THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MORTON**

BETWEEN:

Mr A Sherlock **Claimant**

AND

Caci Ltd **Respondent**

ON: **12 June and 3 July 2018**

Appearances:

For the Claimant: **In person**

For the Respondent: **Ms S Berry (Counsel)**

JUDGMENT

1. The Claimant was fairly dismissed by the Respondent by reason of redundancy.
2. The Claimant's claim of breach of contract is dismissed on withdrawal by the Claimant

WRITTEN REASONS PRODUCED PURSUANT TO A REQUEST BY THE CLAIMANT

1. By a claim form presented on 14 November 2017 the Claimant, Mr Sherlock, presented to the Tribunal a claim of unfair dismissal arising from his dismissal for redundancy and a claim of breach of contract related to his notice pay. He withdrew his claim of breach of contract on the second day of the hearing, having

accepted that the Respondent had lawfully made deductions from his payment in lieu of notice in respect of tax due on the payment.

2. Mr Sherlock gave evidence on his own behalf at the hearing and the Respondent's evidence was given by David Ireland, Network Services Practice Manager with responsibility for the Utilities Practice in which the Claimant worked and the Claimant's line manager, Daniel Oosthuizen, Senior Vice President in that division and Mr Ireland's line manager and Alison Johnson, the Respondent's head of Human Resources. All the witnesses had produced written statements which I read before the start of the oral evidence and there was a bundle of documents containing 260 pages, including 12 pages that were added during the course of the hearing.

3. The hearing was originally listed for one day, but in order to allow time for the parties to make their submissions and for me to deliberate and reach a decision a second day was needed. After I delivered my oral judgment and reasons Mr Sherlock made enquiries about appealing against my decision and made a request for written reasons.

The relevant law

4. The relevant law is set out in s98 Employment Rights Act 1996 ("ERA"). The burden of proof is on the Respondent to show that it had a potentially fair reason to dismiss. In this case it was common ground that the Respondent's reason for dismissing the Claimant was redundancy, which is a potentially fair reason under s 98(2)(c). Section 98(4) ERA then provides that the question of whether the dismissal was fair or unfair involves considering whether, having regard to the reasons shown by the Respondent, in all the circumstances of the case, including the size and administrative resources of the Respondent's undertaking, the Respondent acted reasonably or unreasonably in treating the reason relied on as a sufficient reason for dismissing the Claimant. The question must be determined in accordance with equity and the substantial merits of the case.

5. The case of *Williams v Compair Maxam [1982] IRLR 83* establishes that the Tribunal must not, in reaching a decision on the reasonableness of the Respondent's decision to dismiss, substitute its own view as to what it would have done in the circumstances. Instead it must consider whether the Respondent's decision to dismiss "lay within the range of conduct which a reasonable employer could have adopted".

6. In a case in which a dismissal is found to be procedurally unfair consideration must also be given to the principles in the case of *Polkey v A E Dayton Services [1988] ICR 142* and if it appears that the Claimant would have been fairly dismissed in any event had a fair procedure been followed then any compensation awarded must be reduced to reflect the percentage chance of that being the case.

7. I was also referred to and took into consideration in reaching my decision various authorities, including *Capita Hartshead Ltd v Byard [2012] ICR 1256* which summarises the principles, particularly on the pool of one question, *Wrexham*

Golf Co Ltd v Ingham UKEAT/0190/12 and *Taymech v Ryan [1994] EAT/663/94.* In particular I have borne in mind the passage from Mummery J in Taymech v Ryan to the effect that:

> **"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 is defined is primarily a question 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".**

8. I am therefore concerned in this case with whether the approach that the Respondent took in dismissing the Claimant was one that a reasonable employer could have taken. This applies to both the identification of the pool for redundancy and the search for alternative employment, which are the specific matters about which the Claimant complains. As long as I am satisfied that the Respondent took an approach that was within the band of reasonable responses, it does not matter and is not relevant whether I would have adopted the same approach.

Findings of fact

9. I make the following findings of fact and reach the following conclusions based on the witness statements of the Claimant, Ms Johnson, Mr Oosthuizen and Mr Ireland, their oral evidence at the hearing and the documents.

