THE EMPLOYMENT TRIBUNALS

Claimant: **Mr Michael Harding**

Respondent: **Amalgamated Construction Limited**

Heard at: **Teesside**

On: **26 and 27 September 2018**

Before: **Employment Judge Beever (sitting alone)**

Representation:

Claimant: **Mr Owen, Gateshead Citizens Advice**

Respondent: **Mr S. Healy, Counsel**

REASONS

1. The tribunal gave an oral judgement with reasons at the conclusion of the hearing on 27 September 2018 and the judgment was sent out to the parties. The tribunal found that the claimant's claim for unfair dismissal is not well founded and is dismissed and the claimant's claim for breach of contract is not well founded and is dismissed. The claimant's representative has since requested full written reasons.

Introduction

2. By a claim form dated 4 May 2018, the claimant brings a claim following the termination of his employment with the respondent. The respondent accepts that there was a dismissal and contends that the claimant's employment came to an end by reason of redundancy.

Issues and Preliminaries

3. The parties helpfully agreed a list of issues. The list reflected a claim of unfair dismissal and identified the following:

   3.1. Can the respondent show a potentially fair reason namely redundancy, and if so,

   3.2. Was dismissal fair within the meaning of s. 98(4) ERA having regard in particular to
   (a) the pool from which redundancies were made,
   (b) consultation the claimant,
   (c) efforts made to secure alternative employment for the claimant and
   (d) procedure followed by the respondent.

   3.3. If the dismissal was unfair within the meaning of section 98(4), is it likely that a fair dismissal would have occurred in any event and if so how should that be reflected in remedy (Polkey principles)

   3.4. What amount if any is the claimant entitled to recover as a compensatory award given he has received the equivalent of a basic award in the form of a redundancy payment.

4. I will deal with Polkey therefore as part of this judgement but otherwise remedy issues and evidence as to his remedy will be addressed immediately after this judgement if appropriate.

5. As part my pre-reading I noted in paragraph 26 of the ET1 a complaint by the claimant that because of being placed on gardening leave he had lost the opportunity for Christmas on-call weekend payments and on-call payments. The Schedule of Loss also particularises this loss in the order of £4500. This being a pre-termination loss seemed to me difficult to see how it can be a claim for compensation which could flow from any unfair dismissal.

6. Mr Owen confirmed to me that this was a live issue for compensation, so I queried the basis on which this aspect was being put. In the event the hearing commenced, and I dealt with this point following the lunchtime adjournment on the first day thereby allowing Mr Owen to clarify his position.

7. Mr Owen put it forward as a breach of contract claim. He confirmed that it was not pursued as a deduction of wages claim but rather put by him on the basis that the respondent should not have placed the claimant on gardening leave and because it did, the claimant then lost the payments in question. In response Mr Healey said it was too late and it was not properly part of the ET claim before the tribunal, i.e. that an amendment was required which was just not justified at this late stage; it was any event out of time, and he also rightly reminded me that the parties had agreed a list of issues.

8. Bearing all that in mind, I gave an oral ruling. I had regard in my ruling to the Overriding Objective (Rule 2) of dealing with cases justly whilst trying to be fair to both sides and complying with objectives of informality and proportionality. I noted that the form ET1 box dealing with “contract or other claims” had not been ticked. I also identified, as set out above, that the facts bare though they may be were set out in the ET1, at paragraph 26. With regard to Mr Healey's point that as a result the ET1 didn't expressly state a breach of contract claim in any shape, I considered that a tick against the box was not a prerequisite for the creation of a cause of action provided that the basis of the claim might be said to be capable of being read across from the ET1.

9. I found that the facts in paragraph 26 were just sufficient to establish a basis of a claim and the failure to plead out the legal framework whilst inadequate did not prevent me from finding that Mr Owen was able to proceed not as an amendment to the claim but rather as a much needed clarification of the claim. I was as a result sympathetic to the claimant’s request. A persuasive factor for me was also that both the claimant and Mr Esterhuyse’s witness statements broadly dealt with the facts underlying the claim. I also took account of the fact that recent case law suggests that I should not too readily depart from an agreed list of issues but in reality the effect of that was somewhat mitigated by the fact that the list in question was agreed almost at the door of court.

