



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

5                                    **Case Numbers: 4111350/2021 and 4110441/2021**

**Hearing remotely on 17-19 and 25 -27 January 2022  
(Multiple Reference Number 4100134)**

10                                   **Deliberations: 4 and 7 February 2022**

**Employment Judge Hoey**

15                                   **Mr S Fisher**

**First claimant  
Represented by:  
Himself**

20                                   **Mr O'Donnell**

**Second claimant  
Represented by:  
Himself**

25                                   **British Gas Services Limited**

**Respondent  
Represented by:  
Mr Nichols  
(Counsel)  
Instructed by  
Messrs Pinsent  
Masons**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The claimants were not unfairly dismissed. The claims are therefore dismissed.

### **REASONS**

1. This case involves 2 separate claimants who both claim that their dismissals were unfair. The claims arise from the same set of facts and their claims were combined.
2. The hearing was conducted remotely via Cloud Video Platform (CVP) with the claimants and the respondent's agent attending the entire hearing, with witnesses attending as necessary, all being able to contribute to the hearing fairly. Breaks were taken during the evidence to ensure the parties were able to put all relevant questions to the witnesses. The Tribunal was satisfied that the hearing had been conducted in a fair and appropriate manner, with the practice direction on remote hearings being followed, such that a decision could be made on the basis of the evidence led. Each of the parties confirmed at the conclusion of the hearing that they considered that they had been given the opportunity to present the evidence they wished to consider and had been able to communicate the issues they wished.

15 **Case management**

3. The parties had worked together to focus the issues in dispute and had provided a statement of agreed facts and a list of issues (which had incorporated the legal tests to assist the claimants).
4. We agreed a timetable for the hearing of evidence and the parties worked together to assist the Tribunal in achieving the overriding objective, in dealing with matters justly and fairly taking account of the issues, cost and proportionality.
5. An amended grounds of resistance had been presented to the Tribunal and in the absence of any objection and given it was in the interest of justice to allow the amendment, the application to allow the grounds of resistance to be amended was granted.

**Issues to be determined**

6. The issues to be determined are as follows:

1. Was the respondent's reason for each of the claimant's dismissal some other substantial reason, namely the failure to accept new terms and conditions (and a potentially fair reason under section 98 of the Employment Rights Act 1996)?
- 5 2. If the respondent proves the reason for the dismissal was a potentially fair reason, were the dismissals fair or unfair in the circumstances, which include the size and administrative resources of the respondent and whether the respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the claimants in all the circumstances  
10 (applying the legal tests in this area)?
7. It was agreed that the hearing would address liability only and if remedy was to be determined that would be dealt with at a separate hearing. If applicable, the Tribunal would consider whether any reduction in compensation should be applied in light of **Polkey** (ie whether a fair dismissal would have occurred  
15 at some point).

### **Evidence**

8. The parties had agreed the productions in this case which were to be found in 4 separate bundles (one in respect of the core issues, one in respect of the collective issues and one for each claimant). During the hearing additional  
20 documents were added by agreement.
9. The Tribunal heard evidence from Ms Micalcuff (group head of people strategy and industrial relations, who dealt with the collective issues), Ms Harrison (head of consultancy services, who managed the individual consultation process), Mr Thomson (performance and growth customer delivery manager,  
25 who gave evidence about the individual issues and the new terms) and each of the claimants. The Tribunal assisted the claimants to ensure witnesses were each asked appropriate questions and that the overriding objective was achieved. The parties worked together to assist the Tribunal in achieving the overriding objective.

## Facts

10. The Tribunal is able to make the following findings of fact which it has done from the evidence submitted to it, both orally and in writing. The Tribunal only makes findings that are necessary to determine the issues before it (and not in relation to all disputes that arose nor in relation to all the evidence led before the Tribunal). The parties had agreed that the majority of the facts were not ultimately in dispute and the factual position as set out by the respondent's agent during the submissions stage (with which the claimants broadly agreed) assisted the Tribunal greatly in this regard.

## 10 Background

11. The respondent is part of Centrica plc which is the international parent company of a number of energy services and solutions companies. The principal activity of the Centrica Group ("the Group") is the supply of electricity and gas to consumers and businesses in the UK and Ireland. It also provides household services, energy solutions and engages in energy trading activities.
12. The respondent is a supplier of UK household energy services and employs field-based engineers, a role each claimant carried out. Both claimants were employed as Technical Engineers in the Service and Repair part of the respondent's business. That business employs just over 8,000 employees and is the largest employing entity within the Group.

## Reason for proposed changes to terms and conditions of employment

13. The claimants' claims arise in the context of a project which made changes to terms and conditions of employment across the Group ("the project"), affecting all of its employees (approximately 20,000 in total). The changes were initially proposed to be agreed by the end of 2020 for implementation in 2021.
14. In the years running up to 2021, the Group faced numerous operational difficulties, including a substantial reduction in market share as a result of

5 competition, a loss of around two million customers, sustained decreases in global commodity prices, slow growth in investments, an increasing pension funding deficit and a regulatory default tariff price cap, resulting in a significant reduction in profitability and cash generation. The COVID-19 pandemic and subsequent economic impact added additional strain. This all culminated in a sustained decline in share price, the business' credit rating being downgraded and in June 2020 Centrica left the FTSE 100 index for the first time since 1986.

- 10 15. Centrica's senior management decided it had to take swift and decisive action to arrest the decline, stabilise the business and put the business in a position to return to growth by 2021. The project was considered the best alternative to further significant headcount reduction given the Group had made a headcount reduction of around 9,000 employees between 2016 and 2020 and was already undertaking an additional redundancy process in respect of its management with approximately 1,000 employees leaving the business in 15 2020. Bonuses and dividends had not been paid.
16. In 2020, there were around 81 different contracts of employment and 10 different collective agreements with over 7,000 variations of terms and conditions in use across the Group. There were also around 30 full-time and 20 more than 400 part-time trade union representatives.

### **Principal aims of and drivers for the project**

17. There were 2 principal aims of the project.
18. Firstly to move all employees onto a modernised set of consistent and updated contracts with less variation to reduce the number of different 25 contracts of employment in use across the Group, and to improve flexibility compared to legacy contracts to make the business fit for the future, competitive and sustainable. It also removed complexity and provided fairness and transparency for all employees across the Group.
19. Secondly to introduce new streamlined collective arrangements and 30 agreements so that the bargaining units reflected the organisation of the

business with effective deployment of representatives, whilst maintaining collective bargaining for the same groups of employees.

20. The business case for change was set out in detail and in advance to the Board. On 8 June 2020, the Board approved the plans to proceed with modernising the terms and conditions of employment, and collective arrangements. The decision was to strive for a successful negotiated outcome.
21. There were 3 drivers that led to the respondent undertaking the project: finance, operations and customer focus. There were sound business reasons requiring the changes to be made given the position in which the respondent found itself.
22. The respondent required to take the steps in question to arrest the financial decline of the Group, to stabilise the Group and aim to put it in a position to return to growth by streamlining and modernising the terms and conditions of employment and collective arrangements and agreements.
23. The Group had faced very significant operational difficulties for some years. These had resulted in a substantial reduction in the business' profitability (specifically, a £430 million decrease in operating profit between December 2017 and December 2019) and a downgrading of its credit rating. Further downgrading could affect the company's ability to buy gas which would have had a devastating impact upon the business.
24. Senior managers were tasked with developing a plan to address these financial and operational challenges. One of the matters which it wished to address was the lack of consistency and fairness in respect of employees' terms and conditions of employment, collective agreements, benefits and policies across all business units and functions which had arisen as a result of legacy constraints. This had resulted in a complicated and disjointed organisation from a people perspective. In addition, even though the size of the workforce had decreased by around 30% from 2016 to 2020, there had

been no corresponding changes to the number of trade union representatives or ways of working.

25. Additional strain was driven by the pandemic and uncertain nature of the economic recovery. In early to mid 2020, it was estimated that the pandemic would impact upon the financial position of the Group by approximately £50 million per month. The business at that stage had a forecast bad debt of £200 million for 2020. This meant that the business had to act and move forward with its proposed changes to the terms and conditions of employment.

26. While a group company had been sold, the operating profits of the Group had not increased and the financial position of the Group was precarious. The sale proceeds had not improved profitability to any appreciable extent.