10. The Respondent is part of an international technology services group employing approximately 800 employees across the UK. The Claimant was employed by the Respondent for just over three years as a project manager in Network Services which forms part of the Respondent's operations. There was a detailed description of the Respondent and how it operates in Mr Ireland's evidence and the Claimant does not take issue with that evidence. In summary, Network Services provides IT networking services, including supplying IT engineers on a project basis, to a wide range of commercial and public organisations. The division provides managed services, meaning that it charges for the time spent by its employees and contractors and the materials supplied and undertakes fixed price projects. It is divided into five practice units, of which one is Utilities. That division, of which Mr Ireland is the Practice Manager, services a range of clients in the utilities sector, including Centrica.

11. It was to Utilities that the Claimant was assigned when he started work for the Respondent in March 2014 as a project manager. He initially worked as a project manager (called by Centrica a "delivery manager") in the telephony and networks department at Centrica.

12. On 6 October 2016 he received a letter from Mr Ooosthuizen, which confirmed that that following a regrading exercise he had been graded as a "Level 4 Senior Project Manager 1". There were eight grades in total and the grading criteria were set out at pages 66 and 67. Matters taken into consideration were an individual's qualifications, level of work carried out and experience, which were then matched to the criteria. Details of the Respondent's personnel at that time and their respective grades were at page 68. The Claimant did not raise any concerns

about his grading at the time.

13. He remained with Centrica until November 2016 when Centrica asked the Respondent to remove him following a number of performance concerns. There were minutes of the meeting with Centrica, at which Mr Ireland was also present, at page 71. The Claimant did not complain about this process either at the time or during the Tribunal proceedings.

14. At the time of his dismissal the Claimant was part of what the Respondent refers to as the 'Bench', which it describes as a flexible housing of technical resource which enables it to respond to urgent customer demands quickly and effectively. He was first placed on the Bench after his assignment to Centrica came to an end in November 2016 and he was issued with the Bench Handbook (pages 41-49) on 22 November 2016. Individuals on the Bench had their normal pay and conditions maintained, even if they were not actively working for clients and generating revenue for the Respondent. Mr Ireland then arranged for the Claimant to be placed with Arqiva as a smart metering test engineer. Details of the role were at pages 50-52 and the Claimant was given training to enable him to do the work. He began in the role on 12 December 2016. It was not a Utilities project manager role, but no such roles were available at the time or in the pipeline and Mr Ireland considered that the Arqiva role would provide the Claimant with an opportunity to develop enhanced project related testing skills. The Claimant raised no objection to the assignment. His pay and conditions were maintained even though the client was paying the Respondent a lower daily rate for the Claimant's work.

15. On 17 March 2017 Arqiva notified the Respondent that it needed to reduce the number of the Respondent's employees working for it by 10 (page 73). The Claimant was one of the employees whose role was affected. The change would not take effect until 1 May 2017 as the Respondent's staff continued working for Arqiva during a notice period. Nevertheless on 20 March an announcement was sent to the business at large that the Claimant had been "added to Bench Manager" as he was likely to leave Arqiva at the end of April (page 74). A concern arose about the Claimant's performance at Arqiva during the notice period (pages 77-78). He was described by the manager at Arqiva as someone who always gave "the bare minimum" and that he expected more pro-activeness from someone in a project manager role. Mr Ireland considered that the role had nevertheless been appropriate as a way of keeping the Claimant profitably engaged.

16. By 5 June 2017 the Bench contained 27 individuals who were not actively assigned to projects (page 86). This was problematic given trading conditions, the pipeline of work and the prospects for profitability at the time. The document at page 81 showed that pre-tax profits had dropped by £56,000 from £614,000 to £558,000 in the previous quarter (April to June 2017) and the projections for the quarter July to September were poor. (In the event this was subsequently borne out by a drop in profit of £393,000 to £165,000 for that quarter, which was less than 50 per cent of the £400,000 target set by the business). In light of these conditions, the decision was made that redundancies would have to be made across the business as part of a cost cutting exercise, including on the Bench,

which represented an overhead to the business when individuals were not placed with clients. Nigel Coxon, operations manager (who was himself subsequently made redundant as part of that exercise) wrote to Ms Johnson and Julia Hale (Human Resources Officer) on 7 June (page 87). He confirmed that the business needed to:

> **"initiate a redundancy process as we do not have enough work for our project managers in the Enterprise sector.**
>
> **We have 2 subsets of project managers:**
> - **Service Provider (aka Telco) experience and skillset**
> - **Enterprise**
>
> **We have 1 Enterprise PM on the bench, Ambrose Sherlock, and we have no opportunities at present or in the pipeline for Ambrose.**
>
> **(The main demand for Enterprise PMs comes from Centrica and Arqiva. Ambrose would not be welcome back at either of these clients).**
>
> **We do have some other underutilised PM staff at present but these have Service Provider experience, and we have upcoming opportunities for these.**
>
> **So my proposal is that we define the pool as "Benched Enterprise PMs".**
>
> **Does this work?**
> **Can we start the process asap?"**

17. Mr Coxon sent a second email to Julia Hale the following day (page 88) attaching a table in which the Respondent's project managers were broken down in to Enterprise and Service Provider roles, whether on the Bench or assigned to clients and whether the roles were junior, mid-level or senior. He explained why the mid-level roles were not suitable for the Claimant – either they were at Arqiva and Bluefish (which arranged the placements at Centrica) neither of which would accept the Claimant back after the performance concerns raised or they would involve replacing an established and well performing member of staff with a weaker member of staff, which would not be acceptable to clients. That left one possible role that was however only for three months and there was already a member of staff in place, so replacing him with the Claimant would not have been practicable given the short timescale.

18. The Claimant was therefore identified as at being at risk of redundancy and received a telephone call from Mr Ireland and letter to this effect on 16 June 2017. It was at this point that the Respondent gave consideration to the appropriate pool from which to draw potential candidates for redundancy. On the list at page 89 there was only one other Grade 4 Enterprise Project Manager, Christopher Ritchie, who could potentially have been pooled with the Claimant, but he was occupying the short term role at Direct Line Group and the decision was made that it would not be commercially acceptable or practicable to include him in the pool at that point.

19. The Claimant he was invited to a face to face meeting with Mr Ireland and Julia Hale on 20 June. The minutes of that meeting were at page 107-113. The Claimant was accompanied at the meeting by Rahul Desai. The Claimant had a

number of questions for the Respondent and I find from the minutes that the Respondent properly engaged with and answered those questions. There was a detailed discussion at the meeting about the possibility of offering the Claimant training, to enable him to be offered roles at the Programme Manager level (grades 6 and above). Mr Ireland explained at the meeting that such a promotion would depend on being able to demonstrate relevant experience as well as additional training. The Claimant enquired whether the Respondent would be willing to seek security clearance for him so that he could take up a role in the Government practice, but Mr Ireland explained that this would be dependent on there being roles available to make the investment of time and cost worthwhile. There was also a discussion of whether a role might arise in the defence sector, but Mr Ireland explained that unless there was a pipeline of work and an actual role in that sector the Respondent would not invest in training the Claimant to discharge such a role. However Mr Ireland agreed during the meeting to look into a number of the possibilities suggested by the Claimant as a way of avoiding his redundancy, including a search for potentially suitable roles.

20. On 22 June Mr Oosthuizen sent an email to the business notifying Practice Managers and others that there was an experienced project manager seeking a role and attaching the Claimant's work history. The Claimant was sent the minutes of the redundancy consultation meeting the next day and he was assured that no final decision would be made about his redundancy until after the final consultation meeting. He remained on the Bench circulations list.

21. Following the meeting, on 27 June, the Respondent sent the Claimant a detailed letter in response to the issues discussed (page 116-120). I find that the Respondent dealt genuinely with each of the questions raised by the Claimant and in each instance gave a response that was reasonable in all the circumstances. The underlying premise of all the responses it gave was that there was an overall downturn in work that particularly affected work at the Claimant's seniority level and skill set. This was borne out by the analysis of project managers on the Respondent's payroll at the time (page 89). It was reasonable of the Respondent to identify employees on the Bench as they represented an overhead to the business and were not revenue generating. At a time of falling revenue that would have been a particular concern. I was also satisfied that the Respondent's approach to alternative roles was reasonable. I return to that point in my conclusions.

