Case Number: 3303528/2015

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr N Applegarth	and	Enghouse Interactive UK Limited

Held at Reading on 13, 14 and 15 February 2017

Representation **Claimant:** Mr J Crozier, counsel
Respondent: Mr S Wyeth, counsel

Employment Judge Mr SG Vowles (sitting alone)

RESERVED JUDGMENT

Evidence

1. The Tribunal heard evidence on oath and read documents provided by the parties and determined as follows.

Unfair Dismissal - section 98 Employment Rights Act 1996

2. The Claimant was dismissed by reason of redundancy on 19 August 2015 and that was the effective date of termination. The dismissal was not unfair. This complaint fails and is dismissed.

Reasons

3. This judgment was reserved and written reasons are attached.

REASONS

SUBMISSIONS

1 Claimant On 15 December 2015 the Claimant presented a complaint of unfair dismissal to the Employment Tribunal.

2 Respondent On 26 January 2016 the Respondent presented a response. The claim was resisted.

EVIDENCE

3 The Tribunal heard evidence on oath from the Claimant Mr Nicholas Applegarth (Vice President Sales Europe, Middle East and Africa - VP Sales EMEA).

4 The Tribunal also heard evidence on oath on behalf of the Respondent from Mr Dennis Farar (VP Legal and Human Resources), Mr Geoff Bartle (Corporate VP Information Systems) and Mr Andy Clune (VP Cloud Sales and Business Development EMEA).

5 The Respondent indicated that it was not possible to call Mr Craig Wallace (Chief Operating Officer) to give evidence due to ill health. He had been absent on sick leave from work for an extended period.

6 The Tribunal also read documents in a bundle provided by the parties.

7 From the evidence heard and read the Tribunal made the following findings.

FINDINGS OF FACT

Background

8 The Respondent company sells and provides customer interaction software. It employs approximately 150 people in the UK and it is part of the Enghouse Group which employs approximately 2,000 people worldwide.

9 The Claimant commenced employment with CosmoCom on 4 January 2010 as Vice President, Europe, Middle East and Africa (VP EMEA). On 1 April 2011 CosmoCom was acquired by the Respondent and the Claimant's employment transferred to them. He continued to hold a senior position with the Respondent and in July 2014 was promoted to the position of VP Sales EMEA. His immediate line management was Mr Iain McKenzie (Regional Managing Director EMEA), then Mr Craig Wallace (Chief Operating Officer), then Mr Steve Sadler (Chief Executive Officer). Mr Wallace and Mr Sadler were based at the group headquarters in Toronto, Canada.

10 Unlike CosmoCom, the Respondent took more of a regional sales management approach whereby sales for all products (including the cloud-based product CC-SP acquired from CosmoCom) reported to Regional Managing Directors based in the United States for the Americas, Australia for Asia and Pacifics and the UK for EMEA and Nordics.

Reorganisations

11 In addition to its sales activities, the Respondent was also an acquisitions company, acquiring 2-5 companies each year around the world. As the number of acquisitions grew, the Respondent reorganised its structure during 2014/2015. For example:

11.1 The Nordics region was set up as a separate regional business unit called Northern Europe no longer managed by the UK-based Managing Director.

11.2 The Claimant took on a management role whereby he and his team were responsible for selling a number of the Respondent's products in territories where they did not generally have offices or personnel.

11.3 The UK and German Sales Managers left the Respondent and the Claimant was appointed as VP Sales for the whole of the EMEA region including the UK and Germany.

11.4 The Managing Director of a small Asia region resigned in 2014 and the Claimant assumed management of that smaller Asia sales function (not including Australia/New Zealand).

11.5 In March 2014 and October 2014 the Respondent acquired two additional companies and set up a separate business unit for Germany, Austria and Switzerland, separate from the EMEA business unit.

11.6 In May 2015 the Respondent acquired a business in Italy and this resulted in Italy becoming a standalone business unit separate from EMEA.

11.7 In February 2015 Mr McKenzie (Claimant's line manager) left the organisation. He was not replaced and his direct reports, including the Claimant, then reported directly into Mr Wallace (Chief Operating Officer).

11.8 In June 2015 it was decided that operations in Russia were no longer financially viable and were discontinued.

12 These changes meant that over a period of time, the sales region remaining under the Claimant's management had diminished. In August 2014 the Claimant had 12 direct reports. By August 2015 he had only 6 direct reports.

