as defined below] through the interim management team".
    b. Did the decision to dismiss the claimant fall within the band of reasonable responses open to the respondent for the purposes of s.98(4) of the Employment Rights Act 1996 ("ERA")?

6. There was insufficient time to deal with remedy, the claimant's primary case being that he wanted reinstatement. For this reason, remedy was put off until 19 December 2019 insofar as necessary.

FACTUAL FINDINGS

7. The claimant was involved with the Club from about April 2007. At that point, he became a self-employed head PGA professional ("HP"). As part of that HP role, the claimant organised the running of the Club shop, and tuition facilities. He invested quite a lot of money in refurbishing and stocking the shop. He also, at his own expense, hired various individuals to assist in performing most of the above HP tasks, He in fact personally spent very little time doing HP work, performing a largely supervisory role.

8. His role as general manager ("GM") began about two years later. Though the GM role was supposedly a 4-day week one, the claimant spent most of his time performing it.

9. In addition to those two roles, the claimant was appointed the Licensee of the driving range ("the Licence"), which also generated some further income for him.

10. In the early years, the Club was not in good financial health. However, under his and others' guidance, the fortunes of the Club became much improved.

11. The Officers of the Club became concerned that because the Claimant held both the HP and GM roles, he had or would become overstretched, and as a result had or would run into difficulties discharging all the responsibilities expected of him.

12. As a result, in late 2016, they decided that they wanted to split the two roles so as to ensure they could each be held by somebody who -as the written restructure proposal produced at that time explains- could focus "100% of their effort and energy on making that part of our overall offering as effective and successful as possible". This was because of concerns (articulated in the note) that the claimant "is stretched in

too many directions and is struggling to fully discharge all the responsibilities expected of him".

13. As is explained in the note, the original timescale for moving to that revised structure was envisaged as being "as soon as can be practically managed (say 6/9 months) with a longstop deadline of about 2 years". The note also that explains that the Club would need to discuss matters with the claimant and for "detailed plans" to be formulated, "including inter alia develop revised/enhanced role profiles for the two principle [sic] jobs".

14. However, once the matter had been discussed with the claimant -who was keen to retain both roles, and who did not embrace the idea of the restructure- they decided to review the position again in about December 2017. The note recording the decision -a copy of which was given to the claimant- explains "no fixed timescales have been set and the position will be reviewed again in the light of circumstances in 12 months' time".

15. (The claimant was at that time keen to protect his own personal interests– i.e. the financial benefit he gained from doing both the GM and HP roles. However, in questioning before me, the claimant accepted that there was a legitimate business reason -for the Club, at least - for the GM and HP roles being performed by two different individuals. Conversely, Mr Simpson accepted in questioning from me that - at least as at late 2016- if the claimant could have somehow been duplicated, there would have been no difficulty from the Club's perspective in the 'original' claimant doing the HP role, and in the duplicate claimant doing the GM role. The issue was capacity rather than capability, he said.)

16. The claimant was also informed by Mr Simpson and Mr Coppock in the course of a December 2016 meeting that KPIs had been developed for his GM role.

17. As Mr Simpson properly accepted in questioning, this meant that the Club knew enough about what the claimant did in his job to be able to formulate detailed KPIs. This is relevant in the light of later developments, set out below.

18. The claimant alleged in his evidence that Mr Coppock refused to show the written KPI document to him, and instead told him "there is no point you seeing them, as you won't be carrying them out". I suspect there is an element of misrecollection on the part of the claimant here. After all, the text of the KPI document was very clearly addressed to him and the GM role he was carrying out at that time. However, I do accept that Mr Coppock may have made at least some form of remark which indicated to the claimant that he was not keen on the claimant doing the role, or did not expect he would do so (because he would be expected to do the HP role instead). Nevertheless, the claimant was given the KPI document for his perusal at the meeting.

19. A new job description was also drafted for the GM role at about the same time. It provides that the claimant would work the core hours of 10am to 5.30pm on Mondays, Wednesdays, Thursdays and Fridays.

