Case Nos. 2415534/2020
Code V

EMPLOYMENT TRIBUNALS

Claimants: Mr Dave Smith

Respondent: R Hannah & Sons Ltd

Heard at: Manchester (by CVP) **On:** 12th February & 6th April 2021

Before: Employment Judge Newstead Taylor (sitting alone)

REPRESENTATION:

Claimants: Mrs Gemma Smith (The Claimant's wife)

Respondent: Mr Jack Duffy (Counsel)

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. The claimant's claim that he was unfairly dismissed contrary to s.94 Employment Rights Act 1996 ("ERA") succeeds.

2. The claimant's compensation will be determined at a remedy hearing on **16 July 2021** subject to the following:

    2.1. The Claimant has received a statutory redundancy payment and therefore no basic award is payable; s.122 (4) (a) Employment Rights Act 1996.

    2.2. A 40% reduction will be made from compensation in respect of contributory fault and/or failure to mitigate loss.

    2.3. A 20 % reduction will be made from compensation under

the principles set out in **Polkey v AE Dayton Services Ltd [1998] AC 344**.

2.4. As redundancy was the reason for dismissal, the ACAS Code of Practice on Discipline and Grievance does not apply to the claimant's unfair dismissal claim and there is no uplift for unreasonable failure to comply with its provisions

REASONS

Introduction:

1. The respondent is a Food Service company. It supplies frozen, ambient and chilled food products to a variety of customers, including schools, fast food establishments and wholesale customers, throughout the North West and nationwide. The claimant started working at the respondent in 2005 as a Warehouse Operative ("WO".) He was also a Fork Lift Truck ("FLT") Driver, Powered Pallet Truck Driver ("PPT") and Reach Truck Driver. He progressed through the ranks. In 2014, the claimant left the respondent. He returned in 2015 and worked as a Warehouse Administrator. He was quickly promoted to Shift Manager. On 28 July 2020, the claimant was dismissed by reason of redundancy. This claim is concerned with that dismissal.

The Tribunal Hearing:

2. The hearing took place on 12 February and 6 April 2021.

3. The claimant was represented by his wife, Mrs. Smith, who very ably argued her husband's case. Mrs. Smith was also employed by the respondent. She was employed as a Company Support Administrator and was also dismissed by reason of redundancy. However, Mrs. Smith has not brought any claim against the respondent in the Employment Tribunal ("Tribunal"). Her role in this claim was as the claimant's representative and as a witness. Both the claimant and Mrs. Smith gave evidence on affirmation.

4. The respondent was represented by Mr. Jack Duffy of Counsel. Mr. Ian Wallace (Warehouse Manager) and Mr. Gary Hannah (Managing Director) gave evidence on behalf of the respondent on affirmation.

5. A joint bundle of 190 pages had been prepared for the Tribunal. In addition, there were 4 witness statements. One each from the claimant, Mrs Smith, Mr Wallace and Mr Hannah. I took time to read the bundle. I informed the parties that they should refer me to the documents on which they relied regardless of my reading and the cross references in the witness statements. References in square brackets in this Judgment are to the pages of this bundle.

The Claims & Issues:

6. This is a claim for unfair dismissal. The respondent disputes the claim and contends that it acted reasonably in all the circumstances in dismissing the claimant by reason of redundancy. The respondent accepts, as confirmed by Mr. Duffy, that the claimant:

    6.1. was an employee of the respondent; Ss. 94 & 230 ERA.
    6.2. had been continuously employed for more than 2 years; s.108 ERA.
    6.3. was dismissed by the respondent; s.95 (1) (a-b) ERA.
    6.4. presented the claim in time; s.111 & 207B ERA.

7. The remaining issues were agreed with the parties at the start of the hearing and are set out in Annex A.

8. Additionally, Mrs Smith raised the issue of marriage discrimination. She referred to and relied on an email from Ms Shahina Member (HR Advisor/Manager) to Claire Cox (HR Consultant) in which Ms Member wrote *"Is there anything I can do? I think he is just trying to play the system. Both husband and wife are happy to sit at home at 80% and enjoy it at home."* [41-42] The respondent objected noting that this was an entirely new issue. There was no indication of a claim for marriage discrimination in the ET1, the witness statements or any of the documents. I asked if Mrs Smith was making an application to amend. She said no, but appeared to be uncertain. In all the circumstances, I stood the matter down for 20 minutes for Mrs Smith to consider the

position with the claimant. After the break, Mrs Smith confirmed that the discrimination issue was not pursued and the claimant was happy to proceed on the sole basis of unfair dismissal.

Findings of Fact:

9. I make the following findings in this case.

10. Mr Wallace (Warehouse Manager) ran the Warehouse. The structure of Mr Wallace's department was as follows:

    10.1. Managing Director – Mr. Hannah
    10.2. Warehouse Manager – Mr. Wallace
    10.3. Assistant Warehouse Manager – Mr. Ronnie Smith
    10.4. Shift Managers –the claimant, Colin Eadie & Chris Giblin.
    10.5. Team Leaders – x 2
    10.6. Administration Clerks – x 3
    10.7. Warehouse Operatives ("WO") – x 9

11. The claimant was a Shift Manager. His salary was £26,000-27,000. His role involved running the warehouse, looking after health and safety, managing a team, booking in goods, managing staffing levels, ensuring that the picking was done correctly, dealing with stock queries and liaising with other departments. He was also a trained FLT and PPT truck driver and trained others on trucks.

