THE EMPLOYMENT TRIBUNALS

Claimant: **Patricia Johnson**

Respondent: **Beacon Translations Limited**

Heard at: **North Shields**

On: **3 July 2018**

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

Representation:

Claimant: **Ms Abraham (solicitor)**

Respondent: **Mr Robinson-Young (counsel)**

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 12 March 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 parties helpfully agreed a list of issues in advance of the hearing. At the outset of the hearing, the parties' representatives confirmed their agreement to that list, subject to the following observations.

3. The tribunal queried the start and finish dates of the claimant's employment. The parties were in agreement that the claimant's starting date was 11 February 2008 which was the date that the claimant commenced permanent employment following a period of temporary work through an agency. The parties were not agreed on the termination date. The claimant contended for 4 January 2018; the respondent contended for a date subsequent to 4 January 2018 but subject to an evaluation of the evidence. The date of termination was therefore added as an issue for the tribunal to determine.

4. Both parties also recognised that in the event that the tribunal were to find that the dismissal was at least procedurally unfair, it would fall to the tribunal to determine whether any award would be discounted by reference to Polkey principles. Both parties were content to add it to the list of issues and the tribunal agreed to do so. After further enquiry of the parties, it was agreed that the tribunal should reach a conclusion on any Polkey issue in the course of deliberating on matters of liability.

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

    5.1. Was there a genuine redundancy situation at the claimant's place of work?
    5.2. Had the requirements of the respondent's business for employees to carry out work of a particular kind ceased or diminished, whether expected to cease or diminish?
    5.3. Was the claimant dismissed?
    5.4. Was the claimant's dismissal caused wholly or mainly by cessation or diminution?
    5.5. Was the dismissal attributable wholly or mainly as a result of redundancy or whether any other reasons for the dismissal of the claimant?
    5.6. Has the respondent dismissed due to periods of sickness and bereavement taken by the claimant or capability rather than a redundancy situation?
    5.7. Has the respondent disclosed and applied a genuine selection criterion for redundancy?
    5.8. Did the respondent offer part-time work or home working to the claimant?
    5.9. Was there an individual consultation with the claimant prior to her being made redundant?
    5.10. Was the claimant given any alternatives to dismissal?
    5.11. Was the claimant given a notice of dismissal?
    5.12. Was the consultation a fair process?
    5.13. Did the respondent have a redundancy procedure?
    5.14. If so did the respondent comply with their own contractual redundancy procedure?

5.15. What was the effective date of termination of the claimant's employment?

5.16. By reference to the Polkey principles, to what extent would the claimant have been fairly dismissed in any event?

Findings of Fact

6. The tribunal was provided with a concise bundle paginated to page 79. There were very few key documents in this case. The Claimant provided a witness statement and was cross examined on her statement. The respondent provided 5 witness statements. The statements of Shelagh Wallen and Pamela Gross were admitted in writing only. Appropriate weight was attached to them albeit that each essentially states that they were freelance typists working as and when necessary and this was an agreed fact as between the parties. Peter Johnson, the Managing Director of the respondent, gave evidence and was cross examined. Mr Johnson's wife, the Rev. Johnson, gave evidence as did Hilary Powell both of whom were briefly cross examined.

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

8. The claimant began work with the respondent as a temporary worker in January 2008. She became permanently employed on 12 February 2008, which is the date that the tribunal finds to be the starting date of her employment.

9. The claimant's role was as an audio typist. She worked full time and was office based throughout her employment. Her work involved receipt of translations dictated remotely by Mr Johnson and sent to the claimant electronically. The claimant attended the respondent's office premises from where she would receive her job instructions. The tribunal accepts the evidence of Mr Johnson that the claimant was a good, fast and accurate typist.

10. On a number of occasions, the location of the claimant's office base changed. For many years, it had been at the house of Mr and Rev Johnson until in about 2014 it was decided that they would move house to Perthshire in Scotland as "a step in the direction" of Mr Johnson's semi-retirement. At that point, the claimant was office based in commercial premises and following a further move more recently came to be office-based in Albion House in North Shields. She was the only employee at the Albion House office premises.

11. Mr Johnson's expertise lay in French- English translations. The claimant's typing work was solely in relation to Mr Johnson's work. The respondent did engage other freelance translators for languages other than French. The respondent also had engaged for many years two self-employed freelance typists who would be called on as and when needed.

