EMPLOYMENT TRIBUNALS

Claimant: **Mr S McGowan**

Respondent: **GLH Hotels Management (UK) Limited**

Heard via Cloud Video Platform (London Central) On: 27 & 28 September 2022

Before: Tribunal Judge Peer acting as an Employment Judge

Representation

Claimant: In person with assistance from Mr Brad Groves
Respondent: Mr Mark Foster of Weightmans Solicitors

RESERVED JUDGMENT

The judgment of the tribunal is that:

1. The name of the respondent is amended to GLH Hotels Management (UK) Limited.

2. The claimant was unfairly dismissed by GLH Hotels Management (UK) Limited.

3. There should be a 100% *Polkey* deduction to the claimant's compensatory award.

REASONS

CLAIMS AND ISSUES

1. The claimant is Mr Stuart McGowan. At the hearing, the respondent clarified that GLH Hotels Management (UK) Limited was the proper respondent to the claim and asked that this entity be substituted for GLH Hotels as the respondent. The claimant did not object. The respondent to the claim is therefore GLH Hotels Management (UK) Limited. The claimant worked for the respondent from 8 January 2015 until 27 August 2021 in various roles. After conclusion of ACAS conciliation on 22 November 2021, the claimant

presented his claim for unfair dismissal to the tribunal in time on 29 November 2021.

Unfair dismissal

2. The claim is for unfair dismissal arising out of the claimant's dismissal by the respondent in July 2021. The respondent asserts the reason for dismissal was redundancy. The claimant does not dispute that the reason or principal reason for dismissal was redundancy. Redundancy is a potentially fair reason for dismissal, section 98(1) Employment Rights Act 1996. The issues for the hearing are as follows:

    a. Did the respondent act reasonably in all the circumstances in treating redundancy as a sufficient reason to dismiss the claimant. The Tribunal will usually decide, in particular, whether:

        i. The respondent adequately warned and consulted the claimant;
        ii. The respondent adopted a reasonable selection decision, including its approach to a selection pool and/or selection criteria;
        iii. The respondent took reasonable steps to find the claimant suitable alternative employment;
        iv. Dismissal was within the range of reasonable responses of a reasonable employer.

    b. If the dismissal was procedurally unfair, what was the chance of the claimant being fairly dismissed if a fair procedure had been followed?

    c. If the dismissal was procedurally unfair, what remedy is appropriate? The claimant requests compensation only and does not wish for reinstatement or reengagement.

THE HEARING

3. The hearing was a remote public hearing, conducted using the cloud video platform (CVP). The parties agreed to the hearing being conducted in this way.

4. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. There were some minor connection difficulties experienced.

5. The claimant did not have legal representation but was supported and assisted by Mr Brad Groves. I took care to explain certain procedural matters in the circumstances. The respondent was represented by Mr Mark Foster of Weightmans Solicitors.

6. Evidence was heard from the claimant. Evidence was also heard from Ms Hanna Moore (Thistle Group Operations Manager) and Mrs Heather Harris (HR Director) on behalf of the respondent.

7. There was an agreed bundle indexed to 226 pages. The bundle contained a schedule of loss from the claimant. I admitted an additional document into evidence being a copy of an email dated 9 October 2020 including an attached Cluster General Manager Job Description; the version in the bundle did not show the attachment. The claimant did not object to the admission of this document into evidence and accepted the job description had been attached and sent. The respondent provided outline written submissions. I read the evidence in the bundle to which I was referred during the hearing and the page numbers of key documents relied upon in reaching my decision are cited below.

FINDINGS OF FACT

8. I considered all of the evidence before me and I found the following facts on a balance of probabilities. I have recorded the findings of fact that are relevant to the legal issues and so not everything that was referred to by the parties before me is recorded.

Background

9. The respondent, GLH Hotels Management (UK) Limited, operates a portfolio of hotels including the Thistle brand hotels. The respondent has an internal HR function led by Heather Harris, HR Director. Heather Harris was GLH's Head of HR Operations until she commenced the HR Director role with effect from 1 June 2022. The previous HR Director was Debbie Moore who left in May 2021.

10. The claimant was employed by the respondent initially as a Value Centre General Manager and then from 30 April 2019 as Hotel Manager for the Hardrock Hotel. With effect from 14 January 2020, the claimant was appointed to a role of General Manager (GM) with operational management responsibility for the Thistle Kensington Gardens and Thistle Hyde Park hotels.