**Project approved**

27. On 30 April 2020, senior managers presented their proposals setting out the urgent need to change, and the objectives and outcomes of the project, including the expected financial benefits. Senior management agreed that the case for change was overwhelming. That was a reasonable conclusion to reach.

28. On 8 June 2020, the Group Board met to decide whether to approve the project. In documents prepared for the Board, it was noted that decisive action had to be taken to arrest the decline, stabilise the Group and put the business in a position to return to growth in 2021. If the status quo was maintained, the Group would be unable to survive and thrive as a business in the new competitive market, drive needed cultural change across the organisation, or move to effective collective engagement with its trade unions.

29. In short there was a sound business reason to pursue the proposed changes to terms and conditions of employment, which intended to deliver: (1) significant costs savings to the business; (2) increased flexibility and decreased complexity in the contracts of employment, along with simpler collective agreements more effective deployment of trade union representatives; and (3) better focus on customers.

30. These factors remained just as important in December 2020 and March 2021 when the Board met again to decide whether to approve the making of individual offers to those who had not accepted the new contract of employment and the issuance of notices of dismissal together with offers of re-engagement. There were additional factors to consider, including the need to avoid a two-tier system of terms and conditions of employment, and the maintenance of good industrial relations with each of the recognised trade unions.

### **Collective consultation position and process**

31. The respondent recognised 4 trade unions, with the GMB being the largest in respect of the group of staff covered by the claimants. The respondent invested large sums each year to sustain the infrastructure that facilitated collective bargaining. 79% of staff were covered by a collective agreement.

32. The respondent had a long standing and effective relationship with its recognised trade unions.

33. Senior staff within the respondent had indicated, informally, to the recognised trade unions in around October 2019 that there were plans to introduce consistency with regard to terms and conditions. While the other trade unions understood the position and offered to work with the respondent once the detail had been confirmed, the GMB advised the respondent informally that it would not accept any changes to the current terms and conditions that its members enjoyed.

### **The project commences**

34. On 11 June 2020, Centrica announced its intention to embark upon the project to its employees, including its plans to negotiate and agree changes to terms and conditions of employment. Centrica had cancelled its dividend payment to shareholders; as well as any pay rises and annual cash bonuses for those in management level roles.



35. Senior staff within the respondent had discussions with senior trade union representatives. Representatives from the GMB reiterated that they would not accept any changes to terms and conditions. The respondent had to consider the possibility of agreement not being reached with regard to changes to terms and condition and that it may be placed in the position of having to terminate existing contracts of employment and offer re-engagement on new terms and conditions if no agreement was reached. As a result, on 15 July 2020, Centrica gave notice to commence consultations in respect of potential collective dismissals, pursuant to section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992. This was a fall-back position as the primary focus was to seek a negotiated settlement (despite the GMB indicating that it was not going to accept any changes).
36. The respondent's principal intention was to consult with the recognised unions with a view to reaching agreement (and did so to revise the proposed new terms and conditions) but in the event that agreement was not forthcoming, given the context and challenges facing the respondent, it was prepared to dismiss those who did not wish to accept the revised terms and conditions.

### **Collective consultation**

37. From July to October 2020, the business undertook a detailed collective consultation and negotiation process and negotiated the proposed changes with its trade unions. This lasted for over 300 hours (or around 40 working days). Trade union partners, employee representatives and employees were provided with a very significant amount of information about the proposed changes to the terms and conditions of employment and ways of working, as well as the impact of these changes on them. Over 44% of counter proposals (of which there over 300) were accepted at a cost in excess of £15 million and over £28 million was invested in transition payments for workers.
38. As a result of the consultation and negotiation process, by the end of October 2020 the business had reached a deal in principle with its trade union partners, comprising GMB, UNISON, UNITE and Prospect, regarding the proposed changes to terms and conditions of employment, subject to

approval of its members. UNISON, UNITE and Prospect recommended to its members to accept the deal, which they later did (except for UNITE members in one Group company). GMB recommended the deal for its members in some parts of the business.

5 39. However, in early November 2020 the GMB decided that it was not going to recommend the deal to its members for the bargaining unit of which the claimants formed part, despite earlier assurances that it would do so. GMB also indicated that it would consider taking industrial action at the start of 2021 in respect of Centrica's proposal to terminate contracts of employment and offer re-engagement on new terms if agreement could not be reached.

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40. The ballot on the proposed deal opened on 24 November 2020 and closed on 8 December 2020. GMB members in the field collectives rejected the deal (although they accepted it within the other collective bargaining units).

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41. There was a further Board meeting on 2 December 2020 at which three options were discussed: abandon the deal, pause or proceed to offer the deal to staff and dismiss those who did not wish to accept it. The Board concluded that whilst it was always the hope to reach a negotiated agreement, due to the continued urgency for change, it would proceed with the implementation of the new terms and conditions of employment even if GMB opposed the changes on a collective basis. In the circumstances, the business decided to put the negotiated deal to employees in the field collectives that had rejected the deal, so that changes could be agreed before the end of 2020 and implemented in early 2021 due to the issues affecting the business.

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42. On 11 December 2020 Mr O'Shea, Centrica's Chief Executive Officer, sent a letter to GMB and UNITE members in the field collectives, including the claimants inviting them individually to agree the proposed changes to the terms and conditions of employment. The business also confirmed that a transition payment for the increase of contractual hours from 37 to 40 hours for the following year (£2,540) would be paid on 31st December 2020.

43. After engaging in further discussions with the GMB at ACAS to try and resolve the dispute, following an approach from ACAS, a revised offer was made. It confirmed that the additional commitments agreed through ACAS discussions would apply to all those who had already accepted the new contract and anyone who subsequently accepted the contract. These additional commitments included additional transition payment in January 2022 for the increase in contractual hours and the introduction of a contractual quarterly incentive from 2023 which would pay for the additional contractual hours provided a minimum performance level was achieved.
44. When the changes were not collectively agreed with the union representing the claimants, the business focused the collective consultation in January 2021 on how it could mitigate the number of dismissals if it became necessary to continue with offers directly with colleagues and if there was no alternative but to consider dismissal and offer re-engagement.
45. The rationale underpinning the change had not changed. On 12 January 2021, the business issued an updated section 188 notice.
46. The respondent had given its employees (including both claimants) around 10 months warning of the proposed changes. The claimants had a considerable period of time in which to consider the proposals and raise any enquiries if they wished to do so. At the conclusion of the collective process, the GMB advised its members in the collective grouping covering the claimants that the deal that had been presented to the employees was the best deal that was available given the challenges facing the respondent. The GMB did not, however, support the deal.
47. The proposed changes were explored throughout the extensive collective consultation process. The business engaged with the lead representatives of the four recognised trade unions about the logistics of negotiating the proposals as soon as the proposal was announced on 11 June 2020 and in detail throughout the process. From July to October 2020, the business undertook a thorough collective consultation process and negotiated the proposed changes with its trade unions. The business case for why the

changes were necessary and the effect of those changes was explained and explored in detail.

48. During the collective consultation process, the respondent also undertook an equality impact assessment and alternatives to dismissal were considered.  
5 The value of the concessions the respondent had confirmed amounted to around £15 million per year. The cost of the transitional position was around £28 million.
49. The negotiations were constructive and entered into by the parties in good faith and resulted in numerous changes to the initial proposals as a result of  
10 acceptance of a number of counter-proposals made by one or all of the trade unions, which were put forward during the collective consultation meetings. 44% of the counter-proposals (over 300) put forward by the trade unions were accepted at least in part. The business also responded to every counter-proposal put forward by the trade unions and numerous 'deep dive' sessions  
15 were held to focus on specific elements of the proposals or ways of working.
50. The business sought voluntary agreement for the changes. By the end of October 2020, the business had reached a deal in principle with its trade union partners regarding the proposed changes to terms and conditions of employment, subject to approval of its members. UNISON, UNITE and  
20 Prospect recommended to its members to accept the deal. GMB later changed its stance and decided to recommend rejection of the proposals to its members in the field collective.
51. The decision by the respondent to indicate that it proposed to dismiss those employees who had not accepted the terms (upon conclusion of the process)  
25 (which was colloquially referred to as "fire and hire") led to an erosion of goodwill and resulted in a number of employees not trusting the respondent (and potentially resulted in such staff not meaningfully considering the offers that were made).
52. The respondent had decided that there was a real risk the trade union would  
30 refuse to support any change to the field collective terms and conditions given

that was what senior staff within the respondent had been told by senior trade union officials. Some union representatives had advised the respondent that change would be opposed, irrespective of the position. As a result the business decided as a fall-back option that those who had not accepted the proposed terms (following exhaustive consultation) would be dismissed with the new terms and conditions offered.