12. In addition to the claimant, the respondent employed one other member of staff, Hilary Powell as an administrator, who was responsible for many tasks including the organisation of the work to translators and to the freelance typists as well as dealing within finance and accounting matters such as the SAGE package of accountancy software. Ms Powell gave evidence that she had produced the figures which the tribunal reviewed at the back of the hearing bundle. The role of administrator was significantly different to that of an audio typist. Both Ms Abraham and latterly the claimant in evidence confirmed that no dispute arises in this case about the selection of the claimant for redundancy as opposed to Ms Powell. Questions in cross examination particularly from Mr Robinson-Young suggested that it might still be an issue and Ms Abraham re-confirmed that there was no complaint that Ms Powell should have been involved in the redundancy exercise. The tribunal agrees with that: what transpired was a material reduction in typing work, not in administration work.

13. Following the move of Mr and Rev Johnson to Perthshire in 2014, it was evident that at some point in the future Mr Johnson would seek to reduce his working and to go into "semi-retirement". Notwithstanding that aspiration, the claimant continued to work as before for several years – full time and office based – up until the termination of her employment. Until 4 January 2018, there was no further discussion that placed any specific meaning to Mr Johnson's general intentions for the future. The claimant was not on notice of the likelihood of her job being at risk any time in the short term.

14. It being a small business, there was from time to time a need to undertake tasks beyond the scope of the claimant's contractual terms. She helped on occasions with domestic tasks for Mr Johnson. She covered on occasion for Ms Powell in her absence. On one such occasion, the Claimant made a significant error when she send a completed translation document to the wrong client which caused difficulties with the client. The respondent suffered some loss as a result of this. The claimant was not disciplined for her error. There may have been other occasions where she made errors; again, there was no form of disciplinary action taken.

15. One unfortunate feature of this case is that the claimant's husband passed away in November 2017 after a significant period of illness. His illness and the claimant's subsequent bereavement meant that the claimant was heavily involved in her late husband's care at least during 2017 and was herself absent from work for a 2 month period between November 2017 and January 2018, only returning to work on 2 January 2018. Her return to work was against her doctor's advice who considered that she was not ready to do so given her recent bereavement.

16. Regarding the respondent's attitude to these events, Mr Johnson agreed that on one occasion he had asked the claimant to try to re-organise her caring commitments to take place at the end of the working day to minimise disruption. The tribunal considered that instance to be consistent with the actions of an

understanding employer. Other than that, he was not unhappy with the circumstances that the claimant found herself in and did not make complaints to her about it.

17. It was specifically put to Mr Johnson that he was "fed up" with the claimant as a result of her significant absence from work and also in respect of capability issues arising from errors that she had made when she was at work. It was specifically put to Mr Johnson that this was the real reason for the decision which he subsequently took to dismiss the claimant albeit ostensibly for redundancy.

18. Mr Johnson rejected this suggestion. He specifically referred to the fact that "her mistakes had no bearing as a typist; she is good and fast and accurate, and if it hadn't been for my wish to work fewer hours, she would still be working for me". As regards the claimant's absences, Mr Johnson was clear that it "had no bearing on my decision at all". The tribunal noted that the events surrounding the claimant's absence were deserving of the utmost sympathy and it appeared that Mr Johnson did afford her that sympathy and moreover the tribunal noted that there was no continuing need for the claimant's absence from work following her bereavement. These circumstnaces do not lend themselves to a conclusion that Mr Johnson was motivated the fact of the claimant's mistakes or the illness of her husband or her own absence from the workplace.

19. For a considerable time leading up to the end of 2017, Mr Johnson had been actively contemplating his semi-retirement and a reduction in his work. It would have an obvious consequence to the claimant because if Mr Johnson did not work then there may not be work for the claimant to do. Mr Johnson was conscious that this would not be welcome news to the claimant. There might never be a good time to give bad news; but Mr Johnson, delayed taking any action on his plans given the impact on the claimant. In conjunction with his wife, he decided to take steps only after the claimant's return to work.

20. He took advice from a HR company. The advice is not disclosed. It was entirely verbal. He was advised to inform the claimant of her redundancy face to face rather than by phone or letter. He was advised that a consultation meeting should take place. It appears that he was not given further advice about what "consultation" would entail but he was apparently advised that the claimant should be told of the reason(s), that she should be given fair warning and also given a right of appeal. He agreed that he was given no advice about the timing of any notice or pay or termination date.