22. The letter concluded with an invitation to the Claimant to attend a second consultation meeting on 4 July and confirmed that no final decision would be taken about his redundancy until after that meeting had taken place.

23. The same day the Claimant was signed off sick by his doctor (page 122 by reason of a stress related problem. The Respondent therefore postponed the second consultation meeting to 11 July.

24. On 28 June the Claimant sent an email to the Respondent complaining that there were errors in the meeting minutes. These were set out in detail at pages 123-124. I find that these were not material errors and even if the meeting minutes had included these points and the letter of 27 June amended accordingly, I would

have arrived at the same finding, namely that he Respondent's approach was reasonable in all the circumstances. On 30 June the Claimant wrote to the Respondent to record his objection to the letter to the extent to which it was based on meeting minutes that he regarded as inaccurate.

25. The second consultation meeting took place on 11 July. The minutes were at pages 129 -132. The focus of the discussion was the identification of a suitable alternative role for the Claimant. Since the last meeting the Respondent had taken on a graduate network engineer and the Claimant queried why that was the case as he himself had three years' experience in the live network environment by comparison with the new recruit's one year's experience. Mr Ireland responded that this role was too junior to be best suited to the Claimant's skillset as a project manager. Mr Ireland went on to reiterate that the Respondent was not prepared to put the Claimant through an application for security clearance in case a Government role came up. It would have to be confident that there were such roles first. A letter summarising the outcome of the meeting was sent to the Claimant on 14 July (pages 134-136). It reiterated that Mr Ireland was continuing to notify the other Practice Managers of the Claimant's availability. As regards the junior network engineer role the letter said the following:

> **"As explained previously, a Network Engineer is not a suitable alternative as the requirements of the role are completely different, they require a different skillset, software and application knowledge, that you do not have.**
>
> **We have taken into account your previous experience from your profile in that you held a Network Engineer ole 8 years ago and you have CCNA, however you do not have exposure to many of the modern hardware and technologies that we require in our base graduate and junior level Network Engineer roles."**

26. The letter invited the Claimant to a final meeting with Mr Ireland and Ms Hale on 18 July. On 17 July the Claimant informed the Respondent that as he was off sick with stress the meeting might need to be rescheduled (page 140). On 18 July the Respondent replied (page 141) rescheduling the meeting to 25 July and informing the Claimant that it would take place by phone or Skype if he was unable to attend in person. On 24 July the Claimant requested that the meeting me rescheduled as stress was making him feel insufficiently well to attend. The Respondent declined to reschedule the meeting (page 144) express the view that prolonging the process would be likely to be more stressful for the Claimant. He was given an invitation to enable him to dial in to the meeting and informed that if he did not do so the decision would be taken in his absence. I find that these were reasonable steps on the Respondent's part and that it carried them out in a way that was respectful to the Claimant and showed concern for his situation. In particular I find that it was reasonable to insist that the postponed meeting go ahead on 25 July, even in the Claimant's absence.

27. At page 147 there is a note of the call, in which the Claimant did not participate. The Respondent waited for 10 minutes and Mr Ireland then reported that there was no positive update in finding the Claimant a role within the business, notwithstanding that it had been raised each week in the Practice Managers' meeting. The Respondent sent the Claimant a letter confirming his dismissal for redundancy on 27 July (page 149-150).

28. On 3 August the Claimant appealed against his dismissal (page 155) but his appeal was dismissed by letter dated 18 August (pages 157-160) signed by Nigel Coxon. The Claimant brought his claim to the tribunal on 14 November 2017.

Conclusions

29. The Claimant did not in my judgment seriously dispute that redundancy was the reason for his dismissal and that his dismissal was therefore for a potentially fair reason. He suggested after the cross examination of the Respondent's witnesses that there had been a "cover up" but Ms Berry was right to point out that this was not put to the witnesses during the Claimant's cross examination of them and it was a proposition contradicted by the Respondent's witness evidence and by the documentary evidence, both of which confirmed that there had been a downturn in work and revenues as set out in my findings of fact. There were other redundancies across the business in the same period including that of Mr Coxon and by 30 September 2017 eight employees had left the business or been made redundant as a consequence of the downturn in work.