13 On 17 April 2015 Mr Onkar Mahil (Finance Director) sent an email to Mr Wallace as follows:

From: Onkar Mahil
Sent: 17 April 2015
To: Craig Wallace
Subject: EMEA DD : My opinion
Attachments: EMEA SALES DD.XLSX

Hi Craig
Hope your flight wasn't too bad. This email can wait, so if you're tired, leave it til tomorrow.
Attached is the latest file with "Asia" reviewed and updated by Nick. The balance of the numbers have not changed.
I want to take this opportunity, in strictest confidence (excluding Steve as he may ask me), to give you my opinion on what actions I would take. This is my view so has my bias and needs to be considered with your higher/strategic perspective.
In addition to Mike Whitehouse and one UK TSSC guy, I would also consider:

(a) Removing Jorge completely – He is a firewall between us and Telefonica and I think he adds no value ($30k)
(b) Remove Arnaud (TSSC) in France as soon as practical ($135)
(c) Shut down Russia and lose both heads there ($290k)
(d) Move ME and Africa (Richard Buckham) to work under Gary
(e) After a few months, let go of Nigel from the UK Direct business and move Andy from TSSC Manager and make him "Sales Director" for DIRECT business with Simon Adnett as TSSC support ($120k)
(f) Move the remaining UK TSSC guys under Gary so that we have one UK Channel sales PL
(g) Review India for 2016 plan and look to make a decision in Aug/Sept this year
(h) Remove Tony from UK Marketing by end of Q3 ($110k)
(i) Either transfer Jonny from UK marketing to Geoff's area (Salesforce specialist), or look to remove ($85k)
(j) If Italy gets partitioned off, the balance of ASIA moves to Dean and CCSP sales becomes a global function, then consider letting go of Nick. ($350k)

This will mean you will have a NE MD, a DACH MD, an ITALIAN MD. UK SALES DIRECTOR as ANDY/GARY and a UK / GLOBAL CCSP SERVICES Director in Paul. Jeremy will end up looking after a team of 3 marketing people, as Astrid will be either under a German PL. or gone if Ralf doesn't want her. Jeremy could help with marketing strategy for the other regions if the other MDs want to pay for a share of him.

This seems like a big retraction from market, but this should get the PLs to be profitable with a strong presence in the UK market. The profit this would generate, could go straight back into developing the UK market or we can look at expansion plans in other markets as separate business cases with a full risk analysis and delivery plan, not just spend and hope. Again, this is just my opinion and can be ignored in its entirety.
Regards
Onkar Mahil

14 The reference to "Nick" in paragraph (j) above is a reference to the Claimant.

Redundancy Situation

15 Mr Wallace decided that in view of the reduction in the number of the Claimant's direct reports, his role was no longer sustainable and was to be made redundant. A meeting with the Claimant was proposed for July 2015 but had to be postponed to 10 August 2015 due to other commitments. Mr Wallace had another commitment in California on that day and he therefore handed over the responsibility for dealing with the Claimant to Mr Farar.

16 Mr Farar and Ms Niru Subramanian (HR Director) met with the Claimant on 10 August 2015. This was the first consultation meeting and it was the first the Claimant had heard of the possibility of redundancy. Following the meeting, Mr Farar sent a letter dated 10 August 2015 to the Claimant which included the following:

Dear Nick

Announcement

I write further to the restructure announcement of the EMEA/Asia Sales Team within Enghouse Interactive which took place today, Monday, 10 August 2015, and to confirm our first consultation discussion which took place today.

The Company has changed the way it structures its business and operations since you were appointed as VP Sales for EMEA and Asia last year. This is due to several factors including a number of acquisitions in the EMEA region. We have had to assess whether the current organisation structure will continue to support our business, and we have made the difficult decision to propose a restructure amongst the EMEA and Asia Sales team, which may result in a proposed redundancy. Our proposal is as follows:

We can no longer sustain the position of VP Sales, EMEA and Asia, as the business going forward does not require such a role. This is due to:

- *the acquisitions that have taken place which have resulted in Sales staff for DACH and Italy reporting directly to local managing directors rather than the VP Sales, EMEA and Asia.*
- *reduction in headcount over the last year within sales in the region; and*
- *lower than forecast revenues in the entire region*

The small number of remaining roles that currently report into you will report directly into Craig Wallace as the Chief Operating Officer (COO) for the Company. As you are the only individual affected, there is no pool and you are therefore at risk of redundancy.

