



Reserved judgment

THE EMPLOYMENT TRIBUNALS

Between:

Claimant: Roberto Pineiro-Varela

Respondent: Virgin Atlantic Airways Limited

Hearing at London South on 3 & 4 September 2018 before Employment Judge Baron

Appearances

For Claimant: The Claimant was present in person

For Respondent: Claire McCann - Counsel

JUDGMENT AT A PRELIMINARY HEARING

It is the judgment of the Tribunal that the claim by the Claimant that he was unfairly dismissed fails.

REASONS

- 1 The Claimant was employed by the Respondent as a Senior Project Manager from November 2000 until he resigned with effect from 4 January 2018. The claim is one of 'constructive' unfair dismissal. In the details of his claim the Claimant referred to the Respondent requiring a significant change to his role, and also that the Respondent did not acknowledge that his original role was redundant. Those are the fundamental complaints being made to support the claim.
- 2 The Claimant gave evidence himself and did not call any witnesses. Evidence for the Respondent was given by Carolyn Bunday, Senior Manager Portfolio and Practice Management, and Martin Knell, Senior HR Business Partner.
- 3 I had a bundle of documents approaching 500 pages, and I have taken into evidence those documents, or parts of documents, to which I was referred during the hearing.
- 4 The Claimant was employed originally as an Analyst Programmer and advanced to becoming a Senior Project Manager responsible for IT projects. Clause 2.2 of his statement of employment terms provided as follows:

Virgin Atlantic reserves the right to review your role, the duties for which are set out in your role profile, from time to time in line with business requirements. In addition, you may be expected to

undertake work outside your normal role profile that is reasonably assigned to you by your manager.

- 5 There were two Role Profile documents in the bundle to which I refer further below. I set out the Role Purpose as in the original document as it gives an overview of the responsibilities of the Claimant:¹

Working as part of Virgin Atlantic's Project Management professional practice, the role of Senior Project Manager is accountable for the successful delivery of projects to time, cost and quality. The projects that will be allocated will range from simple deployments to projects which are high-value worth (up to £5M) and complexity, all of which drive significant business benefit. The role holder will define the deliverables and delivery approach to meet the defined business benefits, understanding and supporting the required business change, and then ensure that the projects produce the required deliverables to the agreed standard of quality and within the agreed constraints of cost, risk and time. The role will involve working collaboratively with a number of key stakeholders, external suppliers and other departments.

- 6 There is a footnote on each page of the Role Profile as follows:

This document describes the principal purpose & main elements of the role. It is a guide to the nature & main duties of the role as they exist currently, but it is not intended as a wholly comprehensive or permanent schedule & is not part of the contract of employment.

- 7 There were percentages set out against each head of activity:

Estimating / planning the project	10%
Effective project delivery	50%
Stakeholder and Supplier Relationships	20%
Project control and compliance	15%
Project Management professional practice	5%

- 8 The essential point concerning that Role Profile for the purpose of these proceedings is that the Claimant was not responsible for what I might call the 'general line management' of any other employees of the Respondent. There were Project Managers, but they did not report to him but reported to Resource Managers. The Claimant also reported to a Resource Manager. There were three Senior Project Managers, including the Claimant.

- 9 Although not responsible for general line management the Claimant did have responsibility for managing specific projects allocated to him and to '[e]nsure the project delivery team are fully engaged within the project'.² I accept the evidence of Mr Knell and Mrs Bunday that that inevitably involved some coaching and mentoring of Project Managers, and that that involved feedback to those involved on projects about their performance. Thus the Claimant was involved in people management to some extent.

- 10 In the early part of 2017 the then Vice-President – Business Systems, Jon Pollard, decided he wished to make some changes to the management structure in Virgin Atlantic and Virgin Holidays.³ He took advice from outside consultants and had the assistance of Mr Knell.⁴ Those proposed changes were announced at a meeting on 24 April 2017. The essence of

¹ [63]

² [64]

³ Mr Pollard has left the Respondent and I did not have any evidence from him.

⁴ WS paragraph 9

the proposals as far as they affected the Claimant are neatly set out in the fifth slide of the PowerPoint deck.⁵

As stated earlier the aim of this phase of fit.nimble was to minimise changes at levels D and below. We have largely achieved this in Business Systems. However our proposal impacts the following roles:

- **Resource Managers** – The Resource Manager role will no longer be required.
- **Senior Project Managers** – We will be creating a fourth Senior Project Manager role and our SPMs will take on line management responsibilities for our Project Managers.