10. I therefore permitted what was in fact further particulars of the claim. As a result, the breach of contract claim was then clarified and I gave a short judgement to that effect. It followed that issues for determination in this case were expanded to include a breach of contract claim identifying the following issues:

    10.1. Was there a contractual obligation provide work
    10.2. Was there a breach of that obligation with the claimant being placed on gardening leave
    10.3. What loss if any arises from breach, this latter of course going to remedy rather than a liability issue.

Findings of Fact

11. I was provided with a well-prepared bundle paginated to page 334 although in the final analysis there were very few key documents in this case that were relied on by the parties.

12. The respondent provided 2 witness statements: (i) Mr Esterhuyse, who was put forward as the respondent's decision maker, and (ii) Mr Ahmed, who was the appeal decision maker. The claimant provided a witness statement and was cross-examined on his statement. I also heard from Mr Bowman. A third witness was Mr McDermott, who did not attend. By agreement, I have read his witness statement and applied such weight as I consider appropriate.

13. I therefore turn to make the following findings of fact based on all the evidence received by me and upon the balance of probabilities.

14. The respondent is a specialist engineering construction contractor in a number of sectors. This case concerns the railway sector which is a core sector for the respondent because it is a principal contractor to Network Rail. The relevant structure of this part of the respondent is contained in extremely helpful chart at [62], which shows a broad division of work between "project work" and what has been called "minor works" otherwise known as day-to-day or "D2D" works. The distinction that has been drawn out in the evidence suggests that project works broadly speaking account for complex engineering tasks possibly in excess of £1 million and might be said to amount to an average of £80-£150,000 per project and are managed by site managers who often have engineering qualifications, some to degree level. The chart shows a number of project managers in this division.

15. Separately the minor works or D2D division is of a routine maintenance/ emergency/reactive on-call type, sometimes referred to as "business as usual", and although not always it is typically of the less complex and smaller variety. I am told with an average £10,000 per job albeit potentially as Mr Esterhuyse accepted exceeding £100,000. The focus of this case is on the minor works or D2D aspect of the respondent's business.

16. Network Rail operated contracts whereby in this case the respondent had set up the Network Rail Minor Works Framework. Network Rail had its own examiners who went on site and determined what needed to be done by way of works. It is important to note at this early stage that the respondent had little or no control over incoming work. It was perhaps in one sense a kind of zero-hours contract. The word "target" has been used in this case but I find that its meaning in the present case is somewhat different to how it is more commonly used. Here, "target" is not and should not be regarded as a measure of the performance of the claimant (or any other individual) because the claimant could not affect the amount of work coming in.

17. What came in were tasks set by Network Rail. Each task is known as a "remit". The remits were received into a central IT system called Monitor, and were allocated on a geographical basis. In this case, I am concerned with the London and North-East area (LNE) which extends from London up to the border with Scotland. LNE is subdivided further into regions: (i) the Northern region, (ii) the Central region and (iii) the Southern region. Together, the three regions required a total of four managers: the Central region had 2 managers allocated in the light of the correspondingly higher amount of work requirement.

18. The structure was essentially geographical. The manager(s) in each region was in charge of overseeing the scoping/estimating of each remit and for organising

gangs of operatives to carry out the works. Each region operated largely autonomously and almost as if a separate business unit. There were crossovers for example given the good working relationship that existed between these units so that there would be occasions of helping out with each other on job requirements, covering sickness absence and the like. Mr Esterhuyse said that this was something he would not have planned to do but as necessary each region might exchange or send operatives to different regions of the business.

19. Within this structure, the claimant is clearly identifiable as the manager of the North region of the LNE area, and under the Network Rail Minor Works Framework. He is described as a construction manager. He was an experienced tradesman and manager within the rail sector even when he first joined the respondent in April 2000. By the time of his dismissal, he had achieved 17 years' service. There has been no question of his competence and ability. Mr Esterhuyse recognised and accepted that the claimant was good at managing minor works tasks. The fact that they were not complex was the reason why minor works were separate from project work.

20. The Network Rail Minor Works Framework was a five-year contract which commenced in 2013. The respondent had allocated resources accordingly, and I find that it operated a business model whereby in broad terms a certain level of work had to be achieved so as to be sufficient to justify the costs of the management structure. In this case, the respondent from the outset had concluded that a £1.2 million value or income threshold in any region would be needed in order to justify the presence of a manager.

