EMPLOYMENT TRIBUNALS

Claimant: **Mr Alfred Dorrell**

Respondent: **FMS Foils Group Limited**

Heard at: **East London Hearing Centre**

On: **27 and 28 January 2022**

Before: **Employment Judge Barrowclough**

Representation

Claimant: Mr Adam Griffiths (Counsel)

Respondent: Ms Emily Skinner (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that the Claimant was unfairly dismissed. Accordingly, his claim will be listed for a remedy hearing on the first open date after 28 days, with a half day time estimate.

REASONS

1 By his claim, presented to the Tribunal on 10 February 2021, the Claimant Mr Alfred Dorrell advanced complaints of (a) unfair dismissal and (b) direct age discrimination against FMS Foils Group Ltd. In their ET3 response, the Respondent accepted that they had employed the Claimant as a 'materials handler' at their premises at Temple Farm Industrial Estate, Southend, from 22 January 2018 until 27 November 2020, when he was dismissed with a redundancy payment and two weeks' pay in lieu of notice, but disputed and resisted all the Claimant's complaints. There was a preliminary hearing of the claim before Employment Judge Reid on 29 September 2021, when the learned judge made deposit orders in relation to the Claimant's allegations of age discrimination, as well as case management orders and directions, and when the issues to be identified at the full merits hearing were identified. Subsequently, the Claimant's complaints of age discrimination were dismissed on withdrawal on 11 January 2022. This

face to face full merits hearing took place on 27 and 28 January 2022, and at its conclusion and due to a lack of available time I reserved my judgment. The Claimant was represented by Mr Griffiths of counsel, who called as witnesses both the Claimant and his former colleague Mr Philip Mackenzie. The Respondent was represented by Ms Skinner of counsel, who called Mr David Watson, the Respondent's chairman and majority shareholder; Ms Alison Suttie, the Respondent's HR manager and who is married to Mr Watson; and Mr Paul Barnes, the Respondent's head of operations. I was provided with statements for all the witnesses from whom I heard and an agreed trial bundle. Following the conclusion of the oral hearing and by agreement, counsel's written closing submissions were sent to myself and to the Tribunal on 11 February 2022.

2 The Respondent is a family business that manufactures printed and laminated aluminium-based products for the confectionary, dairy and carton board markets, together with other products for suppliers in the catering and hospitality sectors. The business currently has an annual turnover of about £11 million, and employs 47 members of staff, ten of whom are office based, dealing with customers and suppliers, with the remainder factory based, operating or supervising machinery, unloading moving and handling materials, and packing products for delivery. All staff work from and are based at the Respondent's two sites at Temple Farm Industrial Estate, which are known as 'Wheelwrights' and 'Forum' and which can be seen on the plan at page 131 in the bundle. Wheelwrights is essentially a warehouse in which the business' main raw material of aluminium sheeting was, and to a lesser extent still is, stored, and is about a third of a mile distant from the Forum, where the main factory and offices are situated. The Claimant was initially based at Wheelwrights, one of the reasons for his employment being that he has a C1 driving licence, enabling him to drive the Respondent's 7.5 tonne lorry, used for transporting aluminium from Wheelwrights to the Forum factory. In 2019, the Respondent erected a new aluminium warehouse next to the main printing site at the Forum, which resulted in a significant reduction of lorry journeys to and from Wheelwrights by the Claimant, who by then was based and mainly working at the Forum factory.

