EMPLOYMENT TRIBUNALS

Claimant:	**Ms Pamela Knight**		
Respondent:	**Distribution Cable Jointing Ltd**		
Heard at:	**Leeds by CVP**	**On:**	**18 September 2020 and 19 October 2020**
Before:	**Employment Judge T R Smith**		

Representation

Claimant:	Mr Jenkins (Counsel)
Respondent:	Mr Jaffier (Representative)

RESERVED JUDGMENT

1. The principal reason for the Claimants dismissal was by reason of redundancy .
2. The Claimant was unfairly dismissed.
3. There was a 75% chance the Claimant would have been dismissed fairly in any event.

REASONS

Evidence.

1. The Tribunal had before it an electronic bundle which numbered 193 pages, although in fact the bundle was considerably larger due to sub indexing of the principal pages.
2. A reference to a number in brackets is a reference to a document in the bundle.
3. The Tribunal heard oral evidence from the Claimant, Ms Knight.
4. The Tribunal heard oral evidence from Mr Jim Grayson, Managing Director of the Respondent, and his wife Mrs Lisa Grayson, Company Secretary and Director.
5. The mere fact that the Tribunal has not referred to each and every piece of evidence presented to it does not mean that it did not consider such evidence, even if it has not expressly mentioned it, in the judgement.

The Issues

6. The following issues and concessions were agreed between the parties at the start of the hearing and are recorded below.
7. What was the reason or principal reason for dismissal? The Respondent contended it was redundancy but the Claimant claimed that the purported redundancy was a sham.
8. The Claimant contended her dismissal was unfair for the following reasons namely:-
    - She was not fairly selected for redundancy
    - No attempts were made to avoid the Claimants redundancy including seeking alternative employment
    - The Respondent failed to carry out any or any meaningful consultation prior to dismissal
    - The Respondent failed to consider bumping the Claimant into another role. The Claimant clarified, following an order of the Tribunal, that Ms Donna Hodgson – Operations Manager should have been the employee who was “bumped”
    - The Respondent failed to invite the Claimant to an appeal meeting to discuss her appeal against dismissal and it was dealt in any event by Mr Grayson, the dismissing officer.
9. Did the Respondent act fairly and reasonably in all the circumstances in treating redundancy (if established) as sufficient reason for dismissal?
10. To what extent, if at all was the principle in **Polkey -v- AE Dayton Services Ltd 1988 ICR 142** (“**Polkey**”) engaged.
11. It was agreed at the start of the hearing, due to various technical delays in the commencement of the hearing the Tribunal would determine liability and **Polkey** only, and if appropriate, address the issue of remedy at a later hearing.

Findings of fact.

12. The Claimant commenced employment with the Respondent on 01 September 2014.
13. The Claimant's effective date of termination was 04 March 2020.
14. Immediately prior to termination the Claimant was employed by the Respondent as an accounts manager. She worked full-time
15. Her duties in summary involved payroll, creating spreadsheets from timesheets, raising applications for payment ("AFP") and dealing with any associated queries, turning AFP's into invoices, managing staff holidays, bank reconciliation, vat returns and chasing payments.
16. The principal business of the Respondent is connecting live cables together. This is a safety critical, time critical operation. The Respondent by the nature of its business deals with large corporate clients.
17. The Respondent, although a limited company, is in practical terms controlled by Mr Jim Grayson, Managing Director and his wife Ms Lisa Grayson, Company Secretary and Director.
18. The Respondent employed just under 70 employees.
19. The vast majority of the employees operate in the field.
20. Whilst employed by the Respondent, the Claimant was never subjected to any form of capability or disciplinary proceedings.
21. Prior to the dismissal of the Claimant the administrative functions of the Respondent were carried out by Mr and Mrs Grayson, the Claimant, Ms Donna Hodgson, Operations Manager, and Mr Tony Whiteley, Civils Manager and technical jointers mate. Thus, there was an extremely and limited management structure.
22. Ms Hodgson was NEBOSH qualified and was able to determine which staff were appropriately qualified to do what job. She worked part-time , four days a week. She also job shared with Mr Grayson so they could cover each other's roles. She was able to understand site plans, the various different levels of authorisation for cable jointers and to determine which staff were required and qualified to work upon what job. The Respondents were to produce comparisons of the role of Ms Hodgson compared with that of the Claimant (for example pages 90/ 91). The Tribunal will return to these document in due course. What however is significant is that there were a considerable number of tasks undertaken by Ms Hodgson, which the Claimant could, even on the Claimant's own evidence, only do with training.
23. Mr Whiteley was in charge of the civil engineering aspect of the company including the use of mechanical machinery. He worked full-time. His role was wholly different from that of the Claimant and indeed the Claimant did not contend that he could have been bumped if her role was redundant.
24. The Respondents accounts dated 31 March 2020 showed that sales as at that date with just over 5.6 million compared with the previous year's sales of 7.7 million. Net profit had fallen from just over 17% to just under 8%(53a)
25. During the 12 to 18 months prior to the Claimants dismissal 13 employees had left the business and had not been replaced. They had principally left to join customers of the Respondent. This in turn impacted upon the Respondent's turnover as the customers outsourced less work and further the loss of trained workmen impacted