11. The pandemic impacted on the respondent's business and in March 2020 the majority of its hotels were temporarily closed including the Thistle hotels. Although many employees were placed on furlough, the claimant continued to work performing caretaking duties for Thistle Kensington Garden and Thistle Hyde Park hotels until November 2020. Ms Moore's witness statement sets out that the respondent developed proposals to restructure the entirety of its hotel business including the hotel management structure as a consequence of the pandemic. The respondent engaged in collective consultation across 8 separate groups; Thistle hotels were one group.

12. The respondent's redundancy policy dated March 2020 (**34 – 37)** includes the following:

> "This policy applies to all permanent and fixed term employees and temporary staff. The policy is non-contractual and the company reserves the right to amend the policy and procedure as it considers appropriate."
>
> "Where consultation is on an individual basis the employee will have the right to be accompanied by either a work colleague or union representative."

"During the consultation process it is important to advise the affected employee(s) the following-

- The business reason for the proposed changes
- How the proposed changes will affect the employee if implemented
- The interview process and selection criteria if applicable
- The time frame

The employee has the right to submit a counter proposal which should be submitted in writing detailing the reasons for your proposal.

Minutes should be taken at each consultation meeting."

13. The respondent conducted several phases of restructuring and redundancies. On 5 October 2020, Hanna Moore had a conversation with the claimant about phase 3. The claimant says he was told it would affect all levels of staff.

14. On 6 October 2020, the claimant received an email from Ana Gramadareva which stated that an email regarding phase 3 had been 'sent out only to the roles who are affected in this phase'. The claimant therefore understood at this point that he was not affected.

15. Hanna Moore's written evidence sets out that shortly thereafter a decision was taken to make changes to the general management structure and that 'One of the proposals was to remove the 5 roles of General Manager at its Thistle Hotels'. There was no other evidence before me of any other proposals of the respondent relating to the GM role.

16. Heather Harris gave evidence that the business cases and information relevant to consultations were developed by the senior leadership team including the Chief Executive Officer, the Chief Operating Officer and the Chief Financial Officer. The senior leadership team, Debbie Moore Head of HR and Heather Harris were not furloughed at any point and worked throughout. There were other HR staff brought back on a rota basis to support with the restructuring. Heather Harris explained that it was Debbie Moore as Head of HR who had oversight and was involved in the discussions about restructuring to respond to the impact of Covid.

17. Hanna Moore said she would have sent the claimant an invite to the call on 9 October 2020. There is no record of the invite possibly because the respondent changed its software during the pandemic. Any invite would not have set out that the purpose of the call was to advise the claimant of a proposal to make his role redundant. She said she knew invites were sent as she recalled one of the general managers contacting her to change the time of the call due to a personal commitment on the 9 October 2020.

18. Hanna Moore called the claimant on 9 October 2020. Hanna Moore did not prepare any formal record or minute of the call. The claimant prepared a note referring to the call (**88**). I find that the claimant was told that he was at risk of redundancy during the call. Given the claimant's engagement regarding phase 3 in the days preceding the call, the claimant was surprised to learn at this point that his own role was at risk of redundancy. I find he received an invite to the call but that the invite did not specify the purpose

of the call and accept Hanna Moore's evidence on this point. I also find that the claimant reasonably anticipated the call was about phase 3. I find therefore that even if the call itself was not completely out of the blue, it was a surprise to the claimant to be told his role was at risk of redundancy and I accept the claimant's evidence on this point. I find that the claimant was therefore not best placed to engage in meaningful discussion about the topic of the call.

19. Hanna Moore read a pre-prepared script during the call. There is no copy of that script in evidence before me. Heather Harris said she had never had visibility on any such script. Hanna Moore did not elaborate as to the contents but said that she explained the new structure and the role he could apply for to the claimant. I find that the claimant was told about the proposed new structure, how to apply for the two cluster general manager (CGM) roles and encouraged to apply. The claimant's note records that he raised a concern about the inclusion on the interview panel of Paul Knightley referring to the Hardrock Hotel and the claimant's move to Thistle. I find that the claimant did raise a concern about Paul Knightley during this call. The claimant's note indicates this concern was related to the move from Hardrock Hotel and his perception of Paul's involvement in that move. Hanna Moore gave evidence that she addressed this concern during the call and did not follow up further on the concern raised. She said relevant information was given to the claimant during the call.

20. The claimant also records in his note that he was told by Hanna Moore that documents outlining the business case and confirming the selection process and next steps would be sent later that day. The claimant was also told what redundancy pay might be available during the call.