20. The claimant was keen to undergo a Golf Club Level 5 Managers Diploma, which could only commence in March 2017. It was a three year course, and the parties agreed it would be equally funded by the claimant and the Club. I note that the March 2017 funding agreement between the claimant and the Club at the time spelt out in terms that "neither party intends any explicit or implied link between this agreement and [the claimant's] continued employment in the role of general manager".

21. The claimant had concerns about the abilities of Mr Coppock's wife to perform the function of golf bar and events manager. He also had some issues with the fact of her employment, and salary increases, which he considered (rightly or wrongly) to give rise to an actual or potential conflict of interest. These matters caused a degree of tension between himself and (in particular) Mr Coppock.

22. As explained above, the claimant would have been aware of the Club's intention to revisit the issue of the revised structure in about December 2017. However, when that time came, and the Management Board discussed that issue further in late 2017, the claimant was deliberately not involved. The Board clearly anticipated "some

resistance" from the claimant. The notes prepared following and management board meeting in November 2017 explain as much. They also explain that "2018 could be a difficult year to manage within the Club" as a result. (I can understand some discussion without the presence of the claimant would have been appropriate. However, I consider that a reasonable employer would have also engaged with the claimant about the topic at around the same time.)

23. Tasks which are articulated as required to implement the restructure include developing revised/enhanced role profiles of a full time HP and GM, in the latter case "possibly post GM appointment so that he/her [sic] is involved in the process"; also, "appoint a [GM]". This does not suggest that the claimant was envisaged as the, or even a, potential candidate for the GM full-time role.

24. Similarly, the restructure proposal which was circulated in January 2018 and which was circulated to management board members only, and not to the claimant, explains that "a higher GM salary needs to be offered to attract a quality range of candidates" and that "once a new general manager has been recruited you expect that individual to drive a phase 2 restructure."

25. The proposal document also explains that the Club had "been managing elements of [the claimant's] performance over the last 12 months and in recent times some aspects of this have deteriorated further. Notwithstanding, the proposed restructure is not driven by performance issues– it is essential that we stress our positive reasons for the restructure and distance this from any performance issues".

26. The document sets out a restructure timetable which envisages giving the claimant the terms for his redundancy, allowing him "time to consider the restructure proposal and revert with any suggestions/issues", and for there then to be a four week consultation period. The intention is expressed to be give the claimant three months' notice, "unless anything has changed during the consultation period". The document states that the claimant may consider applying for the GM role on a full-time basis in which case "the application should be considered on its merits". It also sets out the

unequivocal desire on the part of the Board for two different people to be in the GM and HP roles, and for that to be non-negotiable.

27. The draft implementation plan, to which the Board's special meeting minutes of February 2018 refer, sets out the recommendation of Mr Simpson that "unless anything has changed" during the 28 day consultation period, the clamant would be paid in lieu of notice– which would mean "we will need interim GM cover"–and to "start the planning for recruitment process for a new general manager". There was no mention of an interim arrangement of the kind mentioned at para 6(a) above, save for the purpose of 'holding the fort' during recruitment.

28. Appendix 1 to the plan states "it is likely that the recruitment process will take say 6 weeks and the successful candidate might well have to give three months' notice on their existing contract- so, allowing for slippage, if we do not ask GD to work his notice period… we could need interim management for up to 6 months." The opinion is expressed that "with the cooperation of our existing senior staff… We can handle the interim management of the Club between a few willing volunteers". So, again, the key GM functions would be "split amongst a number of members" pending completion of the recruitment process.

29. Mr Simpson (who in 2018 no longer himself had a vote on the Board, being by that time a co-opted member) prepared a script for the first consultation meeting.

30. Under the heading of "notice period", the script explains that the management board "will arrange 'interim' cover the period between GD leaving and us recruiting new general manager". Also, that "for reasons of sensitivity we have not completed our research into the steps required to go ahead and run recruitment project so it is not expected that that will commence on day 1 after the restructure is implemented".