11 Mr Pollard stated at some stage during the presentation that he did not expect those responsibilities to exceed 10% of the time of the Senior Project Managers, although it was Mr Knell's view at the time that 15-20% was more realistic. As mentioned in the presentation, part of the plan was to recruit an additional Senior Project Manager.

12 The Claimant and some of his colleagues prepared a list of 30 questions in advance of the next planned meeting on 3 May. Also in advance of that meeting there had been discussions between the Senior Project Managers and the Resource Managers about the time they spent involved in managing the Senior Project Managers and Project Managers. The Claimant concluded that line management would take up 30-40% of his time. At the meeting on 3 May Mr Pollard said that he considered that to be too high a percentage. The Claimant was away on leave for a week and met Mr Pollard again on 15 May. No further progress was made.

13 On 16 May Mr Pollard issued a revised Role Profile for Senior Project Managers.⁶ The first and third paragraphs of the 'Overall Purpose' are as follows:

Working as part of Virgin Atlantic's Project Management professional practice, you will be responsible for the successful delivery of projects to time, cost and quality; using different methodologies (e.g. Waterfall and/or Iterative delivery). You'll be working collaboratively with key stakeholders, external suppliers and other departments to ensure that agreed deliverables meet the defined business benefits and are completed within the agreed constraints of cost, risk and time.

You will be a senior manager of the Project Management Practice . . . , and act as a leader to coach, mentor and develop others and lead by example in project professionalism.

14 The revised Role Profile is not merely a version of the original document with additions. It is a completely new document, but incorporated the previous responsibilities of the Claimant. Unlike the previous Role Profile there were no percentages of time attributed to each activity. A version had helpfully been prepared for this hearing in which the new functions to be undertaken by the Claimant were highlighted.⁷ The Claimant was to be 'responsible for the line management of ~6 Project Managers or Junior Project Managers'. It was stated that those individuals would be allocated on a day-to-day basis to individual projects to work 'under the guidance of an accountable owner'. The document continues:

⁵ [123]

⁶ [69]

⁷ [74]

Your primary line management responsibilities therefore relate to developing and engaging the resources, for example through objective setting, feedback and coaching, implementation of development plans (which may include formal or informal training, conferences, etc) and performance reviews.

You will also be responsible for recruiting new permanent Project Management expertise and where necessary contractors.

- 15 I add that of course the Respondent had its own HR function, and the extent of work potentially involved in recruitment was not explored to any material extent at this hearing.
- 16 Mrs Bunday summed up her view of the change in her witness statement, which I accept as accurate:⁸

I viewed the added responsibilities as being a formalisation of the existing responsibilities with the addition of administration around formal 1:1s, appraisals, leave requests and, as and when required, performance management and recruitment.
- 17 Mr Pollard attached the Role Profile to an email sent to the Claimant and his two colleagues on 16 May 2017.⁹ In that email Mr Pollard again referred to 10% of the time of each of the Senior Project Managers being spent on line management, and he invited them to consider whether some of the activities could be done by others, or not at all. He also provided some HTML links following requests having been made for training.
- 18 This comment about activities being undertaken by others or not at all echoes a theme mentioned from time-to-time in these proceedings of the Resource Managers having provided a 'gold-plated' service with the consequence that there could be proper line management of the Project Managers but without the use of so much resource.
- 19 I have mentioned above the list of questions prepared by the Claimant and his colleagues. There was a document in the bundle which it was agreed was issued in its final form on 22 May.¹⁰ It contains the questions, Mr Knell's original replies to the questions, further comments from the Senior Project Managers, and Mr Knell's final comments. Mr Knell stated that line management was to be required and that that 'should not typically require more than 10-20% of bandwidth per week.'
- 20 There are other points of some relevance in the document. The number of Project Managers and contractors to be managed by each Senior Project Manager was to be the subject of discussion and Mr Knell was to work with the Senior Project Managers to allocate resources. There was to be a discussion on the point on 22 May 2017. The role of the Senior Project Manager had been assessed through a Hay evaluation process as being of manager and leadership level. It was made clear in answers to question 14 that the Senior Project Managers would not be responsible for the performance of Project Managers on projects with which the Senior Project Manager is not himself involved. Appropriate management training was to be provided.

