THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mr Marko Kondic	**AND**	**EDMI Europe Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **North Shields** **On: 14, 15 & 16 December 2016**

Before: **Employment Judge A M Buchanan (sitting alone)**

Appearances

For the Claimant: **In person**
For the Respondent: **Mr David Robinson-Young of Counsel**

RESERVED JUDGMENT

1 It is the judgment of the Tribunal that the claimant was unfairly dismissed.

2 The respondent is ordered to pay to the claimant £18,219.04 by way of compensation for unfair dismissal. This comprises a basic award of £479.00 and a compensatory award of £17,740.04

3 The Employment Tribunals (Recoupment of Benefits) Regulations 1996 apply to this award and the information required by regulation 4(3) is as follows:-

(a) the monetary award: £18,219.04.

(b) the amount of the prescribed element if any: £11,836.24.

(c) the date of the period to which the prescribed element is attributable: 3 June 2016-3 March 2017.

(d) the amount if any by which the monetary award exceeds the prescribed amount: £6,382.80.

4 The respondent is ordered to pay to the claimant the fee paid by the claimant to issue these proceedings and the hearing fee totalling £1,200.

5 The total sum due from the respondent to the claimant is £19,419.04

REASONS

Preliminary matters

1 By a claim form filed on 3 September 2016 the claimant brought a claim against the respondent for unfair dismissal. The claimant relied on an Early Conciliation Certificate on which Day A was shown as 20 July 2016 and Day B 9 August 2016.

2 By a response filed on 3 October 2016 the respondent denied all liability to the claimant.

3 The matter was listed for a one day hearing but on joint application of the parties the hearing was extended to three days.

4 Difficulties arose in respect of disclosure of documentation and a Telephone Private Preliminary Hearing was held before Employment Judge Garnon on 27 October 2016 at which various orders were made including an order that the claimant was permitted not to disclose documents relating to efforts to find alternative work prior to the hearing. Various orders which had been included in a letter from the Tribunal to the parties dated 5 September 2016 were varied.

Witnesses

5 In the course of the hearing I heard from the following witnesses:-

Respondent

5.1 Alan Masterman ("AM") - General Manager of the respondent company.

5.2 Willem Hoogers ("WH") – Finance Director of the respondent company.

5.3 Catherine O'Sullivan ("CS") – Head of HR of the respondent company.

5.4 Cathryn Cook ("CC") – Senior HR Consultant with RSM – an independent HR consultancy.

In this Judgment, the above mentioned witnesses are referred to by the initials which appear above next to their respective names.

Claimant

5.5 Samuel James Golightly – a former employee of the respondent company and colleague of the claimant.

5.6 The claimant.

Documents

6 I had before me a bundle of documents extending to some 413 pages. I have made reference in the course of my deliberations to those documents to which I was referred in witness statements or during the course of the hearing. Any reference in this Judgment to a page number is a reference to the relevant page within the agreed bundle.

The issues

7 At the start of the hearing issues were agreed with the parties and are now as follows:-

7.1 What was the reason for the dismissal of the claimant and in particular:-

7.1.1 Was the reason for dismissal that a redundancy situation existed?

7.1.2 Was the redundancy situation a sham?

7.1.3 Is the definition of redundancy in section 139 of the Employment Rights Act 1996 ("the 1996 Act") fulfilled?

7.2 If the reason for dismissal is established by the respondent as being redundancy, then the questions posed by section 98(4) of the 1996 Act fall to be considered and so did the respondent act reasonably in treating redundancy as sufficient to dismiss the claimant and in particular:-

7.2.1 Was it reasonable to include the claimant in a pool of one?

7.2.2 Did the respondent apply its mind to the question set out in paragraph 7.2.1?

7.2.3 Was it reasonable not to include the claimant in a pool with other employees and in particular was it reasonable not to apply the concept of bumping other employees?

7.2.4 If so, did the respondent act reasonably in warning the claimant of the redundancy situation?

7.2.5 If so, did the respondent reasonably consult with the claimant and in particular was any consultation process genuine or a process which was predetermined and so a sham?

7.2.6 Did the respondent give reasonable consideration to finding alternative employment for the claimant?

7.3 If the dismissal was unfair has that unfairness made any difference to the outcome – the so called **Polkey –v- A E Dayton Services Limited [1988] ICR 142** issue?

7.4 If the dismissal is unfair, did the claimant contribute to the dismissal by his culpable or blameworthy conduct?

Findings of fact

8. Having considered the evidence both oral and documentary and in particular the way in which evidence was given to me and the cross-examination of the witnesses, I make the following findings of fact on the balance of probabilities:-

8.1 The claimant was born on 12 May 1975. The claimant was made an offer of employment by the respondent company on 6 February 2013 as Senior Manager Smart Implementations – Europe (page 61-62). The role was expressed to be a newly created role whereby the claimant was to be technical lead in respect of the development and implementation of end to end solutions to meet the needs of the respondent's customers. A contract was issued to the claimant on the same day (pages 63-83) in which (page 68) the claimant's role was described as "*Senior Manager Smart Implementations – Europe"* and in which (page 70) the claimant's normal place of work was described as being in Newcastle upon Tyne but with a "*large and long term element of work abroad*"... The claimant's initial salary was £95,000 per annum gross which by the time of his dismissal had risen to £98,832 per annum gross. The claimant began his employment with the respondent on 17 June 2013.

8.2 The respondent company is a company which is a leading "Smart" meter solution provider and its work includes designing, developing and manufacturing energy meters and metering systems. The respondent is the European arm of a much larger global company which has its headquarters in Singapore. The manufacturing base is in Asia but the respondent company itself deals with the European operation which includes the whole of Europe and the United Kingdom. The respondent company has a multi-million annual turnover and its administrative resources are large.

8.3 At the time of the events which led to the dismissal of the claimant, the respondent company had offices in Edinburgh, Newcastle upon Tyne and Reading. The office in Edinburgh dealt with a gas metering programme which had run into some difficulty and indeed that office was closed as part of a review undertaken by AM shortly after his appointment as General Manager. The Newcastle office dealt with support for what was known as SMETS1. This was the first version of a Smart meter which was being developed by the respondent and its parent company. The claimant was brought onboard in 2013 to provide technical assistance to that project. The head office of the respondent company was based in Reading and that site was where the central accounting and human resources departments were based. The office at Reading also housed the research and development project into what was know at SMETS2. This was a project which was designed effectively to replace the SMETS1 meter and was a project into which many millions of pounds had been invested with a view to creating a

Smart meter for the UK market which could be installed in the majority of domestic properties to enable readings of gas and electricity consumption to be uploaded automatically to the energy companies without involvement of meter readings and the like. It is a highly technical area.

