

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100046/2017 Hearing at Glasgow on 4 and 5 May 2017

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Employment Judge: M A Macleod (sitting alone)

10 Nicholas Hill

Claimant
In Person

15 SpaceandPeople Plc

Respondent
Represented by
Mr L Anderson
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's claim of unfair dismissal fails, and is dismissed.

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REASONS

Introduction

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1. The claimant presented a claim to the Employment Tribunal on 16 January 2017 in which he complained that the respondent had dismissed him unfairly.

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2. The respondent submitted a response in which it denied that the claimant was unfairly dismissed, and asserted that the reason for dismissal was redundancy.

3. A hearing was fixed to take place on 4 and 5 May 2017 in order to determine this issue. The claimant attended and represented himself. The respondent was represented by Mr Anderson, solicitor.

4. The respondent called the following witnesses:

- Matthew John Bending, Chief Executive Officer;
- Gregor Rankin Dunlay, Chief Financial Officer; and
- Charles Graham Hammond, Chief Executive of Forth Ports Limited, and Non-Executive Chairman of Respondent.

- 5 5. The claimant gave evidence on his own account.
6. The parties presented a joint Inventory of Productions, upon which reliance was placed during the hearing.
7. Following the conclusion of the evidence, the Tribunal determined that submissions should be presented in writing by the parties. Those written
10 submissions were not received by the sitting Employment Judge until 17 July 2017, following his return from a period of leave.
8. Based on the evidence led and the information presented, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

- 15 9. The claimant, whose date of birth is 4 April 1971, commenced employment with the respondent on 1 February 2004, as a sales manager, rising to the position of Sales Director on 1 February 2009.
10. The respondent is a company which was set up in 2000 by its co-founders, Matthew Bending and Nancy Cullen. Its primary business is as
20 a destination media specialist, providing marketing services primarily to shopping centres. In 2004, the respondent listed on the London stock exchange, becoming a public limited company, at which point they recognised the need to have a sales manager responsible for the growing sales management role within the company. Up to that point, the sales
25 management work of the company had been overseen by Mr Bending, but he wished to recruit a professionally trained sales manager to professionalise the sales approach of the business. He joined the

company in 2004 to manage, improve and expand the sales force of the business.

11. The claimant joined Mr Bending and Ms Cullen on the management team. There was no Financial Director at that time.
- 5 12. In 2010, the respondent made its first acquisition of another business, Retail Profile, which concentrated on retail activity while the respondent had concentrated on promotional activity. The respondent began then to expand into international markets, including Germany and India, and experienced, until 2013, rapid growth in business, turnover and staff.
10 Between 2013 and 2016, the business experienced a decline in some aspects of its activity, but still maintained approximately 80 employees between Germany and the United Kingdom.
13. The claimant's role expanded as the business expanded. The sales reflected the growth in the number of shopping centres with which the
15 respondent was contracting. The claimant required to take responsibility to recruit and mentor staff and ensure that they delivered on targets set by the business. His key focus was on managing the sales team and negotiating key account deals. His promotion to Sales Director recognised the increased role and significance the claimant had come to
20 have within the business. His was not a PLC Board position but reflected his strategic input to the business.
14. The claimant's terms and conditions of employment were set out in a Statement of Terms and Conditions of Employment (87 – 91). That statement confirmed that the claimant was employed as Commercial
25 Sales Director from 1 February 2009. It stated that "*Your duties have been fully discussed with you and a description of the role provided.*"
15. His remuneration was stated to be £62,564 per annum, payable monthly in arrears on the last working day of each month. He was provided with a car allowance for the use of his own car of £6,000 per annum.

16. Under Commission, the statement of terms and conditions provided:

“You will be entitled to receive commission on the Company’s UK paid gross sales less cancellations in any year based on the previous year’s UK gross sales performance subject to said gross sales being not less than £10 million pounds, on the following basis: For avoidance of doubt this means if in 2009 we achieve £12m gross UK sales the following years baseline for commission payments would be £12m:

Less than 80% of paid gross sales less cancellations	0%
81-90% of paid gross sales less cancellations	0.05%
91-110% of paid gross sales less cancellations	0.15%
111%-120% of paid gross sales less cancellations	0.35%
121% + of paid gross sales less cancellations	0.45%”

17. The notice period to which the claimant was entitled under contract was three months until employed continuously for two years, and thereafter the claimant was entitled to one additional week for each completed year of continuous employment up to a maximum of 13 weeks.”

18. The claimant was paid a bonus over a number of years, set out in a table produced at 98, showing the following:

- 2015 – bonus payment £10,000, based on 2014 performance;
- 2014 – bonus payment £17,652.61, based on 2013 performance;
- 2013 – bonus payment £32,035.23, based on 2012 performance;
- 2012 – bonus payment £31,690.22, based on 2011 performance; and
- 2011 – bonus payment £44,166.74, based on 14 months to December 2010.

19. The claimant required to travel on a regular basis to London to liaise with one of the respondent's major clients, Network Rail. In addition, the respondent had succeeded in winning another major contract with a new client, British Land.

5 20. Having succeeded in winning the business of Network Rail, the respondent recognised the need to adjust its methods of working in order to service an important new client, which gave it access to the London market. As a result, the respondent decided that it was necessary to split the role of Sales Director into two positions, on the basis that one person
10 could no longer bear all of the responsibilities required. It planned that one role would take responsibility for the management of the office in Glasgow, and the other role would have the responsibility of liaising with the respondent's key clients, involving frequent travel to London.

21. On 28 January 2016, an extract from a Board meeting minute (37) stated:

15 *"MB – Sales management needs to evolve to meet the current needs of the business. We had looked to keep MPK as a silo as since it has been introduced sales have been very good as has staff retention and satisfaction. However, Ian McLaughlin is a very expensive resource to just be administering a business sector that is still quite small at present.*
20 *He had 4 KPIs when he joined the company including business development and involvement in sales management across the Glasgow sales office. He is at present just engaged in delivering the single KPI that related to the MPK business. IMcL is aware of this and MB has had a discussion with him regarding the running of the whole sales admin*
25 *operation in a more corporate fashion than at present.*

*Nick Hill is understood to have good commercial acumen and is a good client facing representative of the business, but is not proving to be a good administrator or man-manager. The intention is to propose a new role of Client Services Director to him which would make best use of his
30 skills to grow agency and key account business and release him from the*

need to also manage the sales function as it is understood that his current role has grown too large for him to be able to manage it all.”