⁸ Paragraph 10

⁹ [161]

¹⁰ [170]

- 21 As the Claimant in particular was resisting the proposed changes Mr Pollard sought other positions in the Respondent for him without success. His email sent to others of 17 May 2017 refers to the Claimant as not being 'a fan of taking on a bit of line management responsibility'.¹¹
- 22 There was a further meeting on 22 May of the Claimant and his colleagues with Mr Pollard and Mr Knell. The notes of the meeting record that there was an impasse between the estimates made by Mr Pollard on the one hand and the Senior Project Managers on the other of the time to be required for management.¹² Mr Pollard remained of the view that the relevant proportion of working time was 10% whereas the Claimant and his colleagues considered that 30-40% was required. It was agreed that there would be a fortnightly review over a twelve week period.
- 23 The Claimant asked for a separate meeting and that took place on 23 May. The Claimant had Morgan Power, Staff Committee Representative, with him. Following that meeting the Claimant sent an email to Mr Knell on 25 May saying as follows:¹³
- For the avoidance of doubt and for the reasons stated in the meeting on 23rd May I do not agree or accept the proposed job role changes. That said I am as always happy and eager to continue discussions so that we can reach a mutually agreeable outcome.
- 24 The new structure came into effect during the week commencing 29 May 2017. The Claimant became responsible for line managing four employees of the Respondent and two contractors. On 6 June 2017 Carolyn Bunday became the Claimant's line manager. She also took on some of the responsibilities previously undertaken by the Resource Managers.¹⁴ Mrs Bunday also had responsibilities for managing others who are not relevant to these proceedings.
- 25 The Claimant kept what he referred to as a 'Daily Log' of his activities from 30 May to 22 September 2017 broken down into weeks.¹⁵ That showed that he had spent from 28.7% up to 44.4% of his time on what he described as 'new activities'. The number of hours recorded varied from 1.5 to 16.5. Thankfully there was no attempt to analyse the individual entries. However statistics can easily be misleading, particularly when the Claimant took various days off as leave. The Claimant accepted in cross-examination that the average time spent on line management in the period covered by the log was 9.5 hours, and that if divided by 42 hours (being the number of hours the Claimant said in his appeal mentioned below that he worked) then the percentage was 23%, and if divided by 37.5 hours (being the contractual weekly hours) then the percentage was 26%. However those percentages appear to ignore periods of leave.
- 26 The further point appropriate to mention at this juncture is that one Senior Project Manager had not yet undertaken line management responsibilities for personal reasons, and the fourth and new Senior Project Manager had

¹¹ [163]

¹² [186]

¹³ [208]

¹⁴ See the Q&A document question 18 at [171]

¹⁵ [80] – [85]

not been appointed. The number of people for whom the Claimant was to be responsible was therefore expected to be reduced.

- 27 The first of the agreed fortnightly meetings took place on 13 or 14 June.¹⁶ Mr Pollard and Mrs Bunday were both present. The Claimant and one colleague reported that they had each spent about 30% of their time on management, and another colleague reported he had spent about 20% of his time. The Claimant's colleagues had by then accepted the changes required by Mr Pollard, and had acknowledged the associated development opportunities provided to them. I accept Mrs Bunday's evidence that the Claimant's analysis of the data presented at that meeting as to time spent on different activities during the working day 'in granular detail' caused tension.
- 28 The next meeting was on 29 June 2017.¹⁷ The Claimant and his colleagues each reported that about 34% of their time had been taken up on management. Mr Pollard was clearly concerned about the large amount of time being spent, and urged the Senior Project Managers to become as efficient as possible.
- 29 The Claimant and Mrs Bunday met in a one-to-one session on 5 July. The Claimant expressed frustration at the situation and said that it was causing him to become stressed. Mrs Bunday offered to allow the Claimant to manage only contractors, which would have involved considerably less responsibility, but he refused that proposal. He did not want any line management responsibility.
- 30 There was then a further meeting on 17 July 2017 between Mrs Bunday and the Claimant.¹⁸ Mr Douel from HR and Mr Power were also present. This meeting is of considerable importance. The objective was stated to be 'to discuss next steps for Roberto with regard to changed SPM role'. Mrs Bunday accepted that Mr Pollard had been wrong in assessing the proportion of time to be spent on management as 10% of the overall working time, and she said that 20% was more realistic. However, she also considered that the Claimant was spending an excessive amount of time on management, and that he did not need to go to the lengths to which the previous Resource Managers had gone.
- 31 There was then a discussion which needs to be recorded in the light of the Claimant's claim as to him being redundant. The position of the Respondent was that the changes which had been made were not material or significant, and that they fell within the proper limits of the flexibility clause of the contract of employment set out above. When asked what percentage would be considered to be significant Mr Douel replied 'in the 30s'. On that basis the Claimant maintained in paragraph 27 of his witness statement that he should have been assessed as redundant.