3 The Respondent's factory based staff work in different shifts, most of them working between the Respondent's core hours of 6am to 6pm, Mondays to Fridays, and any additional hours worked outside an employee's contracted hours are paid at a premium overtime rate. Mr Watson and Mr Barnes indicated that the need for overtime usually arose between 4 and 6pm, Mondays to Thursdays, and on Friday mornings. The Claimant's initial contractual hours from January 2018 were 8am to 4pm, although those were formally varied to 6am to 2pm from May 2019 onwards. In fact, the Claimant had worked those earlier hours from the start of his employment, as agreed with Mr Martin the (then) operations manager, since due to his domestic commitments (helping to look after his elderly mother and parents-in-law), they suited him better. As a materials handler, the Claimant's duties included unloading raw materials from delivery lorries, moving materials from warehouse to production, finished product from production to warehouse, and from there onto lorries to be delivered to the customer. He was also involved in packing finished product for external deliveries, although that was not one of his core duties. In May 2018 the role of logistics supervisor had been advertised internally, and Mr Martin had suggested that the Claimant apply: he did not do so because, although the role was better paid, the duties involved would impact on the Claimant's commitments at home, as he explained to Mr Martin.

4 The Claimant was one of two materials handlers, the other being Mr Nuno Machado, whose working hours were 12noon to 10pm, Mondays to Thursdays. The Claimant reported to the materials handling supervisor (Mr Tom Brown), and a logistics supervisor (the Claimant's brother Mr Peter Dorrell) was also part of the team, although based at Wheelwrights rather than the Forum.

5 The onset of the Covid-19 pandemic in early 2020 inevitably had a significant impact on the Respondent's undertaking. Mr Watson's unchallenged evidence was that their second largest customer was closed for six weeks whilst a Covid-safe system was installed, that sales to other customers declined, particularly those in the duty free and hospitality sectors, and that overall there was a reduction in sales of £325,092 for the period January to May in 2020 when compared with the previous year. Additionally, the company that provides credit insurance to many of the Respondent's major suppliers withdrew their cover on 15 July 2020, which severely impacted the business' cashflow. Mr Watson was concerned that if the Respondent's bankers removed their credit facilities, as they had done in 2001, the business could be forced into administration, as had happened then. A new overdraft and a separate loan were agreed, the invoice discounting facility was increased, and a number of employees, including factory and office staff and members of the management team, were furloughed on a voluntary basis and subject to the needs of the business. In the Claimant's case, he requested to be placed on furlough leave and was so continuously from 6 April until the end of October 2020, apart from working for the weeks commencing 6 & 13 July and 1 & 7 September that year when he was covering for colleagues' on holiday, in one of those fortnights acting up as materials handling supervisor in Mr Brown's absence. The other members of the Claimant's team were not furloughed and remained at work.

6 Mr Barnes, who had joined the Respondent in January 2020 as an operations co-ordinator before becoming head of operations on 1 September that year, was asked to participate in a review of staffing levels across the business being undertaken in July 2020 by Mr Watson and his son Paul, the Respondent's managing director, since the pandemic continued to impact the business and with a view to cutting costs and eliminating inefficiencies. Mr Barnes therefore prepared a scoring matrix covering all staff within the business, a copy of which is at pages 85A to 85S. Employees were scored on a scale of 1 (very poor) to 5 (excellent) against a number of criteria including productivity, flexibility, and attendance. As a result, cost savings areas were identified and Ms Suttie confirmed that during that month (July) eight members of staff were made redundant or otherwise left the Respondent. The Claimant and his department were unaffected by that process.

7 Mr Barnes goes on to say that he later reviewed each department in the production process to assess whether any further savings could be made. As part of that review, he identified a number of skilled machine operators who were not being fully utilised during their 8 or 10 hour shifts, and who were able to help in packing and other duties, such as embossing and finishing, on an ad-hoc basis. Additionally, Mr Watson and Mr Barnes then decided that there was an ongoing need for only one materials handler, rather than two. This was due (Mr Watson says) to a decline in sales (approx. £10.4 million in 2019/20, as against £11.2 million in 2018/19), which resulted in less product being manufactured and therefore less material being handled. There was also a trend of incoming collections and the delivery of raw materials arriving or occurring later in the day than had previously been the case. Mr Barnes puts that down to the combined effects of Brexit and the pandemic on the availability and punctuality of transport companies' drivers

