THE INDUSTRIAL TRIBUNALS

CASE REF: 1369/17

CLAIMANT: **Steve Veck**

RESPONDENT: **Hospital Services Limited**

DECISION

The decision of the tribunal is that the claimant was unfairly selected for redundancy and was thus unfairly dismissed and that the respondent did not enquire sufficiently into suitable alternative employment. A separate remedies hearing will be convened to address compensation.

Constitution of Tribunal:

Employment Judge: **Employment Judge Wimpress**

Members: **Mr R Black**
Mr J Magennis

Appearances:

The claimant was represented by Mr Michael Potter, Barrister-at-Law, instructed by Fisher Law Solicitors.

The respondent was represented by Ms Rachael Best, Barrister-at-Law, instructed by Mills Selig Solicitors.

SOURCES OF EVIDENCE

1. The tribunal received witness statements from the claimant, Mr Dominic Walsh and Mr Alan Milliken and heard oral evidence from them by way of cross-examination. The tribunal also received two bundles of relevant documents together with additional documents which were produced in the course of the hearing.

THE CLAIM AND THE RESPONSE

2. In his claim form the claimant claimed that he had been unfairly selected for redundancy and that the statutory dismissal procedures were not followed. He also claimed that he was owed amounts in respect of notice pay, arrears of pay, holiday pay and pension contributions. In respect of his pension the claimant sought payment of pension contributions of £937.50. In its response the respondent stated

that the claimant had been dismissed on the basis of redundancy and maintained that the claimant's dismissal was both substantively and procedurally fair. The claims in respect of redundancy pay and notice pay were disputed by the respondent which maintained that the claimant was paid all monies due to him including under his pension entitlement. The respondent agreed with the dates of employment given by the claimant but eschewed any knowledge of the events referred to in the claim form prior to June 2016 on the basis that it took over the claimant's employment in July 2016.

ISSUES

3. A number of the issues identified in a succession of Case Management Discussions have either fallen away or were withdrawn at the outset of the hearing. As a result the main issues for the tribunal are as follows:-

   (i) Was the claimant unfairly dismissed contrary to Articles 26 and 30 of the Employment Rights (Northern Ireland) Order 1996?

   (ii) Was the claimant unfairly selected for redundancy?

   (iii) What loss if any did the claimant suffer in relation to his pension?

   (iv) Did the claimant receive his full entitlement in relation to holiday pay?

THE FACTS

4. The claimant's basic hours and pay were also not in dispute. The claimant's salary was £75,000 per annum. He was paid £6,250.00 per month before tax and had a normal take home pay of £4,214.00 per month. The claimant also had health insurance and was a member of the respondent's contributory pension scheme.

5. The respondent is a large supplier of surgical equipment to public and private hospitals in the United Kingdom and Ireland with offices in Belfast and Dublin. According to Mr Walsh, a director of the respondent business, radiology including the sale of x-ray rooms was the strongest part of the business. The mainstay of the business is radiology and the use of flexible scopes in examinations for the detection of lesions and cancer. The respondent's biggest product is breast screening and the treatment of breast cancer. The respondent supplies and services equipment as well as providing consumables. It now employs around 65 staff. It had approximately 32 employees prior to taking over Eurosurgical Limited on 8 July 2016 by which it acquired 33 additional staff.

6. The claimant spent his early career from 1982 onwards in sales work and was promoted to Area Manager. Thereafter the claimant previously worked as an electrosurgery consultant for Erbe Medical UK Ltd ("Erbe"), an electrosurgical instruments manufacturer, until his resignation in 2004. Electrosurgical devices are used by surgeons to cut tissue and stop bleeding of tissue or bring about haemostasis.

7. The claimant subsequently took up employment with Eurosurgical Limited on 1 January 2006 which at the material time was the parent company of Endosurgical Limited. The claimant's contract described his post as an Electro Surgery Consultant. The claimant's salary was at that time £64,000 per annum together

with an annual retention fee of £6,000. The claimant's contract included being provided with a pool car for company business. It was further provided at clause 10 that the claimant would be able to join the company's contributory or non-contributory pension scheme once he was eligible.

8. The claimant's evidence to the tribunal included extensive references to his dealings with Ray Kane of Eurosurgical Limited and other members of the Kane family. According to the claimant Mr Kane made contact with him on his resignation from Erbe in December 2004 and as a result the claimant was subsequently involved in managing the handover of the Erbe contact from Cardiac Services Limited to Eurosurgical Limited. Initially the claimant worked for two days a week from Leeds but subsequently moved to Northern Ireland where he expanded his work to include large tender exercises. In 2014 Mr Kane asked the claimant to attend a Medical Healthcare Trade Fair in Dusseldorf, to liaise with Erbe and also to look for new products especially in gynaecology. The claimant was already working on one such product called Zed-scan, a cervical screening device. A twin study was set up between Whiteabbey Hospital and Hollis Street Maternity Hospital in Dublin and the claimant's role involved visiting both clinics once per week to discuss progress and overview clinical reports. The claimant would then provide the manufacturers of Zed-scan, Zilico Limited with a cumulative report. The claimant was also tasked with putting together a roll out programme once the clinical trials were complete. During 2014/2015 a new range of vaginal speculum was acquired from Bridea Medical and Mr Kane asked the claimant to act as Project Manager for this product and to offer clinical assistance by way of specific training in anatomy and procedural technique to the gynaecology sales team. In the early part of 2015 the claimant heard rumours concerning Eurosurgical Limited and a documentary was broadcast which suggested that it had been involved in bribery. Mr Kane informed the claimant that he was planning to change the name of the company. The claimant asked how this might affect Endosurgical Limited and Mr Kane replied that it would have no effect on business in the North as it was a separate business registered in Northern Ireland. This would appear to have occurred in November 2007 when it was registered as Endosurgical (NI) Limited. According to the claimant Mr Kane claimed that the junior members of the Kane family had tried to take the name of Gemini Innovation and hive off as many assets of Eurosurgical Limited as possible. In 2016 Eurosurgical Limited was in liquidation and the Official Receiver was called in in May 2016. The respondent was subsequently appointed by the liquidator (RSM) in June 2016 to assist in the day to day running of the business. All staff were asked to attend a meeting in Dublin in early June 2016. Mr George Maloney of RSM said that they were trying to find a buyer for the business. Mr Walsh was introduced and according to the claimant Mr Walsh announced that his company was going to be the saviour of Eurosurgical and possibly eventually Endosurgical.

9. In June 2016 the Erbe distribution contract transferred to Northern Hospital Services Limited.

10. As of June 2016 Endosurgical (NI) Limited had a contract to distribute electrosurgical instruments in Northern Ireland.

11. In June 2016 Endosurgical Limited was party to a contract with Erbe to distribute their products in Northern Ireland. The respondent wished to retain the contract with Erbe. The respondent had previously met with Erbe in November 2015 to discuss the distribution contract and was interested in acquiring the assets of

Eurosurgical Limited. At this stage it was apparent that Erbe was already considering moving the distribution contract to Northern Hospital Services Limited. When the respondent was appointed it again reached out to Erbe to discuss the retention of the distribution contract but they did not agree to a meeting.