¹⁶ There was some confusion over the date, but that is not relevant.

¹⁷ [264]

¹⁸ [272]

- 32 Following that meeting Mrs Bunday sent a further version of the second Role Profile and an email setting out percentages for activities as follows:¹⁹
- Project Delivery (70%)
 - Line Management (20%)
 - Mentoring / Coaching / Practice Dev (5%)
 - Ad hoc activities (incl training) (5%)
- 33 On 25 July 2017 the Claimant presented a detailed grievance.²⁰ It set out the history of the matter as summarised above, and it had links to a significant number of documents. There was a meeting on 4 August 2017 with Jules Gascoigne to consider the grievance.²¹ The outcome letter was dated 18 August 2018.²² It records that Mr Gascoigne had spoken to each of Mr Pollard, Mr Knell and Mrs Bunday. Mr Gascoigne stated that the Claimants concerns were that his role had changed by more than 30% and therefore he should have had the option to take redundancy, and the Claimant had concerns about the consultation process. Mr Gascoigne then sought to analyse the matters raised by the Claimant under eight different headings, but he did not specifically state whether he upheld, or did not uphold, each and every point made by the Claimant. What Mr Gascoigne did acknowledge was that more activity analysis by the Respondent should have been undertaken in advance of the changes, and that the consultation process could have been approached differently. Mr Gascoigne rejected the point concerning redundancy on the basis that the Claimants workload had increased.
- 34 The Claimant then appealed in an email of 22 August 2017 which was supplemented by a more detailed document.²³ The appeal was on two bases. The first was that his role was in fact redundant, and he referred to Mr Pollard having asked him to reduce the number of projects he managed from three to two to enable him to undertake people management responsibilities. Thus he said that his project related work had diminished or been removed. He added that he had been fully engaged on project work, but now having to spend 36% of his time on management meant that he would have had to work for 51 hours each week which was in contravention of the working time regulations. In coming to 51 hours the Claimant was simply adding the time he said he spent on people management to his normal working hours. The second point was that Mr Gascoigne had been wrong to find as a fact that the majority of the Claimant's colleagues had agreed the management time percentage as being 20%, and that it should have been 30-40%.
- 35 Mrs Bunday and the Claimant had a further meeting on 30 August 2017 just before Mrs Bunday went on leave. The Claimant told her that it was likely to be the last time they spoke as he did not expect to be with the Respondent when she returned.²⁴

¹⁹ [273]

²⁰ [275]

²¹ [495]

²² [306]

²³ [310] & [335]

²⁴ [395]

- 36 The appeal hearing took place on 12 September 2017 and it was heard by Emma MacDonald.²⁵ It appears from the notes of the meeting that the Claimant was stating that he had previously been working on average 42 hours per week on project management, and since May 2017 he had had to work on average 13.5 hours on people management, so that if his project management activities had not been reduced then he would have been working for 55 hours per week. In the final paragraph of the notes it is recorded that the Claimant said that even if Ms MacDonald were to remove the people management duties the Claimant would not be satisfied because the relationship had broken down. He said that he had been set up to fail. I find that Ms MacDonald offered to limit the management responsibilities to contract workers and exclude employees.²⁶ The Claimant accepted at this hearing that management responsibilities for contractors would be lighter than managing employees.
- 37 There is a paragraph headed 'Post meeting update' as follows:
- The decision I'm looking for from the appeal is whether – The actual change to the SPM job role is not reasonable and therefore the role is redundant and should have had the same options as those placed 'at risk' during the consultation process.
- 38 The outcome was sent to the Claimant in a letter dated 6 October 2017.²⁷ Ms MacDonald analysed the appeal as falling under two headings, being a breach of contract, and a denial of a right to redundancy. Ms MacDonald said that having considered the Claimant's evidence and as a result of her own investigations she accepted that the average time being spent on line management was 30%. That percentage was, however, stated to be 'a red herring when it comes to redundancy'.
- 39 Ms MacDonald did not, however, uphold the two points of the grievance. It appears that Ms MacDonald understood the Claimant to have been saying that he had in fact been working 55 hours each week, which is not how I read his appeal or the notes of the hearing, and it is clearly not what the Claimant intended. Ms MacDonald said that she 'had not found evidence to indicate [the Claimant] being required to work hours which breach the Working Time Regulations.' Further, she had been advised that the Claimant had not been redundant.
- 40 The Claimant went off sick on 2 October 2017 and did not return to work. The Claimant resigned on 11 October 2017 giving 12 weeks' notice.²⁸ He said that there had been an irretrievable breakdown in the working relationship. He said that there had been a diminution in his project work, and he had been spending 36% of his time on line management. That, he said, was not a reasonable change to have been imposed unilaterally. The Claimant pointed out that the Respondent through Mr Pollard had insisted that it would be only 10%, and then Mrs Bunday had acknowledged it was 20%, and finally Ms MacDonald had accepted a figure of 30%.

