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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100591/2021

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Hearing Held by Cloud Video Platform (CVP) on 28 and 29 June 2021

Employment Judge Young

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Mr Steven Howie

**Claimant:
In Person**

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Tela Technology Ltd

**Respondent:
Represented by
Ms Tracy Newman-Malin
Head of HR**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is that:-

- (i) the claimant was not unfairly (constructively) dismissed by the respondent in terms of s98 of the Employment Rights Act 1996; and
- (ii) that his claim for loss of earnings or compensation is dismissed.

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REASONS

1. The claimant presented a claim to the Employment Tribunal complaining that he had been unfairly dismissed and was due “other payments”. The essence of his claim was that he had acted in the capacity of a “Desk Based Account Manager” with the respondent who had indicated in February 2020 that a redundancy situation affected those in that position. Discussion resulted in him taking on a role as a new “Business Development Manager” on a trial basis. However when he indicated that he was not satisfied with the new position the respondent did not allow him to return to his previous position as a Desk Based Account Manager or to reinstate a redundancy selection process. He then resigned taking a voluntary redundancy payment. His claim was that this was unfair (constructive) dismissal and that he was due loss of commission and earnings which he would have earned in his previous role.
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2. In their response the respondent advised that they took a strategic decision to decentralise the desk-based account management function and that restructure meant there was only a requirement for two Desk Based Account Managers in place of five. Consultation resulted in three new Business Development Manager roles becoming available and the claimant chose to move into one of those positions. It was not the case that the claimant could return to his previous role and so there was no unfair (constructive) dismissal or ground for a claim of loss of earnings.
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3. The issues for the Tribunal were : -
 - (a) Did a redundancy situation affect the claimant as a Desk Based Account Manager?
 - (b) Did consultation in relation to that redundancy situation result in an agreement that the claimant would move to a position of Business Development Manager on a trial basis?.
 - (c) If so, was the agreement to the effect that if the role did not suit the claimant, he was not able to return to consultation on the redundancy situation?.
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- (d) Was it a breach of contract for the respondent now to allow the claimant to return to a consultation exercise in respect of the positions of Desk Based Account Managers?
- 5 (e) If so, did that breach go to the root of the contract between the respondent and claimant entitling him to resign?.
- (f) Did the claimant resign in response to that breach?
- (g) Did the claimant affirm the contract by delaying resignation in response?
- 10 (h) If the claimant was unfairly (constructively) dismissed what amount should be awarded by way of compensation taking into account, the decision in *Polkey* and the duty to mitigate loss?.
- (i) Were there grounds for the claim for loss of earnings advanced by the claimant and if so, what amount should be awarded?

Documentation

- 15 4. The parties had helpfully liaised in providing a Joint Inventory of Productions paginated 1-159. In the course of the hearing additional documents were submitted and paginated 160/163. Reference in this Judgment is to the paginated numbers (J1-163).

The Hearing

- 20 5. Albeit no order had been made for Witness Statements the parties provided statements for the hearing. It was agreed that the Witness Statements would be read out with the witnesses answering supplementary questions and questions in cross-examination. Evidence was given by Tracy Newman-Malin, Head of HR with the respondent since February 2019; Lynn Morgan, Head of Customer Experience with the respondent since his Telecoms Business was purchased by the respondent in 2019; Shez Cheema, Chief Executive Officer of the respondent; and the claimant.
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6. From the documents produced, relevant evidence led and admissions made I was able to make findings on the issues