I explained to you that we will go into individual consultation, in accordance with our legal obligations, and you will be given the right to be accompanied to the consultation meetings. We would envisage that this individual consultation process will take approximately 5 days. …

Niru explained to you that we have looked across the UK business and can confirm that we do not have any roles that we regard as suitable alternative work. Niru gave you a list of the current open vacancies and you confirmed that you were not interested in applying for any of these. Niru also confirmed that we have considered alternative ways of working but have not found any such solutions. She asked you if you had any ideas for alternative ways of working and you confirmed that you did not. …

I would like to invite you to your second consultation meeting where we would like to hear any suggestions that you may have for avoiding redundancy. It is also an opportunity for you to ask any questions, or raise any concerns. We will also explore any opportunities for suitable alternative employment within the Company….

17 The Claimant was told that the Respondent could not identify any suitable alternative employment for him although he was provided with a list of current vacancies, all of which were more junior roles, and he confirmed that he was not interested in any of them. The Claimant was also provided with a schedule of payments he would receive if his employment was terminated as a result of the redundancy.

18 On 17 August 2015 the Claimant wrote a response to Mr Farar in which he challenged the validity of the redundancy and his potential dismissal as a result of it. The letter included the following:

I write in response to the announcement and first consultation meeting held on Monday 10th August and the letter of the same date given to me in follow up of that meeting.

The proposed redundancy of my position is a poorly disguised construct to get rid of me and avoid paying me commission on the significant deals in the offing. To that end I am surprised, shocked and extremely disappointed after the service I have given Enghouse and CosmoCom over the last 5 years. This is farcical.…

It is ill-thought-out and simply not sustainable; it's a sham. There will have to be other restructures in the coming months. Why is this so rushed? Why haven't alternatives been discussed with me? As I said in Monday's meeting, Mr Wallace gave me reassurances in our 1-1 meeting in Reading on Monday 13th July, of which I have a record, that the acquisitions and resultant restructures should not make me worry about my position, that I would be OK. Was he lying? What has changed in less than one month? …

Alternative roles / ways of working: I am surprised and disappointed that no alternatives have been discussed with me before the proposal of redundancy was put forward, especially given the need of the business to make the best use of its resources, protect its investment in people and retain their goodwill. I can only assume that the powers that be simply want me out of the way.

There are a number of potential alternatives, all of which address real business needs for which Enghouse Interactive needs fixes and all of which need due consideration (or evidence that they have already been properly considered and ruled out):

- *Head up the UK entity*
- *Form and lead a global or pan-regional dedicated CC-SP*
- *Form and lead a global channel sales team*
- *Form and lead a global or regional business development team*
- *Microsoft Alliance management*
- *Provide a customer-facing focus for the acquisition team and hand-hold the development of the entities in the "Enghouse way"*
- *Retain as VP of sales for the remaining businesses ….*

It dawned on me that I am paying for having agreed to be a character witness for Mr McKenzie at the time of his dismissal. Am I victim number three to rid the organisation of Ian McKenzie and his cronies? By such association, and

borne out by Mr Black's comments, I am wrongly regarded as not desirable to retain within the business.

I remember that Martin Bird, someone for whom I have little respect I have to say, was made redundant with scant regard to the proper process. The passage of his responsibilities to me had been discussed with me in advance. He had been put in a pool of one, like myself, and there was an interim restructure, but less than 12 months after that we have someone doing the same role for the UK, managing both the direct and indirect business. He's better than Martin and a worthy hire, but I contend that there is a pattern here. Will Jeremy Payne be next? …

Grievance

By this letter and in accordance with the Enghouse Grievance Procedure (March 2015) I submit the following grievances:

1) *That Onkar Mahil has taken too long to resolve my commission queries. …*
2) *That Onkar Mahil has stood in the way of our being able to receive orders from ePLDT that should have come in a Fiscal Q3 and certainly before my consultation period ends, thus denying me a commission payment for the same. …*
3) *That this process is being managed to prevent me from taking advantage of future stock options vetting. As I am not leaving voluntarily, I should be allowed to retain my stock options.*
4) *That I am being managed out of the business with no sound justification. That this is a campaign to remove me to avoid paying me commission … That I am being unfairly targeted, possibly because of a perceived association with or likeness in style to Mr Iain McKenzie. …*

My proposed termination is an orchestrated removal on fabricated grounds. …

In summary, this is not a genuine redundancy, I am being victimised and this process is a device to get rid of me; as such it is a potential unfair dismissal claim or breach of contract. …

19 A second consultation meeting took place on 17 August 2015 attended by the Claimant and Mr Farar. Ms Alicia McAloon (HR Administrator) was present to take notes. There was discussion of those matters which had been raised by the Claimant in his letter referred to above, and Mr Farar subsequently wrote to

the Claimant with a summary of the discussions. He confirmed that he would investigate whether the seven roles suggested by the Claimant were contemplated in the organisation and might be viable alternatives to redundancy.

