Case No: 2602083/2016

EMPLOYMENT TRIBUNALS

Claimant: **Mr J Nattrass**

Respondent: **Domestic and General Limited**

Heard at: **Nottingham**

On: **Wednesday 17 May 2017**

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

Representation: **Claimant – Mr M Game (Solicitor)**
Respondent - Miss M Tutin (Counsel)

RESERVED JUDGMENT

1. The Claimant was unfairly dismissed. His complaint of unfair dismissal is therefore well-founded.
2. The matter will now be listed for a further hearing to consider the question of remedy.

REASONS

Complaints

1. The Claimant confirmed that he pursues only a complaint of unfair dismissal. He does not pursue complaints of breach of contract, unauthorised deductions from wages or age discrimination, nor a claim for a statutory redundancy payment.

Issues

2. In essence the Claimant was dismissed by the Respondent because he did not agree to sign new terms and conditions of employment. It was agreed with the parties at the outset of the Hearing that this was therefore a complaint of ordinary rather than constructive unfair dismissal and that accordingly the issues to be

decided were as follows, the parties agreeing that this Hearing should be concerned only with the question of liability:

2.1 Has the Respondent shown the reason for dismissal?

2.2 Was the reason for dismissal a potentially fair one? The Respondent relies on section 98(1)(b) Employment Rights Act 1996 ("ERA") – some other substantial reason ("SOSR").

2.3 Was dismissal reasonable in all the circumstances as determined by section 98(4) ERA? As EJ Hutchinson stated in his note of the Telephone Preliminary Hearing on 5 April 2017, this included consideration of the procedure followed by the Respondent, the soundness of the business reason for seeking to make the changes to the Claimant's contract, the impact of those changes on the Claimant, the consideration of alternatives to dismissal and whether dismissal was in the range of reasonable responses of a reasonable employer.

Facts

3. The parties produced an agreed bundle of just under 200 pages. I made clear that I had only read the pleadings and associated Tribunal papers. In a short adjournment, I read the Claimant's original contract of employment, the amended contract the Respondent wanted him to sign, details of a presentation given by the Respondent about the changes in February 2016 and witness statements for the Claimant and for Tristan Churcher, a Contact Centre Manager for the Respondent, both of whom also gave oral evidence. I also attempted to read a manuscript note of a meeting between the Claimant and Mr Churcher on 29 June 2016 (see further below) but was unable to do so. The parties agreed to produce within 7 days of this Hearing an agreed typed version of those notes. They did so and I have read them. The only other documents I have read are those specifically referred to in the written statements or oral evidence. Having considered all of this material, I make the findings of fact which now follow. Page numbers refer to the agreed bundle.

4. The Respondent is a large provider of insurance protection for consumer domestic appliances. It employs over 2,000 staff. There is no recognised trade union. The Claimant was employed in the Respondent's Nottingham contact centre, where around 900 staff are based, from 18 March 2002 until 20 September 2016. He was employed as a customer service advisor, or contact centre agent, which essentially involved making sales and providing advice to the Respondent's customers. The Respondent's contact centres, including that in Nottingham, operate 365 days a year, so as to maximise availability to and convenience for customers.

5. This case concerns the Respondent's intention, announced in February 2016, to change the Claimant's terms and conditions of employment, specifically related to bank holidays, though as it transpired it sought to introduce changes to other terms as well. The contract signed by the Claimant in 2002, at pages 34 to 38, included the following terms:

5.1. At clause 4, "Job Title", it said, "4.1 You are employed as a Customer Service Advisor. //4.2 Your normal duties are detailed on the job description to be discussed with you when you commence work [this was not included in the

bundle]. //In addition to your normal duties you may be required to perform such other duties as are reasonably requested by the Company".

5.2. At clause 5, "Place of Work and Accommodation", it said, "Your principal place of employment is [Talbot Street, Nottingham] or such other place as the Company may reasonably require. You may be required to work at various locations around the country from time to time. If the Company decides to exercise this option it will be done so [sic] in a reasonable manner".

5.3. Clause 7, "Hours of Work", stated "Your normal hours of work are 35 hours a week between the hours of 7.00 am – 11.00 pm, Monday to Sunday. The Call Centre is open 365 days a year. The pattern of work will necessarily vary from time to time but we will give you as much notice as possible (normally 1 month). However due to business requirements it may be necessary to change your hours at short notice, a minimum of 24 hours' notice will be given. //You may also be required to work at such additional times and such additional periods as may reasonably be required for the efficient discharge and proper performance of your duties. You should refer to the Employee Handbook [not included in the bundle] for details of overtime and time off in lieu where it is authorised". The Claimant had enjoyed for 6 or 7 years before his dismissal, since his son was born, an arrangement whereby he was not required to work on Sundays or Tuesdays so that he could take childcare responsibilities on those days. This meant that he worked on Saturdays, to ensure that he remained working full-time hours.

5.4 Clause 8, "Holidays", provided, "8.1. You are entitled, in addition to the normal public holidays, to take 22 working days as holidays in each calendar year and you will be paid your normal basic remuneration during such holidays. After completing 5 years' continuous employment with the Company you will be entitled to a further 3 working days as holiday in each year … //8.3 Holidays must be taken at times convenient to the Company and reasonable notice of proposed holiday dates must be given to the Company".

