Case Number: 2501107/2016

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mr K Patterson	**AND**	**Electrical Waste Recycling Group Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **Manor View, Newcastle**
Kings Court, North Shields

On: 18,19,20,26 & 27 January 2017

Before: **Employment Judge Hargrove**

Appearances

For the Claimant: **Mr S Sweeney of Counsel**
For the Respondent: **Mr M Palmer of Counsel**

RESERVED JUDGMENT

1 The judgment of the Employment Tribunal is that the claimant was unfairly dismissed. There was a 50% chance that the claimant would have been fairly dismissed for redundancy within 6 months of the date when he was dismissed

2 Within 28 days of the date of promulgation the parties are ordered to report to the tribunal whether a remedies hearing is required and whether a telephone preliminary hearing should be ordered to discuss it.

REASONS

1 **Overview**

The claimant brings a complaint that he was unfairly dismissed from his position as Group Managing Director (GMD) of the respondent company by a letter dated

and with effect from 3 June 2016, he being paid a redundancy payment and payment in lieu of notice. The respondent in its response claims that the claimant was fairly dismissed for redundancy of his post. The claimant asserts that redundancy was a sham reason for dismissal masking the real reason, centred upon a long running dispute between him and the major shareholders of this company and of CEF concerning the claimant's bonus entitlement and shareholding in the respondent company. Alternatively the claimant asserts that if the genuine and principal reason for his dismissal was indeed redundancy, it was substantively and procedurally unfair and that no **Polkey** reductions should be made. It has been agreed during this hearing that the Tribunal will not deal with remedies save and except that the Tribunal will deal with any **Polkey** issues.

2 At the conclusion of the evidence in the case the Tribunal received written and oral submissions. There is no dispute as to the statutory provisions which apply, or as to the issues which arise, or as to the appropriate directions which the Tribunal is to apply in order to decide them.

Dismissal being admitted the burden lay upon the respondent to prove that the reason or principal reason for dismissal is one of those specified in section 98(2) of the Employment Rights Act 1996 (or some other substantial reason). In this case the reason relied upon by the respondent is redundancy, which is materially defined in section 139(1)(b) as:-

> "(b) the fact that the requirements of that business -
>
> (i) for employees to carry out work of a particular kind, or
>
> (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, had ceased or diminished or were expected to cease or diminish".

Mr Palmer has referred me to a passage from the judgment in by Donaldson J in **Johnson & Another v Nottinghamshire Combined Police Authority ITR page 411 (NIRC)** as to the meaning of work of a particular kind:-

> "This section of the Redundancy Payments Act is concerned with the requirements of the business for employees to carry out work of a particular kind. Work of a particular kind refers to the task which has to be performed, not to the other elements which go to make up the kind of job that it is".

As to the reason for dismissal, Lord Justice Cairns in **Abernethy v Mott, Hay & Anderson [1974] IRLR page 214** said:-

> "The reason for dismissal in any case is the set of facts known to the employer, or maybe the beliefs held by him, which caused him to dismiss the employee. The reason for the dismissal must be established as existing at the time of the initial decision to dismiss and at the conclusion of any appeal hearing".

Establishing redundancy as the reason

In **Safeway Stores Plc v Burrell [1997] ICR page 523** the EAT set out at paragraph 24 the following three stage test. The Tribunal must decide:-

(1) Was the employee dismissed?

(2) If so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?

(3) If so was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

Judge Peter Clark continued at page 539B as follows:-

> "(a) even if a redundancy situation arises as in **Nelson v BBC**, if that does not cause the dismissal the employee has not been dismissed by reason of redundancy. In **Nelson** the employee was directed to transfer to another job as provided for in his contract. He refused to do so. That was why he was dismissed.
>
> (b) if the requirement for employees to perform the work of a transport clerk and transport manager diminishes, so that one employee can do both jobs, the dismissed employee is dismissed by reason of redundancy:- see **Carry All Motors Limited v Pennington** …
>
> (c) conversely, if the requirement for employees to do work of a particular kind remains the same, there can be no dismissal by reason of redundancy, notwithstanding any unilateral variation to their contract of employment".

Competing reasons for dismissal

It is common ground that the burden lies upon the respondent to establish its reason for dismissal throughout. However it is not in itself sufficient to prove that there was a redundancy situation affecting employees, (or for example gross misconduct by the employee in a case where the employer relies upon conduct as the reason or principal reason for dismissal) – that must be the reason or principal reason for dismissal. The Tribunal has considered some passages from what may be described as the leading case on this causation issue, **ASLEF v Brady [2006] IRLR page 576** per Elias J:-

> "66 … Even where the employer adduces some evidence which tends to show that the reason was a statutory reason, that is not necessarily enough. If the employee puts this reason in issue by adducing evidence which casts doubt upon the alleged reason, the

burden lies on the employer to satisfy the Tribunal the reason it relied upon was indeed the true reason. This principle was established in **Maund v Penrith District Council** … in which the employee alleged that he had been dismissed for trade union activities. The industrial tribunal held that he had the burden of proving that but the EAT in the Court of Appeal disagreed. Griffiths LJ said this:-

> 'If an employer produces evidence to the tribunal that appears to show that the reason for the dismissal is redundancy, as they undoubtedly did in this case, then the burden passes to the employee to show that there is a real issue as to whether that was the true reason. The employee cannot do this by merely asserting an argument that it was not the true reason; an evidential burden rests upon him to produce some evidence that casts doubt upon the employer's reason. The graver the allegation, the heavier will be the burden. Allegations of fraud or malice should not be lightly cast about without evidence to support them.
>
> But this burden is a lighter burden than the legal burden placed upon the employer; it is not for the employee to prove the reason for his dismissal, but merely to produce evidence sufficient to raise the issue or, to put it another way, that raises some doubt about the reason for the dismissal. Once this evidential burden is discharged, the onus remains upon the employer to prove the reason for the dismissal'