Findings in Fact

7. The respondent provides a range of communication products and services to businesses. While the services span the whole communications mix, they predominantly involve the provision of unified systems for mobile and fixed line telephone systems along with internet and broadband services. They have made local acquisitions in the course of time which has resulted in there being a strong local presence across the UK. They are a “total communications partner” within the” Vodafone Partner Programme”. The business was structured so that new business teams in mobile and telephony systems introduced customers who, dependent on their size, were managed by either a Field Based or Desk Based Account Manager. The Team comprising Desk Based Account Managers (DBAMT) were responsible for a high volume of smaller spend accounts.
8. The claimant joined the DBAMT in Glasgow with continuous employment commencing on 3 September 2018 in terms of a Statement of Terms and Conditions signed 10 September 2018 (J67/81).
9. He was managed by Jayne Blair, who reported to Lynn Morgan as Head of Customer Experience. The claimant in his role was responsible for achieving a monthly sales target by re-signing customers whose contract had come to an end in addition to introducing new products and services. He would provide Customer Support within the life of the new contract. In that role he received a basic salary and commission. He along with others in the team would manage approximately 350 customer accounts spread across the UK with a large proportion of those accounts being in the Midlands area.

Redundancy Situation

10. The respondent decided in early 2020 to “decentralise” DBAMT. They did this in consultation with Vodafone who had carried out a similar exercise. The respondent had grown through acquisition of various small businesses in the

UK and it was considered that the customer base preferred to deal with those within their local area rather than a centralised team. After a review of the volume of customer accounts and the geographical spread it was apparent that there were enough accounts for only two Desk Based Account Managers in Glasgow rather than the five in post at that time. Two further Desk Based Account Managers were based in Worcester and Guildford. Effectively those individuals looked after their local area in the desk based function. The area to be covered by the proposed two Desk Based Managers in Glasgow was Scotland and North East England. The restructure exercise meant a redundancy situation existed in respect of DBAMT.

Consultation

11. On 4 February 2020, Lynn Morgan along with Tracy Newman-Malin spoke to the individuals at risk of redundancy in Glasgow. The claimant was not in the office that day but was contacted by his Line Manager the same day by telephone.
12. At that meeting and telephone conversation it was explained to the DBAMT that there were two roles identified as suitable alternatives to those selected for redundancy being Business Development manager and Telemarketing Executive. The redundancy selection was to be carried out under a scored matrix.
13. By letter of 5 February 2020 (J88/89) the claimant was advised that his role of Desk Based Account Manager within the Glasgow Office was at risk of redundancy by reason of the decision taken by the business to regionalise Desk Based Accounts. That letter attached the matrix which was to be utilised in the selection process and confirmed the roles identified as being available as suitable alternative employment. The letter advised that those roles had been “available for internal application previously and are currently on hold from external applicants”. Conversations regarding those roles would commence once affected individuals had been notified. Job specifications for those roles were advised in terms of job descriptions supplied on 5 February 2020 (J83/85).

14. Jayne Blair had advised the claimant of the conversations with other individuals on 4 February 2020 and had given the same information to the claimant by telephone (J82). On 5 February 2020 the claimant discussed matters with Tracy Newman-Malin and queried why it was not possible to continue work from Glasgow and received a response (J92).

15. Quite quickly in the course of discussion amongst the individuals affected by the proposed redundancy it became apparent that individuals in the team were open to taking up the positions of Business Development Manager or Telemarketing Executive. Indeed given the response Jayne Blair was satisfied that redundancy process could be avoided if a further role of Business Development Manager was created as there were three interested parties in taking up those roles.

16. After consultation with Mr Cheema, authorisation was given for an additional Business Development Manager role to be created. This role was seen as being beneficial to the respondent in generating more business in the Central Belt and avoided redundancy.

17. By email of 5 February 2020 one of those considering the new Business Development Manager position (Tony Oliver) emailed Tracy Newman-Malin seeking answers to certain questions being :-

“If I was successful with a new BDM role would I go into a three month Trial period?

During the trial period if I thought that the job was not for me and decided not to take up the position would I then technically be made redundant and qualify for my redundancy package?

Would the business look at some sort of bonus protection over my three-month trial period ?

From what date would I qualify for a car allowance from?

18. In answer to those questions Mr Oliver was advised that the trial period would be three months and that in that period he could assess the role and if he decided not to take up the position then he would be made redundant and qualify for a redundancy payment. The arrangements regarding commission would be checked and he would qualify for a car allowance from the date he entered the role (J161).