31. The script also explains that the board "makes no presumption that [the claimant] will want to continue as the "Head Professional", but explains that if he did want to do so "various considerations" would need to apply, such as finalisation of a revised

contract and arrangements for "an effective working relationship between GD and a new general manager who will effectively become GD's reporting line".

32. A script was also prepared for "selective telephone notification" to "Past Captains and Presidents" to take place very soon after 'Day 32'. That script explains that the claimant would not be asked to work out his three months' notice period and that the Management Board "has put in place interim management arrangements to ensure that the Club continues to run smoothly and effectively". It is also explained that the management board "will commence a project to recruit a new general manager shortly– No preparatory work has happened before this point as we were very keen to ensure that confidentiality was maintained and nothing leaked".

33. A Mr Andrew Johnson, who had been HR Director at Whitbread Plc and was experienced in HR matters including restructuring and redundancy situations, was prevailed upon by the Club in about March 2018 to provide some free assistance. On 17 March 2018, Mr Bygraves asked Mr Johnson to look over (amongst other things) draft scripts, as "we are about to deliver the blow soon".

34. Mr Johnson explained in his 20 March email in reply "…we need to emphasise that whilst there is a desire by the Board to create a full-time general manager role it is not a foregone conclusion and that is why we are having the consultation period. I have emphasised this in the post meeting letter and meeting script…. Since we are creating a new role of FT General Manager we need to give the claimant of the opportunity to apply for it (I know he won't want to). I have put this in the letter…."

35. Hence Mr Johnson in his email repeats the Club's expectation -which must have been shared with him- that because the HP role (plus Licence) was more remunerative than the GM role, the claimant would in all probability not want the latter role if he did not have the option of choosing between the two of them.

36. In an email dated 26 March 2018, Mr Johnson responded to an email from Mr Simpson, in which Mr Simpson spelt out -amongst other things- that "the main point of the restructure is to achieve a split of the roles". Mr Johnson's comment was: "I

am okay with this as long as the new role is definitely different from existing part-time role otherwise we can't justify a restructure".

37. Mr Johnson explained to Mr Simpson in his email various changes he made to the draft documents he had been sent. Amongst other things, he states "…we have to offer Geraint the chance to apply for the new role…. If he says yes, in theory we would have to manage his application in the 31 day consultation period. If we interviewed him against a set of agreed criteria that he would not meet we could turn down his application and move on with the conclusion of the consultation".

38. In my judgment, Mr Johnson would not consider 'setting up the claimant to fail' like this without being under the understanding -from indications given by the Club- that there was no appetite for the claimant to continue in post as GM.

39. Mr Simpson in evidence claimed he was "very surprised" at such suggestions from Mr Johnson, and that he was "putting the cart before the horse". But if Mr Simpson really thought Mr Johnson had 'got the wrong end of the stick', to the claimant's obvious detriment, it is surprising he did not say so in the email correspondence.

40. By a letter from Mr Simpson dated 29 March 2018, the claimant was informed for the first time that he was at risk of redundancy because the Board were (again) "considering employing a dedicated General Manager as well as continuing with the services of a Head Professional". The letter explained that a 31 day consultation period would end on 30 April 2018. The letter states that "if the restructure goes ahead as indicated, and pending recruitment of a dedicated general manager, interim management arrangements will be put in place to ensure that the Club continues to be managed effectively and in the best interests of it's [sic] members" .

41. Thereafter, Mr Johnson drafted a job description for the new role. In his email dated 8 April 2018 to Messrs Simpson and Bygraves, he explains that he had "significantly upweighted the candidate qualifications for the target candidate" i.e., I infer, put in place a set of criteria the claimant "would not meet" (to use his 26 March words). For

example, “a university degree in leisure or sports management” (which the claimant did not have) was required.

42. In his 10 April 2018 email to Messrs Johnson, Coppock and Bygraves, Mr Simpson states:

“… As you know, we are not intending starting the formal recruitment on a full-time general manager at this stage– We are intending managing the Club with volunteer interim management for a period with the recruitment to start in say 3/6 months’ time once things have settled a bit… Part of the reasons for the proposed delay is that the Management Board have not yet agreed terms/salary for the full time role- we want to be able to do some research into the market generally and speak to a number of people in our sector to gauge what is required… we haven’t been able to do anything yet given our need to maintain complete confidentiality…”.