12. On 20 and 21 June 2016 all staff in both Eurosurgical Limited and Endosurgical Limited (including the claimant) attended meetings at Eurosurgical Limited's head office at Belmont Road and were introduced to Mr Walsh, the managing director of the respondent business. Mr Walsh informed those present that the respondent was taking over Eurosurgical Limited.

13. On 8 July 2016 the respondent acquired Endosurgical NI Limited as part of Eurosurgical Limited. As a result the claimant became an employee of the respondent.

14. Mr Walsh, the managing director first met with the claimant on 8 July 2016 and asked him about his role in Eurosurgical Limited. The claimant replied – "I am Mr Erbe". Mr Walsh asked the claimant why he had not followed the Erbe contract and moved to Northern Hospital Services Limited and according to Mr Walsh the claimant replied that he did not get on with its managing director, Mr Healey. The claimant denies both having a problem with Mr Healey and referring to such a problem. The claimant also indicated that he was working on a project for Zilco, a medical diagnostics company. According to the claimant Mr Walsh also told him that he would be looking into at least two posts in the company on high salaries one of which would be going and he would be making a decision soon. This was denied by Mr Walsh.

15. According to Mr Walsh he wanted to retain the claimant as he was acknowledged as an expert in his field. In the absence of the Erbe contract the claimant was given the role of 'Special Projects Manager'. However, the respondent had no special projects for the claimant to do. The claimant was never in his office in July 2016 and produced no revenue streams for the respondent. Such work that the claimant undertook at this time was in the nature of consultancy work for hospitals and was non-fee paying.

16. Mr Walsh invited the claimant to a meeting to discuss his role on 1 August 2016**.** According to Mr Walsh the respondent did not carry out any extensive due diligence in relation to employees and their roles prior to transfer because it was not paying 'top dollar' for the company as it was in financial distress. Mr Walsh wanted to find out what work the claimant was undertaking and to assess his capabilities to see if there was any work that he could do to fill the gap left by the Erbe contract. At this meeting the claimant provided Mr Walsh with notes of his experience in this role. The notes were headed "Special Projects Role" and covered six categories - Training, Product Support, Marketing, Education, Technical and Regulatory. No mention was made of sales experience. They discussed the loss of the Erbe contract and the claimant made it clear that there was very little for him to do. The claimant could help with work being done in other parts of the company but only on a very sporadic basis. Mr Walsh had hopes of finding a similar distributor to Erbe but had not secured a firm replacement. It was not clear to Mr Walsh when they could find a replacement, if at all. In these circumstances Mr Walsh considered that it was appropriate to consider redundancy for the claimant.

17. On 7 August 2016 Mr Walsh issued a Step 1 letter to claimant in which he stated that he was considering making the claimant redundant as a result of the loss of the Erbe contract on which the claimant did the majority of the work. Mr Walsh invited the claimant to attend a meeting to discuss this further on 8 August 2016. Mr Walsh also advised the claimant of his right to be accompanied by a colleague or a trade union official. Following representations by the claimant the date of the meeting was changed to 11 August 2016.

18. On 11 August 2016 the claimant attended the Step 1 meeting with Mr Walsh. Mr Milliken, the respondent's Sales Director, was also in attendance and was responsible for taking a note of the meeting. The claimant was not accompanied. Mr Walsh stated that the main source of revenue that the claimant had been working on, Erbe, was now next to zero as a result of the termination of the contract and that the respondent was endeavouring to progress a new supplier, KLS Martin, to replace Erbe and that a meeting with KLS Martin had been scheduled for the previous week but it did not take place and that there might be a conference call in two weeks to further the relationship. Mr Walsh further explained that Accu-Science was currently its distributor for Ireland. Mr Walsh asked the claimant whether he had any ideas for preventing the redundancy and he replied that the conversation seemed to have exhausted all of them. Mr Walsh stated that the claimant was seen as 'Mr Erbe' and the claimant responded by handing over the three pages detailing his role to show that all of his time was not all tied up with Erbe work although he recognised that this was the case three years ago. It was agreed however that Erbe was the main source of revenue for the claimant's role. Mr Walsh asked the claimant for a business case around Zed-scan and the claimant explained that he was unable to estimate as it was still at the trial phase. There was a detailed discussion about alternative products to Erbe but no other way forward was determined. There was also a conversation about the claimant's business relationship with Mr Kane and the claimant stated that he still saw him as a friend but was able to break apart friendship and what was happening in the business. The claimant stated that he could not argue that the loss of the Erbe contract, which represented approximately 22% of Eurosurgical Limited's business, meant that his workload had diminished. The claimant asked what a blank sheet of paper looked like to the respondent i.e. what they wanted to achieve from the meeting and Mr Walsh replied that the respondent did not want to lose his knowledge but needed a plan for the future that made business sense. The possibility of a future consultancy role if redundancy was to happen was discussed and the claimant stated that that may be a reasonable solution. The claimant went on to state that he did not have a strong argument against redundancy as his current position did not fill his time entirely. The claimant was keen to progress **this line** but Mr Walsh was unable to do so as he had to discuss the potential redundancy with his chairman. Mr Walsh asked the claimant what he did during his working week and the claimant replied that he spent approximately three days a week in the Whiteabbey Hospital and the other two days in Dublin in the Children's Hospital mostly on the Zed-Scan project. Mr Walsh stated that the claimant's notice period was three months and the claimant agreed that this was correct. It was agreed that a further meeting would be set up within 14 days.

19. Later that same day the claimant emailed Mr Walsh. In his email the claimant acknowledged that Erbe's decision not to stay with the respondent had clearly left a void in some areas of his responsibility but that as Mr Walsh stated if KLS Martin came on board along with for example Prima Medical that might throw a different light on the situation. The claimant indicated that he would be prepared to discuss

a well presented redundancy package with some possible consultancy based contract going forward. The claimant also described his current work as follows:-

> *"My current work regime is made up of various communications, including existing suppliers eg Bridea Medical, Prima Medical and Zedscan etc. Most of my week is either based at Whiteabbey/Antrim Hospital or The National Maternity Hospital Dublin, involved on both ongoing Clinical Studies, which are fast coming to a conclusion. Of course now the real work begins, in putting a marketing plan into action for rolling out the product North and South.*
>
> *Given the uncertainty of my position in the company has meant putting this on hold for now."*

The claimant concluded his email with a request for a summary of their meeting.

20. On 23 August 2016 Mr Walsh emailed the claimant the notes of the meeting along with the notes that the claimant provided and a copy of the claimant's subsequent email.

21. On 25 August 2016 the claimant emailed Mr Walsh in response and corrected a few points in relation to the time spent by him in hospitals and the misidentification of one. The claimant pointed out that it was now 14 days since their meeting saying that he felt in a state of limbo land and asked Mr Walsh when they could meet in order to conclude this discussion. Mr Walsh replied on the same day and agreed to meet the claimant on 26 August 2016 at 10.30. The purpose of the meeting, according to Mr Walsh, was to see if there was any other option before making a decision.

22. In his witness statement the claimant also made reference to another discussion with Mr Walsh during August 2016 in relation to his plans to speak with other electrosurgical manufacturers. Mr Walsh asked the claimant who might be approached and the claimant mentioned Bowa which was already represented by an Irish company and were starting to make inroads into the market and Bovie, an American company. The claimant also referred to KLS Martin and that during the three months prior to the claimant joining Endosurgical he had been to North Wales to meet two gentlemen who in 2015 were agents for KLS Martin. The claimant denied describing them, as Mr Walsh alleged, as "Two men in a shed".

