EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
MR S MELHUISH	**V**	**NORTHGATE PUBLIC SERVICESSYSTEMS LABELLING LIMITED**

HELD AT: **LLANDUDNO** **ON:** **17 MARCH 2016**

BEFORE: **EMPLOYMENT JUDGE R MCDONALD (SITTING ALONE)**

REPRESENTATION:
FOR THE CLAIMANT: Representing himself
FOR THE RESPONDENTS: Mrs Woodmark, solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant's claim of unfair dismissal succeeds for the reasons set out below.

ORDER

1. The case shall be set down for a remedies hearing with a time estimate of half a day unless the parties notify the Tribunal by Friday 19 May that a shorter or longer remedies hearing is required. The remedies hearing will also consider any costs applications including any for reimbursement of any Tribunal fees paid by the Clamant.

REASONS

1. The Claimant brings a claim of unfair dismissal against the Respondent arising from his dismissal for redundancy on 29 July 2016.

2. The Claimant represented himself and Mrs Woodmark, solicitor, represented the Respondent.

3. At the hearing I heard evidence from the Claimant. For the Respondent I heard evidence from Mr Kevin Finnerty, Head of Development; Mr Steve Blackmore, a Development Manager; and from Ms Jo Jones, Senior HR Business Partner.

4. The parties had prepared a joint bundle. References to page numbers in this judgment are to pages in that bundle.

5. Having heard the evidence there was no time to hear oral submissions at the hearing. I therefore reserved my decision and directed that the parties provide written submissions. To assist the Claimant in structuring his submissions Mrs Woodmark agreed to provide the Respondent's written submissions by the 24 March. The Claimant then provided his by the 31 March and the Respondent provided brief submissions in response by the 4 April. I am grateful to both for the clarity of the written submissions provided. I have not quoted those submissions in full but have read and considered all of them and quote them where relevant to the issues I need to determine.

The Issues

6. There was no dispute between the parties that the Claimant was dismissed by the Respondent. The Claimant, however, disputed that this was a genuine redundancy situation. The first issue therefore was whether there was a genuine redundancy situation

7. If there a genuine redundancy situation then the second issue was whether dismissal of the Claimant because of that redundancy was fair. At the hearing the parties agreed a list of issues. In effect they are sub-issues relating to fairness:

   I. Was there genuine consultation?
   II. What was the pool for selection [for redundancy], who did the Claimant say should be in the pool [and by implication was the correct selection pool used]
   III. What were the selection criteria used?
   IV. What steps did the Respondent take to find [the Claimant] alternative work?

The Law

8. S.98(1) of the Employment Rights Act 1996 (ERA) provides that it is for the employer to show the reason (or if more than one the principal reason) for dismissal and that it is a reason within s.98(2) ERA or some other substantial reason such as to justify dismissal of an employee holding the position which the employee held.

9. Redundancy is a potentially fair reason for dismissal within s.98(2)(c) ERA.

10. S.139 ERA sets out the statutory definition of redundancy. In this case the Respondent says the circumstances fell within s.139(1)(b)(i), i.e. “the requirement of the business for employees to carry out work of a particular kind…have ceased or diminished”.

11. The Tribunal has to be satisfied that there is a genuine redundancy. However, the Tribunal will not go behind the facts and investigate how the redundancy situation arose and whether it could have been avoided and whether there are any viable alternatives; the Tribunal will not go into the rights or wrongs of a declaration of redundancy. ERA 1996 s.139(6) says in terms that the cessation or diminution in particular kind of work may arise ‘for whatever reason’ and that includes a decision by the employer that costs need to be cut – Moon v Homeowrthy Furniture [1976] IRLR 298.

12. The House of Lords (as it then was) confirmed in Murray and anor v Foyle Meats Ltd [1999] ICR 827 that S.139(1)(b)(i) requires a Tribunal to consider whether or not the requirements of the employer's business for employees to carry out 'work of a particular kind' have ceased or diminished or are expected to cease or diminish and, if they have, whether or not the dismissal of the employee in question was attributable to that cessation or diminution. The question whether or not the requirements of S.139(1)(b)(i) have been satisfied is a question of fact.

13. Where the employer has shown a potentially fair reason for dismissal the Tribunal must determine whether the dismissal was fair or unfair having regard to the reason shown by the employer: s.98(4) ERA. Whether a dismissal is fair or unfair 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 the reason as a sufficient reason for dismissing the employee, and must be decided in accordance with equity and the substantial merits of the case. The decision to dismiss is a matter for the employer. If the decision is within the band of reasonableness, it is not for the Tribunal to substitute its own views.

14. In Williams and ors v Compair Maxam Ltd 1982 ICR 156, EAT, the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. The EAT stressed, however, that in determining the question of reasonableness it was not for the Tribunal to impose its standards and decide whether the employer should have behaved differently. Instead it had to ask whether ‘the dismissal lay within the range of conduct which a reasonable employer could have adopted'.