upon the Respondent's ability to tender for contracts and to undertake profitable work, as it took four years to train a cable jointer.

26. In order to address accountancy functions and to make the recording of information simpler, quicker and easier for other staff to access (79) a decision was made by the Respondent to introduce a package from Sage.

27. In April 2019 the Respondent obtained a multi-user Sage system. Sage provided a computerised accounts package to businesses. This was partly to improve productivity but also was aimed to ensure that cover was available within the management function if an employee was absent from work or left the business. The Respondent moved from just the Claimant having access to the computer to other members of the management team now being able to utilise the various accounts packages on the Sage system.

28. The notes of a quarterly meeting held on 18 October 2019, at which the Claimant attended, recorded that the use of the Sage system was "*helping reduce workload in all areas but especially in accounts as we don't have to double type invoices, AFPS and update spreadsheets. This has reduced post, paper and workload so it is positive. All sales are now raised are recorded on Sage and filed concurrently"* (65). The notes, which were not challenged, recorded how more use could be made of the Sage package to automate more work and provide more information and reports (71).

29. The same notes also recorded that cash flow had been an issue for at least the last 6 months (67).

30. The introduction of the Sage system led to Mr and Mrs Grayson and Ms Hodgson, and to a lesser extent Mr Whiteley, undertaking a variety of additional administrative and accountancy functions.

31. The Tribunal found that following initial difficulties in staff understanding the Sage system it led to a reduction in workload and greater efficiency. For example, the Respondent moved from printing and posting invoices to automatic email generation invoices.

32. On 06 January 2020 the Claimant was called into a meeting with Mr Grayson.

33. The Claimant had not been forewarned of the nature of the meeting.

34. At the meeting Mr Grayson read out a pre-prepared script (87) that was handed to the Claimant. The Tribunal considered it important to reproduce the majority of that note which read as follows: –

    "….this letter explains the reasons Distribution Cable Jointing have come to this decision and reasons for your consultation today.

    Over the past 12 months Distribution Cable Jointing have seen a drop in the number of jointing staff it employs. as you are already aware of this has had a knock on effect.

    Turnover, profit and workload have reduced in line with these jointing team reductions.

    As such we have taken the decision to restructure.

    I have and will continue to take an active role in the accounts side of the business so I can manage this situation on an ongoing basis

    This means your role in the business is now redundant…"

35. At the same time the Claimant was given a document setting out her redundancy payment entitlement, details of accrued holiday pay and a termination date (88).

36. The Claimant's dismissal was confirmed in writing by letter dated 07 January 2020 (92/93). The Claimant was given an express right of appeal. The right of appeal was to Mr Grayson.

37. The Respondent claimed there were similar meetings with Mr Whitley and Ms Hodgson on 03 January 2020. The Tribunal was not persuaded that any such meetings took place. Factors that led the Tribunal to this conclusion are set out below.

38. There were no notes of any such meetings.

39. No cogent explanation as to why there was a script for the meeting with the Claimant and not for Mr Whitley and Ms Hodgson.

40. Mr Grayson himself admitted in cross examination that he considered Mr Whitley and Ms Hodgson carried out very different roles to that of the Claimant and thus it is highly unlikely that they would have been consulted on 03 January 2020 as they were not potentially in the pool for redundancy.

41. There was not a shred of evidence to support any such meetings on 03 January 2020, either from the two employees themselves, internal emails or draft letters. If both Mr Whitley and Ms Hodgson had been genuinely placed at risk the Tribunal would have expected, as a minimum, some form of communication to them in writing to confirm that they were no longer at risk, when the Claimant was dismissed by alleged reason of redundancy.