23. On 25 August 2016 Orla Wilson, a Sales Representative employed by the respondent, tendered her resignation with one month's notice to Alistair Harvey, the respondent's Surgical Sales Manager. Ms Wilson was first employed in this capacity by Endosurgical Limited on 3 March 2014 and as with the claimant she transferred to the respondent's employment via TUPE. Ms Wilson was on a basic salary of £30,000 per annum and had the benefit of a company car. She also was part of a bonus incentive scheme. Mr Walsh gave evidence that this scheme did not continue after the transfer.

24. The claimant was aware of Ms Wilson's resignation and referred to it in an email exchange with Andrew Saipe of Zilico Limited on 30 August 2016. In the same email exchange the claimant mentioned the consultancy role suggested by Mr Walsh but said that he wouldn't be sitting around waiting for his phone to ring as

this had been offered to other people on two previous occasions with only one day's work offered.

25. During the intervening two weeks Mr Walsh had discussed with the Board the possibility of whether or not there would be any consultancy work for the claimant. According to Mr Walsh it was hoped that there might be some consultancy work for the claimant if the respondent was able to make progress with KLS Martin but there was no guarantee of this with the result that the respondent could not offer any alternative work at this stage or confirm a consultancy arrangement.

26. On 26 August 2016 Mr Walsh met with the claimant and told him that he was being made redundant. Mr Walsh provided the claimant with a decision letter (wrongly dated 26 November 2016 instead of 26 August 2016) which read as follows:-

> *"We refer to our meeting on 11th August when we discussed the Company's proposal to dismiss you on the grounds of redundancy.*
>
> *It is with regret that we must now inform you that your present role with the Company is redundant. This has arisen because we lost the Erbe contract under which you carried out the majority of your role. After completion of our redundancy procedures you have been selected for redundancy. Unfortunately there is no alternative position within the Company at present. We shall continue to keep you informed during the course of your notice in the event that this changes.*
>
> *You are entitled to receive 3 months' notice of the termination of your employment based on your confirmed employment date of 10 years. We therefore confirm that your date of termination on the grounds of redundancy will be 26th November 2016.*
>
> *You will receive your P45 in due course at the completion of your notice period.*
>
> *The value of the payment by way of redundancy is calculated at £7,500.*
>
> *During your notice period you may be asked to move on to garden leave depending on the needs of the business. The current projects you have been working on should be written up and handed over to Alistair Harvey over the next 7 days.*
>
> *You have the right to appeal against the Company's decision if you are not satisfied with it. If you do wish to appeal, you must inform me in writing within five working days of receiving this decision. If you do appeal you will be invited to attend an appeal meeting in which you must take all reasonable steps to attend."*

27. The claimant did not appeal the decision. In his evidence to the tribunal the claimant said that he didn't appeal because it was a fait accompli and would have been meaningless as the respondent was getting rid of him come hell or high water and that he therefore decided to take the legal route rather than appeal.

28. Mr Walsh gave evidence that there were no alternative positions available within the respondent business in the claimant's specialty and that he could not justify keeping

the claimant pending a new contract with KLS Martin as it was not clear whether the respondent would ever manage to secure such a contract and there were no other projects for the claimant to work on that would have generated income. It is clear that the respondent remained in contact with KLS Martin. Indeed only a matter of days after the claimant was made redundant Mr Walsh met with Mr Schill on 30 August 2016. The respondent had further contact with KLS Martin in January 2017 but had not sold any KLS Martin product and could not justify retaining the claimant on a high salary and expenses.

29. Mr Walsh did not give consideration to sales jobs. Mr Potter put it to Mr Walsh that the claimant was a "Salesman Plus". Mr Walsh replied that this was the first time that this had been put to him by anyone and that it was not included in the staff information or in the claimant's response. Mr Potter further defined this construct as a salesman with expertise in surgical products. Mr Walsh again rejected this on the basis that it was not what the claimant said his job was or what the customers perceived him to be doing. Mr Walsh agreed that he did not ask the claimant if he could take on sales but did ask him what he could do.

30. In or around the third week in October it came to Mr Walsh's attention that the claimant was approaching a number of hospitals and had asked an employee of the respondent's for their sales leads and contact details. This caused Mr Walsh to believe that the claimant was going to start acting in competition with the respondent while still employed by it. The claimant denied that he was preparing to compete with the respondent and the thrust of his evidence is that he was quite properly looking for employment opportunities. As a result of these concerns Mr Walsh asked the claimant to attend a meeting with him on 24 October 2016.

31. The meeting took place as arranged on 24 October 2016. Mr McAllister was again in attendance and subsequently produced a note of the meeting. At the outset of the meeting Mr Walsh asked the claimant to return all Company property to him. The claimant handed over his laptop but wished to retain his mobile phone so that he could transfer personal data on to a memory stick. Mr Walsh then asked the claimant if he had asked another employee of the respondent for their sales leads and contact details. The claimant denied doing so and said that if the respondent had an issue it should give him the evidence. The claimant then went on to say that he did not have a restrictive covenant and was considering setting up a business in future which would be competing with the respondent. In his evidence to the tribunal the claimant vehemently denied making any such statement. Further discussion ensued during which Mr Walsh drew attention to restrictive covenants in the claimant's contract. The claimant regarded the reference to restrictive covenants as a threat rather than being referred to in response to his plans. Mr Walsh then advised the claimant that he was being placed on garden leave on the basis that the respondent had lost Erbe as a supplier. Mr Walsh instructed the claimant to use all of his outstanding holiday entitlement during this period of garden leave and notify the respondent in line with normal procedures. In his evidence to the tribunal the claimant denied being told to use all of his outstanding holiday entitlement. The record of the meeting indicated that the claimant had acknowledged that he had confirmed in writing to Mr Kane (Eurosurgical Limited) that he would accept a non-compete clause. In his evidence to the tribunal the claimant denied this and pointed out that no written confirmation had been forthcoming. Mr Walsh asked the claimant what he had been doing since their last meeting and why he had not received weekly reports from him as requested. According to the record of the meeting the claimant stated that no-one had

contacted him but could not explain why no report had been generated. In his evidence to the tribunal the claimant denied that he was ever requested to make a weekly report. The discussion turned to other matters and Mr Walsh agreed that the claimant could look for alternative employment while on garden leave as long as he respected the non-compete element of his contract. Mr Walsh made clear that the claimant should not contact any suppliers including Zilco or any of the respondent's customers. Mr Walsh also emphasised that if any member of staff was found to be providing commercially sensitive information to a competitor this would result in disciplinary action which could lead to dismissal for gross misconduct. The claimant denied having contact with any member of the former Eurosurgical Limited management since it entered liquidation. It is clear that on a number of issues the parties' version of what transpired during this meeting is in dispute. It is regrettable that a verbatim record was not made. It is also singularly unfortunate that Mr McAlister destroyed his original notes. We do not however read anything sinister into this.