43. Of course, this is not the same rationale as the assertion which Mr Simpson made on other occasions, and which he maintained under cross examination, that a period of interim management was needed to define and understand the GM role going forward. When Mr Simpson was asked in questioning why the claimant could not remain in post whilst the interim management team gained a better understanding of the GM role -assuming a better understanding was necessary- he replied that “it would hinder our understanding of the GM role” if the claimant was in situ, and that “I did not consider that as an option”.

44. Ms Anderson submitted, and I agree, this was an extraordinary thing not to at least “consider”, if the Club was genuinely ‘leaving the door open’ to the claimant when determining what was needed from a full time of “dedicated” GM role. (Mr Simpson also did not explain how, rationally considered, it would not have been possible to re-evaluate the GM role with the incumbent still in role.)

45. Mr Simpson also made various suggestions in his 10 April email in bullet points as regards the job description for the new role. In my judgment, his intention very clearly was to try and ensure that the claimant would not meet the necessary specifications, and to adjust the criteria accordingly.

46. Mr Simpson, who struck me as a particularly well-prepared, carefully considered, intelligent, and articulate witness, nevertheless stated in cross examination that he "did not know" why he had written those bullet points. He therefore offered no explanation, but conceded that it was "inappropriate" for him to have made those suggestions.

47. Mr Simpson concludes the email with his "key question", namely- "if the claimant expresses a desire to take on the full-time GM role and stop being our Head Professional, my understanding from our discussions on Wednesday 28 March was that we would tell him that the job will be advertised in due course (but not immediately) and at that stage he will be able to apply if he wants to when he sees the job profile [which, as Mr Johnson had already suggested, would be designed to be "upweighted"] and terms/conditions. Is that correct?"

48. Mr Johnson duly answered that question in the affirmative, under cover of an email later that day. He also told Mr Simpson "you will run the Club through a small committee with assigned tasks until you have reviewed what structure you require".

49. On 12 April 2018, the claimant for the first time proposed in a letter to the board that he would continue his role as GM, but on a full-time basis. He also indicated his understanding that he would have to give up his HP role.

50. That proposal was repeated at a meeting which took place on 16 April 2018. Mr Simpson told me (and I am sure it is right, if not an understatement) that the proposal "came as something as a surprise". This was not something the Board had really anticipated. As Mr Fennell put it in his submissions, the claimant "astounded

everyone". But that, of course, was no reason not properly to engage with the claimant thereafter.

51. The claimant made a clandestine recording of the meeting, because he did not trust the intentions of the Board at that stage.

52. The claimant asked if the role of general manager was going to become a full-time position rather than a part-time position. Mr Simpson's response to that question was not entirely straightforward. He stated "that is not currently the Board's plan. The Board's plan is to put interim management in place, working towards the recruitment of a full-time general manager. So we see a period of break in terms of having a general manager in place".

53. (It was conceded in questioning before me that this was the first time the Club had articulated to the claimant the alleged intention to have 'a period of break'.)

54. He went on to tell the claimant that "the Management Board are considering employing a dedicated [GM]" -whereas that was, of course, very much the Board's fixed intention. He also said that "our period of the interim management is to allow us the opportunity to formulate recruitment strategy for what the right [GM] structure is going forward".

55. He explained to the claimant that he would not be expected to work out his notice, because it would not "feel right" for him to continue in the GM role "once this becomes public knowledge". He told the claimant "we think it's important to give you the time that will give you to reorganise things, in your role as [HP]." He did not go into any detail as regards what "things" needed to be "reorganised"; in any event, as explained above, the claimant was already performing the HP role and it is thus hard to see what 'reorganisation time' was needed for such a purpose. Instead, it seems to me that the Club wanted the claimant out of the GM role as quickly as possible.

