THE EMPLOYMENT TRIBUNALS

Claimant: **Mr M Douglas**

Respondent: **Francis Brown Limited**

Heard at: **Teesside**

On: **24 September 2018**

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

Representation:

Claimant: **Mr Lewis (counsel)**

Respondent: **Mr Brown, Director of the Respondent**

RESERVED JUDGMENT AND REASONS

1. The claimant's claim for unfair dismissal is well founded and succeeds

2. The matter is to be listed for a remedy hearing on a date to be fixed, subject to the parties reaching agreement in the meantime and informing the tribunal of that agreement

REASONS

1. By a claim form dated 16 May 2018, the claimant claims unfair dismissal. The respondent accepts that there was a dismissal and contends that the claimant's employment came to an end by reason of redundancy.

Issues

2. The tribunal explained the nature of the claim to the parties and in particular to Mr Brown, a Director of the respondent, and it was apparent that he fully understood the tribunal's task. The tribunal identified the issues that needed to be decided and the parties helpfully agreed with those issues at the outset of the hearing.

3. The issues for the tribunal to determine were therefore as follows:

   3.1. Was there a genuine redundancy situation at the claimant's place of work?
   3.2. Had the requirements of the respondent's business for employees to carry out work of a particular kind ceased or diminished, or were expected to cease or diminish?
   3.3. Was the claimant dismissed?
   3.4. Was the claimant's dismissal caused wholly or mainly by cessation or diminution?
   3.5. Was the dismissal attributable wholly or mainly as a result of redundancy or whether any other reasons for the dismissal of the claimant?
   3.6. Has the respondent dismissed due a lack of trust in the claimant or to boost the credibility of the Chief Executive or capability or some other reason rather than a redundancy situation?
   3.7. Did the respondent identify an appropriate pool (and genuine selection criterion) for those at risk of redundancy?
   3.8. Was there consultation with the claimant prior to him being made redundant?
   3.9. Was the claimant given any alternatives to dismissal?
   3.10. Was there a fair process, including by the appeal?
   3.11. By reference to the Polkey principles, to what extent would the claimant have been fairly dismissed in any event?
   3.12. By reference to adjustments, has there been an unreasonable failure to comply with the ACAS Code and should any uplift apply?

Findings of Fact

4. The tribunal was provided with a concise bundle paginated to page 91. There were very few key documents in this case. The Claimant provided a witness statement and was cross examined on his statement. The respondent provided a witness statement from Mr Brown and he was cross examined.

5. The tribunal makes the following findings of fact based on all of the evidence received by the tribunal and upon a balance of probabilities

6. The claimant began work with the respondent as a Business Development Manager in August 2015. He was responsible for generating business and this entailed management of client relationships. There had been no Business Development Manager for at least 12 months prior to the claimant's employment.

7. The tribunal was told that a contract of employment was provided to the claimant, although no contract and no job description is in the evidence bundle. The nature of generating business typically included making an "estimate" of the job required by the client. This was a task which was predominantly carried out by estimators employed by the respondent. The role of an estimator is essentially a back-office role and one which demanded a high degree of attention to detail. Mr Brown suggested that an estimator had to be "fastidious".

8. In the course of the claimant's employment, he would at times have undertaken the task of estimating a job for a client or prospective client. Typically, such estimates would also be approved by the Sales Director before being sent to the client. Mr Brown accepted that a modest part of the claimant's role involved estimating, which he put at 5%. The claimant contended that it was more in the order of 20% and in fact at the time of his redundancy it was nearer 40% given the shortage of estimators in post at the respondent.

9. Mr Brown was asked to comment on [76] which is a document produced by the claimant. Mr Lewis identified at least 7 clients for whom the claimant had carried out an estimation. Broadly, Mr Brown did not disagree, instead saying that he could not say one way or the other. Mr Brown did agree that the claimant had in the past carried out estimations of some significant value. The claimant had been in the industry for a long while prior to commencing with the respondent. He had substantial previous experience of estimating.