32. In any event the only real matter of significance that the meeting covered as far as these proceedings are concerned is the matter of holiday entitlement and we will have to resolve this issue ourselves. In this regard the respondent places reliance on the instruction issued by Mr Walsh at the meeting on 24 October 2016 that he should use all of his outstanding holiday entitlement while on garden leave. A series of emails passed between the claimant and Mr Graham Stewart, the respondent's Finance Director, regarding expenses, fees and holiday pay.

33. On 22 November 2016 Mr Stewart emailed the claimant. In the portion of the email dealing with leave Mr Stewart asserted that the respondent had complied fully with the requirements contained in the Working Time Regulations and the claimant's contract to give the correct notice of a requirement to take leave but as a gesture of goodwill indicated that he was willing to pay 5 days in lieu of accrued holidays in his final payment.

34. On 23 November 2016 the claimant emailed Mr Stewart and reiterated that he had no recollection of any mention of leave at the meeting of 24 October 2016 but that because the meeting began in such a confrontational manner he was not surprised if he missed such a discussion.

35. On 25 November 2016 Mr Stewart provided the claimant with his final payment by cheque together with a breakdown of same which included 5 days accrued holiday pay.

36. In accordance with the redundancy letter of 26 August 2016 the claimant's effective date of termination was 26 November 2016.

37. There was further contact between Mr Walsh and the claimant up until the end of his notice period in relation to alleged contact with competitors. In addition, the respondent's solicitors wrote to the claimant on 18 November 2016 and expressed concern that the claimant was either competing or preparing to compete with the respondent and that he would make use of confidential information in breach of his obligations as an employee. The letter made reference to the claimant's attendance at a major trade exhibition in Germany in the week commencing 14 November 2016 for electro surgical products including specialist products supplied by the respondent; attending the exhibition in close company of the Kane family who were direct competitors of the respondent and attending

Whiteabbey Hospital on 11 November 2016 for the purpose of soliciting business from the respondent's current customers. The claimant's solicitors replied on the claimant's behalf on 16 December 2016 and further correspondence ensued between the solicitors. In the main this correspondence has little bearing on the issues before the tribunal but we note that the claimant's solicitors contended in their letter of 9 January 2017 that the claimant's position was not redundant on the basis of the respondent's ongoing discussions with KLS Martin prior to the termination and would therefore have required the services of an Electro Surgery Consultant. By letter dated 31 January 2017 the respondent's solicitors accepted that the respondent had had meetings with KLS Martin and was likely to go into business with KLS Martin but that it still had a distribution agreement in place with Accu-Science. In addition, no revenue had been generated and sales were possibly 9-12 months away. The respondent could not afford to pay the claimant's salary in the meantime and his role was genuinely redundant.

38. The claimant gave evidence about his efforts to secure an income following the termination of his employment with the respondent. Some of this touched on the matters referred to in the letter of 18 November 2106. The claimant said that he considered setting up as an independent electrosurgery consultant supporting this with a few niche products and to this end he developed an alternative version of an existing product for colposcopy which became available for sale in and around early spring 2017. He also attended a Medica Trade Show in November 2017 at Dusseldorf where he had discussions about a future electrosurgery consultant role with manufacturers including KLS Martin. Mr Schill of KLS Martin indicated that he wanted to meet up with the claimant about issues in Cambridge Hospitals. They met at Heathrow Airport on 28 February 2017. Mr Schill enquired why the claimant was not continuing with the respondent to which the claimant replied that they had no electrosurgical business. Mr Schill stated that he had asked the respondent to act as agents and that discussions had been going on between KLS Martin and the respondent since around September 2016.

39. In May 2017 the claimant took up a self-employed marketing role with KD Surgical but with only a couple of products at a time. He did not earn any money on this enterprise but incurred costs in travel, fuel, parking and so forth. The claimant also gave evidence that he had done some lecturing without remuneration and presentations for Gemini Surgical in June 2017.

40. The claimant was also in email contact with Starkstrom UK and KLS Martin in May 2017. In the course of an email to Jonathan Jenkins of Starkstrom UK on 2 May 2017 the claimant stated as follows:-

> *"I am convinced that Patrick [Schill] has not explained fully with you, what I actually do as an Electro Surgery Consultant.*
>
> *I am of course aware you have a friend of mine, Chris Mee, working in the North. However, as far as I am aware Chris has mostly a sales remit?*
>
> *My role is of a different nature, by virtue of what I do, does influence sales outcomes. Essentially, I come from the premise, that sales staff do not usually like training and education. They would see this role as non sales and certainly getting in the way of making good sales."*

A copy of a presentation by the claimant was attached to the email.

41. Then on 9 May 2017 the claimant emailed Mr Schill in which he stated:-

> *"I have had some email communication with Jonathan Jenkins of Starkstrom UK. I have to say that I am extremely disappointed and bewildered, as Jonathan has not given me the chance to discuss my potential to his company. He simply emailed me to say that he already has someone selling in the North and that he was looking for a Sales Representative for the South.*
>
> *Certainly, I never gave you the impression that I was looking for a Sales representative job. I feel my C.V. shows that I have been operating at a much more senior role than that."*

42. In August 2017 the claimant took on a group of products for Healthcare Essentials, a Northern Ireland distributor for Endoscopy. This produced a small income of a few hundred pounds per month.

RELEVANT LAW

Redundancy

43. Article 130 of the Employment Rights (Northern Ireland) Order 1996 ("the 1996 Order") provides that:-

> *"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
>
> *(a) the reasons (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within Paragraph (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) A reason falls within this paragraph if it –*
>
> *...*
>
> *(c) is that the employee was redundant,*
>
> *...*
>
> *(4) Where the employer has fulfilled the requirements of Paragraph (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

(b) shall be determined in accordance with equity and the substantial merits of the case."

44. A redundancy is defined in Article 174 of the 1996 Order as follows:

"174 (1) For the purposes of this Order an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –

(a) the fact that his employer has ceased or intends to cease –

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(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."

45. Article 130A of the 1996 Order is concerned with the procedural fairness of dismissals. Employees are regarded as unfairly dismissed if the statutory dismissal procedure was not complied with and the failure to comply was attributable to the employer. By Article 130A (1) of the 1996 Order where the statutory dismissal procedure is applicable in any case and the employer is responsible for non-completion of that procedure, the dismissal is automatically unfair. A tribunal is required to consider whether the dismissal is automatically unfair under Article 130A even where this issue has not been specifically raised by the claimant - see ***Venniri v Autodex Ltd (EAT 0436/07)***.

46. When considering the termination of any employment the employer must follow the three-step procedure set out in Schedule 1 of the 2003 Order. Paraphrasing that schedule, the procedure for a redundancy dismissal is:-

"(i) The employer must set out in writing the circumstances which lead him to contemplate dismissing the employee as redundant, and must send a copy to the claimant and invite the employee to a meeting to discuss it.

(ii) There must be a meeting. The employee must be told of the decision and of his right to appeal.

(iii) If the employee wishes to appeal, there must be an appeal meeting and the employee must be told of the decision."

47. Article 17 of the Employment (Northern Ireland) Order 2003 ('the 2003 Order') provides for adjustment of awards made by industrial tribunals where the claim relates to any of the jurisdictions listed in Schedule 2 of that Order. Unfair dismissals are included in that Schedule. Where a tribunal finds that a failure to complete the statutory procedure is attributable to failure by the employer, it may increase any award it makes to the employee by between 10% to 50% if the tribunal considers it just and equitable in all the circumstances to do so unless there are exceptional circumstances which would make an increase of that percentage unjust or inequitable. This only applies to the compensatory award. Similarly, if the employee fails to complete the statutory procedure, comply with its requirements or exercise a right of appeal a tribunal may reduce any award which it makes to the employee by 10%, and may, if it considers it just and equitable in all the circumstances to do so, reduce it by a further amount, but not so as to make a total reduction of more than 50%.