21. On Friday 9 October at 1117, Hanna Moore sent the claimant an email (**88-90**) stating:

"As per our call earlier today, please see below the new structure for Thistle and the Job Description for Cluster General Manager. Applications for either of these roles need to be with me by close of business on Monday. Interviews will take place on the 20th October, there will be a standard 10 question interview and these will be scored this will be with myself, Paul Knightley and Rebecca Gifford. I will also be sharing a questions document with you, please put any questions on here you may have and myself and Heather Harris will respond to them in due course. The consultation process ends on 12th November"

22. The 'new structure' below was a diagram with a box containing the text 'Thistle Group Operations Manager' and two linked boxes below being a box including 'Regions – Heathrow, Luton, Swindon & Poole' and a box for the London Thistle hotels. The job description for the CGM role was attached to the email. The email ends 'As per our conversation, your initial voluntary redundancy pay has been calculated at £25,121. As ever any questions please let me know.'

23. The respondent refers to the call to the claimant on 9 October 2020 as the commencement of individual consultation with the claimant. Heather Harris said that due to the extreme circumstances they had to adapt the

redundancy policy. Heather Harris said that the claimant and other general managers were not notified that the redundancy policy was being deviated from.

24. The policy was deviated from. There was no formal minute of the call on 9 October 2020. There is no evidence that the claimant was informed of any right to be accompanied by a work colleague or union representative during the call referred to as an individual consultation call. The claimant had no notice of the reason for the call and could not have made any such arrangement. The claimant was not accompanied during the initial consultation call or in relation to any other interactions related to his redundancy. I accept the situation was fluid and fast moving due to the pandemic. I find however that this is not a sufficient explanation for the lack of formal minutes or enabling accompaniment for staff at such meetings. I further find that whilst consultation may be effectively conducted via telephone, the circumstances in October 2020, where on the respondent's evidence senior staff were attending work in person, did not prevent face to face meetings for individual consultation.

25. I find that the claimant was advised in the email on Friday 9 October 2020 as to how the proposed change would affect him, the interview process and selection criteria if applicable and the time frame in line with the policy. The claimant was told that he was at risk of redundancy as his role was being removed from the structure. The claimant was told that the 5 Thistle GM roles were being replaced with 2 CGM roles so was aware that if he either did not apply for one of those roles or applied and was unsuccessful he would not have a role. The interview process for the CGM roles was outlined. If the claimant wanted to apply for the new roles, he had to do this by Monday 12 October 2020. The respondent therefore gave the claimant approximately one working day to reflect on the information he had just received and raise any questions or concerns in order to consider whether to apply for the new roles.

26. I find that the claimant was well aware that the pandemic had impacted on the business. The claimant was well aware there had been three phases of restructuring and redundancies arising from the impact the pandemic was having on the business. The claimant was aware that Thistle hotels remained closed including the Kensington and Hyde Park hotels given he was performing a caretaking role for those hotels during this period. There is however no evidence that the business reason for the proposed changes affecting the GM roles was communicated in any precise or explicit way to the claimant during the call on 9 October 2020. There were no documents explaining the business case or specific rationale for the restructuring affecting the GM roles provided with the email for example.

27. There was no evidence that the claimant was informed explicitly as to his right to submit a counter proposal detailing the reasons for his proposal at this stage. The claimant was told he could ask questions.

28. The claimant's evidence is that he did not receive any information about the new roles. At the hearing, I admitted a document into evidence which demonstrated that the email sent 9 October 2020 did have a CGM job

description attached. The claimant accepted that he must have received the job description but said he did not process it at the time.

29. The job description for the CGM role (**217-220**) is consistent with the description of the role given by Hanna Moore in her written statement. The CGM would be responsible for significantly more Thistle hotels, have control of a significant budget with financial accountability and strategic functions. The CGM would not deal with day to day operational management; individual hotel managers would report to the CGM.

30. The claimant applied for the new role(s) and attended an interview on 20 October 2020.

31. On 21 October 2020, Hanna Moore called the claimant to advise him that he had been unsuccessful and he had not secured a CGM role. There is no formal record of this call. The claimant prepared a note referring to the call (**126**). The claimant's note records that he was told he remained at risk of redundancy and under consultation through to 13 November. The note records that the claimant was encouraged to ask questions but that he asked why the Q&A document was not being actively monitored. The respondent's evidence at the hearing was that the consultation about the proposal to remove the GM roles and replace them with fewer CGM roles was to continue until 13 November 2020.

32. On 22 October 2020, the CEO communicated to all employees (**127**) that the restructure was paused whilst the respondent worked through the consequences of the new job support scheme announced by the government to start from 1 November 2020.

33. On 22 October 2020, the claimant had a call with Heather Harris. On 23 October 2020 at 0942, the claimant emailed Heather Harris about their call (**128**). The claimant's email records that the call had clarified matters for him as he had not previously understood that he was under an individual consultation process separate from the phase 3 collective consultation. The claimant did not consider he had received individual consultation and the selection process for the proposed new structure had concluded. The claimant's email also records that he had repeated the concerns he had raised with Hanna Moore about the composition of the interview panel with Heather Harris. I find that the claimant did again raise concerns about the presence of Paul Knightley on the selection panel at this point but the evidence does not enable me to reach a finding about the precise content of the claimant's concerns.