21. An analysis at [218] shows the contract framework from the beginning of the five-year contract back in 2013 in happier days: the amount of work value generated in the North on any view had justified a manager in those early years. I am told that the Central region justified 2 managers in large measure because the central region was based around Barnsley in which there was a high track mileage. The farther north one goes, the more sparse the mileage of track and hence the lower the value of remit work that is generated in the region. Thus it is said that the North region was particularly affected: this has led the claimant to complain that it seems unfair on him that a turnover of £1.2 million was required in order for him to justify his job. I sympathise with that because it was evidently more difficult for the claimant in those circumstances not least because he had no control over the work coming in. As the figures on [218] show, it became practically impossible to achieve the threshold. I find that this model of a threshold of £1.2 million was a genuine business model adopted by the respondent. It was not an attack on the claimant's work ethic or his capabilities

22. I take a step back to 2011 to consider an event which forms an important part of the claimant's case albeit that the respondent denies its relevance entirely.

23. It concerns a request to the claimant to work in Scotland and assist in the setting up of a Framework. The claimant was asked to go by Mr Ahmed. Mr Ahmed himself had done a similar task in another area. Mr Ahmed recounted that the claimant was not willing or able to go. The claimant ultimately spoke directly to Andries Liebenburg, the respondent's managing director, by telephone. The conversation seemed to have brought the matter to a head. I am not in a position to make a finding as to exactly what was said during that conversation but I do find that as a result of that conversation the claimant was aggrieved about what had been said to him and the way it was said; and that the issue was "unresolved" albeit that he was not compelled to work in Scotland. The conversation with Mr Liebenburg has left the claimant with a lingering unhappiness about how Mr Liebenberg treated him.

24. Why is that important? The claimant said in evidence that the experience left him "wary"; specifically, that he was wary of the intentions of senior management in subsequent events involving the claimant and the claimant's colleagues. This was a repeated sentiment in his evidence and in my judgment this has continued to have a significant impact because it has deeply affected the claimant's views about how he looked at the respondent's actions in subsequent years. It is therefore a key feature of the claimant's case that he perceives his opposition to his moving to Scotland as somehow marking him out and establishing a somewhat unfavourable view of him by management. The claimant senses that a "grudge" existed and that perhaps his time in the organisation was always going to be limited. The respondent contends that whatever happened in connection with the Scotland matter, it is clear on the facts that there was no subsequent interaction of any meaningful nature between the claimant and Mr Liebenberg, a point which the claimant accepts. It is contended that Mr Liebenberg was not in any event involved in the decision-making in 2017.

25. Mr Ahmed said that the Board of the respondent was constantly challenging him to be efficient in order to be competitive and to get tenders. In order to maintain contracts, he needed to keep looking at efficiencies. Mr Culley was the claimant's deputy manager in 2012. The respondent concluded that it could not justify having in effect 2 managers in the North region and in the end Mr Culley's employment was terminated. The claimant said that it made no sense because Mr Cully was always very busy and he didn't accept the respondent's explanation. The claimant said in answer to questions posed to him in cross examination that the termination of Mr Culley's employment "didn't signal any desire to save money" but was in fact "part of a wider campaign". This belief was again demonstrative of the gulf that existed in perspective: the respondent's perspective was that the business was too expensive and redundancy was necessary to cut costs; the claimant in contrast said that the redundancy made no sense because "we were all still so busy on the ground". The statistics at [218] are a graphic illustration that the value of the work plainly fell. There is a slight increase in numbers for 2017 but the trend is downwards and it supports the respondent's closer scrutiny of value from 2016 onwards.

26. Another example of its attention to cost-cutting measures was the closure of Ferryhill in July 2017. Again, the claimant didn't agree, and believed it to be unjustified. I also had regard to fact that the size of the gangs that operated under the claimant had reduced steadily over the years from an early high of 10 operatives down to 3. The claimant accepted in evidence that there came a point in time when only 3 operatives were dedicated to minor works but in addition, it appeared that there were times when no operative was dedicated to the minor works contracts. In the course of appeal hearing, the claimant acknowledged that there were times when all of his operatives were working at Seymours however temporary the arrangement. The claimant agreed that given this kind of reduction in demand that there were times when he had to be “creative” to ensure that his operatives were kept busy.