42. Returning to the letter dated 07 January 2020 it went into some details as regards redundancy and holiday pay but the essential matters in respect of redundancy are contained at the start of the letter and read as follows: –

"Following the meeting held on Monday, 6th January 2020 and the recent consultation process, unfortunately, this letter is to confirm that the decision has been made to terminate your employment with Distribution Cable Jointing Ltd by reason of redundancy. This letter is formal notice of termination of your employment. In reaching this decision, we have considered all the circumstances including the options for avoiding redundancy. However, we are satisfied that, unfortunately a redundancy situation is unavoidable although it's a matter of regret was that this situation has occurred…."

43. By email dated 13 January 2020 (94) Claimant appealed her dismissal. Although the letter referred to a lack of consultation, concerns as to the Claimant's selection, and a lack of consideration of alternative employment it made no reference to "bumping".

44. No appeal meeting was held, although the Claimant received a letter from Mr Grayson dated 16 January 2020 (95) setting out his reasons for rejecting the appeal. The letter was short and perfunctory.

45. At the time the Claimant was dismissed no other employee was made redundant.

Submissions

46. Both Mr Jenkins and Mr Jaffier made oral submissions on matters of fact. Neither referred directly to any authorities. The Tribunal therefore means no disrespect to them but it is not repeated those oral submissions, as a record is contained on the Tribunal file. Where appropriate, however, the Tribunal has highlighted its findings on particular arguments.

Discussion and Conclusions.

What was the reason or principal reason for dismissal?

47. The burden of proof is upon the Respondent to establish a potentially fair reason and it relied upon redundancy.
48. In **Abernethy – v – Mott, Hay and Anderson 1974 IRLR213** the Court of Appeal held that a reason for dismissal was a set of facts known to the employer or beliefs held by him which caused him to dismiss the employee.
49. The Tribunal is satisfied that the Respondent has established that the principal reason for dismissal was redundancy and that dismissal was not a sham as alleged by the Claimant.
50. In reaching this conclusion the Tribunal have noted the reference in the documentation to various errors by the Claimant which Mr Jenkins sought to persuasively argue showed that the real reason for the dismissal of the Claimant was capability. Mr Grayson admitted in cross examination that the majority of these errors occurred in 2018. The Tribunal noted that despite these errors, clearly the Respondent was satisfied with the overall standard of the Claimant's work, as she was given a bonus of £1000 at Christmas 2018. To the extent there were any concerns the Tribunal regarded them as historical and were not significant factors in the decision of the Respondent to dismiss the Claimant.
51. Similarly, Mr Jenkins told the Tribunal to an extract from Mr Grayson statement which made reference to capability issues. However, the Tribunal having read the statement in its entirety considered that the principal concern of Mr Grayson was one of redundancy.
52. The turnover of the Respondent and dropped significantly. Staffing numbers had dropped. The Respondent principally dealt with large corporate companies. In the circumstances there were less accountancy functions.
53. Redundancy is defined in section 139 of the Employment Rights Act 1996. For the purposes of this case the relevant section is 139 (b) namely the fact that the requirements of the business for employees to carry out work of a particular kind has ceased or diminished or are expected to cease or diminish.
54. Mr Jenkins argued there was no cessation or diminution in the work the Claimant was employed to undertake. Whilst the Tribunal have noted a reference by the Respondent's independent accountant to the Claimant that she should ask the Respondent for more staff, (59A ,text exchange Claimant and accountant 08 August 2019) he was a friend of the Claimant are not employed in the day-to-day activities of the business. Whilst on many issues the Tribunal had misgivings as to the evidence of both Mr and Mrs Grayson it concluded that whilst initially the introduction of the Sage system in April 2019 did not immediately produce time savings, as others became used to the multi-system, gradually there were efficiencies. This is supported by unchallenged management notes.
55. The notes of the 18 October 2019, at which the Claimant attended, are supportive of this and it will be recorded that they said in respect of the introduction of the Sage system was "*helping reduce workload in all areas but especially in accounts as we don't have to double type invoices, AFPS and update spreadsheets. This has reduced post, paper and workload so it is positive. All sales are now raised are recorded on Sage and filed concurrently"* (65).

56. The Tribunal found that by December 2019, at the latest, other members of the management team were using the system effectively. Ms Hodgson was undertaking timesheets and application for payment and Mrs Grayson inputting most incoming invoices and receipts.