21. On 2 January 2018, the day that the claimant returned to work, Mr Johnson invited the claimant to a meeting in Newcastle to discuss "major changes to the respondent's business". It was a deliberate decision not to inform the claimant of any redundancy issue.

22. The meeting was attended by Mr and Rev Johnson and the claimant: it was very short, in any event just some 10-12 minutes in length. The witnesses in their evidence to the tribunal agreed that Mr Johnson informed the claimant that he was now going to be semi-retired and that he saw no alternative to offering the claimant a redundancy package. He also stated that the claimant was entitled to 10 weeks' pay in lieu of notice and also to a statutory redundancy package. He told the claimant that she had a right of appeal which she should exercise within 5 days. At the end of the meeting, he handed the claimant a pre-prepared letter [13]. The letter re-affirmed the points made during the meeting. It was put to the claimant in cross examination that the letter re-stated all that was raised at the meeting. The tribunal finds that the letter at [13] did properly reflect what Mr Johnson had decided prior to the meeting and what Mr Johnson outlined at the meeting.

23. There was only one material point of dispute between the parties in connection with the meeting on 4 January 2018. Mr Johnson recalls that he had "suggested" to the claimant that the claimant could not afford to go part time. This has been relied on by the respondent as evidence that Mr Johnson had considered alternatives to dismissal. The tribunal noted that the evidence was very specific and was focussed on an assertion that Mr Johnson put to the claimant that she could not afford to go part time. Mr Johnson did not assert that there was any wider conversation relating to whether he would (or would not) wish the claimant to go part time or whether the claimant in fact would (or would not) prefer part time work to termination of employment. Mr Robinson-Young suggested that there was a "discussion" regarding whether the claimant would work part-time. The tribunal does not regard that as an apt description of what occurred. On the respondent's own evidence the tribunal considers that it amounted to a statement of a conclusion that Mr Johnson had already reached before then putting it to the claimant in somewhat of a closed manner.

24. The claimant says she does not recall the conversation. She says that she would have been willing to work part time (or indeed home work for that matter). She supposes that if she had been asked then she would have recalled it and probably not have agreed with Mr Johnson.

25. The tribunal finds that Mr Johnson did put it to the claimant that she would not be able to afford to work part time. The evidence of Mr Johnson was supported by his wife and on balance it probably was said to the claimant. The tribunal considers that it is not surprising that the claimant does not have a complete recollection of the meeting. The tribunal notes that the meeting was held on her first day back at work after a long and traumatic absence and the claimant was undoubtedly in shock about what she was being told for the first time at the meeting.

26. The claimant gave honest and credible evidence to the tribunal. The fact that she cannot recollect a conversation regarding part time work is not a matter going to

her credibility; instead it is more likely a reflection of the shock that she felt given the circumstances and content of the meeting on 4 January 2018.

27. The tribunal finds that the meeting on 4 January 2018 was the first time that the claimant was became aware of any prospect of losing her job in the short term. It was put to the claimant in cross examination that the meeting was in effect "telling her that her job was at risk"; she responded by stating, "no, he was telling me that my job was gone; that he was making me redundant".

28. The tribunal finds that claimant's assessment of the meeting was accurate. The letter at [13] reflects what was said at the meeting. Regardless of what options or alternatives Mr Johnson may have privately considered, by the time of speaking to the claimant he had made the decision that the claimant was to be redundant. The language of the meeting and of the letter is consistent with that, for example, that Mr Johnson had "no option". The fact of the claimant's "entitlement" to notice pay and to a redundancy payment is indicative of a decision having been made. The offer of an appeal (on HR advice) is also evidence of a decision having been made.

29. The tribunal concludes that the intention of the meeting was to inform the claimant that a decision had been made that there was no alternative but to make her redundant. The tribunal considers that Mr Johnson had concluded that this was inevitable given that her work was wholly dependent on him. He had of course delayed this decision considerably out of genuine concern for the claimant's domestic situation.

30. The tribunal then turned to consider the context of the words regarding the claimant's ability to afford to work part time. Given that the words were used by Mr Johnson in the context of a short meeting in which the claimant was being told of the decision that had been made, then the context of the words relating to part time work is to be seen as little more than Mr Johnson's own reflections on the issue. There must be considerable doubt about whether the claimant was in any positon to understand fully what Mr Johnson was raising with her, and it is the tribunal's assessment that it is inappropriate to describe the words as a "discussion". The fact that the claimant agreed that she could not afford to work part time might simply mean no more than the claimant was still in denial about the prospective loss of her full time position. Moreover, the fact (if it be so) that she could not afford to work part time does not inform the tribunal about whether she would have accepted a part-time position given the stark alternative of no job and no income at all.