12. Mr Ronnie Smith was Assistant Warehouse Manager. Initially, he stood in as cover when Alex, the previous Assistant Warehouse Manager, left in around November 2019. The position became permanent. As at 2 March 2020, being the date Mr Wallace started working for the respondent, the position of Assistant Warehouse Manager was filled by Mr Ronnie Smith. The intention was that Mr Wallace would announce Mr Smith's permanent appointment as Assistant Warehouse Manager after his initial induction programme, but this plan was derailed by COVID-19. Accordingly, the claimant never received an organogram or formal notification of Mr Smith's appointment as Assistant Warehouse Manager. Nevertheless, he was so appointed prior to the events with which this claim is concerned and, in fact, remains in the role.

13. As to the WOs, the role of a WO is to work on goods in the warehouse including picking orders on the management system, loading vehicles and pallet racking. This is not a management role. A WO is 3 levels below a Shift Manage. A WO salary is £18,000-20,000. At the time of the redundancy process all of the WOs had less than 2 years service.

14. On 11 June 2020, the respondent emailed the claimant a letter informing the claimant that he would be placed on furlough from 15 June 2020. Specifically, the letter stated:

"We refer to our meeting with you on Monday 8th June 2020, during which we explained how the COVID-19 outbreak has impacted our business and the details of the Government's Coronavirus Job Retention Scheme.

To minimise the need for redundancies because of the downturn in business, we are planning to 'furlough' staff on pay reduced by 20%." [46]

15. On 11 June 2020 at 10.25, the claimant emailed the respondent accepting the furlough offer [47a].

16. On 17 June 2020, the respondent emailed all its staff, including the WOs, attaching a 'Letter informing of Redundancy and Voluntary Redundancy.' The email stated:

"Please find attached important business update, this update will provide you with some clarity over the furlough scheme and re-structure and future plans of the business. … In the meantime, I have set up a new email address: … for any queries and questions around the update anything else please continue to use my Email address below." [47b]

17. The 'Letter informing of Redundancy and Voluntary Redundancy' stated:

"The COVID-19 virus impact is felt around the world and Hannah Foods Services is no exception.

In general, all our teams/departments are operational with very limited staff across the business as we continue to serve our customers. Some of our colleagues are working from home and our transport, sales, finance and warehouse teams has been organised in shifts to guarantee continuity and provide safest working conditions.

So far, COVID-19 has impacted our ability to deliver products, and we work without suppliers and customers to ensure we can continue and resume business as usual. However, depending on the duration of the measures in place we see

major supply chain disruptions, especially with the closure and uncertainty around re-opening of schools it is massively disrupting the workflow at Hannah Foods Services.

…

Over the last eleven weeks the management team has monitored the situation very closely and through a robust workforce plan and the help of government coronavirus job retention scheme we have been able to meet the demands of the business and continue to employ staff. However due to changes in the current environment and the coronavirus job retention scheme Hannah Foods Services unfortunately cannot sustain or absorb the financial impact and as a direct result of this needs to reduce the number of its employees. In these challenging circumstances there is now a requirement for changes to be made to the organisational structure and we are regrettably proposing to make redundancies.

The company is proposing to enter the consultation process with affect from 1st July 2020 with employees of the following departments Warehouse, Purchasing, Telesales including Wholesales. We would like to reiterate that no final decisions have been made at this stage.

Over the coming weeks, we will be arranging individual consultation meetings with all potentially affected employees, at this stage of the process.

***Please note:** Individuals will receive letters in the next 48 hours notifying if their job is at risk...*

If you have any questions or queries regarding the contents of this letter, please do not hesitate to contact Shahina Member HR Advisor at ... " [47f-g]

18. On 18 June 2020, the respondent wrote to the claimant confirming that the claimant's role was at risk of redundancy. The letter stated:

"I write following the business update yesterday 17th June 2020. As informed, the organisation may need to make redundancies.

The organisation is considering making 19 employees within the Warehouse, Telesales including Wholesales and Purchasing departments redundant because of re-structure of the business due to the downturn in business affected by COVID-19. Unfortunately, your post is one of those at risk of redundancy." [48]

19. Further, the letter invited the claimant to apply for voluntary redundancy and explained the consultation process. Specifically, the letter set out the purpose of the consultation process and informed that claimant that he would be invited to an individual consultation meeting. Also, the letter

said that the respondent would keep the claimant *"informed and involved throughout the process"* and positively encouraged the claimant to talk to his manager or contact Ms Member using a new email address *"If you have any queries or would like to discuss any aspect of the process further."* [49]

20. On 26 June 2020, the respondent wrote to the claimant inviting him to attend an individual consultation meeting on 2 July 2020 at 13.00. The letter reiterated that *"The Company is in the regrettable position of having to consider implementing a redundancy programme because of a re-structure of the business due to the downturn in business affected by COVID-19."* The purpose of the meeting was explained and the claimant was advised that he could be accompanied. Also, the letter stated:

"As part of the consultation procedure and in advance of the meeting please have a think about anything specifically that you would like to discuss in more detail. We also wish to fully explore with employees whether there are any options available other than redundancy in order to fulfil the Company's business needs. If you have any viable suggestions or proposals to put forward, please contact Ian Wallace, warehouse manager, by no later than 29th June 2020.

After the meeting, we will consider all the representations that you and others have made. It may be necessary to have further consultation meeting with you if there are any outstanding issues or concerns. However, we will keep you informed and involved whatever decision we ultimately take. ...

In the meantime, if you have any questions, please do not hesitate to contact Ian Wallace Warehouse Manager or Shahina Member HR advisor" [51-52]

21. Prior to his individual consultation meeting on 2 July 2020, the claimant did not raise any questions or queries by email or at all.