56. In cross-examination, Mr Simpson was asked why it would "not feel right" for the claimant to continue in his part time GM role whilst the club progressed with

recruitment, if the Club was genuinely open the possibility that the claimant might be recruited to the 'dedicated' or full-time GM role. As Ms Anderson observed in her submissions, Mr Simpson did not give a satisfactory answer to that question, but instead said the Club need time to evaluate the role. He did not explain why, sensibly, that could not be done with the claimant still in post- even assuming (given the above points regarding KPIs etc) an evaluation was necessary.

57. In a briefing note setting out various options for the purposes of a Board discussion on 19 April, Mr Simpson amongst other things (and as one option) suggested that it could be explained to the claimant -if his proposal was rejected- that that the Club "was not intending to launch a recruitment process for a new dedicated general manager for a period to give the board the opportunity to research the market and develop a recruitment strategy and plan." Also, that the claimant could be told he would be "able to apply" once the role was advertised.

58. The Board (unsurprisingly) followed that suggestion, and the claimant was informed of the same at a meeting on 20 April 2018. The claimant asked for the consultation period to be extended, but this request was later rejected (at the 25 April meeting to which I refer below).

59. The claimant's evidence was that Mr Simpson told him at the meeting that if he did not cooperate the Club's redundancy plans, or if he brought legal proceedings against the Club for any form of unfair dismissal, their support for his continuance as HP would be withdrawn, and steps would be taken to ensure that his HP role be terminated. That serious allegation was not in fact put to Mr Simpson in cross-examination. Having heard from the witnesses, and given paras 77 and 82 below, I suspect the allegation may -regrettably- have some substance. However, I make no finding on that particular point.

60. In cross examination, Mr Simpson was asked if the claimant could have been kept in post whilst the Board explored what it wanted from the GM role. He said that was "an option". But nowhere in the paperwork does that option appear to have been given any serious consideration by the Board. Mr Simpson expressed to me in cross

examination his view that the Board wanted the Claimant to continue in the HP role, and that it would "hinder our understanding of the GM role if the Claimant was in the GM role". Hence (he said) I didn't consider it as an option".

61. By an email dated 20 April 2018, Mr Simson and Mr Johnson exchanged emails setting out which individuals would cover the 'Interim Management Plan", demarcating the various specific GM job functions amongst four persons including himself, Mr Coppock and Mr Bygraves.

62. Further to the claimant's 20 April request for an extension to the consultation period, on 21 April 2018 Mr Coppock and Mr Simpson exchanged emails. Mr Coppock opined that any such extension ""would be seen as giving GD false hope that this is going away if he can delay the process". Such a view does not connote an open mind on the part of (at least) Mr Coppock.

63. In a letter to the claimant dated 23 April 2018, Mr Simpson set out the alleged "2 principal reasons" as to why (he said) the Board rejected the claimant's alternative proposal. The first of these was that the claimant had not agreed to relinquish the Licence as part of giving up the HP role. The second was that "we are not intending to launch a recruitment process for a new dedicated [GM] for a period to give the board the opportunity to research the market and develop a recruitment strategy" (my underlining).

64. This rationale is again somewhat different to the one set in Mr Simpson's witness statement. There, he asserts: "… the period between the proposed redundancy and the appointment of a new dedicated general manager was a fundamental aspect of the overall plan; it was considered to be vital that we understood the nature of that rule from a hands-on perspective". He also does not explain, and nor did he satisfactorily explain, why a "hands-on perspective" of the GM function could not have been obtained with the claimant in post.

65. At a meeting on 25 April 2018, Mr Simpson told the claimant "we are going to pick up your role and run your role for a period". He also made in clear that the Club was

"making you redundant" from the GM role. When the claimant asked "what if I give up [the Licence] as well?", he was told the Licence was only one reason why he could not "just stay on as [GM]", the other reason being "we are not ready to recruit a full time, or dedicated [GM]".

66. In response, and under cover of a letter dated 25 April 2018, which he gave to Mr Simpson the following day, the claimant proposed that he relinquish the License on mutually agreed terms (because of the money he had personally invested), as well as give up his HP position.