48. The Employment Appeal Tribunal in ***Williams v Compair Maxam Ltd [1982] ICR 156*** listed the principles which, in general, reasonable employers adopt when dismissing for redundancy employees who are represented by independent trade unions. Those principles can be adapted where the employee is not represented by a recognised trade union. They are as follows:-

"1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment."

49. These guidelines were expressly approved in **Robinson v Carrickfergus Borough Council [1983] IRLR 122**, a decision of the Northern Ireland Court of Appeal.

50. In ***Langston v Cranfield University [1998] IRLR 172***, the Employment Appeal Tribunal held that, so fundamental are the requirements of selection, consultation and seeking alternative employment in a redundancy case, they will be treated as being an issue in every redundancy unfair dismissal case.

51. In the decision of the Employment Appeal Tribunal in the case of ***Halpin v Sandpiper Books Ltd [2012] UKEAT/0171/11***, it was confirmed that the correct approach to dealing with redundancies is set out in ***Williams v Compair Maxam Ltd [1982] IRLR 83***. It also confirmed that decisions as to pools and criteria are matters for management and rarely will it be for an employment tribunal to interfere with any such decisions.

52. In ***Taymech v Ryan [UKEAT/0663/94]***, Mummery J, as he then was, said on the issue of the basis of the pool for selection:-

> *"There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how a pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it, where the employer has genuinely applied his mind to the problem."*

53. In ***Capita Hartshead Ltd v Byard [UKEAT/0445/12]*** it was held:-

> *"(d) the Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has 'genuinely applied' his mind to the issue of who should be in the pool for consideration for redundancy; and that*
>
> *(e) even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it."*

54. A tribunal is not entitled to substitute its view for that of an employer, who has genuinely applied his mind to the said issue (see further ***Family Mosaic Housing Association* v *Badman [UKEAT/10042/13]***).

55. In ***Fulcrum Pharma (Europe) Ltd v Bonassera [UKEAT/0198/10]*** there was no criticism of the management decision to have a pool of two, the employer's failure related to the failure to consult on the size of the pool. Similarly, in ***Halpin* v *Sandpiper Books Ltd*** since the claimant was the only employee based in China, the respondent's decision to make the post redundant was correctly based 'on a pool of one'.

56. In ***Polkey v AE Dayton Services Ltd [1988] ICR 142*** the Court stated:-

> *"In the case of redundancy, the employer will normally not 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 redeployment*

within his own organisation. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that in the exceptional circumstances of the particular case, procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with."

57. In ***Mugford v Midland Bank [1997] IRLR 208***, the EAT stated:-

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

58. In **Rowell v Hubbard Group Services Ltd [1995] IRLR 195** Judge Levy QC in the context of the requirements of fair consultation emphasised that consultation with an employee in the context of dismissal for redundancy must be fair and genuine. Judge Levy QC also cited with approval a passage in Glidewell LJ's judgment in **R v British Coal Corporation and Secretary of State For Trade and Industry ex parte Price and others [1994] IRLR 72** as follows:

"24 It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in R v Gwent County Council ex-parte Bryant, reported, as far as I know, only at {1988} Crown Office Digest p.19, when he said:-

`Fair consultation means:

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

(b) adequate information on which to respond;

(c) adequate time in which to respond;

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

25 Another way of putting the point more shortly is that fair consultation involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely".

SUBMISSIONS

59. Both counsel made helpful written and oral submissions. Their written submissions are appended to this decision.

60. On behalf of the claimant Mr Potter submitted that the claimant was targeted for redundancy because of his high salary and contacts with the Kane family from or

about the time of his transfer and that the decision was thus predetermined. There was no meaningful consultation. Mr Potter submitted that in a transfer situation it was incumbent on the new employer to ascertain what work potentially redundant employees had done and could do before making decisions. The respondent did not draw a sales job opportunity to the claimant's attention; did not seek to ascertain the claimant's skills and experience in order to consider who should be in the redundancy pool and failed to inform the claimant of ongoing discussions with KLS Martin particularly after 1 August 2016. As a result the claimant was unable to address these matters. Mr Potter drew attention to the absence of a redundancy procedure and documentary evidence that the respondent considered the matter of fair selection and who should be in the pool. Nor was there evidence, Mr Potter submitted, that the respondent genuinely considered whether the pool should be widened to include other employees. Mr Potter also drew attention to Mr Walsh's failure to ascertain the claimant's skills and experience. Mr Potter further submitted that the respondent failed to look for alternative employment before dismissing the claimant and that he should have been considered for a sales job which was available. Alternatively, Mr Potter submitted that the respondent ought to have retained the claimant with a view to utilising his experience in obtaining new electro surgery work whilst deploying him mainly in a frontline sales role pending obtaining a new electrosurgery contract.

61. On behalf of the respondent Ms Best submitted that the decision to dismiss the claimant was fair in all the circumstances and was within the band of reasonable responses open to the employer. There were no other comparable roles to the claimant's role of Electrosurgery Consultant and he was therefore in a pool of one. In terms of credibility Ms Best invited us to view the claimant as an evasive witness who was not averse to misleading the tribunal. Ms Best submitted that the respondent adhered to the principles set out in ***Williams v Compair Maxam Ltd [1982] ICR 156*** and fulfilled all the statutory and contractual requirements relating to a redundancy dismissal. There were no suitable alternative vacancies in the business and that the issue of a sales job was a red herring as this was not a job that the claimant would have taken. Ms Best also drew attention to the claimant's failure to appeal against the decision to make him redundant and the potential impact of this failure on compensation in the event that the tribunal found in the claimant's favour. Ms Best further submitted that a 100% Polkey reduction should be made to any award as the claimant would have been dismissed anyway. Ms Best made the same submission in relation to Article 130A (2) of the 1996 Order in relation to any failure to follow a statutory procedure.

62. Following the hearing the parties' solicitors were asked to produce an agreed chronology to assist the tribunal in correctly identifying the key dates in the history of the matter. Unfortunately, they were unable to agree a chronology but they did produce competing versions which were of some assistance to the tribunal as they set out clearly what was disputed. The tribunal has taken these into account in arriving at its decision.