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53. The vast majority of employees engaged by the Group accepted the changes, including members of UNISON, UNITE and Prospect. GMB members in the field collectives rejected the deal. This amounted to around 3,500 employees out of a total 20,000 affected.

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54. The respondent had concerns that the precise terms of what was being offered was not properly being communicated to those affected by their trade union and had sought to provide detail information to staff setting out the correct position.

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55. The respondent decided to proceed with the implementation of the new terms and conditions of employment in the absence of agreement with the GMB. The respondent explored alternatives, including abandoning the project in its entirety and delaying its implementation but that would result in failure to achieve the desired and necessary business aims of consistency and fairness amongst colleagues, modernised terms and conditions, and collective arrangements, and reduced costs to effectively compete in the increasingly challenging market. The respondent was also concerned that allowing those who did not accept the revised deal to remain with their current terms and conditions would create unfairness and introduce a two-tier system in respect of its terms and conditions of employment (creating division between those who accepted the position and those who had not). A large number of staff had accepted the position and the creation of a two tier system would potentially damage relationships with the other trade union partners.

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56. Further delay would cause continued uncertainty and unrest with no guarantee of a successful outcome given the detailed and lengthy negotiations to date. Both GMB and UNISON had advised at an earlier stage

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of the collective consultation process that they would put the deal to their members of the basis that it was the best that could be achieved in the circumstances but the GMB changed their position. It was not unreasonable in the circumstances facing the respondent to put the deal that had been negotiated upon conclusion of the process (irrespective of the GMB's ultimate decision not to support it) to employees in the field collectively individually, so that changes could be agreed before the end of 2020 and implemented in 2021 given the position in which the business found itself at the material time.

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57. The GMB balloted members for industrial action. Just over 50% of GMB members who could vote did vote to support industrial action, which took place over a two-month period on and off from 7 January 2021 to 8 March 2021. The main reason for this action was the way in which the respondent had approached the project, namely the issue of dismissal and re-engagement.

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58. During the industrial action, the respondent continued to discuss with GMB the practical process of implementing the changes to terms and conditions, such as how to mitigate and minimise the number of employees who may be dismissed and to minimise the impact of moving to the new contract of employment.

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59. The collective process concluded in January 2021 with conciliation in ACAS concluding in February 2021 with the offer to all staff being revised in February 2021. Whilst collective consultation was ongoing, employees were given the option of accepting the new terms and conditions individually (obtaining the benefit of any revised terms issued as a result of further discussions).

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### 25 **Individual consultation**

60. A significant amount of staff had chosen to accept the revised terms and conditions as the project progressed. The respondent had devised and implemented a robust and thorough process of individual consultation aimed to secure genuine and meaningful individual input from each employee who had not indicated acceptance of the new contract. At this stage, were around

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3,398 meetings to be arranged. Detailed planning had gone into the process to ensure that the process was meaningful such that staff understood what was happening and why and that matters arising from affected staff were fully considered with responses given.

5 61. The focus of the process was on the individual employee and steps were taken to ensure affected staff were given all information, in different formats, and able to fully engage in the process.

62. Staff were informed, in different ways, as to the updated position. Thus staff were advised by email of the position, "town hall talks" took place whereby staff could attend sessions and hear in real time from senior managers as to the position (and ask questions) (with such sessions being recorded and capable of being watched at a later date). An intranet site had been dedicated to the position with all information being placed online with steps taken to ensure it was up to date and accurate. Staff were also able to ask their line manager questions or complete an online "Q&A Form" to ask questions. An SMS (text message) Q&A tool was devised allowing staff to text questions. These methods were robust and substantive and management responded to any questions arising, identifying trends and ensuring communication to staff was fulsome. Once updates were received each of the communication channels was updated to ensure staff received the up to date information irrespective of the place they found it.

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63. Around 5000 questions were asked and answered over a 2 month period providing affected staff with information about the process.

64. The respondent had also devised an online "colleague illustrator form". This allowed affected staff to enter their payroll number into the system and receive a detailed comparison between their current position and the future position under the proposed terms and conditions. The existence of (and instructions for) that tool was communicated to all affected staff on a number of occasions, including at the individual consultation meeting. Links to the form were also on written communications to staff, including email footers. As the terms and conditions changed in line with agreements reached the illustrator was

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updated such that it always provided the correct comparison between the current and new terms.

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65. The proposed new contracts were first made available around 19 January 2021 giving employees around 3 months to consider the position and seek further information if needed.
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66. The respondent was keen to ensure consistency of approach at each of the initial consultation meetings and therefore arranged for substantial HR and related support to be available to each manager. Each manager was given the same training and provided with the same information (and amount of support, as needed). Further training was provided following the revised position that was adopted in February 2021
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67. The initial consultation meetings had commenced on 9 February 2021 and were paused for ACAS talks to take place with the trade union. It was too late to cancel the meetings that were to take place on that morning but the revised offer that was issued following the ACAS talks was issued to all staff, including those who had their initial meeting and they were advised of the updated terms and conditions. The ACAS talks ended on 22 February 2021 and an update session took place on 24 February 2021 to which all engineers were invited and slides were produced which were sent to all affected staff, ensuring all staff understood the up to date position. The illustrator was also updated as was the intranet site.
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68. The individual consultation meeting was arranged to ensure that individuals were consulted and had the opportunity to raise issues and ask questions. Affected staff had the opportunity to discuss aspects of the offer that they were unsure of, to understand the reasons they did not wish to accept and whether they required support. It was also an opportunity for line managers to ensure that the affected employees fully understood the offers and what it meant for them. To ensure consistency of approach a script had been prepared for use at the meetings (which was used for both claimants at their meetings) 19,672
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- staff were involved in the process with 3,398 indicating that they did not wish



to accept the deal, for whom individual consultation meetings were being arranged.

- 5 69. Any questions arising from the individual consultation meetings that could not be answered during the meeting were dealt with after the meeting and communicated to the employee (and cascaded upwards).
70. The time limit for accepting the new offer was extended and revised offer letters were issued on 8 March 2021 setting out the new terms and conditions. Staff were advised that they had until 25 March 2021 to accept the new terms, which failing dismissal would be considered.
- 10 71. The respondent took into account points raised by individual employees during the consultation process. Individual issues that arose were taken into account, and where appropriate adjustments made. This applied in relation to disabled employees and in other situations, such as in relation to people with childcare responsibilities. Issues raised by individual employees in relation to the new terms and conditions were considered and accommodated where it was possible for the business to do so.
- 15 72. The respondent wanted to ensure that information obtained at a local level from individual employees was presented to the Board to allow themes to be identified and any concerns raised to be considered. This ensured the Board to make a carefully informed decision as to whether, at each stage, to continue with the project. If any substantive issue arose that would have required the project to have been paused or abandoned that would have been considered. There were no such issues.
- 20 73. The reasons provided during the individual meetings for those who did not wish to accept the new terms and conditions were carefully noted and analysed on an ongoing basis by senior management to identify trends and to reconsider any issue that required to be reconsidered.
- 25 74. Once all the meetings had taken place the Board was given details as to the position with the numbers of staff not wishing to accept the new terms and conditions and their specific and individual reasons. This culminated in a
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detailed document being presented to the Board at its meeting on 26 March 2021 when the decision was made to issue notices of dismissal and offers of reengagement. The Board had regard to the reasons why engineers did not wish to accept contracts. An in-depth equality analysis was also undertaken that revealed no substantive issues regarding protected characteristics.

### **Appeal provided**

75. An appeal process had been set up to provide employees that had been dismissed another opportunity to raise any objections about their dismissals. The intention of the appeal process was to ensure that those who raised matters at appeal which may have impacted the decision to dismiss them had an opportunity to discuss this further. The process allowed those who raised new issues or issues that had not been identified before to raise matters which were fully considered. Some changes were made and appeals were upheld in respect of individual circumstances.

