



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr N Fitzgerald

**Respondent:** Credit Karma UK Limited

**Heard at:** Leeds (by CVP)

**On:** 23 June 2021

**Before:** Employment Judge Anderson

## Representation

Claimant: In person

Respondent: Mr N Caiden (counsel)

# RESERVED JUDGMENT

The complaint of unfair dismissal is not well-founded and is dismissed.

# REASONS

## Technology

1. This hearing was conducted by CVP (V - video). The parties did not object. A face to face hearing was not held because it was not practicable and all the issues could be dealt with by CVP.

## Introduction

2. This was a claim of unfair dismissal brought by the Claimant, Mr Fitzgerald, against his former employer, Credit Karma UK Limited. The Claimant appeared in person. The Respondent was represented by Mr Caiden, counsel.

## Evidence

3. There was an agreed bundle of documents running to 324 pages, and a witness statement from each of the three witnesses giving oral evidence. I also received a skeleton argument from the Respondent.
4. I heard evidence from the Claimant. For the Respondent, I heard from Mr D Maunder (Vice President of International Engineering, which he described as being the Chief Technology Officer (CTO) for the Company's UK and Canadian businesses) and from Mr El Baba (General Manager: UK & Canada).

## The Claims and Issues

5. The Claimant brings a complaint of unfair dismissal in the context of redundancy. There was no dispute that the reason for dismissal was redundancy.
6. In determining such a claim, the Tribunal must consider whether the Respondent acted reasonably in all the circumstances, in treating redundancy as a sufficient reason to dismiss the Claimant and will usually consider, in particular:
  - i. Did the Respondent adequately warn and consult with the Claimant?
  - ii. Did the Respondent adopt a reasonable selection decision, including its approach to the selection pool?
  - iii. Did the Respondent take reasonable steps to find the Claimant suitable alternative employment?
  - iv. Was dismissal within the range of reasonable responses?
7. At the outset of the hearing, I discussed the issues with the parties. It was not disputed that there was a redundancy situation, and no real issue was taken with the consultation in general or the selection pool, though the Claimant referred to the lack of written redundancy procedure. The Claimant's complaint essentially relates to the processes followed by the Respondent and, in particular, what he says was a failure to offer him suitable alternative employment.
8. The Claimant particularised his claim under three headings of complaint, which he expanded upon within his claim form and subsequent witness statement and which are summarised below:
  - i. The Respondent failed to share all alternative roles within the organisation with those at risk of redundancy in September 2020; the Claimant's case is that there was an available role, but it was ear-marked for another employee (who was not at risk of redundancy) and so was not shared/made available.
  - ii. The interview process the Claimant went through for an alternative position was unfair.
  - iii. A second event of failing to share alternative roles with employees at risk of redundancy; specifically, a vacancy arose in another office for an

Engineering Manager (the Claimant's own job title) after the conclusion of the consultation period, but prior to his effective date of termination. The Respondent says he was not formally notified of or offered this.

9. The Claimant says that the Respondent was financially motivated not to share the roles and not to appoint him to the job for which he applied, as he commanded a very generous salary and stocks package.

## **Preliminary Matters**

10. The Claimant had written to the Tribunal on 17 May 2021 seeking the Respondent's response be struck out. He said that the Respondent had not provided all relevant information, was withholding information, and had not complied with the Tribunal's orders (by not providing the information).
11. The Respondent replied to that application on 19 May 2021, stating that the Claimant had no evidence for his allegations, which were denied.
12. The Tribunal directed, in correspondence dated 4 June 2021, that the matter be considered at the start of this hearing. The Claimant confirmed that he pursued his application. I refused that application.
13. Striking out is a significant step and must be a proportionate response in all the circumstances. In this case, the Claimant was asserting that there 'must' be more documentation, and there were 'gaps' in the evidence, but had no evidence that specific documents existed. I considered the duties and obligations on the parties and on the Respondent's legal representatives. Counsel for the Respondent submitted that disclosure was required of everything that was relevant, not of every piece of information held, that 'bathroom chat' was irrelevant, and that the matters being raised were of evidence, not of disclosure.
14. The Claimant suspected there was further documentation about the alleged ear-marking of a job for a specific individual. I was satisfied that this was a matter about which I would hear oral evidence from both sides. I noted that the specific individual was not currently in the role the Claimant alleged had been ear-marked for him.
15. There was no direct evidence that documents were being withheld, or that specific documents existed. I was satisfied the Respondent was aware of its duties to the Tribunal. I was not satisfied that there were sufficient grounds to conclude that it had failed to comply with them, nor would striking out the response have been a proportionate act in all the circumstances in any event.