31. The tribunal concludes that a decision had been made to terminate the claimant's employment prior to the meeting on 4 January and that the claimant was informed of that fact at the meeting. She left the meeting believing that her employment had come to an end albeit with no clarity as to precisely when.

32. The tribunal recognises that the claimant went into work on Friday 5 January 2018. She did so because she was "on autopilot", not knowing with clarity what was really happening. The tribunal notes that she returned already completed work but that the respondent provided the claimant with no new work subsequent to the meeting on 4 January 2018. The claimant's final act was to state on Monday 8 January that she was unfit to attend work. The tribunal does not consider that the conflict of evidence as to whether the claimant had a chest infection and/or discussed the same with her GP requires a determination: it is of no direct relevance and regardless it does not go to the credibility of the claimant's evidence.

33. The respondent treated the claimant's termination date as being 8 January 2018. This reliance arose as a result of the Mr Johnson's belief, as the tribunal has found, that he had made the decision to terminate the claimant's employment on 4 January and Mr Johnson interpreted subsequent events in the light of a belief that the claimant had chosen not to appeal the decision. In the light of the conduct of the parties, the tribunal finds that the termination date of the claimant's employment was 8 January 2018. This is also the date on which the calculation of the claimant's notice pay was based.

34. The claimant did not appeal. Some criticism is made of the fact that it would inevitably have been an appeal to Mr Johnson albeit he had also made the initial decision. The tribunal is mindful that whilst that may not be a perfect solution it is a consequence of the fact that Mr Johnson and the respondent were to all intents and purposes one and the same.

Legal Principles

35. 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.

36. 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.

37. 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.

38. 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.

39. 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.

40. 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".

41. 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.

42. 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. 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.

43. 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 Swainston UKEAT/0603/12 to similar effect. Finally, also the dicta in Williams v Compare Maxam [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.

44. 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. Mr Robinson-Young also referred to the case of Contract Bottling v Cave UKEAT/0100/14 which 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".

The parties' competing arguments

45. Ms Abraham provided clear and concise submissions. She referred to the two questions arising from s.98 ERA. She contended that the evidence supported a conclusion that Mr Johnson's real motivation to terminate was as a result of the mistakes (capability) of the claimant, and also the inconvenience that was brought about due to her personal situation and her extended absences and the effect that had on the respondent's business.

46. Turning to fairness, she suggested that there was no basis for any conclusion that the claimant was put on notice regarding the risk to her job prior to the actual meeting on 4 January 2018. The meeting itself, given the timing of the notice (immediately on her return to work after her bereavement) and the lack of clarity about the termination, was wholly unreasonable. The lack of any information regarding figures or dates (until the later email of 25 January) was also unreasonable. She invited the tribunal to conclude that the conversation regarding part time work did not happen.

47. These features of unreasonableness also accumulated to provide an irresistible inference that the claimant received no proper notice or information at the time and that in reality the ostensible reason of semi-retirement was a product of convenience.

48. The tribunal invited Ms Abraham to make any further submissions that she wished to make in relation to Polkey principles. There were no further submissions.

49. Mr Robinson-Young provided some helpful written submissions summarising the respondent's position. He reminded the tribunal that the respondent was in essence the smallest of businesses, with 2 employees at the relevant time, doing the best it could in the circumstances.

50. It was emphasized that the diminution in work was self-evident once Mr Johnson had elected to semi-retire. The tribunal was referred to documents which established the actual diminution in work. The remaining freelance typists were required only to work a total of 40hrs in January 2018 whereas previously the

claimant would have been paid in respect of c. 150hrs per month. It was thus a self-evident genuine redundancy situation.

51. It was acknowledged that the meeting on 4 January 2018 came at a difficult time but it was despite the fact that Mr Johnson had delayed for a considerable time.

52. Mr Robinson-Young characterised the claimant's response to Mr Johnson's statement at the meeting on 4 January that she could not afford to work part time as "the claimant closing her mind to the possibility of her going part time". In similar vein, the claimant's failure to appeal was emphasised.