### **Protected terms**

76. At the outset of the process the core terms and conditions were offered to all staff together with protected terms which included a transitional payment, which were ultimately extended to every employee who accepted the new terms and conditions. The decision to offer the protected terms to all employees (and not just those who accepted the terms in advance of the deadlines) was to ensure everyone was treated in the same way and dismissals were avoided, where possible.

### **The changes to the terms and conditions affecting the claimants**

77. The respondent sought to introduce consistent core terms and conditions that applied to the Group. These were terms that applied to all staff, irrespective of their position. It included such terms as holiday entitlement and company policies. The other terms and conditions applied to each affected grouping (in the claimants' case, the field services engineers). The changes covered compensation, wellbeing, ways of working/allowances, incentives and recognition and colleague lifecycle.

78. For some staff the changes resulted in improvements to certain terms and conditions. While the core hours for field engineers increased from 37 to 40 hours, the respondent agreed to pay a sum in respect of this change at the start of the first and second years with year 3 and beyond being paid subject to achievement of a productivity scheme (which was to be agreed with the trade unions).
79. The respondent had analysed the impact of the changes upon staff. While some staff were financially better off, some were marginally worse off financially with 38 staff potentially losing over £1,000.
80. One of the key drivers of the change was to ensure customer demand was met. The respondent agreed, however, that it would honour the existing flexibility staff had, where it could. While working hours changed, the flexibility staff had with regard to operational issues did not.
81. Some of the changes that were being introduced were to increase productivity. One such change was to commence the working day for those within the claimants' grouping when they arrived at their first job (rather than when they entered their van at the start of each shift). While some staff were unhappy with this, the respondent required to increase productivity. While some regarded entering their van as commencing work, the respondent considered on balance that it was necessary to change the starting place so as to become the first job (capped at 30 minutes from home, but it could be much less). Within the context in which the respondent operated that was not an unreasonable position to adopt.
82. The respondent had also introduced an uncapped incentive scheme which could increase worker's income. Engineers who perform well had the potential to earn large sums, potentially more than under the previous terms.
83. The revised terms and conditions were competitive within the marketplace in which the respondent operated and compared favourably to competitor terms and conditions.

84. The respondent had also undertaken to recruit further staff and to focus on direct labour, rather than external support, in an attempt to develop and grow the business. One of the reasons for the change to terms and conditions was to allow the business to grow and to attract and retain staff and ensure terms and conditions were internally consistent and fair.

**The Board decision to dismiss those who did not accept the new terms**

85. The Board met on 26 March 2021 and had been given a detailed report with slides. The Board was informed at the time that only 4% of staff had not accepted the new terms and conditions at the time but 2% were expected to accept before the end of the process. The Board considered the basis for the project and impact and concluded that the business had mitigated against the impact of the new terms as far as possible by offering transition payments and protection of some terms.

86. The Board approved the decision to issue notices of dismissal to those who had not accepted the new terms and conditions. Staff who had not done so would be dismissed and given offers of re-engagement upon the new terms and conditions (that the majority of staff had already accepted). This was the first point in time when the decision to dismiss staff was taken, which decision was reached having considered the rationale for the process, the consultation that took place, the reason why some employees had not accepted the terms and the measures that had been put in place.

87. Of all staff affected by the project across the business, 98% accepted the new terms. Within the collective grouping covered by the claimants (which was a part of the entire staff group), 6715 employees of the total 7148 employees (94%) accepted. 433 employees (6%) did not accept.

88. The respondent had analysed the reason for non acceptance. There were 3 key reasons identified during the individual consultation meetings. The first was the way in which the process had been conducted, the dismiss and reengagement approach. A significant number of those who did not accept gave this as their reason for choosing not to accept the new terms.

89. Another important reason staff who decided not to accept the terms was the change from 37 to 40 hours per week. The respondent had sought to mitigate this issue by paying staff, at the start of the year, a transitional payment in respect of this change for years 1 and 2 with a sum being paid in year 3 and beyond, provided a level of productivity was met. The respondent believed that it needed increased productivity to survive in the challenging market place in which it operated.

90. The third main reason was flexibility in working practices. The respondent had guaranteed that for 2 years there would be no change in working patterns and change would only happen thereafter if customer demand required it.

### **The claimants and their decision**

91. Both claimants in this case had been given the same documentation and communication as the other affected staff and the offer of the new terms had been made to them on a number of occasions from December 2020 to April 2021.

### **Mr O'Donnell**

92. While Mr O'Donnell did not identify any specific element of unfairness with regard to the reason for his dismissal (other than his belief that his flexibility was being reduced), the process or the specific impact upon him during the formal process, he was disillusioned with the respondent and how business had been conducted. He would have taken voluntary redundancy if it were offered to him. There was a real risk that he would have left the business irrespective of the changes that were offered to him in light of his view of the organisation. Mr O'Donnell believed that the job was becoming so complex and felt management was questioning more. He had become disillusioned. He tried his best but was not enjoying working with the respondent. Mr O'Donnell was not interested in the rationale for the changes nor the detail with which he was presented. For him the only issue was what he perceived to be a change to his working hours.

93. Mr O'Donnell has been sent an invitation to an initial consultation meeting (together with supporting documents) on 8 February 2021. The meeting took place on 9 February 2021. Notes were taken of the meeting and sent to the claimant, which were accurate notes. During the meeting Mr O'Donnell stated that he was not accepting the new terms. He said: "My mind was made up long ago with this propaganda" and "I can't remember one change that was good in British Gas".
94. Mr O'Donnell was a trade union representative and had made his mind up not to accept the new contract before the meeting took place. He had made his mind up before February 2020 not to accept the new contract.
95. Although Mr O'Donnell had been given all the documents and information setting out the position in detail he chose not to read the information or engage with it fully. Although the meeting took place before the ACAS meeting he was told that the revised offer that was issued following the meeting would be offered to him and he was given the specific information in connection with his position. His colleague illustrator would also show the impact of the new terms upon the claimant.
96. Mr O'Donnell had been told that no-one would receive a second consultation Meeting as a result of the improved offer unless they needed it. Mr O'Donnell was asked if he required one and he did not reply. He also was given the notes from the initial consultation meeting on 13 March 2021 along with the revised offer.
97. Mr O'Donnell did not choose to appeal or seek further information. His only communication was to raise an issue with regard to his final pay slip.
98. In the absence of any engagement from Mr O'Donnell and given he had decided not to accept the new terms and conditions, he was issued with his notice of dismissal and offer of reengagement on 29 March 2021.
99. While Mr O'Donnell had not raised the issue during the consultation process, his main reason for not accepting the new terms and conditions were because he believed that the new terms would prevent him from working the same

pattern he had developed over his years with the respondent which involved working 3 day weeks in the summer. Unfortunately this was not something Mr O'Donnell had raised during the consultation process and was not something he had specifically checked (formally). He had formed the view following informal discussions that his working pattern would not be supported but that was not something he had formally raised with the respondent. In fact the new terms and conditions did provide flexibility in working hours and it would have been possible for Mr O'Donnell to have retained flexibility in his working hours, working more hours during the winter and less hours during the summer.

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10 100. Mr O'Donnell had decided that he could not trust the respondent and was not prepared to see how the flexibility worked. He wished to retain his existing terms and conditions, irrespective of the content of the new terms and conditions. He believed that staying with the respondent was a "leap of faith". He was not prepared to do so and chose therefore not to accept the new terms and conditions.

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101. The Board had considered other employees' reasons for not accepting the terms and conditions, which included unhappiness with the change in hours. The Board had decided that the new terms and conditions did offer sufficient and reasonable flexibility.

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102. Mr O'Donnell had not fully read the material he had been given by the respondent and did not ask any questions during the consultation process. He did not appeal against the decision to dismiss him.

**Mr Fisher**

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103. Mr Fisher was invited to his consultation meeting in writing and was given the full set of documents and information, setting out the background, rational and new terms and conditions. This has included the full information pack and frequently asked questions. He had been advised to read through the documents carefully in advance of the meeting.

30  
104. By the time of his initial consultation meeting Mr Fisher had a reasonable period of time to be well prepared and informed and in the position to be able

to ask any questions. While he had received the information, Mr Fisher did not consider the information he had been sent at any great length nor did he take reasonable steps to inform himself as to the specific terms applicable to him.