## **The Facts**

16. The Tribunal made the following findings of fact:
17. The Claimant commenced employment with the Respondent, under a previous

trading name, on 1 August 2018. Prior to this, he had been employed by its parent company from 21 May 2018. He 'TUPE'd' between the companies (i.e. he transferred under the Transfer of Undertakings (Protection of Employment) Regulations 2006, known as TUPE.)

18. During July 2018, the Claimant was issued with a new contract for employment with the Respondent (under its previous name), which contained the same terms and conditions as his previous contract. The Claimant signed this contract on 2 August 2018.
19. The name of the Claimant's employer became Credit Karma UK Ltd. in April 2019. On 19 June 2019, amendments were agreed to the terms of the Claimant's contract of employment and the Claimant signed the contract on this date. The Claimant's terms of employment included an entitlement to a company bonus, a 24% increase in salary and the grant of a number of restricted stock units (RSUs) in the parent company, subject to specific conditions.
20. At this time, the Claimant's job title changed from 'Manager-Product Development', to 'Manager, Engineering'.
21. In February 2020, Credit Karma's parent company announced it had agreed to be purchased by another company; the purchase was to be paid through a combination of shares and cash. This would provide a substantial return to the Claimant on the basis of his RSU grant.
22. On 30 April 2020, the Respondent's parent company announced pay cuts due to a dramatic drop in revenue as a result of the Covid-19 pandemic. The Claimant met with the Respondent's Human Resources Business Partner (Ms Dalla Riva) as part of the consultation on accepting the pay cut. The pay cut was to be actioned by way of the issuing of new contracts of employment.
23. The Claimant's 'Employment Agreement' was re-issued again, to incorporate the pay cut. The document is dated 1 June 2020. It was signed by the Claimant and by the Respondent on 28 May 2020. The Claimant's job title on that document is 'Manager, Engineering'.
24. Also in April 2020, the Claimant says he was informed by his line manager (Mr Stephenson) that the Respondent's parent company had dismissed all its contract engineers in America who were assisting the UK teams; as a result, there were high priority software 'bugs' that required fixing. There were few people who could do this work. The Claimant says Mr Stephenson asked him to pick up that work until they were in a position to backfill the engineering resourcing, and Mr Stephenson would pick up some of the Claimant's line management work. The Claimant considered this made sense, as Mr Stephenson did not have an engineering background.
25. The Respondent says that the Claimant's management responsibilities were removed for two reasons: firstly, the team had two managers, who had both had seven individuals reporting to them, but following a restructure, the team

had only six engineers, and so two managers were unnecessary, particularly when individuals were needed to 'write code'. Secondly, the Respondent says that whilst the Claimant was very good technically, there were concerns about his ability to manage others.

26. The Respondent's evidence was that it considered the Claimant to be performing more at a 'senior software engineer' (Sr. SWE) level. Mr Maunder set out that although the Claimant had the job title of 'Engineering Manager', he did not have the management responsibilities. In addition, he did not 'own', nor was he primarily responsible for, individual 'domains', which would be expected of an engineering manager. This is supported by the contents of a 'talent planning' document dated April 2020, which records in relation to the Claimant that *On a People Manager side there's also question marks but we haven't been able to explore this in depth, there's an overlap between him and (Mr Stephenson). He'll be doing a Sr. SWE role.* The July 2020 version of that document refers to the Claimant having moved to an individual contributor role recently.
27. The Claimant disputed there were any concerns about his management abilities. He said that no concerns had ever been raised with him and he pointed to positive peer feedback he had received, which included references to him being a good manager.
28. In cross-examination, Mr Maunder said he could not recall if he told the Claimant he thought of him as a Sr. SWE. Mr Maunder could not comment as to whether Mr Stephenson had raised this with the Claimant. Mr El Baba told the Tribunal that he considered the Claimant to be 'addressing bugs', which was 'very much a Dr. SWE role. Mr El Baba considered the Claimant to be an 'individual contributor' (i.e. rather than a manager).
29. Having considered the evidence, I find that the Claimant's management responsibilities were removed for the reasons set out by the Respondent and that he was considered to be as a Sr SWE by key personnel within the company. I make such a finding based upon the clear oral evidence of Mr Maunder, which was supported by Mr El Baba, and the documentary evidence from April and July 2020. However, I find that the Claimant was not informed of this. I note in particular that the renewed contract retained the same job title, that there is no documentary evidence of any discussion with the Claimant, and Mr Maunder's inability to recall any situation or conversation in which this was raised with the Claimant. I also considered the Claimant's slight surprise that he was regarded as highly as described by the Respondent in relation to technical matters to be genuine.
30. On 9 September 2020, those working at the Respondent's Leeds office were informed that it was to close, and that all employees faced redundancy. More than 25 individuals were deemed at risk and the Respondent treated this as a large-scale redundancy.
31. There was no written redundancy policy in place.