²⁵ [362]

²⁶ See [351]

²⁷ [406]

²⁸ [413]

- 41 The Claimant also pointed out that Ms MacDonald's understanding of his point about overall working hours was incorrect as discussed above. He said that no feasible options had been made available, and he referred to the offer of only having to manage contract workers was a 'gentlemen's agreement' which he had refused because the Respondent could have changed it at any time in the future without consultation.
- 42 The Claimant remained employed by the Respondent until 4 January 2018. During that period the Claimant continued to comply with the Respondent's procedures for notifying absences, submitted forms Med3 to the Respondent, and received contractual sick pay.
- 43 So much for the facts. Miss McCann provided written submissions to which she spoke, which I now summarise briefly. Miss McCann accepted that the Claimant, and his colleagues, had been required to undertake people management duties, but submitted that that did not significantly alter the job role. The Claimant's original role included or allowed for people management duties, and further the Respondent was entitled to vary the Claimant's duties. There had been adequate consultation and the Respondent had sought other roles for the Claimant. The Claimant had also been offered reduced management responsibilities by Ms MacDonald, but that was rejected.
- 44 Miss McCann referred to the following authorities in this connection which I list in chronological order:
- D A Coleman v. S and W Baldwin (t/a Baldwins)* [1977] IRLR 342 EAT
Wadham String Commercials Ltd & anor v. Bron [1983] IRLR 46
United Bank Ltd v. Akhtar [1989] IRLR 507 EAT
White v. Reflecting Roadstuds Ltd [1991] ICR 733 EAT
Land Securities Trillium Ltd v. Thornley [20056] IRLR 765 EAT
- 45 The principles drawn by Miss McCann from those cases are that any express flexibility clause requires that reasonable notice be given and that the change must not make the performance of the employee's job impossible or change the whole nature of the job, but there is no requirement to imply a general principle of reasonableness. I refer to those authorities again below.
- 46 Miss McCann submitted that as a matter of fact and law the Claimant was not redundant because the Respondent's requirements for employees to carry out project management work had not ceased or diminished, nor were they expected to do so.
- 47 Miss McCann submitted that even if there had been repudiatory conduct by the Respondent entitling the Claimant to resign he had affirmed the contract. She pointed out that on 25 May 2017 the Claimant had said that he refused to take on line management responsibilities.²⁹ However he then waited over four months before resigning. Having resigned he continued to supply forms Med3 to the Respondent, and to receive contractual sick pay.

²⁹ It appears that he made that statement on 23 May 2017 and repeated it on 25 May 2017.

48 Miss McCann referred to the recent decision of the High Court in *Brown, Bhoma & O'Reilly v. Neon Management Services Ltd* [2018] EWHC 2137 per Choudhury J. That was a somewhat unusual case. I will refer only to Mr Brown and Ms Bhoma. In essence the claimants resigned on notice on 16 March 2018, the notice periods being 12 months and six months respectively. Following further incidents they resigned with immediate effect on 1 May 2018. It was the position of the defendant that the claimants had elected to affirm the contracts by giving notice. Choudhury J cited para 55 from the judgment of the Court of Appeal in *Kaur v. Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978 which I consider clearly summarises the law of constructive unfair dismissal:

55 I am concerned that the foregoing paragraphs may make the law in this area seem complicated and full of traps for the unwary. I do not believe that that is so. In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

- (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
- (2) Has he or she affirmed the contract since that act?
- (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
- (4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)
- (5) Did the employee resign in response (or partly in response) to that breach?