20 On 17 August 2015 Mr Farar sent an email to Mr Wallace summarising the meeting that day which included the following:

From: Dennis Farar
Sent: 17 August 2015 12:23
To: Craig Wallace
Subject: Redundancy Proceeding
Attachments: N Applegarth – Data Subject Access Request 17.08.15.pdf; N Applegarth Request based on UK law.

We had our second consult today. Nick has put considerable time and effort into a letter and grievance that he prepared for this meeting. I have attached Nick's full write up and a Data Subject Access Request based on UK law.

… However, what we need to on the redundancy proceeding next steps is to respond to his alternative roles he has suggested. I need to understand whether we have any expectations of filling the following type of roles and whether Nick would be a candidate for them.

... The roles are summarised from his letter as follows:

1. *Managing Director for the UK Business Unit (on peer with DACH, ITALY, NORDICS, ANZ, etc)*
2. *CCSP Global Sales MD (counterpart to Paul Sarin's Global CCS CS/PS role)*
3. *Global or Pan European+ Channel Sales Director*
4. *Business Development Director – Pan European+*
5. *Business Development Director – Microsoft Alliance*
6. *Acquisition Integration Director*
7. *Continue in his current role just supporting the remaining 6-7 direct reports he has currently as he doesn't think it is feasible to add these folks to Craig's existing direct reports.*

Nick understands that none of these roles are currently being recruited for. Having proposed these options he feels that we'll be limited in or ability to fill these roles within the reasonable future without including him for consideration now. He sees that these are roles that Enghouse really needs to fill that he wants to be considered for them as go forward alternatives. If we are not

contemplating these types of roles, please so indicate and I will tell him that we are not filling them currently and he therefore can't be considered for them. …

21 Also on 17 August 2015 Mr Farar conducted a Skype conversation with Mr Wallace to discuss the Claimant's position and the contents of his letter of that date.

22 On 19 August 2015 Mr Farar and Ms Subramanian held a further meeting with the Claimant. It was described as a final redundancy consultation meeting and a grievance hearing.

Dismissal

23 The grievances regarding commission payments were not related to the redundancy situation and were dealt with separately. The other grievances regarding future stock options and being managed out of the business with no formal justification to avoid paying commission and being targeted due to a perceived association or likeness with a previous managing director were dealt with as part of the redundancy consultation. None of the grievances were upheld.

24 The outcome was confirmed in a letter dated 20 August 2015 from Mr Farar which included the following:

Dear Nick

Grievance Hearing and Final Redundancy Consultation Meeting

I write further to your grievance hearing and the final redundancy consultation meeting which took place on 19 August 2015, at 14.00. I chaired the meeting and Niru Subramanian, HR Director, was present to take notes. As agreed prior to the meeting in an email dated 19 August, and in accordance with your request, at the meeting, we discussed and responded to your grievance before we held the redundancy consultation. …

… This is a genuine redundancy based on a necessary restructure for the Business. Considerable thought was given to this restructure before the announcement was made to you. The Company's response to your comments follow.

a. *You state that it is not possible for Mr Wallace, COO to manage your remaining direct reports as this creates an unreasonable span of control. … There are no plans to consolidate these reporting lines in the way that you suggest in your letter and thus, there is no-one else in the redundancy pool.*

b. *Alternative roles. … We discussed these at length with Mr Wallace and can confirm that these roles do not exist. While the roles you have brought up may be good ideas that we can consider in the future, we are not currently contemplating the existence of such roles now or within any near term.*

c. *Your contention that the redundancy proceeding is a contrived event to manage you out of the business due to a perceived affinity toward Iain McKenzie notwithstanding, we affirmatively restate that this is a genuine redundancy situation due to an undisputed outcome of recent acquisition strategy and resulting new business units along with recurring financial difficulties and other business changes…*

d. *You state that the statutory redundancy payment made to you is an insult and you would expect some enhancement. … Enghouse only pays the minimum statutory payments in a redundancy situation. This is not punitive nor insulting. …*