10. Mr Brown described the need for an estimator to have an attention to detail. He said that a number of people across the organisation had been involved in estimating from time to time, including himself. He said that he believed that he himself might not have the attention to detail that is required to be an estimator and it would be too great a risk to the respondent to permit others including himself to be full time estimators. Mr Brown included the claimant in that analysis and concluded that the job of estimator required "a different skill set".

11. In response to that, the claimant appeared to accept that analysis in broad terms. He said that normally one would view the role of BDM to be different to that of an estimator. However, in the claimant's case, given his experience of estimating over the years and also while working for the respondent, he was able to look at work with an estimator's eye.

12. There was no criticism of the claimant's performance. Mr Brown did not seek to make any point about any shortfall in the Claimant's performance. Both parties appear to agree that when the claimant asked on 9 March 2018 (see further below) whether the situation was his "fault" the response from Mr Brown was that he was not saying that, but rather it was the effectiveness of the business.

13. The Respondent is an industrial manufacturing and developing company with a turnover of approximately £6million, employing 70 employees. The business was

family owned: Mr James Brown had stepped down as Managing Director and became Chief Executive officer. He told the tribunal that this was in essence a title to enable him "to open a few doors". The tribunal finds that it was more than that because he was employed in a hands-on role including taking responsibility for the redundancy process that affected the claimant in 2018. Mr Simon Brown, his brother, was the Finance Director.

14. There were regular Board meetings and more frequent informal meetings involving the Senior Management Team. The SMT was made up of Mr James Brown, Mr Simon Brown and Mr Roddy, the Managing Director. In February 2018, the Sales Department comprised Mr James Brown, Mr Ray Smith (the Sales Director), the claimant, and one estimator (Tony Martin). There were regular Monday Sales Meetings which principally discussed sales opportunities.

15. There were Monday Sales Meetings on (at least) 5 February 2018 and 19 February 2018. There was discussion about the effectiveness of the Sales Department. The claimant was requested to provide a snapshot of his activity. He did so, see [76] and [77]. The claimant does not recall any discussion with Mr Brown about his individual performance. Instead, the fact that he was asked for the information indicative of the fact that the respondent was becoming increasingly concerned about the productivity of the Sales Department.

16. Over a period of time culminating in March 2018, the SMT concluded that the Sales Department was ineffective. It had been under scrutiny for some months. The conclusion reached was that the quantity of enquiries had not increased despite even with the extra role of BDM in place since the claimant's appointment. According to Mr Brown, "the cost of department outweighed the value". In addition, the appointment of Mr Roddy as Managing Director had inevitably meant that Mr Brown had more capacity.

17. None of this was conveyed to the claimant. The claimant was completely unaware that his job might have been at risk at any time prior to the meeting on 9 March 2018. Mr Brown accepted that he had not mentioned any risk of redundancy to the claimant prior to the 9 March meeting.

18. On 9 March 2018, the claimant was called to a meeting with Mr Brown. He was not told the purpose of the meeting. What took place came out of the blue as far as the claimant was concerned.

<u>9 March 2018 meeting</u>

19. The meeting began with Mr Brown telling the claimant that "it was not working out". Mr Brown accepted that he said that.

20. Mr Brown recalls that he said to the claimant that he was "considering" making the claimant redundant. The claimant recalls this differently because his evidence

was that Mr Brown had said, “unfortunately Mick, I have to make you redundant as things are not working out”. This is a significant factual dispute.

21. There is at [78] a note, in Mr Brown’s handwriting which he says he had drafted prior to the meeting. There was some debate about whether parts of it were overwritten but the tribunal is not in any position to make findings of fact based on photocopied documents. In any event, the document refers to the fact of “role redundant”. There was significant dispute about the extent to which the matters in the list at [78] were in fact discussed with the claimant on 9 March 2018; notwithstanding, the list of matters is instructive as to what Mr Brown had in mind.