15. The factors suggested by the EAT in the Compair Maxam case that a reasonable employer might be expected to consider were:
    - whether the selection criteria were objectively chosen and fairly applied
    - whether employees were warned and consulted about the redundancy

- whether, if there was a union, the union's view was sought, and
- whether any alternative work was available.

16. Dealing with the law on those issues in the order in which they appear in the list of issues agreed by the parties in this case.

17. The first of those is consultation. The question of what constitutes fair and proper consultation in each individual case is a question of fact for the Tribunal. The EAT provided some general guidance in Rowell v Hubbard Group Services Ltd 1995 IRLR 195, EAT. In the course of its judgment, the EAT referred to the comments of Glidewell LJ in R v British Coal Corporation and Secretary of State for Trade and Industry ex parte Price and ors 1994 IRLR 72, Div Ct, including the comment that 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'. The EAT took the view that those comments on the meaning of fair consultation were 'of assistance to employers when they have to consult with staff in the context of dismissal for redundancy or dismissal'. Although there were no invariable rules and the outcome of each case depended on its own facts, the EAT stated that 'when the need for consultation exists, it must be fair and genuine, and should… be conducted so far as possible as the passage from Glidewell LJ's judgment suggests'.

18. The second sub-issue identified was the correct pool for redundancy selection. Where there is no customary arrangement or agreed procedure to be considered, employers have a good deal of flexibility in defining the pool from which they will select employees for dismissal - Thomas and Betts Manufacturing Co v Harding 1980 IRLR 255, CA. They need only show that they have applied their minds to the problem and acted from genuine motives. However, in all cases, the Tribunal must be satisfied that the employer acted reasonably. In deciding whether this was so, the following factors may be relevant:
    - whether other groups of employees are doing similar work to the group from which selections were made
    - whether employees' jobs are interchangeable
    - whether the employee's inclusion in the unit is consistent with his or her previous position, and
    - whether the selection unit was agreed with any union.

19. The third sub-issue identified by the parties was the selection criteria used. In the event, this issue was not pursued because there were two in the pool and two vacancies and so no need to select between them.

20. The fourth sub-issue was the steps taken by the Respondent to identity alternative employment. The cases show that, in certain circumstances, an employer may be excused a failure to make efforts to redeploy employees rather than make them redundant.

However, as a general rule, Tribunals will expect an employer with sufficient resources to take reasonable steps to ameliorate the effects of redundancy, including giving detailed consideration to whether suitable alternative employment is available. This may include allowing an at-risk employee the opportunity to demonstrate his or her suitability for a vacant position, even if the employer is doubtful about this because the employee lacks prior relevant experience.

21. If a Tribunal finds that a dismissal was unfair the compensation it should award is "such amount as the Tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal" (s.123(1) ERA)

22. A just and equitable reduction can be made where the unfairly dismissed employee could have been dismissed at a later date or if a proper procedure had been followed (the so-called Polkey Principle named after the House of Lords decision in Polkey v AE Dayton Services Ltd 1988 ICR 142).

23. In Software 2000 Ltd v Andrews [2007] IRLR the EAT summarised the principles derived from previous cases on Polkey. Omitting those passages which relate to the now repealed s.98A ERA it said:

" (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.

.....

(7) Having considered the evidence, the Tribunal may determine:

...(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.

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."

Findings of Fact

24. The Claimant was employed as a Senior Developer and Support Analyst. He was dismissed for redundancy with his employment ending on 29 July 2016.

25. The Respondent develops software used by local and central government. Of particular relevance to this case are its Revenue and Benefits software products. It supplies these to over 170 local authorities who use them to collect Council Tax and administer claims for benefits. Each product was built using a "technology stack" and would then continue to use that technology base as it evolved or developed. As I understand it, the "technology stack" is in effect the technology framework or infrastructure within which specific products are created and function.

26. Central to this case is that some of the Respondent's products had been built using Oracle technology while others were built using .net ("dot net") technology. Specifically, while the Respondent's core revenue and benefits products were Oracle based, the three products on which the Claimant worked at the time of his dismissal were .net based. Those three products were eBenefits (eBens), eRevenues (eRev) and a fraud management system called FIMS.

27. At my request, the parties helpfully provided a brief glossary of terms. That explains that eBens is a customer facing system which enables a citizen to check whether they are entitled to benefit on

council tax while eRev is a complimentary system which enables changes of address or direct debit details to be made.

28. As I have said, eBens, eRevs and FIMS were .net rather than Oracle based products. Mr Finnerty's evidence, which was not disputed, was that the Respondent had teams developing and supporting each technology base but that in the Revenue and Benefits part of the business the .net team was very small in comparison to the Oracle team. He also gave evidence that the Respondent did use .net in other parts of its business, for example for its Safety (Police) products and health (Screening and Joint Registry) products.

29. In July 2015 responsibility for the .net team working on eBens, eRev and FIMS was transferred to Mr Finnerty. At that time the team consisted of the Claimant (who was home based), Mr Lewis (who was based at the Bury St Edmunds office based) and two offshore employees based in India.