8.4 By 2015 the respondent company was in some difficulty. The gas metering project based in Edinburgh was found not to be fit for purpose. The claimant had had great difficulty in obtaining sufficient support for the SMETS1 project. Much of the work in relation to SMETS1 was carried out in Australia and there was difficulty in obtaining necessary information from Australia to enable the work in Newcastle to proceed smoothly. There was also conflict between the Newcastle office and the Reading office in relation to funding of SMETS1 and SMETS2. The parent company based in Singapore was concerned about the performance of the respondent company and those concerns increased when the general manager of the respondent company, David Stroud, resigned in March 2016.

8.5 As a result of that resignation the directors of the parent company How New Seng (Chief Operating Officer) and Lee Kwang Mong (Chief Executive Officer ("CEO")) headhunted AM to come into the respondent company and effectively sort it out. His brief was quickly to turn around the administrative problems in the respondent company and to provide to the parent company a proper profit and loss assessment which had hitherto been lacking.

8.6 The claimant began his duties in 2013 and by 2015 he had effectively completed his technical work on the SMETS1 project and it was agreed with the then General Manager David Stroud that he should focus his attention on the European Market and in particular sales of SMETS1 meters in Europe. In April 2015 the claimant transferred the majority of the staff who reported to him to another colleague, Michelle Wright, and from that time on the claimant mainly was based at home with much travel involved to customers and potential customers and partners in Europe. The claimant enjoyed direct access to the Group CEO Mr Lee Kwan Mong in Singapore and other Singapore based Directors. By the time of the events which led to the claimant's dismissal the claimant had four members of staff reporting to him, Boris Pracek – Sales Manager Contractor based in Slovenia, Mihael Hribar – Product Manager Contractor based in Slovenia, Lionel Yeong – Account Manager and Support based in Newcastle and Sam Golightly – Firmware Development Lead who worked on a part time basis and was based in Newcastle.

8.7 At the end of March 2016 the claimant was contacted by Directors in Singapore to discuss the resignation of David Stroud as General Manager of the respondent company and it was agreed that pending the appointment of AM the claimant would report and communicate through Anthony Campion who at that time was in charge of UK sales.

8.8 I find that an organisational chart (page 191) dated 12 May 2016 effectively reflected the position when AM came into post at the end of March 2016 with the claimant being shown as "Head of Technical Services" reporting to Anthony Campion. That organisational chart did not however reflect the actual work being carried out by the claimant at that time as he was effectively dealing with European sales. I find that the organisational chart at page 192 was being worked on at the time the claimant was

being dismissed and was issued some three weeks after his dismissal on 3 June 2016. That draft structure chart showed at least 11 posts marked "TBH" – to be hired. This chart was not shown to the claimant at any time prior to his dismissal.

8.9 AM came into post in late March 2016. He had spent some days in the company prior to that assessing the situation and he did not like what he found. He found an organisation which he deemed to be without proper structure. Together with the also newly appointed Finance Director WH, he set about assessing the viability of the respondent company and the strength or otherwise of its internal organisation. Initially AM thought to transfer the operations of the respondent to the Reading office but on further review, AM decided that it was more appropriate to base all functions of the company (other than research and development) in Newcastle for that was a more cost effective option. AM put plans in place to achieve that result and to have the Reading office used for research and development functions particularly in relation to SMETS2 and in relation to a government contract being managed from that office which was mainly involved in research and development.

8.10 The claimant's perception of his seniority in the Newcastle office was not shared by AM and his colleagues on the review which took place in March/April 2016. AM had a chart prepared showing the responsibilities of various people within the respondent and that chart was described as "middle managers" and the claimant was described as such. The claimant did not see that chart prior to these proceedings but that clearly reflected how he was perceived by AM. The claimant perceived himself as being a senior manager and indeed a member of the senior management team at the Newcastle office.

8.11 AM came into post and immediately decided to bring into the respondent company two other people who were known to him from previous organisations and who had worked with him. These two individuals came into the respondent company at various times in April and May 2016 and effectively took over aspects of some roles which were being carried out by others at that time but the titular positions which they filled were new. The two individuals were Mike Wong and Manuel Alvarez who between them had experience of so called pre- integration testing ("PIT") and systems integration testing ("SIT") which was lacking within the respondent company. They began work with the respondent company as self-employed contractors.

8.12 Whilst bringing in additional staff at a higher level to the respondent company, AM carried out his review. He concluded that the structure of the respondent company required change and he was also greatly concerned about sales to the European market on which the claimant had concentrated his efforts in the previous twelve months. There had been no meaningful sales in the European market in that whole period and AM quickly concluded that the product being offered to that market, namely SMETS1, was not a product which was suited to the Eastern European market. The demand in that market area was for a low cost and low quality meter and SMETS1 did not meet that description.

8.13 As part of his review AM visited the Newcastle office on 12 April 2016. He had asked CS to organise for him to meet people in groups of four and he gave each of them a presentation and then asked and answered questions. The claimant did not wish to see AM on a group basis and requested a one to one meeting and this was

accommodated. The claimant welcomed AM and was optimistic that he would bring to the respondent company much needed structure and direction. However, the meeting was not wholly successful because I find at the end of the meeting AM was critical of what he had heard about the claimant and told him that he had heard that the claimant was not a team player and that he had bridges to rebuild and that he would have to relinquish control over Europe. AM told the claimant that he did not mediate between two senior managers of a senior management team but that they could both go. AM told the claimant that once he had made up his mind he rarely changed it. Ostensibly the meeting ended on a friendly basis but the claimant's concerns were already raised in relation to his position. I conclude that he was right to be concerned. I also find that at that meeting the claimant did tell AM that he had no relevant skills in respect of PIT and SIT.

8.14 The review of AM continued throughout April 2016 and in particular the claimant was made aware that Manuel Alvarez was to join the respondent in order to run a project in Reading and his job title was ultimately decided and announced as being Products Manager for EDMI Europe. Products management was an area where the claimant was largely involved and he felt his own position threatened by this appointment.

8.15 AM and Manuel Alvarez visited the Newcastle office on 11 and 12 May 2016 and the claimant sought a meeting with Manuel Alvarez to explain to him the current background and activities of the respondent in Europe. The claimant had no contact with AM during that two day visit and in particular did not accept an invitation to go out for dinner with members of the management team. Between 13 and 17 May 2015, meetings took place between AM and CS and WH and other senior managers when decisions were taken as to the roles to be placed at risk of redundancy. These were important meetings and CS made notes of them. The notes were not before me and it is said they cannot be located. The records of the respondent were poor: the claimant's job description was not held on his personnel file and thus was never considered at all during the ensuing redundancy consultation process. In the redundancy process the respondent did not trouble to keep notes of any meetings with the claimant. The claimant produced some notes and these were agreed by the respondent but the respondent did not know in advance of the meetings that the claimant was going to take notes. Had the claimant not done so, there would have been no notes of any of the so called consultation meetings.