22. On 2 July 2020, the claimant, accompanied by his wife, attended his first consultation meeting with Mr Wallace and Ms Member who acted as note-taker. At the beginning of the meeting, Mr Wallace stated the reason for the redundancies as follows:

"Looking at the reasons for redundancies, Bingo Halls and schools at the moment we have no idea what that looks like, I think there maybe another lockdown, and this means we do not know. We need to look at the restructure of the business at the minute we don't need a 2-tier management and the warehouse is operating on team leaders are running the shift. The changes to the furlough scheme mean we have to pick the costs and it means that's an extra

strain on the business, which is why we are looking at re-structure especially in the warehouse as ... we have the biggest number of employees in this department." [58]

23. During the meeting, the claimant was asked if he had any suggestions for reducing the number of redundancies. He replied *"I just don't know the structure of the business, I don't know what this will look like so can't really comment." Mr Wallace advised that "...the structure is warehouse manager, assistant manager and team leaders with admin and then warehouse operatives."* In cross examination, Mr Wallace said that he could not release the organogram because he was unsure of the number of WO, but did not think it relevant to mention the WO to the claimant.

24. Also, suitable alternative employment was discussed. Mr Wallace advised the claimant that *"- if we have vacancies we have to look at this and advise you this..."* and that it was, in effect, a shifting sand as the consultation process had not been completed. He informed the claimant that there was no team leader position available, but that a Goods In & Stock Team Leader position had been created. This role was carved out of a previous role, namely Stock Control Team Leader. Mr Warren Mawdsley was the Stock Control Team Leader. He was responsible for Goods In and warehouse maintenance including fixing machinery. Due to the impact of COVID-19, external contractors were not allowed on site to repair machinery. Therefore, Mr Mawdsely's focus moved to maintenance and, consequently, he was not always available as Goods In team leader. This change in priorities was undertaken within Mr Mawdsley's original job description. No new maintenance role was created. However, this situation did result in the creation of a new role, being Goods In & Stock Team Leader.

25. Also, the claimant was informed that if after this meeting he had any questions then he could ask and they would be answered. Finally, it was explained that the purpose of the second consultation was to discuss the redundancy package and, if he applied, whether or not the claimant had been successful in applying for the Goods In & Stock Team Leader role.

26. On 3 July 2020:

    26.1. The Goods In & Stock Team leader position along with a job description was emailed out to the claimant and others [67 – 70.] As accepted by the claimant in cross examination, he met the core and desirable criteria for the role.

26.2. The claimant attended Mrs Smith's first consultation meeting at which Ms Member stated that the respondent had saved 9 jobs in the warehouse by offering the WO a change in shift pattern; something which had not been mentioned during the claimant's first consultation meeting.

26.3. In summary, the WOs were at risk of redundancy and informed of the possibility of voluntary redundancy. However, before their first consultation meetings the respondent decided instead to change their shift patterns and, consequently, took redundancy off the table. The WOs were not aware of this until they attended their first consultation meetings. No conversations were held with the WOs about voluntary redundancy.

26.4. At the end of her first consultation, Mrs Smith checked Ms Member's notes and with Ms Member's permission, retyped the notes to reflect what had been discussed. Mrs Smith requested a printed copy that she could sign, date and retain, but as Ms Member's laptop was not connected to a printer this could not be done. Ms Member agreed to save the notes as a pdf, so no amendments could be made, and email a copy that afternoon. No copy was emailed despite Mrs Smith emailing to request one later that day.

27. On 6 July 2020, the claimant emailed 7 questions to Mr Wallace and Ms Member [53-54.] In particular, the claimant asked:

"During the meeting I was asked if I had any ideas of ways to avoid redundancies, I asked for the proposed organogram / restructure, to hopefully give constructive ideas, was told there wasn't one and verbally told the below positions and posts:

Assistant Warehouse Manager – Ron Smith

Team leaders – Callum Mawdsley & Joe Worsley

Admins – Sam Broadhurst & Ivana.

…

Friday 3rd July, I accompanied Gemma Smith in her consultation meeting, during the meeting Shahina Member was explaining how as a Company were doing everything possible to avoid redundancies and said, in the Warehouse they had already reduced the redundancies from 19 to 10, so had saved 9 jobs. I told Shahina that none of this was mentioned in my consultation meeting the previous day and asked how 9 jobs had been saved? Shahina responded to myself, Gemma and Leon by offering them an alternative from Tuesday-Saturday shift to Monday-Friday shift. Gemma replied so that means there are now 10 compulsory redundancies to which Shahina responded yes..." [53]

28. On 7 July 2020:

28.1. Mr Wallace replied to the claimant's email dated 6 July 2020. He said that *"...all your questions that you have asked will be answered during your second consultation meeting..."* and confirmed that the salary for the Goods in & Stock Team Leader role would be circa £22- 26,000. The claimant was remined of the application process and the deadline [54].

28.2. Ms Member emailed the claimant a copy of the notes from his first consultation meeting.

28.3. Mrs Smith received the notes from her first consultation meeting. The notes had been amended and the following paragraph added in concerning the 9 WO:

"SM - we have explored different ways to reduce or avoid redundancies i.e. trade counter opened to public, freeze on recruitment and explored another avenue such moving shift patterns and we have possibly reduced the number of compulsory redundancies from 19 to around 10 however this is still in consulting stage so this is not yet been finalise. What we are trying to say at this point is that we are trying to reduce the number of redundancies and these are ways we are exploring, but these can change at anytime during the consultation period, so things may change again."

29. On 8 July 2020, Mrs Smith emailed Ms Member informing her that the notes differed to those checked by Mrs Smith at the end of her first consultation meeting and asked her to take out the additional paragraph detailed above. Ms Member denied this. Mrs Smith asked for her email to remain on file.

30. On 10 July 2020, the claimant was informed that the closing date for the Goods In & Stock Team Leader vacancy had been extended to 17 July 2020 and the salary confirmed as £22,000-26,000 [67 & 71.]