- 5
22. Following that meeting, Mr Bending emailed the claimant (101) asking him to “pop up” to meet with him. He and Mr Hammond, the Chairman, met with the claimant to advise him that the Sales Director role was to be divided into two roles, and that the whole Board was united in its view that this was a necessary step for the business to take. He advised the claimant that they wished to ensure that they created a role for him which met the needs of the business and of him as an individual. He told the claimant that with the new Network Rail contract, there were significant risks and opportunities open to the business, and that the business needed someone to get more business face to face. He said to the claimant that they wished him to take the role of Client Services Director, and that while the respondent was determined to proceed to reorganise in this way it would be best if it were not imposed upon him.
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23. Mr Bending told the claimant that he felt strongly that this role was suitable for him, and that he could have input into the drafting of the job specification. He was asked how he felt about it.
24. The claimant responded by saying that they should provide him with a copy of the job specification and that he would get back to them. He said that he was interested in what they had said, though he felt somewhat deflated as it appeared to have been suggested that he or the business had failed in some way, but he felt that the discussion was more positive towards its end. During the course of the meeting, the claimant accepted that there was a need to split the role which he had been performing, on the basis that it was becoming too big for one person to carry out.
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25. The claimant left the meeting with the impression that he had been given an assurance that his terms and conditions would not change if he accepted the new role. Mr Bending did not expressly state at that meeting that the claimant’s terms and conditions would not change. The respondent did intend that his terms and conditions would be amended, in
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terms of the basic salary package, with certain protections in place for the first two years.

5 26. On 29 January 2016, Mr Bending emailed the claimant (45/6) attaching a copy of the job specification proposed for the new position, and the proposed KPI indicators. He invited the claimant to revert to him by email in the first instance with any key questions so that by 3 February *“we can agree terms and move forward.”*

27. The job specification (115) was headed “Client Services Director”. At the outset, it made reference to the salary for the position:

10 *“Salary £80K*

Core OTE £100K (guaranteed in 2016, 50% guaranteed in 2017)

Stretch OTE £120K (not guaranteed)”

15 28. The job specification went on to confirm that it was a management board position, and that *“Key Agencies and key accounts will be two of the three main drivers in the UK business. A clear focus on the revenues generated from this sector is essential in enabling improvements in sales and profitability. We must drive more revenue from current and new customers.”*

20 29. So far as the responsibilities of the position were concerned, they were set out as follows:

25 • *“Managing all Agency relationships, creating presentations and commercial relationships to drive growth from this key sector of at least 10% (core) and 20% (stretch) per annum from a starting position of £3,937k (£80k/£160k net approx) of gross revenue in 2015 (top 50 ATL/BTL accounts), involving:*

- Active Agency recruitment, management and sales monitoring;

- *Active communication with S&P Plus and coordinating the key relationships with them with a view to improving Group sales; and*
- 5 • *Identifying areas of gross revenue improvement with non-ATL/BTL key accounts of at least 10% (core) and 20% (stretch) per annum from a starting position of £10,253k (£200k/£400k nett) in 2015 through:*
 - *Active management of relationship and commercial deals with all accounts currently valued at more than*
10 *£20,000 net per annum; and*
 - *Increase revenue from non-agency identified Key Accounts (as identified by Client Services Director);*
- *Regular meeting with all Key accounts to ensure uplift in booking rates from them;*
- 15 • *Identify new account potential from inbound, client meetings etc;*
- *Create a sales plan for each actual and potential client;*
- *Assist Venues team with pitches/presentations showcasing our deep commitment to ATL and BTL Agencies and the role of Key Account management in our service; and*
- 20 • *Deliver written monthly contact reports to Management with clear analysis of client engagement, opportunity and revenue expectation.”*

30. The claimant replied to that email enclosing the job specification on the same day (44/45):

25 *“Hi Matthew,*

Many thanks for the email.

Will review over the weekend and revert for an in-depth discussion on Wednesday where hopefully we can get agreement.

5 *In the first instance can you just confirm the salary (when we met yesterday you said this role was under the same terms and conditions as I currently am on) as you have it as £80,000. I am currently paid £97,535.79 per annum. This is split £91,535.76 basic and £6,000 car allowance.*

10 *On the OTE I would need you to talk me through this in more detail. My current OTE would be @£123,000 if we delivered growth on last year actuals (this is based on 0.15% of gross revenues at £17,500,000 across promo, MPK and RP).*

Many thanks.

Nick”

15 31. Mr Bending replied (44): *“Overall in Year 1, it is a payrise, the board have specifically asked that the bonus guarantee to be tapered 50% Y2 and 0% in Y3, I think a mutual discussion on targets especially Y1 and Y2 will help reassure you that this is achievable.”*

20 32. The claimant’s response was to ask (43) if he was to take a 12.6% fall in basic but that he would be guaranteed to make £100,000 in total pay, with no car allowance of acknowledgement of current bonus potential, and that in year 2 the guarantee would only be to £95,000. He concluded: *“Please can you confirm as under those terms I cannot agree as I am financially worse off and that is not what you described yesterday.”*

25 33. Mr Bending then emailed again (42):
“The job spec and remuneration are designed to enable you to achieve stretch, as I mentioned a discussion on bonus achievement will put your mind at ease.

Year 1 £80k and £20k guaranteed, this is a £2.5k increase on your current package, with stretch £120k.

Year 2 after 11 months in the role, £80k basic (annual pay rise would be applicable based on performance, and £10k guaranteed with stretch £120k

5 *Over the two years this equates to your current salary, there will be pay awards in line with performance in Y2 and if overachievement we would never deny a discretionary bonus.*

I think this is an excellent package I hope you do too.”