5.5. Clause 11, "Pension", stated, "The Company operates a non-contributory pension scheme details of which can be obtained from the Group Secretariat." The rest of this clause detailed the age and length of service required for entry into the scheme, both satisfied by the Claimant.

6. The majority of the Respondent's staff in equivalent positions to the Claimant appear not to have been employed on this contract, as new terms were introduced not long after the Claimant was first employed. The staff on the newer terms could be required to work on bank holidays. In practice however, the Respondent covered bank holidays by asking staff to volunteer to work, paying premium rates of pay or giving time off in lieu. Those who didn't work bank holidays automatically had them as annual leave.

7. On 1 February 2016, the Respondent held staff briefings, including at Nottingham, to announce that it would be changing how it arranged bank holiday cover. In essence, no premium rates or time off in lieu would be given in future; it was going to add seven days to employees' annual leave entitlement, with bank holidays to be booked as holiday by staff who wanted to take them; Christmas Day would be an exception. The change was said to affect customer service staff like the Claimant, Team Leaders, and Contact Centre Managers like Mr Churcher.

8. Mr Churcher, who joined the Respondent in September 2015, says there were three reasons why the Respondent wanted to make this change. The first was to ensure the Respondent could provide sufficient cover to meet customer demand during bank holidays. His evidence was that customer calls were not being answered, which of course would not be good for any business. There was a high level of customer complaints and poor customer survey results, although Mr Churcher did not suggest that this was principally a result of problems on bank holidays; he was clear that the problem was much wider than this. Losing calls on bank holidays also led to an excessive call volume in the several days following, so that staff leave had to be restricted on those days as well.

9. The second reason for the change was cost. Based on 12 years of working in other call or contact centres, Mr Churcher says bank holidays were typically a normal working day. He was unable to say what the cost savings for the Respondent have been, although except for Christmas Day no premium payments are now made for bank holiday working. The Claimant's evidence is that the premium rates meant that the Respondent never encountered any difficulty in staffing bank holidays in any event.

10. The third reason, Mr Churcher says, was to give employees greater flexibility to take holidays when they chose. He then added a further allied reason, which was that having different contracts for people working in the same team created some "hostility"; those who were regularly rostered to work on bank holidays sometimes voiced unhappiness about it, particularly when others would vocalise that they were not. The Claimant himself says he heard comments from colleagues about having to work bank holidays. Mr Churcher was not aware of any formal complaints about the matter.

11. In the Claimant's case the presentation about the changes was given by Mr Sean Ross, to 6 or 7 staff in total. Mr Churcher did not give any of the presentations. At pages 39 to 40 is a script which the Claimant agrees Mr Ross read out. It refers to "changes that we are introducing with regards to scheduling bank holidays in the future", highlights the importance of being "able to service our customers at all times when they want to speak to us", and says that the change will be effective from Easter 2016. It goes on to say, "Currently we use volunteers to work bank holidays with enhanced pay or TOIL or a combination of the two to those who work them, with everyone else being on holiday", and then says, "We will be changing this to add 7 days' bank holiday entitlement … to the normal holiday entitlement of 22 or 25 days, and if you want to be off on a bank holiday you will need to book the day off as holiday in the normal way". Christmas Day was to remain as a bank holiday for all staff. As for the reason for the change, in addition to availability to customers, the script states, "This will enable a more effective and efficient scheduling of employees to work on bank holidays and allow more flexibility for employees to allocate their holiday over the holiday year".

12. The script goes on to say, "Individuals who do not book the bank holiday off and whose schedules mean that they are due to work on a bank holiday will be expected to work it and will be paid at a single rate of pay … // We will adopt a fair process to ensure that there is a fair allocation of bank holiday working throughout the year. As a business, we require 30 – 40% of departmental FTE to be working on a bank holiday". Mr Churcher says that this percentage figure was calculated as a best estimate, by the Respondent's scheduling team. He accepted that most staff were not on the same contract as the Claimant and

could therefore be required to work bank holidays already, though as noted the Respondent had operated on the basis that it was optional. Mr Churcher insisted that having some staff who could not be compelled to work on bank holidays impacted the Respondent's overall coverage of customer demand. Specifically, he says that having different employment contracts increased the complexity of scheduling workforce requirements against demand in various parts of the business.

13. At page 41 is a short "Frequently Asked Questions" document, which Mr Ross also read out and which the Claimant was given to take away at the end of the presentation. It makes clear that "if you work on a bank holiday you will be able to take that holiday at another time".

14. Slides for the presentation are at pages 42 to 44, but I accept the Claimant's evidence that the slides were not used. The slides explain that "Currently bank holidays are worked on a voluntary basis and we pay premium overtime for those that work them, or enhanced time off, or a combination of the two". They indicate that this is not the industry norm, and then outline the change that is being introduced and who is covered by it. They go on to state, "Our contracts of employment and handbook stipulate that bank holiday working may be a requirement and a day off in lieu will be given. //Some employees have old contracts of employment which do not cover this. It is a relatively small number of employees and we aim to get individuals' agreement to the change and update contracts accordingly".

15. The Claimant was clear by the end of the presentation as to the key changes the Respondent was introducing. He understood that seven days would be added to his annual leave entitlement, that he would have to book bank holidays off if he wanted leave on those days, and that he would no longer receive premium rates or TOIL if he worked a bank holiday – although apart from Boxing Day 2015 he had not worked bank holidays for a long time. He also understood the reason the Respondent was giving for the changes – more effective and efficient scheduling of employees, and to bring all employees' contracts in line. The Claimant says that there was an opportunity to ask questions at the end of the meeting with Mr Ross, but that Mr Ross was not able to answer them.