31. On 17 July 2020, the claimant emailed Mr Wallace, in response to his email dated 7 July 2020, stating:

    "During my first consultation meeting you told me that the next meeting would be my final consultation meeting in two weeks time, therefore having all my questions answered during my second consultation meeting would not provide me with adequate time to ask questions likely to be raised from the answers provided.

    I would struggle to arrange childcare before my final consultation meeting and appreciate how busy you are, so having the above questions answered via email would be helpful and greatly appreciated.

    New Question:-

    If 9 Warehouse Operatives on Tuesday to Saturday shift were put at risk of redundancy and now their jobs saved by offering them Monday-Friday shift, why was that option not made available to me?" [56]

32. I accept, as confirmed by the claimant during cross examination, that by the above 'New Question' the claimant was asking why he had not been offered a WO role when the 9 WOs roles were saved by changing the shift pattern.

33. The claimant did not apply for the Goods In & Stock Team Leader role. The reason for this was that, originally, the role had been sent out to four people one of whom, Mr Paul Smith, had previously done the role. The claimant considered that Mr Smith would get the role and, in effect, that there was no point applying for it. However, the respondent did not at any stage indicate that Mr Smith would get the job. In fact, Mr Smith did not apply for the role. Also, the claimant maintained that he did not have the skill set for the role. I reject that contention because the claimant met the core and desirable criteria for the role. Ultimately, Mr Colin Eadie, a former Shift Manager like the claimant, successfully applied for the role.

34. On 24 July 2020, the respondent invited the claimant to attend a second consultation meeting on 28 July 2020 at 12.00pm. The letter confirmed

the reason for the redundancies, that the claimant's role was at risk of redundancy, the purpose of the meeting and the claimant's right to be accompanied. Again, the letter stated *"In the meantime, if you have any questions, please do not hesitate to contact Ian Wallace Warehouse Manager or Shahina Member HR Advisor."* [75]

35. On 28 July 2020, the claimant attended the second consultation meeting with Mr Wallace and Ms Member. The claimant was not accompanied, but had the notes prepared by Mrs Smith [78]. At the outset of the meeting, Mr Wallace answered each of the claimant's 7 questions from his emails dated 6 and 17 July 2020. In answer to the claimant's question about the organogram, Mr Wallace stated:

"IW - I informed you that there was a proposed organogram in place but it wasn't finalise yet, as I still wasn't sure what the numbers in the Warehouse would look like, I explained, as you have mentioned above, those roles, and that the Goods-In staff would report to the Goods In & Stock Team Leader, that only leaving the Warehouse Operatives reporting into the Team leader."

36. In answer to the claimant's question about the 9 WO, Mr Wallace stated:

"IW - The business looked at ways of reducing the possibility of making people redundant, although there was no need for people to be on a Tuesday-Saturday shift, there was a need for Warehouse Operatives working on the rotating shift pattern, so rather than go down the redundancy route, which would have a financial impact on the business, and we didn't have to go that way, we opted to change the shifts, safe guarding these people. This was not offered to you, as the complete Shift Manager's structure was put at risk, it wouldn't be fair to make another person, employed as a Warehouse Operative, redundant just to make way for the Shift Managers." [83]

37. Mr Wallace, as confirmed in cross-examination, did not know what the bumping procedure was and never put his mind to the possibility of bumping i.e. replacing a WO with a shift manager.

38. On answering all of the claimant's questions, Mr Wallace asked if he had anything to say at this point and the claimant said no. The claimant was not offered and did not request a break to consider the answers he had been given. Mr Wallace, having answered all the questions, proceeded directly to read from a pre-prepared script stating that the claimant was being made redundant. At the end, the claimant was asked, more than once, if he had any questions. The claimant, who having just been informed that he was being made redundant was concerned for his young family and in a state of shock, did not have any questions.

39. On 30 July 2020, the respondent wrote to the claimant confirming his dismissal by reason of redundancy. The claimant was advised that the respondent had explored suitable alternative employment, but this had not been successful. The claimant was told that the respondent would continue to monitor vacancies during his notice period and was provided with support services via an Employee Assistance Programme from Care First. The letter confirmed that the claimant's last date of employment, allowing for his notice period, would be 31 August 2020 and that he would receive a redundancy payment of £3,069.24. Also, the claimant was informed of his right to appeal [85-86.]

40. On 4 August 2020, the claimant appealed against his dismissal. He contended that a fair redundancy process was not followed. Specifically, he alleged that it was not open and collaborative. He raised 7 grounds of appeal which, in the main, repeated the 7 questions asked by email on 6 and 17 July 2020. In particular, he cited the following:

"I had requested to see proposed re-structure(s) / organogram …. None where provided

I feel reasonable effort was not made to find me alternative employment elsewhere and was not told about 9 Warehouse vacancies, nor was I given the opportunity to apply. Told during my final consultation, it would have been unfair to make way for shift managers. …

I was not provided the answers to 7 of the 8 questions raised via email on 6th & 17th June, until my final consultation meeting where I was made redundant. I feel I was not provided with adequate time to ask questions likely to be raised from the answers provided." [138-139].

41. On 6 August 2020, the respondent invited the claimant to an appeal hearing chaired by Mr Hannah on 12 August 2020 at 10am. The claimant was informed both of his right to be accompanied and that the appeal decision would be final [147].

42. On 12 August 2020, the claimant attended the appeal hearing with Mr Hannah and Debbie King as note taker. During the appeal hearing, each of the claimant's grounds of appeal from his email dated 4 August 2020 was addressed. In particular:

42.1. As to the 9 Warehouse vacancies, the claimant said that he *" should be given the opportunity to apply for these roles. … All should be at risk. We should all be allowed to apply for the jobs. I was working those hours. This was not told to me by Ian – didn't reply until final consultation – it seems hiding things told about the one job. All worked for Hannah's - should have been told."* Mr Hannah did not have an answer to these points and agreed to look into it and come back to the claimant.