34. The claimant responded (42):

10 *“Thanks for clarifying. The real term decrease in basic is a major concern, and was not explained yesterday, this is actually contradictory to your statement that my salary and terms would remain the same, and if I had been made aware would have raised those concerns to you and Charles.*

15 *This has a major impact on my monthly outgoings, mortgage payments and commitments. As I hope you can appreciate my bank would need to re-evaluate my mortgage and my ability to pay based on a decrease in my basic salary. As such I do not think this is something I can agree on.*

20 *Please can you come back to me and confirm that the basic and terms are as my current contract so that we can look at how we take this forward?”*

35. Mr Bending’s reply (41) was: *“No it wouldn’t as the £basic and bonus would be payable evenly across the year, so you are up in Y1, if in Y2 we haven’t increased your salary or you haven’t achieved stretch then somethings gone wrong, and that is not the aim.”*

25 36. The claimant replied by insisting (40) that having checked his mortgage contract he required to make them aware of changes in his employment including basic salary, commission or bonus not being applicable unless they could be demonstrated on wage slips. He reiterated that *“I also cannot agree to something where we do not know the potential or the*

levels that can be reached when currently I have commitments which are based on my current basic.”

5 37. Mr Bending replied (39): *“Well I am sorry but that’s the best I can do, please review what I have written, I am sure no mortgage holder will see this as not a material change in circumstance and I am sure you can discuss that with them. The package is enhanced not reduced in Year 1 and balances out as the same over the 2 years. Please think it over so we can discuss on Wednesday.”*

10 38. On 1 February, the claimant emailed the respondent (47) to notify them that he had been suffering from increased stress levels, and that this had seriously affected his sleep and health. As a result, he had attended his doctor, who had signed him off work for two weeks.

15 39. As a result, the respondent stopped the process, in order to await the claimant’s return. When he did return, Mr Bending invited him to attend a meeting with Mr Dunlay and himself, on 22 February, which the claimant accepted (50/51).

40. Mr Dunlay took a note of that meeting (52).

20 41. The claimant indicated at the outset that *“If you don’t address the money I won’t address the role”*. The note went on to record that the discussion continued as a follows:

“MB mentioned the salary in Y1 is higher than his current and that we would be working to make the job a success and therefore Y2 would see a pay rise and bonus if performance was good.

NH reiterated not unless the basic pay and terms are addressed.

25 *MB said – this leaves us in a difficult position we agree the job needs to be split as it is too big for one person and that stress has impacted you, this answers all of this. NH would not comment.*

NHS said – why don’t you work out what my pay off would be.

I said we would take advice and come back to him.

Subsequently I invited NH by email to a meeting on Monday 28th Feb to discuss how we move forward.”

5 42. The claimant also prepared a note of that meeting (53) at greater length. It became apparent that this note was in fact a hybrid of the claimant's own version of the meeting, together with some annotations highlighted in red, shown on a colour version of the note produced at 205ff. The annotations were made by Mr Bending on receipt of the claimant's note.

10 43. The notes of the meeting (205ff) confirm that the claimant was advised about the structure of the remuneration under the new arrangement, and that it was at that point unlikely that he would be in receipt of a bonus in 2016 owing to falling performance by the respondent's business.

15 44. The meeting concluded without agreement, and the claimant requested an indication from the respondent as to the likely redundancy payment he would be due, as he could not accept the revised package being offered to him.

45. A further meeting took place on 29 February 2016, at which the claimant confirmed that he was not prepared to accept the revised package.

20 46. Following that meeting, the respondent wrote to the claimant on 1 March 2016 (56):

“Dear Nick

Redundancy Consultation Meeting

I write further to our recent conversations, and in particular our meeting yesterday.

25 *In those conversations, you will be aware that we have expressed our concerns about the viability of your current role of Sales Director, particularly in relation to the increased complexity of our sales and the administration and client support required to deliver this. We have*

5 received the structure of UK Sales and we believe that it might be the best interests of the business to reorganise the structure of the department, with your role and the Business Development Director role being removed and replaced with two newly created roles – Client Services Director and Sales Administration Director.

10 As part of the review, we identified that the role of Client Services Director would be a suitable alternative role for you, taking into account the draft job specification (already issued to you) and your skill set. We have carried out a benchmarking exercise in respect of that role and identified a remuneration package which provides for a lower basic salary than your current role, but with a greater earning potential than your existing role and with a guaranteed bonus in the first year meaning that you would not earn less than your previous basic salary in the first year.

15 We have spoken to you informally on a number of occasions about the Client Services Director role, but unfortunately you are unwilling to explore this with us until we agree to confirm that the role will offer a commensurate basic salary to your existing role. We are regrettably unable to accede to this demand, particularly in circumstances where the role has been externally benchmarked. Whilst we understand your position in respect of your personal commitments, it is disappointing that you remain unwilling to explore the role with us, as we think you would be better able to understand why we believe this role carries overall greater earning potential.

25 In such circumstances, we feel we have no choice but to initiate a formal redundancy process in respect of your current role. As we are giving serious consideration to removing your existing role from the structure, I do need to make you aware that at this time, your role of Sales Director is provisionally at risk of redundancy.

30 I would like to stress that no decision has been made, and we will do everything we can to avoid making you redundant.

5 *I would therefore like to formally meet with you to discuss this situation further. It will be an opportunity for you to let me know your thoughts in respect of the current redundancy situation, your provisional selection and we can also discuss further the alternative roles that would exist as part of the reorganisation, namely the role of Client Services Director and Sales Administration Director. I would be grateful if you could attend a meeting with Gregor Dunlay and me on Friday 4th March at 10.00 am, at 100 West Regent House.*

10 *You are invited, if you wish, to be accompanied to the meeting by a work colleague or trade union representative. If you would like to be accompanied, please let me know in advance of the identity of the person who will be accompanying you.*

Following the meeting, I will consider any submissions made by you and a further meeting will then be arranged to discuss the situation further.

15 *I appreciate that this may be a difficult time for you. if you have any questions about the meeting, require any further information in advance, or if you have any queries about the redundancy process itself, please do not hesitate to contact me. In any event, I would be grateful if you could confirm your attendance at the proposed meeting at your earliest convenience.*

20

Yours sincerely,

Matthew Bending

Chief Executive Officer”

25 47. The claimant put a number of questions to the respondent in writing, and Mr Bending replied to those questions in a document (59) enclosed in an email dated 4 March 2016 (58).

48. The claimant had been advised that the new role, which he was offered, had been “benchmarked” by the respondent. He asked a number of questions, which were answered as follows:

“What benchmarking has been carried out in respect of the Sales Director and Business Development Director salaries?”