16. Mr Churcher's evidence was that he believed the Respondent had decided by 1 February to implement the new bank holiday arrangements and therefore make the contractual changes required. He was unable to say the numbers of staff across the business affected in the same way as the Claimant. In the area he manages, it was two out of around 140 staff. One was the Claimant. The other, a Mr George Atkinson, signed the new contract and has had his bank holiday requests for leave accommodated. Mr Churcher is unaware of anyone else who was dismissed in the same circumstances as the Claimant. The Claimant's evidence was that he believed10 people out of 250 on his floor were on old contracts; he was told by Mr David Hillier (formerly an HR Business Partner) that quite a lot of people across the business were affected in the same way.

17. There is no analysis in the bundle of the improvement in customer call handling since the changed bank holiday arrangements were introduced, though Mr Churcher says that there was an immediate improvement during bank holidays and that call handling overall improved from October 2016 because of other measures taken by the Respondent, namely outsourcing and some new recruitment.

18. On or around 8 February 2016 Mr Hillier handed the Claimant a letter from Alan Warren, then Head of Contact Centres (pages 45 – 46). It began by stating that "from Easter 2016 we will be changing" bank holiday scheduling, and then repeated some of the detail of the presentation from a week before, setting out how the new arrangement would work. It then went on to say, "Your contract of employment requires an amendment to bring it in line with our current contract of employment which already states that working on public holidays may be required". The letter then set out how the "Normal hours of work" clause in the Claimant's contract would read: "(b) You may also be required to work on public holidays. You will be given a day off in lieu for each public holiday on which you are required to work. Your particular working pattern will be set by your manager from time to time. Your manager will let you know if we need to make any changes to this pattern of attendance, for example if we need to make sure that there is sufficient cover … //(c) Your pattern of attendance may change from time to time. We will always give you notice of a change [normally a month, in unforeseen circumstances 24 hours]". The letter concludes with a request that the Claimant sign and return the letter to confirm acceptance. Mr Churcher accepts that the new provisions meant the Claimant could be required to work on bank holidays as the need arose.

19. The Claimant says he asked Mr Hillier what would happen if he did not sign. He says that Mr Hillier's response was that Alan Warren had decided it would mean the Claimant would need to leave. That evidence was unchallenged both in the Response and at the Hearing and so I accept it. The Claimant emailed Mr Hillier after receiving the letter to say that he would not be agreeing the change; Mr Hillier responded to say that the Claimant was thus in line for a consultation meeting.

20. On 8 March 2016 Mr Hillier emailed the Claimant outlining the process the Respondent would now be following. He stated, "**The process *may* work as follows** [his emphasis] – Face to face meetings will be held, during which, we would look to inform employees of the change to their terms and conditions and serve them notice that we will be issuing a new contract of employment based on the changes already outlined … and that their current contract will cease to exist on XXXX (sic) date (this is likely to be 90 days from the start of consultation). // Based on the employee agreeing to the new terms … they would remain in our employment (on the new contract), but based on the employee [not agreeing], their employment would terminate on XXXX (sic) date and they would have effectively resigned … // … if you wish to enter into consultation please let me know … and I can schedule meetings as appropriate for you". The Claimant accepted that he understood his employment would be terminated if he did not agree but did not think that was right or fair.

21. In March 2016 the Claimant lodged a grievance. The parties agreed that it is not necessary for me to consider it except in relation to the Claimant's complaint that his holiday requests were regularly being turned down. He also complained about the contract change. The Claimant alleges that the Respondent delayed progressing the grievance because Heather Duckett (Senior HR Business Partner) wanted him to drop the bank holiday point. It is clear however from her email to him dated 5 May 2016 (pages 60 – 61) that she was simply seeking to deal with the contract issue separately, given its wider implications. The Respondent did not uphold the Claimant's grievance about holiday bookings (point 10 on page 102) on the basis that it did not believe the Claimant had

encountered disproportionate refusal of his requests, and that where they were refused it was to ensure adequate cover. The Claimant did not appeal this point, saying that he did not think it worthwhile and that he was focussed on his other points of grievance.

22. Mr Hillier informed the Claimant that he would not be rostered to work on bank holidays, i.e. under the new arrangements, unless and until he signed the new contract. For at least one of the bank holidays in April and May 2016 he was nevertheless rostered to work. It appears this was a mistake, and when the Claimant informed his Team Leader, it was rectified. Nothing further appears to have happened from March to June to progress the contract change. Mr Churcher agrees that the Claimant spoke to him about the delay which he says was due to the time needed to get the contract wording approved internally.

23. At page 72 is a letter from Mr Churcher to the Claimant dated 22 June 2016. The letter refers to a "proposed" variation to the Claimant's contract and states as the reason the need to make the Respondent "a more attractive strategic partner [i.e. to customers] insofar as it will increase our availability and capacity to take calls during times that are practical and convenient for customers". The letter convened a meeting between the Claimant, his union representative, Mr Churcher and Mr Hillier, on 29 June to discuss "the reasons why we feel it is necessary to make the variation; how it impacts on you as an individual; and the alternatives to making the variation". It then states, "… at the meeting you will be provided with a new contract of employment … and you will be given until 20 September 2016 to sign …". This was said to allow for a "statutory consultation period" of 12 weeks, based on the Claimant's notice entitlement. The letter concluded by stating that if the new contract was not accepted, the Claimant's employment would terminate on 20 September "as we will no longer be bound by the terms of your current contract of employment. You will have no right of appeal".