…

68 In this case (counsel for the claimant) submits that the employee clearly raised the issue of an ulterior motive or reason, and the employers therefore had to prove the true reason and satisfy that tribunal that it fell within the statutory reasons. This, he submits, is in essence what the union is suggesting. In **Timex Corporation v Thompson** the employee was found to be unfairly dismissed when the employer dismissed for redundancy or reorganisation. The tribunal found that although there was a redundancy situation they were not satisfied that the employee was dismissed for that reason rather than that being a pretext for dismissing for another reason, namely his performance. Brown-Wilkinson J giving the judgment of the EAT said this at paragraph 5:-

> > 'First it is submitted that since the industrial tribunal had found that there was a redundancy situation (or alternatively that there had been a reorganisation of the managerial structure) they should have found that the reason for dismissal was either redundancy or

> some other substantial reason of a kind such as to justify dismissal. The submission was that the evidence of redundancy being clear, in the absence of compelling proof or some other reason, the industrial tribunal ought to have found that the redundancy or reorganisation was the reason. It was urged that since the employers had tendered the evidence as to Mr Thompson's alleged unsatisfactory performance in his job as evidence of the reason why he rather than others was selected for redundancy, it was not open to the industrial tribunal to look at such evidence as suggesting that it was the incapacity and not the redundancy that was the reason for dismissal. We reject this submission. In our view there is no such presumption as it is suggested. Even where there is a redundancy situation, it is possible for an employer to use such a situation as a pretext for getting rid of an employee he wishes to dismiss. In such circumstances, the reason for the dismissal will not necessarily be redundancy. It is for the industrial tribunal in each case to see whether on all the evidence, the employer has shown them what the reason for the dismissal, that being the burden cast on the employer by section 57(1) of the Act. The evidence in this case, even though possibly tendered for some other purpose, certainly raised the possibility that redundancy was used as a pretext for getting rid of Mr Thompson …'."

There are further passages at paragraphs 77 to 79 of that judgment which are also material. For the sake of brevity the Tribunal sets out part of the head note in the case in the IRLR report which adequately summarises that passage:-

> "It does not follow therefore that whenever there is misconduct which could justify dismissal a tribunal is bound to find that that was indeed the operative reason. Even a potentially fair reason may be the pretext for a dismissal for other reasons. For example, if the employer makes the misconduct an excuse to dismiss an employee in circumstances where he would not have treated others in a similar way, then the reason for the dismissal – the operative cause, will not be the misconduct at all, since that is not what brought about the dismissal, even if the misconduct in fact merited dismissal.
>
> Accordingly, once the employee has put in issue with proper evidence a basis for contending that the employer dismissed out of pique or antagonism, it is for the employer to rebut this by showing that the principal reason is a statutory reason. If the tribunal is left in doubt, it will not have done so. Evidence that others would not have been dismissed in similar circumstances would be powerful evidence against the employer, but it is open to the tribunal to find the dismissal unfair even in the

absence of such strong evidence. In a case of mixed motives such as malice and misconduct, the principal reason may be malice even though the misconduct would have justified the dismissal had it been the principal reason.

On the other hand, the fact that the employer acted opportunistically in dismissing the employee does not necessarily exclude a finding that the dismissal was for a fair reason. There is a difference between a reason for the dismissal and the enthusiasm with which the employer adopts that reason. An employer may have a good reason for dismissing whilst welcoming the opportunity to dismiss which that reason affords".

Fairness

If the respondent establishes that the reason for this dismissal was redundancy the Tribunal has to decide whether the dismissal was fair applying section 98(4) of the Act:-

"(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(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".

Generally speaking in relation to a genuine redundancy dismissal fairness requires the following to be considered taken from the well known passage in the judgment of Lord Bridge in **Polkey v A E Dayton Services Limited [1987] IRLR page 503**:-

"In the case of redundancy, the employer will not normally act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy, and takes such steps as maybe reasonable to avoid or minimise redundancy by redeployment within his own organisation".

Compensation

Section 123(1) of the Act materially states that the amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer.

It is agreed between the parties that in relation to compensation the Tribunal will only deal at this stage with what is know as the **Polkey** test:- If the dismissal was unfair, what are the chances that if a fair procedure had been carried, that the claimant would have been fairly dismissed at some stage for redundancy or his employment would have terminated in any event for some other reason, and if so when? As to that, the Tribunal has to apply the principles set out in **Software 2000 Limited v Andrews [2007] IRLR page 568**.

3 The issues identified in the case are thus these:-

3.1 Has the claimant put in issue with proper evidence either from himself or from other evidence, documentary or in cross-examination or otherwise or if necessary by inference, a basis that the employer dismissed for a reason other than redundancy?

3.2 Has the respondent proved on the balance of probabilities that the reason or principal reason for the dismissal was redundancy?

3.3 If the respondent has satisfied that burden, was the dismissal for that reason fair or unfair?

3.4 If the dismissal was for any reason unfair what are the chances that the claimant would have been dismissed in any event fairly or his employment would have ended otherwise than by dismissal in circumstances which were not unfair, and if so when?

4 **The evidence**

The dismissal being admitted, the Tribunal heard evidence first from the respondent who had the obligation to prove the reason for dismissal. The respondent called only Michael Bishop (MB), the alleged decision maker, and Jeremy Saunders (JS), who dealt with the appeal hearing on 30 June 2016. The claimant then called the following witnesses who gave evidence in the first tranche of hearing dates:-

4.1 Thomas Meney (TM), a consultant to the respondent who principally worked in Durham Sales.

4.2 Christopher Allen (CA), sales manager with the respondent for 13 years until he left in July 2016.

4.3 Kelvin Robson (KR), a sales manager for the respondent for 10 years until he also left at the end of July 2016.

4.4 Yvonne Currie (YC), formerly office and customer sales manager whose job title was recently changed to business development manager.

4.5 The claimant, Keith Patterson, who gave evidence on 26 and 27 January 2017.

There was an initial bundle of documents which contained 320 pages. Contentious issues were raised before and during the hearing as to whether the respondent had properly complied with its disclosure of obligations. Over 50 pages of documents were added on day 1 including a number of documents by the claimant headed KP and, at the request of the Employment Tribunal, two organograms identifying historically the employees of the respondent (see pages 321-321A). A further 50 pages were added during the hearing, some of it consisting of late disclosure by the respondent who had undertaken a further search.