Compared with similar role at STV Group in Glasgow. That role is larger in scope and expected sales, but lower salary and OTE. STV Client Services Manager is on £64K basic OTE £100K.

You have mentioned that the new roles have been benchmarked externally, please can I see that report?

No report was mentioned. I asked George Watt at STV what comparable roles were being offered at his organisation, it being a Scottish media company with need for relationship building with customers throughout the UK with an emphasis on south of the border in general and London in particular.”

49. He went on to ask further questions about the new role, as follows:

“In your letter you have stated ‘we will do everything we can to avoid making you redundant’. I am asking for my current basic to be honoured, if this means reducing slightly the ‘greater earning potential’ I am happy to explore this which would mean I can engage fully with the new role and work with you to continue the growth of S&P.

Your current basic salary is not appropriate for the new role. The guaranteed element of the bonus in year one is being offered to help ease the transition. For the level of salary and OTE on offer, it is essential that the person is fully engaged.

In regards to the role please could you supply detailed information on the targets, KPIs and applicable bonus and the research done to derive the figure presented? My initial view is that the size and complexity of the client base is too large to deliver the necessary account management to provide growth. In addition the targets presented need to be discussed as the Client Services Director cannot influence alone these revenues.

5 *I outlined in the job spec sent to where we see important KPIs as this is where revenue growth potential exists and wanted you to engage in the process to sharpen the definition of these KPIs to ensure they were achievable. That said for all sales orientated jobs I will require a sales pipeline demonstrable as being aided by this positions efforts of circa 3 times salary and costs, we would work with you on an acceptable timeline for this, but by the end of the first 12 months (and pro rata) would be a reasonable guide.*

10 ***Please could you also outline what aspects of my current role are no longer part of the Client Service Director role?***

15 *The current role of Sales Director needs to be split for company strategic reasons as we see sales growth potential if we had a senior person talking regularly to organisations whether current, past or identifiable targets as new business. We want this role to enable senior staff in these organisations to be briefed and engaged with to deliver more of their respective marketing budgets into below the line, experiential business in general. We see the role as wide ranging in that you could sell SpaceandPeople and its group companies, whether that is SpaceandPeople Plus, MPK, JiT, space or sponsorship opportunities, or*
20 *indeed any opportunity the role uncovers. When you have been able to find the time in your schedule in your current role this has reaped huge rewards for the company ie British Gas, EoN, Sky, to name but a few. When you meet people face to face the business wins, we see the role being predominantly client facing at their offices and at venues or invited to Glasgow if appropriate. We see this element of your current job being*
25 *100% of your time, in the newly created CSD role.”*

50. A further meeting took place on 8 March 2016, at which the claimant, Mr Bending and Mr Dunlay were present. Mr Dunlay presented notes of that meeting (62). There were discussions about the role and the targets
30 to be achieved, and at the conclusion of the meeting, it is noted that the claimant said “... had time to look at it. Can’t take role if basic is reduced. Would be putting himself in a position that he couldn’t do the job at this

rate. Issue with personal finances for this. Doesn't want to be confrontational but it isn't an option for him."

51. A Board meeting took place on 17 March 2016. An extract of the minute from that meeting read (37):

5 *"While discussing UK sales MB updated the Board on the situation regarding Nick Hill. Since the Board took the decision to restructure the UK Promotions division's senior sales management, Ian McLaughlin had stated that he would be interested in the Sales Administration Director role that had been proposed to him along with the Client Services Director*

10 *role. However, when NH had been offered the opportunity to be considered for these roles he refused to do so because the basic salary was less than his current basic salary. It was pointed out to him that the Client Services Director role that was believed to be a very suitable role for him would have an element of guaranteed bonus in the first two years*

15 *that should ensure that he earned no less in each of these years than he did in 2015 in his current role. Upon NH's return to work following his period of absence due to stress, we held an initial redundancy consultation meeting with him, however, he continued to refuse to discuss his suitability for this role unless his current basic salary was maintained*

20 *in this new role. As a result, formal redundancy proceedings were initiated and he was invited to a meeting on 8th March to discuss this. Unfortunately, no further progress was made at this meeting and we are now considering whether or not NH's position is being made redundant and whether or not he will accept the new position. It was pointed out that*

25 *the position of Client Services Director would ideally be a London based role as this is where the majority of key accounts and agency clients were likely to be based, however, as NH was Glasgow based we were trying to accommodate him by making the role Glasgow based if at all possible. MB stated that by the time he meets again with NH on 21 March for what*

30 *could be the final redundancy meeting that NH may have changed his mind and be willing to be considered for the new role. MB will keep the Board updated."*

52. A further meeting took place on 21 March 2016 at which the claimant met with Mr Bending and Mr Dunlay. A note of that meeting was provided by Mr Dunlay (64) though it appeared to replicate the terms of the note of the previous meeting. At the meeting, there was further discussion about the possible new role for the claimant, but no progress was made.

53. Following that meeting, Mr Bending wrote to the claimant (65) to confirm the outcome of the process:

“Dear Nick,

Confirmation of Redundancy

I am writing further to the second formal redundancy meeting that took place today 21st March.

During this meeting, you informed us that you do not wish to be considered for the vacant role that currently exists internally, namely ‘Client Services Director’ due to the level of salary associated with the role. In light of that, and the fact that no other alternatives to redundancy have been identified, the outcome of the meeting was that regrettably your redundancy was confirmed...”

54. Mr Bending went on to confirm that the claimant was entitled to 3 months’ notice, but that in that period he would be placed on gardening leave, and would continue to be paid under the contract until 21 June 2016, upon which date his employment would be deemed to terminate. He also confirmed that the claimant would be paid £3,867.07 gross in respect of annual leave accrued but untaken as at the date of termination, subject to deduction of tax and national insurance, and a statutory redundancy payment of £6,650.

55. He advised the claimant that he had the right to appeal against the decision within 5 days of the letter.

56. The claimant decided to appeal against the decision to dismiss him on the grounds of redundancy, and submitted a letter of appeal on 22 March 2016 (67). The grounds upon which he sought to appeal were:

“1. I dispute there was a genuine redundancy situation.