67. Mr Simpson duly asked the Board to confirm its position did not change as a result. Whist he did not in terms tell the Board what its answer should be, he gave rather a strong hint- he opined in his 26 April 2018 email to Broad members: "… I do not believe this changes the Management Board's view that the redundancy on Monday will need to go ahead".

68. Under cover of an email dated 27 April 2018, Mr Godfrey stated to Messrs Simpson, Coppock and Bygraves (amongst others) that "it was to [the claimant's] credit" that he is behaving so well. I have my doubts whether that will continue when he doesn't get the GM position". Mr Godfrey was cross examined about this email, and it was put to him this was a further indication that the claimant was bound to be dismissed. In answer to questions, Mr Godfrey candidly explained his view that the claimant was suited to the HP role and not to the GM role. He also confirmed that there was "shared consensus" that the claimant should do the HP role, and not the GM role. He stated he personally presumed the claimant would not get the GM role, but he denied this was a shared view. I was not at all convinced by that denial, in the light of the above.

69. Mr Simpson confirmed that the claimant's Licence proposal was rejected in his 30 April 2018 letter for "our remaining reason as set out in my letter of 23 April" (as above). He also wrote to the Claimant that day, giving him confirmation of termination on 1 May with a payment in lieu of notice.

70. The option to work out his notice was not afforded to the claimant. Mr Simpson explained that this was to give him the opportunity to reintegrate into the HP role- though, of course, the claimant had continued to do the HP role (with his staff) for several years and throughout the consultation process.

71. The following day, in a communication to all members, the Board stated that it "believes the time is now right for the Club to be managed by a dedicated [GM]… Pending the formal recruitment process for a new [GM], members of the board will cover the role on an interim and voluntary basis…". No interim period without a GM in post, whist the interim team learned 'hands on' what the role did and should contain, was mentioned.

72. The claimant duly appealed his dismissal. Mr Simpson informed Mr Johnson and Mr Bygraves of the fact of the appeal under cover of an email dated 8 May 2018. In that email, he advised: "I'm not sure there is anything we can do more than 'flat bat' the appeal with a rejection". Mr Johnson's response to it was to recommend the board "invite him to an appeal meeting, hear what he has to say and then respond arguing against the points he has made".

73. These emails, and the fact that the appeal was dealt with by Mr Godfrey and Mr Coppock (who had been involved as set out above), once again strongly suggest that the claimant had no real prospect of matters being heard in a suitably objective way.

74. So, too, does the somewhat partial briefing note which Mr Simpson prepared for those hearing the appeal. In the note, in response to the claimant's assertion that the redundancy consultation process "has been a sham" because the focus had been on termination, rather than considering alternatives to redundancy, he simply asserts that the claimant "is trying to build a case of constructive dismissal". He also warns the appeal panel to "steer clear" of the subject of competence issues, whilst disputing the claimant's assertion that no issues of competence has been raised by the Club with him.

75. In an email exchange dated 17 May 2018, Mr Johnson suggested to Mr Simpson that it should be stressed at the appeal hearing "that we have made the role redundant and replaced it with a matrix structure where the duties within that role have been assigned to various Board members… This will operate for at least 6 months… This is important as it stresses that we are not going to make anyone redundant on the basis that we are going from PT to FT". Mr Simpson's response was to say (rightly, as it transpires) he thought "we may have a problem" with that approach. He explained: "…I simply don't think we can state that Board members will cover the GM role 'until the Board decides the best structure going forward'. Everything we have said so far indicates a firm intention to recruit dedicated GM. I don't think we have any choice but to stick to the same line...".

76. The appeal hearing took place on 18 May 2018. Mr Coppock reported back In his email of 18 May 2018 his opinion that "nothing new came of the meeting". He comments "… presumedly we are still on the same page on this and we will meet as soon as possible and discuss. My feeling is he will take this further, but I don't think he understands the implications of doing so. In an ideal world, someone would go out for a beer with him and try to get him to see the endgame if he continues. Not sure how that can work…." Mr Coppock was not cross examined on what "implications" he had in mind. On the face of it, the email suggests that the claimant's future at the Club (in any guise) would not be enhanced by taking matters further.

