Neutral Citation Number: [2024] EAT 106

Case No: EA-2022-000015-NK

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 23 January 2024

Before:

HER HONOUR JUDGE TUCKER

- -

Between:

HENDY GROUP LTD

Appellant

- and -

MR DANIEL KENNEDY

Respondent

- -
- -

Mr O Foy (instructed by **MILS Legal Ltd**) **for** the **Appellant**
Mr D Kennedy the **Respondent** in person

Hearing date: 23 January 2024

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JUDGMENT

SUMMARY

REDUNDANCY

An Employment Tribunal did not err in concluding that the Claimant's dismissal for redundancy was unfair because the Respondent employer had failed to consider alternative employment.

HER HONOUR JUDGE KATHERINE TUCKER:

1. This is an appeal against a decision of an Employment Judge, EJ Housego, sitting in the Employment Tribunal in Southampton following a hearing which took place by CVP on the 4 November 2021. The Judgment and Reasons were sent to the parties on 6 December 2021.

2. The employer, Hendy Group Ltd is the Appellant in this appeal. I refer to the parties to this appeal as the Claimant and Respondent, as they were before the Tribunal.

3. The conclusion of the Judge was that the Claimant was unfairly dismissed by the Respondent. The Respondent was ordered to pay compensation to the Claimant of £19,566.73. The Judge found that no *Polkey* reduction should be made.

The issues on appeal

4. The Grounds of Appeal concern three matters. First, whether the Judge erred in his conclusion that the Claimant was unfairly dismissed for redundancy because the Judge applied the incorrect test when considering whether the Respondent had properly considered alternative employment. Secondly, whether the Judge erred by substituting his own view in respect of the dismissal, rather than considering whether the dismissal was within the range of reasonable responses open to a reasonable employer. Thirdly and finally, whether the Judge erred in law by failing to properly consider the question of remedy, in particular whether any *Polkey* reduction should have been made, i.e., a reduction to reflect the percentage chances that, had a fair process been followed, the dismissal may have occurred in any event.

The facts found by the Tribunal and which are relevant to the issues in this appeal

5. The Respondent is a well-known car dealership. At the point of his dismissal, the Claimant had been employed as a trainer within the Respondent's Training Academy. He had taken up that role in 2015; a role in which he was required to provide training for all of the Respondent's sales teams across its workforce. The Claimant was very happy in that role and appreciated, in particular, the set working hours of 9:00am to 5:00pm, Monday to Friday. However, before working in that role, the Claimant had had some 30 years' experience in the motor trade and specifically in sales; both in respect of new and used vehicles. The Claimant had started working with the Respondent in 2013 in used cars. He then managed a new distributorship for Kia cars (a brand which was new to him), and was successful in that role. He then began to train people working in the Respondent's various dealerships and ultimately moved to his final role as a full-time trainer within the Training Academy in 2015.

6. In 2020 a redundancy situation arose, largely, it appears, as a result of the COVID pandemic. The Claimant accepted that a genuine redundancy situation had arisen within the training team; he also accepted that, in terms of selection for redundancy within that team, he was fairly selected for redundancy. His complaint before the Tribunal was that he was not fairly dismissed for redundancy. In particular, he asserted that no adequate, appropriate or fair consideration had been given to the possibility of him continuing to work for the Respondent, albeit in a different role. For that reason, he asserted having regard to section 98(4) of the Employment Rights Act 1996; the decision to dismiss him was unfair.

7. The Judge made a number of factual determinations which were not challenged in this appeal. In particular, the Judge found that the Claimant had a consultation meeting on 4 September 2020 (paragraph 15 of the Judgment). At that meeting the Claimant was told that he could apply for posts listed on the Respondent's intranet. The Judge found that:

> **''15. …it is apparent that the Human Resources Department took no step whatever to assist Mr Kennedy. I do not consider that telling him he could apply for posts open and advertised to the world, and on the same basis as every other applicant, to be help (sic).**
>
> **16. … [the Claimant] was not at work. He was given no assistance to apply for any post, and no post was suggested for him to apply for. The most assistance that was offered was that Graham Tarrant [the Claimant's line manager] said that he was willing to speak to anyone who wanted to phone him. He would be as any other applicant, internal or external.**
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> **17. Mr Palmer [the Respondent's Used Car Sales Director who gave evidence before the Tribunal] assumed that Mr Kennedy [the Claimant] was given details of posts he could apply for, but he had no concrete knowledge of any positive step taken by anyone in the Respondent. There is no evidence of any such step being taken by him or anyone else. Neither Mr Palmer nor Mr Tarrant had any knowledge of anything done by the Respondent to try to avoid dismissing Mr Kennedy by reason of redundancy. They made some assumptions, but had taken no step before the hearing to verify them.**
>
> **18. A week after being told that he was to be dismissed (so in late September 2020) Mr Kennedy [the Claimant] was required to (and did) return his laptop. He no longer had access to internal email or to the intranet. He had the only the same access as any member of the public to the jobs notified on the website.**
>
> **19. There were multiple jobs available with the Respondent in sales in the period between Mr Kennedy being given notice and his dismissal, a 7 week period ending 09 November 2020.''**

8. The Judge found that, despite a lack of any proactive assistance from the Respondent, the Claimant applied for a number of jobs. He was interviewed for one role on 9 September 2020. The Claimant had applied for a sales manager position in Bournemouth Toyota. He was interviewed for that role by a Mr James White (Area Sales Manager) and Mr Ball (Toyota Franchise Manager). Mr White considered that, whilst the Claimant was very personable, interviewed well and had previous sales experience, he was not convinced of his desire to lead and motivate a team. The Judge recorded that Mr White considered that the Respondent wanted someone with recent car managerial experience and a proven track record of building a team

and considered that the Claimant did not possess those attributes. In addition, he stated that he was concerned that the Claimant lived in Basingstoke which required a long commute to the dealership in Bournemouth. Mr White's evidence was that he felt that the Claimant was simply keen on remaining employed. As a result, the Respondent appointed a different candidate who was not at risk of dismissal by reason of redundancy but was an existing employee within the Respondent. Mr Ball gave evidence that, whilst the Claimant had come across as having energy and positivity, he did not feel that the Claimant was the 'right fit', or that he would get on with the New Car Sales Manager. The Judge stated that he did not accept the second-hand evidence (by which he I understand him to refer to hearsay evidence) that there was anything negative about the possible relationship between the Claimant and the New Car Sales Manager, as suggested by Mr Ball. That Manager had not given evidence to the Tribunal.

9. The Judge noted that the Claimant had found the role for which he applied, and applied for it, without any assistance or input from the Respondent, in particular from his line manager Mr Tarrant, Simon Palmer (Director and Senior Manager) or anyone within Human Resources. The Judge found that Mr Tarrant told the Claimant that he could not assist with any role outside of his own department (the Training Academy where there were no opportunities). The Judge noted while that may well have been the case, 'someone else in the Respondent should have done', in particular, Mr Palmer, or someone from HR.

10. The Claimant was given notice of termination of his employment, due to expire on 9 November 2020, by way of a letter dated 21 September 2020. The Judge stated, at paragraph 23 of the Reasons, that the letter and e-mail correspondence sent to the Claimant did not make '**any reference to any possibility of help to find another role**'. He stated:

> **'the Respondent did not satisfy itself of anything in relation to the possibility of alternative employment'.**

11. The Claimant applied for another role as a Sales Advisor at Christchurch Jaguar Land Rover on 7 October 2020. The Judge found that he was not interviewed for that role, but that on 30 October 2020 Mr Jenkins contacted him about it. Mr Jenkins informed the Claimant that the role had been offered to an external candidate and that he did not know that the Claimant was being dismissed by reason of redundancy. Again, the Judge recorded that there had been no input from anyone in Management or Human Resources. At paragraph 25 of the Reasons the Judge stated:

> **''25. The simple narration of this chronology clearly shows the failure of the Respondent to meet its obligation to Mr Kennedy. There was no support, there was delay in dealing with the application, someone else was appointed who was not an employee, at the same time as Mr Kennedy was dismissed.''**

12. On 13 October 2020, the Claimant identified and applied for another role within the Respondent; this time at a Renault dealership at Chandlers Ford. The Judge found that once more there was no support from anyone within the Respondent's Human Resources or management. The Judge recorded that a Mr Morrison saw the application the Claimant had made to the Toyota dealership and rang Mr White (who had previously interviewed the Claimant) for feedback, which influenced his decision, negatively. The Claimant was not interviewed for the Renault role and another candidate was appointed who had extensive Renault experience. Significantly, in my judgment, the Judge, in my judgment, accepted that there was a complex procedure involved with Renault and that there may have been a good reason to appoint the other candidate, but nonetheless continued (paragraph 26):