5 *2. Even if there was I should have slotted in to the new position which is substantially the same as my job was.*

3. The consultation process was insufficient.

4. The company has no grounds to place me on garden leave. I should be allowed to work my notice and stay active.

10 *5. I have been stigmatised by the decision to escort me from the office and place me on garden leave, as both responses are normally reserved for misconduct cases.”*

57. He also requested that the annual leave figure and notice payment figure should be reconsidered. In particular, he pointed out that in his contract
15 of employment, he was entitled to a notice period of three months, then one week per year served up to a maximum of thirteen weeks.

58. In response to that letter, Mr Bending wrote to the claimant on 1 April 2016 (68) confirming that the appeal would be heard by Charles Hammond in Edinburgh on 6 or 7 April 2016.

20 59. He declined to comment on the grounds of appeal, but made certain observations in response to the letter.

60. He advised that under clause 17 of the claimant’s contract, the respondent reserved the right to require the claimant not to attend work or perform any duties during his notice period.

25 61. He also stated that the respondent’s solicitors had advised that he was not in fact entitled to six months’ notice.

62. The appeal hearing took place on 6 April 2016. The hearing was chaired by Charles Hammond, who was assisted by Emma McAslan, taking notes (74ff). The claimant attended with the assistance of Linda Farmer.

5 63. Mr Hammond opened the meeting by explaining that he would not take a decision that day, but would listen to the claimant without comment, and provide a decision in writing. He then asked the claimant what he was seeking. The claimant was recorded as saying:

10 *“NH discussed the proposed role of Client Services Director. NH refers to the initial meeting in which the new role was discussed in a ‘blue sky thinking’ manner. NH states that only in later meetings was it discussed that in this role the basic salary would be reduced by 20%. NH stated that on this basis he could not engage in the process any further. He mentioned that there had been discussion on the scope of the new position and the targets and that any redundancy process had been*
15 *suspended while these discussions were ongoing. Initially the proposal was for the target to be for all UK promotions, which NH felt was outside his scope, this was later reduced to 75% of £1.5m-£2m gross sales and 75% of new business. NH proposed this could not work and he could not accept the position on this basis.*

20 *CH summarised the position. There was a restructuring of sales in which NH’s current role as Sales Director would be replaced by two newly created roles, Client Services Director and Sales Administrative Director. It was confirmed and agreed NH had been offered what the Company felt was a reasonable and suitable alternative to his current position, however*
25 *NH said he was unable to engage in discussions unless the terms of the new position were on not less than his current basic salary.”*

64. The claimant then confirmed that ideally he would like to return to the respondent’s employment. He said that he wanted the new role of Client Services Director, but not at the lower basic salary, which he said was not
30 financially viable for him.

- 5 65. The claimant then went over his appeal points. He stressed that he considered that he was suitable for the Client Services Director role, which he had the skills and experience to do. He agreed that the salary for the new position would be lower, if the position were taken to market, than both his current salary and the proposed salary but he felt that his 12 years' experience with the respondent was not reflected in the proposed salary.
- 10 66. He argued that the new role is something he already did, and had been doing for some time, and he did not understand why this would carry a lower salary than his current salary.
67. He suggested that he did not know, at the outset, that if he did not accept the proposed role he would be made redundant.
- 15 68. He felt that the way in which he was placed on gardening leave was more akin to a gross misconduct situation. However, it is noted that he agreed with Mr Hammond that this was not a ground of appeal. Mr Hammond did seek to explain that the reason why he was placed on gardening leave was in order to protect the respondent due to his sensitive sales position.
69. The claimant then confirmed that points 4 and 5 were personal comments and not grounds for appeal.
- 20 70. There was then a further discussion as to why the claimant did not consider this to be a genuine redundancy. He stated that he considered that the position of Sales Director was not mentioned until February or March, to which Mr Hammond replied that he did not agree. He went on to say that he felt that he carried out both the Client Services Director role and the Sales Administration Director role in his existing role. The initial discussions were, in his view, less on the skills required for the position and more on the salary difference compared to his current position.
- 25 71. The claimant continued to assert that he felt that he had been unfairly dismissed, and complained about the manner of his removal from the

business. There was a lengthy discussion about the different factors involved in the new as opposed to his existing role.

5 72. Following the appeal hearing, Mr Hammond considered the matter and wrote to the claimant on 25 April 2016 (79) to advise him of the outcome of the appeal.

10 73. With regard to ground 1, Mr Hammond stated: *“I find there was a genuine redundancy situation. The creation of the two new positions in sales function was something which was presented to and debated by the Board and ultimately approved by the Board. It was a decision reached on the basis that your current role of Sales Director was not a role that was working for the organisation from a strategic perspective. During the Appeal Hearing you acknowledged the difficulties you experienced with the role, and the demands on you having to manage both sales and administration...We felt that the two key components of your role should not fall within the remit of one person and hence why a decision was ultimately taken that we no longer had a requirement for the role of Sales Performance Director. This role would be replaced with two new positions in the sales function and I don’t think you dispute the rationale for taking this step.”*

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20 74. Mr Hammond concluded that by refusing the new role, the consequence was that the claimant was made redundant. In his view, he said, it was a redundancy situation that arose from the restructuring of the sales function, and was entirely genuine.

25 75. With regard to ground 2, he found that the respondent made a genuine offer to the claimant of the new position of Client Services Director, a position which “would have involved you carrying out some but not all of the duties you had previously held”. He understood that the claimant felt that the role was suitable but that the remuneration was not. Mr Hammond found that the respondent did all it reasonably could to mitigate any financial effect upon him and had evaluated the job in a fair and

30 reasonable manner. He observed that *“...to try and offset the reduction in*

basic salary that you would experience, the guaranteed bonus in year 1 would result in your overall earnings for that year exceeding your current package and that could have been maintained in future years with the greater earning potential in respect of the bonus.”