49 Choudhury J then said the following:

141. In my judgment, it is clear that by resigning on notice on 16 March, Mr Brown and Ms Bhoma affirmed their contracts of employment. It is well-established that in the face of a repudiatory breach of contract the employee must not leave it too long before resigning otherwise he will be taken to have affirmed: see *Western Excavating v Sharp* [1978] QB 761 (CA) at 769C-D, per Lord Denning MR. In the present case, whilst Mr Brown and Ms Bhoma did reserve all their rights, they clearly indicated that they would be working out the entirety of their notice periods, which, in Mr Brown's case, involved a further year of employment. It would be unconscionable to keep one's right to discharge a repudiated contract alive for that length of time in the absence of any further breaches of contract. Of course, if there are further breaches of contract then, as per the judgment of the Court of Appeal in *Kaur*, such breaches would not "land in an empty scale" and may be taken into account with the pre-16 March 2018 breaches. Whether or not there were further breaches post-16 March 2018 and whether they add "something" to the earlier breaches is considered below.

50 In that case there were further breaches which entitled the claimants to resign without notice on 1 May 2018. I mentioned to the parties the decision of Simler J in the Employment Appeal Tribunal in *Cockram v. Air Products plc* [2014] IRLR 672 where I had held at first instance that Mr Cockram had affirmed the contract when he had given seven months' notice in circumstances where the contractual period was three months. Simler J said the following at paragraph 25:

The question whether a party has affirmed the contract is fact sensitive and context dependent. It does not generally lend itself to bright line or rigid rules. As Jacob LJ said in *Buckland* 'the law looks carefully at the facts before deciding whether there has really been an affirmation' [54]. Similarly the statutory protection provided by the unfair dismissal scheme is also fact dependent. Within that legal framework there is no basis for inferring

that s.95(1)(c) provides an inflexible rule that post-resignation affirmation as a concept (however rare as a matter of fact) is excluded from consideration. Where an employee resigns on notice and despite doing so, his conduct is inconsistent with saying that he has not affirmed the contract, that conduct must be capable of consideration by a fact-finding tribunal. Where he gives notice in excess of the notice required by his contract, he is offering additional performance of the contract to that which is required by it. That additional performance may be consistent only with affirmation of the contract. It is a question of fact and degree whether in such circumstances his conduct is properly to be regarded as affirmation of the contract.

- 51 The Claimant replied to Miss McCann. He referred to the original statement that only 10% of his time would be needed for people management, and that his analyses showed that it had in fact been in the region of 35%. He further said that originally it was proposed that he would be responsible for two or three Project Managers, but that had increased to four or five, without any increase in the estimate of 10% of time. The Claimant also submitted that such consultation as there had been was insufficient in circumstances where there was such a significant change. Further, said the Claimant, he had a reasonable belief that he was redundant because of Mr Knell referring to 'in the 30s' in connection with a significant change of role.
- 52 The Claimant referred to the offer made by Mrs Bunday that he would be responsible for managing only contractors. He repeated that the arrangement could have been withdrawn at any time, and pointed out that the offer was not repeated at any time during the grievance process.
- 53 The reason, said the Claimant, that he resigned by giving his contractual notice (as opposed to immediately) was that that was what was required and he did not want to leave himself open to a claim of breach of contract.
- 54 I now turn to my conclusions. It is necessary to start with the details of the claim and the reason for the Claimant's resignation. In his claim form he referred to the different percentages mentioned above and said that the percentage of time involved in line management was 36% and that was 'not a reasonable change to unilaterally make to my contract of employment. This is a fundamental and repudiatory breach of contract.'
- 55 It is not possible for me to come to any detailed or specific conclusions as to the overall amount of time which the Claimant would have been required to spend on line management. Inevitably that amount would vary. For example there would inevitably be an increased workload when appraisals had to be undertaken or where there were disciplinary or absence problems with one or more of those reporting to the Claimant.
- 56 Mrs Bunday acknowledged on 17 July 2017 that Mr Pollard's original figure of 10% was too low, and she accepted a figure of 20%. Ms MacDonald acknowledged that in fact the average time was about 30%. My view is that the Claimant was probably taking longer undertaking his line management function than would have become necessary as he became more experienced, and the same applies to his colleagues. Further, the amount of time would have reduced when responsibilities were allocated to the other two Senior Project Managers as mentioned above. The best I can do

based on the evidence is to assume that the amount of time involved would be 20-30% in the long run.