32. The Claimant was elected as the employee representative for the engineering department, within which nine roles were at risk.
33. An email from Ms Dalla Riva to the employee representatives on 14 September 2020 confirmed that a limited number of vacancies were anticipated within the London office and 'full details of any available vacancies on an ongoing basis' would be provided throughout the consultation period.
34. Collective consultation redundancy meetings took place on 16, 18 and 23 September 2020. The Claimant had individual consultation meetings on 28 September 2020 and 27 October 2020.
35. The Claimant's evidence was that during the consultation process, he had discussed with his wife the best options for their family, and concluded that the combination of salary and RSU income was 'a once in a lifetime opportunity'. The Claimant agreed with his wife that if a suitable role became available in the London office, he would take such a role. I have no reason to doubt such conversations took place or conclusions reached. Emails between the Claimant and Ms Dalla Riva, and notes of the individual consultation meeting on 28 September 2020, also document the Claimant's interest in a role in London and his intention to commute.
36. At the collective consultation meeting on 23 September 2020, alternative roles within the Respondent's London office were shared with the employee representatives. The roles available in engineering were: two senior software engineers, two software engineers and one senior manager.
37. The Claimant believes that an individual named Mr Perga was 'ear-marked' for an engineering manager position and consequently this was not made available during the consultation period. At the time of the Tribunal hearing, I heard that Mr Perga remained a Staff Software Engineer, though had recently been put forward for promotion to Engineering Manager.
38. The Claimant says that Mr Maunder, Ms Dalla Riva and Mr White (Director, Engineering) met on 14th October 2020 to discuss moving Mr Perga, an existing London based software engineer into an Engineering Manager role. There is a screenshot in the bundle of a meeting called '(Mr Perga) Eng Manager Transition Finalization'. There is a further screenshot of a meeting on 16 October 2020 called 'Eng Manager Transition Kickoff'.
39. The Claimant says this is evidence of a role being offered to Mr Perga and commented on conversations were taking place with Mr Perga about a manager position when his was being made redundant. In cross-examination, it was put to the Claimant that his case on this point was based entirely on inferences. The Claimant accepted he was not privy to the content of those discussions and he couldn't contradict the evidence on the Respondent in this point.
40. Mr Maunder's evidence was that Mr Perga had always expressed an interest in becoming a manager and it was agreed amongst himself, Ms Dalla Riva and

Mr White that it was appropriate for Mr Perga to be put on the 'management track', which is a training-type programme. The programme involves, amongst other things, six months of the individual demonstrating they can operate at the desired level. I asked Mr Maunder directly what happens at the end of this programme – is a role created for the individual, are they offered the next vacancy that becomes available etc. Mr Maunder stated that if successful, a role is created for the individual.