5 105. Mr Fisher's consultation meeting took place on 16 March 2021 and lasted for about 45 minutes. He brought along with him an experienced trade union representative to the meeting. While Mr Fisher was unhappy that a paper copy had not been given to him of his new contract, he took no steps to obtain a copy himself, whether by printing a copy himself or asking his Union  
10 representative to assist him. He understood how he could have obtained a paper copy (as he was given instructions on how to print one) but he chose not to do so.

15 106. Mr Fisher asked a few questions during the meeting. He confirmed he had received his invitation letter and read it together with the enclosed documents (albeit he had not read it in detail). He understood the purpose of the meeting and that he had the chance to ask any questions which would be answered at the time or a later answer provided if it was not possible to answer the questions at the meeting.

20 107. During the meeting the rationale for the changes were discussed and the relevant documents in connection with the changes to the terms and conditions were signposted to the claimant and it was recommended that he read them.

25 108. Mr Fisher stated that he understood the rationale but did not agree with it. He did not have any questions in connection with it or raise any specific issues. He stated that he was too stressed to attend any of the Town Hall meetings but was advised that the matters would be discussed at the meeting if he had any questions. The claimant had also been advised as to the text message question took but did not take the opportunity to ask any question via that forum.



109. At the meeting the Information Pack and Revised Offer document was discussed in detail and Mr Fisher was advised that the protected terms would be available for acceptance until 25 March 2021. Mr Fisher understood the position.
- 5 110. Mr Fisher did not ask any questions about the offer or its application to him specifically. He understood that he could use the illustrator to see a comparison of the terms he had at that time with the proposed new terms and conditions (but he chose not to use the illustrator and do so).
- 10 111. Mr Fisher was unhappy that “fire and rehire” had been used. He was told why a two-tier workforce (which would exist if those who did not accept the terms could remain on those terms while those who accepted the new terms did not). Mr Fisher’s view was that “fire and rehire was completely the wrong way to do it” and that changes “should have been just through negotiation”.
- 15 112. At the meeting the consequences of not accepting the new terms and conditions were explained. Mr Fisher’s substantive questions were around one issue relating to the new offer which was in connection with the new system around working time which was answered at the meeting.
- 20 113. He asked for a paper copy of his new contract but did not explain why he needed a paper copy given he had been given the document online (which he had read) and instructions as to how to print a paper copy if he wanted one.
- 25 114. While Mr Fisher found the process stressful the meeting was conducted professionally and thoroughly and Mr Fisher was able to ask any questions he wished to ask (and able to ask his union to ask any questions on his behalf). He had asked a number of pertinent questions.
115. Following the meeting Mr Fisher was sent further information setting out the specific offer and background. He was also sent the meeting notes on 19 March 2001 and follow up issues addressing the outstanding questions Mr Fisher had raised.

116. At the time of the decision to dismiss both claimants there was no ongoing collective consultation as the trade union had indicated that it was not prepared to recommend the revised terms and conditions (issued following the ACAS meeting) to their members. It was for each individual employee to choose whether or not to accept the new terms and conditions.

117. There were no ongoing negotiations with the trade unions at the time the respondent decided to dismiss. Further days of talks were agreed when the strike mandate expired at the beginning of June 2021 which post dated the dismissals. At the time of the dismissal the claimants had been given the terms and conditions that all other staff had been offered.

118. While Mr Fisher did not raise any specific concerns as to the new terms and conditions at his initial consultation meeting, Mr Fisher was concerned about his work-life balance and some financial issues. These were not matters, however, that Mr Fisher had specifically raised at the time with the respondent. While Mr Fisher had a concern about a decrease in the overtime rates, in the previous year he had not worked any overtime and that issue had not directly affected him. He had a residual concern about his work life balance, albeit he had not worked additional hours during the preceding year. Mr Fisher had not given the respondent the opportunity to explain their position in relation to these matters. In any event, the Board had considered the issues and had satisfied themselves that the approach being taken was necessary and fair in the circumstances (which was a reasonable conclusion for the Board to reach given the prevailing circumstances).

119. Given Mr Fisher had decided not to accept the new terms and conditions, he was issued with his notice of dismissal and offer of reengagement on 29 March 2021.

**Mr Fisher appeals**

120. Mr Fisher appealed against his dismissal on 4 April 2021 focussing on the “fire and rehire” approach and the lack of a paper contract. As his appeal letter did not contain any new information (that he had not already been raised), on

8 April 2021 he was advised that as he had not raised any new matters, the decision to dismiss him and offer him re-engagement would not change. He was advised that the offer was still open for acceptance if he wished to do so.

- 5 121. Mr Fisher had not raised any new issues in connection with his dismissal or the reason for it. There was nothing raised by Mr Fisher about his personal circumstances which would have resulted in an exception being made for him to allow him to remain on his existing contract.
- 10 122. One of the main reasons for his appeal was that he was unhappy he had not been given a paper copy of his new contract. He had, however, been given an electronic copy of his contract, which he had read and he had access (if he wished to use it) to his colleague illustrator that set out the terms under his then current contract and the terms under the new terms and conditions.
- 15 123. While Mr Fisher wanted to a paper copy of his contract, he chose not to print a copy of the contract himself or ask anyone else to assist him (including his manager). The claimant knew how a paper copy could be printed if he wished to do so but wanted the respondent to provide him with a copy.
124. Mr Fisher accepted that a paper copy would not have told him anything about which he did not already know (as he had read the copy online). There was no disadvantage to him in not having a paper copy of the contract.
- 20 125. Mr Fisher had been given a full opportunity to discuss the specific terms at the initial consultation meeting. That included use of the colleague illustrator and questions about specific terms. While he knew about these sources, he chose not to avail himself of the opportunities. Mr Fisher did not explain to the respondent during his employment why he needed a paper copy in addition to having the online copy (which he was able to access and did read). Mr Fisher did not ask for help in connection with the illustrator (which would have shown him the new terms and the old terms).
- 25 126. The respondent was unable to find a copy of Mr Fisher's then current contract of employment and he raised a grievance about that on 12 April 2021. On 14 April 2021 the respondent confirmed the position.
- 30

127. The grievance arose following the claimant's dismissal and Mr Fisher had not raised the absence of his original contract during his initial consultation meeting. There was no suggestion that this was a concern to the claimant until after his dismissal. There was no reason why Mr Fisher could not have used the colleague illustrator to obtain the same information, which was available to him throughout the process. The respondent did not have a copy of the claimant's original paper contract.

128. Both claimants were dismissed because they did not accept the revised terms and conditions which had been the subject of extensive collective consultation and negotiation and which had been consulted upon individually. The vast majority of affected staff chose to accept the revised terms and conditions.

### **The end of the project**

129. An update session was run on 15 April 2021 at which senior leadership were updated with the final numbers of staff who had accepted the new terms and those that had not. At that date there were 19,205 staff who had accepted the new terms across the whole business (98%). By the end of the process 458 (2%) of impacted staff chose not to accept.

### **No redundancy situation**

130. The respondent's requirements for employees to carry out work of the kind carried out by the claimants had not diminished. They required the same amount of staff and in the same place of employment. The respondent was looking to expand their business and grow it, which would be facilitated by the new terms and conditions applicable across the business.

### **Observations on the evidence**

131. Each of the witnesses sought to recollect matters to the best of their abilities. Each of the respondent's witnesses were able to provide detailed evidence in connection with the process undertaken and the rationale for the changes. The evidence presented to the Tribunal was fulsome and corresponded with the contemporaneous documentation.

132. Both claimants gave their evidence in a measured way. Mr O'Donnell was clear and candid in accepting he did not meaningfully enter into the consultation process. In his view he was not prepared to take the "leap of faith" with regard to the new terms. He believed the change would result in lesser flexibility for him and he was concerned his then existing work pattern would change. He was not prepared to "give it a go". It was for that reason he did not raise his concerns during the process or fully examine what was being given to him.
133. Mr Fisher was also broadly clear and candid. He accepted that while he believed the decision to dismiss him was premeditated and that there was no intention to meaningfully engage with the trade unions or affected staff, he considered that was a difficult argument to sustain in light of the clear and compelling evidence led and the extent to which the respondent had engaged with the trade unions and affected staff. On occasion he answered "no comment" to certain questions when presented with information that tended to show the impact of the changes and how this had been mitigated by the respondent.
134. This case did not depend upon the credibility of any of the witnesses, as the parties had agreed. While the respondent's agent argued that both claimants had made their minds up not to accept the terms and conditions some time before the individual meetings (a matter that the claimants disputed), these were not matters that required to be determined. The claimants accepted that they had not engaged fully in the consultation process.
135. The issues both claimants raised as potential concerns as to the new terms were not issues that either claimant had raised during the consultation process. Had these been specific concerns of the claimants the formal forum for raising them was the initial consultation meeting. There were a number of other ways in which the issues could have been raised, whether by text or via the intranet site or at the town hall meetings.
136. The issues that were raised by the claimants in connection with the new term were, in any event, issues that other staff had raised during their consultation

meetings and were issues that the respondent had considered fully in detail. Even if the claimants had raised the issues with the respondent, they would not have changed the position that was adopted as the issues had been considered and the respondent had presented their response.