34. The claimant emailed Debbie Moore at 1309 on 23 October 2020 (**131-132**) setting out an alternative proposal. Debbie Moore replied at 1508 on 23 October 2020 (**129-131**). Debbie Moore provided comments on the detail of the claimant's proposed structure concluding: "Your proposal is more expensive and spends money on senior people not required in the current economic climate." The claimant replied at 1542 (**129**) setting out that the rationale given of a long term restructure and right size of the business was a rationale that had not formed part of the consultation process. The claimant said that general managers were informed the proposed structure was as a result of the pandemic and there was a belief that the longer term

strategy was to increase headcount. The claimant also said he understood a general manager role was available at Barbican when it re-opened.

35. At 1629 Debbie Moore replied (**135**) to confirm that 'the financial imperative caused by the pandemic was the reason for looking at the structure initially, however, we would not put in place a senior structure that we did not believe had longevity.' The claimant's email of 1646 (**134-135**) raised a concern about the disclosure of information stating that 'it is incumbent on GLH to disclose fully the rationale and justification for the restructure as part of this consultation if this is a genuine consultation, as purported.' The claimant referred to the information that the Chairman wanted Thistle 'ring fenced'. The claimant also set out that if GLH was 'willing to remain open to considering further alternative proposals offered up in good faith, could you please advise on what structures have been rejected…in order that a meaningful proposal could be presented.'

36. Debbie Moore responded at 1827 (**134**) to clarify that the 'ring-fencing' was a longstanding position held since phase 1 organisational changes and that she was sure the purpose of the restructure had been confirmed to the claimant by Hanna Moore. Debbie Moore also said that individual consultation was done due to the seniority of the GMs as otherwise it would be through employee reps who were members of the GMs teams.

37. On 26 October 2020, the claimant received feedback in relation to his interview by email and in conversation with Hanna Moore and Rebecca Gifford. An email from Rebecca Gifford (**145-146**) refers to this conversation and details concerns raised by the claimant about Paul Knightley being on the panel including that Paul Knightley was stated to have personal relationships with other candidates.

38. A Q&A document (**141-144**) from this time concludes with a request that GMs confirm whether they wish to move into the collective consultation and raise queries through reps or remain in individual consultation and raise questions in individual consultation meetings with Hanna Moore.

39. On 29 October 2020, Hanna Moore emailed the claimant to respond to a range of questions he had raised. The new structure is stated to take effect from 13 November 2020. The claimant's contract will continue if he accepts the job support scheme until the scheme ends at which point if there is no suitable role secured there would be consultation as appropriate and recalculation of redundancy notice and pay. The claimant would have a right of appeal if his employment was terminated but currently he had nothing to appeal against.

40. On 3 November 2020, the claimant met with Debbie Moore. The claimant's note of this meeting (**153**) refers to being told that the company were disappointed in the way he had responded to the redundancy process. The claimant's note includes that he was told Paul Knightley brought his own team to Hardrock which is why he was moved to Thistle and that this was common practice and that he should go on furlough and consider re-training for a role you enjoy. Debbie Moore emailed Hanna Moore and others on 3 November 2020 (**154**) to report a positive and honest discussion with the claimant and that he accepted the outcome of the interview and would not

take any further action. She asked that thought be given to enabling the claimant to support one of their projects for the one day a week he needed to work on the job support scheme; she noted he was putting himself through a project management qualification.

41. On 6 January 2021, the CEO announced four internal promotions (**156**). The CEO said that those promoted had been carrying the work of the senior roles due to leavers and the additional responsibility they had taken on was being formally recognised. The claimant said in evidence that if he had known about the vacancies for Head of Property and Head of Projects he would have considered himself a suitable candidate and put himself forwards for those roles.

42. On 27 January 2021, the claimant emailed Debbie Moore noting the promotions and asking about the process for employees at risk to be aware of vacancies (**157**). The claimant noted that he had passed the Prince2 foundation course in November and was 'working towards the practitioner qualification'. The claimant had also undertaken unpaid work experience with a construction consultancy. Debbie Moore replied (**158**) to explain the suspension of contracts so recruitment advertising options were limited, current roles available were specialist tax and digital roles but those at risk would be considered if suitable roles arose. She advised the claimant to start looking externally.

43. On 8 February 2021, the claimant started a temporary secondment of indeterminate length in the respondent's property team reporting to Richard Young, the Head of Property (**160**).