- 5 76. Mr Hammond also concluded that the consultation process was fair and reasonable. He took the view that he had been afforded ample time to discuss the changes taking place and the impact upon him personally.
77. Mr Hammond finally determined that the claimant’s notice period should have been 22 weeks, based on his contractual entitlement, and that his
10 garden leave period should be extended from the date of his redundancy for that period of time. He also dealt with some questions raised by the claimant in relation to his share options and bonus payments.
78. Accordingly, the respondent did not uphold the claimant’s appeal against his dismissal.
- 15 79. The claimant was paid up to 23 August 2016. Following the final termination of his employment with the respondent, the claimant succeeded in obtaining new employment with iSight TV, based in Colchester, Essex, as the Home Based Business Director. His responsibility is to manage the account for Homebase, and to drive the
20 income for that client by providing work to them.
80. His salary in his new position is £85,000 per annum, and in addition he is entitled to an uncapped commission of 3% of all revenues derived. He estimates that in his first year of employment with his new employer he is likely to earn a commission of £15,000 in total.
- 25 81. His monthly gross salary is £7,083; and with commission, his monthly net pay is approximately £5,300. He has a similar occupational pension scheme to that which he enjoyed when employed by the respondent, and has a car and a petrol allowance for business mileage. He described himself from a salary point of view as being “slightly better off than I was”

Submissions

82. Submissions were received from the parties in writing, and the Tribunal has referred to the detail of those submissions, which are summarised briefly here.
- 5 83. For the respondent, Mr Anderson submitted that the dismissal in this case was fair, being for a potentially fair reason, namely redundancy, which failing some other substantial reason.
84. He argued that the respondent has established that the business was in the process of significant change and that the claimant's role of Sales Director was no longer required by the business, and that it was to be split
10 into two roles, a Client Services Director and a Sales Administration Director.
85. He went on to submit that the respondent went to great efforts to retain the claimant in employment, having considered him to be a competent
15 and valued employee.
86. Mr Anderson argued that the dismissal of the claimant was fair and reasonable in all the circumstances, and that a fair and reasonable procedure was followed by the respondent.
87. He urged the Tribunal to find that Mr Bending, Mr Dunlay and
20 Mr Hammond were all witnesses who were credible, reliable and wholly believable.
88. By contrast, Mr Anderson argued that the claimant's evidence was not credible nor reliable, and as an example suggested that the claimant was
25 evasive when pressed as to whether or not he had described himself as the Lionel Messi of the business. He also suggested that the claimant's evidence to the effect that he had not known that the respondent was seeking to make him redundant until a late stage in the process was not believable.

- 5 89. Mr Anderson submitted that the claimant was dismissed by reason of redundancy on 30 August 2016, and that the respondent had identified that due to business expansion, the requirements for the claimant's role had ceased and the role of Sales Director was no longer needed, to be replaced by two roles instead. The Client Services Director was a role which was identified as suitable alternative employment for the claimant, but he declined to accept it. The claimant was permitted a right of appeal against dismissal. He has mitigated his losses by finding new employment.
- 10 90. He argued that the respondent not only fairly dismissed the claimant but also considered suitable alternatives. The consultation entered into was adequate in all the circumstances, given that there are no prescribed timescales within which the consultation should be completed.
- 15 91. He submitted that there was a genuine redundancy situation because the "type of work the claimant was involved in was no longer required and that as such the particular role he performed was redundant".
- 20 92. Mr Anderson pointed out that the claimant had argued that any alternative position should be paid at the same basic salary as his existing post, but that that was unreasonable in the circumstances. The new role of Client Services Director was an "entirely different one" which did not involve managing any employees and instead was focused on client interaction and relationship building.
- 25 93. Even if there were any procedural irregularities in the process leading to redundancy, the appeal rectified those irregularities.
- 30 94. The respondent's alternative submission is that the claimant was dismissed for some other substantial reason, a different potentially fair reason for dismissal. Here, complex new contracts were won by the respondent which would fundamentally change the way in which they provided services to clients. The changes were not for an arbitrary or capricious reason but were in pursuit of a sound business reason. The decision to dismiss the claimant, given the size and resources of the

respondent, was entirely reasonable. They consulted with the claimant about the changes, and he refused to enter into any meaningful consultation.

95. The appeal was fairly and reasonably conducted by Mr Hammond.

5 96. In the event that the Tribunal finds that the dismissal was unfair, Mr Anderson submitted that any compensation should be reduced by reason of Polkey deductions and contributory conduct.

97. The respondent accepted that the claimant has made reasonable efforts to mitigate his losses following dismissal.

10 98. The respondent also reserved its right to apply for expenses on the basis of the way in which the claimant had conducted the proceedings.

99. The claimant submitted a short written submission on his own behalf.

15 100. He described the respondent as having, out of the blue, wished to change his role and package. He argued that the respondent was never willing to match either his basic or overall package (by which I interpret the claimant as meaning his basic or overall salary). They only benchmarked one role, a TV sales manager selling to Scottish businesses, but did not explain why they had not looked at more London based positions.

20 101. The claimant submitted that while the respondent has asserted that he was unwilling to engage with the consultation process, it was in fact the respondent to refused to engage with that process. Mr Hammond accepted during his evidence that if the claimant were able to earn more than the Chief Executive Officer then that would be inappropriate. The claimant argued that he was not responsible for awarding his package, and that he should not have lost his job because his success meant that he could potentially earn more than the CEO.

25

102. He argued that Mr Bending had raised performance issues, but had never raised this matter with the claimant during his employment with the respondent.

103. He submitted that he has suffered losses which are both financial and emotional.

104. The claimant asked that his claim for unfair dismissal be upheld.

The Relevant Law

5 105. The Tribunal considered carefully the statutory provisions, firstly, in relation to unfair dismissal. The respondent require to show that dismissal, where admitted, was for a reason potentially fair under section 98(1) of the Employment Rights Act 1996 (ERA). In this case, the reason was redundancy (albeit that they make an alternative case in respect of
10 some other substantial reason, considered below).

106. The Tribunal also had regard to section 98(4) of ERA, in which the Tribunal needs to be satisfied that in the circumstances the employer acted reasonably in treating the reason relied upon as a sufficient reason for dismissing the employee.

15 107. I took account of, the definition of redundancy contained within section 139(1) of ERA:

“(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

20 *(a) the fact that his employer has ceased or intends to cease—*

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

25 *(b) the fact that the requirements of that business—*

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.”