(see pages 73 and 128/129 in the bundle). That meant that there was less work for materials handlers on the morning shift, and more work on the late shift, which had to be covered by staff working overtime, an additional expense. Finally, it was noted that the business had managed during the Claimant's furlough absence with only one materials handler (Mr Machado) and two materials supervisors (Messrs. Brown and Peter Dorrell); and that due to the erection of the new aluminium warehouse at the Forum site, a majority of the lorry movements from Wheelwrights to the factory, previously undertaken by the Claimant, had been eliminated. Messrs Watson and Barnes conclusion was that the one materials handler needed by the business would be required to work the 12noon to 10pm shift, currently undertaken by Mr Machado. They decided that it was necessary to speak to the Claimant and ask him whether he would be prepared to change his hours to work that shift: if he agreed to do so, there would be a redundancy selection pool of two – the Claimant and Mr Machado – who would be scored against objective selection criteria, with the lower scoring employee being dismissed by reason of redundancy. The scoring matrix prepared by Mr Barnes in July was apparently not used or relied upon.

8 Mr Barnes states that he and Ms Suttie as HR manager considered whether any such redundancy pool should be enlarged to include Mr Brown and Mr Paul Durrell, but decided not to do so because of their experience and seniority, together with their additional responsibilities as supervisors at their respective sites (Wheelwrights and the Forum) and the importance of having a supervisor at the start of the working day to ensure correct materials were available for the smooth running of production.

9 Accordingly, Mr Barnes and Ms Suttie say that together they met the Claimant in early October 2020, when they explained to him the perceived need to reduce the number of materials handlers, the reasons for the proposed change in the Claimant's hours, and the consequent redundancy process if he did not agree to that change. They say that the Claimant was given time to think over their proposal and his position, and that there was then a second (virtual) meeting with the Claimant on 20 October, when despite it being made clear to him that he would be at risk of redundancy, he was not willing to change his working hours and undertake the 12noon to 10pm shift. Accordingly, the Claimant alone was put at risk of redundancy by letter dated 27 October (pages 99/100), when the redundancy consultation process began.

10 The Claimant's account differs, at least in relation to the timing of the various meetings. Whilst he doesn't address the chronology of events in his evidently homemade witness statement, the Claimant suggests in the particulars annexed to his claim that the first step in the process leading to his dismissal was his receiving the Respondent's letter dated 27 October putting him (apparently alone, as he subsequently discovered) at risk of redundancy, and advising him of a consultation period up until 10 November. He was invited to and duly attended a meeting on 2 November with Mr Barnes and Ms Suttie (who was attending remotely), when for the first time he was asked whether he was willing to change his working hours to the later afternoon/evening shift, which he said he was not willing to do because of his domestic commitments. It was following that meeting that the Claimant came to the conclusion that older workers like himself were being *'culled'*. I will return to this significant conflict of evidence in due course.

11 In any event, the parties agree that a meeting took place on 2 November. Present at that meeting were the Claimant, Mr Barnes and Ms Suttie, both of whom state that the Claimant was accompanied by his colleague Mr Mackenzie. The Claimant's recollection

was that the first meeting Mr Mackenzie attended was on 11 November, rather than on 2 November; but since Mr Mackenzie confirmed in his evidence that he was present on the 2nd and could recall what was then discussed, I think that the Claimant is mistaken or has confused the chronology (and also that Ms Suttie attended in person, rather than remotely). At the meeting, Mr Mackenzie (who was attending as a work colleague, rather than in his capacity as a trade union representative) pointed out on the Claimant's behalf that he was the only employee who had been put at risk of redundancy, that it was unfair to ask the Claimant to undertake the 12 noon to 10pm shift, which was outside the Respondent's core hours of 6am to 6pm, and that factory staff including himself were currently undertaking virtually as much overtime as they wanted, giving rise to costs greater than the Claimant's wages. Finally, if the Claimant was made redundant, the Respondent would struggle to provide adequate holiday cover and lose flexibility, with particular relevance to additional packing capacity. That was potentially significant, since at that time the Respondent no longer had a dedicated packer, Mr Brian Wickes (who undertook that role) having left at the end of August 2020, although as Mr Barnes states, packing work was covered by other staff, including the Claimant, on an ad-hoc basis. Mr Barnes' recollection was that Mr Wickes had been made redundant by the Respondent, although Ms Suttie's evidence was that that wasn't the case, and that Mr Barnes was mistaken.