27. The Network Rail contract was due for renewal in early 2018. Mr Ahmed was optimistic by December 2017 and I accept that the message that may have been given was that the contract renewal had been successful. In fact, the renewal was not actually awarded until sometime even after the claimant’s appeal hearing taken place in January. I find that the respondent would have had every reason to believe it was likely to obtain the renewal but that if it did, the pipeline work was likely to be similar in value and was not going to improve in the foreseeable future. I find that the value of the work undertaken by the Northern region was a measure scrutinised by the respondent: it was a measure of its profitability. It exemplifies the conflict in this case which is as I have found is the result of competing legitimate points of view: the claimant says that the respondent is applying these measures in in the face of the fact that his team was always busy and he himself was never actually without work to do. In that regard, I accept his evidence that if the number of remits increased then that will serve to make him proportionately busier as each remit has a paperwork task associated with it even if the value is reducing. This placed him at odds with what the respondent was seeking to do, namely, to focus on the value and react to the fact that over the course of the five-year Rail Network contract there had been a significant reduction in both numbers and value to the extent of approximately two thirds; that this was reflected in a cutting-back of premises and staff; that there was no immediate prospect of a reversal to that trend.

28. I find that respondent had a closer scrutiny on its resources. For example, there were monthly progress meetings attended amongst others by the claimant at Barnsley. The question of how to address this trend must inevitably have been discussed. This included potential cost-cutting measures. This occurred over a period of 18 months to 2 years. I find that this established a foreseeable potential redundancy of the claimant on the horizon. However, I do not find that the claimant’s redundancy was expressly the topic of any communication with him until November 2017.

29. In early November 2017, there was a discussion on site in Hartlepool. It was recollected by all because it was an occasion when Paul Moyes the transport manager was also visiting on the same day. On the day, the claimant was told by Mr Esterhuyse for the first time - at this point informally and verbally - that the prospect of his redundancy might arise. The effect of this was to confirm in the claimant's own mind that there was a wider issue, whether it be political or personal against him, because it continued to make no sense to him given that he remained busy and indeed I accept that the claimant was still working overtime, working three out of four weekends.

30. The redundancy process commenced on 20 November 2017. The claimant was invited to a meeting which took place on 23 November 2017. There are minutes of the meeting. It was in effect an at-risk meeting where the prospect of redundancy and consideration of alternative employment was discussed. The same day, HR had sent out a jobs alert and were seeking vacancies within the organisation. I find that there was a period of time between 20 November and the second meeting on 8 December 2017 which confirmed redundancy where there were attempts to consider alternative opportunities.

31. The focus of the claimant at the 23 November meeting was to look at alternative ways to try to avoid losing his job. I have identified seven ways in which the respondent sought to look at alternative opportunities. Put briefly: (i) Alan Boyle in Scotland, a vacancy for which the claimant was not considered suitable, (ii) Chris Redfern from HR had undertaken a search himself which had not uncovered vacancies , (iii) an EA role which turned out to be a dead-end, given that it was in the South of England, very short term and that it had been filled anyway, (iv) work in Barnsley, at least as a temporary provision, until things “picked up", but which did not overcome the main issue of the cost to the business of employing the claimant nor did it create extra income, (v) the option of being demoted and working back on the gangs: I find that this was considered but rejected as the claimant had inevitably deskilled over the past 20 years as a manager and more crucially because there were in fact no vacancies, many being temporarily laid off it and it was a struggle to keep existing teams busy. It was thus not possible to offer the claimant the opportunity to be back on the gangs. I did reflect on Mr William Pringle who, put briefly, was an existing employer who had been laid off so the fact that he was brought back into work may raise questions but I do not find it particularly relevant and helpful in my analysis, (vi) a job opportunity within Seymours: the respondent had encouraged the claimant to apply for this job opportunity, but it transpired that the claimant did not have the skill set for the non-rail working environment that job opportunity presented. It did reinforce my understanding the claimant was at all times keen and willing to try all opportunities to avoid his dismissal, (vii) an opportunity for site agent out of Barnsley even as late as 17th January [160]. The claimant however was turned down for this opportunity because senior management involved had expressed the view that what was needed for that role was somebody with a technical skills background as opposed to the claimant’s experience in trade skills.

32. These are all examples of efforts undertaken to see if redundancy could have been avoided. The claimant had said in evidence that he would have been willing to move to Barnsley permanently given the opportunity. I find that during the process he expressed the view that he would go willingly go there until the work picked up which suggested on his part a willingness to be there on a temporary basis. On the other hand I also find that he was not asked by the respondent specifically whether he would consider a permanent move. The claimant presented as someone who was a keen to keep his job even to the extent of taking other work such as working back on the gangs and even at significantly lower pay.