30. It was not disputed that the Claimant's work consisted of two distinct elements. The first was development work, i.e. contributing to the ongoing evolution of eBens, eRev and FIMS. The second was support, i.e. providing support to the Respondent's customers who were already using those products. This was by way of "third line" support or specialist support where the first two lines of support had not resolved the customer query. I will return later to a dispute between the parties about the extent of support work which the Claimant was carrying out by the time the redundancy process was being implemented.

31. It was also not disputed that although the two offshore workers carried out .net support roles there were certain tasks which they could not carry out. The reason for that was that data protection legislation restricted their ability to directly access customers' systems. This meant in particular that, unlike the Claimant and Mr Lewis, they could not "dial in" or gain remote access to customers' systems in order to resolve problems.

32. Mr Finnerty's evidence was that in June 2016 he was told at short notice by his boss Stuart Terheege that there was a need to make headcount reductions across the business to reflect reduced workload. Mr Finnerty had to decide where to make reductions within his area. Ms Jones gave unchallenged evidence that the redundancies in Mr Finnerty's team were part of wider redundancies as a result of downturn in work and resultant cost cutting. This had also led to the closure of offices in Milton Keynes, Sale and Ossett and no all employee pay reviews for 2 years. She referred to a list of roles at risk of redundancy at the same time as the Claimant's [p.125-126] – a list of some 30 or so roles across various departments. I note that not all those on that list were eventually dismissed – some were not selected for redundancy "following the scoring" and three are marked "redeployed internally". However, I accept the Respondent's evidence that the Claimant's

dismissal was part of a wider, company-wide redundancy process driven by the need to reduce costs. Ms Jones evidence was that the workforce had reduced from 1550 with 400 offshore workers in 2015-16 to 1400 with 400 offshore workers.

33. Mr Finnerty's evidence was that he decided that he would make the necessary headcount reduction in his area by placing at risk the UK based .net technology specialists, i.e. the Claimant and Mr Lewis. He explained that by mid-2016 the Respondent had introduced CA-B (Citizen Access-Benefits) to replace eBens. CA-B is an Oracle based product. His unchallenged evidence [para 19 of his statement] was that by June 2016 some customers had already transitioned onto that product. He also gave unchallenged evidence [para 19 of his statement] that by June 2016 the Respondent had also been discussing writing an Oracle based replacement for eRevs because customers had been complaining that it was no longer adequate. His view was therefore that there was clearly less .net support needed and no new development was planned using that technology. Mr Finnerty's evidence was that he did not place the offshore .net workers "at risk" because they were in a different "cost centre" and so would not have led to the reduction in costs in Mr Finnerty's area which Mr Terheege was requiring. Mr Finnerty's evidence was that those offshore workers were primarily providing maintenance work (rather than development) work and that those posts will ultimately be removed when no more .net maintenance work is required. A letter from the Respondent to customers [p.139] confirms that it is withdrawing support for eBens from April 2017.

34. Mr Finnerty's evidence was that he did not include the UK Oracle team in the "at risk" pool with the UK .net team because "it was a different skill set and the developers fulfilled different roles". This is another area of dispute. A key element of the Claimant's case is that the distinction drawn by the Respondent between the Oracle team and the .net team is a false one. In essence his argument is that when selected for redundancy his role was as a developer who happened to have been working on .net rather than Oracle products. In contrast the Respondent's view is that he was a .net developer rather than an Oracle developer. The redundancy pool consisted of the Claimant and Mr Lewis. There was no selection process as such because the Respondent had identified the need to make two redundancies. With a pool of two there was therefore no selection exercise and no redundancy selection criteria.

35. I deal with that dispute below but for now I will continue with the narrative of events. Mr Finnerty was away on leave when the redundancy consultation with the Claimant was due to take place. Instead that consultation was carried out by Mr Blackmore. All the consultation meetings were by phone because the Claimant was home-based.

36. Mr Blackmore set up a call with the Claimant at 11.30 on the 30 June 2016. Mr Blackmore had been provided with a script [p.35]. His unchallenged evidence was that at that first consultation

meeting he read out the script. The key part of the script said that "as our plans to support eRevs, eBens and FIMS going forward require minimal development work, I must inform you that as of today your role has been placed at risk of potential redundancy". The script explained that the Respondent would continue to consult with the Claimant until 30 July 2016 where "if the proposal becomes a reality and you have not been able to be redeployed then the post with be confirmed as redundant". It also confirmed that the Claimant would receive on a weekly basis a list of all vacancies with the Respondent and gave the email address to contact if any of the vacancies are of interest.

37. A letter of the same date [p.39] sent by email confirmed that the Claimant's role was at risk explaining that "[as a result of] a review of its current structure in line with future business expectations….we need to reduce headcount". It said that "[the Respondent] will consider all ideas, suggestions and representations you wish to make to us in this period". Under cover of the same email the Claimant was also sent a copy of the Respondent's Redundancy Policy and a set of FAQs.