… You asked whether we thought the original timescale of five days for redundancy consultation was reasonable. … after you expressed concern as to the timing, we accommodated your time needs for a longer timeframe for the consultation process to complete. …

During your final consultation meeting, I told you that we have looked across the Company to identify any suitable alternative work and alternative working solutions. There have been no suitable alternative roles or any alternative work solutions identified. I confirmed that no additional opportunities have become available since our last consultation meeting. You confirmed that you had no further suggestions for suitable alternative work or alternative working solutions.

As the consultation period has now come to an end, I am writing to confirm that your redundancy has now been confirmed and your employment will be terminated on the grounds of redundancy. This letter is to confirm that the effective date of your redundancy is 19 August 2015. This is also your termination date with the Company.

Appeal

25 On 22 August 2015 the Claimant presented a written appeal against the decision to dismiss. The appeal repeated the issues raised in his letter of 17 August 2015.

26 An appeal meeting chaired by Mr Bartle was held on 27 August 2015 and the Claimant attended unaccompanied.

27 In a letter dated 3 September 2015 Mr Bartle confirmed the appeal had been unsuccessful and upheld the decision to dismiss.

RELEVANT LAW

Unfair Dismissal – Employment Rights Act 1996

28 *Section 94. The right.*

(1) An employee has the right not to be unfairly dismissed by his employer.

29 *Section 98. General.*

(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) –

i. 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

ii. shall be determined in accordance with equity and the substantial merits of the case.

30 *Section 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) …

(b) The fact that the requirements of the 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.

Case Law

31 In Williams & Others v Compare Maxam Ltd [1982] ICR 156, the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. They were as follows:-

- 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.

32 In Polkey v AE Dayton Services Ltd [1988] ICR 142, the House of Lords said that an employer will not normally act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by deployment with his own organisation.

33 In Capita Hartshead v Byard [2012] UKEAT/0445/11 redundancy cases were reviewed and applicable principles were set out where the issue in an unfair dismissal claim is whether an employee has selected a correct pool of candidates who are candidates for redundancy:

(a) It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted (per Browne-Wilkinson J in Williams v Compare Maxam Ltd [1982] IRLR 83, 18;

(b) The courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn (per Judge Reid QC in Hendy Banks City Print Ltd v Fairbrother and Others (UKEAT/0691/04/TM);

(c) There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem (per Mummery J in Taymech v Ryan [1994] EAT/663/94;

(d) The Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has 'genuinely applied' his mind to the issue of who should be in the pool for consideration for redundancy; and that

(e) [Even] if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it.

34 Wrexham Golf Co Ltd v Ingham (UKEAT/0190/12/RN) - there will be cases where it is reasonable to focus upon a single employee without developing a pool or even considering the development of a pool.

35 Ultimately, the fairness of a decision to dismiss for redundancy must be assessed against the range of reasonable responses.

DECISION

Redundancy situation

36 Up to two weeks before the start of this hearing the Claimant conceded that there was a redundancy situation and that this was a potentially fair reason for the Claimant's dismissal. By the start of the hearing that had been amended to:

"It is accepted by the Claimant that there was a diminished requirement for senior management in the EMEA area and that this potentially led to a redundancy situation affecting senior management."

37 The Claimant's case was that the redundancy was a sham and that the process was "reverse engineered" as a means of removing him from the company. It was asserted that the Claimant had fallen into disfavour with Mr Wallace who had taken an increasingly distant and antagonistic approach towards him and that was because he was too much like Mr McKenzie who had left the Respondent in February 2015. Mr McKenzie gave evidence on behalf of the Claimant to the effect that he had been instructed by the Chief Executive and the Chief Operating Officer in June 2014 to "engineer" a redundancy situation in respect of Mr Martin Bird and that, in accordance with the instruction, he had done so. The Claimant suggested that the Respondent therefore had a proven record of engineering redundancy situations to get rid of employees who had fallen into disfavour. It was also alleged that the proposal that the Claimant's line reports would report to Mr Wallace upon his dismissal were untrue and in fact it was an interim arrangement and they were thereafter reporting to other managers.