33. The second meeting was set up and took place on 8 December 2017 when the claimant's redundancy was confirmed. I have had regard to the minutes of the meeting and the letter of outcome. There was a brief diversion in the evidence because the claimant complained about jobs having been withheld on the Monitor system apparently deliberately so as presumably to improve the respondent's prospects of ensuring his redundancy. On closer analysis, this issue was of 3 remits that had a 26 week operation period. These would not have applied until 2018, and I find did not any impact upon the process or the outcome. There is insufficient evidence to conclude that there was deliberate underhand conduct. I reflected on whether Mr Esterhuyse had told Robbie Barron, the TU representative, that the redundancy "made no sense" to him. Mr Esterhuyse gave evidence on this. I find that he believes now he did believe then that he was making a decision that made sense from the respondent's perspective. It is inconsistent that he would have said to the TU representative that it made no sense to make the claimant redundant. I find that he did not do so.

34. On 11 December 2017, the claimant's redundancy was announced by Mr Ahmed in a communication meeting with staff. As regards the announcement of the renewal of the Network Rail contract, I find that he was sufficiently optimistic to convey that the respondent was likely to obtain the contract. At the same time, however, it was clear that the contract was not going to provide significant improvement in income.

35. On 13 December 2017, the claimant received his letter of redundancy and was placed on gardening leave. Mr Esterhuyse decided upon this course of action to assist the claimant for example to allow him to have extra opportunity to look for other work. The claimant did not agree to go on gardening leave: but it was not a matter of choice for him.

36. His appeal eventually took place on 16 January 2018. He raised three grounds of appeal, in summary: (i) that there was no redundancy situation i.e. that there was still work to do, (ii) that job remits had been deliberately withheld, (iii) that insufficient attention had been paid to alternative employment. These were discussed with Mr Ahmed the appeal officer. The minutes of the Appeal meeting

are in the bundle and I have taken account of those. The outcome was that the claimant's redundancy was confirmed.

Legal Principles

37. The law in relation to unfair dismissal is section 98 of the Employment Rights Act 1996 (ERA). It requires the tribunal ask itself two questions: (i) the reason for dismissal, per s.98 (1), and (ii) whether the employer acted reasonably, per s.98 (4) ERA.

38. For the purpose of section 98(1) the burden of proof is on the respondent to establish the reason. What matters is whether the respondent has established the operative reason for the dismissal as operating in the mind of the decision maker. Abernethy v Mott [1974] IRLR 213.

39. Redundancy is potentially fair reason. For a dismissal to be by reason of redundancy, a redundancy situation must exist. S.139 ERA states that there is a redundancy situation where the requirements of the business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where they are employed, have ceased or diminished. This covers a number of separate situations including where work of a particular kind has diminished, so that employees have become surplus to requirements and also where work has not diminished, but fewer employees are needed to do it.

40. The tribunal has followed the guidance in Murray v Foyle Meats [1999] ICR 827 which identified that s.139 ERA asks two questions of fact: (i) whether there exists one or other of the various states of economic affairs mentioned in the section, and (ii) a question of causation, whether the dismissal is wholly or mainly attributable to that state of affairs.

41. As regards whether there is a redundancy situation, it is not for tribunals to investigate the reasons behind such situations. So, a tribunal's concern is whether the reason for the dismissal was redundancy not with the economic or commercial reasons for the redundancy.

42. Turning to the second question, section 98(4) then sets out what needs to be considered in order to determine whether or not the decision is fair. It states "termination of the question whether dismissal is fair or unfair…. (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".

43. For the purpose of section 98(4) the burden of proof is neutral in applying section 98(4). The tribunal reminds itself that it does not stand in the shoes of the employer and decide what it would have done if it were the employer. Rather the tribunal has to ask whether the decision to dismiss fell within the range of reasonable responses open to the employer judged against the objective standards of a hypothetical and reasonable employer.

44. The case of Sainsbury's Supermarket Ltd v Hitt [2002] EW CA Civ 1588 makes it clear that the range of reasonable responses that applies to all aspects of the dismissal decision. This includes decisions as to the correct pool:

45. See Capita Hartshead v Byard [2012] IRLR 814 where it was held that the question of how the pool should be defined was primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer had genuinely applied his mind to the problem

46. The tribunal is required to consider whether dismissal fell within the range of reasonable responses see Iceland Frozen Foods v Jones [1983] ICR. What does that mean in practical terms? Here the question of whether an employer has acted reasonably in dismissing will depend upon the range of responses of reasonable employers. Some might dismiss others might not.