19. On 5 February 2020 another individual interested in the alternative roles (John Monteith) asked if the role in Telemarketing would be a “trial” and was advised that “there would be a trial in place for the individual stepping into either the BDM role or Telemarketing role of 90 days. This trial is for you rather than the business, so if you decided that the role was not right for you within the 90 days (and due to time served you were eligible to receive a redundancy payment) then this would be processed” (J160).

20. By email of 7 February 2020 Jayne Blair advised DBAMT (along with Tracy Newman-Malin and Lynn Morgan) that:-

“As discussed, the business is happy with the creation of a BDE role, which gives us five roles for the five team members. I have confirmed that you as a team are happy with this and confirmed that you are all in agreement not to go down a matrix route allowing the individuals to move into the roles where they felt they have the greatest opportunity to be successful.

Tracy will send out a further individual communication today to confirm that you are no longer at risk bringing an end to the consultation period” (J94)

21. By further email of 7 February 2020 and letter attached (J95/96) the claimant was advised:-

“Dear Steven,

I am writing to confirm that the consultation period has ended.

During this consultation period the business took on board (and continues to take on board) the feedback and suggestions provided by the team. It is this feedback that has enabled us to create a further sales role, with 3 sales-oriented roles on offer in addition to the current two Desk-Based Account Manager Roles.

I would like to take this opportunity to thank you for your continued professionalism, approach and work ethic during a very difficult time. The business appreciates your loyalty and continued support”.

22. There was no email or other correspondence between the respondent and claimant on this aspect of matters at the relevant time in February/March 2020.

New role and trial period

23. It was a matter of agreement that the claimant took up a position of Business Development Manager with two colleagues taking the further positions of Business Development Manager and Telemarketing Executive. These positions were taken on a trial basis. The claimant’s new role was concerned with winning new business on company mobile phone contracts.

24. The role of Business Development Manager carried the same basic salary but in addition benefited from a £450 per month car allowance. Commission was based on a combination of gross margin on new sales (paid at a higher percentage of 20% for Vodafone gross margin or 15% for other networks). Further bonuses were also available.

25. The position of Lynn Morgan and Tracy Newman-Malin was that the claimant was very willing to step forward into the Business Development role where he felt that he would be successful. Their position was that they considered the individuals who had entered the position of either Business Development Manager or Telemarketing Executive had done so on the basis that if these roles did not work out for them in the trial period (and the trial period was for the individuals and not the business) then they could leave and qualify for a redundancy payment but would not re-enter the consultation on redundancy

selection involving the five Desk Based Account Managers. Their position was that matters were resolved by two Desk Account Based Managers remaining in their position and the other three taking up roles in Business Development Management/Telemarketing. There was then no redundancy situation.

5 26. The position of the claimant in his evidence was that during the “course of the
consultation 3 new positions became available in the Glasgow Office and
nobody wanted to see a friend be left without a role so we used our own
knowledge to filter out who would be best for each role. I was assigned, not
interviewed for but assigned a new role of BDM but I only took the new role
10 under the guarantee that it would be a trial and that I would come back to the
matrix if it was unsuccessful, at no point did I sign a contract”. He also stated
that he had “20 years’ experience and if it was alluded to, pointed out or even
mentioned that I that I had no route back to the matrix or my original role then
I would not have agreed to the move, I had nothing to gain and everything to
15 lose as I had no tenure and as such I had no grounds for redundancy”.

27. It was originally intended that the claimant and the others occupying the
positions in business development would commence those roles as from early
March 2020. However they had accounts to finalise within their original roles
of and those accounts carried commission. Accordingly the period from which
20 they would commence the new roles was extended to around 20 March 2020.

28. By that time the Covid pandemic affected normal business activity as all but
essential travel became banned. Accordingly those involved in the new
business roles were required to “cleanse data” namely to ensure that the
respondent’s records on customer information was updated and in good order
25 so that when restrictions were eased the new Business Development
Managers could quickly proceed with winning appointments. That was
communicated to the claimant on 17 March 2020 (J97/100).