30. The Claimant's real complaint was about the process leading to his dismissal and in particular:

    a. the fact (which is not in dispute) that he was the only person doing the particular type of work he was employed to do who was placed at risk of redundancy in June 2017 when the redundancy process began. In his submissions on the second day of the hearing he suggested that he did not know that he was in a pool of one until after he had been dismissed, but I find that that is not the case. The Claimant knew from the outset that he was the only person at risk – he was told this in terms at the first consultation meeting on 20 June 2017 and this was confirmed in writing on 27 June. I therefore reject any suggestion by the Claimant that the process lacked transparency in that the fact the he was in a pool of one was not disclosed to him. The actual words 'pool of one' may not have been used, but he clearly understood that he was the only person at risk, or should have done. In any event he complains that it was not reasonable to choose a pool of one.
    b. He complains that he was not party to the internal discussions about whether a pool of one was appropriate. This too is not in dispute.
    c. He also complains about the adequacy of the search for alternatives to redundancy and in relation to that whether he should have been considered for more senior or more junior roles (the Respondent, he said, unreasonably limited its search).
    d. He also queries whether he should have been offered some training to make him more marketable.
    e. He complains that he was insufficiently involved in and consulted about internal discussions regarding the suitability of alternative roles and that in that respect that process was not transparent and therefore unreasonable.

31. I will limit my remaining findings to those relevant to the points raised by the

Claimant. As regards identification of the pool for redundancy I find as a fact that the Respondent did, as the authorities require, address its mind to the appropriate pool for redundancy. It considered one other potential candidate for inclusion in the pool, Christopher Ritchie and excluded him for valid commercial and practical reasons as set out in paragraph 18 of my findings of fact. The evidence of that was at pages 87 and 89 of the bundle and an exchange of emails between the then operations director Nigel Coxon and Julia Hale of the Respondent's HR team. The Respondent's approach was predicated on there being a distinction between the skill sets demonstrated by those in 'Enterprise' (which included the Claimant) and those in 'Service Provision'. I find as a fact, based on the evidence that I have heard and read, that this was a real and not a contrived distinction, and in particular that it was not a distinction that was manufactured in order to manoeuvre the Claimant into a position in which he was the only candidate for redundancy. It was a genuine decision based on business need, which then fed into the discussions about suitable alternative roles.

32. The distinction led however to the Respondent identifying the appropriate pool as 'Benched Enterprise PMs', which had the consequence that the Claimant was the only person in the pool. On the evidence, particularly that of Ms Johnson, which the Claimant did not challenge, I find that it was reasonable of the Respondent to identify a pool that contained employees categorised as having an 'Enterprise' skill set and not pooling those with the 'Service Provider' skill set. The Claimant did not provide any compelling evidence that this was an unreasonable distinction. I also consider that it was reasonable of the Respondent to focus on 'benched' employees because they were not revenue generating. I do not accept that Claimant's submission that he was entitled as part of a fair redundancy consultation to be consulted about the identification of the pool. This was in my judgment a matter for the Respondent. That is consistent with the authorities and in particular the passage from *Taymech v Ryan* set out at paragraph 7 above. It would be going too far to suggest that employees should be involved in the employer's decision about how the pool should be identified in an exercise of this nature, (as opposed to a collective redundancy consultation in which such a discussion is likely to play a part).

33. The second aspect of the pool was the skill level identified – level 4 project managers as distinct from more junior or senior roles. I heard a considerable amount of evidence about the transferability of the Claimant's skills into more senior roles and was satisfied that the Respondent reasonably took the view that the Claimant could not be transferred into more senior roles without considerable additional experience and expertise which could only have been acquired on the job. I find as a fact, based on Mr Ireland's evidence that it was not a straightforward matter to equip employees with the skills for which there was a pipeline of work simply by sending them on training courses. The nature of the work required on the job experience coupled with a range of technical, people and management skills. The Respondent also reasonably took the view that it did not want to invest in training the Claimant or obtaining clearance for him to take on a Government role at a time when there was no obvious roles in the pipeline for which the Claimant would have been suitable had he received such training or clearance. As I have recorded in my findings of fact here was an extensive discussion of these potential alternatives at the two consultation meetings.