77. Mr Johnson assisted Mr Simpson in drafting an appeal outcome letter, the first draft of which had been written by Mr Johnson and copied into Mr Godfrey and Mr Coppock. Mr Johnson asked Mr Simpson and Mr Bygraves to "complete first draft and we can see if we can reject each suggestion".

78. On 5 June 2018, the claimant was told his appeal had been unsuccessful.

79. The 'decision letter' was in fact drafted in late May 2018 by Mr Simpson following input from Mr Johnson. Amongst other things, the letter states "the Board have assigned the duties of the GM position to a number of Board members on a voluntary basis for an interim period to give the Board the opportunity to research the market

and develop a recruitment strategy for a dedicated [GM] to take the Club forward. When the Management Board does advertise the dedicated GM role in the future you will be able to apply and your application will be considered alongside any others received.

80. So, there is no mention of the Board members needing to understand, via a 'hands on' experience or perspective, what the role would entail. Moreover, the good faith of the indication that the claimant 'would be able to apply' for the GM role in due course would doubtless and understandably have been viewed by him with even greater scepticism, had the claimant been made aware of (e.g.) the "upweighting" proposal in the 8 April email to which I have already made reference.

Post dismissal

81. The claimant's HP role was terminated in September, following notice given to him in June 2019.

82. Following the dismissal, it seems the Board appointed a working party relating to the new GM post.

83. On the second day of the hearing, the Club disclosed for the first time a few emails relating to that working party. In particular, in an email dated 4 July 2018 and headed 'Working Party to Map out New Role', Mr Joe Nellis explained the primary aim of that working party was to "draw up detailed Job and Person specs ["JPS"] for this new role".

84. Mr Nellis shortly thereafter produced a draft JPS, which he sent to Messrs Simpson and Coppock (and others) under cover of an email on 12 July 2018. In that email, which followed a meeting "earlier this week", Mr Nellis (amongst other things) stated "we need to decide where and how to advertise the vacancy for a full time GM post". Mr Nellis made further revisions to the JPS and sent it to Messrs Simpson and Coppock (and others) under cover of an email on 24 July 2018, on which day it would appear a meeting took place.

85. No other relevant post-24 July 2018 emails have been disclosed.

86. So, it seems the "interim management phase" to which Mr Simpson refers in his statement was not essential in order to enable a JPS to be drawn up. Also, that at least in July 2018, the intention appears to have been to advertise in the near future.

87. From the content of an undated document -again, only disclosed by the Club on day 2 of the hearing- which is headed 'The selection and interview process for BGC GM Post', it appears the Club's intention (at some point no later than about July/August 2018) had been to advertise for the post on 3 September 2018, and to have final interviews on 8 October 2018.

88. A new GM has in fact still not been appointed; nor has the role yet been advertised. In the interim, the various board volunteers how between themselves performed all or most of the duties generally required of a GM. Mr Coppock explained in his evidence that the hiatus was primarily because the Club thought an appointment was not appropriate whilst these proceedings (presented on 28 August 2018) were ongoing. Moreover (he said), whilst the claimant was the HP, he would have been reporting to the new GM- which Mr Coppock did not think was appropriate. (He did not explain why this was so.)

THE LAW

89. The following principles are material:

    a. When considering whether or not a dismissal was fair for s.98(4) ERA purposes, a tribunal must not substitute its own judgment as to what would have been a fair outcome. Rather, it must consider what was within the band of responses reasonably open to the employer. See for example **London Ambulance Service NHS Trust v. Small**[1].