12 Ms Suttie says that at the meeting on 2 November she raised the potential alternatives of a printing role and that of customer service administrator with the Claimant, but that he was not interested in either. She and Mr Barnes apparently came away from the meeting with the impression that the Claimant would or at least might be prepared to work different hours, so long as they fell within the business' core hours of 6am to 6pm, although both accept that wasn't said or made clear in terms by either Mr Mackenzie or the Claimant; and they fed that and Mr Mackenzie's remarks back to Messrs David and Paul Watson. Mr Barnes raised the possibility of moving Mr Machado to a machine operator's role within the finishing department, in which he had already expressed an interest and had previous experience, since a vacancy in that 12 noon to 10pm role had recently arisen. That would enable the Respondent to retain the Claimant as the sole materials handler, working within the Respondent's core hours, although his shift hours would need to be changed to provide cover at what were now the busiest times. Accordingly, it was decided to offer the Claimant his existing role, albeit with his hours changed to 10am to 6pm Mondays to Thursdays, and 8am to 4pm on Fridays.

13 A further meeting took place on 11 November, at which the Claimant, Mr Mackenzie and Mr Barnes were again present, with the addition of Mr McBride, the Respondent's sales director in place of Ms Suttie. At the commencement of the meeting, the Claimant was given a letter dated 11 November drafted by Ms Suttie (pages 107/108). The letter sets out two alternatives: either the Claimant agree to retain his role, albeit with his shift hours changed to those set out above, or he would be made redundant, the terms of his redundancy package being set out in the letter. The Claimant responded that, for the reasons the Respondents were already aware of, he could not agree to the proposed new hours, and he and Mr Mackenzie asked who would be covering his current hours, and in particular the 6am start. Mr Barnes replied that Mr Brown would do so, and in fact was already working from that start time. Both the Claimant and Mr Mackenzie state that following the meeting Mr Brown categorically denied having agreed to change his shift hours from 8am to 4pm. In any event, the outcome of the meeting was that the Claimant's role was deemed redundant, his employment terminated on 27 November 2020, and he was paid in accordance with Ms Suttie's letter of 11 November.

14 It is accepted that the Claimant was not offered a right of appeal against the decision to dismiss him. However, on 11 December the Claimant submitted a grievance (page 111) in which he alleged that the Respondent had failed to follow its own procedures in relation to redundancy, that he had been unfairly selected for redundancy, and that the Respondent had failed to offer him a right of appeal against his dismissal. Ms Suttie says that whilst she referred to the Claimant's complaint as a grievance, she treated it as being his appeal against dismissal, that she assumed he would wish Mr Mackenzie to continue to represent him, and that she made arrangements for him and Mr Barnes to attend a meeting with her and the Claimant at 2pm on 21 December.

15 Ms Suttie wrote to the Claimant by email on 15 December, acknowledging his grievance and advising him of the meeting she had set up. However, the Claimant responded on 17 December (page 115) saying that Mr Mackenzie no longer wished to be involved, and that he didn't want to attend such a meeting without representation. Ms Suttie replied that the Claimant could choose any internal employee representative that he wished to accompany him, but the Claimant declined that invitation and said that he would not attend the proposed meeting, but pursue an unfair dismissal claim to the Tribunal instead. In his ET1, the Claimant suggests that Mr Mackenzie was 'scared for his job' if he agreed to continue to accompany the Claimant at such meetings; but in his evidence to the Tribunal, Mr Mackenzie stated that his reason for refusing to accompany the Claimant was because he felt that the Claimant needed more qualified specialist help than he could provide, and that he didn't have the necessary skillset or experience.

16 I am grateful to counsel for both parties for their helpful written submissions. I do not rehearse them here, but refer to points made when they are of particular assistance in addressing matters of law and conflicts of evidence.