At the conclusion of the evidence the Tribunal received written and oral submissions from counsel. The Tribunal reserved its decision.

5 **Chronology**

The Tribunal now sets out a chronology only of the essential facts necessary to provide a background to its reasons. It is to be noted that the parties had singularly failed to provide a reasonable agreed chronology. The initial version produced by the respondent was woefully inadequate. The claimant did not contribute at that stage. The later version to which the claimant had added some detail but was still inadequate. The claimant's own witness statement amounting to 256 paragraphs on 88 pages was excessively lengthy; referred to many matters which had little or no relevance to the issues I had to decide; it was almost impossible to follow at various points; and contained very few dates for events, even those which were of relevance. At times and during the same paragraphs the claimant referred to himself as "I" and in the third party as Keith Patterson. It could be reasonably described as an unrestrained stream of consciousness. At an informal case management hearing immediately before the start with counsel and solicitors only, Mr Sweeney sensibly recognised its deficiencies and requested the Tribunal only to read paragraphs 1-22, 43, 51-52, 85, 105-107, 139 and 150-256. I add that in the claimant's live evidence to the Tribunal he was at times unable to answer a single yes/no question but would answer a different unasked question; and he gave the appearance of being evasive when pressed although he clearly had a voluminous knowledge of the background facts. What was clear however was his unshakable belief that he had been the subject of a sham process by the respondent leading to his dismissal, although that his belief is not of itself relevant to the issue whether it was indeed a sham process.

By contrast the written and oral evidence of the main witness for the respondent, MB, was very short on detail of the kind to be expected to explain a redundancy dismissal. In particular there was little evidence of a detailed analysis by him of the nature of the tasks actually undertaken by the claimant as Group Managing Director. This was a fundamental defect in his evidence. There were other significant submissions which I will identify in my later reasons.

5.1 The claimant had a background in electrical and electronic recycling and joined a start up company called Lamp Care UK Recycling Limited, based in Glasgow, in 2001. He became a shareholder and director in 2002. In that year the first Waste Electrical and Electronic Equipment Recycling

Directive (WEEE) was passed. Lamp Care was heavily involved thereafter in the disposal of electrical and electronic waste in compliance with those regulations.

5.2 One of the clients of Lamp Care in the North East was CEF (City Electrical Factors Limited). CEF is a very large electrical wholesale business having over 400 branches in the UK and others internationally. It had a potentially very large responsibility for the disposal of electrical and electronic waste. In that respect Lamp Care started trading with CEF branches in the North East of England from 2003. In particular the claimant was in contact with Alan Jackson, a General Manager of CEF based in the North East who introduced him to five other General Managers around the UK including Charles Beddoes who later became Managing Director of CEF. The claimant had charge of the CEF account for Lamp Care.

5.3 There came a time when Lamp Care needed further funding to expand and accommodate the business and external funding was sought by the five directors including the claimant.

5.4 In 2004 CEF acquired the company by share purchase. At that time the claimant had a 22% shareholding in Lamp Care. He was required either to reduce his shareholding to 10% or to sell all of his shares for an agreed share of the annual profits for the year multiplied by 10. He chose the former.

5.5 Members of the Mackie family were principal shareholders in CEF and I assume controlled the majority of the shares in Lamp Care. There were originally five Mackies involved in the company led by Ashley Mackie, others being Adam and Gerald Mackie.

5.6 In **late 2004** the claimant was appointed to the post of Managing Director of Lamp Care. At about the same time another former Director of Lamp Care who was responsible for sales and marketing left. The post was not filled and I accept that the claimant also took over responsibility for that role.

5.7 In **2005** an offer was made by a competitor to buy out Lamp Care but the offer was subsequently refused by the Mackie family. The claimant's case is that he was invited to a meeting with the Mackie family in Geneva in **February 2006**. Alan Jackson was present. The claimant asserts that at that meeting he was offered a salary increase and other benefits including an annual bonus based on 10% of the annual net profits of Lamp Care. There is a fundamental issue as to what was to be included and was not to be included in calculating the net profit figures, which later became contentious in particular in **March/April 2016** shortly before the claimant was first notified by MB that his job was at risk of redundancy. In the interim, control of the Mackie family enterprises and of CEF had de facto passed to another member of the Mackie clan. I make no findings of fact concerning this dispute about the bonus which concerns not merely the

calculation of the bonus but also the value of the claimant's shares and is now the subject of a pre-action protocol prior to action in the civil courts. The existence of the dispute is however potentially relevant background information for these Tribunal proceedings concerning the claimant's dismissal.

5.8 Lamp Care changed its name to the respondent's name (EWRG) in **February 2008**.

5.9 It is now necessary to describe the structure of EWRG by reference to version 1.8 of an organogram dated **7 January 2016**, at page 321A. Keith Patterson appears at the top as the Group Managing Director. There are two divisions material to the present case. The first is Durham Sales where KR, CA and YC are shown as reporting to the claimant as Sales Managers. There are other administrative employees, in effect the sales and admin was run from the Durham office. A second division was the Huddersfield factory premises where the collection and disposal of electrical waste takes place. Sean Donaghy is shown as the Group Operations Director and he was apparently appointed by the claimant to manage the Huddersfield operation. There were Managers and Supervisors of the Huddersfield and 30 operatives employed there. TM, a Consultant to the business, is also shown on the EWRG organogram as reporting to the claimant. There is a further division, Wercs PCS Limited, but that division does not play any material part in the story. What the organogram does not show is that the claimant was not in fact at the top of the managerial tree of the respondent. From sometime shortly after the share purchase in **2004** Peter Birks, an Executive Director of CEF, was in post above the claimant and the claimant reported to him. He was sacked in **August 2014** and Alan Jackson was re-appointed in his place as General Manager. However Alan Jackson died soon afterwards and in **November 2014** was replaced as General Manager by Mike Bishop, to whom the claimant thereafter reported. It is to be noted that there was nothing unique in the appointment of a general manager to oversee the respondent company. That in itself is not significant within the chronology. Alan Jackson had been MB's predecessor, and the claimant does not make any complaint about his treatment by Alan Jackson whom he considered to be an ally. In addition to his responsibilities as General Manager, however, MB was also responsible at the same time, and had been since **March 2012** for overseeing the operation of 57 CEF branches within the UK. It follows that he was not in day to day control of the respondent's operation but visited it from time to time.