CONCLUSIONS

63. There was no dispute that the claimant was dismissed on a potentially fair ground namely by reason of redundancy and we are satisfied that this was indeed the case. The main issue that we have to decide is whether the claimant was unfairly selected for redundancy. We are satisfied that at the point when the respondent decided to dismiss the claimant by reason of redundancy a potential redundancy situation

arose due in the main to the loss of the Erbe contract. However, there was no evidence that the respondent approached the potential redundancy situation in a structured manner. True it is that Mr Walsh did conduct an initial meeting with all staff following the transfer of the business and also held an individual consultation meeting with the claimant but there is no evidence of any attempt to identify a pool or appropriate criteria. In short, there was no credible evidence that the respondent genuinely applied its mind to the issue. Thus we cannot be satisfied that the respondent complied with the principles set out in **Williams v Compair Maxam Ltd [1982] ICR 156**. The respondent's submission that the claimant was in a pool of one is not based on Mr Walsh's consideration of the matter at the time but it rather appears to be ex post facto reasoning. We can understand this as it is clear that Mr Walsh having inherited a workforce made business decisions as to who should be retained or otherwise. He had no knowledge of the workforce prior to taking over the business and we agree with Mr Potter that in a transfer situation it was incumbent on the new employer to make proper enquiries as to who should be in the pool. Mr Walsh's focus was clearly and understandably on the claimant as he was a high earner with a significantly reduced workload due to the loss of the Erbe contract but Mr Walsh failed to address the matter properly through the prism of a redundancy process. As Mr Potter points out there was no redundancy procedure, no evidence that Mr Walsh considered who should be in the redundancy pool and no selection criteria. The touchstone for our decision is whether the employer acted reasonably and in the absence of any evidence of proper consideration of these matters we cannot be satisfied that the respondent acted reasonably in selecting the claimant for redundancy.

64. Having got off on the wrong foot Mr Walsh's conduct of the process thereafter cannot be fairly criticised but the damage done by his failure to address the redundancy issue correctly in the first instance was not capable of being rectified. Mr Walsh gave the claimant the opportunity to say what he could do within the respondent's business. The claimant when asked to say what he could do did not make any mention of his sales skills. We were not impressed with the claimant's attempts to shoehorn various marketing and support roles into sales. The fact is that when given the opportunity to enlighten Mr Walsh as to his skillsets the claimant failed to do so. It is also clear that the claimant was interested in securing an attractive redundancy package if one was available. We do not criticise the claimant for this as it was both understandable and prudent for him to do so. We are satisfied that the claimant was more than capable of deploying sales as a role suited to him if he chose to do so. The claimant was also capable of going the other way and he dismissed the prospect of doing sales work in his email of 9 May 2017. Further, the three page document that the claimant provided to Mr Walsh gave no hint of sales experience and we do not believe that the claimant intended this document to convey to the reader that he was interested in sales work. Although the dictionary definition deployed by Mr Potter provides some support for a broader definition of sales we do not propose to decide the case on the basis of semantics. Nothing in the three page document would or should have prompted Mr Walsh to enquire as to whether the claimant would be interested in a job in sales. While there may be some force in the contention that Mr Walsh could have probed the claimant more deeply about his experience given that he was dealing with a transferred employee of whom he knew little it cannot be seriously contended that the claimant was not given every opportunity to inform Mr Walsh as to what he had to offer to the respondent.

65. There is also a legitimate question as to whether Mr Walsh should have revisited this issue when a concrete sales job came up particularly at a later stage in the notice period when an employee such as the claimant might be more interested in other roles. While the claimant had said nothing to Mr Walsh that would have suggested that he would have been interested in a sales role we consider that the respondent ought to have at least considered the claimant for this position.

66. We are not impressed by the suggestion that the respondent ought to have informed the claimant about ongoing discussions with KLS Martin. This was a legitimate business opportunity that the respondent was pursuing and we do not consider that it was obliged to keep the claimant informed about its progress and certainly not until these discussions had reached fruition. We are satisfied on the basis of Mr Walsh's evidence and the documentation that we have been shown that the discussions had not resulted in an agreement by the expiry of the claimant's notice period on 26 November 2016. Accordingly, there was nothing concrete for the respondent to discuss with the claimant during his notice period.

67. Nor have we heard any credible or persuasive evidence to support the suggestion that the real reason for dismissing the claimant was that he was perceived as being too close to the Kane family who were in competition with the respondent. The claimant's relationship with Mr Kane was touched upon during the Step 1 Meeting but no criticism was voiced by Mr Walsh about this relationship and there is no evidential basis to support the suggestion that this was a factor in Mr Walsh's decision to make the claimant redundant. We are not prepared to draw any adverse conclusions from the criticism made of the respondent's approach to disclosure.

68. The disappearance of the claimant's role and his high salary were clearly the critical factors as far as the respondent was concerned. While we can entirely understand and appreciate that these were legitimate considerations and that it made business sense to take them into account the respondent did not address the redundancy issue correctly and lawfully. We are satisfied that the claimant was unfairly selected for redundancy and further that the respondent did not enquire sufficiently into suitable alternative employment. The claimant was therefore unfairly dismissed.

69. The three step minimum statutory dismissal procedure was fully complied with by the respondent. However, the claimant did not complete the procedure due to his failure to appeal against the decision to make him redundant.

70. Regrettably, we are unable to address the issue of compensation as it became apparent during the course of the hearing that the necessary evidence particularly in relation to the claimant's earnings was not available. A separate remedies hearing will therefore be convened to address compensation.

Employment Judge:

Date and place of hearing: 12-13 February 2019 and 6 March 2019 Belfast.

Date decision recorded in register and issued to parties:

Case No 1369/17 IT

IN THE OFFICE OF INDUSTRIAL TRIBUNALS AND THE FAIR EMPLOYMENT TRIBUNAL

BETWEEN

MR STEVE VECK

Claimant

And

HOSPITAL SERVICES LIMITED

Respondent

Submission for Claimant

1. The Claimant was dismissed on the 26th November 2016 on the ground of redundancy having been given notice of redundancy on the 26th August 2016.

2. The Claimant claims unfair dismissal and 5 days holiday pay. The unfair dismissal claim falls into three main parts:

    a. Consultation failure;
    b. Unfair selection for redundancy;
    c. Failure to offer suitable alternative employment;

Relevant background

3. The dismissal followed a transfer of undertakings between the transferor, Endosurgical and the transferee, being the Respondent. The Claimant worked for the parent company Eurosurgical before the establishment of Endosurgical, and then worked for Endosurgical until the transfer. A significant part of the Claimant's work with Endosurgical involved electrosurgical devices and machines, and in this context he had an important liaison role with Erbe Medical UK. The Erbe contract did not transfer with Endosurgical to the Respondent. The Erbe contract went to a company called Northern Hospital Services Limited.

4. The Claimant had previously worked in frontline Sales roles. For the last period of time his job with Endo-surgical had focused upon 'electrosurgical consultancy' as explained in his synopsis of his special projects role at pages 177-178 of the bundle. The role was an integral part of the Company's sales, marketing and customer support functions.[1]

[1] Marketing is the "act or practice of buying and selling in a market", *Chambers Twentieth Century Dictionary*.

5. By letter of 7 June 2016 it became known that the provisional liquidator had engaged Hospital Services Limited to assist in the continuing operations and trade of Endosurgical.(Page 59)

6. There was a transfer of undertakings on the 8th July 2016.(Pages 77-84)

7. With the loss of Erbe in July the Claimant was working mainly on a Zedscan project in Whiteabbey Hospital and the National Maternity Hospital Dublin and also with existing suppliers Bridea Medical and Prima Medical.(Page 187)

Redundancy

8. The Claimant believes Mr Walsh had earmarked the Claimant for redundancy from at or about the point of transfer. He refers to Mr Walsh telling him a high salary post would be going, on the 8th July.