41. Mr Maunder's evidence was supported by the Respondent's 'promotions guidance' document, which was in the hearing bundle. This identifies questions to ascertain whether an individual has 'demonstrated capability at the next level', and includes *in what ways has this person exceeded present-role and met next-role expectations across our competencies over the past 6 months?*
42. Mr Maunder's evidence was that there was no available role for an engineering manager during the collective consultation period.
43. A screenshot of Mr Perga's profile from 22 April describes him as a 'Staff Software Engineer'.
44. I accepted Mr Maunder's evidence about the process, as well as the evidence that Mr Perga is not currently and has not to date been employed as an engineering manager.
45. The Claimant considered that from the list of available vacancies provided on 23 September 2020, the closest match to his own role was that of senior manager, engineering. This was the role performed by his line manager. The Claimant said he considered the roles to be similar. The Claimant emailed Ms Dalla Riva on 23 September 2020 expressing an interest in this role.
46. The Claimant's evidence is that there was some uncertainty as to how to manage the logistics of a re-location between the offices. Ultimately, the Respondent adopted a procedure akin to where there is an external applicant, and the Claimant was asked to upload his CV via the careers website for the role of senior manager in London.
47. On 12, 13 and 16 October 2020, the Claimant was interviewed for the role (Senior Engineering Manager). Two individuals who interviewed the Claimant in respect of his technical competency 'graded' the Claimant as a 'hire'. Mr White and Mr Maunder interviewed and assessed the Claimant in relation to people management and process, as well as planning, process and delivery. Mr Maunder did not recommend the Claimant be hired based upon his answers in interview and relied on the differences in the roles, the role the Claimant was in fact performing at that time, and a lack of proven ability to take on the management responsibilities of a Senior Engineering Manager. Mr White also considered the Claimant should be a 'no hire'.
48. The individual ultimately employed in the role of Senior Engineering Manager had held various management positions over the previous decade, including that of CTO, which Mr Maunder says exemplifies the level of experience

required for the role.

49. On 22 October 2020, the Claimant was informed that he had not been successful in his application for Senior Engineering Manager.
50. The Claimant complains that the interview process was flawed. He notes that two of the interviewers graded him as a 'hire', whereas Mr Maunder and Mr White did not. The Claimant takes issue with the lack of documented feedback from the interview process from Mr Maunder and Mr White. The Tribunal heard that due to the international character of the company, it is not always possible for all involved to attend round table meetings (e.g. due to time differences) and so some managers choose to write detailed notes within a shared programme. This might especially be the case where a manager is conducting a number of interviews. Mr El Baba confirmed that it is at the discretion of the individual as to how they record any feedback, or if they choose to discuss it at an attended meeting. Mr Maunder said that he did not record his feedback 'centrally', preferring to discuss this within the meeting forum.
51. There is evidence that a round table meeting took place on 19 October 2020 to discuss the application and that the four interviewers (as well as others) were invited. The screenshot indicates that one of the interviewers was unable to attend the meeting. This supports the explanation of Mr El Baba around how and why feedback might be recorded differently by different individuals.
52. Mr Maunder's evidence was that there were three levels of engineering manager within the company as at October 2020: Engineering Manager, Engineering Manager II and Senior Engineering Manager.
53. Mr Maunder set out that engineering managers normally manage one team and Senior Engineering Managers are expected to be responsible for 10-12 people across two teams. He noted that the Claimant was applying for the highest role, without the stepping/intervening step of engineering Manager II. None of this was challenged. The Claimant accepted during cross-examination that the senior post was two levels above his job title, though he disagreed that it would be surprising for someone to 'jump' two levels.
54. Mr Maunder also gave evidence that, in any event, the Claimant was in fact performing at a Sr SWE level. I have already referred to this above.
55. On 23 October 2020, the Claimant was sent his notice of redundancy dismissal with a termination dated of 31 December 2020. The Claimant says he read this on 27 October 2020.
56. On 13 November 2020, a role was advertised, both internally and externally, for a 'Manager, Engineering', in the London office.
57. The Respondent says this role arose following the unexpected departure of an employee in the San Francisco office and a subsequent decision to downgrade and move the role to London. I have seen various documents that support that explanation and I accept it.