[1] [2009] IRLR 563, CA, §43 *per* Mummery LJ.

b. "Redundancy" is defined at s.139 ERA, which in so far as is relevant provides as follows:

> "(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.
>
> ….
>
> (6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.

c. Proper warning of impeding redundancies; a transparent and (if not agreed) appropriate criteria for selection, fair application of that criteria, and -where possible- checks to see if alternative employment could be offered, are generally part of a fair process for S.98(4) ERA purposes. See **Williams v. Compair Maxam Ltd**[2]. (There the EAT also explained that "*not all these factors are present in every case*", albeit departure from such principles would require some good reason. Further, it held that the guidance it had given did not constitute "principles of law", but rather "standards of behaviour".)

d. The overall picture must be looked at up to the date of termination, to ascertain whether the employee has or has not acted reasonably in dismissing the employee on the grounds of redundancy. See **Mugford v. Midland Bank**.[3]

e. In the event of a finding of unfair dismissal, pursuant to **Polkey v. AE Dayton Services Ltd**, if the tribunal finds that procedural unfairness may or would, if remedied, not in fact have made a material difference, the tribunal can reduce

[2] [1982] IRLR 83, EAT
[3] [1997] IRLR 208, EAT.

in whole or in part any compensation the claimant might otherwise have received.

APPLICATION TO THE FACTS

90. I accept the Club's submission that a decision on the part of the Board for an interim regime under which some of its members voluntarily assumed the GM functions between themselves whist they 'scoped out' and got a better understanding of the role *could* have amounted to a redundancy situation. I also accept that it *could* have theoretically been possible for the claimant to have been dismissed (fairly or otherwise) for the principal reason that the Club wanted to put that interim arrangement in place.

91. However, I do not think that hypothetical scenario applies to the instant facts.

92. The above facts in my judgment demonstrate:
    a. The Club legitimately considered that separation of the GM and HP roles was in the best interests of the Club.
    b. The claimant gave clear indications that he did not want that separation to take place for some time. As a result, the Club's plans were put in abeyance.
    c. When the Club revisited those plans in late 2017, it failed for several months to consult with the claimant. This was at least in part because it assumed the claimant would very probably not be interested in giving up the HP role to take the GM role. But a reasonable employer would have recommenced consultation in early 2018 if not late 2017, and properly explored options with the claimant.
    d. The Club considered at that time -and consistently thereafter- that the claimant should be existed from the GM role, whilst retaining the HP role. Hence it made plans to ensure he could not successfully remain in the GM role.

e. When the claimant told the Club he would give up the HP role and Licence, the Club gave no real consideration to retaining the claimant in the GM role. The 'consultation process' was a fait accompli, as was the appeal outcome.

93. I consider:

a. The principal reason for the dismissal was to exit the claimant personally from the GM role. It was not on grounds of redundancy or the 'other substantial reason' as articulated by Mr Fennell in his submissions.

b. There was no redundancy situation as at the EDT, because the Club's intention (after the 'dust had settled') was to appoint a new and full time GM. I reject the contention that the Board genuinely wanted to have a period in which to assess 'hands on' what the GM was and ought to be. Instead, its intention at that stage was to 'caretake' until a new appointment had been made in the next few months.

c. Even if that 'caretaking period' can be said to represent a redundancy situation (i.e. reduced need, on temporary basis, for a GM)- I do not think it does, in the above circumstances- I repeat (a) above. If a redundancy situation existed, it was not the principal reason for dismissal.

d. In any event, the dismissal was unfair.

e. The fact that, as it has transpired, no GM has yet been appointed does little to reveal the reason for the claimant's dismissal or prove the Club's case as regards its intentions and motivation *at the time* of dismissal- especially given the matters set out at above which indicate the intention to move to recruitment once the 'dust had settled'.

94. It follows that the claim succeeds.

95. I had invited submissions from the parties concerning **Polkey**. However, having considered the matter, I think it is best for any **Polkey** arguments to be addressed at the remedies hearing, which will proceed on 19 December 2019 unless matters are somehow compromised before that time. (If that is the case, the parties are asked to

give as much notice as possible.) Directions, already given to the parties orally and on a provisional basis on 20 September 2019, are provided under separate cover.

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Employment Judge Michell, Cambridge
25.10.19
JUDGMENT SENT TO THE PARTIES ON

.....25.10.19.....

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FOR THE SECRETARY TO THE TRIBUNALS