22. “Enq levels”, “Order levels” “cost” “structure going forward” indicate that Mr Brown was not satisfied with the Sales Department performance and that change was needed. “Not effort – effectiveness” indicates that no criticism of the claimant was intended but that it was the effectiveness of the Sales Department at issue. The reference to “commission” is a reference to the possibility of the claimant continuing to work in a different status, earning only commission. The claimant denied that this was raised: the tribunal finds it unlikely to have been raised in any meaningful sense given the extreme brevity of the meeting. “Consultation” is of course an indicator of a process, which the tribunal considers in further detail below. “Letter” and “1500” is consistent with evidence received by the tribunal that Mr Brown informed the claimant that he would receive a letter confirming the positon on Monday and that in the meantime it was to be anticipated that any redundancy money would be approximately £1,500. Mr Brown stated that this figure was raised in the context only that redundancy was a possibility. The tribunal considers it unlikely that figures would be raised in such a brief meeting if in fact redundancy was not yet decided upon. In other words, the mention of a sum of money is suggestive of a decision having been made. As to “Estimator role”: there was a dispute about whether this was the subject of any discussion. Finally, “keys, phone, car” broadly reflect the agreed position that the claimant was required to hand (at least) his keys and phone and was not required to return to work.

23. Both parties accept that the meeting was very short; in the order of 5-10 minutes. Both also accept that following the meeting, the claimant was required to hand in his keys and phone, and was not required to return to work. He did not work again until the termination of his employment on 6 April 2018 although he was paid in full during that time.

24. The claimant was in no doubt that he had been told that he was now redundant and that he would simply be paid his notice up until 6 April 2018. On Monday 12 March, the claimant contacted the respondent and asked for written confirmation. He received [79]. Mr Brown was at pains to describe the letter as a “mistake”. He says it was drafted by a Mr David Wilson (and signed on his behalf, without his input) and in evidence said, “that’s what the claimant told Mr Wilson”. The

implication of that evidence was that Mr Brown supposed that Mr Wilson was influenced by the claimant's version of events.

25. The evidence of Mr Brown became much clearer during cross examination. In the days prior to the 9 March meeting, Mr Brown had taken ACAS advice. He was particularly concerned that the role of BDM was commercially sensitive and he wanted advice on being able to shorten any consultation period. He was told that in the case of an individual redundancy there was no fixed period required for consultation.

26. Mr Brown came to a decision in his own mind: he decided that he could give the claimant an opportunity to consider the situation over the ensuing weekend and that Mr Brown would then confirm the position in writing on the Monday. The questioning elicited this piece of evidence: "I was going to give him over the weekend and confirm it to him on the Monday". When questioned further, Mr Brown could not describe how there could be consultation over the weekend: he said, "perhaps it would have been me, if I was available by phone". Mr Brown did not assert that he told the claimant he had that option over the weekend.

27. The reason that Mr Brown decided on such an arrangement was because it was his belief that the role of BDM was commercially sensitive and any longer process would have placed too much of a risk on the business: the "risk" being presumably the possibility of the claimant misusing confidential information which was known to him in his role as BDM once he was aware that his future might not be with the respondent.

28. This may explain the reference to "consultation" within the note at [78]. In other words, whatever Mr Brown may or may not have said about consultation (and the claimant rejects any notion that he was advised about consultation), the decision to make the claimant redundant was going to be confirmed to the claimant on the following Monday. This too is consistent with the claimant making contact to ask for the redundancy letter.

29. The tribunal reflected again on the letter at [79] which Mr Brown had contended was a "mistake". The tribunal finds however that the terms of the letter correspond in all material ways to the intention of Mr Brown to confirm the claimant's redundancy on the following Monday.

30. The parties' respective positons regarding consultation represents a distinction without a practical difference. The claimant says that he was not afforded any consultation or warning but simply was told on 9 March 2018 that he was being made redundant. Mr Brown contends that he was just "considering" amking the claimant redundant but on any view he provided the claimant with an illusory period of consultation "over the weekend" with no guidance or direction and then confirmed the positon on the following Monday.

31. The tribunal concludes that regardless of whether the word “consultation” or the words “considering making you redundant” were or were not used on 9 March 2018, the simple reality is that the claimant was not warned and there was no meaningful consultation at all with him prior to the decision being made to make him redundant.

32. The tribunal has also noted a factual dispute about whether Mr Brown had expressly referred to the “estimator role” at the meeting on 9 March 2018.