8.16 The next event of significance was on 18 May 2016 when AM sent out an announcement by e-mail to the company (page 193) which read:-

"*… the business structure needs to adapt and go through a period of change. As a result of this we will be undertaking a full review of the roles within the company and what sites these roles are carried out at in order to make sure the staffing model reflects where the company needs to be to move forward. We anticipate that the review is likely to result in some staff being made redundant. We will contact you individually by close of business Friday, 20 May if you role has been identified as being at risk of redundancy. We are fully aware of our consultation obligations in respect of any staff who are at risk of redundancy and will carry out a full consultation with staff accordingly. We are committed to minimising the number of redundancies that arise as a result of this restructuring and appreciate your professionalism during this transition*".

8.17 The claimant saw the writing on the wall and he was right because on the following day he received from the HR department of the respondent an e-mail on 19 May 2016 (page 194) advising him that "*we would like to arrange an individual meeting with you to discuss your provisional selection for redundancy"* at 10:30am on the following day. Although the letter did not say so, the respondent had decided that the claimant was in a pool of one in relation to the redundancy exercise. In his evidence to me WM stated: *"From my review of the business, it was clear that there was no one else doing the same type of work as the claimant at his level".*

8.18 By this time five posts at the Newcastle office had been identified as being at risk of redundancy of which the claimant's was the most senior. A so called consultation meeting with the claimant took place on 20 May 2016 in person with Alexandra Hatcher (HR advisor) and WH the new Finance Director. This was a very short meeting in which the consultation process was explained and it was indicated that a follow up meeting would take place the following week and that a final outcome meeting would likely take place on 3 June 2016. A letter was handed to the claimant (page 197) informing him that his role as Head of Technical Services was at risk of redundancy and giving the claimant details of eight roles which were vacant within the company at that time. It is common ground that only two of those roles were of any relevance of interest to the claimant namely a Sales Account Manager (New Business Gas) and a Sales Account Manager. In the event the claimant did not request details of any of those roles and none were provided. On 24 May 2016 an email was sent to managers in the company (page 198) introducing Manuel Alvarez as Head of Product Management and asking the managers to gather a list of the products and projects on which they were working and put developments on hold pending confirmation those projects were still required. The rationale for this request was that "*we are in the process of consolidating our sales and product strategy for Europe as a part of the recent management changes up here".* The claimant was not copied into this message.

8.19 The next meeting in the process took place on 26 May 2016. It had been scheduled to begin by telephone with the claimant at 9:00am but it was delayed starting until 9:23am. CS and WH attended by telephone from Reading and the claimant and his witness Sam Golightly were present in Newcastle. Notes were not kept of the meeting by the respondent but the claimant kept notes and submitted them to the respondent for agreement and they were agreed. The notes appear at pages 201-204 and indicate that the meeting lasted 26 minutes. The claimant asked which part of his job description was being made redundant and he was told that the whole job was being made redundant. It was confirmed that no other members of senior management faced redundancy. The claimant asked to see the new organisation chart for the company and was told that he could not do so as it was a "*work in progress".* When the claimant asked for confirmation of what the respondent considered his present duties were and what were his skills and experience, the reply given was "*We'll get back to you on that".* The claimant asked about the newly created role of Head of Product Management and Operations Director which had recently been filled. CS replied to him "*Head of Product Management is a newly created role which we recruited externally, not advertised, to bring the right people in to stabilise the business".*

8.20 By this time the claimant had effectively concluded that he was going to be made redundant and nothing that he could say about the matter was going to alter that

position. He considered the matter to have been predetermined. He had been provided with no information in respect of the new structure of the respondent company and nothing upon which he could effectively comment as to where his skill set might be put to use. He entered into a consultation process effectively with one hand tied behind his back. This was compounded by the fact that the claimant had had difficulty accessing his computer system and indeed he could not do so from 11 May 2016 onwards which he attributed to further evidence of a predetermined decision that he was to be dismissed. In fact, I find that that was not so but nonetheless that was the impression left with the claimant.

8.21 In the meeting on 26 May 2016 the claimant asked various questions many of which were answered to the effect that the respondent's representatives would need to check and get back to the claimant. The claimant ended the meeting by asking to be pooled in relation to the proposed redundancy with AM, the Technical Director and the Head of Product Management.

8.22 On 27 May 2016 Anthony Campion drafted a letter (page 205) to be sent out to customers giving an indication that the respondent company was in the process of a major transition and would be opening a new office in Europe within the coming six months, moving headquarters from Reading to Newcastle and basing all research and development from that point onwards in Reading.

8.23 Being dissatisfied with the process to date, the claimant raised a formal grievance (pages 207-209) on 28 May 2016. The letter raised six specific grievances. The first grievance related to the conduct of AM towards the claimant at the meeting on 12 April 2016 for which the claimant asked for a "*formal written apology".* The second grievance alleged unprofessional bullying behaviour on the part of AM at the meeting on 12 April 2016 and requested that it be investigated in accordance with the respondent's policies. The third grievance requested that individuals who had been spreading malicious rumours about the claimant should be brought to a formal hearing, the fourth grievance related to the claimant's exclusion from senior management team meetings, the fifth grievance related to the appointment of people since the arrival of AM into roles which the claimant himself could have carried out and the fact that such appointments had been made in breach of the respondent's own policies and in particular the Equal Opportunities Policy. The sixth grievance effectively commented that the consultation process then ongoing was no more than window dressing and would lead inexorably to the claimant's dismissal.

8.24 On 1 June 2016 (pages 210-212) the claimant received a reply to the questions which he had raised at the meeting on 26 May 2016. The second question he had asked related to whether the new organisational model of the company had been worked out and the claimant was told on 1 June 2016 that: "*the new organisational model is still under review and discussion to be released in a couple of weeks. We are moving all the development functions to Reading".*
At question 12 the claimant had asked which part of his job description was being made redundant and the replied given was:
"Entire technical function is moving to Reading. This means that any technical based riles such as yours will no longer be required in Newcastle. In addition to this we do not currently anticipate a need for a standalone Technical Services function as you perform, as this can be added responsibilities to other roles".

At question 13, the claimant asked to see the job description which the respondent had used to determine that his role was redundant and the reply was:
"*There is no job description however our review is based on the functions you carry out on a day to day basis*".
At question 19 the claimant had asked the respondent to identify his skills and expertise and the reply was:
"*Clarification your role is no longer required in Newcastle and doubtful this is required in Reading. You have a stand alone role and if the Senior Team decide there is no requirement in the business this would be redundant*".

8.25 On 3 June 2016 the claimant had a final meeting with CS again by telephone. Alexandra Hatcher was also present. It was a very brief meeting in which it was confirmed that the claimant had been selected for redundancy because there were no technical roles to be based in Newcastle and he was told that he had not provided any details of any skills that he may have and which the respondent might have missed and that the respondent did not have any job description for the claimant. The claimant was advised formally that he was being made redundant.