58. Mr El Baba accepted he had not reached out directly to the Claimant when this role became available. Mr El Baba commented that the consultation had ended and that the Claimant had been unsuccessful in securing the Senior Engineering Manager role. He repeated that the Claimant was not performing the role of an engineering manager, but was acting as an individual contributor and therefore would not be eligible to directly 'map' into the new vacancy in any event.
59. Mr El Baba gave evidence about the 'mapping' process. He said that if a person with a specific role and job title, who is doing that job, was willing to move to London, they could be mapped into the same role/job title in the capital. He explained that where an individual was not an exact 'map', the individual had to go through an application process, rather than be directly 'mapped'. Mr El Baba said this was comparable to the Claimant's situation, because the Claimant was doing a different role to his actual job title. Mr El Baba confirmed that the job title was insufficient of itself to directly map; an individual had to be actually performing the role. Mr El Baba commented on the 'unfortunate disconnect' between the Claimant's job title and role and said that the Claimant would have had to go through the application process for the post of engineering manager because he was not, in fact, performing that role.
60. When questioned by the Claimant, Mr El Baba confirmed there had been a Sr. SWE role in London during the consultation period and that if he had expressed an interest, he suggested the Claimant would have been mapped into it. Mr El Baba said that the Claimant would have needed to express an interest in both the role and location. Mr El Baba confirmed that Mr Maunder would be responsible for mapping that particular role.
61. Mr El Baba stated that it was not his role to say the Claimant 'should be doing this or that role'; it was up to the individual.
62. The Claimant did not apply for any other roles identified in September 2020. In cross-examination, the Claimant said that he had not limited himself to one role and did not say he was not interested in the others. However, he only applied for one role – the engineering manager role. He accepted he could have expressed an interest in all the roles, but considered this would 'not be helpful'.
63. The Claimant was aware of the salaries attached to the roles, and was able to tell the Tribunal that the Sr. SWE role would have carried a higher salary.
64. The Claimant was aware of the engineering manager vacancy during the time it was advertised in November/December 2020 and confirmed this in his evidence.
65. The Claimant did not apply for the vacancy of Engineering Manager. He said that he had obtained two alternative offers of employment by this time. He rejected the suggestion he could have pursued the vacancy with the Respondent and explore delaying a start date with his prospective employer.

66. The Claimant further said that by this time, he had become aware that the relationship had broken down between him and the Respondent. He said that following a subject access request around this time, he had become aware that the Respondent considered him to be performing at a different level from his job title and he feared losing his offers of employment elsewhere if he pursued the vacancy of Engineering Manager.
67. For the avoidance of doubt, I find that the Claimant made a conscious decision not to apply for the role, which was based upon his appreciation that the Respondent viewed him as performing a different role from that advertised, and his desire to secure the employment that had already been offered to him.
68. On pressing, the Claimant said that he felt the Respondent didn't want him when he was unsuccessful for the Senior Engineering Manager post. When asked how his rejection for this role demonstrated the entire relationship with the company had broken down, he pointed to correspondence between himself and Ms Dalla Riva in relation to a settlement agreement. The Claimant takes issue with the Respondent's request that he communicate through legal advisers over the settlement. All employees were invited (and granted a financial sum to pay for) legal advice in relations to the settlement agreements. I have reviewed the email exchanges between the Claimant and Ms Dalla Riva and objectively, I find no evidence that would lead me to conclude the relationship had broken down. Ms Dalla Riva requested the Claimant to ask his advisors to raise all queries/corrections together and responded to the Claimant's messages in a courteous manner.
69. The Claimant's case is that this entire matter turns on the issue of stock and that his salary and stock package was so generous that the Respondent was happy for him to leave. During Mr El Baba's evidence, he said that salaries are fixed, and are determined based on comprehensive equity philosophy. He further said that he did not know whether the post of Engineering Manager or Sr. SWE paid more.
70. The Claimant said that his stock arrangement was negotiated specifically for him. The Respondent said, through counsel, that both salaries and stock were 'fixed'.
71. The issue of stock was raised during the collective consultation process, when the Respondent was asked if it would accelerate vesting on 'everyone's' stock, so that everything unvested would become vested on exit.
72. On balance, and in the absence of additional evidence, I think it more likely that the Respondent would have accurate knowledge of whether stock arrangements were fixed for its employees and therefore accept its evidence on the point.

## **Legal Principles**

73. Unfair dismissal is dealt with in the Employment Rights Act 1996 as follows:

74. Section 94(1) provides that an employee has the right not to be unfairly dismissed by his employer.

75. Section 98 sets out 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 reason (or, if more than one, the principal reason) for the dismissal, and
- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

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

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

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
- (b) shall be determined in accordance with equity and the substantial merits of the case.

76. Section 139 deals specifically with 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.

38. A tribunal is entitled only to ask whether the decision by an employer to make redundancies was genuine, not whether it was wise.