9. The Company began liaising with a company that supplied *inter alia* electrosurgical machines and devices called KLS Martin in July 2016 hoping to enter into a supply agreement. A meeting was held with Patrik Schill of KLS Martin on the 30th August 2016 which Dominic Walsh attended. The Company continued to liaise with KLS Martin for the remainder of the Claimant's tenure and beyond. It entered into a pre-contractual agreement (Letter of Intent) on or before 23 November 2016; it ordered equipment in November; and employees started training in January 2017.(See pages 246, 249-254, 299-300, 313 and 335.)

10. On the 1st August the Claimant was invited to a meeting with Mr Walsh. He was informed he would be considered for redundancy. At the meeting the Claimant expressed an interest in being involved in any discussions with electro-surgery product suppliers. At the meeting he was not offered an alternative job. We now know there was a sales job vacated by Orla Wilson.

11. A meeting was held on the 11 August 2016 between Mr Walsh and Mr Veck. Mr Milliken was a note-taker. The Claimant disputes the accuracy of some of the minutes but the document does seem to provide a reasonable gist of the conversation. The Claimant was not offered suitable alternative employment. The Claimant was not offered the vacant Sales Job.

12. Whilst the notes indicate a similar meeting would be held in 14 days, on the 26th August 2016 the Claimant was given notice of redundancy. The letter states as follows:

> *"It is with regret that we must now inform you that your present role with the Company is redundant. This has arisen because we lost the Erbe contract under which you carried out the majority of your role. After completion of our redundancy procedures you have been selected for redundancy. Unfortunately there is no alternative position within the company at present. We shall continue to keep you informed during the course of your notice in the event that this changes."*

13. It is submitted that the redundancy decision and the procedure under which it was reached is unlawful.

    a. Consultation[2]:
        i. Meaningful lawful consultation involves the employer providing the employee with the information relevant and necessary to understand the issues fully thereby making the consultation meaningful. This is known as adequate information.
        ii. The employee has an opportunity to consider the information and then is given an opportunity to respond.
        iii. Finally the employer must take account of the employee response – give it conscientious consideration – consider it genuinely and properly.
        iv. A material change of circumstances following any consultation and the effective date of termination may require further consultation.[3]
        v. The three main issues here are (1) that the respondent did not draw the Sales Job opportunity to the Claimant's attention; (2) The Respondent did not seek to ascertain the Claimants skills and experience for the purpose of considering who should be in the pool; and (3) that the respondent did not inform the Claimant of the ongoing discussions with KLS Martin particularly after the 1 August 2016.
        vi. These failures mean that the Claimant was not able to respond and address these matters. Most obviously a job opportunity was available and potentially the company could have utilised the Claimant in the Sales role but also utilised his experience and expertise in its discussions with KLS Martin.
        vii. It is submitted that the consultation in this case was inadequate falling short of legal requirements.

    b. Selection[4]:
        i. The first point to make is there appears to be no redundancy procedure.
        ii. There is no documentary evidence that the employer considered the matter of fair selection or who should be in a pool.
        iii. There is no evidence the employer genuinely considered the issue as to whether the pool should be widened to include other employees and not just the Claimant. As noted above the employer did not proactively

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[2] *Harvey on Industrial Relations and Employment Law*; Part D1 para 1704 onwards. See also *Thomas v BNP Paribas* EAT 13 October 2016. *TNS UK LTD v Swainston* EAT 22 January 2014. *Pinewood Repro Ltd* [2011] ICR 2010.

[3] *Stacey v Babcock Power Ltd* [1986] ICR 211 – The fairness of a dismissal for redundancy will not be judged simply at the date on which notice is given but also with regard to events up to the date on which it takes effect.

[4] *Harvey on Industrial Relations and Employment Law*; Part D1 para 1685 onwards. *Thomas and Betts Manufacturing Co Ltd v Harding* [1980] IRLR 255. *Capita Hartshead v Byard* [2012] ICR 1256.

question the Claimant on his skills and experience during the consultation.

iv. The Tribunal must carefully scrutinise the reasoning of the employer to be satisfied the employer has genuinely applied its mind to the issue of who should be in the pool;
v. The Claimant's job was a Sales job - as he performed an important function in Sales / marketing / customer care and support. Also the Claimant had previously worked exclusively in Sales roles.
vi. It is submitted that the Claimant was targeted because of his high salary and he was perceived as excess to requirements because the Erbe contract was lost.
vii. It is submitted that there was no fair redundancy process for the reasons set out above – there was no procedure – there was no genuine attempt to ascertain the Claimants skills and experience – there was no genuine attempt to consider the 'pool' issue.
viii. As indicated in evidence there were a number of employees who could/should have been in a pool –_Alistair Harvey (Sales Manager) Paul O'Brien, Alan Stead, Paul Rossiter, Niamh Rainbow, J Colville, R Morgan and Orla Wilson (Sales Executives).
ix. It is notable that a number of these employees subsequently went on to undertake training with KLS Martin.(See page 335)
x. The Company failed to genuinely apply its mind to the pool.
xi. However the truth may be that the Company never considered or properly and genuinely considered the pool issue because it wanted rid of the Claimant by reason of his salary and contacts with the Kane family.

c. Suitable alternative employment[5]:
    i. In a redundancy situation an employer is obliged to look for alternative work and satisfy itself that it is not available before dismissing for redundancy.
    ii. The employer must make reasonable efforts to look for alternative work.
    iii. In a transfer a new employer must ascertain the skills and experience of an employee before it can consider what available work is suitable.
    iv. In this case the employer and in particular Mr Walsh did not ascertain the Claimants skills and experience.
    v. There was a Sales job available.
    vi. Further and in the alternative there was an obvious opportunity to retain the expert in electro surgery (with a view to utilising his expertise in obtaining new electro surgery work) whilst deploying him for most of his working time in a more frontline Sales type role pending the Company obtaining a new electrosurgery contract.

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[5] *Harvey on Industrial Relations and Employment Law*; Part D1 para 1721 onwards.

14. The Claimant was given notice of the termination of his employment by reason of redundancy on the 26th August 2016. The effective date of termination was the 26th November 2016.

15. A meeting was held with the Claimant on the 24th October 2016. Mr Milliken also took notes at this meeting.(Page 193) The primary concern at this meeting was the concern that the Claimant might pose a competitive threat to the Respondent. The competitive concern is again apparent in a letter dated 18 November 2016 (page 65)

16. The Claimant's employment with the Respondent ended on the EDT, the 26th November 2016.

Discovery

17. The Claimant sought discovery of relevant documentation pertaining to contacts with KLS Martin. The Respondent refused to disclose such documentation contending it was not relevant to the present claim.

18. In March and May 2018 a number of CMDs were held to consider the Claimant's application. The Tribunal ordered the production of relevant material in May 2018.

19. The material disclosed is found at pages 212-337.

20. As demonstrated during the hearing and in this submission, said material or at least parts thereof was plainly and obviously relevant to the claim.

21. The Tribunal may take the respondent's conduct in relation to disclosure into account when assessing the credibility of the respondent and its defence to this claim.

Summary

22. In summary the Claimant believes he was unfairly dismissed. He alleges there was no fair procedure. In particular the employer failed to adequately engage in the consultation process to clarify his experience and skill-set.

23. In a transfer situation a new employer who is unfamiliar with employees needs to take the time to find out what work potentially redundant employees have done and can do before they can make informed decisions about the redundancy pool and alternative employment.