42.2. As to the lack of adequate time, the claimant confirmed that he did not ask for an extension of time at the second consultation meeting because he was concerned for his children in light of the fact that he and his wife had both been made redundant and they would have no income. He couldn't digest everything. He repeated that his questions should have been answered in advance.

42.3. Also, the claimant asked why the shift managers were being made redundant as opposed to the Team Leaders. Mr Hannah did not know the reason, but identified a fundamental salary difference between the two roles.

43. On 13 August 2020, Mr Hannah wrote to the claimant upholding the redundancy dismissal [163-164.] The letter only cited 3 of the 7 grounds of appeal, the others having been addressed orally at the appeal hearing. Mr Hannah informed the claimant that the reason the Shift Managers had been put at risk of redundancy rather than the Team Leaders was a business decision based on job roles, responsibilities and financial saving. Further, as to the 9 Warehouse vacancies, Mr Hannah state:

"By way of background the Warehouse Operatives were not at risk of redundancy. The process that the Saturday Warehouse Operatives were consulted on related to a change in their shift pattern. The change in shift patterns were made to meet the needs of the business and related to workload. No additional positions were created, neither were there any reductions in positions and we received no resignations. With no vacancies available within this team we were unable to offer you a position as a Warehouse Operative as a reasonable alternative to redundancy."

44. On 31 August 2020, the claimant's employment terminated.

45. On 18 September 2020:

45.1. At 10.55, Ms Member emailed Mr Wallace about the claimant stating:

"Initially we invited 9 warehouse operatives to a redundancy Consultation, within the initial letter we asked if they would consider VR. In the time between sending the consultation and meeting with the individual, the structure changed and we decided to exercise the clause in our contract where we can give 28 days' notice to change any T&Cs. During the consultation we spoke to the individuals, we discussed the VR options if they wanted to take VR, we asked if anyone wanted to resign. None of which volunteered or expressed any interest for either. We therefore couldn't use Bumping as an alternative as we had no position for Dave. Also Bumping is not a legal requirement and we may have considered this if any of the warehouse Ops opted for VR or resigned." [180]

45.2. At 11.02, Mr Wallace emailed Ms Member stating:

"I agree, I don't think Dave has a case, but when you mention the VR for the Warehouse People, this was an option when we first sent out the letters, but was never discussed with them as redundancy was taken off the table, it was just the change to their working hours, so don't think we need to mention this to ACAS ..."

45.3. At 11.07, Ms Member emailed Mr Wallace stating:

"Yes sorry, what I'm trying to say is they were offered the opportunity to apply for VR if they wanted to and although the option was taken away they could still applied for VR as they knew the option was there. Alternatively they could have resigned from their post if they weren't happy with the change of shift patterns. What we are saying is that Bumping would have been considered if the operatives opted for VR or not accepted new terms. NO new positions were created the T&Cs remained the same therefore it wasn't an alternative. Dave did express why he wasn't offered the position and you advised him that we cannot dismiss someone else to make way for him ..."

The Law:

i) Unfair Dismissal:

46. The burden of proof lies on the respondent to show, on the balance of probabilities, what the reason or principal reason for dismissal was and that it was a potentially fair reason under S. 98 (2) ERA.

47. S.98 ERA states:

"(1)In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a)the reason (or, if more than one, the principal reason) for the dismissal, and

(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2)A reason falls within this subsection if it—

...

(c)is that the employee was redundant, or ..."

48. The respondent contends that the reason for dismissal was redundancy, which is a potentially fair reasons within S. 98(2) (b) ERA. Alternatively, the respondent refers to and relies on SOSR which is a category of potentially fair reasons that do not fall within those specified in the Act.

49. The definition of redundancy is set out in S.139 ERA as follows:

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

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(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,

have ceased or diminished or are expected to cease or diminish."

50. **Hatchette v Filipacchi UK Ltd v Johnson (2005) UKEAT/0425/**05 establishes a three-stage process for determining whether an employee has been made redundant under s.139 ERA as follows:

"It is now well established that a three-stage process is involved in determining whether an employee is redundant under ERA 1996, s.139 (1) (b). First, ask if the employee was dismissed. Second, ask if the requirements of the employer's business for employees to carry out work of a particular kind had ceased or diminished or were expected to cease or diminish. Third, ask whether the dismissal of the employee was caused wholly or mainly by the state of affairs."

51. If the respondent shows a potentially fair reason, such as redundancy, for dismissing the claimant then the question of fairness is determined by s.98 (4) ERA which states:

"(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..."

52. Further, when considering the question of fairness, the correct approach is that set out in **Williams v Compair Maxam Limited [1982] IRLR 83.** In summary, employers acting reasonably will give as much warning as possible of impending redundancies to employees, consult them about the decision, the process and alternatives to redundancy, and take reasonable steps to find alternatives such as redeployment to a different job. However, the Tribunal must not put itself in the position of the respondent and decide the fairness of the dismissal based on what it would have done in that situation. It is not for the Tribunal to weigh up the evidence as if it was conducting the process afresh. Instead, its function is to determine whether, in the circumstances, the respondent's decision to dismiss the claimant fell within the band of reasonable responses open to an employer.

53. Section 123(1) ERA provides that:

*"(1)Subject to the provisions of this section and sections 124 [**F1**, 124A and 126] , 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 in so far as that loss is attributable to action taken by the employer.*

(2)The loss referred to in subsection (1) shall be taken to include—

(a)any expenses reasonably incurred by the complainant in consequence of the dismissal, and

(b)subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

(3)The loss referred to in subsection (1) shall be taken to include in respect of any loss of—

(a)any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or

(b)any expectation of such a payment,only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122) in respect of the same dismissal.