5.10 The next material event is that commencing on **25 February 2016** the claimant started e-mailing Thomas Hartland-Mackie under the subject heading "EWRG Limited November 2015 Accounts". He was in effect raising the issue of his shareholder agreement and service contract. In that e-mail he asserted that EWRG would deliver a healthy six figure profit and that he was confident that next year it would deliver a seven figure profit. He indicated that Thomas' wife, Jackie somewhere and she had indicated that she was intending to visit the Huddersfield factory. Thomas

Mackie responded on **26 February** asking the claimant not to raise the matter of the shareholding with her and that it should be discussed with himself and Mr Beddoes. He stated that Mr Beddoes would be seeing the claimant on **4 April** to discuss the matter and report back. (The meeting scheduled between the claimant and Charles Beddoes to take place on **4 April** was cancelled by Mr Beddoes shortly before it was due to take place, and was not rescheduled.)

On **9 March 2016** the claimant e-mailed Mr Beddoes regarding the meeting which was to take place on **Monday, 4 April**. Mr Beddoes responded on **11 March** asking for confirmation that the claimant wished to discuss his service contract and shareholder agreement. On **14 March** the claimant e-mailed Mr Beddoes referring to previous discussions he claimed to have had with Mr Birks and Peter Jackson, and MB to deal with the family shareholders. Mr Beddoes responded on the same day:-

> "I have received very little on this matter so therefore the content of your e-mail is not factually correct. At this stage all I need to know is would you like to add it to the agenda? Please confirm yes or no".

The claimant responded "Yes I would" (see page 356).

The next communication from the claimant was on **22 March 2016**. This was an e-mail to Thomas Mackie and MB regarding the salary and bonus recommendations for **April 2015**, and referred to the verbal arrangement he claims he had with Ashley Mackie dating from the Geneva meeting in **2006**. This e-mail was inserted into the bundle during the hearing at pages 42A-B.

On **29 March** the claimant sent an e-mail to Thomas Mackie concerning the same subject but in a much more insistent tone. The e-mail is extremely detailed, occupying six closely typed pages of A4 in horizontal format (see pages 77-82). A further slightly less lengthy e-mail was sent by the claimant to Thomas Mackie on **5 April** (see pages 74-77) and a fifth e-mail on **Tuesday, 12 April 2016** (pages 70-74).

5.11 In the meantime, on **7 April 2016** MB e-mailed the claimant asking him to attend a business review meeting on **13 April** at CEF's head office in Kennilworth, Warwickshire. This is a two line e-mail which does not indicate what the business review meeting was to discuss.

5.12 At the meeting on **13 April 2016** MB read out a pre-prepared note of what he was to say. That note is at pages 91-95. The note begins:-

> "I have been overseeing the business of EWRG for the last 18 months and have made several observations which have led me to conclude that, regrettably the role of Group Managing Director is no longer required.

> For this reason the company is currently considering the role redundant".

The note that MB says he read out is at pages 91-93. Because of the importance and sensitivity of this document the Tribunal requested the respondent produce the metadatadata as to its date of creation and similar evidence about two other notes relevant to the issue. Confusingly, probably due to a malfunction of a hard drive, there are two sources of metadata concerning this and the two other documents. The first and most likely one indicates that it was created on **12 April**, the day before the meeting, and modified on **13 April 2016**. The document continues however at pages 94-95 and at page 94. It is headed "Extra Notes if Required". Underneath that is a further series of notes prefaced with the hieroglyphic "tbi" in small type, to which Mr Sweeney attached significance in his closing submissions. It is common ground that the extra notes were <u>not</u> read out.

5.13 MB wrote to the claimant a letter also dated **13 April** (page 97):-

> "Thank you for meeting me today when we discussed the possible redundancy of your role.
>
> Over the last 18 months, I have had the opportunity to work closely with you and other personnel within the EWRG business and have concluded that the role of Group Managing Director is no longer required.
>
> I explained the options to be considered by you over the forthcoming weeks as follows:-
>
> Offer any alternative suggestions which would mean we do not have to make your role redundant. Consideration of any alternative vacancies for which you may be suitable. At present we have no vacancies but should this situation change I will of course let you know.
>
> Should neither of these prove to be fruitful then regrettably your employment with the company would be terminated by reason of redundancy and a redundancy package would be payable. As requested please see the below figures along with calculations should your role be made redundant. (The figures then follow).
>
> I would like us to meet again on 18 April at 1:00pm at the same venue as today …".

5.14 There are two other documents upon which MB relied on in his evidence to the Tribunal as indicating that he was in fact genuinely considering the future of the claimant's role as Group Managing Director at that time. The first is at pages 7-10 of the bundle headed "Rationale for the possible

termination of the Group Managing Director's role within the EWRG business". This document opens with the following:-

> "As stated in my previous meeting I have been overseeing the EWRG business since **November 2014** in which time I have been able to assess key positions within the operation, my observations have led me to conclude that regrettably the role of the Group Managing Director is no longer required.
>
> I would like to discuss my rationale for this decision! The Group Managing Director has stated to me on a number of occasions that his key skill sets are purchasing, sales and marketing; I would like to discuss the Group Managing Director's involvement within these three key areas of the business amongst other areas".

There then followed a number of bullet points under the headings of Procurement, Marketing, Sales, Account Department and Huddersfield Plant Management. At the end there is a summary as follows:-

> "After working within the EWRG business since **November 2014** and carefully looking at all the areas of the business along with the various key members of the team I have concluded that the role of the Group Managing Director is no longer required within the EWRG business, therefore I can see no other option then to make this role redundant".