33. The background to this issue was that the Sales Department was short of estimators. A recruitment process was underway and two posts had been advertised and interviews had taken place. At least one of the two posts had been filled and the incumbent was due to start work on 12 March 2018. The new recruit(s) complemented Tony Martin, who was in February 2018 the only estimator.

34. Mr Brown asserts that prior to the 9 March meeting, he (along with SMT) had decided that the role of estimator was different to that of BDM and that it was not necessary or appropriate for a pool of employees at risk to be created. In short, the only role at risk was the BDM and as a result the claimant found himself in a pool of 1. Furthermore, the decision was taken that it was not appropriate to offer to the claimant a role of estimator as an alternative to dismissal.

35. By the time of the meeting on 9 March 2018, the tribunal finds that the decision had already been taken by the respondent that the claimant would be in a pool of 1 and that it was not necessary or appropriate to offer him the role or the opportunity of the role of estimator. This was a decision already taken prior to informing the claimant on 9 March 2018. The tribunal considers that it was unlikely during the course of the brief meeting that any meaningful mention was made of the existence of the estimator role. If it was mentioned, it is likely to have been in the context solely that the claimant was not going to be considered for such a role. In short, neither the pool (nor inevitably any selection criteria) nor a role as an alternative to dismissal was the subject of consultation.

36. By 12 March 2018, the claimant had been confirmed as redundant. There were no further meetings and no further meaningful process up to the termination of his employment.

37. The claimant had raised a grievance about his treatment: this culminated in a meeting on 11 April 2018. It was chaired by Mr Roddy, the Managing Director. He was, in the words of Mr Brown, “the head of the business”. There are notes of the meeting. The meeting was treated as an “appeal”. It confirmed the claimant’s dismissal. It is contended by the claimant that it was unfair because Mr Roddy was not truly independent, being a part of the Sales Department, and also having been recruited by Mr Brown.

Legal Principles

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

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

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

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

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

43. Turning to the second question, section 98(4) then sets out what needs to be considered in order to determine whether or not the decision is fair. It states "termination of the question whether dismissal is fair or unfair…. (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and (b) shall be determined in accordance with equity and the substantial merits of the case".

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

responses open to the employer judged against the objective standards of a hypothetical and reasonable employer.

45. The case of Sainsbury's Supermarket Ltd v Hitt [2002] EW CA Civ 1588 makes it clear that the range of reasonable responses that applies to all aspects of the dismissal decision. This includes decisions as to the correct pool: see Capita Hartshead v Byard [2012] IRLR 814 where it was held that the question of how the pool should be defined was primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer had genuinely applied his mind to the problem

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

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

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

Discussion and conclusion

49. What was the reason for dismissal? The claimant in his evidence has established an evidential basis for his case that the real reason he was dismissed related to him personally, namely, his effectiveness in carrying out his role and arguably the fact that he was not a member of the family of what is in fact a family owned business. The tribunal accepts that the claimant also genuinely believed that there was a loss of trust of the claimant and that there might be no other

legitimate explanation for the fact that he was given no warning or indication that he would lose his job.

50. The burden is on the respondent to establish the reason for dismissal. The tribunal finds that Mr Brown was the decision maker. The respondent had put the Sales Department under scrutiny for a number of months and had come to the conclusion that it was not operating effectively. The claimant had been recruited into the role of BDM in 2015 but despite the extra resource there had been no growth in enquiries or sales. The tribunal was not shown figures or data to corroborate this position but having heard the evidence of Mr Brown it is satisfied that Mr Brown was concerned to act because there was a business need to do so. The tribunal accepts Mr Brown’s evidence that this was not to do with the performance of the claimant; instead it had everything to do with the effectiveness of the Sales Department.

51. The history of the matter was that after Mr Brown had stepped down from Managing Director, he had more flexibility to focus on Sales. The respondent made a decision at SMT level that there was no longer a need for the role of BDM. The tribunal concludes that as a result of Mr Brown’s decision to remove the role of BDM from the Sales Department and to subsume its responsibilities into the roles of existing staff, there arose a redundancy situation because there was an obvious diminution in the requirement of the respondent for employees to carry out work of a particular kind, that of Business Development Manager. Although there was arguably no diminution in work requirements, fewer employees were now needed to do the work. This amounted to a paradigm redundancy situation.