(4)In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland...

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

54. Under the principle in **Polkey v A E Dayton Services Ltd 1988 AC 344,** where a Tribunal finds that a dismissal was unfair, it must go on to consider the chance that the employment would have terminated in any event, had there been no unfairness i.e. if a fair dismissal could have taken place in any event – either in the absence of any procedural faults identified or, looking at the broader circumstances, on some other related or unrelated basis. The Tribunal should make a percentage reduction in the compensatory award which reflects the likelihood that the claimant would have been dismissed in any event.

ii) Bumping:

55. In **Byrne v Arvin Menitor LVS (UK) Ltd EAT 239/02/MAA** the EAT established that:

"18. The obligation on an employer to act reasonably is not one which imposes absolute obligations, and certainly no absolute obligation to "bump", or even consider "bumping". The issue is, what a reasonable employer would do in the circumstances, and, in particular, by way of consideration by the Tribunal, whether what the employer did do was within the reasonable band of responses of a reasonable employer?..."

56. In **Dial-a-Phone & Anor v Butt EAT 0286/03**

"16. The Company's first ground of appeal focuses on the second of these findings. Its case is that it was not open to the tribunal to find that the Company should have considered offering Mrs Butt the post occupied by Mr Kemp and making Mr Kemp redundant instead. That was because that had not been argued in the tribunal and Mrs Butt had never said that she wished to be considered for Mr Kemp's post or that she would have been prepared to take it on if it had been offered to her. It is said that the only suggestion which she made about Mr Kemp's post was not that she should be offered it, but that it should be eliminated rather than hers. In these circumstances, there was no

need for the Company to consider offering her Mr Kemp's post, because as the Employment Appeal Tribunal said in Barratt Construction Ltd. v Dalrymple [1984] IRLR 385 at para. 5:

"Without laying down any hard and fast rule we are inclined to think that where an employee at senior management level who is being made redundant is prepared to accept a subordinate position he ought, in fairness, to make this clear at an early stage so as to give his employer an opportunity to see if this is a feasible solution." ...

19. But even if it is correct, we have not been persuaded that the tribunal fell into error. In our view, it was open to the tribunal to conclude that the Company should have considered offering Mr Kemp's post to Mrs Butt and making Mr Kemp redundant instead, even if Mrs Butt had not suggested that herself. We have not overlooked Mr Jones' reliance on the comment in Dalrymple , but we make three points about it. First, the Employment Appeal Tribunal said that it was not laying down a hard and fast rule. Secondly, even if a senior employee should inform his employers (if it be the case) that he is prepared to accept a subordinate post, that does not necessarily mean that the employers will act fairly in not considering the employee for that post simply because the employee did not say that he would be willing to accept it. Thirdly, Mrs Butt was pressing for Mr Kemp's post to be eliminated instead of hers. It would have completely undermined that stance if she had in effect been required to say (before the Company had reached a final decision on whether Mr Kemp's post should go instead of hers) that she would be prepared to take on his post. In our judgment, it was entirely open to the tribunal to find, to use the language of para. 6(j) of its reasons, that Mrs Butt's selection for redundancy was not carried out after a proper and fair consideration of "the pool of employees", i.e. Mr Kemp and her, from whom the selection should have been made following a fair selection process. A fair consideration of which of them had to go once the decision had been made to eliminate her post would have involved considering which of them should be retained to carry out the duties of Mr Kemp's post. The need to consider that was not dependent on Mrs Butt saying that she would be prepared to take his post on."

57. In **Lionel Leventhal Ltd v North EAT 0265/04/MAA** the EAT provided the following guidance

"7. ... But it does not dispose of the second finding made in paragraph 50 of the Tribunal decision, namely that proper consideration was not given to alternative employment within the group for Mr North by making another employee redundant whether voluntarily or compulsorily. As to this we note that this was not a case of there being a vacancy for a subordinate position. Nevertheless it is quite apparent from the case law (and indeed Mr Nawbatt did not suggest the contrary) that it can be unfair not to give consideration to alternative employment within a company for a redundant employee even in the absence of a vacancy: it is a question of fact for the Employment Tribunal....

12. Whether it is unfair or not to dismiss for redundancy without considering alternative and subordinate employment is a matter of fact for the Tribunal. It depends as we see it on factors such as (1) whether or not there is a vacancy (2) how different the two jobs are (3) the difference in remuneration between them (4) the relative length of service of the two employees (5) the qualifications of the employee in danger of redundancy; and no doubt there are other factors which may apply in a particular case. …

13. ...Having found that the Respondents acted unfairly in not taking the initiative on the alternative employment issue, it seems to us that it was essential for them to go on to consider what would have happened had the less well paid position been considered. This is not a matter of speculation. It is a matter of assessment of the possibility that a scrupulously fair procedure would have made no difference.

14. The decision of the House of Lords in Polkey v Dayton [1987] 3 All ER 974 made it clear that the question of whether a fair procedure would have made a difference is not relevant to liability for unfair dismissal, but it is highly relevant to the question of remedy. Sometimes the matter is considered at a single hearing (as was apparently done in the present case), sometimes at one or other part of a split hearing where remedy is deal with separately. But, however it is dealt with, it must (as we see it) be dealt with at some stage, and in taking the course they did in paragraph 51 we regret to say that the Tribunal failed to grapple with the difficulties.

15. In some cases of this type it has been found that the award that which would otherwise have been made in compensation should be reduced by a percentage to take account of the so−called Polkey reduction. In other cases such as Abbotts v Wesson−Glynwed Steels Ltd [1982] IRLR 51 the Tribunal concluded that the result would inevitably have been the same had a proper procedure had been followed, but it would have taken a certain number of weeks, and that therefore the compensatory award should be limited to that number of weeks' loss of earnings."