34. However I thought carefully about Claimant's submission that the process of considering alternative employment lacked transparency. Although there was an open discussion with the Claimant about it on two occasions I was concerned in particular about whether the Respondent should have been more open to offering the Claimant a more junior role as a way of avoiding his redundancy and whether it had made assumptions about his skills, aptitudes and interests without discussing them with him in an open way. The question of a more junior role arose at the second consultation meeting on 11 July at which the Claimant said that he noticed that new graduate network engineer had been appointed. There are two accounts of this discussion – at pages 129 and 132A, the former more detailed than the latter. It is apparent from these that Mr Ireland took the view that more junior roles were not suitable for Claimant because they were lower paid and did not reflect his experience. At the meeting he said that the focus of the search for alternative roles was on finding the Claimant an alternative mid-range project manager role. The Claimant submitted that this search was too narrow and that he had been insufficiently involved in the Respondent's thought process about why particular roles were out of his reach. In his evidence to the Tribunal Mr Ireland said that the Claimant's skills in this area were very out of date – his last experience had been 8 years previously and that the technological developments in that area of work were such that it would not have been feasible to offer the Claimant such a role. That point was also made to the Claimant during the consultation process and in the appeal outcome letter.

35. Nevertheless I was somewhat troubled by this aspect of the Respondent's case. It seemed to me from a reading of the consultation meeting minutes that the Claimant not unreasonably felt that the search for alternative employment for him was not in fact a genuine search and that the Respondent came up with a series of reasons why he could not be offered alternative roles or opportunities as opposed to showing determination to redeploy him if it could. The contemporaneous evidence of the consultation meetings, as distinct from the evidence Mr Ireland gave to the tribunal, would tend to support the view that the search for alternative employment was narrow. The question was whether it was unreasonably so.

36. Neither party presented its case on this issue as clearly as would have been desirable. The Respondent's evidence at the Tribunal provided a level of detail about its thought processes that would not appear to have been shared with the Claimant at the time. The Claimant on the other hand did not explain in detail how his skills and experience would have equipped him to carry out roles that were actually available at the time. As the Respondent submitted the junior network engineer role was not actually a vacancy. The redundancy exercise itself was I have found, plainly not manufactured. It took place against a backdrop of a decline in business levels which led to the loss of seven other jobs in Network Services. The Respondent did not prevent the Claimant from conducting internal searches for jobs, or receiving bench reports of available work and it circulated his professional profile to parts of the business on 22 June (page 101). There is no evidence from either party of actual available roles in the relevant period.

37. I have concluded overall therefore that the Respondent's approach to alternative

employment was reasonable overall. There was no evidence of the Claimant having been overlooked for obviously suitable roles and I have not lost sight of the fact, although this fact was not relied on by the Respondent, that the Claimant had not distinguished himself in his performance for two of the Respondent's significant clients, Arqiva and Centrica, thereby himself limiting the number of potential roles available to him.

38. For completeness I will deal with one final point, which is the Claimant's submission, made for the first time on the second day of the hearing, that there were other employees who should have been pooled alongside him and considered for redundancy. I have taken into account that the Claimant is self-represented and will not therefore appreciate the importance of making all the relevant points at the right time. This was an important issue in the context of his case and I considered whether to allow him to put it forward. However I accepted Ms Berry's submission this point had been addressed on the first day of the hearing when I had asked the Claimant what his concerns were about being in a pool of one and he had not at that point taken the opportunity to explain which other employees should have been included in the pool. By that stage he had had the Respondent's documents for some time and could had illustrated his point by reference to the documents and spreadsheets in the bundle but he did not do so. I do not think therefore that there is any injustice to him in not allowing him to make his submissions on that basis. The point is primarily relevant to the question of whether the approach taken by the Respondent was procedurally unfair and if so whether any such fairness would have affected the overall outcome of the redundancy process.

39. However the Polkey question does not arise because my overall conclusion is that the Respondent's approach to the Claimant's redundancy was reasonable within the meaning of s98(4) ERA and the Claimant was therefore fairly dismissed for redundancy.

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Employment Judge Morton

Date: 20 August 2018