47. These cases have general application but "the touchstone would need to be section 98(4); the tribunal would keep in mind the need not to fall into the error of substitution, but would still need to review the decisions made and the process followed and determine whether each stage fell within the range of reasonable responses". See Green v LB Barking UKEAT/0157/16, para 32-35 and 42. The tribunal has also expressly reminded itself of the cautionary words in TNS v Swainson UKEAT/0603/12 to similar effect. Finally, also the dicta in Williams v Compare Maxim [1982] ICR 156, setting out extremely useful guidance which the tribunal has no hesitation in adopting and in reflecting on the further guidance provided by HHJ Eady QC in Green.

48. Turning to deductions from compensation, the Polkey principle established that if a dismissal is found unfair by reason of procedural defects then the fact that the employer would or might have dismissed the employee anyway goes to the question of remedy and compensation reduced to reflect that fact. Thornett v Scope [2007] ICR 236 affirmed the obligation on an employment tribunal to consider what the future may hold regarding an employee's ongoing employment. Contract Bottling v Cave UKEAT/0100/14 described the Polkey principle as an "assessment to produce a figure that as accurately as possible represented the point of balance between the chance of employment continuing and the risk that it would not".

49. Turning to the breach of contract claim, the issues have been framed around the case of William Hill v Tucker [1999] ICR 291, Court of Appeal. Where there is no

express term for garden leave and an employer places an employee on garden leave, the material legal question which arises is whether that employee has a contractual right to work and not just a right to be paid.

50. The proper approach is to look at the contract is actually required of the employer and what the employee agreed to do. An implied obligation on an employer actually to provide work does not arise in every case but only in certain limited cases. Those limited cases are reflected in the individual circumstances whereby it might be said for example that there is a particular need for frequent and continued exercise of the features of the job such that without that continued and frequent exercise there would be a deterioration in skills or a loss of the underlying purpose of the contract (e.g. an actor's need for publicity). On one view, it might be said that "de-skilling" could apply to every single job, but the case law focuses on specific and individual situations, e.g. a surgeon who if he is not in theatre will very quickly become unskilled.

Discussion and conclusion

What was the reason for dismissal?

51. The burden is on the respondent to establish the reason. There are two questions which arise: (i) was there a redundancy situation? and, if so, (ii) was the redundancy the main cause of the dismissal?

52. The respondent's senior team was tasked with looking at the productivity of the Network Rail Framework. Its business model maintained a £1.2 million threshold for a management structure. This was not a criticism of the claimant and I accept the increasing difficulty that he was thereby under as a result of the application that model. However, the facts bear out that there was less work; values went down; redundancy was on the horizon, with all the corroborating events of cost saving and reduction in gang operative numbers, even to the point where the claimant agreed that, "there were times for a couple of weeks when I had no operative".

53. With this background, Mr Esterhuyse was tasked with implementing a proposal for redundancy. He was the decision-maker, having put the Framework under scrutiny for as much as 18months to 2years prior. The respondent's conclusion was that the Northern region stood out. This is not a case about the cause of that, but about whether the respondent is entitled to take steps to respond to it. Looked at in that context, these features are relevant: (i) the backdrop was a downwards trend in values, (ii) Mr Culley's termination of employment had the hallmarks of a redundancy, (iii) even though the claimant disagreed with the move out of Ferryhill in 2017, it was a cost-cutting measure, (iv) the dramatic reduction in gang operative numbers, (v) the figures at [218].

54. Mr Esterhuyse's decision to remove the role held by the claimant and to subsume its responsibilities into the roles of existing staff meant that a redundancy

situation arose. There was an obvious diminution in the requirements of the respondent for employees to carry out work of a particular kind, that of a construction manager. I am satisfied there was a diminution in work requirements. Even if there was not, taking account of the claimant's complaint that he remained always busy, the respondent nevertheless concluded that fewer employees were now required and needed to do the job. That amounts to paradigm redundancy situation.

55. Turning to the second question: what is the cause/the real reason for the dismissal? The claimant contended that the real reason was a wider campaign against him; action taken against him personally. He described a sense of wariness that he felt towards the actions of senior management, which was compounded by what he regarded as decisions that made no sense to him.