8.26 The dismissal was confirmed to the claimant by writing on 3 June 2016 (pages 216-217) and the claimant was paid his redundancy payment of £958, outstanding holiday pay of £5512.12 and payment in lieu of notice of £24,709.50 being twelve weeks' pay. All payments were expressed as gross payments but were to be paid net of income tax and national insurance contributions.

8.27 The claimant appealed by e-mail of 6 June 2016 (page 218) on the basis that his role as Head of Technical Services was not one he had carried out for over a year but that he had been focused on business development throughout continental Europe and secondly he should have been pooled with other senior managers whose roles and he had the qualifications and experience to carry out.

8.28 The claimant was invited to an appeal hearing on 29 June 2016. Given that there was no senior manager in the respondent company who had not been involved at the dismissal stage, the respondent decided that external consultants should be employed to deal with the appeal and CC was appointed for that purpose.

8.29 The same organisation was appointed also to deal with the claimant's grievance of 28 May 2016 and a grievance meeting was arranged for 29 June 2016 with a different officer of RSM UK Limited namely Anita Hutchinson.

8.30 The appeal against dismissal took place by conference call for 50 minutes on 29 June 2016 with the claimant being accompanied by Sam Golightly and CC being accompanied by Ashleigh Lake as a note taker. The claimant made the point that it had transferred responsibilities in relation to technical matters to Michelle Wright in 2015 and advanced his case for being pooled with other senior managers.

8.31 The grievance hearing took place on that same day and lasted two hours and the claimant set out his points of grievance in detail.

8.32 The grievance was thoroughly investigated and five witnesses from the respondent company were interviewed by Anita Atkinson. AM was interviewed on 9 June 2016 by

CM in relation to the grievance (pages 328-329) and during that meeting he commented:
"It is not our job to hand out operational organisation charts before they are signed off. Once the structure is communicated to the company, people will have this and this will then be communicated to customer – this exercise is not due to be finished until 23 June".
Michelle Wright was interviewed on 22 July 2016 and during that interview she accepted that the organisational charts for the business were only issued after the claimant had left the business namely some "*two or three weeks ago".*
Subsequently AM was interviewed by Anita Hutchinson and during that meeting AM accepted (page 338) that he had never had a conversation with the claimant about sales in Europe as he did not consider that to be the claimant's role: he considered the claimant to be the "*technical lead".*
The resulting report (pages 361-386) included a conclusion at point 4 (page 383) to the effect that the claimant was not part of the Senior Management Team when AM took over in April 2016 but rather part of the Middle Management Team. It is noted that there was no communication with the claimant in relation to his role in Europe and continues: *"It was more widely known at this point that MK had been undertaking activity within Europe and it would have been courteous to have informed MK of the review process. There is no evidence of a deliberate act of exclusion".*
The resulting report did not uphold any of the claimant's grievances.

8.33 The claimant's appeal against dismissal was not upheld and that decision was communicated by letter dated 15 July 2016 (pages 299-301). Both grounds of appeal were dismissed - the first ground of appeal being dismissed in the following terms: "*The Company fulfilled its legal obligation in holding a consultation with you regarding the proposed redundancy of your role as Head of Technical Services. During the consultation period you were given an opportunity to put forward proposals to avoid redundancy, in consideration of your skills and experience in the Company. You did not propose any alternatives and failed to engage with the Company in relation to this at all during the consultation period".*

8.34 The number of employees at the time the claimant was made redundant was 14 in Newcastle and some 180 in Reading. After the redundancy exercise, a reorganisation process followed resulting in there being 25 employees in Newcastle and 110 in Reading. When the claimant was made redundant, there were 11 employees put at risk of redundancy, 4 in Newcastle and 7 in Reading. The claimant was one of the 4 people put at risk in Newcastle and the most senior member of the company by far. Of the 11 put at risk, all 11 were dismissed as redundant. The respondent does not have a formal redundancy policy.

8.35 In July 2015 – some three months after the claimant had changed the emphasis of his role from SMETS1 to European sales - there had been a proposal to put roles at risk of redundancy. Four roles were identified including that of the claimant. However, the proposal was not approved by the directors of the parent company in Singapore and thus the proposal was scrapped. In his new role the claimant had direct access to and frequent contact with the senior managers of the parent company in Singapore. The claimant had been identified to CS in July 2015 as a trouble maker by the then managing director David Stroud.

Submissions

9 Claimant

9.1 The claimant produced written submissions to me which are held on the Tribunal file - the final version of which document extended to six pages. The claimant made submissions in respect of each of the identified issues and I considered those submissions in detail. The claimant supplemented the written submissions with oral submissions. I summarise the submissions briefly.

9.2 There was no documentary evidence to support the existence of a redundancy situation. More contractors were brought into the senior management team.

9.3 The claimant submitted that he had been targeted by AM for redundancy and that AM had concluded that the claimant's role was redundant without carrying out any proper analysis of the situation. CS had confirmed as head of HR that she was not involved in any discussions about possible redundancies prior to acting on the instruction of AM. Michelle Wright had taken over the duties of the claimant in relation to SMETS1 in April 2015 but her role was never placed at risk of redundancy. The claimant submitted his duties in relation to sales in Europe had not diminished and in fact were taken up by Manuel Alvarez who worked for the respondent as a contractor.

9.4 The claimant submitted it was not reasonable to consider him in a pool of one: it was unreasonable for the respondent not to include Michelle Wright in a pool with him and the claimant asserted he did possess skills in relation to SMETS2 which the respondent had failed to specify and investigate.

9.5 The claimant submitted that the respondent's approach to bumping namely that it was unfair was an unreasonable position to adopt. This was particularly so in relation to Manuel Alvarez who was only put into the role of Head of Product Management a matter of days before the redundancies were announced which led to the claimant's dismissal.

9.6 It was submitted that the head of HR claimed under cross examination that she knew the claimant's role was at risk in 2015 when she joined the respondent and yet no warning was given and no steps were taken to preserve the claimant's position by freezing recruitment in 2015.

9.7 The claimant submitted that the consultation process was predetermined and a sham. In addition no reasonable consideration was given to finding alternative employment for the claimant. The organisational charts produced by the respondent during the hearing were not available at the time of the consultation and no consideration was given to inviting the claimant to move to Reading or elsewhere in the global organisation of which the respondent was part.

9.8 The claimant submitted that a fair procedure would surely have resulted in a post for him in the respondent organisation given his breadth of experience, 3 years' service with the respondent and exemplary employment record. The claimant contended that he had not contributed to his dismissal by culpable or blameworthy conduct as he did not

have appropriate information from the respondent to which to respond at any time during the process.

10 **Respondent**

10.1 On behalf of the respondent Mr Robinson-Young made written submissions which he supplemented orally. I summarise the submissions briefly.