58. In summary, first there is no strict requirement that an employee must state his willingness to accept a junior and/or lower paid position. In the absence of such a statement, an employer may still act unfairly in failing to consider an employee for such a post. Second, an employer's failure to consider bumping does not, automatically, make the dismissal unfair. Third, it is a question of fact for the Tribunal in light of all the circumstances of the case.

Discussion & Conclusions:

59. Based on the findings of fact above and having considered the relevant law, I conclude as follows.

60. As to the principal reason for the claimant's dismissal and whether it was a potentially fair reason, I am satisfied that the test set out in **Hatchette v Filipacchi UK Ltd v Johnson** is satisfied. First, the claimant was dismissed. Second, the requirements of the respondent's business for employees to carry out work of a particular kind had, as a result of COVID-19, ceased or diminished and/or were expected to cease or diminish. Third, the claimant's dismissal was caused wholly or mainly by that state of affairs. Therefore, I find that the claimant was made redundant under s.139 ERA 1996.

61. Further and for the avoidance of doubt, in the alternative the respondent argued that the claimant's dismissal was for SOSR. In closing submissions, Mr Duffy accepted that the respondent's redundancy argument was it's 'first port of call.' In light of my finding on redundancy, I reject the alternative argument that the claimant's dismissal was for SOSR.

62. As to warning and consultation, I find that by its letters, dated 11, 17 & 18 June 2020, the respondent gave as much warning as possible of impending redundancies to the claimant. However, I find that the respondent failed to genuinely consult with the claimant about the decision, the process and alternatives to redundancy. I note that in its letters, dated 17, 18 and 26 June 2020, the respondent promised to keep the claimant *"informed and involved throughout the process"* and, to that end, set up a line of communication to raise any queries and/or to discuss any aspect of the process. However, I find the claimant sought to engage in a collaborative approach, but was thwarted by the respondent's failure to honour its promise.

    62.1. First, the respondent failed to provide the claimant with an organogram of the proposed re-structure. I accept that any such organogram would have been subject to change, but in the absence of even a provisional organogram the claimant was, as he said at the first consultation, unable to make any suggestions for reducing redundancies because *"I just don't know the structure of the business, I don't know what this will look like so can't really comment."* Further, I don't accept that the verbal organogram provided by Mr Wallace sufficed because, importantly, it did not refer in sufficient detail to the WOs.

62.2. Second, initially the claimant was advised that the respondent was considering making 19 employees redundant. The respondent failed to inform the claimant that the nine WOs, who had been put at risk of redundancy, had, by a change in shift pattern, effectively been removed from the selection pool meaning that there would be 10 compulsory redundancies. The claimant discovered this at his wife's first consultation meeting. This omission was compounded by the subsequent inconsistent explanations provided by Ms Member, Mr Wallace [83] and Mr Hannah [163]. It is further compounded by the respondent's apparent failure to mention the WOs position to ACAS.

62.3. Third, save for one, the respondent failed to answer the questions raised by the claimant on 6 and 17 July 2020 in advance of the second consultation. This is particularly lamentable given that the claimant expressly informed the respondent on 17 July 2020 that *"...having all my questions answered during my second consultation meeting would not provide me with adequate time to ask questions likely to be raised from the answers provided."* The respondent argued that it was better to answer these questions at the. second consultation because the claimant could be accompanied, there was a note taker and it avoided a back-and-forth approach. I do not accept this. I accept the claimant's evidence that it would have been preferable for the respondent to answer in advance because this *"could raise different questions so the last consultation might explore different avenues."* In failing to do so, the respondent, effectively, shut the door on the claimant's enquiries. Further, the claimant was not afforded a break during the second consultation to consider the answers he had been given. I accept that he did not ask for a break during this meeting. I do not consider this material. He had previously asked for his questions to be answered in advance and the respondent had refused. Further, I accept that at the end of the second consultation he was asked, more than once, if he had any questions and he did not raise any. Again, I do not consider this materiel. The claimant had just been informed that he was being made redundant. He was shocked and his thoughts were concerned with the welfare of his family.

62.4. Fourth, as shown by the prepared script Mr Wallace proceeded to read from immediately upon finishing answering the claimant's questions, the decision to make the claimant redundant had been taken before the second consultation and the respondent did not consider seriously or at all any ideas or alternatives put forward by the claimant in his questions, including

the issue of bumping which the claimant had raised on 17 July 2020.

62.5. Fifth, Mr Hannah answered a number of the claimant's grounds of appeal at the appeal hearing, but again failed to afford the claimant a. break to consider the answers given. Also, he failed to address all of the claimant's grounds of appeal during the appeal hearing, three areas were investigated after the appeal hearing. The claimant was provided with the relevant answers in the appeal letter upholding the dismissal. Therefore, the claimant was deprived of the opportunity to consider the answers and raise questions/queries or propose suggestions/ideas before the decision on the appeal was taken.

63. As to whether the respondent adopted reasonable selection decisions, including its approach to a selection pool, I find that it did not because the respondent did not consider bumping. I remind myself that an employer's failure to consider bumping does not, automatically, make the dismissal unfair. However, in all the circumstances of this case I find that the failure to consider bumping does make the dismissal unfair. I refer to and rely on the following:

63.1. The claimant raised, albeit slightly obliquely, the issue of bumping in his email of 17 July 2020. Accordingly, the respondent knew, at least impliedly, that the claimant was prepared to accept a junior and/or lower paid position. In evidence, the claimant confirmed that he would have applied for a WO role and would have taken it if offered.