The metadata for this document indicates that it was modified on **24 April 2016**. It is unclear when it was first created. The other document is that contained at pages 13-16 of the bundle. It is headed "Copy of notes regarding EWRG interviews and observations over the last 18 months". The metadata is conflicting but it is likely that the document was created on **1 June** and modified on **7 June 2016**. This document is contentious. It purports to record interviews with Sean Donaghy on **17 March 2016**, Yvonne Currie on **1 March** and **19 April**, Sharon Ennis on **17 March** (both of the latter interviews bear the note "This statement is not to be disclosed to Keith Patterson"), and Richard Colwell on **17 March**. The notes of interview with Yvonne Currie in particular are contentious. The first paragraph reads:-

> "During my meeting with Yvonne Currie (Keith Patterson's ex-partner) Yvonne explained that Keith had very little involvement in working as part of the internal sales team when it came to driving the telephone sales on a day to day basis, in fact he was quite a hindrance".

Yvonne Currie, in her evidence to the Tribunal, adamantly denied that she had been interviewed by MB either on **1 March** or **19 April** and adamantly denied she had made any statement to MB to the effect that the claimant was "quite a hindrance". The last paragraph on page 16 is also material. It reads:-

> "Without any possible vacancies within the business to consider and no alternative suggestions from Keith Patterson, the correct commercial decision for the EWRG business was to make the position of the Group Managing Director's role redundant as of **3 June 2016**".

5.15 Returning to the chronology as of **13 April 2016**, on that day the claimant commenced sickness absence, self certificating to the effect that he was coughing blood frequently (see page 121). This document was signed by the claimant on **4 May**.

5.16 On **15 April** the claimant wrote a yet further e-mail to Thomas Mackie concerning the service agreement/bonus and shareholding. The e-mail referred in derogatory terms to his business review meeting with MB in which he had been notified that his post was redundant. The letter concluded:-

> "I am sure the next action which would add to my abuse would be to push me out of the door whilst I am on sickness leave and without any consultation and dress it up as something else".

It is to be noted that in the course of that e-mail he asserted that Thomas Mackie would have been copied into the communications from MB. Mr Mackie forwarded the e-mail to Charlie Beddoes the same day stating, "Charlie give me a call when you've had a chance to read the e-mail". The claimant's e-mail also referred to the fact that Charlie Beddoes had cancelled the business review meeting with the claimant fixed for **4 April** at short notice. The e-mail referred to Mr Beddoes as being "the husband of Tonya Beddoes who made the meeting to Freshfields to look into terminating my contract in **2014**. She was accompanied at the time by Mark Jacobs who now wants to look into my reporting about the abuse of a minority shareholder concerns". This passage may be a reference to another document on which the claimant relies, which is an invoice from the respondent's present solicitors dated **2 April 2014** sent by letter of the same date to the Glasgow office of EWRG with the subject heading of "Employment Advice". This document was added to the bundle at page 18A. The respondent produced a copy of the actual invoice but late in the day during the hearing. It does not name the claimant but the claimant believes that the respondent was taking advice as to his dismissal at that stage. The amount of the invoice, however indicates that it can only have involved about two hours work.

5.17 MB, significantly, somehow found out from Thomas Mackie following that e-mail that the claimant was asserting that he was unable to attend the **18 April** meeting because of sickness. He e-mailed the claimant on **16 April** asking for confirmation and suggesting an alternative date. The claimant responded at some length on **18 April** (see pages 146-147). In summary, he asserted that for the consultation to be meaningful and to enable him to give the fullest possible consideration to all options he would need to be fit

and well before any further meeting took place. On **25 April** the claimant e-mailed to say that he had been signed off for a second week by his doctor and on **26 April** MB asked for a self certification form (see page 151). On **26 April** MB e-mailed stating, "When you feel well enough to contact me with any questions or concerns about the potential redundancy of your role please do so". On the same day MB e-mailed Andrew Moseley enquiring about possible future vacancies within his purchasing and marketing team. Andrew Moseley was the Head of Procurement and Marketing at CEF. He responded the same day stating that he had no current or immediate plans to add to either of the teams.

On **29 April** Mark Jacobs in a lengthy e-mail responded on behalf of Mr Mackie to the claimant's concerns about his service agreement and shareholder agreements. That e-mail is at pages 177-182 of the bundle. The entire correspondence from the claimant concerning that issue continues to page 210.

5.18 On **3 May** Charlie Beddoes wrote to the claimant in a format which indicates that he was treating the claimant's e-mail to Mr Mackie of **15 April** as raising several grievances. He asked for a response to his earlier e-mail of **19 April**. The claimant responded on **4 May** stating that he would answer when he came back to work. On **6 May** the claimant signed himself off for a further two weeks (see page 217). On **16 May** MB wrote to the claimant proposing a meeting on **23 May** at the Ramside Hall Hotel in Durham, stating that he had concluded his investigations. He referred to the fact that the claimant had been off sick for several weeks since **13 April** and stated that he "must balance your needs with those of the business and I do not feel it is in either party's interest to leave this in abeyance for much longer. If you feel unable to meet face I would be happy to write to you with my findings and for you to respond in writing with your suggestions, comments or proposals. Following this I would then be in a position to make a final decision". This communication was followed by a hard copy on **17 May**. There was a further follow-up e-mail on **20 May**. The claimant responded (see page 227) stating that he was still seeing his doctor but "in the circumstances I am happy to go along with your suggestion that you send me your written findings and then after considering them I will reply in writing". In that e-mail he asked to be provided with the May month end figures for the branch; the year end management accounts and confirmation of the bonus payments due to him for year end **30 April 2016**. MB responded with the documents and stated:-

> "As you can see from the attached set of figures the year end EWRG Limited company has made a financial loss of £446,838 against a previous loss of £1,376,000.70. I am sure you will agree that this is still a very positive result for the company with a loss reduction of £929,232 from the 2014/5 year end figures".

He indicated that despite the financial loss the claimant would be paid a discretionary bonus of £20,000.