24. There was a dispute about whether the Claimant received the contract at the meeting or with the letter, as his witness statement (paragraph 19) suggests the latter. In oral evidence, he stated that it was not given until the meeting. Given the clear contents of Mr Churcher's letter, I accept that was the case.

25. The meeting on 29 June lasted over 2 hours. The notes (now typed) are therefore clearly not a verbatim record. Mr Churcher said in evidence that the possible outcomes of the consultation were that the Claimant would sign the new contract (the Respondent wanted him to agree the changes), leave his employment or there would be a further review of the situation to look at flexible working if possible.

26. The Claimant accepts that Mr Churcher explained again what the Respondent's new bank holiday arrangements would be, in the same terms as had been outlined before. The Claimant stated his opposition to working bank holidays and that he was not guaranteed to be given them off, which Mr Churcher confirmed. Mr Churcher did inform the Claimant however, based on information he had obtained from colleagues, that 95% of holiday requests were granted. He was thus seeking to assure the Claimant that in practice it was very likely he could continue to have bank holidays off. At page 146a is a table which shows that in fact approval rates for bank holiday requests in the Claimant's former work area during 2017 have, so far, been between 71% and 87%. It appears Mr Churcher stated that the Claimant would not necessarily be rostered to work

bank holidays, but it seems to me it would be more accurate, as the Claimant says, to say that he would have to book off any bank holiday that he did not wish to work. The notes reference the Claimant stating, "can see child on hours I have".

27. The notes of the meeting also include the following exchange: "Mr Churcher: 'You may not have to work bank holidays, can't guarantee but may not. The payments have been changed. Ninety odd percent agreed to it. //Claimant: I am only here as worked here so long and it's not in my contract, would have gone along with it if not had chance to dispute it. //Mr Churcher: So if not given the chance you would have accepted it? //Claimant: Yeah".

28. The question of flexible working was also mentioned. Mr Churcher said in evidence it was an option to explore, though it was for the Claimant to initiate such a request. The Claimant did not see how he could fit full time hours into a working pattern that would give him Sundays, Mondays and Tuesdays as non-working days, and therefore felt that he would have to reduce his hours and his pay if he were to suggest flexible working. Mr Churcher accepts that flexible working could not be guaranteed, as it would depend on the needs of the business. The Claimant in turn accepts he could have made a formal request to change how his 35 hours were configured, perhaps working some additional hours on Wednesdays, but chose to stay on the hours he had already arranged. The meeting notes record the Claimant saying he could not afford to reduce his hours. There is no recorded reply from Mr Churcher.

29. No other alternative suggestions were made to the Claimant – as Mr Churcher put it in evidence, there was no long-term alternative to the contract change if the Respondent was to treat all staff fairly; the aim was to have one contract in each area, and the only variation would be for those who had flexible working arrangements. As he said in the meeting, the option of the contract not changing "would be declined". The notes state that if the Claimant could come up with another suggestion – other than signing up, leaving or flexible working – Mr Churcher would listen. Near the end of the notes it was confirmed by Mr Churcher that if the Claimant did not sign up by 20 September his employment would terminate.

30. The new contract given to the Claimant at the meeting on 29 June included contract changes other than that related to bank holidays which were also of concern to the Claimant when he read them:

30.1. Under the heading "Job title", it states, "(a) Your job title is Contact Centre Agent. //(b) The enclosed job description [not in the bundle] outlines your normal duties … //(c) The company operates a policy of job flexibility. You may be required to carry out additional or other work which is not within the scope of your normal responsibilities. //(d) Contact centre roles are generic, and you may be asked to move between different areas of the contact centre and/or work for different clients".

30.2. Under "Location", it states, "(a) Your normal place of work is [Talbot Street]. The company reserves the right to change your place of work, either temporarily or permanently, within a 10-mile radius. //(b) You may be required to travel and work within the United Kingdom and/or overseas to carry out the duties of your employment. //(c) We reserve the right to second you on reasonable notice for any length of time to any other UK location".

30.3. In relation to "Retirement and pension" it stated, "(b) You can join the company's Group Personal Pension Scheme [subject to its terms and conditions and the Respondent's] "right to amend, replace or discontinue the scheme". //(c) You can start making voluntary contributions with effect from your start date. //(d) … the company will match your contributions of between 3 – 5%".

30.4. As to hours of work, these were confirmed as 35 per week, plus additional hours required to meet business needs. It then set out the Claimant's normal hours of attendance, confirming that he was not expected to work on Tuesdays or Sundays, would work 8 hours "fully flexed between 8.00 am and 8.00 pm" on each of Monday, Thursday and Friday, 1.00 to 8.00 pm on Wednesday, and 4 hours between 9.00 am and 3.00 pm on Saturday. The Claimant thus accepts that his working days stayed as they had been for some years.

30.5. As to holiday: "Your annual paid holiday entitlement is 33 days inclusive of the usual eight bank and public holidays … [which] are normal working days (except for Christmas Day). If you wish to take annual leave on [these days] you will be required to request annual leave in the normal way and, if your request is approved, the day will be deducted from your … entitlement … In the rare event that we do not get enough volunteers you may be required to work on Christmas Day …".