53. In Polkey terms, it was submitted that the claimant was likely to have been dismissed in any event and in reality dismissal would have been no more than a month later – presumably allowing for a longer process of consultation – and thus any compensatory award should be limited to a month's pay in any event. No basic award is due because the claimant has already received a full redundancy payment.

Discussion and conclusion

54. What was the reason for dismissal? The claimant in her evidence has established an evidential basis for her case that the real reason she was dismissed related to her personally, namely, her absence and her capability.

55. The burden is on the respondent to establish the reason for dismissal. Mr Johnson was the decision maker. His response to questions properly put to him was that "if it hadn't been for my wish to work fewer hours, the claimant would still be working for me".

56. The tribunal concludes that as a result of Mr Johnson's decision to reduce his hours, 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, audio typing. The consequence of work of a particular kind diminishing meant that the claimant was effectively surplus to requirements; and in any event fewer employees were now needed to do the work, including because the claimant was in fact replaced by the self-employed independent contractors who were freelance typists. This amounted to a paradigm redundancy situation. The claimant herself in cross examination accepted the facts that underpinned this conclusion.

57. The tribunal accepts Mr Johnson's evidence. The tribunal finds that the facts and beliefs operating on the mind of Mr Johnson when he made the decision to dismiss the claimant arose as a result of his intention to reduce his hours to a point that he would have semi-retired and would not work regularly but would work "spasmodically". The tribunal finds that work at the rate of 30h per month

was typical during 2018. This is to be contrasted with the obligation to pay the claimant for 150h per month.

58. 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.

59. The meeting on 4 January was the first time that Mr Johnson informed the claimant of his decision to become semi-retired. This was the product of a decision that was long in the making but heavily delayed in implementation due to Mr Johnson's undoubted sympathy for the claimant's situation. The tribunal finds that Mr Johnson decided that, there being no right time to deliver uncomfortable news, he should wait until the claimant returned to work following her bereavement. The meeting on 4 January followed on from the telephone call on 2 January inviting the clamant. The telephone conversation deliberately avoided comment about redundancy on advice from a HR company.

60. The meeting on 4 January represented the start of the redundancy process so far as the claimant was concerned. At the meeting, the claimant was informed that Mr Johnson saw no alternative but to offer her a redundancy package. Her entitlement to notice pay and to a redundancy package was spelt out to her. The meeting was short.

61. The tribunal finds that there was no communication with the claimant prior to the decision being taken by Mr Johnson to make the claimant redundant. The decision had been taken prior to the meeting and the pre-prepared letter was handed to the claimant at the end of the meeting. The context and content of the meeting was in all respects that of a decision meeting not that of a consultation meeting.

62. There is a conflict of evidence regarding what was said about part time work. The tribunal has resolved that by determining that Mr Johnson did suggest to the claimant that she could not afford to work part time. However 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. The tribunal regards the epithet of "discussion" as it related to these words as inappropriate. The claimant was simply being told what Mr Johnson had in effect decided for himself.

63. The respondent did not provide the claimant with any warning of her impending redundancy. She was informed of it without warning on 4 January albeit she was offered a right of appeal, but the decision had been made.

64. There was no reason put forward by the respondent that would explain why it was necessary to convey a decision to the claimant at that first (and only) meeting as opposed to providing her with warning of an impending redundancy so that the claimant could have taken time to reflect and to inform herself of the relevant facts and to consider possible alternative solutions including some form of alternative employment (not only part time, but also home work for example) and to attend a subsequent process on an informed basis.

65. 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 respondent had delayed for a significant period for genuine reason and no reason was given as to why even a modest further delay in decision making was not an option available to the respondent.

66. The respondent did not consult with the claimant. The reference to part time working in the context of the brief meeting on 4 January 201 is not instructive. Nor can it be reasonably regarded as a genuine attempt to see whether instead of dismissing the claimant it might be possible to see whether an alternative basis for employment was achievable. The decision to terminate the claimant's employment had already been taken prior to the meeting and as further evidenced by the pre-prepared letter.

67. 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.

68. The respondent has not put forward any compelling reason why the claimant could not have been warned and was not consulted with prior to the decision being made. If it were suggested that having delayed for a considerable period during the claimant's absence then it was fair to proceed with a decision with no further delay, 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 her positon and her available options.

69. 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.

70. 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.