5.19 The issue of whether EWRG had in fact made a trading loss or a profit in every year since **2008** assumed a significance during this hearing which was in my view not justified because whether or not the company had made a profit (as the claimant claimed) or a loss (as the respondent claimed) is of no direct relevance to the principal issue which I have to decide, which is whether the redundancy was a sham or genuine. MB does not assert that that issue played any part in his decision to dismiss. The issue was essentially raised by the claimant who in summary asserts that a loss was shown in the accounts only because of accounting practices which were applied by which company liabilities were artificially inflated, in particular for supposed loans to the company by Seldon Limited, and interest thereon; and for substantial litigation costs (£9.5 million) incurred by CEF and not EWRG in the Recolite litigation. In addition, the claimant asserted that EWRG was required to incur substantial cost, in the collection and disposal of re-products not merely for CEF, but also for two other competitor companies of CEF, free of charge and at great cost to EWRG, without recompense. The claimant claims that, but for these matters, the company would have recorded a profit which would have impacted on his entitlement to a bonus and on the value of his shareholding. This could be relevant to the motive for dismissal

I am not prepared to make any findings on these issues, or to make any comment on the propriety of the accounting practices because I have heard no expert evidence on these matters; they have little relevance to the matters I have to decide; and they are likely to be litigated in another jurisdiction. It would be improper for me to make any findings. Both Counsel have agreed with the latter reason. I record however that the existence of the dispute about the claimant's entitlement to a bonus and the valuation of his shares would have provided a motive for dismissing him, and, it is clear that one of the points that he raised at his redundancy appeal hearing on **30 June** was that he had been responsible for motivating, supporting and coaching the sales team in the preceding year resulting in an £800,000 profit. The claimant relied upon this, together with his stated expectation of a profit in excess of £1 million in the succeeding year, as being reasons why his role should not be made redundant.

5.20 On **21 May** MB wrote to the Group Manager of the CEF Durham branches enquiring whether there were any available vacancies, but without specifying in which fields. He got a negative reply on **22 May**. The claimant submitted at the Tribunal hearing that no enquiry had been made of the Newcastle or North Yorkshire branches.

5.21 On **24 May 2016** MB wrote to the claimant giving the "business rationale for the role no longer being required". This is an important document which sets out matters which MB claims to have considered and which I will consider further in my conclusions. There is some similarity between it

and the rationale document at page 7 of the bundle (see pages 235-237). The letter concluded:-

> "As there are no current vacancies for which you can be considered, I spent some time trying to identify if there was any role we could create to utilise the key skills which you have often identified – purchasing, sales and marketing. Unfortunately I could not identify any suitable alternative roles we could create for you at this stage.
>
> I would welcome your comments regarding my observations and any alternative suggestions you may have? Please submit these in writing to me within three working days …".

The claimant replied at length on **28 May 2016** (see pages 239-242). MB copied it to Tonya Beddoes on the same day. TB is the wife of CB and is Head of HR foe CEF.

5.22 On **3 June 2016** MB wrote confirming the redundancy and terminating the claimant's employment with immediate effect (see pages 245-247). He notified him of his right of appeal to JS within three working days. On **6 June 2016** the claimant did appeal in writing.

5.23 The appeal hearing took place on **30 June**. Dawn was there as a note taker. Of some significance is that there are now two sets of notes of that meeting. The only set originally disclosed by the respondent was that at pages 253-259. The second set was only produced by the respondent at the second tranche of hearings and because an issue had arisen as to the authorship of the notes. The second tranche has been inserted at pages 378-383. It is clear that JS had a prepared set of questions which appear in both versions. There are some differences in the replies. However, in the first version, which JS initially insisted Dawn had written, there are some derogatory comments about the claimant such as "kept going on about how he had written to Thomas explaining how he was going to take the business forward to 1 million and 2 million sales – what he meant was net profit, not sales. I had to keep going back to the question in hand and trying to stay away from the 'waffle'" – see page 255. No such comment appears in the version at page 380. Mr Palmer for the respondent says that the second version is the notes made by Dawn. It is plainly obvious that the first version was made by JS, who must as "I", have added the derogatory comments. However he did not admit that, and it reflects upon his credibility generally.

During the hearing the claimant produced a document headed "Points of consideration on redundancy appeal for Keith Patterson, date **30 June 2016**". JS adjourned to read it and on his return asked questions on its contents. Towards the end of the meeting JS said that his investigations after the meeting would include interviews with certain key employees with EWRG who at this stage he considered to be MB and Sean Donaghy, the Operations Manager at Huddersfield. The two sets of notes agree

substantially that the claimant said that there was little point speaking to both of them as they had been working together to get rid of him. The claimant then gave a list of employees whom he suggested should be approached. There are notes of the eleven people who JS subsequently interviewed between pages 261-306 of the bundle.

5.24 On **13 July 2016** JS wrote to the claimant rejecting his appeal. He set out detailed grounds for doing so. The letter starts by identifying what the claimant had allegedly stated at the appeal hearing were his grievances:-

- The length of the consultation period given your length of service of 16 years – two days.

- Not being considered for alternative roles within the business or group of companies.

It continues:

> "You were not appealing against the decision to make your role redundant."

It is a fact that those two grounds of appeal identified are mirrored in the second paragraph of the claimant's appeal letter of **6 June** at page 249. In other words, the claimant did not assert that the redundancy process was itself a sham, and it does not appear from the notes that the claimant made that point, which is now a crucial issue in the case. The claimant did however at the end of the appeal hearing assert that MB and Mr Donaghy were out to get him, and the claimant had clearly made the point in his correspondence with Thomas Mackie. In any event, for whatever reason, JS did not consider anew whether or not it was a genuine redundancy process.

This ends the chronology of the main events. It does <u>not</u> deal with <u>all</u> of the factual issues which have arisen during the course of the lengthy hearing, but it does deal with those I consider to be material.

6 Closing submissions

Both parties have submitted closing "skeleton" arguments; the claimant's being 15 pages long and the respondent's 17 pages long. Each was allowed to expand upon them with oral submissions which took about half an hour on each side. I have already identified the essential issues. The "skeleton" arguments are in effect closing submissions. I do not intend therefore to rehearse here each party's submissions.

7 Conclusions

7.1 The essential issue here is whether the respondent has proved on the balance of probabilities that the principal reason for the dismissal was redundancy or whether the claimant has done sufficient to suggest that

there was another reason, which the respondent has failed to overcome by showing that it was redundancy.