- 57 I note the point made by Miss McCann in her submissions that the two Resource Managers whose functions were being replaced by the Senior Project Managers could not possibly have spent as much time on line management for each person they managed. To me the fundamental point is that the Respondent was requiring the Claimant to undertake a function which had not previously been his responsibility, and that that function involved a material amount of the Claimant's time.
- 58 Miss McCann submitted that the expansion of the SPM role to include direct people management activities was not a substantial change to the nature of the role such as to require the Claimant to carry out a fundamentally different job, and that the change was permitted by the contract.³⁰
- 59 I have set out clause 2.2 of the Claimant's contract of employment above. It is in two parts. The first refers to reviewing the role as set out in the role profile. The second refers to undertaking work outside of that role where that additional work is reasonably assigned to the Claimant. It is the second part which is relevant.
- 60 I now return to the authorities mentioned by Miss McCann. In *Akhtar* a junior bank employee working in Leeds was told on 2 June that he was required to start work in Birmingham on 8 June, the following Monday without any financial assistance being provided. There was a clear unqualified express mobility clause in the contract. The Employment Tribunal implied two provisions into the contract, the one being that reasonable notice of the exercise of the discretion had to be given, and the other was that the discretion to require the employee to move had to be exercised in such a way as not to render performance of the contract impossible.³¹ The Employment Appeal Tribunal upheld the decision of the Employment Tribunal. In paragraph 44 Knox J said that it was not impermissible to imply a term controlling the exercise of a discretion conferred by the contract. He referred to the possibility of such discretion being 'exercised in a capricious way.' At paragraphs 47 and 48 Knox J said the following:

47 We see no conflict between that conclusion and the well-established principles to which Mr Lynch drew our attention that terms can only be implied in contract at common law in clearly defined circumstances and according to well-established rules. The first to which we were referred was that no term can be implied which is contrary to or inconsistent with an express term and, upon this aspect of the matter, we have already expressed our view. There is no conflict between a limit on the way in which a discretion can be exercised, on the one hand, and the existence of the discretion on the other.

48 Secondly, we accept that it is now well-established that implications of a term in a contract, which the parties have reduced to writing, can only be made first to give business efficacy to their contracts; secondly, where the implication is to give effect to an obvious combined intention of

³⁰ Submissions paragraphs 31.4 and 31.5

³¹ The Tribunal also made reference to the 'standard' implied term relating to trust and confidence.

the parties; and, thirdly, where it is a necessary addition to the expression of the particular relationship between the parties and an implication which completes their contractual arrangements. Reference was made to *Chitty on Contracts*, paragraph 847, which sums up this branch of the law by saying:

'The touchstone is always necessity and not merely reasonableness'.

- 61 *Akhtar* was referred to in *White* where Wood J specifically stated that the *Akhtar* case was not authority for the general proposition that there was an implied term that the employer should act reasonably. *White* was another case where there was no restriction on the right of the employer, in that case to transfer the employee to alternative work. I do not find that either of those authorities assists because in this case there is a specific restriction on the exercise of the discretion to require the Claimant to undertake work outside of his normal role profile as clause 2.2 refers to such additional work being 'reasonably assigned'.
- 62 Miss McCann referred me to the old authority of *Coleman*. I do not find that to be of any particular assistance either. It was a constructive unfair dismissal case heard before even *Western Excavating Ltd v. Sharpe*. Certainly the *Malik* implied term had not been articulated. Mr Coleman had had all his major duties removed and was left with duties of 'a very humdrum character.' Unsurprisingly the EAT concluded that there had been a constructive dismissal. There was no relevant express contractual provision. The case of *Wadham Stringer* is similar to *Coleman*.
- 63 In *Land Securities* Cox J in the EAT delivered a lengthy judgment concerning the exercise of an express clause allowing the employer to vary the duties of the employee, which power was qualified by the word 'reasonably'. It was another case of a reduction in duties, rather than an increase of them. The employee was an architect. More than 50% of her duties were removed having the effect of deskilling her. The EAT said the following in paragraph 55:³²

55 (c) For convenience we repeat that clause 1 provided as follows:

'You will perform to the best of your ability all the duties of this post and any other post you may subsequently hold and any other duties which may reasonably be required of you and will at all times obey all reasonable instructions given to you.'