38 In the Claimant's closing submission regarding the matter of redundancy, it was said as follows:

"d. Most significantly, it is now plain that C's role was not in fact redundant at all. R's requirement for an employee to carry out the relevant work – namely a senior leadership role for sales in EMEA – was plainly not diminished, or in any event not diminished to the extent that a single member of staff carrying out that role was no longer required. It is now incontrovertible that Andy Clune ('AC'), formerly VP for Technical Sales, was moved to and carried out C's role within a couple of months of C's dismissal."

39 If that was factually correct it would be a redundancy situation. The employer had reorganised and distributed work such that there was a diminished requirement for a senior manager in the EMEA area. It was not in dispute that following the Claimant's dismissal, the senior management headcount had reduced by one. The Claimant's direct reports and his duties had been redistributed among existing employees. No-one was brought in from outside to carry out his, or any other role. That was a classic redundancy situation.

40 Mr McKenzie's evidence was challenged by the Respondent. It was not in dispute that he was due to be the subject of disciplinary action and possible dismissal for his conduct in the case of Mr Bird but eventually left the Respondent's employment by way of an agreement. His credibility was

therefore challenged as being someone who had a grudge against the Respondent. It was clear, however, that even taking his evidence at its highest, he had left the company in February 2015 and could only refer to past events involving other employees. Other than what the Claimant may have told him, he had no direct personal knowledge of the circumstances of the redundancy which gave rise to the Claimant's dismissal, nor the circumstances of the Claimant's dismissal itself.

41 The Claimant relied upon his own impression that Mr Wallace became distant and antagonistic towards him but provided no evidence of direct animosity towards him which would support his conspiracy theory. His suggestion that the redundancy and his dismissal were commercially and economically unviable were disputed by the Respondent during the course of the consultation period and during the course of the Tribunal hearing.

42 In this case it was clear that the Respondent regarded the redundancy and the Claimant's dismissal as commercially required and justified. Tribunals are not at liberty to investigate commercial and economic reasons behind a redundancy decision. A Tribunal is entitled only to ask whether the decision to make a post redundant was genuine, not whether it was wise. Here I was satisfied that there was a redundancy situation based upon sufficient and proper information set out in the letter to the Claimant dated 10 August 2015.

43 Although the Claimant asserted that the redundancy was a sham and there was a "conspiracy" to remove him, in evidential terms, it never proceeded beyond being just a theory.

44 I find that there was a genuine redundancy situation in August 2015 and that redundancy was the reason for the Claimant's dismissal.

Fairness

45 The Claimant claimed that, even if there was a genuine redundancy situation, the circumstances in which his dismissal was executed was unfair. It was said there was no clear or declared plan upon which the Claimant could be consulted, that there was no consultation with the Claimant at a formative stage of the process and that by the time the Respondent began consulting with the Claimant, it had already been determined that his role was to be made redundant. He was only notified of the decision at the first consultation meeting on 10 August 2015 and the only matter upon which he was consulted was whether he had any proposals for suitable alternative employment. His seven alternative suggestions merited only a nine minute Skype call between Mr Farar and Mr Wallace and there was no evidence that the decision

makers, Mr Wallace and Mr Farar, gave any genuine consideration to alternative means of achieving the Respondent's economic aims.

46 It was also submitted that there was no consideration regarding pooling, and that the Claimant should have been pooled with Mr Andy Clune and Mr Christoph Mosing. It was said that no later than October 2015, that is shortly after the Claimant's dismissal, Mr Clune was given the title of VP Cloud Sales and Business Development EMEA which was effectively to carry out the same role as the Claimant had performed and that therefore the Claimant should have been considered alongside Mr Clune for that role.

47 I do not find that it was unfair that the Claimant was not involved in the decision to make his role redundant. That was a managerial decision made at the highest level by the CEO and COO. They had a global overview of the business and they were entitled to decide, without consulting others, that a particular post was no longer required. Once that decision had been made, the reasons for it were set out in detail in the letter dated 10 August 2015 and the Claimant was consulted about his own position following on from that decision.

48 I was satisfied that the Respondent had genuinely applied its mind to a possibility of a pool but had discounted that option due to the absence of other comparable roles. Mr Farar in his evidence confirmed that he had discussed with Ms Subramanian the possibility of a pool, although those conversations were not documented.