10.2 It was submitted that whilst the process which had been undertaken by the respondent could have been done better at times it was nonetheless a reasonable process and the claimant should not succeed.

10.3 It was submitted that a review of the respondent company took place and it was determined that the role carried out by the claimant would disappear and the functions would be absorbed by staff in the Reading office. The claimant had been sent a list of vacant posts in the respondent company which included the post of Sales Account Manager which could be based from any location in the UK and carried a salary of £75000 per annum plus commission. The claimant did not apply for that role and acted unreasonably in not doing so. The appeal against dismissal lodged by the claimant was taken by CC but was not successful as the claimant did not engage in the consultation process and the pool he suggested was not considered feasible. The claimant had not engaged in the consultation process at all.

10.4 It was submitted that the claimant had contributed significantly to his dismissal by refusing to impart any information or suggestions which could have assisted in avoiding his dismissal. This should be reflected in any compensatory award to which the claimant may be entitled.

10.5 It was submitted that the pool suggested by the claimant was unreasonable and that so long as the employer had genuinely applied its collective mind to that question, it was not for the claimant to challenge the decision to place the claimant in a pool of one. Reference was made to the decision in **Taymech –v- Ryan EAT/663/94**.

10.6 It was submitted that if it was deemed the dismissal was procedurally unfair then an assessment should be made as to whether a fair dismissal could and would have taken place. That might involve a further period of time in which to complete a fair process which might include preparation of completed organisational charts. Reference was made to the guidance in **Contract Bottling –v- Anor UKEAT/0100/14/DM**

10.7 In oral submissions reference was made to the decision in **Robinson –v- British Island Airways Limited 1978 ICR 304** and the necessity to look at the situation as a whole to determine whether the respondent has established redundancy as the reason for dismissal. It was submitted that there was clearly a reorganisation which led to redundancies in this case namely 4 in Newcastle and the rest in Reading.

The Law

Claim for Ordinary Unfair Dismissal Sections 94-98 (inclusive) Employment Rights Act 1996 ("the 1996 Act")

11.1 I have reminded myself of the definition of redundancy found in section 139 of the 1996 Act:

"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".

11.2 I have reminded myself of the provisions of section 98 of the 1996 Act which read:

"*98(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 in 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) The reason falls within this subsection if it – …

(c) is that the employee was redundant

(4) In any other case 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 reasons 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".

11.3 I have reminded myself of the words of Judge Clark in **Safeways Stores plc –v- Burrell 1997 IRLR 200 ("Burrell")** and in so doing it has noted section 139 of the 1996 Act is the provision which has replaced section 81 to which reference is made:
"Free of authority, we understand the statutory framework of s.81(2)(b) to involve a three-stage process:
(1) was the employee dismissed? If so,
(2) had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish? If so,
(3) was the dismissal of the employee (the applicant before the industrial tribunal) caused wholly or mainly by the state of affairs identified at stage 2 above?"

11.4 I have further noted the guidance given by Lord Irvine of Lairg in **Murray –v- Foyle Meats 1999 ICR 827 ("Murray")** on the meaning of "redundancy":

"*My Lords, the language of paragraph (b) is in my view simplicity itself. It asks two questions of fact. The first is whether one or other of various states of economic affairs exists. In this case, the relevant one is whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second question is whether the dismissal is attributable, wholly or mainly, to that state of affairs. This is a question of causation. In the present case, the Tribunal found as a fact that the requirements of the business for employees to work in the slaughter hall had diminished. Secondly, they found that that state of affairs had led to the appellants being dismissed. That, in my opinion, is the end of the matter. This conclusion is in accordance with the analysis of the statutory provisions by Judge Peter Clark in Safeway Stores Plc. v. Burrell 1997 IRLR 200 and I need to say no more than that I entirely agree with his admirably clear reasoning and conclusions".*

11.5 I have reminded myself of the decision of the EAT in **Taymech Limited –v- Ryan 1994 UKEAT/663/**94 and the guidance of Mummery J in respect of the pool from which to select candidates for redundancy:

"In our view, …….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 the problem".

11.6 I have reminded myself of the decision in **Contract Bottling Limited –v- Cave and McNaughton UKEAT/0525/12/DM** and the guidance of Judge Richardson on the so called two stage test set out in **Murray** (above):

*Applying the two-stage test laid down in **Murray**, the first question for the Tribunal was whether there was a diminution in the requirements of the business for employees to carry out work of a particular kind. As a general rule, employers who are considering redundancies tend to look individually at the different kinds of work they have within the business: it is then easy to see that there is a diminution in the requirement of the business for employees to carry out work of a particular kind. But it no doubt sometimes occurs that there is a diminution in the requirements of the business for employees to carry out work of several kinds. Such a state of affairs is capable of satisfying the first stage in the **Murray** approach*

11.7 I have reminded myself of the words of Lord Bridge in **Polkey –v- AE Dayton Services Limited 1988 ICR 142 ("Polkey"):**

"In the case of redundancy, the 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 redeployment within his own organisation".

11.8 I have reminded myself of the guidance on the meaning of consultation provided by Glidewell LJ in **R-v- British Coal Corporation ex parte Price 1994 IRLR 72 ("Price"):**

"It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in R v Gwent County Council ex parte Bryant*, reported, as far as I know, only at [1988] Crown Office Digest p.19, when he said:*
'Fair consultation means:
(a) consultation when the proposals are still at a formative stage;
(b) adequate information on which to respond;
(c) adequate time in which to respond;
(d) conscientious consideration by an authority of the response to consultation.'
Another way of putting the point more shortly is that fair consultation involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely".

11.9 I have also reminded myself of the decision in **Mugford-v- Midland Bank plc 1997 IRLR 208 ("Mugford")** and the guidance of Judge Peter Clark on the question of consultation:
(1) Where no consultation about redundancy has taken place with either the trade union or the employee the dismissal will normally be unfair, unless the industrial tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.
(2) Consultation with the trade union over selection criteria does not of itself release the employer from considering with the employee individually his being identified for redundancy.
(3) It will be a question of fact and degree for the industrial tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy".

11.10 I have considered the difference between a redundancy situation and a reorganisation of a business. I note that it is sometimes difficult to differentiate the two situations. I note the EAT stated in **Corus and Regal Hotels plc –v- Wilkinson 0102/03:** "E*ach case involving consideration of the question whether a business reorganisation has resulted in a redundancy situation must be decided on its own*

particular facts. The mere fact of reorganisation is not in itself conclusive of redundancy, or, conversely, of an absence of redundancy". It is crucial to consider whether a reorganisation entails a reduction in the number of employees doing work of a particular kind as opposed to the redistribution of the same work amongst different employees whose numbers remain the same.