> **''26. …it is noteworthy that there was not even an interview for the Claimant because his application was not considered worthy of furthering because of Mr White's input. There is force in Mr Kennedy's submission that far from helping him, he was blocked every time he tried to get a different role.''**

13. The Judge noted Mr Palmer's oral evidence that there was a duty described as a ‘‘duty of care’’ towards the Claimant and that, whilst it was a matter for the Claimant to determine which roles he applied for, the long and unremitting journey times to and from work might not have been sustainable for him. Further, the Judge found that Mr Palmer was influenced by a conversation which had taken place a year or so before. During that conversation the Claimant had expressed how much he liked his training role and would ideally wish to carry on with it. However, the Judge found that, when faced with redundancy, the Claimant had ‘‘got his head round’’ going back into a sales manager, or, sales role - and having done so, intended to apply his customary enthusiasm moving forward. The Judge clearly took the view that the conversation which had taken place with Mr Palmer previously should not have been a critical factor; that conversation took place when the spectre of redundancy was not looming. In an ideal world the Claimant would have liked to carry on working in training, but the reality was that in the light of a genuine redundancy situation, the circumstances were not ideal and the Claimant had adjusted his expectations and accepted the fact he would have to work in a different position. The Judge then set out factual evidence about the Claimant’s personal situation which meant that, whilst the additional travel required by working in sales would be onerous for him, there could be benefits to it, such as the opportunity to see family members; the Claimant’s grown-up daughter living in Bournemouth.

14. On 28 October 2020, the Claimant applied for another sales manager role, this time at Salisbury Toyota; he did not hear back about that application.

15. On 6 November 2020, the Claimant asked if he could remain furloughed, so that he could continue to seek alternative employment within the Respondent’s Group, and also chased up the outcome of his two outstanding applications.

16. The Claimant's request to be furloughed was refused. However on 9 November 2020, that is, the last day of his employment with the Respondent, the Claimant received an e-mail which had previously been sent to him, for reasons which were not clear, on 3 November 2020, to his internal e-mail address by HR. The Claimant had had no access to that e-mail inbox since late September 2020. The e-mail included a letter written to the Claimant by an individual within HR, and stated as follows:

> 'I am writing to update you in relation to your applications for the below positions:
>
> - Sales Manager (Eastleigh Renault)
> - Sales Manager (Salisbury Toyota)
>
> Now that applications have been reviewed, it is with regret to inform you that your applications are not going to be progressed on this occasion.
>
> James White, who previously interviewed you for the Sales Manager (Bournemouth Toyota) position is Head of Brand Performance and also responsible for Renault within the group, and subsequently is not in a position to interview you again for either of these positions. Whilst you interviewed well previously, there were some questions around your motivations for applying for a Sales role which therefore resulted in your previous application being unsuccessful. James is looking to build out continuity within the team and increase overall brand performance. Whilst we do not wish to deter you from applying for alternative roles within the group, the response will be consistent for other Sales related roles.
>
> We appreciate this news will likely be disappointing, however hopefully you will understand the reasons behind the decision. Should you wish to discuss this any further, do not hesitate to contact me directly.'

17. Unsurprisingly, given the content of that e-mail, the Judge was critical of it and stated as follows in paragraph 31 of the Judgment:

> **''This was the human resources department, which should have been supporting Mr Kennedy [the Claimant] in a search for an alternative to dismissal, instead saying that they would not give him *any* sales role *anywhere*. This to a man who had spent 35 years selling cars, or training**

> **people how to sell cars. It is hard to imagine anything less helpful. There was absolutely nothing positive about that e-mail. There was no suggestion that he might try something else (although what is hard to imagine).''**

It was not difficult to see why the Judge was critical of the email. The email appeared to suggest that the Claimant had been interviewed for one role and, as a result of that and the Respondent's views about the Claimant's motivation in applying for alternative employment (which, on the Judge's conclusions appeared to have related to a desire to remain employed) the Respondent had determined that the Claimant would not be successful in any applications for any other roles within the Group.