57. The Tribunal noted the Claimant did not seeks to undertake any overtime from November 2019 which pointed away from her evidence that she was extremely busy, despite the introduction of the Sage system.

58. The Tribunal, in reaching its conclusion that the principal reason for dismissal was redundancy, has factored into its conclusion the fact the Respondents turnover dropped substantially.

59. A fall in turnover does not automatically result in a drop in accountancy work but in this case the Tribunal is so satisfied. The Respondent operated with a number of large commercial clients and the work had fallen by approximately 30%.

60. The drop in staff working in the field led to a drop in work processing timesheets, wages, and invoicing.

61. The Tribunal is satisfied that there was a diminution in the accountancy work undertaken by the Claimant prior to her dismissal.

62. In the Tribunal's judgement it was also significant the Claimant had not been replaced. Her work had been distributed amongst existing members of staff. There had been no outsourcing of all or part of the Claimant's work. The only change had been that Ms Hodgson had increased her hours from 4 days a week to 5 days a week.

63. Mr Jenkins submitted that as Mr Grayson could not identify an exact date when the decision was made to announce a redundancy situation as in effect the was not such a situation. The Tribunal was not persuaded by that argument. The catalyst for the redundancy, on the evidence, was the gradual realisation that there was a diminution in the work the Claimant was employed to do which came to a head in approximately Christmas 2019/2020 when Mr and Mrs Grayson were going through the accounts. They were also aware from their own personal involvement in the accountancy function that the work the Claimant was employed to do had diminished in that some of the tasks were now allocated to other members of the management team. Even if the Tribunal is wrong and there was not a diminution in accountancy work the Respondent needed less staff to do it as it was now distributed amongst the management team

64. Looking at all the evidence holistically the Tribunal is satisfied that there was a diminution in the needs of the business for the functions that the Claimant undertook. Whilst there were some concerns as to the Claimant's performance, particularly in relation to the prompt production of monthly management accounts and her attitude at times, the principal reason for the Claimant's dismissal was the diminution in work which the Claimant undertook.

<u>Was the dismissal fair or unfair?</u>

65. The Tribunal started by considering **Williams -v- Compare Maxam Ltd [1982] ICR 156.** That case emphasised the need for warning, consultation an objective selection criteria, the fair application that criteria and, prior to dismissal, the employer considering alternative employment. The Tribunal reminded itself that a failure to adopt one or more of those principles set out in the judgement did not necessarily

lead to a finding of unfair dismissal , see **Grundy (Teddington) Ltd -v- Plummer [1983] ICR 367**

66. The Tribunal has little hesitation in finding the decision to dismiss the Claimant was unfair.

67. The Claimant was called into a meeting on 06 January 2020 and had no idea what the meeting was about.

68. There had been no forewarning.

69. Mr Grayson read from the pre-prepared script which he handed to the Claimant (87). The Claimant was also given details of her redundancy entitlement, notice period and other sums due to her.

70. The Tribunal particularly noted the phrase *"this means your role in the business is now redundant…"*. A decision had already been made that the Claimant's role was redundant even before the meeting .There was no consultation whatsoever as to the Claimant's role. Mr Grayson accepted the Claimant was very upset and the meeting lasted at most 10 minutes. There was some dispute between the parties as to whether the Claimant was asked to clear her desk. The Tribunal found the Claimant's evidence on this point that she was asked to hand in her keys to be more credible, looking at the evidence in its totality.

71. The Tribunal did not accept Mr Grayson's assertion that this was simply a consultation meeting. That does not fit comfortably with the fact that Mr Grayson accepted that on 06 January the Claimant was told that her role was being made redundant as from that day. Another factor that points away from this being a consultation meeting, at which no decision had been made, was the fact that the Claimant was being told how much she was entitled to financially and her termination date (88). The Claimant considered that she had been dismissed and Mr Grayson accepted in answer to a question from the Tribunal that he understood why she might well have reasonably believed that on the basis of the documentation and what was said to her. The Tribunal found the Claimant was dismissed and a reasonable person, aware of all the facts, would have come to the same conclusion.

72. The Tribunal does not accept that if this genuinely was a consultation meeting, where the Respondent was open to suggestions from the Claimant, why it would have carefully calculated the Claimant's redundancy payment, notice pay and accrued holiday pay and recorded her effective date of termination.

