EMPLOYMENT TRIBUNALS

Claimant: **Mr K Mann**

Respondent: **Airbus Defence & Space Ltd**

HEARD AT: **Bury St Edmunds** **ON**: **17th January 2017**

BEFORE: **Employment Judge Laidler**

REPRESENTATION

For the Claimant: **Miss J Bradbury, Counsel**

For the Respondents: **Mr G Griffiths-Jones, Solicitor**

JUDGMENT

1. The Claimant was dismissed for some other substantial reason.

2. The dismissal was fair in all of the circumstances and the claim of unfair dismissal must therefore fail and is dismissed.

REASONS

1. The claim in this matter was received on the 12th September 2016 bringing a complaint of unfair dismissal. In its response of the 3rd November 2016, the Respondent denied the claims stating it had dismissed for some other substantial reason and that that dismissal was fair.

2. The Tribunal heard from Evan Jones, Senior HR Business Partner and Sue Crook, Security Manager for the Respondent and from the Claimant. From the evidence heard the Tribunal finds the following facts.

The Facts

3. The Claimant commenced employment on the 10th February 2003 and the Tribunal saw in the bundle at page 27 his contract as a network operations engineer. At the time of the termination of employment he was involved in the MOD Welfare Network as part of the PAN East Team. In his witness statement at paragraph 2, Mr Jones explained that the Respondent was assigned to provide services to the MOD which were subject to security clearance, policed at a national level. The contract between the Respondent and the MOD was to provide for a rapid response call out. In the contract at page 28, clause 10, could be seen a provision with regard to overtime but it was accepted in this hearing that that was not the same as the on-call rota. The on-call policy was seen in the bundle at page 172 and this contained the following relevant provisions;

Introduction

For operational reasons employees may be required to be available outside normal working hours to assist with project work or site-related issues. The requirement is that they are immediately contactable by phone and available for immediate return to the workplace if required. Employees who agree to provide this type of cover are referred to as being 'On Call'. There are payments associated with being on call as identified below. If On Call employees are contacted and required to return to work this is referred to as 'Call Out'. Again, there are payments associated with Call Out that are additional to those for On Call.

Organising On Call

The relevant Manager determines the business need for employees to be On Call. The agreement for particular individuals to be On Call is between the Manager and that individual. (For further details on the process for organising and administering On Call, please go to the On Call process). The requirements for being On Call are:

- *The employee provides a telephone number on which they can be contacted immediately throughout the on call period,*
- *The employee will return to work immediately if required,*
- *The employee will be in a fit state of return to work and perform the required task/s.*

4. The Claimant explained the current rota at paragraph 3 of his witness statement explaining that it was a one week on primary call, one week on secondary and one week off. He estimated his loss by a change in the

rota to that proposed by the Respondent would be approximately £4,250 per annum. In cross examination he accepted that the current pattern had been in existence for between 3 and 5 years and that he never questioned that the Respondent could change the rota and he did not question the Respondent's business case for so doing.

5. The Respondent had carried out an analysis to find that the demand for secondary call out for the period January 2014 to September 2015 was negligible and that cover was no longer required in order to fulfill the Respondent's contractual obligations.

6. The matter was initially dealt with by Glenn Lloyd, the person immediately responsible for the Claimant and his two colleagues, Paul Britton and Stuart Dobbs assisted by Kelly Beck HR Business partner. In his letter of the 5th May 2015 seen in the bundle at page 95, Mr Lloyd wrote to the Claimant and others in the team setting out the need to change the on call rota system making it clear that this would remove the secondary leaving just a single primary On Call operative.

   By way of an outline, I explained that as part of the GC GO initiates begun last year a number of efficiency/cost saving measures have been highlighted across the business and one of those was the amount of personnel on call. I stated that Service Delivery had carried out a review of on call across the department and given that the changes to Welfare and over the past 12 months and other changes, it was decided to reduce the PAN East on call provision for Primary and Secondary to a single Primary On Call. I appreciated that as individuals you need reasonable notice before we affect the change I therefore stated that the change to a single On Call would begin from the beginning of June 2015.

7. The email also recorded that the Claimant had said he would rather be removed from the on call process if it was going to reduce to one week in three. In an email of the 28th May Mr Lloyd stated that the on call position would change from the week commencing the 6th July rather than the 1st June and on the 9th June a meeting was proposed on the 16th. The Tribunal saw an email on the 19th June following that meeting in which again the need to move to a single on call was stressed and the email recorded that they had agreed to move the start date to the first Monday, the 7th September. He set out questions that had been raised with the Respondent's answers to them.

8. On the 2nd July 2015 Mr Lloyd wrote to the Claimant following a meeting that Mark Enness had had on the 6th May and their meeting on the 16th June. This again confirmed that they had decided to delay the start date until 7th September 2015. This was to give serious consideration to all of the points that had been raised.

9. The Claimant wrote to Mr Enness by email on the 13th July stating his point of view had not changed as he did not believe that the work/life

balance worked for him anymore and he did not want to be on call for primary only from September.

10. In an email of 26th August 2015 Mr Lloyd set out again details of the business case and again set out answers to specific questions that had been raised. They remained willing to discuss particular problems faced by employees but asked that the employee let them know of their position having received the information set out in that letter.