39. In Williams and ors v Compair Maxam Ltd 1982 ICR 156, EAT, the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. These were:

- whether the selection criteria were objectively chosen and fairly applied
- whether employees were warned and consulted about the redundancy
- whether, if there was a union, the union's view was sought, and

- whether any alternative work was available.
40. The EAT stressed, however, that in determining the question of reasonableness it was not for the employment tribunal to impose its standards and decide whether the employer should have behaved differently. Instead it had to ask whether ‘the dismissal lay within the range of conduct which a reasonable employer could have adopted’. In addition, the guidelines are not principles of law but standards of behaviour that can inform the reasonableness test under S.98(4).
41. Whereas an employer defending a claim of unfair dismissal bears the burden of proving the reason for dismissal under S.98(1), when it comes to the question of reasonableness under S.98(4) there is no burden of proof on either party and the issue of whether the dismissal was reasonable is a neutral one for the tribunal to decide.
42. In relation to the issue of alternative employment, the reasonableness test under s98(4) requires a tribunal to consider whether the employer’s actions lay within the range of responses of a reasonable employer.
43. A number of cases provide guidance as to the question of alternative employment:
44. In Akzo Coatings plc v Thompson and ors EAT 1117/94, the EAT set out that the *Compair* guidelines did not apply to selection for alternative employment, where the issue was whether the employer had taken reasonable steps to find alternative employment for the employees. The EAT stressed that a tribunal is entitled to consider how far an interview process was objective, but it should keep in mind that an employer’s assessment of which candidate will best perform in a new role is likely to involve a substantial element of judgement.
45. If an employer considers that an employee would not accept an alternative post, it may be unreasonable to exclude him or her from consideration for it without consulting him or her first (Ward and anor v Mahle Filter Systems UK Ltd ET Case No.3102701/09).

## **Application of the Law to the Facts**

46. Applying those principles, I reach the following general conclusions:
- a. There is no doubt that the Claimant was warned and consulted about the redundancy.
  - b. There was no issue in relation to selection pools, as the entire office was closing.
  - c. The Respondent notified the Claimant as part of the consultation, of alternative roles that were available in the London office.
  - d. The Claimant was aware of a further vacancy that became available after the conclusion of the consultation.
47. I now deal with the specific complaints as identified by the Claimant, as well as

issues arising during the hearing:

i. The Respondent failed to share all alternative roles within the organisation with those at risk (in September 2020).

48. The Claimant alleged that an engineering manager role was available and should have been made offered/listed with the other roles in September 2020 during the consultation period. He said such a role was hidden because it was earmarked for Mr Perga.
49. I do not accept that the Claimant's perception of events is correct. I note that even at the time of the hearing, more than eight months after the consultation period ended and some six months after the Claimant ceased to be employed by the Respondent, as set out in the findings of fact, Mr Perga has not been offered such a role.
50. I accepted the evidence of the Respondent that Mr Perga was placed upon the 'management track' and consider this is what the meetings in October 2020 were about. I also accepted the evidence of Mr Maunder that when an individual is successful on the management track, a role is created for them. I further note that the engineering manager role for which Mr Perga has been put forward is a new role; it is not even the same role as became available after the end of the consultation period but before the Claimant left his employment (see below).
51. I do not accept that the Respondent was 'hiding' or 'holding back' an engineering manager role from the Claimant and others during the consultation period. I reject the allegation that Mr Perga was 'lined up' to take over the Claimant's role as he suggested in his closing submissions, for the reasons set out above.
52. The Claimant was aware of the vacancies available in the London office and was able to express an interest in any or all of them. Given his desire to remain with the Respondent, due to his salary and stocks package, he might have chosen to formally express an interest in all roles. His choice was to apply for the senior engineering manager role.

ii. The interview process for alternative employment was unfair.

53. The Claimant complained that some of those interviewing him had noted him to be a 'hire (i.e. recommended he be offered the role), but he was ultimately unsuccessful. The Claimant also complained that not all interviewers had recorded their feedback. The Claimant relied on positive feedback he had received from colleagues as evidence he had good management skills.
54. The role of Senior Engineering Manager was not one into which the Claimant directly 'mapped'. It was two 'grades' above his current job title. It was not unreasonable for the Respondent to require the Claimant to apply for this role and be interviewed in those circumstances.
55. An employer's assessment of which candidate will best perform in a new role

is likely to involve a substantial element of judgement and it is not the role of the Tribunal to interfere in that process in the absence of clear failings and/or unfair process. In this case, the Respondent has provided, through Mr Maunder, a rationale for the decision not to offer this role to the Claimant. There is always a level of subjectivity involved, but there is nothing about those reasons that leads me to conclude that it was inherently unfair, unreasonable or arbitrary. Whilst the Claimant plainly takes issue with the lack of written feedback and disagrees with the outcome, he has not identified any basis for the Tribunal to interfere with the Respondent's judgement about suitability.

iii. The 'second event' of the Respondent failing to share alternative roles.