73. A further factor that points towards the fact the Claimant was dismissed on that day was that Mr Grayson remonstrated with the Claimant as to some of the property she was taking when she emptied her desk drawers. Mr Grayson was not protesting with the Claimant that she had not been dismissed, but rather the argument was whether the Claimant was taking property belonging to the Respondent. Had the Claimant not been dismissed there was no reason for Mr Grayson to ask the Claimant for the office keys .

74. The meeting had taken less than 10 minutes. That was not disputed by either party and is a fact that further points away from any meaningful consultation having taken place.

75. With respect to Mr Jaffier his submission that the Claimant did not raise alternatives to dismissal is not a persuasive argument. It is not persuasive because Claimant was caught completely by surprise and justifiably shocked. In any event it is the duty of the Respondent to engage in consultation.

76. The Tribunal asked Mr Grayson why, given how upset the Claimant was, he simply didn't adjourn the meeting but chose to write the next day, he said, to dismiss her, given it was clear she could not fairly engage in any genuine consultation exercise the previous day. He could not give a satisfactory response.

77. Fair consultation requires the Respondent to give the Claimant a fair and proper opportunity to understand fully the Respondent's proposal and to make suggestions which must then be carefully considered by the Respondent. What took place on 06 January 2020 was not consultation but a fate accompli.

78. Whilst the Claimant was critical that there was no discussion of alternative employment at the meeting the Tribunal is satisfied that there was no alternative employment (other than bumping which the Tribunal returned to later) and at no stage has the Claimant identified any job that was vacant or about to become vacant which she says she could have fulfilled. There was no duty upon the Respondent to create a job for the Claimant. In isolation if this was the only complaint raised by the Claimant the Tribunal would not have found the dismissal to be unfair.

79. The Claimant did not attend work on 07 January 2020. She did not ring in sick. The Respondent did nothing. This is more consistent with the Respondent considering the Claimant had been dismissed the previous day.

80. The Tribunal concluded that the decision to dismiss the Claimant was made prior to the meeting on 06 January. The Tribunal considered that the assertion that the Respondent genuinely exercised its mind as to the possibility of bumping Ms Hodgson prior to dismissing the Claimant was not well founded.

81. The Tribunal considered there was merit in the submission of Mr Jenkins that the documents now produced to the Tribunal which purported to show the strengths and weaknesses of the Claimant and Ms Hodgson, and showed it considered bumping at dismissal, were not contemporaneous and that was a factor that ought to weigh in at the Tribunal's assessment of the cogency of the evidence of the Claimant compared with that of the Respondent. Bumping was not in the mind of the Respondent at dismissal. The irony of this is that there is no obligation on an employer to specifically consider bumping see **Samels-v-University of Creative Arts [2012] EWCA Civ 1152** .

82. The Tribunal will return to this topic of the bumping documentation when addressing the issue of **Polkey**

83. The Tribunal considered whether it was procedurally unfair for Mr Grayson to deal with the appeal and not to hold a formal meeting

84. In general terms a dismissal and appeal should be dealt with by different persons with the appeal been dealt with by a more senior person.

85. Here the decision to dismiss and effectively been taken by Mr Grayson supported by his wife. There were no person within the company that were more senior. The management structure was extremely flat. Whilst an employer could have considered utilising the services of an external consultant there is no obligation to do so. Whilst the ACAS code recommends an appeal is held it is not necessarily unfair for appeal to be addressed by means of a written reply. Mr Grayson did respond to the points raised by the Claimant. If this had been the only error in the process the Tribunal would not have found the dismissal unfair.

Polkey and necessary additional findings of fact.

86. The case of **Polkey -v- AE Dayton Services Ltd 1988 ICR 142** held that a Tribunal must consider whether the unfairly dismissed employee could have been dismissed fairly at a later date.

87. The mere fact a **Polkey** reduction may involve a degree of speculation or is difficult does not mean it should not be undertaken.

88. The burden of proving that the Claimant would have been dismissed, in any event, is on the Respondent. Provided the Claimant can put forward an arguable case that she would have been retained were it not for the unfair procedure, the evidential burden shifts to the Respondent to show that the dismissal might have occurred even if a correct procedure had been followed, see **Britool Ltd -v- Roberts 1993 IRLR 481.**

89. The Tribunal looked carefully at the guidance given in **Software 2000 Ltd -v- Andrews 2007 ICR 825** on the application of **Polkey**.