38. There was no verbatim note of the consultation meeting in the bundle. Instead there was a "consultation log" [p.56]. This is a pro forma which "can be used by line managers…to record discussion". The log records Mr Blackmore advising the Claimant that his role is potentially redundant in the same terms as the script. Under the heading "Any issues/concerns" the log records that the Claimant "raised he felt his role was not redundant but that a choice was being made to use lower cost labour". It also records that "[the Claimant] asked about the extent of role reductions [and that Mr Blackmore] advised that this is a review across the UK business".

39. In terms of action points they included sending the Claimant the documents referred to above and "[Mr Blackmore] to send redundancy quote once available". The consultation log was emailed to the Claimant at 13:45 on 30 June 2016 [p.55] and the redundancy quote sent the same day at 15:26 [p.58].

40. The Claimant acknowledged receipt of the quotation at 20.57 that same day [p.60] saying that it "[had] given [him] some useful information. We shall doubtless be discussing the contents in due course".

41. On the following Monday, 4 July 2016, Mr Blackmore emailed the Claimant asking him whether he would be available at 10 a.m. on Wednesday of that week to "go through any questions on your quotation or any other queries you have" [p.61]. That consultation meeting went ahead despite the Claimant having been signed off with stress at work for three weeks from 4 July. The consultation log for that meeting on the 6 July 2016 [p.67-68] records the Claimant's "disgust" at the proposed redundancy compensation. It also records him saying that "he felt that plans for replacement products have been in place for a long time and felt that he should have been

given an opportunity to transfer his business skills into the new technology areas" and that "[his] record shows that he would have had no trouble retraining to new technologies". The log records Mr Blackmore responding that "that is the reason for circulating the internal vacancies list to look at the potential for redeploying into other roles." The log also records the Claimant saying that "he was no longer interested in staying with the Respondent but [was] looking for a better deal or will go to Tribunal".

42. The "Follow up/Actions" section of the log refers to "[Mr Blackmore] to raise [the Claimant's] concerns with HR and Management chain" [p.68]. The consultation log for the next consultation discussion on 13 July confirms that Mr Blackmore has "escalated [the Claimant's] issues and the notes from the previous consultation to [Mr Blackmore's] line manager and HR and this is in turn being escalated to director level. [The Claimant] confirmed that there was nothing further to add to his case" [p.78]. In the bundle there were also exchanges of emails relating to payment of mileage and relating to benefits payable to the Claimant but those are not relevant to the issues I need to decide. What there was not was any evidence of a substantive response to the points raised by the Claimant at the 6 July consultation meeting, i.e. that he should have been given an opportunity to transfer to new technology areas and would have no difficulty retraining into those new technology areas.

43. On 20 July 2016 the Claimant says in an email to Mr Blackmore "I am making plans that my employment ceases at the end of the month. If there is any reason why this would not be so then do let me know. I understand the pedantic terminology of "at risk" but as no-one has discussed anything else then I have to make appropriate plans before the end of the month" [p.86]. Mr Blackmore's response on the same day says "Whilst obviously the process has to be taken to completion, I would suggest you plan for the worst case" [p.87].

44. The consultation log for the discussion on 21 July 2016 deals with various points relating to benefits and the process for handing over any equipment in the "event of no alternative placement being identified". In relation to escalating the concerns raised by the Claimant on 6 July to HR and management chain the log says (under the "Follow Up/Actions" heading) "[Mr Blackmore] has raised and awaiting any outcome. [Mr Blackmore] reported there were no further outcomes from escalating [the Claimant's] issues" [p.89].

45. Both Mr Finnerty and Ms Jones gave evidence that they had responded to queries raised by the Claimant about his redundancy package, pension and other benefits and there are emails in the bundle which corroborate that. Ms Jones confirmed that she saw copies of the consultation logs. In answer to my question she said that she did not recall any discussions about the Claimant's contention that he was not really redundant or about the possibility of redeployment. Mr Finnerty's evidence was that he did not speak to the Claimant during the consultation process but did raise with

his boss, Stuart Terhegee, queries Mr Blackmore had raised about the possibility of the Respondent paying enhanced redundancy pay. The answer to that was no. I make a finding of fact that neither Mr Finnerty nor Ms Jones responded to the issues raised by the Claimant on 6 July about the possibility of his re-training or being re-deployed into new roles. I find that the Respondent's position at that point was as stated by Mr Blackmore in para 22 of his statement, i.e. "[the Claimant] was skilled on .net technologies and training to Oracle would have taken a very long time if he was still doing his .net job. [The Respondent] had no developer vacancies in Oracle anyway at that time" but that he was welcome to apply for any job on the vacancy list circulated to him weekly.

46. The Claimant's dismissal due to redundancy was confirmed by letter dated 29 July 2016 [p.103] which simply says that "I regret it has not been possible to avoid the potential redundancy" before confirming payment in lieu of notice. That letter also notifies the Claimant of his right to appeal against the decision to dismiss within seven calendar days by writing to Jo Jones, Senior HR Business Partner [p.104].