17 In an *'ordinary'* unfair dismissal claim such as this, the Respondent must prove on a balance of probabilities that the reason or principal reason for the Claimant's dismissal was a potentially fair one, falling within s.98(2) of the Employment Rights Act 1996. If the Respondent succeeds in so doing, then the determination of whether the dismissal was fair or unfair depends on whether in the circumstances, including the size and administrative resources of the employer's undertaking, the Respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the Claimant, and shall be determined in accordance with equity and the substantial merits of the case (s.98(4)). As Ms Skinner correctly points out, that is a neutral issue for the Tribunal to determine, in the sense that there is no burden of proof on either party.

18 The primary potentially fair reason relied on by the Respondent in this case is redundancy (s.98(2)(c)). Self-evidently, for that to be established there must have been a redundancy situation at the material time. That is determined in accordance with s.139 of the 1996 Act, which provides, so far as relevant to the circumstances of this claim, that dismissal shall be taken to be by reason of redundancy if it is wholly or mainly attributable to the fact that the requirements of the employer's business for employees to carry out work of a particular kind have ceased or diminished, or are expected to cease or diminish (s.139(1)(b)(i)).

19 Ms Skinner's submissions on this issue can be summarised as follows. The Claimant was employed by the Respondent as one of their two materials handlers, his shift being from 6am to 2pm whilst his colleague Mr Machado worked from 12noon to 10

pm. In the summer of 2020, the Respondent decided that, going forward, they only needed one materials handler rather than two. That was because of a reduction in the Respondent's turnover, sales and overall activity, and consequently in materials handling work, due to the Covid-19 pandemic; the fact that raw materials and other lorry collections and deliveries were happening later in the day than had previously been the case, due to the impact of Brexit and the pandemic on the commercial transport companies that the Respondent used and dealt with; the reduced need for lorry movements, previously undertaken by the Claimant, between their Wheelwrights and Forum sites, due to the erection of a new aluminium storage warehouse next to the Forum factory; and the fact that the business had coped satisfactorily in the Claimant's absence on furlough from 6 April 2020 onwards. Accordingly, the provisions of s.139(1)(b)(i) are met, since the Respondent's need for materials handling work had in fact diminished.

20 The Claimant and Mr Griffiths on his behalf object by pointing out, correctly, that the Claimant undertook other duties apart from materials handling, including packing work and acting up in the role of materials handling supervisor when the supervisor (Mr Tom Brown) was absent or on leave, for example for a fortnight during the summer of 2020 when the Claimant returned from furlough to provide holiday cover. Secondly, the Claimant's absence was itself covered by other staff doing overtime, and/or by the Respondent taking on new staff, including Wayne Baker for three weeks from late November 2020, George Heath in January 2021 and James Bell in September that year. One way or the other, it is submitted, there was no appreciable diminution in the materials handling role or work; and even if there was, reorganisation within the Logistics department was feasible and would have obviated the need for any redundancies.

21 In my judgment, there is no merit in the Claimant's objections. Whilst the Claimant certainly undertook packing duties from time to time, Mr Barnes' unchallenged evidence was that from the summer of 2020 onwards a degree of flexibility was expected of all the Respondent's factory employees, particularly after the departure of Mr Wickes, the designated packer, in late August that year; and that Mr Mackenzie and other skilled machine operators would also assist with packing and other tasks, as and when they had time and on an ad-hoc basis. That, it seems to me, does not undermine the separate and distinct nature of their (or the Claimant's) respective roles with the Respondent, and it was reasonable for the Respondent to focus on the specific role or roles where a diminution of work was apparent in determining whether or not a redundancy situation had arisen. Mr Baker was taken on via an agency for the specific purpose of cleaning and painting the Respondent's factory premises for a periodic 'BRC' audit in December 2020, and whilst he may have helped out with packing when he had spare time, that was not the purpose of his engagement. Mr Heath replaced Mr Terry Kenton, a 'core cutter' whose role was very different to the Claimant's, involving cutting cardboard and other materials to size, and Mr Bell joined some 10 months after the Claimant's departure as the Respondent's sole materials handler, taking over from Mr Machado, who had been moved, as he wished, to a machine operator role, and in effect taking the role which the Claimant had been offered on 11 November 2020 but turned down. Finally, the evidence before the Tribunal was that apart from Friday mornings, when Mr Brown the materials handling supervisor was not at work, overtime was undertaken by staff members in the afternoons, generally from 4pm onwards. Since the Claimant's shift was from 6am to 2pm, no overtime 'covering' for the Claimant arose. In his evidence, the Claimant himself said that he could not remember seeing anyone doing overtime during his shift, apart from Mr Brown. Even if it is correct, as the Claimant alleges, that Mr Brown's working from 6am to 8 am on Mondays to Thursdays was overtime and was paid as such, that does not really assist the Claimant,