18. The Claimant applied for a further role on the 17 December 2020 with a Skoda dealership in Bournemouth. He did not receive any reply. The Judge stated, at paragraph 35:

> **''35. I observe that the basic premise put by the Respondent's witnesses is fundamentally unsound. It is that someone so good that he trains sales managers is not able to do the job he is training others to do. As I observed in my ex tempore judgment, if being out of a customer facing or management role for a while was an issue, that would merely mean that there might be a training need: but he would have been the person to give that training until his role was made redundant.''**

There was no suggestion in anything that I have read that the dismissal was for anything other than a genuine redundancy situation. There was no suggestion that the reason asserted for dismissal related to capability.

19. The Judge stated, at paragraphs 5-10, as follows:

> **''5. The reason put forward is redundancy, which is a potentially fair reason for dismissal[1]. It was accepted to be the real reason, and Mr Kennedy accepts that there was a redundancy situation, and that he was fairly selected to be placed at risk of dismissal by reason of that redundancy situation.**
>
> **6. The sole issue is whether his dismissal was fair, or not. There is an obligation on the employer to make efforts to find the employee alternative**

employment. As Harvey[2] puts it: *'In order to act fairly 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.'*

7. The starting point for the issue of fairness is the words of section 98 (4) of the Employment Rights Act 1996 (''the Act'')[3]. There is no burden of proof in deciding the issue of fairness, for it is an assessment of the actions of the employer. It is not for the Tribunal to substitute its own view for that of the employer.

8. Compensation for unfair dismissal is dealt with in sections 118 to 126 inclusive of the act

9. The compensatory award is dealt with in Section 123 of the Act.''

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[1] S98(2) of the Employment Rights Act
[2] The authoritative textbook on employment law
[3] ''…. 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"
[4] S123(1) "the amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

20. The Judge's conclusions were set out at paragraphs 36 to 40 of the Judgment as follows:

''36. The Claimant's role was redundant and his selection for dismissal for that reason was fair - Mr Kennedy has always accepted this.

37. The Respondent failed in its obligation to Mr Kennedy in seeking to avoid dismissal as a result. The reasons for this conclusion are set out above. Mr Kennedy did all he could: it is not as if he was waiting for the Respondent to help him. He was as proactive as he could be. The claim therefore succeeds.

38. Mr Wayman submitted that there should be a 100% *Polkey*[5] reduction. I made no reduction. The submission is that if the procedure was unfair - failure to attempt to avoid dismissal - it made no difference because Mr Kennedy had access to all the jobs, applied for them and was unsuccessful. The submission fails because the reason he did not get another job within the Respondent was, on the balance of probabilities, that very failure.''

The 'very failure' referred to in the last line of paragraph 38 appears to refer back to the procedural failure of attempting to avoid dismissal. The Judge continued:

> **''38…The central fact is that at the time there were multiple jobs available for Mr Kennedy, for which he was qualified, and which he wanted. Ultimately, by 03 November 2020 the Respondent was actively blocking him from getting one.**
>
> **39. I did not accept Mr Wayman's submission that the Respondent was in each case entitled to take the best person for the job, and in each case that was what they had done. That assumes that Mr Kennedy was unsuitable for the role (or that it was not a suitable job for which he could be considered, which amounts to the same thing). That is not a sound assumption. That there might (I make no finding of fact that this was so) in every case have been a better candidate when the vacancy was advertised to the world does not mean that the role was not suitable for Mr Kennedy. If it was suitable the Respondent had an obligation to consider Mr Kennedy for it, not appoint someone new to the business instead.**
>
> **40. Of course Mr Kennedy's prime aim was to avoid being dismissed. He identified with the brand. He wanted to see out his career with the Respondent. That is not synonymous or indicative of not wanting the jobs for which he was applying. A change of direction was not what he wanted, but when as the phrase has it, *''push came to shove''* he was going to throw himself into a new role with enthusiasm. As he put it, in an ideal world he would have stayed in the training academy: but this was not an ideal world and he would try his best to make a success of a new role. He had the skills enthusiasm and experience to do so.''**

The following passages addressed the issue of remedy:

> **''41. Mr Kennedy had provided no documentation about his search for work. Mr Wayman submitted that Mr Kennedy had failed to show that he had mitigated his loss as he was obliged to do. Mr Kennedy had printed off his job search record from Totaljobs, one of several agencies he said he had used. I permitted him to email it to Mr Wayman and to me. I accorded the opportunity for a break to consider it, which Mr Wayman very sensibly declined. Mr Kennedy said that it was very hard to find a job, approaching Christmas and with the pandemic and lockdowns still affecting things. He had started with a search 50 miles from home and expanded it over time. In the end he had got a job managing a team of 8 sales advisers for Cinch (an online car sales company) as a "Customer Experience Team Leader". He started work for them on 24 May 2021. Apart from having to wait 3 months before joining their pension scheme his losses stopped then. He had claimed job seeker's allowance in February 2021 which was paid until he started work. He had not claimed before as he had not known he was eligible.**

> **42. I decided that Mr Kennedy's job search within the Respondent during his notice period was indicative of a person who was trying hard to find employment. He had a wife and children to support. His redundancy payment was not so large that it was likely that he had done nothing while spending it. He and his wife had to buy new cars which cost more than that payment. He needed work. He found a similar job in 7½ months. There was no reason for him to look outside the Respondent until dismissed, for he was making efforts to remain with them. In the extraordinary circumstances of the pandemic, I think Mr Kennedy has done very well to find an equivalent job in that period. He has mitigated his loss fully.**
>
> **43. He had a company car and hired another for his wife. They were similar cars. That for his wife cost £259 a month. It is likely that the lost benefit of his company car was worth that amount to him. The Respondent made pension contributions for him of £156.25 a month.**
>
> **44. There is no basic award, as a redundancy payment of the equivalent amount was paid, extinguishing that liability.**
>
> **45. Mr Kennedy applied for an uplift on the award. I declined to order any uplift. That provision penalises an employer which fails to follow the right process. It is not designed to do so for an employer which follows the right process, but does so unfairly. The unfairness is compensated by the award.**
>
> **46. Mr Kennedy asked for a preparation time order. I declined to make one. The Respondent had not behaved abusively, vexatiously or otherwise unreasonably in the conduct of the proceedings and this was not a case where the Respondent falls within the "no reasonable prospect of success" heading.''**

The Law

21. The question of whether a dismissal is fair or unfair must be determined having to regard to Section 98(4) of the ERA 1996. Once an employer has established that the reason for dismissal was a potentially fair reason (as set out in s.98(1) of the ERA 1996), the determination of the issue of whether the dismissal is fair or unfair, having regard to the reason shown by the employer for the dismissal, 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. That question must be determined in accordance with the equity and substantial merits of the case. The

requirements set out in Section 98(4) look, first, at the reason established for the dismissal, in this case redundancy, and then look at whether (in the light of the matters just set out, the employer acted reasonably or unreasonably in treating that reason (in this case redundancy) as a sufficient reason for dismissing the employee.

22. The cornerstone is, as has been stated many times in appellate authorities, an assessment of reasonableness. That means that a Tribunal or Judge must not substitute their own view for that of an employer; rather, what is required is to determine whether or not an employer acted reasonably, focusing on the range of different responses to the particular circumstances reasonably open to a reasonable employer. In redundancy cases, the question is not whether it was reasonable to dismiss 'an' employee, but whether it was a reasonable decision to dismiss this particular employee for the potentially fair reason of redundancy.

23. A number of authorities have addressed reasonableness and fairness in the specific context of redundancy notice. Notably, albeit in 1982, in *Williams v Compair Maxam Ltd* [1982] IRLR 83, it was noted that a reasonable employer will usually seek to ascertain whether, instead of dismissing an employee, the employer could offer him alternative employment. Focusing on the question of alternative employment, in *Quinton Hazell Ltd v WC Earl* [1976] IRLR 296, the EAT considered the previous decision of *Vokes Ltd v Bear* [1973] IRLR 363 which addressed the question of the duty of looking for alternative employment prior to dismissal. The EAT, in the *Hazell* case, noted that in *Vokes Ltd v Bear* not a single reasonable step was taken by the employer. In contrast, in the case before the EAT (*Hazell)* the Respondent had considered possible posts which might have provided the employee with alternative employment was available: they did, quoting from paragraph 7, ''*consider how to go about the question of looking at alternative employment''*. They did have consideration for the Claimant;

they did wonder whether he could be placed somewhere else; they did have in their mind the possibility of other reduced-pay jobs; but, ruled them out because they assessed, reasonably, the situation before them.