108. The Tribunal took account of the case of **British Aerospace v Green** [1995] IRLR 437, and in particular the following passage:

“Employment law recognises, pragmatically, that an over minute investigation of the selection process by the Tribunal members may run the risk of defeating the purpose which the Tribunals were called into being to discharge, namely a swift, informal disposition of disputes arising from redundancy in the workplace. So in general, the employer who sets up a system of selection which can reasonably be described as fair and applies it without any over signs of conduct which mars its fairness, will have done all that the law requires of him.”

109. The Tribunal also had regard to the decision in **Mitchells of Lancaster (Brewers) Ltd v Tattersall** [2012 UKEAT/0605/11], in which it is stated:

“Just because criteria of this sort are matters of judgment, it does not mean that they cannot be assessed in a dispassionate or objective way, although inevitably such criteria involves a degree of judgment, in the sense that opinions can differ, possibly sometimes quite markedly, as to precisely how the criteria are to be applied, and the extent of which they are satisfied, in any particular case. However, that is true of virtually any criterion, other than the most simple criterion, such as length of service or absenteeism record.”

110. The Tribunal was referred to a number of other authorities. The well known case of **Williams & Others v Compair Maxam Ltd** [1982] ICR 156 sets out basic principles for employers to carry out a fair redundancy process. It is necessary for a Tribunal to take into account current standards of fair industrial practice, such as whether the employers had given the maximum warning of impending redundancies, whether they

had consulted with the union as to the criteria to be applied when selecting employees for redundancy, whether those criteria were objective rather than subjective, and whether they could have offered employees alternative employment before dismissing them.

5 111. In **Murphy v Epsom College 1985 ICR 80**, the claimant was one of two plumbers, and he also carried out some engineering work. He declined to perform the engineering aspect of the work, and the respondent decided to dismiss him and replace him with an engineer who could also undertake some plumbing. He argued that he was not therefore
10 redundant, on the basis that the respondent still required two employees, a plumber and an engineer who could do some plumbing work. The Court of Appeal found that the employer no longer needed an employee to carry out the work of the particular type done by the claimant and he was therefore redundant. It said that a reorganisation creating a
15 substantial change in the kind of work required by the employer can result in redundancy even though the employer's overall requirement for work or employees remain the same.

112. In **Mercy v Northgate HR Ltd [2008] ICR 410** the Court of Appeal upheld the decision of the Employment Appeal Tribunal to overturn the
20 Employment Tribunal's judgment that the claimant in that case had not been unfairly dismissed on the grounds of redundancy. The Tribunal had found the dismissal to be fair despite finding one "glaring inconsistency" in the operation of the redundancy selection criteria to the detriment of the claimant. The Tribunal had erred by taking the view that in the absence of
25 bad faith they could not determine that the employer had acted unfairly. Quoting the Employment Appeal Tribunal decision, the Court of Appeal stated: "*The lawful basis of intervention [by the Employment Tribunal] would be where glaring inconsistency, whether as a result of bad faith or simple incompetence, evidenced a decision which was outside the band*
30 *of reasonableness.*" The Court of Appeal endorsed that view.

Discussion and Decision

113. The first issue for the Tribunal to determine is: what was the reason for the claimant's dismissal? In this case, the respondent maintains that the claimant was dismissed on the grounds of redundancy. That was the reason that was given at the time to the claimant, and accordingly I find that that was the reason for his dismissal.

114. Redundancy is a potentially fair reason for dismissal. The respondent has also raised, in submission, the alternative argument that the circumstances justified a finding that the dismissal was for some other substantial reason.

115. In order to determine the fairness or otherwise of the claimant's dismissal on the grounds of redundancy, it is necessary for the Tribunal to address the next issue: was the claimant was redundant, in terms of the statutory definition set out in section 139(1) of ERA.

116. Here, the respondent took a decision that the claimant's role was, in effect, unmanageable in the hands of one person. There were two primary aspects to the role of Sales Director: the management and development of a sales team based at the respondent's office in Glasgow; and the recruitment and development of new business, alongside the servicing of existing clients. The respondent decided, following their success in winning two significant new clients (namely British Land and, in particular, Network Rail), that a new role of Client Services Director should be established, in order to address the particular needs of those clients. The investment of time in meeting such clients on a regular basis, given their bases in the south of England, and the travelling involved, meant that the postholder would, in the respondent's view, be so taken up with that aspect of the job that the management and development of the sales team in Glasgow would be impossible for him to attend to properly. Accordingly, a second new post, that of Sales Administration Director, was to be established in order to address that aspect of the existing Sales Director role.

117. The evidence demonstrated, in my judgment, that the new roles would encompass the work carried out by the claimant in his existing Sales Director role, but would also expand upon that work and involve new areas of work for the postholder. In particular, the kind of business development and maintenance envisaged with Network Rail appeared to be of a different order to that involved with the respondent's existing client base, partly due to the location of Network Rail in London and partly due to the large new area of business opened up by the new contract, and therefore its importance to the respondent's business in the future.

118. In my judgment, this meant that the claimant's role of Sales Director was redundant, in that the requirement for the business "*for employees to carry out work of a particular kind in the place where the employee was employed by the employer*" had ceased or diminished, while at the same time the requirement for employees to carry out the new form of business, with the new clients, away from the Glasgow office, had increased.

119. In my judgment, this is a situation which is analogous with that in **Murphy v Epsom College 1985 ICR 80**, referred to above. In that case, the Court of Appeal found that a reorganisation can give rise to redundancy in circumstances where the overall requirement for the work remains the same. Here the reorganisation was brought about by a significant change in the business, namely the need to service significant new clients, and in my judgment that is what gives rise to a redundancy situation here.

120. In any event, it was quite clear that this was not the primary area of dispute between the parties. The claimant, during the internal consultation process and during the Tribunal proceedings, appeared to accept that there was a need to split the Sales Director role into the two roles proposed. When first approached with the job specification by the respondent, the claimant did not reject the approach, but asked for time to consider the matter. In subsequent discussions, he was able to express positive views about the new structure, while maintaining his opposition to the role owing to the remuneration available.

121. The next issue, then, is for the Tribunal to determine whether the claimant was fairly dismissed on the grounds of redundancy. Essentially, the claimant criticises, in this case, the lack of proper consultation and the failure to offer suitable alternative employment to him on redundancy. Accordingly, the Tribunal must examine both of these allegations.