24. Consequently the Respondent failed to adequately consult. It failed to genuinely and meaningfully consider who should be in a redundancy pool. It failed to ascertain what work the Claimant could do and arguably as a consequence failed to make known to the Claimant a potentially suitable employment opportunity in Sales.

25. Moreover the respondent was and is well aware that the Claimant's role was integral to Sales, Marketing and Customer support. The contentions to the contrary are not credible and undermine the respondent's case.

26. Of course in this case there is a less attractive interpretation of the employers conduct. That the Claimant was perceived as too close to the Kane family who were competitors and he was simply black-balled by reason of his salary and his connections. In other words there was no genuine attempt to follow a fair redundancy process: redundancy was simply a smokescreen behind which the Claimant was sacked because of his salary and contacts.

For and on behalf of the Claimant
Michael Potter BL
Shaun Fisher – Fisher Law Solicitors.
4th March 2019

IN THE OFFICE OF INDUSTRIAL TRIBUNALS & THE FAIR EMPLOYMENT TRIBUNAL

Case Ref No: 1369/17IT

Between:

STEVE VECK

Claimant

-And-

HOSPITAL SERVICES LIMITED

Respondent

Submissions on behalf of the Respondent

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1. An employee has the right not to be unfairly dismissed by virtue of Art 126 Employment (NI) Order 1996.

2. Under Art 130 (1) 1996 Order it is for the employer to show that the reason for the dismissal and that it was a reason which fell within Art 130 (2) 1996 Order.

3. The Respondent submits that the Claimant was dismissed for redundancy as per Art 130 (2) (c) 1996 Order which is a potentially fair reason for dismissal.

4. According to Art 130 (4) 1996 Order:

"Where the employer has fulfilled the requirements of paragraph (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

5. It is a question of fact whether a dismissal is fair or not and the tribunal should look at matters in the round and in an industrial relations context (UCATT v Brain [1981] IRLR 224). A number of tests have been set out giving tribunals guidance on how to approach this question. It is important to stress that the tribunal must not step into the employer's shoes (British Home Stores v Burchell [1980] ICR 303; Post Office v Foley [2000] IRLR 827; Anglian Home Improvements Ltd v Kelly [2004] IRLR 793).

6. When considering these dismissals in terms of Section 130(4) the tribunal, it is respectfully suggested, will benefit from certain appellate judgments.

7. According to the Court in Williams v Compair Maxam Ltd (1982) IRLR 83, there are five principles which a reasonable employer will be expected to follow. Para 19, -"*where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:*

    1. *The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.*

    2. *The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.*

3. *Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.*

4. *The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.*

5. *The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment."*

8. The Respondent says that it has fulfilled all requirements as set out in the above principles. However it should be noted that the Tribunal, in the above mentioned case, went to great lengths to emphasise that these are "standards of behaviour' not principles of law (para35).

Selection for Redundancy

9. The Claimant was in a specialised role as "Electosurgery consultant". There were no other comparable roles. He was in a pool of one and seemingly accepted that his role was gone (see minutes of meetings and relevant emails). The Respondent had lost the ERBE contract which was the main part of the Claimant's role.

10. In considering matters it is submitted that the tribunal must not decide what it would have done itself in the circumstances of the case but whether the employer has acted reasonably (Grundy (Teddington) UK Ltd v Willis [1976] ICR 323). The test is objective and the tribunal should be guided by the fact that in any case there are a variety of responses open to an employer but, provided dismissal was within the limits of that range of responses, the dismissal will be fair (Rolls Royce v Walpole [1980] IRLR 343).

11. In **British Leyland UK Ltd v Swift [1981] IRLR 91** the test was put in a slightly different way in that there is a 'band of reasonableness' to be looked at. This approach was adopted in **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439** and the principles were set out in this way:

> *'(1) the starting point should always be the words of section 57(3) [the predecessor of section 98(4) of ERA 1996] themselves;*
>
> *(2) in applying the section an [Employment] Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the [Employment] Tribunal) consider the dismissal to be fair;*
>
> *(3) in judging the reasonableness of the employer's conduct an [Employment] Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;*
>
> *(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another;*
>
> *(5) the function of the [Employment] Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair.'*

12. Applying Williams v Compare Maxim where dismissal is for redundancy the employment tribunal must be satisfied that it was reasonable to dismiss each of the claimants on the grounds of redundancy. It is not enough to show that it was reasonable to dismiss an employee; it must be shown that the employer acted reasonably in treating redundancy **"as a sufficient reason for dismissing the employee".** Therefore, if the circumstances of the employer make it inevitable that some employee must be dismissed, it is still necessary

to consider the means whereby the claimant was selected to be the employee to be dismissed and the reasonableness of the steps taken by the employer to choose the claimant, rather than some other employee for dismissal.

Procedural steps

13. The Respondent submits it fulfilled and satisfied all statutory and contractual requirements relating to the dismissal (including Redundancy) procedure as set out in **Part 1 of Schedule 1 of Employment (NI) Order 2003**.

14. The Claimant did not seek to appeal his redundancy and therefore did not seek to invoke Step 3 of the Statutory dismissal procedures. This has an impact on any potential quantum in that an appropriate reduction should be made.

Alternative Employment

15. In relation to alternative employment there were no suitable alternative vacancies in the business. The issue of Sales is a red – herring and not one that the Claimant would have taken (as per his own emails of May 2017 to other employers).

Quantum

16. Whilst the Respondent denies all allegations and claims against it, if the tribunal do find for the Claimant then there are a number of issues that the Respondent submits should be taken into account.

17. In relation to the basic award claimed the Respondent submits that none is payable as the Redundancy payment paid to the Claimant cancels this out.

18. The Respondent respectfully submits that should the tribunal find that there has been a flaw in the procedure that in all the circumstances of the case and based upon the evidence given there should be a Polkey reduction of 100% of any award as the Claimant would have been dismissed in any event had there not been a flaw.

19. Furthermore the Respondent also respectfully relies upon **Art 130(A) (2) of 1996** Order which states:

> ***" (2) Subject to paragraph (1), failure by an employer to follow a procedure in relation to the dismissal of an employee shall not be regarded for the purposes of Article 130(4)(a) as by itself making the employer's action unreasonable if he shows that he would have decided to dismiss the employee if he had followed the procedure."***

20. The Respondent relies upon the above provision and respectfully submits that as a result any award should be reduced by 100% as the Claimant would've been dismissed in any event had the procedures been complied with.

21. The Respondent also alleges that the Claimant has failed to mitigate his loss and any loss he has suffered flows from his own act or failure to mitigate. Art 157 (4) 1996 Order states that

> ***"In ascertaining the loss referred to in paragraph (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of Northern Ireland".***

22. The employee must act as a reasonable person would if he or she had no hope of seeking compensation from his or her previous employer. The employee must take all reasonable steps to mitigate the loss to him or her consequent upon the respondent's wrong and cannot recover damages for any such loss that he or she could have avoided but has failed through unreasonable action or inaction to avoid.

Conclusion

23. The Respondent contends that the Claimant's dismissal was a fair dismissal in all the circumstances and that the decision to dismiss was within the band of reasonable responses open to the employer.

24. The Tribunal are invited to dismiss the Claimant's case.

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