56. I take account the series of events set out above, commencing with the instance in 2011 when the claimant was required to work in Scotland. I note that it was not imposed on him because in the event he was not required to go. In my judgment, that single incident and any conversation ensuing would be unlikely to have produced a lingering animosity such that a decision was likely to be made by senior managers that would otherwise be contrary to the interests of its business. There was no subsequent meaningful interaction between Mr Liebenberg and the claimant and on all the evidence before me Mr Liebenberg had no involvement in the subsequent redundancy process. The claimant's interpretation of events faces two challenges: (i) it relies upon no actual evidence of hostility shown towards him, aside from his recollection of the 2011 conversation, to enable me to find that there is a sound basis for making a finding of fact that senior managers were making decisions affecting him personally and subsuming the interests of the respondent as a result, and (ii) Mr Esterhuyse is himself a senior manager. It was his decision to make the claimant redundant, and I take the view that he showed both during the process and in evidence no animosity toward the claimant. In fact it was arguably the reverse because I accept his evidence that he did not find the process at all enjoyable and that he recognised the impact of the claimant losing his livelihood; that it was an uncomfortable but necessary part of his task.

57. Thus, in order to uphold the claimant's perspective, I would have to conclude that the decision-making of Mr Esterhuyse was itself impaired and I have considered what findings of fact would be required in order for me to reach a conclusion that he was impaired or infected by a sense of animosity, or "grudge", towards the claimant. Mr Esterhuyse gave evidence that he was not aware of the 2011 events, save that "it is possible the claimant mentioned to me but I had no communication with Mr Liebenberg at all". It is an uphill task to argue that whatever feelings Mr Leibenberg perhaps expressed or felt about the claimant back in 2011 somehow filtered through to Mr Esterhuyse's decision-making in 2017.

58. I find that Mr Esterhuyse's decision was one that he genuinely regarded as being in the best interests of the respondent and that it was not a personal attack on the claimant in any way. He had managerial responsibility for the Framework. I find that the facts and beliefs operating on Mr Esterhuyse's mind when he made the decision to dismiss arose as a result of the decision of the respondent after a period of close scrutiny to make the role of construction manager in the North region a redundant role. I find it was a genuine business decision. I accept the claimant genuinely feels that it made no sense, but I would be overstepping my role if I were simply to second-guess the economics of that decision. I have investigated whether there had been any ulterior or different motivation but I in the final analysis I have concluded that it was a genuine business decision and it is not the role of the tribunal to second-guess the economics of the decision.

59. I conclude the respondent has discharged its burden of showing that there was a potentially fair reason for dismissal, namely redundancy, and that this was the reason in this case for the claimant's dismissal.

<u>Did the respondent act reasonably in treating that reason as sufficient to dismiss the claimant?</u>

60. As in any dismissal claim no less a redundancy dismissal, it is the tribunal's task is to look at the fairness of dismissal. This depends upon asking whether the decision itself and the process fell within the range of reasonable responses that a reasonable employer might adopt.

61. I have considered each of the points in the list of issues and as raised by both representatives as part of my deliberation. As to the relevant at-risk pool, the respondent adopted a pool of one. The claimant says that the other minor works managers should have been in the pool, although in evidence and in submissions the claimant was content to exclude the South manager; but certainly there was a pool the claimant says that ought to have included him along with the two Central managers, i.e., a pool of three. It might also have been argued that the pool should have included a much wider management trawl so as to include project managers of the specialist teams. However, the evidence established a sufficient difference in size and complexity and skill sets that the decision not to include a pool wider than minor works, or day-to-day, managers was justified.

62. As to the specific question of the make-up of the pool, Mr Esterhuyse stated that the essential reason for there being no other manager in the pool was geographical. His evidence was in part that was "unfair on the others" since the issue was that this was just a North supply problem and it was not a problem that the other managers should have to share. In isolation, I would have found this explanation insufficient: all day-to-day managers were working equally and discharging competently any remits they were receiving. The evidence, however, goes much further than that. For example, Mr Ahmed corroborated the picture of the need for a geographical focus. There is a clear sense of autonomous

business units, where the managers were identifiably responsible for each of their regions; that there was to a greater or lesser extent a need for practical integration into the region; one's own regional knowledge; and that sense of autonomy. It is no better painted than by the claimant's own words in the context of the move to Hartlepool where he was, I find, offered the opportunity of an office in what might be described as the main block on site, but he rejected that in favour of being part of the Portakabin setup which left him literally working alongside with his operatives on a day to day basis. In all, a very clear sense that his job is done most effectively only when he had the actual physical day-to-day interaction with operatives. This reinforces the geographical structure of the regions.