24. In *British United Shoe Machinery Co Ltd v Clarke* [1977] IRLR 297, the EAT concluded that a Tribunal had been entitled to find that an employer had failed to take reasonable steps to find the Claimant alternative employment. The EAT noted that, whilst the standard to be applied in determining whether the employer had discharged that obligation is the standard of the reasonable employer, in the case before the EAT, the Tribunal's decision was one which was opened to them upon the evidence, and could not be challenged on appeal. The EAT also stated that where a Tribunal finds a dismissal unfair, it will be necessary to make some estimate for the purpose of assessing compensation, of what would have been the likely outcome had that been done which ought to have been done. The EAT considered that this is a a question well-suited to Tribunals, in their capacity as industrial jury, to answer, provided a Tribunal remembers that what it is trying to do is to assess the loss suffered by the Claimant, and not to punish the employer for their failure in good industrial relations.

25. More recently, these issues were considered in **Mr Joseph De Bank Haycocks v ADP RPO UK Ltd [2023] EAT 129 and Mrs S Mogane v 1) Bradford Teaching Hospitals NHS Foundation Trust 2) Karen Regan [2022] EAT 139.** In particular, in *Haycocks* the EAT stated, at paragraph 23:

> **‘‘23. Starting with Compair Maxam [Williams & Ors v. Compair Maxam Ltd ICR 156] the theme surrounding reasonableness in redundancy situations is that it reflects what is considered to be good industrial relations practice; that employers acting within the band of reasonableness follow good industrial relations practice. The substance of what amounts to good practice will vary widely depending on the type of employment, workforce and the specific circumstances giving rise to the redundancy situation.**

> **However, there are certain key elements which seem to appear. First amongst those is that a reasonable employer will seek to minimise the impact of a redundancy situation by limiting numbers, mitigating the effect on individuals or avoiding dismissal by engaging in consultation. At one time consultation, certainly in the cases above, tended to relate to methods of selection. However, in more recent years it has been noted that consultation could result in a broader range of outcomes. (During the hearing the JCB workforce taking a pay cut to avoid redundancies was discussed as an example).''**

26. Coming back to first principles, it is important to state that reasonableness is the keystone.

Submissions

27. The Respondent helpfully and skilfully grouped its submissions into the areas outlined at the beginning of this judgment. It was submitted that the judgment was light on its analysis and statement of the legal principles; that there was not a proper recitation of the correct legal principles. In particular, a significant omission was any reference to the band of reasonable responses. It was submitted that the Judge did not demonstrate an analysis of relevant factual issues, importantly the reasons given by the Respondent in not offering alternative roles and whether that was within the band of reasonable responses.

28. In addition, it was submitted that there was no reasoning as to why the Judge concluded that the evidence given by the witnesses was unreasonable. That error of approach, in the Respondent's submission, led to the Judge impermissibly substituting his own view for that of the employer. It was submitted that the language used by the Judge tended to suggest that he concluded or considered that there was an obligation on the Respondent to provide assistance to the Claimant in obtaining work.

29. It was submitted that although the Judge reminded himself that he should not substitute his own view, he went on to do precisely that, and perhaps through sympathy, he slipped into substitution, precisely that which is warned against in **London Ambulance Service v. Small [2009] EWCA Civ 220 (CA).** It was submitted that the Judge used his findings of fact to support his own personal conclusion, rather than making reference to the objective standards of the hypothetical reasonable employer. It was submitted that the Judge fell into the error commented upon **in Tayeh v. Barchester Healthcare Ltd [2013] EWCA Civ 29 CA, at paragraph 48**. The Respondent assiduously took me through the different parts of the Judgement where it was said that substitution had taken place rather than an objective assessment of reasonableness been made.

30. Finally, it was submitted that at paragraph 38, the Judge erred in his approach to a **Polkey** reduction. It was submitted that the Judge erred because, rather than engaging in an assessment of what might have been the result in a world that never was, where the Respondent had properly considered alternative employment, the Judge simply stated that he would not make such a reduction because the reason that the Claimant did not obtain another job was because of the Respondent's failure i.e. the blocking of his applications. It was submitted that, even on a fair reading, the proper self-direction and analysis of *Polkey* was missing.