47. The Claimant did not appeal within that seven day period. However, on 28 October 2016 the Claimant emailed Ms Jones giving "notification that [he] wish[ed] to pursue an appeal against [the Respondent] for wrongful dismissal" [p.120]. He acknowledged the seven day appeal time limit for appeal but as "that is not statutory [he] did not accept that this is appropriate". At the Tribunal hearing the Claimant's explanation for the delay was that he did not have evidence for an appeal until he saw a job advert for "his" role in October 2016.

48. Ms Jones replied on 31 October asking the Claimant to set out the reasons for appeal. Having had no response she then sent a chasing email on 14 November [pp.121-122]. The Claimant responded on the same day saying that his grounds for appealing against "the redundancy on the grounds that the post no longer exists is that this is not true…the requirement for the post is ongoing for the foreseeable future….my job has been done by others albeit at a deliberately reduced intensity and probably less efficiently in order to meet contractual obligations….Also my role has been advertised for the last three weeks, this is a time period that was chosen to be outside the period when jobs were presented to me for consideration despite the fact that the requirement was known for at least the last year…..no attempt whatsoever was made by [the Respondent] to consult with me on this role or to negotiate any time and/or salary reduction to achieve the required cost reduction, such negotiations may well have been fruitful…the redundancy is fake on the terms presented and is purely a desire on [the Respondent's] part to reduce costs by employing another person to do the same job on a lower salary" [p.121].

49. Ms Jones replied on the 17 November 2016 by email asking the Claimant to confirm that the advert referred to was for a Senior

Developer based in Bracknell reference NOR00009V [p.123]. The Claimant confirmed by email on the 19 November 2016 that that was the advertised role and that "anyone familiar with my role with Northgate will recognise this advertised job is pretty much the same as my job was and would evolve into [p.124]. Ms Jones's evidence [para 13 of her statement] was that she did not respond further because by then the Respondent had received the Claimant's ET1. The Claimant did not follow this up he says because the Tribunal proceedings were by then underway.

50. Moving now to the areas of relevant factual disputes between the parties.

The Oracle - .net divide and the feasibility of crossing it

51. Perhaps the key area of factual dispute was the extent to which .net and Oracle technologies are distinct and the difficulty (or not) for a software developer to move from one to the other. Mr Finnerty's evidence was that it was a case of "never the twain" –he had never known a developer move from Oracle to .net. or vice versa. Mr Blackmore's evidence supported this view.

52. The Claimant gave evidence that he had visited the Oracle training site and identified the core instructional training that was officially recommended. Those courses are 5 and 3 days long, i.e. a total of eight days either as two classroom based intensive sessions or as training on demand or web delivered courses [para 16 of his statement]. When the Claimant put this to Mr Blackmore in cross examination his response was that while undertaking such a course might make you able to use the Oracle tools it would not make you an expert in Oracle-the course could, in his words, only provide a "walk though" of Oracle.

53. The hearing bundle contained job descriptions and job adverts. One is the "Senior Software Developer" job description [p.127-129]. I note that the "Essential" knowledge required for that role [p.129] includes "Experience of delivering software applications in ASP.NET and C#.NET". It make no reference to Oracle. In contrast the job advert at p.118 reference NOR00009V which prompted the Claimant's belated appeal says that the successful candidate "must have a proven track record on the full development lifecycle of large applications using the Oracle database and toolset". It does not refer to any .net competencies. It seems to me that this supports Mr Respondent's case that there was a fundamental distinction between ".net roles" and "Oracle roles". I have not ignored the Claimant's evidence that he was familiar with using some Oracle based products such as Oracle databases. However, I find that at the time of his dismissal the work the Claimant was carrying out .net based developer and support work rather than Oracle based developer and support work and that, as the Respondent submitted, these were different "kinds of work".

54. The Claimant gave evidence about his track record for adapting to new technology and this was not challenged by the Respondent. He submitted that this meant that he could become proficient in Oracle based work in a short period of time if he was allowed to undergo the 8 days core training referred to above. The Respondent's witnesses suggested that in reality it would take at least 12 months and more likely 18 months to become sufficiently proficient to fulfil an Oracle developer role. It seems to me that the evidence of those witnesses is more credible. The developer roles involved developing products and providing third line, i.e. expert, technical support. It seems to me that to fulfil that role more would be needed than the 8 days "core training" course. While I accept that the Claimant may well have had the aptitude to get to grips with new technologies I accept the Respondent's contention that he would not have been able to simply step into and fulfil any available Oracle role within the Respondent after the 8 days training course and without further experience of using Oracle.

The extent of .net support work when made redundant

55. The Claimant's evidence was that at the time he was selected for redundancy 50% of his time was spent on support work for eBens, eRevs and FIMS customers. In contrast, Mr FInnerty's evidence was that it consisted of about 15% of the Claimant's role. Mr Finnerty said that he based that on the number of "dial ins" recorded, i.e. occasions when the .net support team had had to remotely access the customer's system in order to resolve a problem. Mr Finnerty's evidence was that in 2015-16 there had only been 12 such dial-ins.