since Mr Brown was the materials handling supervisor, paid more and with some additional duties and responsibilities to that of a materials handler.

22 The fundamental point is that it is clear that the Respondent was able to cope and run its business reasonably satisfactorily in the Claimant's absence on furlough from early April 2020 onwards, with only one remaining materials handler who worked a significantly later shift pattern than the Claimant, and without taking on additional staff or staff overtime to cover for his absence. I accept Ms Skinner's submissions on this issue, and I find that there was indeed a redundancy situation for machine handling work as at October 2020 and thereafter, and that the reason for the Claimant's dismissal was redundancy.

23 The governing principles and applicable law in a redundancy situation are well established and well-known. Ms Skinner cites the *locus classicus* authority of **Williams v Compair Maxam Ltd [1982] ICR 156**, and both she and Mr Griffiths quoted from Lord Bridge's speech in the House of Lords decision in **Polkey v AE Dayton Services Ltd [1988] ICR 142**. I was also reminded of the cautionary words of Browne-Wilkinson J (as he then was) in **Compair Maxam** that the issue is whether dismissal lay within the range of conduct which a reasonable employer could have adopted, and for the Tribunal to substitute its view of what was reasonable would be an error of law. In broad terms, a reasonable employer should so far as reasonably possible consult early and throughout the redundancy process with those affected, adopt and apply objective selection criteria, and seek to avoid redundancy dismissals through suitable alternative employment.

24 Mr Griffiths submits that for the process adopted by the Respondent to be fair, all six of those in the Logistics department should have been in a redundancy pool, which should not (along with the related consultation) have been restricted to the Claimant alone; that the apparent offer of an alternative role was illusory; and that the whole process fell well short of the standard of reasonableness required of an employer and was essentially a sham, simply window dressing for a decision which had already been taken by Mr David Watson some time earlier, as evidenced by his wife's email to Mr Barnes on 12 August 2020 (page 86).

25 Putting aside for the moment that last point, to which I will return hereafter, in my view what Mr Griffiths suggests concerning the redundancy pool and the consequent consultation amounts to substituting a potential alternative approach for that taken by the Respondent, and is impermissible. Assuming that the redundancy process that the Respondent undertook was genuine, they could have enlarged the pool to include everyone in the Logistics department, but instead took the view that they no longer needed two materials handlers, that the materials handling work they did need was required during a later shift or part of the day than that currently undertaken or worked by the Claimant, and that it would not be appropriate to place supervisors, with additional duties and responsibilities, in a redundancy pool. I have some doubts as to whether in truth such additional responsibilities and duties that were not undertaken at least occasionally by the Claimant and others existed, and if so to what extent, but that is not the issue here. When the Claimant (for perfectly understandable reasons) was not willing to change his working hours, that in effect resulted in a pool of one. In my judgment, that cannot be described as an unreasonable approach.