5 **Law**

137. Section 94 of the Employment Rights Act 1996 provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed. Section 98 provides:

10 “(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.

15 (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) 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 shall be determined in accordance  
20 with equity and the substantial merits of the case.”

138. A dismissal is potentially fair if it is for ‘some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the  
25 employee held’. A business reorganisation may, in appropriate circumstances constitute some other substantial reason (“SOSR”).

139. The authorities in this area have led to a number of principles in assessing the fairness of the dismissal. To establish SOSR as the reason for dismissal, an employer does not have to show that a reorganisation was essential. In  
30 **Hollister v National Farmers’ Union** [1979] ICR 542, the Court of Appeal

held that a 'sound, good business reason' for reorganisation was sufficient to establish SOSR for dismissing an employee who refused to accept a change in his or her terms and conditions. The reason is not one the Tribunal considers sound, but one 'which management thinks on reasonable grounds is sound' (**Scott and Co v Richardson**, EAT 0074/04 at para 14).

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140. Where an employer cannot agree changes to terms and conditions of employment with its employees, it may choose to dismiss and re-engage. In **Ellis v Brighton Co-operative Society** [1976] IRLR 419, the Employment Appeal Tribunal suggested that there must be a 'pressing business need' in order for dismissal of this nature to be justified; one that avoided a real detriment to the business.

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141. The Court of Appeal decided that the threshold for justifying such dismissals is not a 'risk to the survival' of the business. In **Hollister v National Farmers' Union** [1979] ICR 542, a re-organisation was introduced for the benefit of the employees. Mr Hollister refused to accept it because although it improved his remuneration, it diminished his previous rights. The Court of Appeal held that he was fairly dismissed (and that a failure to consult him over the re-organisation in that case did not render the dismissal unfair). Lord Denning MR approved the test of a sound, good business reason for the business change in that case in preference to showing that the business would come to a standstill. It depends on all the circumstances whether the only sensible thing to do was to terminate the employee's contract unless he would agree to a new arrangement.

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142. The sound, good business reason was tested in **Catamaran Cruisers Ltd v Williams** [1994] IRLR 386 where the Employment Appeal Tribunal held, at [19], that it is an error of law to say that significant changes can be made only if they are "vital for the survival of the employer's business". This point was relied on and reaffirmed by the Employment Appeal Tribunal in **Garside & Laycock Ltd v Booth** [2011] IRLR 735 and **Glasgow City Council v Deans** UKEATS/0061/05.

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143. The employer must demonstrate that there are discernible advantages to the business but need not show the 'quantum of improvement achieved': **Kerry Foods Ltd v Lynch** [2005] IRLR 680, at 14]. A mere statement that there are advantages without evidence is insufficient: **Banerjee v City and East London Area Health Authority** [1979] IRLR 147.
144. In considering whether the dismissal was fair in the full context of the business change, no one factor should be looked at to the exclusion of others: **St John of God (Care Services) Ltd v Brooks and others** [1992] ICR 715 at 722D.
145. The assessment usually entails a balancing act in which the reasonableness of the respondent in dismissing the employee is considered along with the reasonableness of the claimant in refusing to accept the change: **Catamaran Cruisers v Williams** at [28(ii)]. However, it does not follow that if it is reasonable for an employee to refuse to accept a new contract of employment, then it is unreasonable for the employers to dismiss them when they do so: **Catamaran Cruisers v Williams** *ibid* at [27], citing Balcombe J in **Chubb Fire Security Ltd v Harper** [1983] IRLR 311 at p.319.
146. The Tribunal should not substitute its decision as to whether or not it would have dismissed but rather decide whether on the facts the decision to dismiss fell within the range of responses open to a reasonable employer acting reasonably. All relevant factors should be considered in assessing the reasonableness of the respondent's actions with particular consideration being given as to whether there was meaningful consultation, whether the impact of the changes were assessed on employees and whether the respondent entered the process with an open mind.
147. A redundancy situation exists where the circumstances within section 139 of the Employment Rights Act 1996 exist namely where the dismissal is wholly or mainly attributable to (a) the fact the employer has ceased or intends to cease to carry on the business for the purposes which the employee was employed or to carry on business in the place employed or (b) the requirements of the business for employees to carry out work of a particular



kind or to carry out work of a particular kind in the place employed have ceased or diminished.

### **Submissions**

5 148. The parties had been given a considerable amount of time to consider the evidence that had been led and the legal issues arising. It was agreed that the respondent's agent would prepare skeletal written submissions which the claimants would consider. Each of the parties was able to fully engage with the issues and present their submissions which have been taken into account when dealing with the decision below.

### 10 **Discussion and decision**

#### **Reason for the dismissal**

15 149. The first issue that arose was what the respondent's reason for each of the claimant's dismissal was and whether it was a potentially fair reason, being on this occasion, some other substantial reason in accordance with section 98(1)(a) of the Employment Rights Act 1996).

20 150. In this case the respondent argues that the reason for the claimants' dismissals were the same and that the reason for their dismissal was because the claimants had refused to accept terms and conditions, the detail of which had been arrived at following extensive consultation and negotiation individually and collectively. As the claimants had chosen not to accept those changes to their terms and conditions, the respondent decided to dismiss the claimants. The reason for the dismissal, the set of facts or beliefs that caused the respondent to dismiss the claimants, was the claimants' decision not to accept the new terms and the desire to avoid a 2 tier workforce.

25 151. The reason for both claimants' dismissal on the facts of this case was a potentially fair reason, being some other substantial reason on the facts.

#### **A sound business reason underpinning the dismissals**

152. While the claimants argued that there was no sound business reason, which was their belief, rather than presented on the basis of any evidence, on the

facts of this case that were presented to the Tribunal, there were clear and sound business reasons for the decision that was taken that led to both claimants' dismissal.

5 153. The circumstances in which the respondent found itself demonstrated why change was necessary. The business was not on a firm financial footing and there were sound financial reasons why change was needed. While one of the group companies had been sold, the financial position of the Group had not demonstrably improved. The Tribunal had not heard any evidence as to what had been realised from the sale nor why this fundamentally altered the  
10 financial position given the context in which the respondent found itself. The reason for the change was not limited to the financial position but included the operational issues facing the business.

15 154. Operationally, change was needed. The large number of different contracts and terms made progress difficult. Consistency and fairness was a key reason that drove change, allied with retaining and recruiting new staff. It was accepted that the new terms were commercially competitive albeit for some a little less favourable for some compared to their then pre-existing terms. Having consistency of terms was a sound reason for change.

20 155. Commercially, there were sound reasons too. Customers had been falling and the business required to increase and improve productivity. The changes that were being proposed, while adverse for some, allowed the respondent to place its staff on a firmer footing to allow the business to grow and expand. The commitment to direct labour and the investment that was made in the transition demonstrated the aim of investing in the future while having a  
25 secure foundation, which was what the new terms sought to achieve.

156. Neither claimant was able to present any evidence to challenge the detailed business case that had been presented as the rationale for the changes (other than their belief and perception as to the position).

157. There were reasonable grounds for the respondent to conclude that change was needed. The financial and organisational circumstances were clear and compelling.

5 158. The reason for both claimant's dismissal was the same. It was because they did not accept the new contracts. That was a potentially fair reason, being some other substantial reason and was a sound reason on the facts.

### **Was the dismissal fair on the facts**

10 159. The question as to whether the dismissal of each of the claimants is fair is determined by considering whether the respondent acted fairly and reasonably in dismissing each claimant for the reason above, taking account of size and resources of the respondent and whether the respondent acted reasonably in treating the reason it had as sufficient to dismiss the claimants.