52. The tribunal finds that the facts and beliefs operating on the mind of Mr Brown when he made the decision to dismiss the claimant arose as a result of the decision of the SMT after a period of close scrutiny to make the Sales Department more effective and to remove the role of BDM.

53. The claimant contended that the real reason was that Mr Brown was concerned for his own “credibility” as a CEO. This was how Mr Brown is alleged to have expressed it at the meeting on 9 March 2018. The tribunal concludes that this is not informative as to the reason for dismissal. Whilst it may well be the case that Mr Brown was concerned as to how the performance of the business may reflect on him, the tribunal is satisfied that the respondent had made a genuine business decision to seek to improve the prospects of the respondent’s business. Further, even if Mr Brown had expressed to the claimant during the 9 March meeting that he was acting to protect his own credibility, the real reason which underpinned the decision to make the claimant redundant was an economic decision to reduce costs in the face of a lack of growth in enquiries and orders in the Sales Department.

54. The tribunal concludes that the respondent has discharged its burden of showing a potentially fair reason for dismissal; that the reason for dismissal was redundancy.

55. Did the respondent act reasonably in treating that reason as sufficient to dismiss the claimant? As in all unfair dismissal claims, no less in respect of redundancy dismissals, the tribunal reminds itself that the fairness of the dismissal depends upon asking itself whether the decision to dismiss fell within the range of reasonable responses that a reasonable employer might adopt.

56. The meeting on 9 March was the first time that Mr Brown informed the claimant of any risk of redundancy let alone as the tribunal has found the fact that a decision to make him redundant had been taken. This was despite the fact that the redundancy was the product of a decision that was long in the making. The tribunal finds that Mr Brown did seek advice from ACAS and was told that there was no fixed consultation period in respect of an individual redundancy.

57. The meeting on 9 March represented the start of the redundancy process so far as the claimant was concerned. At the meeting, the claimant was informed that he was being made redundant. The tribunal finds that Mr Brown told the claimant that he would confirm in writing on the following Monday and further that it was Mr Brown's intention to confirm on Monday that the claimant was being made redundant. If Mr Brown had mentioned the weekend, there is no sensible interpretation that might permit the claimant to believe that the claimant was able to consult with the respondent or was able to affect the decision that was to be confirmed on Monday. There was no consultation.

58. The advice from ACAS did not require Mr Brown to fix a minimum period for consultation. The tribunal finds that he decided not to afford the claimant any consultation because he perceived the role undertaken by the claimant as "commercially sensitive" because of the information that the claimant held regarding clients. Notwithstanding, there has not been any criticism of the claimant or his performance. The role which the claimant held was no different to client facing roles in businesses across any sector. No reasonable employer would deny an employee consultation entirely.

59. The tribunal finds that there was no communication with the claimant prior to the decision being taken by Mr Brown to make the claimant redundant. The decision had to all intents and purposes been taken prior to the meeting and the letter sent to the claimant the following working day is confirmation of that. The context and content of the meeting was in all respects that of a decision meeting not that of a consultation meeting.

60. There is a conflict of evidence regarding what was said about estimator work. The tribunal has resolved that by determining that Mr Brown did not suggest to the claimant that the respondent had considered the alternative role of estimator

but had rejected it. However, even if the estimator role had been mentioned, given the fact that this was part of a short decision meeting, the tribunal rejects the proposition that it could be termed as “consultation” in any meaningful sense. At its highest, the claimant was simply being told what Mr Brown had in effect decided for himself.

61. The tribunal finds that the respondent had genuinely formed a view that there was a distinction between a BDM and an estimator and that justified the claimant being placed in a pool of 1 rather than a pool alongside the estimator role(s). This is just sufficient to discharge the obligation on the employer as expressed in the Capita Hartshead that an employer must have genuinely applied his mind to the question. That said, there was a complete failure to consult the claimant regarding the role of an estimator as an alternative to dismissal. No reasonable employer would have denied an employee at least an opportunity to identify possible alternatives (even if only to disagree).

62. The respondent did not provide the claimant with any warning of his impending redundancy. He was informed of it without warning on 9 March albeit that an appeal process was undertaken, but the decision had been made.