90. The proper approach when applying the **Polkey** principle is not to look at what the Respondent would have done if it had not made an error, rather to look at what would have happened if the correct procedure had been applied

91. Mr Jaffier relied upon two separate matters.

92. The first relates to an accountancy error made by the Claimant in July 2018. She overpaid PAYE by a total of some £64,000. The Tribunal is satisfied she knew of that overpayment but did nothing to draw it to the attention of the Respondent.

93. Whilst it was true the Claimant said in her evidence she spoke to Mr Grayson as to her error and that he laughed it off, whilst generally the Tribunal found the Claimant to be a preferable witness to that of Mr Grayson, on this point, the Tribunal was not persuaded by her evidence.

94. The reason for this finding is firstly it was never directly put to Mr Grayson that this occurred and this appeared to be the first time the matter had been raised. All that was put to Mr Grayson in cross examination was that he was told of the overpayment by the company accountant, which he denied. There was nothing from the company accountant either by way of oral evidence, or written documentation either contemporaneous or post before the Tribunal.

95. Secondly this was at a period when the Respondent was having cash flow difficulties. The Tribunal finds it inherently improbable that if Mr Grayson was suddenly told the Respondent was £64,000 better off he would not have asked more about it such as where it had come from.

96. The Tribunal was satisfied the Respondent had shown that the Claimant knew of the overpayments made in approximately July 2018. She knew of the error firstly on the information provided by HMRC(as she required a unique password sent to her by HMRC to a mobile phone) and there was a running total which showed the account was in credit (192/193) and secondly a letter was sent by the Inland Revenue to the Respondent on 02 December 2018 referring to the overpayment. The Claimant accepted that all such correspondence would normally go to her. Whilst it was true, she said she couldn't recall seeing the letter there was no reason for the Respondents to seek to hide the same from the Claimant when at that time she was the only person who could deal with HMRC.

97. The Claimant was well aware the Respondents were having cash flow difficulties as was evidenced by the minutes of the meeting held on 29 April 2019 at which the Claimant was present (79). The Claimant did not indicate there was a significant credit balance with HMRC at that meeting although for the reasons already indicated the Tribunal is satisfied the Claimant knew of it.

98. It remained in credit until June 2019 when it was rectified. Despite the Tribunal's concerns as to aspects of the evidence of Mr and Mrs Grayson, the Tribunal found Mrs Grayson to be totally plausible that at about Christmas 2019 she found a loose document from HMRC dated December 2018 which said the Respondent was in credit, while she was working through the accounts with her husband. She did not immediately do anything with it because she noted there was a credit balance and it was an old document but made a note to raise it with the Claimant. Of course, the Respondents could not raise it with the Claimant because of the first day back after Christmas the Claimant rang in sick and on the second day the Tribunal found that she was dismissed.

99. It was only in February 2020 when the Respondent's received a letter from HMRC which expressed concerns as to how their account was being managed that Mrs Grayson started to look very carefully at the Respondent's dealings with HMRC and then found out, having been given the unique pin sent to her phone so she could access the company's dealings with HMRC, the full extent of what had occurred. No one without the pin could access the HMRC site on behalf of the Respondent.

100. Effectively there been an overpayment to HMRC in July 2018 of over £64,000 and this was not remedied until June 2019 during which period the Respondents encountered cash flow difficulties and demands upon it for VAT.

101. In the course of the Claimant's evidence she appeared to accept some responsibility for the overpayments (there were three totalling just over £64,000) but said part of the time she was on holiday .Given the Claimant was the person with the unique access to HMRC and given the Claimant accepted that she dealt with such matters the Tribunal considered on this point the Claimant was less than frank .There was no evidence whatsoever to suggest that anyone else within the Respondent was responsible for part of the overpayment.

102. The Tribunal therefore had to assess what would have happened to the Claimant had she not been unfairly dismissed now the Respondents were aware of this accountancy error and if it had followed a proper procedure.

103. The Claimant had made previous errors but never of this magnitude. It is right that the Tribunal reminds itself that even with those previous errors no action was taken against the Claimant. The Tribunal therefore had to carefully weigh in the balance whether any action would have been taken on this occasion given that ultimately the matter had been remedied .

104. In 2019 the Respondents cash flow situation was such it had to take out loans. The Tribunal is satisfied that had the Claimants known they were substantially in credit with HMRC and that the Claimant was aware of that and had not immediately rectify the matter brought it to their attention (and for the avoidance of doubt the Tribunal has already found the Claimant did know about it and did not bring it to the Respondents attention)they would have taken disciplinary proceedings against the Claimant.