71. If the defects had been rectified, the claimant at the least would have had a reasonable opportunity to consider her positon. She told the tribunal that she "would have taken part time work" and "would have taken home work". She said that work that was both home based and part time would "have been really good, actually". Her acknowledgement at the 4 January 2018 meeting that she could not afford to work part time is not, given the context of the meeting, instructive as to what would have been the result of further consideration of the options.

72. It does not mean of course that such employment would have been offered to her because it was still open to the respondent to make its own business decision after a period of consultation. Mr Johnson was asked about this in cross examination. He accepted that he had ruled out part time work as a possibility for the claimant and therefore did not raise it as "a serious possibility at the meeting". When pressed, he said, "I rejected part time work for the claimant because I assumed she would not have been able to work part time and because I knew I could not provide her with work for the major part of the week as I was not planning to do that much". However, when pressed further, Mr Johnson also said, "if she had come back to me after the consultation [which was a reference to the meeting on 4 January], we could have discussed it further, it would have been complicated" and "I suppose she could have worked from home".

73. The tribunal concludes that if a fair process had been adopted, then it is most likely that a conversation would have ensued where both parties were open to the idea of discussing the claimant's future employment. The tribunal accepted the claimant's evidence that she would have been willing to accept part time and/or home work as a means of continuing her employment. The tribunal also recognised that it was the respondent's prerogative ultimately to conclude that the ongoing work requirement was best met by outsourcing to freelance typists. The respondent was a small employer and these conversations would have taken place over a relatively short period of time such as 1 month.

74. The tribunal concludes that there was a significant prospect that the respondent would ultimately have made the decision to make the claimant redundant 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 66% chance of the claimant being fairly dismissed within 1 month of her 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.

75. The tribunal has throughout the hearing anxiously kept at the forefront of its mind the fact that the respondent is a small employer who took HR advice prior to speaking to the claimant. Nevertheless, the basic principle of fairness which required fair warning and consultation was not adhered and without good reason as the tribunal found.

76. Turning to the specific issues raised by the parties and having regard to the detailed reasons provided above, the tribunal's determination of the issues is as follows:

    76.1. Was there a genuine redundancy situation at the claimant's place of work?
    Yes, there was a diminution in the requirement of the respondent's business to carry out audio typing work

    76.2. Had the requirements of the respondent's business for employees to carry out work of a particular kind ceased or diminished, whether expected to cease or diminish?
    Yes, see .1 above

    76.3. Was the claimant dismissed?
    Yes.

    76.4. Was the claimant's dismissal caused wholly or mainly by cessation or diminution?
    Yes, the tribunal has accepted the evidence of the decision maker, Mr Johnson.

    76.5. Was the dismissal attributable wholly or mainly as a result of redundancy or whether any other reasons for the dismissal of the claimant?
    The dismissal was attributable wholly as a result of redundancy.

    76.6. Has the respondent dismissed due to periods of sickness and bereavement taken by the claimant or capability rather than a redundancy situation?
    No.

    76.7. Has the respondent disclosed and applied a genuine selection criterion for redundancy?
    The tribunal considered that this had no relevance to the present case. It was the agreed position of the parties that there was no issue about the selection of the claimant for redundancy.

    76.8. Did the respondent offer part-time work or home working to the claimant?
    No. Part time working was the subject of words used at the 4 January meeting (see above) but it did not constitute an offer.

76.9. Was there an individual consultation with the claimant prior to her being made redundant?
No. The tribunal concluded that there was no consultation prior to the decision being made.

76.10. Was the claimant given any alternatives to dismissal?
No.

76.11. Was the claimant given a notice of dismissal?
Yes. The tribunal considers that the letter dated 4 January 2018 constituted notice of dismissal. No date was expressed.

76.12. Was the consultation a fair process?
No. see the detailed reasons above.

76.13. Did the respondent have a redundancy procedure?
This was not the subject of evidence adduced or submission advanced by either party.

76.14. If so did the respondent comply with their own contractual redundancy procedure?
Not applicable.

76.15. What was the effective date of termination of the claimant's employment?
8 January 2018.

76.16. By reference to the Polkey principles, to what extent would the claimant have been fairly dismissed in any event?
The tribunal concluded that there was a 66% chance of the claimant being fairly dismissed within 1 month of her unfair dismissal. Any consequential matters can be addressed at the remedy hearing.

EMPLOYMENT JUDGE BEEVER

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
5 July 2018