31. Mr Churcher was unable to say in evidence why the job title changed, though he says there was no intended change in duties. The change in the "Location" clause could have been, he says, because the Respondent was looking at another possible call centre in the Nottingham area. He does not recall discussing these matters with the Claimant between 29 June and the Claimant's departure date. He was unable to say why the pension clause was different but informed the Claimant that he could speak to the Respondent's pensions experts. He also said in evidence that he did not believe that the Claimant's shift pattern would change (that is consistent with the contract wording stated above) but added that this too would have had to be addressed at some point.

32. The Claimant says that he took away the contract he had been handed at the meeting, and read it at home for the first time. As indicated, I accept that evidence. He therefore read about the other changes for the first time at that point. The notes of 29 June record Mr Hillier saying, "Happy for you to read contract and come back with any questions you may have". The Claimant says that he subsequently emailed questions to Mr Hillier about the other changes. As Miss Tutin pointed out these emails are not in the bundle, but given Mr Hillier's invitation, given that the Claimant had not seen the other changes until after the 29 June meeting, and given his obvious concern and willingness to raise matters he was unhappy about, I accept the general point that the Claimant did raise concerns about these matters. I also accept, as inherently probable and unchallenged by the Respondent, that when the Claimant subsequently – on advice from ACAS – asked Mr Hillier if the Respondent was complying with employment rights legislation, Mr Hillier ended the dialogue and suggested the Claimant take legal advice.

33. The Claimant says he felt under pressure to sign the new contract – he says that during the period when the contract change was a live issue he was put on a performance improvement plan, encountered problems with his equipment and so on. Mr Churcher says he does not recall the Claimant saying this to him. The

Respondent asserts that the Claimant refused to sign the new contract because he was being challenged about his performance; the Claimant denies this was the case.

34. A very brief further meeting between the Claimant and Mr Churcher took place on 14 September, at which the Claimant was handed a further copy of the new contract, Mr Churcher stating that not a lot had changed, that they would like the Claimant to stay, but that he should make sure he said goodbye if he decided not to. It was followed by an email from Mr Hillier (page 122), reminding the Claimant that if he did not sign the contract by 20 September his employment would terminate. The Claimant emailed Mr Churcher the following day (page 122a) to say "I'll not be signing the new contract".

35. Mr Churcher agrees that the emphasis of his explanations of the changed holiday arrangements was the need to "optimise the customer journey". He summarised his recollection of the Claimant's objections as being associated with childcare responsibilities but also the principle of having to change his contract at all. What the Claimant said in evidence is that he had previously tailored his annual leave around bank holidays, not being able to go on holiday during the summer months. When there was a bank holiday Monday, he would therefore take off a Saturday, which because Sunday and Tuesday were non-working days meant that he had four consecutive days to spend with his son, who is not normally resident with him. The Claimant accepts that his annual leave entitlement was to remain unchanged but says that his concern was that he could no longer guarantee being able to take off bank holiday Mondays. He was also concerned that he would not be assured of taking Saturdays off either during a bank holiday weekend because he had encountered rejections of holiday requests, hence his grievance. His evidence was that all bank holidays, whether Mondays or not, were important to him, adding that he would also be losing the opportunity of premium earnings on bank holidays, though as noted it had been some considerable time since he had worked any, with one exception.

36. The Claimant says that a Mr George Simak told him he was not required to sign the contract because he was shortly to retire; Mr Churcher says however, and the Claimant appeared to accept, that Mr Simak was engaged on a different contract to the Claimant. Mr Simak's contract is at pages 46a to 46h. Although it is a different form of contract to the Claimant's, clause 8.1 relating to holidays is in fact identical to the Claimant's. Another employee, Mr Kevin Gallagher, was not required to sign the new contract because, Mr Churcher says, he was on long-term sick leave, and left the Respondent before a discussion about his contract could take place on his return to work. The Claimant also refers to a Ms Elaine Blake and her team. Mr Churcher says, and the Claimant accepts, that they were a complaints team and therefore in a different role.

37. The Claimant was not given an opportunity to appeal the decision to terminate his employment, as per Mr Churcher's letter of 22 June. Mr Churcher says the consultation would have covered it.

38. The bundle included (pages 147 – 148b) advertisements for new positions with the Respondent similar to that held by the Claimant, which refer to "30 days holiday allowance (22 days plus bank holidays)". When Mr Game suggested that this showed the change in arrangements had not been maintained by the Respondent, Mr Churcher responded that he was sure that when discussions

took place with any candidate about the role, the actual contractual position would be made clear.

The law

39. Section 98 ERA says, "(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 … (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".

40. As the section makes plain therefore it is for the Respondent to show the reason, or principal reason, for dismissal. The question to be considered is what reason the Respondent relied upon. The case of **Abernethy v Mott, Hay and Anderson [1974] IRLR 2013** is long-established authority to the effect that the reason for dismissal is "a set of facts known to the employer or as it may be of beliefs held by him, which cause him to dismiss the employee". The reason or principal for dismissal is therefore to be determined by assessing the facts and beliefs which operated on the Respondent's (in this case Mr Churcher's) mind, leading him to act as he did in effecting the Claimant's dismissal.