### **Procedure**

15 160. It was clear that the Board carefully considered the options open to it and the impact of each option. Negotiation and consultation was the preferred approach but in the absence of agreement being reached, and given the likelihood that no agreement would be reached, it was reasonable for the respondent to adopt the approach it did. While a reasonable employer might not have adopted the approach that was taken in this case, an equally  
20 reasonable employer could adopt the approach that was taken.

161. In other words the procedure that was undertaken in respect of each of the claimant's dismissal fell within the range of responses open to a reasonable employer. There was extensive collective consultation that was entered into a meaningful and open minded way.

25 162. While the claimants argued that the decision had been premeditated, there was no evidence on which to base such a submission. The claimants accepted that such an assertion was a belief but not based on any evidence.

163. The respondent sought to and did consult with the recognised trade unions (and employee representatives) in good faith and meaningfully considered the

responses received. Each issue raised by a representative or employee was considered and where appropriate the position was revised.

- 5 164. This was not a “sham” as suggested by the claimants but a meaningful attempt to reach consensus. It was clear that the respondent wanted to avoid the need to dismiss any staff, not least given they needed the experience and expertise and wanted to build their business (not contract it).
165. The respondent clearly considered the change advantageous to their business which was a reasonable conclusion to reach.
- 10 166. The collective consultation that was embarked upon was substantial and in depth. The length of time taken and the changes agreed (and investment therein) underlined the importance to which the respondent attached to collective consultation.
- 15 167. While some may not have chosen the dismissal and re-engagement approach, given the position facing the respondent in this specific case, the act of the respondent was reasonable and fair. While a reasonable employer may not have followed the process that was followed in this case, an equally reasonable employer in the circumstances of the respondent could have done so.
- 20 168. A point had been reached where it was reasonably clear to the respondent that consensus with the recognised trade union was not going to be feasible. The comments that had been made to the respondent’s senior staff and the approach taken during the process showed that agreement was unlikely to be forthcoming in the short to medium term. A reasonable employer could decide to wait and continue negotiations in the hope the union’s position would change, but given the context an equally reasonable employer could reasonably conclude that the collective consultation had reached its conclusion and a decision required to be taken as to the future terms. The context in which this occurred is important.
- 25 169. The ACAS conciliation moved matters forward a little but the relevant union was still not ultimately prepared to recommend the deal.
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170. While some further concessions were achieved following the dismissal date, the collective consultation that was carried out, from the evidence before the Tribunal, was substantial, meaningful and had the aim of reaching agreement, avoiding dismissals.
- 5 171. The respondent also considered the impact of the proposed changes upon the claimants and staff individually and generally. The respondent carried out detailed analysis as to the financial and general impact of the proposed changes. The respondent made concessions during the consultation process and altered the proposals. The transition payment evidences the attempt to  
10 lessen the impact of change while improving productivity to allow the business to grow.
172. The respondent engaged in detailed individual consultation. Each of the managers involved was trained and scripts were provided to ensure consistency. This was not a “box ticking” exercise but rather a genuine  
15 attempt to understand the reasons why each individual was not prepared to accept the new terms.
173. At each meeting the rationale for change was presented together with the specific proposals as impacting upon the individual explained. Any specific issues were dealt with at the meeting or responded to following the meeting.  
20 The issues arising were considered on a daily basis by the respondent and considered.
174. The respondent approached the consultation with an open mind, listening carefully for any alternatives that would achieve the objectives that needed to be achieved given the context of the project. The individual consultation was  
25 meaningful.
175. While some reasonable employers may have allowed more than one meeting, the meeting in this case was substantive and in depth. Employees were able to ask questions and fully engage in the process and any outstanding issues were fully addressed and further meetings could be sought. Affected staff fully  
30 understood the rationale and impact upon them. In some cases dismissals

were avoided as a result of matters arising at the individual consultation meeting or upon appeal.

176. At a general level the procedure that was followed in this case was a procedure that was fair and reasonable in all the circumstances taking  
5 account of the size of the respondent, its resources, equity and the merits of the case.

**Substantive issues – did the respondent act fairly and reasonably in dismissing each claimant**

177. They key issue is whether or not each of the claimant’s dismissals was fair in  
10 all the circumstances. Having considered the evidence in detail and applied the legal tests and balancing all the factors in this case, as shown below, the decision to dismiss each claimant for not accepting the terms and conditions was, on the facts of this case and in respect of each claimant separately, a decision that fell within the range of responses open to a reasonable  
15 employer.

178. The desire to maintain industrial relations and avoid a two tier workforce was an important consideration given the respondent’s desire to be fair and consistent to all trade unions, and to ensure fairness and consistency to all employees balanced against the position of each claimant.

20 179. In considering the fairness of the decision to dismiss in this case it is important to consider each of the individual claimant’s reasons for refusing to accept the terms and conditions and balance these against the respondent’s reasons for change. The authorities in this area emphasise that the legislation requires the Tribunal on consider the full factual matrix, with no one factor being  
25 decisive.

180. It is important to apply the statutory wording and the legal test in assessing the fairness of the dismissals. From a general standpoint there was a potentially fair reason for dismissal. In respect of both claimants the respondent acted fairly and reasonably with regard to the procedure adopted  
30 in dismissing for the reason in this case.

**The claimants' positions and substantive fairness**

181. Balanced against the claimants' reasons the Tribunal must consider the business case for introducing the changes which was compelling and set out in detail above. The vast majority of other workers chose to accept the terms and conditions and the respondent wanted to ensure fairness was adopted, avoiding a two tier workforce (with all staff doing the same job on the same terms and conditions, one of the key purposes of the exercise). That fairness criterion applied to the trade union position and to individuals. It was reasonable to want to ensure that the position adopted with each business unit and the collective representative was consistent given the negotiation that had taken place. It was also reasonable to wish to ensure those staff within each grouping were engaged on the same terms and conditions.
182. Each claimant was given reasonable warning about the proposed changes and meaningful collective and individual consultation was embarked upon.
183. Neither claimant raised any substantive point during the individual consultation process and their position. Individual circumstances pertaining to affected workers were taken into account and if there were specific reasons why the new terms and conditions would not work, alternatives were considered.
184. It is relevant to note that the claimants' trade union did not agree with the proposed changes and that is taken into account in the assessment of fairness. Equally, however, a large proportion (over 90%) of the specific staff grouping did accept the changes, of which the claimants formed part. The proportion of all staff that accepted the changes was higher. The respondent took into account the reasons why those who did not accept the new terms did not wish to do so and those points were considered this with an open mind. Mitigation was put in place where practicable. While some terms were adverse to certain staff (such as the time workers started changing to be their attendance at their first job) the changes were not unreasonable within the context of the operation. The consultation process that was adopted was fair, genuine and meaningful and the respondent sought to take into account

concerns about the terms that were raised and revise the position where it could.

185. The respondent entered into the process with the intention of reaching agreement with the trade unions and representatives and did so with an open mind, seeking agreement (having prepared for the position in the event that agreement is not forthcoming). When that did not transpire, the respondent sought to reach agreement with each individual employee, carefully considering each individual's reason for not accepting the changes. Alternatives were explored and the approach taken was fair and reasonable. Points that arose were taken into account and adjustment was made to the final terms. All staff benefited from any subsequent adjustment to the proposed final terms.

186. Central to the project was the desire to be fair to all staff and the recognised trade unions. On the facts of this case that was a reasonable position to adopt, particularly given the desire to avoid a two tier workforce and to differ in the approach to the bargaining units given the work that was undertaken in seeking a negotiated agreement. It was reasonable to proceed to seek consistency and fairness with regard to the position adopted on the facts of this case.

20 **Mr O'Donnell**

187. Mr O'Donnell did not engage with the consultation process as he believed that his working pattern was being removed and he felt there was no point engaging with the respondent during the process. He was wrong in his understanding. He accepted during cross examination that he may have approached the process "naively". It was regrettable that he did not give the respondent the opportunity of demonstrating how the flexibility he had with his old terms would have been preserved. Had he done so, the outcome for him may have been different. He indicated, in any event, that he was not prepared to give the respondent any opportunity to show that the flexibility previously enjoyed would continue and his position was that he did not wish to continue working for the respondent given his perception.