44. On 9 March 2021, the claimant was advised of a hotel manager vacancy but did not wish to apply for the role as it was a more junior role than any he had held with the respondent (**162**).

45. On 21 April 2021, the claimant notified Debbie Moore that he had qualified as a certified Prince2 practitioner (**163**).

46. On 12 July 2021, the claimant emailed Heather Harris to request certainty on his role and to share an email he had initially drafted to send to both Heather Harris and Richard Young (**166**). The claimant refers to a meeting with Richard on 7 July 2021 during which he was advised that Richard was seeking approval to extend his secondment in the property team. The claimant refers to the possibility of a role within the property team and sets out that 'Having given lengthy consideration to what this role might be, in this current market, I am not sure that I would apply, even if a position was to become available.' The claimant refers to 'the completion of the Clermont project' as a 'more sensible and natural end point' than a further 4 weeks extension to the end of September. The claimant was therefore asking for clarity but also communicating reservations about applying for any future role in the property team or continuing the secondment.

47. On 14 July 2021, the claimant and Heather Harris had a call (**225**). There is a note prepared by the claimant timed 13.26 and dated 22 July 2021 referring to the call. The note refers to both 'notes from call with Heather Harris' and 'Points to cover on my call with Heather' including 'would like to

stay with glh Hotels'. The note then refers 'Post call note'. This document is clearly not simply a contemporaneous note of the call with Heather Harris. The claimant also refers to this call taking place on 22 July 2021 in his written statement. During evidence, it was clarified that the date of 22 July 2021 had been taken as it was the date a copy of the 14 July 2021 email had been printed. Heather Harris' evidence is that during the call they agreed that unless a suitable vacancy arose, the claimant's employment would end by reason of redundancy on the agreed date of 27 July 2021.

48. I accept Heather Harris' evidence about the call on the 14 July and find that the call did cover agreeing an end date given the circumstances. I find that those circumstances included the indications from the claimant that he did not wish to continue with the secondment to the property team and the uncertainty and that he was not interested in the hotel manager vacancy.

49. On 17 July 2021, the claimant started to work for two days a week with the construction consultancy he had interned at during furlough. I find that this is also a relevant circumstance with regard to the agreement around the end date of employment with the respondent; the claimant was clearly open to and pursuing this work opportunity outside the respondent.

50. On 22 July 2021, Heather Harris wrote to the claimant to confirm that his employment would end on 27 August 2021 and provided details of final payments (**170**). The letter did not refer to any right of appeal against the termination decision.

51. On 27 August 2021, the claimant's employment with the respondent ended.

52. On 29 August 2021, the claimant was offered a full time role with the construction consultancy.

53. On 2 September 2021, the claimant wrote to Gavin Taylor (**171**). The claimant set out that he wished to appeal against his dismissal on the basis that the respondent did not conduct a genuine or meaningful consultation, failed to explore alternatives to redundancy and did not follow its own policy. The claimant also set out that he had not been informed of his right of appeal.

54. The claimant set out in his written statement that he became aware on 17 September 2021 of positions being advertised by the respondent including a property project manager role in the property team and general manager roles at non-Thistle hotels. Heather Harris explained that a new project manager was hired on 6 December 2021 and that a general manager appointment was an internal transfer. I accept the evidence that the vacancies became available after the claimant's employment had ended.

55. An appeal hearing took place on 1 October 2021. On 1 November 2021, Gavin Taylor wrote to the claimant setting out a decision not to uphold his appeal (**204-206**). The letter set out that 'There is no evidence to prove that by having Paul Knightley as part of the interview panel for the new roles would have had any impact on the interview outcome or that he would have treated you unfairly. There were two other Managers involved in the

interview process and I can see no reason why they would calibrate with each other as there was no motivation to do so.'

56. Paul Knightley and the claimant had never worked together. The claimant left his role at Hardrock Hotel when promoted to the role of General Manager of the Kensington and Hyde Park Thistle hotels. Paul Knightley replaced the General Manager at Hardrock Hotel at this time. There was no real and no persuasive evidence before me on which to base either a finding that there was any animus between Paul Knightley and the claimant or that Paul Knightley was not an appropriate person to sit on the selection panel for the CGM roles.

57. The appeal outcome letter from Gavin Taylor also sets out that 'If at any time you were provided with inaccurate information regarding the reason for your redundancy or the process, then this would have made no difference to the decision to restructure the GM roles within Thistle.' The letter noted that at the end of the consultation process the claimant was given the option to remain on payroll and be paid furlough rather than be made redundant at that point. The letter referred to the claimant's counter-proposal and noted that as Debbie Moore was fully involved in building the business case she would have been in a position to respond in a timely manner and that Debbie also met with the claimant to address his concerns about the consultation process and this resulted in the secondment opportunity. The promotions in January 2021 were not vacancies. The claimant had turned down the hotel manager role which was a suitable alternative. The termination 'was triggered by yourself you made it clear … your intention was not to extend your secondment and therefore it was mutually agreed that you would leave on 27 August 2021.'