41. If the Respondent shows the reason and establishes that it was a reason falling within section 98(1)(b), the Tribunal must then go on to consider Section 98(4) ERA in order to determine whether the dismissal was fair. The burden is no longer on the Respondent at this point. Rather, having regard to the reason or principal reason for dismissal, whether the dismissal is fair or unfair requires an overall assessment by the Tribunal, and depends on whether in the circumstances, including the size and administrative resources of the business, the Respondent acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the Claimant. This is something which is to be determined in accordance with equity and the substantial merits of the case. This overall assessment is in part concerned with the steps taken by the Respondent to effect dismissal, and it is well-established that the assessment of fairness extends to and includes any appeal procedure – **West Midlands Co-operative Society Ltd v Tipton [1986] IRLR 112,** which concerned a contractual appeal procedure but I do not regard the principle it sets out as limited only to contractual procedures. It is equally well-established that in assessing fairness, it is not for the Tribunal to substitute its own view for that of the employer. What must be assessed is whether what the employer did was within the band of reasonable responses of a reasonable employer.

42. Both representatives referred in their written submissions to authorities on SOSR dismissals, both on the question of the reason for dismissal and on the question of the reasonableness of dismissal under section 98(4). I will deal with

them only briefly. In **Hollister v The National Farmers' Union [1979] IRLR 238,** Denning MR made clear that dismissing in the context of a business reorganisation where an employee refused to accept new terms could be SOSR even if not making the change would not bring the business to a standstill. It doesn't have to be as severe as that. What is required is a "sound, good business reason for the reorganisation …it must depend in all the circumstances on whether the reorganisation was such that the only sensible thing to do was to terminate the employee's contract unless he would agree to a new arrangement". Denning MR went on to say that consultation with the employee is not an absolute requirement of section 98(4). The question is the statutory one, namely what is fair and reasonable.

43. In **Catamaran Cruisers Ltd v Williams and others [1994] IRLR 386,** as Miss Tutin pointed out, the Employment Appeal Tribunal held that an employer is not restricted to offering less favourable terms to staff only when the survival of the business depends on it. What an employment tribunal must do, it was said, is satisfy itself that contract changes are not sought for arbitrary reasons. The EAT also quoted with approval an earlier decision (**Richmond Precision Engineering Ltd v Pearce [1985] IRLR 179**) that weighing the advantages to the employer against the disadvantages to the employee is only one part of the section 98(4) assessment. Disadvantages to the employee don't automatically mean that the employer has acted unreasonably in dismissing. An employee may act reasonably in refusing a change, and still the employer might act reasonably in dismissing in the face of that refusal given the benefits that will accrue to it in insisting on the changes; it is a case of balancing the two. It will also be relevant to take into account the numbers of other employees who accepted the change.

44. Miss Tutin also referred to the EAT's decision in **Kerry Foods Ltd v Lynch [2005] IRLR 680.** Peter Clark J referred to the decision in **Abernethy** and said, in reference to an earlier Court of Appeal decision in **Kent County Council v Gilham [1985] IRLR 18** that if on the face of it the employer's reason could justify the dismissal, then it passes as a substantial reason and the enquiry moves on to section 98(4). On the question of establishing the reason for dismissal, Peter Clark J described this as a "low hurdle" and said that it was not necessary for an employer to show the "quantum of improvement achieved"; that was to put the onus on the employer too high. On the section 98(4) question, I accept Miss Tutin's submission that Tribunals should not substitute their own opinion for that of the employer on the question of whether a contract change is advantageous to the business. As Langstaff J put it in another EAT decision referred to by Miss Tutin, **Garside and Laycock Ltd v Booth [2011] IRLR 735,** the focus of the Tribunal's attention is required to be on the reasoning and reasonableness of the employer. He later added that of course to identify a reason falling within section 98(1)(b) does not answer the question whether it is reasonable or unreasonable to dismiss the employee for that reason. It is important to keep those two issues separate.

Analysis

45. Has the Respondent shown the reason for dismissal? This is not an onerous burden on the Respondent, and I conclude that the reason has been shown. Mr Churcher was the individual who effected dismissal, by his letter dated 22 June 2016 at page 72. The crucial wording was, "I must remind you that should you decide that you do not wish to accept this new contract [which was handed to the

Claimant at the meeting on 29 June 2016], your employment with the Company will terminate on 20 September 2016". The reason for the dismissal was therefore the Claimant's refusal to accept the new contract, it being clear from Mr Churcher's evidence – both written and oral – that what he particularly had in mind was the refusal to sign up to new terms regarding bank holidays. There was nothing in the evidence before me that suggested anything other than this as the reason for dismissal.

46. As the Respondent has not contended that this was a reason falling within section 98(2), has it shown that it was some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held? This too, the case law says, is a low hurdle for the Respondent to surmount. The Respondent has not contended that the changes in the Claimant's contract were essential to the future of the business, but they don't have to be. I have set out in detail Mr Churcher's explanation of why the Respondent wanted to effect the changes to the Claimant's contract as to bank holidays. They can be summarised as: first, the need to ensure proper cover to meet customer demand on bank holidays (including the complexities of seeking to schedule employee cover when staff are on different contracts); secondly, reduction of cost by removing premium rates for bank holiday working; and thirdly, the need to ensure fairness in respect of allocation of bank holiday working between employees. These were the principal reasons operating on Mr Churcher's mind within the broader reason of the Claimant's non-acceptance of the contract. Were they sound business reasons for dismissing the Claimant when he refused to agree to the changes to his contract?