7.2 There is this difficulty with the claimant's case:-

The claimant did not attend any hearing with MB during the redundancy process after the initial hearing on **13 April**, where however I accept he was presented with almost a fait accompli, that the role of GMD was to go without any advance notice. Nonetheless he did not challenge MB's letter of **24 May** which set out at least some details of his supposed thinking to the claimant. In his letter of **28 May** the claimant says that until the "primary material" has been produced "I must reserve my position as to whether there is a redundancy at all". He did not at any stage of the redundancy process including the appeal, put forward the challenge that is now being put forward in great detail. Nor did he do so clearly in the ET1. He stated that he had been responsible for driving the company into profit in **2016**, and that he did not accept that his role of Managing Director was redundant. No basis for a claim that the redundancy was a sham was raised in these documents. Nevertheless, he did raise questions as to the propriety of what was happening in his letter of **15 April 2016** to Thomas Mackie. In addition, the lack of any documentary evidence disclosed during the Tribunal process predating the **13 April** meeting showing that the claimant's role was genuinely under consideration for redundancy (a situation which the claimant did not become aware of until the discovery process, which he challenged) does cause me real concern as to the genuineness of the process. That is highly significant in my view, when combined with the proximity of the events beginning on **13 April** with the claimant's six insistent e-mails to Thomas Mackie over the six week period up to **12 April** claiming, in ever greater detail and insistence, that Mr Mackie had reneged on a promise made by his predecessors concerning the claimant's bonus and shareholding. This is, I find, a case of the accumulation of information which leads me to the conclusion that the respondent has not established that the principal reason for the claimant's dismissal was redundancy. I will set this out in some detail.

7.3 First, there is no contemporaneous documentary evidence that MB undertook any investigation process into the possible redundancy of the claimant's role at least prior to **7 April**, when he invited the claimant to an apparently innocuous "business review meeting". There was no indication in that e-mail that he was intending to discuss the claimant's redundancy. The metadata for the meeting notes of **13 April** indicate that they were prepared on **12 April**. I regard the absence of any earlier documentary evidence as being highly significant. It was reasonable to expect that if the redundancy of such a senior executive had been under consideration, MB would at least have contacted and obtained authority from Charlie Beddoes and/or Thomas Mackie about it, and/or approached a senior HR Manager such as Tonya Beddoes for advice as to the appropriate procedure; and in those circumstances there would or should have been some written record of e-mail relating to that communication. None has been produced. MB says that there was no such communication, but we

do know that he was in contact with Thomas Mackie because he learned from him on **16 April** that the claimant was not planning to attend the second meeting planned for **18 April**. I agree with Mr Sweeney's analysis. Either there was some contact by e-mail and it has not been disclosed or there was verbal contact only in order not to lay a trail. It is hard to believe that there would have been no communication on the topic of the claimant's dismissal at all, either before **13 April**, or at some time before **3 June**. Some assistance at least is to be derived from the extra notes document beginning at page 94 prefaced by the hieroglyphic "tbi". There is no suggestion that this is a reference to anyone other than Tonya Beddoes, who was responsible for HR matters. As to the copy of "notes regarding EWRG interviews and observations over the last 18 months" at pages 13-15, the metadata indicated that it was probably not created until **1 June 2016**. It purports to record details of interviews with Donaghy, Currie, Ennis and Colwell. All are said to have voiced criticisms of various aspects of the claimant's management of EWRG. MB has not produced any contemporaneous notes of such significant meetings and it is difficult to accept that if these notes were made MB would still have recollected them accurately if he did not compile the document until **1 June 2016**, when the meetings are supposed to have taken place in **March/April**. Yvonne Currie says she did not describe the claimant as being a "hindrance". She goes further and says she was <u>not</u> interviewed by MB on **1 March** or **19 April**. I accept that MB was staying overnight in Durham on **1 March** and did visit the office. He may well have had some discussion with Yvonne Currie, but I accept her evidence that she was not critical of the claimant to MB, even taking account of the fact that she had lived with him for 23 years and had broken up five years before. This finding causes me to doubt the accuracy and authenticity of the other notes in that document. There is a separate peripheral issue about Donaghy. He was said to be unpopular with staff at Durham because he had had a meeting with them in **2010** when he had given them a dressing down, and upset them by saying he "couldn't care a fuck about their mortgages". The claimant had initially attended the start of the meeting but left before this remark was made. MB's claim in the Tribunal was that SD had told him much later that he had been set up by the claimant with a script which included that remark. The claimant agrees that he <u>did</u> ask SD to attend the Durham office to speak to the staff, but adamantly denies that he gave SD any script. SD has not been called to give evidence on this narrow point. Despite some doubts about the claimant's reliability I accept the claimant's evidence on this point. Yvonne Currie also claims that when MB learned that she had been subpoenaed to give evidence for the claimant at this hearing, on the Friday before, he intimidated her by sending her home on the Friday; required her to attend a return to work meeting with him and made the sarcastic remark to her "What a coincidence". MB denies this interpretation. He says he had her welfare at heart. I accept that YC was to some extent intimidated by MB when he found out that she would be giving evidence which might challenge him.

7.4 I do not regard it as mere coincidence that Charlie Beddoes cancelled the meeting on **4 April 2016** to discuss the claimant's bonus/shareholding

complaint, and did not relist it. It is consistent with CB knowing that the claimant's future employment was under imminent threat and that a meeting would no longer be necessary.

7.5 Without making any specific findings about the profitability of EWRG for reasons I have already expressed, I do accept the claimant believed that the 2015/16 figures would show a profit which he also believed would entitle him to a significant bonus payment. This would represent a further motive for the respondent to end his employment.

7.6 **Other factors**

The extent of MB's supposed investigation into the extent of the claimant's role as GMD, and the consideration of alternatives to redundancy

I have already made findings about the authenticity of the document at pages 13-15. It is also of significance that MB did not make any enquiries of Robson, or Allen or Meney, the first two being heavily involved in sales, as to their view of the claimant's management skills and performance, prior to **13 April 2016**. His excuse for not speaking to the former two was that they were "personal friends" of the claimant, which is disputed, and in any event would not be a reason for ignoring them. This contrasts with MB's description of them at pages 94-95 as being "quality individuals", and in his letter of **24 May** in which he described them as being "very experienced in external sales and I do not believe they need any guidance from a more senior manager". He said in his letter of **3 June** that he had discussions with "individuals responsible for managing key parts of the business …". It is likely that the reason why MB did not specifically speak to any of these as part of any investigation is that he knew that they would have spoken highly of his contribution to the business.