LAW

Unfair dismissal

58. Section 94 of the Employment Rights Act 1996 ("the Act") gives employees a right not to be unfairly dismissed. The right is enforceable by way of complaint to the Tribunal.

59. The test for unfair dismissal is set out in section 98 of the Act and there are two stages. Section 98(1) of the Act provides that it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal and that it is a potentially fair reason within section 98(2). Redundancy is a potentially fair reason.

60. Section 139(1) of the Act provides that an employee who is dismissed is taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the employer having ceased or intending to cease to carry on the business for which the employee was employed or to carry on the business in the place where the employee was employed; or the requirements of the business for employees to carry out work of a particular kind or to carry out work of a particular kind in the place the employee worked have ceased or diminished or are expected to cease or diminish.

61. The second stage is for the Tribunal to consider whether the respondent acted fairly or unfairly in dismissing for that reason and the burden of proof is neutral. Section 98(4) provides that the determination of the question as to whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 this shall be determined in accordance with equity and the substantial merits of the case.

62. In considering reasonableness, the tribunal cannot substitute its own view. The tribunal must apply the 'range of reasonable responses' test to the decisions and actions of the employer. The question for the tribunal is therefore whether the dismissal was within the band of reasonable responses of a reasonable employer.

63. In the case of *Williams and ors v Compair Maxam Ltd 1982 ICR 156, EAT*, the EAT gave guidelines that a reasonable employer might be expected to follow in making redundancy dismissals such as: warning and consultation about the redundancy; whether union views were sought; whether the selection criteria were objective and applied fairly; and whether any alternative work was available. The tribunal must not substitute its own view and these guidelines assist a tribunal in assessing whether an employer has behaved reasonably in dismissing for redundancy and in particular whether the dismissal is within the band of reasonable responses of an employer.

64. The case of *Polkey v AE Dayton Services Ltd [1987] UKHL 8* established procedural fairness as an element of the reasonableness test at section 98(4) of the Act. Lord Bridge stated that *"the employer will not normally act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by deployment within his own organisation."*

65. The tribunal must consider whether the employer's selection criteria are to be regarded as objective and whether they have been applied fairly but must not engage in over-minute or microscopic scrutiny, *British Aerospace plc v Green and ors 1995 ICR 1006.* Lord Justice Waite stated that *"in general the employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt sign of conduct which mars its fairness will have done all that the law requires of him."*

66. A selection process was found fair where a selection panel included two managers against whom the claimant had previously raised grievances, *Wess v Science Museum Group EAT 0120/14.* Whether selection is fair or unfair due to prior interactions between the person being scored and those responsible for applying selection criteria is a question of fact.

Remedy/Polkey reduction

67. The principles established by the case of *Polkey v AE Dayton Services Ltd [1987] UKHL 8* provide that if I find the dismissal to be unfair, I must consider the possibility (in terms of a percentage chance) of the respondent fairly

dismissing the claimant and when this might have occurred and make a 'Polkey deduction' from any award.

ANALYSIS AND CONCLUSIONS

68. I turn to apply the law to the facts that I have found in this case. I remind myself that I must not substitute my own view rather I must apply the range of reasonable responses test and thus in making findings and reaching conclusions on reasonableness I am applying this objective test.

Redundancy as the reason for dismissal

69. The claimant was employed as a general manager. As above, the pandemic had an impact on the respondent's business and the majority of the respondent's Thistle hotels were closed from March 2020. The respondent developed restructuring proposals as the requirements of the business for senior managers had ceased or diminished and/or was expected to cease or diminish. I have concluded that there was a redundancy situation within the meaning of section 139(1)(b)(i) at the time the claimant was told he was at risk of redundancy and at the time his employment ended on 27 August 2021. In any event, there is no dispute that the reason for the claimant's dismissal was redundancy. The claimant did not advance any other suggested reason. The respondent has shown that the reason for the dismissal was redundancy which is a potentially fair reason for dismissal in accordance with section 98.

70. The real focus of the claimant's complaint is that the respondent did not engage in genuine consultation. The claimant also complains about the selection process and in particular the composition of an interview panel. The claimant also suggests that the respondent did not actively offer him suitable alternative roles. The respondent contends there was consultation, fair selection and consideration of suitable alternative employment such that there was a fair process overall. I have considered the process overall. For a redundancy dismissal to be fair the tribunal needs only to be satisfied that the procedure used by the employer builds in the components of reasonable and genuine consultation, a fair and reasonable selection process and reasonable steps to find suitable alternative employment.