63.2. The claimant had experience as a WO having started his employment with the respondent in that role.

63.3. All 9 WO roles were filled so there was no vacancy for a WO. However, there was a vacancy for a Goods In & Stock Team Leader which the claimant had been invited to apply for.

63.4. The WO role and the Shift manager role were significantly different as detailed in paragraphs 11 and 13 above. The WO role

was a subordinate role being 3 rungs lower than the Shift Manager role and not a management position.

63.5. The WO role attracted a salary of £18,000-20,000. The Shift Manager role attracted a salary of £26,000 – 27,000.

63.6. The claimant had been employed by the respondent for, approximately, 15 years. All of the WOs had been employed for less than 2 years.

63.7. The claimant was an extremely experienced employee, having worked for the respondent for 15 years, and was qualified to drive FTT, PPT and Reach trucks. He also trained all new warehouse staff to operate such trucks.

63.8. The respondent failed to engage adequately or at all in the consultation process with the claimant's question about bumping.

63.9. In cross-examination, Mr Wallace's confirmed that he did not know what bumping was and, at least impliedly, that he had not considered it.

63.10. In cross-examination, Mr Hannah confirmed that he, the Managing Director, was not involved in considering whether or not to apply bumping.

63.11. There is no contemporaneous evidence showing that the respondent considered bumping.

64. In all the circumstances, I find that the claimant's selection for redundancy was not carried out after a proper and fair consideration of the 'pool of employees' from whom the selection should have been made following a fair selection process. A fair consideration would have included, at least, considering bumping.

65. In light of my conclusions on bumping, I find that the respondent failed to take reasonable steps to find the claimant suitable alternative employment. For the avoidance of doubt, however, I find that the role of Goods In & Stock Team Leader was suitable alternative employment as the claimant had all the core and desirable criteria. This role was close in salary and status to the claimant's existing role. I do not accept that the claimant's speculation that Mr Paul Smith, who had previously undertaken the role, would get the job made the role unsuitable. Further, I reject the Claimant's contention that there were other available roles, namely an Assistant Warehouse Manager role and / or a Maintenance role, which he could have been and was not offered.

66. Therefore, the claimant's claim for unfair dismissal succeeds. However, the claimant's basic award is extinguished by the statutory redundancy payment of £3,069.24; s.122 (4) (a) ERA.

67. As to contributory conduct and/or mitigation of loss, the claimant had a duty to take reasonable steps to mitigate his loss. I find that the claimant's failure to apply for the Goods In & Stock Team Leader role is a factor to be taken into account to reduce any compensatory award on the grounds of contributory fault; **Fisher v Hoopoe Finance Ltd UKEAT/0043/05,** and/or failure to mitigate his loss. This was a role, being a management role with only a slight reduction in salary, that the claimant could and should have applied for. He had no good reason for failing to apply. Also, it is now known that only two employees applied, being Mr. Colin Eadie, a Shift Manager like the claimant, and Kevin from telesales. Mr. Eadie was successful in his application. In these circumstances, had the claimant applied he would have had a good chance of obtaining the role. This conclusion is based on the fact that he would have had the same chance as Mr Eadie, both being former Shift Managers, but a greater chance than Kevin whose previous experience was in telesales. I assess the claimant's and Mr Eadie's chance of obtaining the role as 40% each and Kevin's as 20%. Accordingly, I find that the claimant's compensatory award for unfair dismissal is reduced by 40% for the claimant's contributory conduct and/or failure to mitigate his loss.

68. As to **Polkey**, I must look at what is just and equitable bearing in mind the 40% reduction for contributory conduct and/or failure to mitigate his loss. I find that the claimant's compensatory award should be reduced by 20% in accordance with the principles in **Polkey v A E Dayton Services Ltd** for the following reasons:

68.1. As to the failure to adequately consult the claimant, I note that the claimant, having had time to consider the answers provided at the second consultation, did not raise any new questions on appeal, but repeated the original questions. Therefore, it is far from certain that having been afforded time to consider the three answers provided in his appeal letter the claimant would have raised any new questions.

68.2. As to the issue of bumping, it is not certain that having considered bumping the respondent would have elected to bump. In particular, as Mr Hannah stated in evidence if bumping had been pursued the respondent was 'at risk of bumping half the staff.' I understood this to mean that there was a risk that a cascade of bumping redundancies would ensue which I find may have disproportionately affected the most junior employees. Also, I note that bumping would involve uncertainty and delay. Finally, there is no guarantee that had bumping been applied the claimant would have successfully obtained a position.

69. As redundancy was the reason for dismissal, the ACAS Code of Practice on Discipline and Grievance does not apply to the claimant's unfair dismissal claim and there is no uplift for unreasonable failure to comply with its provisions.

70. In light of my decision, a remedy hearing will be listed and a notice of hearing and case management directions will be sent in due course.

Employment Judge Newstead Taylor

Date: 22 April 2021

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

23 April 2021

FOR THE TRIBUNAL OFFICE

ANNEX A

Agreed List of Issues

1. What was the reason or principal reason for the claimant's dismissal and was it a potentially fair one?

    1.1. The claimant contends that the reason was redundancy or some other substantial reason ("SOSR.").

2. If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will usually decide, in particular, whether:

    2.1. The respondent adequately warned and consulted the claimant;
    2.2. The respondent adopted reasonable selection decisions, including its approach to a selection pool;
    2.3. The respondent took reasonable steps to find the claimant suitable alternative employment;
    2.4. Dismissal was within the range of reasonable responses.

3. If the reason was SOSR, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

4. If the dismissal was unfair did the claimant cause or contribute to the dismissal by any blameworthy or culpable conduct and, if so, to what extent and/ or did he mitigate his loss?

5. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any award to reflect the possibility that the claimant would still have been dismissed in any event had a fair and reasonable procedure been followed?