63. The tribunal concludes that the respondent failed to give any warning to the claimant. In so failing, it failed to give as much warning as possible to the claimant. The claimant was denied time to reflect and to inform himself of the relevant facts and to consider possible alternative solutions including some form of alternative employment and to attend a subsequent process on an informed basis.

64. The tribunal recognises that there are not procedures which are bound to be followed in every case and that fairness in the conduct of a dismissal for redundancy depends on all the circumstances of the individual case. However, the need to give as much warning as possible and to obligation to consult where possible are fundamental to the justice and fairness of a redundancy process and absent a compelling reason, should be present in any fair process.

65. The respondent has not put forward any compelling reason why the claimant could not have been warned and was not consulted at all prior to the decision being made. If it were suggested that because his role was a client facing role then it was fair to deprive him of any opportunity to fight for his job (or an alternative job), then than suggestion should be rejected. No reasonable employer in those circumstances would have proceeded without giving the claimant some warning of its intentions and offered the claimant some opportunity to reflect and consider his positon and available options.

66. The tribunal asked itself the question posed by s.98 (4) namely: did the respondent act reasonably in treating that reason as sufficient to dismiss the claimant? The tribunal concluded that the answer was no.

67. The tribunal went on to consider whether the respondent would or might have fairly dismissed the claimant for redundancy even in the absence of this unfairness. The question that the tribunal had to answer was this: what would have happened had the respondent carried out a redundancy process which gave the claimant as much warning as possible and adequate consultation before a decision was made? The tribunal reminded itself that it should not be deterred for considering this point by the fact that it involved some element of speculation.

68. If the defects had been rectified, the claimant at the least would have had a reasonable opportunity to consider his positon. He told the tribunal that he "would have taken an estimator role" and "would have probably still been there". The tribunal records that there was no evident hostility between the claimant and Mr Brown at the hearing and although the claimant has suggested that a reason for his dismissal was loss of trust, that is not surprising given the fact that he had lost his job out of the blue: in contrast Mr Brown reiterated in evidence that he had always "trusted the claimant implicitly".

69. The issue essentially boils down to an assessment of whether an alternative role, i.e., the estimator role, but also perhaps a commission based role, could have been available to the claimant. The fact that the tribunal finds that the claimant would have accepted such a role does not mean of course that such employment would have been offered to him. It might still have been open to the respondent to make its own business decision after a period of consultation. The respondent held a genuine view that the key skills of a dedicated estimator were different to those held by a BDM. However, the claimant gave persuasive evidence of his substantial experience as an estimator over the years both during and before his employment with the respondent and all the while without any question about his competence. The tribunal recalls also Mr Brown's words that he trusted the claimant implicitly. Self-evidently, there was a prospect that an alternative solution could be found.

70. The tribunal concludes that if a fair process had been adopted, and a genuine openness existed, then it is most likely that a conversation would have ensued where both parties were open to discussing the claimant's future employment. The tribunal accepted the claimant's evidence that he would have been willing to accept estimator work as a means of continuing his employment. The tribunal also recognised that it was the respondent's prerogative ultimately to conclude that an estimator role was not appropriate for the claimant. More to the point, the tribunal considers that such a conversation would have uncovered the true extent of the claimant's experience of estimating and (in the absence of any performance issues or loss of trust) the prospect of retaining him in work even on a commission basis.

71. The respondent was a relatively small employer and these conversations would have taken place informally over a relatively short period of time such as 1 month.

72. The tribunal concludes that there was a significant prospect that the claimant could have avoided a redundancy in these circumstances in any event. Applying the principles set out in Polkey v A E Dayton Services Ltd [1988] ICR 142 HL, the tribunal concludes that there was a 25% chance of the claimant being fairly dismissed within 1 month of his unfair dismissal. Had the claimant not been dismissed, the question of whether the employment would continue on alternative terms and conditions would no doubt have been the subject of further discussion. These are however matters going to remedy and therefore the tribunal expresses no further view pending a remedy hearing.

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EMPLOYMENT JUDGE BEEVER

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
26 September 2018
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