29. By beginning April 2020 the restrictions due to Covid had increased and it was
clear that those involved in the new Business Development roles would not
30 be able to travel to meet with customers and win business and a decision was
taken to place them on furlough (J101/102). By letter of 3 April 2020 the

claimant along with others involved in Business Development were placed on furlough with effect from 6 April 2020. At that time 80% of salary was payable. That furlough arrangement was extended through May/July 2020 to a time when it was anticipated that a return to work could be put in place as from 10 August 2020. (J104/116)

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30. The claimant's position in evidence was that by June 2020 he had asked "multiple times since March to go my original role and was told "no" and each time I mentioned it was supposed to be a trial I was fobbed off or not properly answered.... " He also indicated that a new Desk-Based Account Manager taken on whilst he was on furlough was a direct relative of the person to whom the individual would be reporting. He also discovered in June 2020 that one of the surviving two best Desk-Based Account Managers in Glasgow had not been placed on furlough at all. He considered that in a fairer environment that should have been him.
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31. He stated that in June and July he called "Lynn Morgan a few times to discuss getting back to work" and that he was not being supported properly by the promised "Telemarketer" and that he "pleaded to go back to his old role and was told "Stevie, who will I sack to give you the job, John or Jacqui?" and that was "the end of that discussion".
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32. The only correspondence produced in relation to these stated representations was an email to the claimant from Tracy Newman-Malin of 21 July 2020 when the claimant indicated that he was looking forward to getting back to work and wished to ask some questions regarding his wages during furlough with particular reference to whether commission payment should have been taken into account; and why it was that others had received 100% of salary rather than 80% (J125). Tracy Newman-Malin spoke to the claimant and responded to the points raised by email of 22 July 2020 (J121/122). She advised that the furlough arrangements were applied consistently across the team and that as commission payments were discretionary and not contractual they could not be included within the furlough scheme. It was confirmed also that the car
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allowance available to the claimant had been overlooked and arrangements were put in place for the appropriate amount to be paid from 1 April 2020.

33. By email of 27 July 2020 (J120) the claimant acknowledged the advice indicating that he was looking forward to returning to work at the earliest opportunity and:-

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“With regard to my new role, I do feel like I have been severely disadvantaged by this move, I am going to take some time to think it over but in the meantime could you let me know what happens should I wish to look into moving back into Account Management, from my understanding my new role was a three month trial and it was sold to me on the basis that this is a trial for all parties”.

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30. He also indicated that he considered that he had the best figures in the DBAMT and nothing but praise from customers and that he could come back out of furlough into the job he had been in particularly when another had been hired.

- 15 31. Tracy Newman-Malin responded by email of 28 July 2020 (J118/119) stating:-

“Re the BDM role and trial, the trial in place was for you, rather than the business. It’s to give you the opportunity to see whether you would like to continue in the role moving forward. If after the trial period you didn’t want to continue in the role, the other option available at the time was redundancy as we did not have enough accounts in the area for the number of Account Managers in place, which is what created the redundancy situation in the first instance following the business moving to regional model.”

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- 25 She indicated that given the impact of Covid she would return to the claimant on extending the trial period and confirmed that the reason that he had been kept on furlough was because of lack of demand for the new Business Development Manager in that particular area given the pandemic. She confirmed that regionalisation had continued as the model and accounts had been reallocated to the regions. While Niamh Byrne an existing employee had been appointed as a Desk Based Account Manager she was to be based out

of either Worcester or Northampton to cover accounts in the Midlands specifically and was not to be based in Glasgow.