105. Mr Jenkins submitted that the money was never actually lost and therefore that would point against the Respondents believing that they had lost trust and

confidence in the Claimant. With respect to Mr Jenkins the fact the money was not lost was not the central point. The fact was the Respondent has established the Claimant knew of the overpayment, knew the Respondent was having cash flow difficulties and did nothing. Nor is Mr Jenkins submission that it was not the error in itself that contributed to the drop in turnover a valid reason why this employer would not have taken disciplinary action against the Claimant. The issue was not the overall performance of the Respondent but rather the acts or omissions of the Claimant.

106. Of course, there was no such proceedings and the Tribunal reminds itself an investigation would have been required. However the Tribunal has had the opportunity of hearing from the Claimant as to her explanation and for the reasons outlined above it found them unconvincing and considered so would have the Respondent or any reasonable employer.

107. In the Tribunal's judgement disciplinary action would have been taken given the seriousness of the error , and the period of time during which there was none disclosure.

108. What is more difficult is whether the Claimant would have been dismissed. For all intents and purposes the Claimant had a clean disciplinary record so even if disciplinary action was taken the Tribunal had to consider the possibility that the Claimant would not have been dismissed.

109. It was clearly important in a relatively small company that there is trust between those who prepare the accounts and those who manage the business. The Tribunal concluded that the Respondent has established that there was a very real risk the Claimant would have been fairly dismissed but it could not go higher than that. It did not accept Mr Jaffier's submission that it was a hundred percent guaranteed the Claimant would have been dismissed.

110. The second limb relied upon by Mr Jaffier was that in reality, even if a fair procedure had been followed, in terms of redundancy the Claimant would inevitably have been dismissed because her principal argument was one of bumping and she would inevitably have still been selected for dismissal.

111. The Tribunal considered that the argument was more nuanced than just bumping. The Claimant contended that had she been given a proper opportunity to engage in consultation, suggestions could have been put forward which might have been considered such as a drop in pay, reduction in hours or other efficiencies. It cannot be said that had those proposals been made they would necessarily be rejected out of hand, particularly given that following the Claimant's dismissal Ms Hodgson increased her hours by one day a week. Dismissal was not inevitable.

112. The Claimant also contended that Ms Hodgson could have been bumped so she would have remained in full-time employment.

113. At this point it is appropriate to return to the tabular document prepared by Mr Grayson (90/91) setting out various tasks of both the Claimant and Ms Hodgson and what they could and couldn't do.

114. The Tribunal considered there was weight in Mr Jenkins submission that the Tribunal had to approach this document with considerable care. Considerable care was required because initially the Respondents gave the impression it was a contemporaneous document when now it was accepted it was prepared, posted dismissal and after the Claimant had submitted her Tribunal claim. The document

was self-serving and was prepared to seek to strengthen the Respondents position after proceedings were issued. These are strong points. That said the Claimant was taken through the document and asked to comment upon the analysis carried out by Mr Grayson. However, the Claimant did give evidence as to the document which cannot be ignored. The Tribunal has approached this matter by accepting the Claimant's evidence at face value on this document rather the Respondents analysis.

115. The Claimant did accept that there were 19 tasks done by Ms Hodgson (out of 51) she could only do with training as described by the Respondent. She did not accept there were tasks she was incapable of as described by the Respondent. She said she could do them with training. This increased the number of training tasks from 19 significantly. She accepted that in her estimate she would need about three months training, perhaps the little less.

116. The Tribunal noted that Ms Hodgson was also a long serving employee although not as long serving as the Claimant.

117. The Tribunal cannot say that had bumping been approached fairly that inevitably the Claimant would still have been dismissed. The Tribunal considers that doing the best it can on the evidence it is more finely balanced.

118. The Tribunal considered that whilst it could not be said there was no risk that the Respondent would have dismissed the Claimant fairly it was less than the risk the Claimant would have been fairly dismissed due to the significant accountancy error.

119. The Tribunal reminded itself of the dangers of what is sometimes called double counting, that is looking at a number of factors and then failing to stand back, in making the appropriate **Polkey** adjustment.

120. Pulling both matters together and putting particular weight on the accountancy error and the failure to disclose the same to the Respondents, the Tribunal considered there was a 75% chance the Claimant would have been fairly dismissed.

_____

Employment Judge T R Smith

_____

Date 20 October 2020