63. I find that Mr Esterhuyse genuinely considered the make-up of the pool and concluded that there was a distinction to be drawn between the North and Central region managers, albeit that the roles were essentially the same. He genuinely applied his mind. Having reached that conclusion, unless there is something patently unrealistic or patently not genuine about his decision, this is sufficient to discharge the obligation on the employer as expressed in the Capita Hartshead decision.

64. As to the issue of alternative employment, I have asked myself whether this employer took reasonable steps. Having regard to my findings, this respondent has approached this issue in an open-minded way; its job enquiries were genuine. I have identified at least 7 ways in which those enquiries were undertaken. The respondent reached a conclusion that it genuinely held that such vacancies as there were, were not suitable; that was conclusion was as a result of several enquiries and, at least in the case of Seymours, an interview, and in other respects there were no vacancies. It was for example challenging even to keep existing workforce busy. I accept the submission of Mr Healy that even by the end of the hearing (and this is no criticism) the claimant does not identify a specific job that was vacant and was available and that should have been offered to him. Having identified the pool as it did and, as I find genuinely so, the respondent was entitled to conclude there was no suitable vacancy. The respondent did not permit lodging on a planned or permanent basis and the relocation of the claimant on such a basis would not have produced the cost-cutting that was required.

65. Turning to the question of consultation, I conclude that there is little to this aspect of the complaint. The process in my view was exemplary in its implementation, record-keeping and open-minded examination of the claimant's concerns and the steps that might be taken to avoid a redundancy. There are not procedures which are bound to be followed in every case as the fairness of each dismissal for redundancy depends on all the circumstances of each case, including the need to give as much warning as possible, the obligation to consult being a fundamental part of the process. On my findings, this obligation was discharged by the respondent.

66. Taking all that into account I turn back to the central question which is that posed by s. 98(4), namely, has the respondent acted reasonably in treating the redundancy of the claimant as sufficient to dismiss the claimant. On my findings I have concluded that it did. I therefore find that the dismissal of the claimant was fair.

67. Stepping back, it appears that there remains a fundamental gap between the parties, which arises from the claimant's frustrations that on the ground he was as busy as ever. The claimant's competence or for that matter his experience and skills are not in question. However, an employer is entitled to make hard financial decisions which it genuinely thinks are in its interests and in this case the decision was taken by Mr Esterhuyse who was uncomfortably well aware of the impact that it would have on the claimant.

68. In those circumstances, it does not fall to me to consider Polkey principles. I nevertheless went on briefly to consider the point, namely, whether the respondent would or might have fairly dismissed the claimant in the absence of any unfairness. Such an exercise always involves speculation and tribunals are encouraged not to be deterred from considering the point despite the element of speculation.

69. I find that if the defects had been rectified and, in this case most likely that the claimant would have been pooled with the other Framework Managers in the Central region, it was more likely than not that he would in any event have been made redundant. On the other hand, I accept that it might have created an opportunity to review and then possibly to look at alternative ways for more flexible ways of working. Applying the principles of Polkey, I conclude that that there was at least a 50% chance of the claimant being fairly dismissed within a further two months of his actual dismissal in any event. I should re-state for the reasons already given that the Polkey question does not in fact arise on the facts of this case as it is my conclusion that the claim for unfair dismissal fails

70. I turn to deal with the breach of contract point. There was no express term entitling the respondent to place the claimant on garden leave. I turned therefore to consider whether the claimant had a contractual entitlement, that is, a right to work. I reflected on the limited circumstances in which such a right to work exists: it revolves around those whose job is specifically of a type where frequent and continued experience of the job in the particular market-place was necessary. The claimant's tasks did not fit at all into that category. I conclude that no term can be implied into his contract that he had a contractual right to work. It follows inevitably that the claimant cannot succeed on his breach of contract claim.

71. I make no findings as to what loss might or might not flow from any breach that presumably would otherwise have arisen once he was put on garden leave. Had

there been such a breach, the matter of loss would then need to be dealt with at the remedy stage.

72. The claimant's claims are dismissed.

EMPLOYMENT JUDGE BEEVER

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
16 October 2018

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