47. In my judgment they were certainly not the most pressing grounds for dismissing the Claimant, given in relation to the first reason that the Respondent already appears to have had sufficient numbers of employees whom it could require to work on bank holidays, and given in relation to the second that the Claimant had not worked on a bank holiday for some considerable time, with one exception. Nevertheless, they were not arbitrary reasons. I note Mr Game's submission that the reason for dismissal could not fall within the SOSR category when the Respondent has itself argued that the contractual changes it required were not substantial. What the Respondent argues however is that the reasons for the changes were good, sound and necessary for the business, but the impact of the changes would not in practice have been significant for the Claimant. I see no inconsistency in that. Whilst the Respondent's evidence in relation to the improvement in bank holiday call handling and cost reduction was sparse, it does not have to show a particular "quantum of improvement", and I accept its case that it wanted to reduce the complexity of matching its workforce to likely customer demand during bank holidays. I also accept that it was entitled to seek to reduce its costs by bringing its bank holiday practices in line with what appears to be standard call centre practice – whilst the Claimant had not worked more than one bank holiday for several years, that would not necessarily have been the case in future.

48. That leads to the third aspect of the Respondent's business reason, namely consistency of arrangements across all employees. I accept that too as a sound business reason. This was not harmonisation for mere convenience. Both parties gave evidence of some discontent amongst the workforce on this issue. The Respondent was entitled to seek to address it. Whilst the job adverts at pages 147 and 148 are somewhat misleading, I accept the Respondent's case

that they are only adverts and not necessarily indicative of the contractual position that would follow.

49. For these reasons, I find that the Respondent has established that the reason for dismissal was substantial and not arbitrary, and was of a kind (the need to effect contractual change) such as to justify dismissal of an employee holding the position which the Claimant held. It is an entirely separate question, as the authorities point out, whether dismissal for that reason was fair and reasonable under section 98(4).

50. Miss Tutin argued that it was. She argued that the Claimant had ample warning of the changes (1 February to 20 September); they were explained and his agreement was sought; there was a 12 week consultation period (29 June to 20 September) including a meeting on 29 June to discuss his objections; the Claimant understood that his employment would terminate if he did not agree; the practical impact of the changes on the Claimant was slight; the Claimant was unable to clearly articulate why he objected; the Respondent suggested he could make a flexible working request; and no-one else refused to agree the changes.

51. Beginning with the substance of the changes to the Claimant's holiday entitlement, Miss Tutin stated in her written submissions that the Claimant was the only employee to refuse to agree. She conceded however in oral submissions that the scope of the employees affected is uncertain. Although Mr Churcher was not aware of any other dismissal for this reason, that does not satisfactorily address the issue of how many of the Claimant's colleagues actually agreed to the changes, because the Respondent was simply unable to provide that information to this Hearing, and so it is unclear for example whether there were employees who left voluntarily during the period from when the changes were announced to their implementation because they didn't agree with them. The position of Mr Simak's contract is also confusing for the reasons I have explained. For these reasons, the question of who else agreed to the arrangements does not seem to me to assist in the assessment of section 98(4) reasonableness.

52. As for the Claimant's personal position in relation to the change in holiday arrangements, I do not accept Miss Tutin's submission that he had no reasonable objection. I have noted the exchange at the 29 June meeting which the Respondent suggests means the Claimant objected to the changes basically for the sake of it. The Claimant denies that, and it is evident that he made clear in the meeting his in-principle objection to working bank holidays – as he said, it was not in his contract. It may be that the Claimant's objection was not as clearly articulated to the Respondent whilst he was still employed as it was in these proceedings, although clearly the minutes of the 29 June meeting were by no means a verbatim or comprehensive note of a two-hour discussion, there is a (somewhat unclear) reference to childcare in the meeting notes, and Mr Churcher himself recalls that the Claimant's concerns about the changes related at least in part to childcare. Given how important bank holidays were to the Claimant in respect of time with his young son, in my judgment the concern about having to secure two days (Saturdays and Mondays) of leave rather than one day (Saturday) in order to ensure a run of four days away from work over a bank holiday weekend was a legitimate and reasonable concern. In fact, simply not wanting to change to a situation where he might have to work bank holidays would not have been unreasonable on his part. It follows that I reject the suggestion that the Claimant did not sign the new contract because he was being

challenged about his performance. All of that said, it is clear from the authorities that the reasonableness of the Claimant's position does not of itself mean that the Respondent acted unreasonably in insisting on pushing through what it wanted.

53. It is undisputed that the changes were explained and understood, that the Respondent wanted the Claimant to agree to them, and that the Claimant understood the consequences if he did not. It is equally clear on the evidence however that the Respondent had finally decided from the outset that the contractual changes would be made and that the consequence of failure to agree would be the Claimant's dismissal. I refer in particular to:

53.1. the content of the briefing documents from 1 February – although in the slides (which were not utilised in the presentation to the Claimant) there is a reference to aiming to get employees' agreement to the changes, they are otherwise in mandatory language including statements such as "the changes that we are introducing" and that the changes would be effective from Easter;

53.2. Mr Churcher's evidence that the Respondent had decided to implement the new bank holiday arrangements and the resulting contractual changes by 1 February;

53.3. David Hillier's comment to the Claimant after handing him the letter from Alan Warren on or around 8 February, to the effect that Mr Warren had decided that anyone who did not agree would have to leave; and

53.4. Mr Hillier's email of 8 March, which although it emphasised that it set out how the process may work in fact set out how it actually worked.