11.10 I have reminded myself of the provisions of Section 123 of the 1996 Act in relation to the fact that compensation must be 'just and equitable' and have reminded myself of the decision in **Polkey –v – A E Dayton Service Limited 1988 ICR142** and the guidance given by Elias J in **Software 2000 Limited –v- Andrews 2007 ICR825/EAT** where it was stated:-

"The following principles emerge from these cases:
(1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.
(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).
(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.
(4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.
(5) An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.
*(6)The s.98A(2) and **Polkey** exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a Tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.*
(7) Having considered the evidence, the Tribunal may determine
(a)That if fair procedures had been complied with, the employer has satisfied it – the onus being firmly on the employer – that on the balance of probabilities the dismissal

would have occurred when it did in any event. The dismissal is then fair by virtue of s.98A(2).
(b)That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly.
(c)That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the ***O'Donoghue*** *case.*
(d) Employment would have continued indefinitely.
(8) However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored".
I recognise that this guidance is outdated so far as reference to section 98A(2) of the 1996 Act is concerned but otherwise holds good.

11.11 I have reminded myself of the guidance from Langstaff P in **Hill –v- Governing Body of Great Tey Primary School 2013 IRLR 274** in respect of the so called Polkey assessment:

"A "Polkey deduction" has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. Although Ms Darwin at one point in her submissions submitted the question was what a hypothetical fair employer would have done, she accepted on reflection this was not the test: the Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand".

11.12 I remind myself that in considering an assertion that a dismissal is by reason of redundancy, there is no need for an employer to show an economic justification or business case for the decision to make redundancies.

Conclusions

Reason for dismissal: Issues 7.1.1 - 7.1.3

12.1 I have first considered whether the respondent has established the reason for the dismissal of the claimant falling within section 98(1) or 98(2) of the 1996 Act. The reason advanced by the respondent was redundancy. On the other hand, the claimant asserted that the reason was not redundancy but rather that he had been targeted for dismissal because AM had received poor reports about the claimant and he had determined that the claimant should be dismissed and that the redundancy process was merely a cover for that decision: in other words the redundancy was a sham. I remind myself that it is for the respondent to prove the reason for dismissal on the balance of probabilities.

12.2 Since the law on the meaning of redundancy was clarified in the **Burrell** and **Murray** decisions (paragraphs 11.3 and 11.4 above), it is easier to establish that the reason for a dismissal was redundancy. Before that clarification there would have been a necessity to look at the contract of the claimant and also to examine the functions being carried out by the claimant at the time of his dismissal. With the clarification in **Murray** that is no longer so and I have to consider the three questions posed in that case.

12.3 I have had concerns over this matter. However, having carefully reviewed and assessed in particular the evidence of AM, I am satisfied that the requirements of the respondent for employees to carry out technical work in Newcastle in relation to SMETS1 had diminished at the time of the dismissal of the claimant. I am also satisfied that the focus of sales for the respondent company was to move from Eastern Europe to Western Europe and the United Kingdom and thus that the requirement for employees to carry out that particular type of selling work was expected to diminish. Thus I can answer the first two questions in **Burrell** in the affirmative and move onto the crucial third question – was the dismissal of the claimant caused wholly or mainly by that diminution?

12.4 I am satisfied on balance that the dismissal was principally caused by the diminution in the requirements of the respondent for employees to carry out work of that particular kind. I am satisfied on balance that the claimant would not have faced dismissal when he did but for the diminution. I am satisfied that AM and WH had concluded that the claimant carried out technical work which was no longer required in Newcastle. This conclusion had been reached by virtue of the review undertaken by AM and I am satisfied that that was the principal reason for the claimant's dismissal. I am not satisfied that it was the only reason for dismissal but I am satisfied that redundancy was the principal reason. It is clear that the meeting between the claimant and AM on 12 April 2016 was not a cordial meeting and I infer that AM had received reports about the claimant's attitude and personality to which he took exception and which led him to look carefully at the claimant's position. The claimant was not perceived to be a team player and none of those matters commended him to AM. I conclude that AM and WH used the redundancy situation which presented itself to them to target the claimant for dismissal but I am satisfied that they would not have done so when they did had there not been a redundancy situation. There was no appreciation on the part of AM or WH that the claimant was in fact no longer involved in technical services but that is a matter which goes to the reasonableness of what followed rather than the reason for dismissal itself. I am satisfied the claimant was dismissed principally by reason of redundancy and that the respondent has therefore proved the reason for dismissal.

Section 98(4) of the 1996 Act: Issues 7.2.1 – 7.2.6

12.5 I remind myself again that when considering the relevant matters raised by section 98(4) of the 1996 Act that I must not substitute my own view but I must consider what the respondent did from the objective standpoint of the reasonable employer: only if no reasonable employer would have acted as the respondent did can the dismissal be categorised as unfair within the 1996 Act.

12.6 I conclude that the review carried out principally by AM in the period from mid April to mid May 2016 had led AM to conclude that the SMETS1 project in Newcastle was no longer required and that SMETS2 was to be fully developed and brought on as the way to safeguard the future of the respondent company. There was an assumption made that the claimant alone provided technical support for SMETS1 and as that technical support was no longer to be required, the claimant found himself in a pool of one. That conclusion was incorrect. I find that it was incorrect because by that point the claimant had been undertaking selling responsibilities in Europe for over 12 months but this was not a matter which the respondent had any knowledge of as the so called consultation process continued. Furthermore, there were other employees engaged in providing technical support for SMETS1 namely Michelle Wright and her team but they were not considered for inclusion in the pool of one in which the claimant found himself. No reasonable employer would construct a pool for redundancy purposes with that level of error and misinformation.

12.7 I find that the conclusion that the claimant should be in a pool of one was the conclusion WH wished to reach as he had decided that the claimant was to go even before the redundancy process began. He had received poor reports of the claimant even before he met him for the first time on 12 April 2016. That meeting did not go well and confirmed AM in the view he had already reached that the claimant was to go. Nothing that happened over the ensuing four weeks altered that position and thus when the announcement was made about redundancies on 18 May 2016, the claimant received a letter on the following day (paragraph 8.17 above) inviting him to discuss **his** provisional selection for redundancy as opposed to the position he held: a small error but a meaningful one in the circumstances of this case. No reasonable employer would have approached a decision to make an employee redundant as AM and the respondent did in relation to the claimant and that is sufficient to render the dismissal of the claimant unfair.