188. The failure to engage in the process prevented the respondent from being able to work with Mr O'Donnell and explain the actual position which differed from his perception.
189. In all the circumstances of this case the respondent acted reasonably in choosing to dismiss Mr O'Donnell rather than continuing to engage him on his existing terms and conditions. Consistency and fairness were key reasons why the respondent wanted all staff engaged on the same terms and conditions.
190. The decision to dismiss Mr O'Donnell in the circumstances of this case, taking account of the evidence before the Tribunal, was fair. The respondent acted fairly and reasonably in all the facts of this case in dismissing the claimant for refusing to accept the new terms and conditions, taking account of the size, resources, equity and merits of the case.

**Mr Fisher**

191. With regard to Mr Fisher, while he argued the business case for change was absent, there was no evidence on which to base his assertion other than his belief that the approach taken was premeditated and that he considered the financial position to have been "massively exaggerated". He argued that the sale of one of the group companies ought to have changed the position but there was no evidence led as to the sums obtained or why this altered the position, particularly given the business case went beyond the financial position.
192. He also argued that the decision to dismiss was "premeditated" but during submissions he accepted that his argument was "difficult" given the time taken and approach to the collective and individual process. The respondent invested a very large amount of time and effort in seeking to discuss their rationale and process and did listen to the feedback received. The process that was followed, collectively and individually, was robust and meaningful. There was no evidence at all that the outcome was premediated and the respondent wished to retain its staff to allow it to grow.

193. The respondent did take into account the fact that not all engineers were better off as a result of the change. That is necessarily a consequence of changing terms and conditions with some benefitting more than others. It may well have been reasonable for Mr Fisher to refuse to accept the new terms but that did not mean it was unreasonable for the respondent to proceed with his dismissal.
194. Regrettably Mr Fisher did not raise any specific concerns he had with particular changes during the individual consultation process (other than a question about the proposed new system). Mr Fisher had the opportunity to raise any specific issues he had with the proposed terms and conditions at which stage the respondent would have had the chance to work with him to respond to the issues he believed affected him. The issues Mr Fisher did raise during the consultation meeting were responded to in full.
195. A key issue for Mr Fisher was the absence of a paper contract. While he raised the issue during the Hearing, on the basis of a concern the changes he was being asked to accept could change if he accepted the electronic copy, that had not been raised previously with the respondent. Mr Fisher had asked for a paper copy but did not indicate that there were any specific reasons for this. He had access to the electronic copy and had read the terms and conditions. He knew how to print a copy of it if he wished (or ask someone to assist him). He did not do so nor provide any further information.
196. The respondent did not act unreasonably in not providing him with a hard copy given the steps they had taken to provide Mr Fisher with the specific details (and the fact Mr Fisher had seen and read the online copy). He had a large number of disparate sources of information and forums provided to him to seek further information about any of the terms. He had not explained why a paper copy would have made any difference to his decision. He was capable of printing a copy himself or asking someone to help him. While some reasonable employers would have provided a copy, the failure to do so did not render the decision to dismiss him as unfair. The respondent did not act unreasonably.

197. Mr Fisher also argued that one of his main reasons for believing his dismissal was unfair was that he did not consider the respondent to have sound business reasons for using “fire and rehire”. He believed that negotiation should have been used. While some reasonable employers may have adopted that approach, on the facts of this case, while it caused industrial unrest and led to a loss of some goodwill, the approach was reasonable. From the information before the respondent it became clear that agreement with the trade union representing the claimant’s bargaining unit was not likely to be forthcoming. Given the union had already indicated they would not agree to changes, that had the potential to create lasting delays to a project that had become relatively time critical given the challenges facing the business. The respondent reasonably concluded on the facts of this case that absent agreement with the relevant unions (or individuals), dismissal on their current terms with an offer to remain in employment on their new terms (which terms had been extensively negotiated) was reasonable.

**No redundancy situation**

198. Finally it was suggested by Mr Fisher (and indirectly by Mr O’Donnell) that redundancy payments should have been offered. There was no redundancy situation in law. There was no diminution or cessation of the respondent’s requirements for workers of a particular kind or to work in the place they were employed. The respondent required the same amount of work and the same amount of (if not more) workers. Given the financial position affecting the business, it was not surprising that voluntary redundancy packages were not on offer. The respondent’s desire throughout this process was to achieve agreement with all existing staff as to revised term and conditions that would allow it to grow and become a sustainable and competitive organisation.

**Post dismissal adjustment did not make dismissal fair**

199. Mr Fisher also argued that his dismissal was unfair because after his dismissal the terms were further revised. At the time Mr Fisher was dismissed the collective consultation process had ended. There were no ongoing discussions. While there was a further refinement to the terms which applied

to all staff a few months after Mr Fisher's dismissal, this was not something in the parties' contemplation at the time of dismissal and cannot therefore have a bearing on the fairness of it.

**Proposed new terms and issues arising**

- 5 200. For both Mr Fisher and Mr O'Donnell, the points raised during the Tribunal process with regard to the new terms were points that the Board had considered as a result of the analysis that had been carried out. Each of the issues the claimants raised during the Tribunal process were points that had been considered by the respondent during the consultation process and  
10 points that they had chosen not to alter (or points in respect of which mitigation had been given), even if they were not points the claimants raised at the time. The respondent had entered into the consultation process with an open mind and examined each of the reasons given for not accepting the proposed changes and sought to adjust the position where possible to accommodate  
15 as many workers as possible.
201. There were reasons for the position the respondent adopted, having made a large number of concessions during the consultation process. They had also introduced measures to limit the impact of some of the changes. None of the points that arose with regard to the revised terms and conditions was such as  
20 to render the decision to dismiss the claimants for not accepting them unfair. The fact most of the staff within the claimants' grouping accepted the new terms is not irrelevant in this regard.
202. The respondent considered the terms and conditions in detail and revised their position in response to points arising. While some reasonable employers  
25 would have acted differently, on the facts of this case the respondent acted fairly and reasonably. The proposed terms were reasonable.
203. There were no specific points raised by either claimant in terms of their claim forms as to particular parts of the proposed new terms. Rather their case had been based upon the process of "fire and rehire" being unfair. The Tribunal

has found that the process in this case (both collectively and individually and in respect of the decision to dismiss and offer re-engagement) was fair.

5 204. Despite the absence of specific challenge to the proposed terms in their pleadings by the claimants, the Tribunal did carefully consider the proposed terms being offered and the claimants' position in assessing whether or not their dismissal was fair.

10 205. The Tribunal did not consider any of the proposed new terms to raise issues such as to find that the respondent did not act fairly and reasonably in dismissing the claimants for their decision not to accept them. The respondent acted fairly and reasonably in their approach, which included with regard to the specific content of the new terms and conditions.

15 206. The respondent listened carefully to the recognised trade unions and staff representatives and to the affected staff who raised issues. The consultation was meaningful and the respondent reasonably explored alternatives to dismissal in addition to the points raised by the union and staff. The impact upon staff was balanced with the needs of the business going forward in the context in which it operated. The respondent approached and conducted the process with an open mind.

20 207. A reasonable and genuine consultation process with the affected employees had taken place. That included listening to the reasons for rejecting the changes and responding reasonably to objections and making concessions, where reasonable to do so.

**Dismissal was fair**

25 208. In all the circumstances of this case the respondent acted reasonably in choosing to dismiss Mr Fisher when he chose not to accept the new terms and conditions rather than continuing to engage him on his existing terms and conditions. Consistency and fairness were key reasons why the respondent wanted all staff engaged on the same terms and conditions.

209. The decision to dismiss Mr Fisher in the circumstances of this case, taking account of the evidence before the Tribunal, was fair. The respondent acted fairly and reasonably in all the facts of this case in dismissing the claimant for refusing to accept the new terms and conditions, taking account of the size, resources, equity and merits of the case.

### **Summary**

210. Looking at each of the claimant's position separately, the decision to dismiss each claimant was fair and reasonable taking account of size, resources, equity and the substantial merits of the case, their dismissal being for a fair reason.

211. This decision does not mean that the claimants acted unreasonably. There were reasons, as set out above, for each claimant choosing not to accept the new terms which was a matter for them. On the facts of this case the respondent acted fairly and reasonably having balanced all of the factors, in dismissing each claimant. Applying the law to the facts of this case, each claimant was dismissed fairly.

212. The claims are accordingly dismissed.

20 Employment Judge: David Hoey  
Date of Judgment: 14 February 2022  
Entered in register: 16 February 2022  
and copied to parties