Was consultation genuine and reasonable?

71. I have concluded that there were a number of flaws in the consultation process the respondent carried out with the claimant.

72. A consultation should include:

    a. an opportunity for the affected employee to put forward any suggestions for ways to avoid their redundancy;
    b. an opportunity for the affected employee to comment on the basis of selection for redundancy both the pool and the selection criteria;
    c. an opportunity for the affected employee to challenge their selection and explain factors which may have influenced their selection which the employer was not aware of;
    d. consideration of alternative employment; and

e. any other concerns.

73. The employer must approach consultation with an open mind and be capable of being influenced about the matters which are to be included within consultation.

74. I have concluded that the respondent did not provide for a genuine and meaningful consultation for the following reasons:

a. the meeting on 9 October 2020 which the respondent says was the start of individual consultation with the claimant cannot be said to be a consultation meeting. At this meeting the claimant was told he was 'at risk'. The claimant had no prior warning of this and by contrast although the claimant thought he might be at risk earlier in October as part of phase 3 he was assured he was not within that phase. The claimant could not make any meaningful representations during the call on 9 October 2020 given this unwelcome news was a surprise to him and he had not been able to consider the issues as they affected him.

b. although the respondent said the consultation was to last for a period of over a month and until 12 November 2020, the respondent was clearly not expecting to have to consider alternative proposals related to the pool for redundancy or the selection criteria.

c. the call and follow up email on 9 October 2020 essentially gave the claimant a fait accompli. He was told the GM roles in the Thistle Hotels were being removed from the organisational structure and replaced by fewer and different CGM roles. He was told that the selection criteria for the CGM roles were a standard 10 question interview before a named panel and he had to confirm whether he would apply in a timeframe which amounted to just over one working day.

d. notwithstanding my findings about the inclusion of Paul Knightley on the interview panel, the handling of the concerns raised by the claimant were curt rather than courteous. Hanna Moore's evidence was that she did not accept the concern on the call on 9 October 2020 and did not follow up further. The impression was that any other concerns about the criteria or selection process would not likely be given due consideration.

e. although there was a Q&A document and questions were encouraged, the timeframe overall meant that these questions could not be a meaningful opportunity for the claimant to comment or raise concerns on the pool or selection for redundancy or engage in alternatives to redundancy.

f. the detailed rationale as to the proposal to replace the GMs with CGMs was not shared explicitly or readily with the claimant so he was hampered in his ability to input in any meaningful way.

g. when the claimant did turn his mind to a possible alternative this was readily dismissed indicative of the proposal being a fait accompli and the respondent not being of an open mind at the stated outset of consultation.

75. I did not have any concerns about the approach to consult individually with the GMs and it is clear this was done on the basis of sensitivity with regard to the seniority of those in the pool. The impression is that there was much information generally known given there had been several phases of redundancies and related collective consultations which GMs were generally aware of as their teams were affected. I consider that this may have inadvertently contributed to some of the claimant's confusion and caused there to have been a lack of clear bespoke information provided explicitly and directly to the GMs by the respondent.

76. From November 2020 onwards, consultation was ongoing and encompassed ways to avoid the claimant's redundancy and consider alternative employment. The claimant was placed on furlough and had a temporary secondment opportunity and his employment continued for a significant period of a further 9 months before he was made redundant.

77. However, having regard to the flaws identified with consultation at the outset, I was not satisfied that the respondent acted reasonably with regard to adequate warning and consultation with the claimant overall.

Was the selection process including the choice and application of criteria fair and reasonable?

78. I remind myself that in considering whether the respondent behaved reasonably in determining the selection pool that I must not substitute my view but decide whether the pool was within the range of reasonable responses of an employer in the respondent's circumstances. The respondent treated Thistle hotels as one group for the purpose of collective consultation. The respondent consulted individually with the Thistle GMs and faced with the need to reduce senior management roles placed all GMs within the selection pool; the claimant did not raise any specific argument about the selection pool and there was no specific evidence addressed to this. I have concluded the respondent acted within the range of reasonable responses of an employer in the circumstances in determining the selection pool.

79. In relation to the selection criteria, again I remind myself that my task is not to decide what selection criteria were appropriate but whether those chosen by the employer were within the range of reasonable responses. I remind myself that my task is not to engage in a microscopic level of scrutiny of the selection criteria or their application or substitute my own view as to the appropriate scores. There was no evidence to suggest that interviewing all those within the pool on the basis of the same standard questions related to the new role was not within the range of reasonable responses.