56. The Claimant says that a vacancy arose for the position of engineering manager prior to his employment ending and that he was not told of or offered this role.

57. As set out in the findings of fact above, there is no evidence that the Respondent 'hid' this vacancy from the Claimant; it was advertised both internally and externally. The Respondent accepts it did not draw the Claimant's attention directly to it, and says this was due to the consultation ending, the Claimant's unsuccessful application for the senior post and because he would not directly 'map' into the vacancy.

58. The Respondent did not actively draw this vacancy to the attention of the Claimant. However, it was shared and advertised in the usual ways and the Claimant was aware of it. On the Claimant's own evidence, he made a conscious decision not to apply. I remind myself of his closing comments that *"I could have applied for the role in December, but my priority was securing the financial future for my family"*. He went on to say that *"taking a role at a place that respects me and will keep me in employment is a better option than applying for the December engineering manager role, knowing I hadn't been approached about it."*

The Sr SWE Role

59. It was clear from both the written and oral evidence of the Respondent that the Claimant was considered to be operating at a Sr SWE level and role. There was a vacancy for this role during the consultation period. The Respondent says that the Claimant would likely have 'mapped' into that vacancy.

60. The Claimant was made aware of this role during the consultation period through the usual processes. He accepted that he could have expressed an interest in any or all of the available roles. He chose not to express an interest in this role. He said this was because he only applied for the role for which he considered he had the skill set. However, this does not entirely accord with the strength of his expressed desire to remain with the Respondent company.

Relationship Breakdown

61. The Claimant says that it became clear that the Respondent 'didn't want him'

and he believes there was financial motivation on the part of the Respondent (see below). As set out in my findings, I found the Claimant's evidence about the relationship breakdown unclear and at times contradictory. He said that it broke down after the subject access request, but later said it was after he was unsuccessful in his application for senior engineering manager. He also referred to the email exchanges with Ms Dalla Riva as evidence of this breakdown, which I found did not demonstrate such a breakdown.

62. The Respondent was complementary of the Claimant's technical abilities and the Claimant himself admitted he had not realised how highly he was regarded in that sense.

### Financial Motivation

63. The Claimant says that the Respondent was financially motivated in not wanting him to continue his employment. The Claimant says that the whole case 'turns on the issue of stock'. As set out above, the Claimant rejects that the salaries and stock offers are standard and fixed. I have found that the Respondent is more likely to have accurate information about this point.
64. However, I do not consider in any event that there is evidence within the bundle, aside from the Claimant's allegations, that there was any financial motivation on the part of the Respondent. I note that Mr El Baba did not know which posts commanded a higher salary. Crucially, I have determined that there is no basis upon which I should interfere with the interview decision, and the Claimant was aware of all vacancies at all times.

### **Conclusions**

38. I have to consider the entirety of the case and determine whether the actions of the Respondent were within the band of reasonable responses. This is an objective test and I remind myself that it is not for the Tribunal to adopt a substituted judgment.
39. Whilst it is unfortunate that there was no written redundancy policy, a procedure was clearly followed. The Leeds office was closing and there is no dispute that this was a genuine redundancy situation. There was notice and consultation, both individual and collective. There is no issue around selection pools, as the whole office was closing. Alternative roles were shared and I heard that in addition to the Claimant, at least two others expressed an interest in those roles and did take other roles.
40. There is no doubt that the Claimant was aware of all the available alternative roles, including the role that became available later, after the consultation had ended. The Respondent evidently had in place processes that properly informed the Claimant about available vacancies, because he was so aware. The September 2020 vacancies were shared through the consultation and the later vacancy was advertised both internally and externally. The Claimant was free to express an interest in all or any of the roles made available in September 2020 and later. The Claimant made conscious decisions about whether and

what positions to apply for, as set out in his evidence.

41. In all the circumstances, I am satisfied that the Respondent's actions were within the band of reasonable responses. I do not consider that the actions of the Respondent not to pro-actively invite the Claimant to apply for specific roles, or to draw his attention specifically to the later vacancy were outside the range of reasonable responses or render the dismissal unfair, given that the Claimant was properly informed about all available vacancies through its processes.

Employment Judge Anderson

12 August 2021

Reserved Judgment & Reasons Sent To The Parties On

16 August 2021