31. The Claimant, who acted for himself, provided brief written submissions. He submitted that the Judge, for the reasons given by Judge Gullick at the sift stage of the EAT procedure, had been entitled to reach the conclusion that he did. On the *Polkey* point, the Claimant submitted that reading the judgment as a whole, it was clear that the Judge had concluded that if a fair procedure had been adopted, the Judge was satisfied that he would have achieved a role with the Respondent.

Conclusions

32. Although I initially considered that there was strength in the final point made by the Respondent, I have determined that each ground of appeal should be dismissed.

33. I accept that the Judge does not refer to the band of reasonable responses. I also accept that the Judge's statement of the law is unusual and could have been expressed in more detail. Overall, however, I consider that it is clear that the Judge had the correct test in mind, that being whether the dismissal was fair or unfair having regard to section 98(4).

34. I am not satisfied that the first ground of appeal is made out. I do not consider that the Judge applied the incorrect legal test. His conclusion was that the employer did nothing in terms of alternative employment. The Claimant was told that he could apply for jobs on the website. HR communicated with him via an email to which he did not have access. HR did not tell managers that he was at risk of redundancy. I noted, in addition, that there was no evidence of other steps a reasonable employer might have taken. For example, speaking to employees about where their interests might lie, assisting in identifying other roles, encouraging conversations about different roles even if that meant demotion.

35. It appears from the facts found by the Judge that nothing was done by the Respondent in respect of consideration of alternative employment. At its highest, the Claimant's line manager had said he would speak to someone on the telephone. In my judgment, it was open to the Judge to determine that that approach was one which no reasonable employer would have adopted.

36. Turning to the question of substitution, I accept the submission that the language used by the judgment could have been expressed in more refined terms. The duty upon the employer was to consider whether the Claimant could be offered alternative employment. That has to be considered within the size and administrative resources of the employer. This was a large organisation with relatively large resource. In a short period of time, there were a number of vacancies for which, on paper at least, the Claimant to be suitable to be considered for.

37. The Judge made a number of findings on the question of the Claimant securing one of those roles. I am not satisfied that that amounted to substitution. Rather, I consider that, on a fair reading of the Judgment as a whole, those findings of fact were relevant to the question of remedy.

38. The assessment of the Claimant's career background was relevant to the likelihood of him obtaining employment. Likewise, his recordings about the Claimant's positive attitude. So too was the fact that he had previously managed a distributorship for Kia cars which was a brand which was not previously known to him. That was relevant to the Judge's assessment of likelihood of him being selected for the roles if that which should have been done, had been done. So too were the reasons from the two individuals who interviewed the Claimant. The Claimant had interviewed well and he was positive and proactive. Their concern was whether he was 'the right fit' and his motivation for seeking appointment to the role. That must be put in the context that there had been nothing done by HR to find alternative employment and that the reason the Claimant was looking at the roles was his desire to remain employed. The Claimant had to look for other roles. It is not right to criticise the Tribunal Judge for recording that the interviewing managers had formed negative views of the Claimant in a 15-minute chat

and, in his view, it was clear that the Claimant would approach new employment with his customary enthusiasm.

39. Finally, I turn to the email of 9 November. What that appeared to evidence is that a decision had been taken that, no matter how the Claimant interviewed, and, no matter what his application said, he would not be considered for roles in sales. The Judge was fully entitled to be critical of that.

40. I then turn to the *Polkey* assessment. I considered that this was the strongest point advanced by the Respondent.

41. Focusing on paragraph 38, there was some strength in the submission that the Judge appeared not to have carried out the required analysis: to look at what would have occurred had what needed to be done been done. It was submitted before the Judge that the failure by the Respondent to attempt to avoid dismissal, which is a clumsy way of saying consider alternative employment.

42. The Judge's view was that the reason the Claimant did not secure the other roles was because the Respondent had not properly considered alternative employment. Reading the decision as a whole, I consider that what the Judge concluded was that, had the Claimant not been unfairly blocked, had the Respondent carried out its responsibility in terms of considering alternative employment, he would have secured alternative work. That was why the Judge did not make any *Polkey* reduction.