54. It is even more clear that the Respondent had made up its mind by the time it came to start what it described as a consultation period on 29 June, because a week before that meeting the Claimant was given the letter of 22 June from Mr Churcher, which although it refers to a "proposed" variation in the contract, in fact gave notice of termination (albeit of course conditional on the Claimant not agreeing the changes).

55. The evidence summarised above demonstrates that the Respondent closed its mind to hearing from the Claimant an alternative to his contract being changed in relation to bank holiday working. As Mr Game put it in his written submissions, it had a "pre-determined mindset". It is not a necessary requirement of reasonableness that an employer accommodate an employee's position, but a reasonable employer – particularly a large employer such as this Respondent – would, when acting reasonably, at least countenance the possibility that consultation, on any objective understanding of that word, could lead to a different outcome to that which it preferred. That is what the Respondent unreasonably failed to do in this case. Miss Tutin commented during submissions that notice could have been rescinded, but there is no evidence at all that this was even remotely contemplated whatever the "consultation" might have revealed. The notes of the 29 June meeting for example show the clear opposite.

56. It is correct that Mr Churcher suggested at the meeting of 29 June that the Claimant might make a flexible working request. Miss Tutin's position was that the Claimant did not engage with that suggestion nor suggest any further

alternative. In assessing whether the Respondent acted reasonably in dismissing the Claimant, the focus is of course on the actions of the Respondent. Whilst that does not mean that an employee is thereby free to sit idly by and refuse to engage in discussions about alternatives, it does mean that when deciding to dismiss someone who had been employed for over 14 years the onus is on the employer, if it is to act reasonably, to at least consider and if possible propose alternatives to dismissal to the extent that they are available. In this case, Mr Churcher's suggestion appears to have been that the Claimant could reduce his hours, but as the Claimant made clear that was something he couldn't afford. It was far from clear how a request for flexible working – if indeed it were granted – would address the Claimant's concerns about bank holidays unless he was not to be rostered for Saturdays or Mondays, in which case it would have been very difficult for him to maintain full-time working hours. The Respondent did seek to assuage the Claimant's concerns by saying that he may well be able to take bank holidays off in any event. Essentially however, the Respondent left the Claimant to work out and initiate the possible alternatives to being dismissed. As Mr Game put it, the Respondent never set out for the Claimant that he could work flexibly and still work full-time. All of that is of one piece in my judgment with the Respondent's mind being made up from the start, and again particularly for a large employer this was not within the band of reasonable responses to the circumstances.

57. The Claimant was eventually handed a revised contract for signature on 29 June, a week after he had been given notice of termination by way of Mr Churcher's letter and almost 5 months after the change in bank holiday arrangements was announced. On reading that contract for the first time later that day, the Claimant identified other changes to his terms and conditions of employment that were legitimately of concern to him. Whilst the change in job title was not material, in relation to workplace the Respondent was reserving considerably more scope to change it, and in relation to pensions it appeared that the Claimant was being moved from a non-contributory arrangement to a contributory one. The Respondent was unable to lead any evidence at this Hearing as to why those changes were necessary and included in the contract, apart from Mr Churcher's guess that the Respondent might be looking to open a new contact centre. Nor was it able to lead any evidence as to what assurances it sought to give to the Claimant, if any, in this regard, apart from Mr Churcher's suggestion that the Claimant could speak to someone within the Respondent who knew about pensions.

58. The Respondent therefore gave notice of termination of employment at a point where such changes had not even been notified – let alone explained – to the Claimant, and there was no evidence before me as to Mr Hillier's exchanges with the Claimant to demonstrate that any assurance or explanation was given. It is clear from the 22 June letter that the Claimant was dismissed on 20 September because he did not sign up to the new contract. To dismiss an employee at least in part because he did not sign a contract which contained revised terms that the Respondent is unable to explain, is clearly not the action of a reasonable employer acting reasonably, particularly in relation to a long-serving employee.

59. Finally, there is the fact that the Claimant was not afforded any right of appeal. He was informed in Mr Churcher's letter of 22 June, at the start of the Respondent's consultation period, that he would be dismissed if he did not sign the new contract handed to him on 29 June and that there would be no right of appeal. The Respondent has not offered an explanation of why this was the

case, and whilst I do not say that it is an absolute rule that in all cases failure to offer the right of appeal would render a dismissal unfair, in this case, particularly when one considers that the Respondent is such a large employer, the failure was also outside of the range of reasonable responses of a reasonable employer.

60. For all of these reasons, I conclude that although the Respondent had a fair reason for dismissal, in accordance with equity and assessing the substantial merits of the case it acted unfairly in dismissing the Claimant for that reason. The dismissal was in the respects I have outlined outside of the range of reasonable responses of a reasonable employer. The complaint of unfair dismissal is therefore well-founded and the matter will now be listed for a Remedy Hearing.

Employment Judge Faulkner

Date: 30 May 2017

JUDGMENT SENT TO THE PARTIES ON
9 June 2017
.....
S. Cresswell
.....
FOR THE TRIBUNAL OFFICE