26 I also accept that there was appropriate consultation with the Claimant about his potential redundancy. I find that the Claimant was mistaken not only in suggesting that the

first meeting attended by his colleague Mr Mackenzie took place on November 11, rather than on November 2 as Mr Mackenzie and others say, but also in stating that the first time that he was asked whether he would be willing to change his shift and working hours was at the meeting on November 2. Ms Suttie's letter to the Claimant of 27 October (pages 99/100) specifically refers to *'our discussions last week'*, when his being placed at risk of redundancy had been explained to him. Secondly, at the meeting on 2 November Mr Mackenzie argued on the Claimant's behalf that it was unfair to ask him to work a shift from 12 noon to 10pm, outside the Respondent's core hours. Finally, in his oral evidence to the Tribunal Mr Mackenzie confirmed that he had attended an earlier meeting to that on 2 November with the Claimant, Mr Barnes and Ms Suttie, but couldn't now remember when. All that suggests, and I find, that the Claimant was consulted about potentially changing his working hours and being at risk of redundancy if he was not willing to do so at some point in the second half of October, and in any event before the Respondent's letter of 27 October and the meeting on 2 November. Finally in relation to consultation, it is equally clear that following the meeting on 2 November, the Respondent apparently re-considered, and at the third and final consultation meeting offered the Claimant amended working hours of 10am to 6pm, albeit they too were unacceptable to him.

27 That would also seem to meet the overall requirement of trying to avoid redundancy dismissals by means of suitable alternative employment. The Claimant's role and duties would remain essentially the same, whilst the later shift hours reflected the changed practical conditions whereby materials working personnel were needed later in the day than formerly had been the case because of the later pattern of deliveries and collections to or from the factory, which was the sole criterion adopted by the Respondent in this redundancy process. Additionally and as noted, Ms Suttie had raised two other potential alternative roles (outside the Logistics department) with the Claimant at their meeting on 2 November.

28 That takes me to the issue which I think lies at the heart of this case: the integrity of the redundancy process undertaken by the Respondent. Was the Respondent simply going through the motions, rubber stamping a decision to dismiss the Claimant that had already been taken, or was the process genuine? If the process was genuine, then in my judgment there can be little doubt that the decision to dismiss the Claimant was fair; if on the other hand it wasn't, then whilst for the reasons already given I am satisfied that the Respondent's reason for dismissing the Claimant was redundancy, that dismissal would be unfair for procedural reasons because the procedure adopted by the Respondent was a sham, and the Claimant entitled to compensation, subject to potential **Polkey** arguments.

29 Ms Skinner submits that there was no pre-determination in this case. Whilst it is conceded that in an email from Ms Suttie to Mr Barnes dated 12 August 2020 (page 86) concerning Mr Machado's forthcoming holiday absence, Ms Suttie states that she *'will cut* (in the sense of *'refer'*, as she confirmed in evidence) *to Dave as he was talking about putting Alf at risk'*, and it is accepted that 'Dave' is her husband Mr Watson and 'Alf' the Claimant, that is not indicative of any such state of mind. Mr Watson had denied the suggestion when it was put to him in cross-examination, and the remark needed to be seen in its proper context. There had been a review of staffing levels across the business as recently as July that year, Mr Watson hardly knew the Claimant and had barely come across him, mistaking him on one occasion for his brother Paul Dorrell, and so would have no personal animus or ulterior motive for singling the Claimant out, as the latter had

accepted in his evidence to the Tribunal. Finally, simply because Mr Machado was not named in the email does not mean that Mr Watson was not thinking of putting him at risk as well as the Claimant.

30 I have to say that I do not find that explanation entirely convincing. The actual context of Ms Suttie's statement was that Mr Machado was shortly due to be away on holiday for two weeks, and Mr Barnes was suggesting that the Claimant be brought back from furlough to cover for him: it seems to me that Ms Suttie's response suggests the possibility, at the very least, that the Claimant might not be available to do so because of being *'at risk'*, whilst, inferentially at least, Mr Machado's job was safe. Secondly, no animus against or prior knowledge of the Claimant would be required of Mr Watson to come to the stated view, other than that the Claimant undertook the early materials handling shift, which was then being identified as no longer necessary. Thirdly, the evidence was that the Listing department had not been included in or affected by the redundancies following the recent staffing levels review, which in any event Mr Barnes and Ms Suttie confirmed was not relied on in the Claimant's case. Finally, Mr Watson's answer – that he wanted to reduce the Claimant's function and the overall costs – when the suggestion of pre-determination was put to him in cross-examination does little to negate it.