12.8 The consultation process which began on 19 May 2016 and ended on 3 June 2016 was not a process which any reasonable employer would have carried out. On the face of it the procedure followed was reasonable but in the circumstances of this case it was not. The decision to dismiss the claimant as redundant was preordained and what followed over the two week period was window dressing. I reach this conclusion for several reasons. First, there was a lack of documentation provided to me to evidence the rationale of the respondent for acting as it did. Secondly, CS in giving evidence to me was patently uncomfortable, as well she might be, for I infer that she knew she had come to the Tribunal to seek to justify a process which was preordained and for which she could not produce any of the documentation which a reasonable employer would have been able to produce to evidence the rationale for the redundancy and the ensuing consultation and search for alternative employment. The respondent kept no notes whatever of the meetings with the claimant. Thirdly, the respondent could produce no minutes of discussions showing the thought processes of the respondent to establish a pool of one and so select the claimant for redundancy. CS told me she had kept some notes of the crucial meetings of the senior directors in May 2016 (paragraph 8.15 above) but had not produced them and they were said to be unavailable. It was said that AM had produced a new structure chart showing the roles for senior and middle managers after his review in April/May 2016 but CS had been told not to produce it to the claimant in the consultation period ending in June 2016 and that same document

was not before me. No reasonable employer would enter on a consultation process with a decision already taken as this respondent did.

12.9 The claimant entered into the consultation process effectively with one hand tied behind his back. The respondent had created a structure plan for the senior and middle managers arising out of the AM review but that document was not shown by the respondent to the claimant and so the claimant did not know the roles which might have been available to him and effectively could not make any meaningful contribution to the so called consultation process. The process was characterised by inadequate information being provided and considered. I refer to the guidance on consultation in **Price** referred to at paragraph 11.8 above. Consultation with the claimant should have been at a formative stage, adequate information should have been provided to the claimant to allow him to consider if there were roles he could carry out and there should have been conscientious consideration of the claimant's views by the respondent. There was a comprehensive failure to follow that guidance in the circumstances of this case and those are not the actions of any reasonable employer. Furthermore there was a failure by the respondent to properly inform itself of the actual role being carried out by the claimant in the 12 months prior to the redundancy process and a failure to consider his job description and indeed take any account of his numerous skills and lengthy industry experience. No reasonable employer would have approached a redundancy exercise lacking such readily available and important information.

12.10 The consultation process which was entered into was not meaningful and bore all the hall marks of window dressing. The first and third meetings were mere formalities and the crucial second meeting was conducted by telephone and basically comprised the claimant asking a series of questions many of which CS and WH could not answer and promising to revert to the claimant with the answers: they did so but less than 48 hours before the redundancy dismissal was confirmed. To conduct meetings by telephone is not of itself unreasonable, but when seen with all the other factors in this case, it reinforces my conclusion that the decision to dismiss the claimant was preordained.

12.11 Some eight vacancies were notified to the claimant at the start of the so called consultation process but the claimant did not engage with any of them (only two were even remotely suitable) because he had rightly concluded by that stage that he was engaged in a process which was leading only to one preordained conclusion namely his dismissal. The approach of the respondent thus meant that possible alternative posts were not given proper consideration. The responsibility for that lies squarely at the door of the respondent and no reasonable employer would so conduct itself.

12.12 It follows that the dismissal of the claimant was unfair and the claimant is entitled to a remedy.

Contributory conduct – Issue 7.4

12.13 I was asked to conclude that the claimant contributed to his dismissal by culpable and blameworthy conduct by failing to enter into consultation.

12.14 I reject that submission for the reasons I have already explained. The impression given to the claimant even before the redundancy process began was that he was

facing dismissal. That impression was confirmed as the so called consultation process began and proceeded to its preordained conclusion. The claimant had rightly seen the process as window dressing and that nothing he could say was going to alter the decision which had already been taken. By failing to consider the two roles which were notified to him and engaging with the respondent, I do not consider the claimant was acting culpably or in a blameworthy way.

12.15 There will be no reduction from remedy by reason of contributory conduct.

The Polkey question – Issue 7.3

12.16 I have considered the so called **Polkey** question. This is not an easy exercise but it is one which must be carried out using common sense, experience and sense of justice. Has the unreasonable process followed by the respondent in this case in fact made any difference? Or would the claimant have faced dismissal in any event? Could this respondent have dismissed the claimant fairly after a fair process?

12.17 The new structure for senior and middle managers was completed by AM in early June 2016. Without the information I conclude that the claimant could not have been fairly dismissed for that would underpin any reasonable consultation process. I conclude that once that information was issued, there would be a period of four weeks before there can be any question of a fair dismissal. Accordingly I propose to allow four weeks compensation effectively to bring the claimant to the end of June 2016 before there is any chance of a fair dismissal.

12.18 What then is the prospect of a fair dismissal thereafter? I have concluded that the chances of the claimant being fairly dismissed for redundancy if proper consultation had taken place are high. I reach that conclusion because a decision had been taken that European sales on which the claimant had been involved for the period of 12 months or so prior to his dismissal were to be put on hold for some 12 to 18 months. Whilst it is true that this decision had not been taken at the point of the claimant's dismissal, it was taken fairly shortly after that and that would have exposed the claimant to a real risk of fair redundancy.

12.19 The claimant is highly skilled and joined the respondent company initially to give highly technical and specialised advice to the SMETS1 project. I am satisfied that the SMETS1 project is a very different animal to the SMETS2 project which the respondent had decided to push ahead with by committing to more research and development at its Reading office. The claimant might have been able to find a role at Reading but that would have meant uprooting his young family from Durham to Reading or a long weekly commute. However, the claimant did not have skills in SMETS2 and would have had to acquire them. Thus the claimant would not have been well placed to find a role in Reading and may not have wanted one. The respondent clearly needed employees there who were ready and able to begin or continue work on that project immediately.

12.20 I found the evidence of AM in respect of the decision he had taken to change the direction of the respondent company compelling. AM had been brought into the respondent company to sort it out and he had decided to concentrate on SMETS2 and PIT and SIT and the claimant was not skilled in those areas. Set against that, the claimant is highly qualified and intelligent and could have acquired skills.

12.21 Doing the best I can. I conclude that the there is only a 25% chance that the claimant would have avoided dismissal – put another way there is a 75% chance he would have faced a fair dismissal after the further period of 4 weeks to which I have referred at paragraph 12.17 above. I will calculate compensation on that basis.

13 **Remedy**

Findings of fact in respect of remedy

13.1 The claimant was paid £98,832 per annum at the date of his dismissal. This equates to the sum of £8,236 per month gross and £5,399 per month net. Expressed on a weekly basis this equates to £1,900.61 per week gross and £1,245.92 per week net.

13.2 In addition the claimant received from the respondent a 7% contribution each month to his pension. This represented a 7% contribution on gross earnings and over a 12 month period represented a payment of £6,918.24 which expressed monthly amounts to £576.52 and expressed weekly amounts to £133.04.