122. With regard to consultation, it was stated by the Lord Bridge in **Polkey v AE Dayton Services Ltd 1988 ICR 142 HL** that “..the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation.”

123. In this case, the respondent met with the claimant on 28 January 2016 to discuss the reorganisation and to propose that he take on the new role. Although, as the claimant complains, he was not expressly told at that meeting that he was redundant, it was clear in my judgment that the respondent was advising him that there would be a change, and that this was to be his part in it. That message was made more explicit in the subsequent meetings of 22 February, 29 February, 8 March and 21 March, all of which were primarily designed to discuss with the claimant the proposed reorganisation, its impact upon him and his role, and the alternative employment which the respondent had in mind for him.

124. Accordingly, it is quite clear that the respondent took reasonable steps to consult with the claimant about the proposed redundancy, giving him the reasons for it, and offering him the Client Services Director role as an alternative.

125. The Tribunal then considered whether the respondent offered suitable alternative employment to the claimant as a means of avoiding redundancy. This is primarily a test which arises when a claimant complains that he has been unlawfully deprived of a redundancy payment, but in this case that is not part of the claim. However, it is also an important factor in determining the fairness of the claimant’s dismissal.

126. The alternative role which the claimant was offered was one which the respondent considered well suited to his skills and experience, demonstrated in his performance of the Sales Director role for some years. The claimant agreed with that. The terms and conditions of employment upon which he was offered the position were identical to those upon which he was previously employed, protecting his employment rights and length of service, save for one important aspect: that of remuneration.

127. The claimant's primary complaint in this case is not difficult to discern. It is a thread which ran through every discussion about the reorganisation between the parties and which clearly fired the claimant's sense of injustice about the manner in which he was treated by the respondent.

128. The question for the Tribunal is therefore whether, in light of the redundancy situation in which the claimant found himself, the offer of the Client Services Director role amounted to an offer of suitable redeployment within the company, on an objective view of the matter.

129. The claimant's remuneration as Sales Director was divided into three components: a basic salary, a bonus payment and a car allowance. In the year to his dismissal, the claimant's basic salary was £91,535.76, and his car allowance was £6,000. Although over the preceding five years, the claimant had received a bonus (albeit on a diminishing scale) the Tribunal was presented with strong evidence from the respondent, which I accepted, that for 2016 the claimant was not due to receive a bonus, and therefore his total remuneration was £97,535.76.

130. The offer which was made to the claimant for the Client Services Director role was that he would receive a lower basic salary of £80,000 and no car allowance; but that he would be guaranteed a bonus of £20,000 on top of his first year's salary, regardless of performance, and of £10,000 on top of his second year's salary.

131. In addition to the guaranteed bonus, it was also possible that, in the event that performance was at a particular level, he would receive a discretionary bonus.

5 132. The respondent argued that the guaranteed pay for the first two years of the new post were the equivalent of his current pay, and gave rise to the possibility of an increased payment of discretionary bonus.

10 133. In my judgment, on an objective basis, this offer amounted to an offer of suitable alternative employment to the claimant. The claimant would be guaranteed a particular level of bonus – which would normally only be paid in the event of the respondent achieving certain targets – in order to protect his pay for the first two years and maintain it at a higher level than his 2016 pay, and, if taken as an average, at approximately the same level over the two years as his 2016 pay.

15 134. The claimant argued that he was told by Mr Bending at the January meeting that his terms and conditions would not be changed. Neither Mr Bending nor Mr Hammond, who were both present and whom I found to be both reliable and credible in their evidence, accepted that this had been said. The claimant may have received that impression – I did not consider that he was lying about that – but in my judgment it was not
20 expressly stated by the respondent at that meeting.

25 135. This was a new post, and therefore to some extent the appropriate targets for performance would depend on how the first year went (as the respondent indicated). The respondent made clear that they wished to discuss the matter with the claimant, to his satisfaction, so that he might be able to accept the position and then participate in ongoing discussions about the targets and the achievement of those targets. The claimant's unwillingness to engage with that discussion, caused by his refusal to accept the remuneration package on offer, meant that no further discussion was possible.

30 136. In my judgment, the new position of Client Services Director was accepted by the claimant to be suitable in that it would have been well

fitted to his experience and skills; and the offer made (and it was a specific job offer, not merely a proposal) was such that in the first year at least it represented an increase in the remuneration package on offer. It is my view that the claimant's concentration upon the concept of "basic" salary was unhelpful and to some extent disingenuous. The offer he received did have a reduced basic salary but there was a higher guaranteed element as well as a possible bonus on top. It is characteristic of those employed in a senior position in a commercial venture, bearing a heavy responsibility for the development and success of that venture, also bear a degree of risk, which is instituted in the remuneration package by the allocation of an uncertain bonus payment. That risk was, at the point when the claimant was offered the new post, removed from him by the inclusion of a guarantee that he would receive a minimum payment of £100,000 in the first year and £90,000 in the second year. That the guarantee was of a minimum, rather than a maximum, sum reinforces the conclusion that this was, objectively, a suitable alternative offer of employment.

137. The respondent was keen to retain the services of the claimant. They acted consistent with that approach. Their offer of alternative employment was, in my judgment, a reasonable attempt to retain the claimant's services in light of his redundancy.

138. The claimant expressed considerable misgivings about the effect this would have upon his mortgage provider, and quoted his mortgage contract on a number of occasions (though this was not a production in these proceedings). In my judgment, that may be a subjective reason which would permit the claimant reasonably to refuse the offer of alternative employment but not forfeit the right to a statutory redundancy payment, but that is not the question before the Tribunal. In any event, in order to make such an assessment, much more detailed evidence would require to have been placed before the Tribunal by the claimant about the actual effect of the new contract upon his mortgage. The claimant has obtained alternative employment since his dismissal, at a lower basic pay than he was receiving, but no evidence was presented to the Tribunal to

the effect that his mortgage provider has taken any action adverse to him for this reason.

5 139. Accordingly, it is my judgment that the respondent acted reasonably in all the circumstances of this case in determining that the claimant should be dismissed by reason of redundancy, and therefore the claimant's claim of unfair dismissal must fail, and be dismissed.

10 Employment Judge: Murdo A MacLeod
Date of Judgment: 27 July 2017
Entered in Register: 31 July 2017
and copied to parties.