31 There were also a number of unusual aspects in Ms Suttie's evidence, as Mr Griffiths pointed out. Ms Suttie has both lengthy and high level past experience as an HR professional, having previously acted as HR director for a large and prestigious international law firm for five years, and before that running her own HR business for some twenty years; and has been advising her husband's business on a weekly basis for some years. Both her and Mr Barnes' evidence was that they held a meeting with the Claimant in early October 2020, when they explained to him the need to reduce the number of materials handlers, the reasons for the proposed change in the Claimant's hours, and the consequent redundancy process if he did not agree to that change. But there is no note at all of any such meeting, and no subsequent email or letter to the Claimant recording and confirming the significant matters then discussed. Furthermore, in Ms Suttie's letter to the Claimant of 27 October, the only reference to any prior meeting is to discussions during the previous week, rather than any earlier in October. Secondly, the only notes relating to the consultation meeting with the Claimant and Mr Mackenzie on 2 November are those prepared by Ms Suttie of her preparatory meeting with Mr Barnes in advance of it, rather than for the consultation meeting itself. Finally, and whilst Ms Suttie was not present, no notes have been produced of the later meeting with the Claimant and Mr Mackenzie on 11 November, when Mr McBride accompanied Mr Barnes and when the Claimant's redundancy dismissal was confirmed. The absence of such meeting notes and/or confirmatory letters is surprising in the light of Ms Suttie's expertise.

32 It is also noteworthy that it is accepted that in the Claimant's redundancy process there was no reference to or reliance on Mr Barnes' staffing levels review and the resulting scoring matrix, which covered all factory employees and which had been prepared only two or three months earlier when redundancies were in the offing. Nor was any other member of the Logistics department (apart from the Claimant) spoken to in connection with the materials handling redundancy process, to ascertain whether anyone would be willing to swap shifts or working hours with the Claimant, as he subsequently asserted was the case, or whether some other arrangement was possible which might avoid the need for any redundancies.

33 I bear in mind that following their meeting with the Claimant and Mr Mackenzie, Mr Barnes and Ms Suttie returned to the subsequent meeting on 11 November with a revised proposal, namely that the Claimant change his hours and work a daily shift from 10am to 6 pm. However, as Ms Suttie confirmed in her evidence, she already knew the reasons why the Claimant was unwilling to change his hours, namely his caring commitments for his elderly parents and in-laws, which were equally applicable, so far as the Claimant was concerned, to the Respondent's revised proposal.

34 Weighing all these matters together, I have come to the conclusion that it is more likely that the Respondent had decided at some point in the late summer or early autumn of 2020 that it was the Claimant who was going to be made redundant due to the diminution of materials handling work, rather than that the redundancy process which they subsequently undertook was genuine. Accordingly and for these reasons, in my judgment the Claimant's dismissal was unfair. For the avoidance of doubt, I reach the same decision for the same reasons which are equally applicable to the Respondent's subsidiary ground relied on of 'some other substantial reason'.

35 The Claimant seeks compensation, so there will have to be a remedy hearing unless the parties are able to reach an agreement. As noted above, this is a case where a **Polkey** reduction may be appropriate, and I have yet to hear argument on the point. I appreciate that it may be argued that, since the Claimant was apparently unable, or at least unwilling, to alter his working hours to any great extent because of his domestic commitments, the same outcome might have resulted; but in my view it is also arguable that, had the Respondent genuinely applied their minds to seeking a resolution that avoided redundancy, some re-organisation within the Logistics department might have been possible that enabled them to do so.

Employment Judge Barrowclough
Dated: 5 April 2022