80. The main weight of the claimant's challenge is that Paul Knightley was not an appropriate person to include on the panel. The timing of the selection process made it difficult for this to be addressed and I set out my

conclusions in relation to this above. However, although the claimant raised concerns about Paul Knightley's inclusion on the panel, the claimant did not maintain complaint about his scores in particular, raise any grievance or progress his complaint after November 2020 other than by repeating it when he brought his appeal against dismissal in September 2021. As above, the evidence did not support any finding that Paul Knightley was not an appropriate person for the panel. The claimant had detailed feedback on his interview and the scoring sheets were shared with him and show scores were consistent across all members of the panel. The claimant did not object to the other members of the panel. I have concluded that the consistency of scoring is most likely explained by the scores being appropriately related to the claimant's performance rather than a result of collusion.

81. I am satisfied that the selection process, criteria and their application to the claimant was fair and reasonable overall.

Was suitable alternative employment considered and/or offered for the claimant?

82. The claimant's employment continued for a period of approximately 9 months after the initial period of individual consultation concerning the deletion of his GM role as the respondent was able to put the claimant on furlough and then offer him a temporary opportunity within its property team until his employment was terminated on 27 August 2021. Given my findings above, it is clear the respondent did take reasonable steps to provide the claimant with alternative work and to consider alternative roles for him.

83. The circumstances were such that there were very few vacancies overall and given his seniority and skill set even fewer suitable alternative roles. I have concluded that it was reasonable not to consider the Head of Property and Head of Project Manager roles as suitable alternative employment for the claimant as they were not real vacancies given incumbents doing the work were promoted into those roles and there was no evidence that the claimant had the relevant experience and skills for those roles at the relevant time and the respondent was aware of that. I have concluded this even though it is to the claimant's credit that he was resilient and resourceful during lockdown working through a foundation and practitioners Prince2 qualification and doing unpaid work and internships with a construction consultancy to broaden and deepen his skill set. The claimant accepted a permanent full time role with the construction consultancy on 29 August 2021.

84. I am satisfied that the respondent took reasonable steps to find suitable alternative employment for the claimant.

Appeal

85. The claimant was never notified of any right of appeal in relation to his redundancy. In October 2020, he was told there was no right of appeal because his employment was continuing. When he was notified on 22 July 2021, that his employment was to terminate on 27 August 2021 for redundancy, the claimant was not notified of any right of appeal against this decision. As above, the circumstances in July 2021 were that it was

understood that agreement had been reached around the ending of the claimant's employment. This may explain why the respondent did not set out any right of appeal available even if it would have been prudent to specify any internal right of appeal available.

86. The claimant raised an appeal after his employment ended. I find that the appeal that was conducted at that stage did consider and address the concerns raised by the claimant comprehensively.

Conclusion

87. Although the respondent was more than reasonable and accommodating in seeking to support the claimant's continued employment during the difficult period in 2020/2021 and it is clear the claimant reached a point where he wished to move on, I have had to reach the conclusion that the dismissal was unfair. I have concluded that the dismissal was unfair due to the element of procedural unfairness arising from the flaws I have identified with the initial phase of the consultation.

Additional conclusion - Polkey

88. I have found that the claimant's dismissal was unfair because of flaws in the consultation process. In order to conclude my judgment, I am required to speculate what would have happened had a fair procedure been adopted following the principle in *Polkey* and whether the flaws in the consultation process made any difference to the final outcome.

89. I have concluded that if the respondent had not limited the consultation and enabled the claimant to provide meaningful representations or demonstrated that the employer's mind was not closed to options other than removal of the GM roles and implementation of the CGM roles, this would not likely have resulted in other options being taken account of by the respondent or indeed alternatives to the claimant's redundancy arising. There is nothing inherently wrong or contradictory in having to respond to the impact of the pandemic and also putting in place a structure with longevity. In addition, the respondent did enable a significant period of time during which consultation continued for consideration of alternative employment for the claimant within the organisation and behaved fairly and reasonably in this regard particularly given the prevailing pandemic context.

90. The claimant had indicated to the respondent that he did not wish to explore a hotel manager role. The claimant had also indicated that he was not interested in any further extension of his secondment. The claimant had been actively exploring other opportunities, was paid for part-time work during his notice period and was able to commence full-time work immediately his notice period ended. This means that although the dismissal is unfair, I have decided that a *Polkey* deduction of 100% is appropriate in this case.

EJ - Peer

Date 26 October 2022

JUDGMENT SENT TO THE PARTIES ON

26/10/2022

FOR EMPLOYMENT TRIBUNALS

Notes

Public access to employment tribunal decisions: Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.