32. By email of 29 July 2020 the claimant advised that his understanding of agreeing to the new role was that if either party was unhappy with the new role then “we would go back to the matrix” and that was why he had agreed to move. He believed that if he had returned to the matrix he would easily have got one of the Desk Based positions. However he stated that this could well be “irrelevant as I am desperate to make the new business work and I will be working my socks off to make this happen... We can car park all of this now and I look forward to getting the nod to start back on the 10th...” (J117). Tracy Newman-Malin responded on that day (J117) stating that clearly there had been a “couple of different interpretations from the sound of it, but we are certainly looking to have you back in the team and leading the new business piece for us...”
33. Written confirmation of the end of furlough and details of the move to Business Development Manager was given to the claimant by letter of 3 August 2020 (J127) accompanied by the job specification (J128). It was confirmed that the role had been effective from 1 April 2020 and that the move came with the introduction of a car allowance from that date. A return to work was scheduled for Monday 10 August 2020. The trial period in respect of the role was to be 12 weeks from 10 August 2020.

Resignation of claimant

34. In October 2020, the claimant expressed unhappiness in the new role. He spoke with Tracy Newman-Malin on 5 October 2020 to ask if other options were available. He did not feel that account regionalisation had taken place and did not feel supported because the Telemarketing role had been affected by illness of Mr Monteith.
35. By 26 October 2020 the claimant had become dissatisfied in the role of Business Development Manager and again contacted Tracy Newman-Malin. By email of that date (J133) he indicated that he would wish to discuss his

current role as he had been “very unhappy” and had asked on “many occasions to move back to my old role, on each occasion it has been made clear to me that won’t happen even though I was assured that my new role was a trial for both parties”. He sought to discuss matters. By email of 26
5 October 2020 Tracy Newman-Malin responded indicating that there were no other opportunities within Glasgow in Account Management and that the nearest role for the claimant would be based in Aberdeen. She also stated that she would check whether voluntary redundancy was an available option (J132).

10 36. Consequent on further discussion the claimant confirmed that he did not wish to continue on the trial of the Business Development Manager role and that he would wish to volunteer for redundancy. That was confirmed in a letter to the claimant of 3 November 2020 (J136) wherein it was accepted that the claimant did not wish to pursue the role of Business Development Manager
15 on a permanent basis and accepted his “proposal for redundancy considering there are no other suitable alternative roles that can be offered”.

37. He was advised of the redundancy package with final pay being made on 30 November 2020. He was given the opportunity to appeal the redundancy decision.

20 38. The claimant advised by email of 3 November 2020 (J138) that he was sad to leave and had enjoyed his time as a Desk Based Account Manager, a role he had “asked on many occasions to move back to” but that was never considered. He made no appeal against the redundancy.

Alternative employment

25 39. The claimant found another job immediately on leaving. He took up a position in a similar business operated by his former Line Manager Jayne Blair who had previously left the respondent. He stated that he had been “headhunted” by her but only after she was aware that he was leaving the respondent. He did not claim any wage loss in respect of the transition between the
30 respondent and his new employment.

40. However he claimed that he lost commission payments between July/December 2020 of approximately £5,798.00 and that his salary was reduced to 80% in the furlough period which would not have happened had he been able to return to DBAMT. While he had received a car allowance of £400 per month he had lost money in this change of role to Business Development Manager.

Conclusions

41. The claim made in this case is one of constructive dismissal. Section 95(1)(c) of the Employment Rights Act 1996 (ERA) states that there is a dismissal “where the employee terminates the contract in circumstances such that he or she is entitled to terminate it without notice by reason of the employer’s conduct”.

42. *Western Excavating (ECC) Limited -v- Sharp [1978] ICR 221* makes it clear that the employer’s conduct must be a repudiatory breach of contract:

“A significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the terms of the contract”.

45. It is clear that it is not sufficient that the employer’s conduct is merely unreasonable. It must amount to a material breach of contract. The employee must then satisfy the Tribunal that it was this breach the led to the decision to resign and not other factors.

46. Finally if there is a delay between the conduct and the resignation the employee may be deemed to have affirmed the contract and lost the right to claim constructive dismissal.

47. The claim by the claimant is that in the discussion on redundancy affecting DBAMT in Glasgow he took the position of Business Development Manager on the understanding that if the trial period did not work out for him then there would be a return to a consultation process in DBAMT using the matrix prepared to determine who should be selected for redundancy. His position

is that he took the job of Business Development Manager with that “guarantee” and it was a breach of that contractual term which occasioned him to resign and take “voluntary redundancy”.