7.7 I also find that MB's supposed investigation into alternative roles for the claimant was very limited. He made only two enquiries; and one was made only to the Durham branches of CEF when there were other branches in the Newcastle and North Yorkshire regions. This does not suggest that MB had a genuine interest in accessing alternative employment for the claimant, although I also recognise that the claimant did not express any real interest in any alternative employment with EWRG either at this stage or at the appeal. His attitude was simply that there continued to be a need for him to perform his existing role including sales and marketing. This is a finding which is also material to the **Polkey** issue.

7.8 It is a notable feature that MB raised criticisms of the claimant's abilities during the process. I do not intend to deal with all of them but I have significant doubts about the validity of some of those criticisms. For example the criticism that the claimant had failed to supplement the customer base, which remained at around 150 clients. I accept the claimant's point that the number of clients is not an important indicator. It

is the value of their custom which is important. Some may produce many thousands of pounds of custom annually; others may only produce a very low figure. As to the claimant's alleged responsibility for the supposed losses in every year since **2008**, I have already noted these largely depend upon accountancy practices which the claimant disputes. I do not need to consider this issue in more detail because, as I accept, MB did not dismiss the claimant on performance grounds. I find however that MB had a separate motive to discredit the claimant by making such allegations.

7.9 I turn now to consider the validity and materiality of the appeal process conducted by JS. I make some general observations first. As I have already noted, the claimant did not assert in his appeal letter that the redundancy process was a sham. It is to be noted that in his outcome letter JS specifically dealt in some detail with the points the claimant had raised in the appeal letter - the length of the consultation period and not being considered for alternative roles. I do not agree with the reason which JS put forward for rejecting these complaints. However, JS expressly noted at page 307 of the letter, "You were not appealing against the decision to make your role redundant". He therefore did not consider or deal with in anyway the point raised by the claimant at this hearing. There is also the issue about the format of the appeal notes at pages 253 onwards, which I have found <u>were</u> written by JS despite his denials and contain derogatory comments about the claimant. There are areas of similarity between the two versions of the notes but a significant difference appears on page 381 of Dawn's notes where she records the question from JS "Do you agree that the financial analysis should not have formed a big part in the decision? If yes – why? If no – why?". The claimant's noted reply is "Keith said I would like to know what the decision is made up 1 – financial 2 – face didn't fit, getting out before profitable". This comment, which with hindsight is highly significant, does not appear at all against that question at page 256 of JS's version of the notes.

7.10 I accept that JS did go to the trouble of interviewing those named by the claimant at the appeal hearing. However, the notes of the interviews were never given to the interviewees (at least until after disclosure in the Tribunal process) and there are disputes as to the accuracy of some of them. Christopher Allen alleges that in his witness statement there were significant omissions of parts he raised that were favourable to the claimant, and errors. Tom Meney agrees however that the note is "largely accurate". Kelvin Robson also disputes the accuracy of the note of his interview. He has provided a much later note (with I accept the benefit of hindsight). He says that a number of his comments have been misquoted and he also comments that a number of the questions put by JS to him were "very angled". (In parenthesis, Kelvin Robson also claims there was talk in the office in **late 2015 early 2016** that a letter and invoice <u>had</u> been received at the Glasgow office for legal work undertaken in relation to the termination of the claimant's employment. That there was an invoice for legal work done by the respondent's solicitor in **<u>April 2014</u>** is not in dispute but whether it concerned the claimant's employment is heavily in dispute. It may be that there was a rumour to that effect but it is certainly

not proved and I am not prepared in the circumstances to infer that it did concern the claimant's employment. The respondent's response to the allegations by Robson and Allen was that they were biased against the respondent, having themselves left the respondent in or about **July 2016**. I accept that they did genuinely and honestly have a favourable view of the claimant's abilities as a Group Managing Director, and were honest in their evidence to the Tribunal but it does not take the claimant's case very far on the vital issue as to the reason for dismissal. The same comment may be made in respect of Yvonne Currie's evidence concerning the interview with JS. In summary I do not find that the disputes concerning those notes assist me much in assessing the real reason for the claimant's dismissal. I find that MB has not satisfied me that the principal reason for the claimant's dismissal was the claimant's redundancy or a genuine belief in it. I find it more probable that the reason for the claimant's dismissal was because he was raising with ever greater insistence his entitlement to substantial bonuses and his assertions as to the value of his shareholding based upon an agreement made sometime earlier with Ashley coupled with the recognition that EWRG was likely to move into profitability (or greater profitability) in the near future. JS's evidence goes nowhere in casting doubt on that conclusion. As in the **Thompson** case a potentially fair reason was used as a pretext for a dismissal for other reasons. This means that the decision to dismiss was unfair.

8 **Polkey**

It is of significance that the respondent did not in fact replace the claimant after his dismissal, and I accept that the reality is that there must be significant aspects of his job in the area of sales which are now being done by others. On the other hand, it is highly unlikely that the respondent would have undermined its position as to the reason for dismissal by replacing the claimant. I have only found that redundancy was not the principal reason for dismissal. In these circumstances I find, applying the test in **Software 2000 Ltd** that there was a 50% chance that the respondent would have undertaken an investigation and the clamant would have been fairly dismissed for redundancy within about 6 months of the date when he was dismissed. The respondent would have been entitled to take into account as part of its legitimate business reasons for the redundancy the cost of continuing to pay the claimant's substantial salary and bonus entitlement. I conclude that, having regard to the claimant's failure to show any interest in alternative employment at a lower rate of pay, and his insistence during the process that the job was still available for him at his existing rate of remuneration, he would have maintained that position. I reject Mr Sweeney's submission that the evidence is such that seeking to reconstruct what would have happened is to uncertain to make any prediction

EMPLOYMENT JUDGE HARGROVE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
15 February 2017
JUDGMENT SENT TO THE PARTIES ON

23 February 2017

AND ENTERED IN THE REGISTER

P Trewick

FOR THE TRIBUNAL