56. The Claimant's evidence was that .net support accounted for at least 50% of his work. His evidence was that the dial-ins represented only a small proportion of the support work done-most problems could be resolved without needing a dial in. In his written submissions he said that his timesheets substantiated this but they were not put in evidence at the hearing. It was clear from the evidence at the hearing, however, that neither Mr Finnerty nor Mr Blackmore had a detailed grasp of what the Claimant's day to day workload was.

57. That's not surprising given that as Mr Finnerty says in his statement [para 15] from July 2015 day-today operational management of the .net team was carried out by an offshore project manager, Ajay Kolankarai. However, it does seem to me to mean that they were not in a strong position to contradict the Claimant's evidence on this point. It also seems to me that it must have been the case that the support work must have consisted of more than simply dial-ins because the evidence I heard was that the two offshore .net workers were not able to carry out dial-ins because of data protection legislation. If support consisted solely of dial-ins they would not have been able to carry out any. I find therefore that at the time of redundancy selection the Claimant's work did consist of around 50% support calls.

58. What is not in dispute is that the .net development work either had ceased or was going to imminently because eRevs and eBens were being replaced with Oracle based products. Mr Finnerty's evidence was that this meant the demand for .net support was reducing and would eventually disappear in relation to Revenue and Benefits products. The Claimant suggested to Mr Finnerty in cross examination that the transition to the new products would actually lead to an increase in support calls as such transitions inevitably give rise to challenges and unforeseen problems. Mr Finnerty disagreed. He accepted that the customers were still there but more were now on Oracle products and so the need for .net support was continually diminishing. His evidence was that neither the Claimant nor Mr Lewis had been replaced and that the remaining .net support was being carried out by the two offshore colleagues.

59. I find Mr Finnerty's evidence on this point more credible. It seems logical to me that as the Respondent's customers moved from .net to Oracle products, the need for .net support would diminish. Even though I accept that at the time of redundancy the .net support element of the Claimant's work was nearer the 50% suggested by him that the 15% suggested by the Respondent I find that that work was expected to diminish and has continued to do so.

Advertising of "the Claimant's" role in March 2016 and October 2016

60. The Claimant suggested that the advertising of two roles by the Respondent undermined their claim that his role was redundant. He referred to two advertised roles. The first was advertised in March 2016, i.e. when the Claimant was still employed by the Respondent and before the redundancy process had begun. Mr Finnerty's evidence was that this arose from the resignation of a Senior Oracle Developer who had been with them for 15 years. In the event, the Respondent did not replace her. I accept that evidence. I also accept the Respondent's point that this could not be the Claimant's role since at that time he was still filling his role with the Respondent.

61. The second advert was the one referred to as NOR00009V which caused the Claimant to email Mr Jones on 28 October 2016. The Claimant said this was "his" role. Mr Finnerty's evidence was that this was a re-advertising of the vacant Senior Oracle Developer post previously advertised but not filled in March. His evidence, which I accept, was that they had advertised the role in anticipation of winning a Central Government contract which would have needed staff to fulfil at short notice. In the event the contract was not won and so the vacancy was withdrawn. As I have mentioned above, the job is for a "Senor Developer…based in the Bracknell office working on Oracle Web based applications". I have found as a fact that the Claimant's work was as a .net developer and I accept the Respondent's case that this was not "his" job being advertised after his departure.

"Segregation" of .net team and failure to provide training

62. One of the Claimant's contentions was that from around 2015 the .net team was segregated and, in effect moved into a career cul-de-sac. Mr Finnerty's evidence was that in July 2015 the eBens/eRevs .net team were transferred to him. Because their work was fundamentally different they could not easily be absorbed into his team which otherwise consisted of 20 onshore and 13 offshore Oracle development and support employees. This was the reason for appointing an offshore project manager to deal with their day to day operational management with David Njoka, an UK based manager, being responsible for the Claimant and Mr Lewis's formal line management for things such as performance reviews.

63. The Claimant's suggestion was that the "segregation" of the .net eBens/eRev team included other teams being told about the proposed replacement of those products with Oracle based products before the Claimant and Mr Lewis. Mr Finnerty denied this was the case and the Claimant did not provide any evidence in support of his assertion. Indeed in cross examination by Mrs Woodmark he had to acknowledge that he was not in a position to know what other teams knew. I accept that was the case, particularly given that the Claimant was home based. I also accept as credible Mr Finnerty's evidence that while there might have been rumour or gossip about what the future might hold, the only people who knew for certain were the Respondent's board and senior management. That the position was not generally known seems to me to be corroborated by the email from Mr Blackmore to Mr Finnerty dated 20 May 2016 [p.138] in which he passes on concerns about their futures raised by the Claimant and Mr Lewis at their performance review with Mr Njoka. He says that they have concerns "because they are aware of the new CAB and proposed CaR projects [i.e. the replacements for eBens and eRev]".Mr Blackmore says that "I am not clear at this point what [future plans] would be". I do not find that the Respondent "segregated" the .net team in the way suggested by the Respondent nor deliberately kept them in the dark about proposed developments while others were told what those were.