5 48. There was also a certain challenge by the claimant as to whether there was a redundancy situation affecting DBAMT. His position was either (one) there was no need for regionalisation and it was a mistake to think that would assist customer relations and (two) in any event regionalisation of accounts was not carried out.

Redundancy situation.

10 49. Redundancy is defined in Section 139(1) of ERA. The applicable statutory words in this case are :-

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

(b) the fact that the requirements for that business –

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

20 (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”

25 50. Thus, redundancy does not only arise where the employer is in financial trouble or struggling to provide work. It occurs where there is a successful employer with plenty of work but for commercial and economic business reasons decides to reorganise and a lesser number of employees are required to perform the same function.

51. It is the requirement for employees to do work of a particular kind which is significant. If fewer employees are needed to do the work of a particular kind in the place where the employee was employed there is a redundancy situation. There is no need for an employer to show an economic justification for that reason.

52. In this case there was a decision by the respondent to “regionalise” the accounts. They had discussed this proposal with their significant business partner, Vodafone. A view was taken that customers would prefer their Desk Based Account Manager to be within the customers own region. The respondent had acquired a number of smaller business and those customers had been used to contact with Account Managers on a regionalised basis.

53. It is not for the Tribunal to consider whether that was wise as a business decision but be satisfied that background created less need for Desk Based Account Managers in Glasgow. I was satisfied from the evidence that was the case. With the accounts being regionalised then there was less work available within the team in Glasgow than previously. That meant that there was a redundancy situation affecting DBAMT. I was also satisfied from the evidence given that the proposed regionalisation of accounts had in fact been carried out and there had been no change of heart in that respect by the respondent or that in some way the proposal was a sham.

Guarantee of return to consultation on selection.

54. It would appear that the consultation with DBAMT was to be conducted rapidly. The intent was that there would be consultation and scoring on a matrix which would lead to selection of those to be made redundant within a few days of the team being initially consulted. At that time, and in terms of the letter of 5 February 2020 to the affected team members (including the claimant) it was stated that there were two roles within the Glasgow Office available namely Business Development Manager and Telemarketing Executive. These had been identified as suitable alternative employment. The intent in terms of that letter (J88/89) was that those individuals selected for

redundancy would have the opportunity to move into these suitable alternative positions. That would have entailed a trial period.

55. However the consultation process identified that there was interest from team members in these alternative positions such that if a further Business Development Manager job was created there would in fact be no need for any redundancy to be effected. Two of the existing Business Account Managers would continue in their role with the three others taking up positions either as Business Development Manager or Telemarketing Executive. It seemed from the evidence that the individual members decided themselves which role they considered would be suitable.

56. I did not consider that the claimant had been “assigned” to the Business Development role. It seemed clear that he agreed that he would take up that position. I consider he did so because he saw the potential to be successful in that position which would be to his financial benefit. He came across as an individual confident in his own abilities to ensure success in the Business Development role.

57. It was the case that the role was offered on a trial period for him and the other two individuals concerned. That trial was for the individual who could determine if he/she wished to continue with the role.

58. The crucial matter was whether or not there was, as the claimant maintained, a “guarantee” that if he decided the new role was not for him he could, if he wished, return to a consultation exercise amongst the five affected individuals to determine who should be made redundant. In that event he would be confident that he would survive such selection.

59. I did not consider that on that crucial element the claimant had been offered any guarantee to that effect for the following reasons.

60. In the first instance the whole exercise with DBAMT commenced with a straightforward indication that there was a redundancy situation and a need to select 2 out of 5 Desk Based Account Managers. The proposed method was by use of a matrix and once those who were to be made redundant were

identified they would be offered what the respondent considered were suitable alternative positions. The fact there was no selection process at the end of the day indicated a change. I considered that it was far more likely that the change was to the effect that there was an agreement that of the 5 Desk Based Account Managers 2 would remain in that position and 3 would take up alternative positions without any such “guarantee”.