In our judgment this clause in the applicant's contract of employment, correctly construed, does not grant to the appellants the wide discretion for which Mr Linden contends. It is substantially different from the clause which was considered by the court in *Nelson v BBC*. Read as a whole the tribunal were entitled, in our judgment and for the following reasons, to conclude that the extent and nature of the changes to the applicant's duties imposed by the appellants did not fall within the scope of the discretion afforded. Firstly, we consider that the words 'and any other post you may subsequently hold' indicate a different post which the parties to the contract may agree that the applicant will hold, as a result of a consensual variation to the contract, and not a post which the appellants require her to hold against her will. Secondly, the requirement that she perform to the best of her ability 'any other duties which may reasonably be required of you' does not afford the appellants carte blanche to require the applicant to undertake any duties they wished her to, but expressly imposes a requirement of reasonableness on the employers' request. Once it is found that the duties required by the appellants were unreasonably required of her, as the tribunal found to be the case, the fact that there may have been valid, commercial grounds,

³² My emphasis

as opposed to a wholly arbitrary basis, for the appellants requiring her to undertake them, cannot in a contract of employment cure the unreasonableness of the requirement in so far as the employee is concerned. Employers will often be able to demonstrate that they have valid grounds, commercially, for example, for redeploying an employee to a wholly different department or location in circumstances which, for the individual employee, would be a wholly unreasonable requirement. Once such a requirement is found to be unreasonable for that individual employee, a reasonable basis for making the request cannot mean that it is 'reasonably required' of that employee.

- 64 The ET had found that in her new role the claimant 'was left with only a residue of narrow and sometimes vague duties.' The employer had therefore gone beyond the bounds of reasonableness.
- 65 After considering those authorities I conclude that in the end the question for the Tribunal is to decide is simply whether the requirement to undertake the line management duties in question was a reasonable one within clause 2.2 of the contract of employment. The issue of reasonableness is to be seen from the employee's point of view, but on an objective basis. The Claimant clearly considered that the requirement was unreasonable, but that is not determinative of the issue.
- 66 This is not a case where an individual is being effectively required to do is to cease to carry out his principal activities as was the position in *Coleman, Wadham Stringer* and *Land Securities*. The principal function of the Claimant clearly remained that of project management. He was also being required to undertake additional functions of some line management of Project Managers. That did not involve what might be described as 'full' line management on a day-to-day basis because Project Managers would necessarily be assigned to projects. I accept of course that the line management functions were different from pure project management functions, but the management of Project Managers cannot be considered to be a menial task or one which deskilled the Claimant as was the case in the three cases just mentioned. By far the majority of the Claimant's time would continue to be spent on his principal role of managing projects. On the Claimant's own figures he would be spending twice as much time on project management as on line management.
- 67 In my judgment the requirement to undertake those additional line management functions which were required of the Claimant was not an unreasonable exercise by the Respondent of the power in clause 2.2. I do not find that the Respondent was in fundamental breach of contract entitling the Claimant to resign without notice.
- 68 The role of the Claimant had been assessed as being of managerial and leadership level. Indeed, the Claimant was already involved in the supervision and day-to-day management of the work being undertaken by individuals on projects which he managed. As is evident from his title, the Claimant was a senior employee earning a significant salary.³³ In my judgment the more senior an employee then the more flexible he should be about varying responsibilities being required of him. A training needs

³³ The amount is of course known to the parties, and there is no need to record it in this document.

analysis was to be undertaken. It is not therefore a case of a junior individual without any managerial experience being required to undertake a role wholly outside of his experience.

- 69 I have noted the Claimant's contention that he was in effect being made redundant. The Claimant is under a misapprehension on this point. Section 139(1) of the Employment Rights Act 1996 is as follows:

139 Redundancy

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

- (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.

- 70 The relevant wording is underlined. The work of a particular kind was the management of projects. There was no reduction in the number of employees required by the business to undertake that work. The role of Resource Manager had become redundant due to a management decision, but that is not relevant to the position of the Senior Project Managers as far as redundancy is concerned.
- 71 There is one final point which ought to be covered and that concerns waiver of any breach by the giving of notice. If it had been relevant I would not have found that the Claimant had waived the breach by the Respondent by continuing to receive sick pay during his period of notice. It is clearly anticipated by section 95(1)(c) of the 1996 Act that an employee can resign on notice and still maintain that he has been constructively dismissed. There is no specific authority as to the length of notice during which the employment continues which will constitute a waiver. In my judgment a three month notice period is a sufficiently normal period for it not to constitute waiver by itself, and I entirely accept the Claimant's explanation that that was the contractual notice he was required to give.

Employment Judge Baron

Dated 25 October 2018