49 The Claimant accepted that at his level, there was no-one else who, like him, performed only a sales role. No-one else did purely sales. Additionally, the question of pooling was raised at the outset of the consultation process in Mr Farar's letter: *"As you are the only individual affected, there is no pool and you are therefore at risk of redundancy".* The Claimant did not raise the issue of a pool until the appeal hearing and then he suggested the possibility of being pooled with Michael Stubbing (Managing Director for the Nordics) but appears to have accepted that their roles were not similar at all.

50 So far as Mr Clune and Mr Mosing were concerned, the Respondent provided extensive evidence of their roles and the differences with the Claimant's role.

51 Mr Clune said that he and the Claimant were peers but had different remits. His role was highly technical, analysing and advising on the integration of products with customers' infrastructure and its functionality. The Claimant's role was sales. He would have come to Mr Clune and his team for technical input and professional services, pricing and estimations because the Claimant

did not have such skills himself. He said that as part of the reorganisation which resulted in the redundancy and the Claimant's dismissal, he was tasked with generating licensed sales revenues for Cloud products from existing customers in EMEA by using technical skills, investigate why the existing revenue stream was not as good as it should have been and developing solutions to address this. He said the emphasis was to be on solving the technical bottlenecks to the business success and he was tasked with business development being driven from a technical bias rather than a purely sales focus. He said that the Claimant would not have had the necessary skillset to perform that role. The Claimant did not dispute that Mr Clune had a superior technical skillset compared to his own. Mr Clune said that the new role, although the title appeared similar to that of the Claimant's previous role, was not the same functionally, based as it was upon his technical experience and expertise.

52 The Respondent produced an extract of a covert audio recording made by Mr Arnoud Dumas DeRauly (a former contractor of the Respondent) at a meeting held on 9 December 2015 in Paris at which Mr Clune's new role was described to a customer. Mr DeRauly did not attend the Tribunal to give evidence and the context of the recorded conversation was challenged by the Respondent. The extract was at odds with the accounts given by Mr Farar and Mr Clune who did attend the Tribunal to give evidence on oath. I accepted their accounts which were detailed and authoritative based upon their own knowledge. I found that Mr Clune's new role was as he had described and was not the same as the Claimant's old role nor was it a suitable role for which the Claimant should have been considered.

53 So far as Mr Mosing was concerned, he was President Direct Business Americas. It was clear from the various organisational structure diagrams presented that he was senior to the Claimant. After the Claimant's departure, a new Cloud business unit was created, which Mr Mosing took on. At the time of the redundancy his remit was wider than the Claimant's role, including sales, marketing, customer services professional services and research and development for the North American area. He was responsible for a headcount of 95 staff compared to the Claimant's 19 staff. The Claimant had control of sales in his region, but his sales peer in North America reported to Mr Mosing. Mr Mosing would not have been an obvious or appropriate pool member alongside the Claimant.

54 In these circumstances it was reasonable for the Respondent to conclude that a pool was not appropriate or necessary.

55 Although the initial consultation period was intended to be very short (5 days) it was extended at the request of the Claimant. There were three meetings and the Claimant was given an opportunity to suggest alternative roles, which he did at length, in writing, on 17 August 2015 and made proposals regarding seven possible new roles.

56 The recording of the Skype meeting between Mr Farar and Mr Wallace lasted only nine minutes, but it was clear that Mr Wallace had sent a copy of the Claimant's letter to Mr Wallace, so he was aware of the full extent of the Claimant's suggestions, and that was accompanied by Mr Farar's summary of those suggestions. The Respondent provided evidence to support their position that none of the Claimant's suggestions were roles that the Respondent wished or intended to implement in the near future.

57 I was satisfied that there was a sufficiently meaningful consultation with the Claimant regarding his position in consequence of the redundancy situation.

58 I was also satisfied that the Respondent gave due consideration to the possibility of alternative employment. The junior roles immediately available were unsurprisingly rejected by the Claimant. The Claimant suggested new roles which were considered and discounted. The role which was later performed by Mr Clune was not a suitable role for the Claimant to perform in view of the technical skills required.

59 It is not the function of the Tribunal to determine whether it might have been fairer for the Respondent to have acted in a different way. The question is whether the Claimant's dismissal lay within the range of conduct which a reasonable employer could have adopted.

60 I found that the dismissal was by reason of redundancy. It was within the range of reasonable responses and it was not unfair.

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Employment Judge Vowles

Dated 14 March 2017

Sent to the parties on

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for the Secretary to the Tribunals