Whether training requests were made by the Claimant

64. To my mind the Claimant's allegation on the final area of dispute supports the finding that though not officially announced it was known that eRevs/eBens were probably moving to the end of their shelf lives which was likely to result in a move to a new platform. The dispute is about whether the Claimant asked (from some 18 months before he was made redundant) for training "for the transition from the current software platform of the software I am developing and supporting to the net platform". The Claimant's evidence was that he raised these requests in performance reviews.

65. Those reviews were held with his line manager, David Njoka. He did not give evidence at the Tribunal hearing. There were also no notes of those performance reviews. This was a contentious point. The Claimant had asked the Respondent for extracts from his performance review which he said would show those training requests being made. What the Respondent provided was a document in the form of a table containing information extracted from the performance review system [p.140]. However, it did not include reference to training requests. The Claimant alleged those references had been deliberately omitted by the Respondent. Ms Jones's evidence was that it was not possible to provide a print out of the information in the performance review system. Instead, a colleague of hers had had to cut and paste the text from that system into the document at p.140. If information had been left out it was oversight not conspiracy. I accept that as the most likely explanation.

66. The table at p.140 included a column headed "Development plan". There was an entry for 2014-15 referring to "CA product knowledge". For 2015-16 it simply says "not mentioned" in that column. Since Mr Njoka did not give evidence the Respondent was not in a strong position to contradict the Claimant's version of events. Mr Blackmore suggested that had the Claimant raised the issue of training with Mr Njoka then he would have passed it on to him, as he had done with the concerns referred to in the mail of 20 May 2016 referred to above. However it seems to me that the fact that a manager escalated concerns about line reports' futures to his manager is no guarantee that he would escalate more operational matter like requests for training. On balance I prefer the Claimant's evidence and accept that he did ask for training to enable him to move to a new platform in his performance reviews from 18 months prior to his dismissal.

Discussion and conclusions

67. I will now consider the list of issues in light of the evidence, the relevant law and the parties' submissions.

Issue 1: Was whether there was a genuine redundancy situation.

68. Was the Claimant's dismissal "wholly or mainly attributable to…the fact that the requirements of the business..for employees to carry out work of a particular kind…have ceased or diminished or are expected to cease or diminish (s.139(1)(b)(i) of ERA)"?

69. The Claimant's submission is that the work packages that together constituted his role on leaving the Respondent continue and have been replaced by alternative personnel at reduced costs. I do not accept that submission. There was no real dispute that the .net development work which represented 50% of the Claimant role on

eRev and eBens continues – it did not because those two products were in the process of being replaced. I have also found that the Respondent's requirement for support work for those .net products was expected to diminish and continues to do so. In simple terms, the .net work on eRevs and eBens previously done by 4 employees (the Claimant and Mr Lewis and two offshore employees) is now done by 2 employees offshore.

70. As my findings of fact in relation to the October 2016 advert for role NOR00009V make clear, I do not accept that the Claimant's job was advertised after he left and is now being done by someone else.

71. I therefore find that the Claimant's dismissal was attributable to the fact that the Respondent's requirement for employees to carry out .net development and support work had diminished (and was expected to diminish further). There was a genuine redundancy situation and his dismissal was attributable to that.

72. I understand part of the Claimant's case to be that the failure to provide requested training and the "segregating" or "isolating" of the .net team undermines the contention that this was a genuine redundancy situation. On the evidence I have heard I do not accept there was any such concerted campaign The most that can be said is that the Respondent did not at an early stage (prior to the redundancy process itself) take steps to re-skill the .net team to enable them to work on the new Oracle based revenue and benefits products. It does not seem to me that that is a matter which is relevant to the issues I am deciding. It would be to commit the error of "going behind" the redundancy situation to examine why it happened as it did.

Issue 2 - was the dismissal of the Claimant because of that redundancy fair?

73. This issue consists of a number of sub-issues.

Issue 2 sub-issue 1 - Was there genuine consultation?

74. The Claimant's submission is that the consultation in this case was not genuine and there was no effort by the Respondent (in the person of Mr Blackmore, who carried out the consultation) "to engage in meaningful discussion as to possible roles within his direct sphere or any other".

75. This was not a case where there was no consultation. Mr Blackmore held a series of consultation meetings with the Claimant. The issue is whether that was a genuine consultation or merely a case of the Respondent "going through the motions".