13.3 The claimant received no other benefits in kind.

13.4 The claimant was dismissed as from 3 June 2016 (pages 216-217). At the time of his dismissal the claimant was paid a redundancy payment wrongly calculated at £958. He was paid his salary for the month of May 2016 and his outstanding holiday entitlement. In addition the claimant was paid three months pay in lieu of notice which equated to £24,709.50 gross. I have considered whether the payment in lieu of notice to the claimant was paid gross or net of tax and national insurance. The document attached to the claimant's schedule of loss dated 19 September 2016 which was a pay statement received from the respondent dated 30 June 2016 shows a net payment to the claimant of £18,054.06. It is not clear to me what the pay adjustment of £7,096.06 referred to on that statement relates to but I am satisfied that the payment in lieu of notice of £24,709.50 gross was subjected to tax and national insurance and that the claimant received the 13 weeks' notice pay net of deductions.

Conclusions in respect of Remedy

14.1 The claimant expressed the wish to receive the remedy of compensation. Accordingly I will not consider any reemployment orders.

14.2 I have considered the question of the payment of a basic award for unfair dismissal. This falls to be calculated in accordance with section 119 of the 1996 Act read with section 97(2) of the 1996 Act. The effect of section 97(2) is to make the effective date of termination of the claimant's contract fall at the end of the period of statutory notice to which the claimant would have been entitled pursuant to section 86 of the 1996 Act. In the

circumstances of this case the claimant would have been entitled to two weeks statutory notice. Accordingly the position for the purposes of calculation of the basic award is that the claimant began employment with the respondent on 16 June 2013 and his contract ended on 3 June 2016. The claimant was aged 41 years at the time of dismissal. However, if two weeks statutory notice is added to the date of termination of 3 June 2016 that brings the date of termination artificially to 17 June 2016 which would mean the claimant had three years' service at point of dismissal. Accordingly the claimant is entitled to 3 x £479 which is the maximum amount of a week's pay for the purposes of the calculation of the basic award. That gives to the claimant an entitlement to a basic award of £1,437. From this must be deducted the amount of the redundancy payment which was paid to the claimant at the time of his dismissal namely £958. Accordingly there is due to the claimant by way of a basic award for unfair dismissal the sum of £479. I would point out that the calculation of the redundancy payment made to the claimant on 3 June 2016 was incorrect as it should have been £1,437. A redundancy payment falls to be calculated pursuant to section 162 of the 1996 Act but that has to be read with section 145(5) of the 1996 Act which also serves to extend the effective date of termination. However, as the claimant has now been awarded the basic award for unfair dismissal, nothing now turns on this error.

14.3 I am satisfied that the claimant has been in receipt of Jobseekers Allowance since the time of his dismissal and therefore the Employment Tribunals (Recoupment of Benefits) Regulations 1996 ("the 1996 Regulations") apply to this award and it is necessary therefore that I calculate compensation due to the claimant to the date of the promulgation of this decision namely 3 March 2017. That will be the prescribed element for the purposes of the 1996 Regulations. The remaining part of the compensatory award will be the non-prescribed element and the 1996 Regulations will not apply to that part of the compensatory award.

14.4 I conclude above that there is a chance that the claimant could have been fairly dismissed after a further period of four weeks from the date when he was actually dismissed. Accordingly I propose to allow full pay to the claimant for the period of four weeks, 3 June 2016-1July 2016. At a net weekly sum of £1,245.92 this gives a figure of £4,983.68. For the following 13 week period, namely from 1 July 2016 - 30 September 2016, there is no loss to the claimant because the claimant was paid 13 weeks net pay at the time of his dismissal and there can be no double recovery. Accordingly loss to the claimant begins again on 30 September 2016. The period from 30 September 2016 - 3 March 2017 is 22 weeks. At £1,245.92 per week net this gives a figure of compensation of £27,410.24 (namely 22 x £1245.92). If that sum is reduced by 75% (£20,577.68) it leaves a figure due to the claimant of £6,852.56.

14.5 I consider it right to award the claimant losses for 12 months from the date of his dismissal. There is no suggestion by the respondent that the

claimant has failed to mitigate his loss in any way. That concession was quite rightly made by Mr Robinson-Young given the evidence before the Tribunal. I consider that it will take the claimant 12 months before he finds alternative employment given the highly specialist nature of his work. He has made every effort to find work to date without success. I will therefore award compensation for the period 3 March 2017 – 3 June 2017 which is 12 months since the claimant was dismissed. The period from 3 March 2017 until 31 May 2017 is 13 weeks and at £1.245.92 per week this gives an award of £16,196.96. If that sum is reduced by 75% (£12,147.72), that leaves £4049.24 due to the claimant.

14.6 I propose to award loss of statutory rights of £500 and I propose to award the claimant 7% of his gross annual salary of £98,832 by way of compensation for the pension contribution which would have been made by the respondent to the claimant in the one year following his dismissal. 7% of £98,832 equates to £6,918.24. That gives a sum of £7,418.24 which if reduced by 75% (£5563.68) gives an amount of £1854.56 due to the claimant.

Compensation Table

15. I summarise the awards of compensation in the following table:

Basic award

3 x £479	£ 1,437.00
Less redundancy payment paid at dismissal	£ 958.00
Balance due to claimant -	£ 479.00 (A)

Compensatory award – prescribed element

3.6.2016-1.7.2016 4 weeks at full loss of £1,245.92 per week (no Polkey deduction)	£4,983.68
Period 1 July 2016-30 September 2016	No loss
30 September 2016-3 March 2017 – 22 weeks at £1,245.92 per week	£27,410.24
Less **Polkey** deduction of 75% in respect of the the period of loss from 30 September 2016 onwards namely 75% of £27,410.24	£20,557.68
Amount due to claimant	£ 6,852.56
Add full loss from 3 June 2016-1 July 2016	£ 4,983.68
	£11,836.24 (B)

Compensatory award - non prescribed element

Loss 3.3.2017-3.6.2017 – 13 weeks at £1,245.92	£16,196.96

Loss of statutory rights	£ 500.00
Loss of pension – 7% x £98.832	£ 6,918.24
Total	£23,615.20
Less 75%	£17.711.40
Amount due	£ 5,903.80 (C)

Summary

Basic award	£ 479.00 (A)
Compensatory award – prescribed element	£11,836.24 (B)
Compensatory award – non-prescribed element	£ 5,903.80 (C)
GRAND TOTAL	**£18,219.04**

25 **Fees**

The claimant has paid £1,200 fees in order to file this claim and obtain a hearing and it is right that the claimant should be awarded that sum to be paid by the respondent and I make that order pursuant to rule 78(1)(c) of schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

26 Accordingly the total sum due from the respondent to the claimant is £19419.04. The amount of £11836.24 is subject to potential recoupment as explained in the note attached to this Judgment. The balance of £7582.80 is due to the claimant forthwith.

EMPLOYMENT JUDGE A M BUCHANAN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 3 MARCH 2017

JUDGMENT SENT TO THE PARTIES ON

3 March 2017

AND ENTERED IN THE REGISTER

P Trewick

FOR THE TRIBUNAL