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61. Indeed, 2 of the team clarified that very point with Tracy Newman-Malin in their emails of 5 February 2020 when they specifically asked about the “trial” of BDM role or Telemarketing role. They were told that if they decided that the role was not right for them in the trial period then they would leave with a redundancy payment (assuming they had the requisite qualifying service). One of the individuals sought clarification that if “I thought that the job was not for me and decided not to take up the position would I then technically be made redundant and qualify for my redundancy package?” and was told “That’s correct, the normal trial period is 4 weeks, we’re working to a 90 day trial. If at any point during this period you decide the role is not for you and you qualify for redundancy pay based on time served (which you personally would, based on your start date) then you would be entitled to the redundancy payment” (J161). The other individual was similarly advised.(J160)

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62. So at that point Tracy Newman-Malin was clear in outlining the respondent’s position. It was not the case that if in the course of the trial the individual decided the role was not for them they could return to a consultation exercise to determine who should be selected for redundancy within DBAMT. If the role was not suitable then the individual could leave on a redundancy package (assuming the necessary service qualification service was reached).

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63. In evidence the claimant advised he received his” guarantee” in phone calls with “Tracy – not sure if with Lynn”. Later he indicated that he had not had any conversations with Lynn Morgan on the matter but only with Tracy Newman-Malin. He did not say that Tracy Newman-Malin was “a liar” but that there was a “different interpretation of the conversation” and that he took the conversation to mean he could go back to the matrix. I did not consider that

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was likely. In the request for clarification made by the claimant's colleagues Tracy Newman-Malin had been clear in the advice that if the role was not suitable then the individual required to leave with a redundancy package (assuming service qualification). It was highly unlikely that she told the claimant a different position or given him a "guarantee" that he could return to the selection matrix when his colleagues could clearly not do so.

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64. That the respondent considered they had reached an agreed solution to the redundancy was outlined within the communication from Jayne Blair who on 7 February 2020 (J94) advised the team that the business was content that there were now 5 roles for the 5 members of DBAMT and that "it had been confirmed that you as a team are happy with this and confirmed that you are all in agreement not to go down a matrix route allowing the individuals to move into the roles where they felt they had the greatest opportunity to be successful". That was followed up by a letter to the claimant from Tracy Newman-Malin of 7 February 2020 (J95) confirming that the consultation period had ended with individuals being placed into certain positions. There is no mention of being able to return to the matrix in the event the individuals taking up positions in the Business Development area did not find the roles satisfactory.

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65. I also considered (despite the claimant's denial) that this was a close-knit team who would discuss matters amongst themselves and that it was very unlikely that he had not received the same information that the other two had received from Tracy Newman-Malin on the impact of them taking on roles in Business Development. It was clear that they would not be able to return to the matrix and that was the basis upon which they accepted the positions. I considered that the same message reached the claimant in the discussion and that it was not the case that he had been offered a different guarantee by Ms Tracy Newman-Malin.

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66. The impact of Covid and the necessary furlough arrangements interrupted normal business continuity. It would seem that had there not been that prolonged interruption the claimant would have been successful in the role

and not financially disadvantaged. He complained of lack of support but at the same time there was a general downturn in business activity in the period which would seem to be the predominant reason why the new role did not suit. It is understood why he would wish to return to Desk Based Account Management in those circumstances but I did not consider that there was a breach of a contractual term that in relinquishing the new role the respondent should have returned to the consultation exercise with DBAMT to determine who should be selected for redundancy.

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67. In those circumstances given that there was no breach of a contractual term there can be no constructive dismissal and so the claim of unfair constructive dismissal fails.

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68. Without there being a contractual term that the claimant was entitled to return to the Desk Based Account Managers role neither can there be any compensation claim for any loss of commission earnings in the period in which he occupied the Business Development role.

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Employment Judge: Jim Young
Date of Judgment: 02 August 2021
Entered in register: 17 August 2021
and copied to parties

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