76. I made a finding of fact that neither Mr Finnerty nor Ms Jones responded to the issues raised by the Claimant on 6 July about the

possibility of his re-training or being re-deployed into new roles. The Respondent submitted that the Claimant had said at the meeting on the 6 July that he was no longer interested in working for the Respondent. In cross examination Mr Blackmore said that "I was attempting to [establish the Claimant's skills and aspirations and align them with future vacancies] but you had no interest in going down that route". The Respondent's submissions as I understand it is that the Claimant had, by making his comment about no longer wanting to work for the Respondent on 6 July 2016 signalled that there was no point seeking redeployment. I do not accept that. I find it perfectly understandable that in the course of what was to him a severe shock (leading to his being signed off for stress for three weeks) the Claimant might have expressed views of this kind in the heat of the moment. I do not accept that absolved the Respondent from engaging in meaningful consultation where the Claimant in fact continued to attend consultation meetings.

77. I also note that the subsequent consultation meeting logs report Mr Blackmore waiting for a response from senior colleagues about the matters escalated to them following the 6 July meeting. It seems to me that in the meetings subsequent to the 6 July there was still a "live issue" about how the Respondent (specifically HR and Mr Finnerty) responded to the Claimant's questions about redeployment raised on the 6 July. It seems to me that beyond sending the Claimant the regular list of vacancies the Respondent had decided that the Claimant's dismissal was a foregone conclusion. I find that the consultation was not "meaningful consultation" because, in the words used in R v British Coal Corporation and Secretary of State for Trade and Industry ex parte Price and ors 1994 IRLR 72, Div Ct, the Respondent did not consider the views expressed by the Claimant about possible redeployment or re-training 'properly and genuinely'.

78. The Respondent submitted that even had there been meaningful consultation it would have made no difference as the Respondent had no relevant vacancies. It seems to me clear that Polkey means that a dismissal for failure to consult is unfair even if it would have made no difference. The fact it may have made no difference may justify a reduction in compensation on Polkey grounds but does not render an otherwise unfair dismissal fair.

Issue 2 sub-issue 2 - Was there genuine consultation?
What was the pool for selection [for redundancy], who did the Claimant say should be in the pool [and by implication was the correct selection pool used]

79. The Claimant did not expressly address this issue in his written submissions. My understanding is that he considered himself to be doing a generic developer role and that if there were a redundancy pool the Oracle developers should have been included in such a pool. I have found as a fact that the Oracle and .net roles were distinct, not interchangeable and that it was the eRevs and Ebens .net team work which was diminishing and expected to diminish

further. In those circumstances I accept the Respondent's submissions that it acted reasonably in selecting the UK based .net developers to be included in the pool for selection.

Issue 2 sub-issue 3 - What were the selection criteria used?

80. Although this issue was included by the parties it did not in practice arise in this case. Since the pool in this case consisted of two employees and there was a need to make two posts redundant there was no need to select between them.

Issue 2 sub-issue 4 What steps did the Respondent take to find [the Claimant] alternative work?

81. The final issue is whether the Respondent took reasonable steps to ameliorate the effects of redundancy, including giving detailed consideration to whether suitable alternative employment is available. The Respondent's submission is that it did so by providing the Respondent with lists of weekly vacancies. It does not submit that it did more than that, e.g. by actively seeking to establish what skills the Claimant had and whether there might be opportunities to redeploy him. That was arguably particularly important in the Claimant's case because the absence of any selection process (or any involvement of any direct line manager in the redundancy process) meant that neither Mr Blackmore nor Mr Finnerty had a good understanding of the Claimant's skills and knowledge. It is clear that the Respondent did achieve redeployment of some at risk employees – as shown by the list at p.126. The Respondent's evidence is that there were no relevant vacancies but again that seems to me to go to the issue of compensation and Polkey deductions – it did not mean it was reasonable not to make a greater effort to establish the Claimant's skills and knowledge and seek opportunities for redeployment. The effort should have been made even if ultimately it proved futile.

82. I therefore find that the Claimant was unfairly dismissed. The Respondent failed to engage in meaningful consultation and did not take the steps to seek alternative employment which a reasonable employer would have.

<u>Remedy</u>

83. I have considered carefully whether it was possible for me to deal with the issue of remedy without hearing further from the parties. Clearly it is desirable to avoid them incurring additional costs if possible. I have found that the redundancy procedure in this case was flawed. The evidence given at the hearing was that there were no appropriate vacancies for the Claimant on the lists of vacancies circulated by the Respondent. It is clearly also the case that the Respondent was reducing numbers. That would tend to suggest that even had there been meaningful consultation or more proactive steps to find alternative roles for the Claimant they would not have been successful.

84. On the other hand, however, the Respondent is a large organisation of over a 1000 staff. Mr Finnerty's evidence was that there are other .net roles within the company. I heard very limited evidence about that because the focus was on Oracle roles within Mr Finnerty's team**.**

85. Ultimately I have decided that to deal fairly with this issue it is necessary to hold a remedies hearing. That hearing will obviously need to take into account the findings of fact I refer to in the preceding two paragraphs.

Judgment posted to the parties on

3 May 2017

EMPLOYMENT JUDGE R MCDONALD

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Dated: 30 May 2017

For the staff of the Tribunal Office