11. By email of 1st September the start date was then moved to the 5th October pending further discussion. There was then emails between the Claimant and the Respondent about the need to take advice and it was confirmed he was completely free to do so. The start date was then moved again to the 5th October and by email of the 8th September Mr Llloyd provided answers to further questions that had been posed.

12. The date for the start of the new rota was then moved to the 19th October and it appeared there must have been a meeting between the trade union representative and others on the 14th October. Again the start date for the new rota moved to the 2nd November and was stated in a letter of 26th October. This made it clear that they were going to trial the new rota from that date and as a gesture of goodwill to enable the smooth transition, the employees would continue to receive the same on call payments until the end of the year with the new on call rates being effective 1st January 2016.

13. By letter of 5th November 2016 the Claimant was invited to a meeting on the 10th November to discuss the situation. The Claimant accepted in evidence that this was the first time that the Respondent formally explained to him that if the matter could not be resolved then the Respondent proposed to issue notice of contract termination to be followed by immediate reengagement on the new terms.

Given the length of time that this issue has been discussed and the fact that we appear to have reached an impasse on the contractual status of the on call rota (you saying that you are not obliged to work it and the company saying that you are), the company is giving consideration to approaching this matter as if it were a contractual change. It is proposed that this will affected by notice of contract termination and you will be provided with revised terms and conditions of employment containing further clarifications of your obligations. The new contract would take effect immediately following termination (providing continuity of employment).

On this basis I am writing to invite you to meet with me on Tuesday 10th November 2015 at 10am in Evan Jones office together with Evan Jones. Senior HR Business Partner. The purpose of this meeting is to discuss the rationale for the company's proposal, provide you with a further opportunity to confirm your agreement to the proposed changes and answer any additional questions you may have. If agreement is not

reached, you should be aware that the decision may be taken to issue your contractual notice as detailed above.

That made it clear that in offering new terms and a new contract, continuity of employment would be maintained.

14. Correspondence was then seen from Unite the Union objecting to the tone of the correspondence and a meeting appears to have been delayed but then appears likely to have taken place on or about the end of November as an email seen in the bundle at page 152 is from Mr Jones to the Union representative thanking him for his time that morning. Either there was a meeting or further discussion.

15. In a detailed letter to the Claimant of 18 December, Mr Lloyd virtually repeated the contents of the letter of 5 November and again advised that if the company had no other alternative and the impasse had not been resolved, then they would treat this as a contractual change and give notice of termination and immediate reengagement.

16. The Tribunal is satisfied it could not have been clearer that that was the route the Respondent was proposing to take if agreement could not be reached. In this letter Mr Lloyd proposed a meeting on 6 January 2016 to again attempt to reach an agreement. This meeting went ahead and a letter was sent following the meeting on the 28th January 2016 seen in the bundle at page 158.

Despite the view that a contractual obligation already exists, the Company has decided to issue you 3 months' notice with effect from 1st February 2016 that your on call payments will be changing to reflect the pattern of work you have been trialling since 1st November 2015. This period of notice is at least equivalent to your contractual notice with the Company. During this notice period you will continue to receive payments as if you had been on secondary on call to enable a smooth transition into the rota. On expiry of the notice, there will be a "technical" termination of your employment followed by an immediate offer of reinstatement where on call payments will reduce to reflect the new rota, and the attached addendum to contract will apply. All other terms and conditions and continuous employment will of course be unchanged.

You will find enclosed a letter informing you of amendments to your contract. In order to assist in planning for the transition, I would be grateful if you would sign and return one copy of this letter to Kelly Beck, retaining the other for your own records by no later than 29 February 2016.

Addendum to Terms and Conditions of Employment

1. This addendum shall become effective as of 01 May 2016.

The following addition to your contract of employment shall be applicable from 01 May 2016.

a. The role in which you are employed as PAN Engineer has a requirement to work flexibly and provide out of hours on-call cover, should business needs deem it a requirement, over a 24/7/365 period as part of an on-call team. The business will retain the discretion to change on call arrangements (providing reasonable notice) according to business requirements.

2. No other terms or conditions of the above mentioned contract shall be changed as a result of this addendum.

3. You should retain this statement, and you are asked to sign the enclosed copy to indicate your agreement that the particulars contained in the statement accurately represent terms of your contract of employment. You should then return the copy to Kelly Beck to be held on your personal file.

17. The Tribunal is satisfied that this letter was giving notice of contractual change to be implemented by 1st May 2016. The Tribunal does not accept that it was a termination of employment if the contractual changes were not accepted. What it does however find is that the Claimant demonstrated that he did not accept those changes by tearing up the letter and leaving that with HR.

18. In so far as the Respondent seeks to argue that the contract ended on that tearing of the letter on the 29th January, the Tribunal does not accept that position. What the Tribunal has concluded is that it was the subsequent letter that was sent to the Claimant on the 2nd February 2016 actually read out to him by Mr Jones at a meeting on that date that terminated the contract. It is very clear that it was given in the light of the Claimant's refusal to accept the new on call arrangements and it expressly stated "I am writing to give you notice of the termination of your employment". The Claimant was given 12 weeks notice and his last day of employment would be the 26th April 2016. Although it refers to considering the Claimant's behaviour, no disciplinary action was taken.

19. On the advice of Sue Crook, the Claimant was put on garden leave and the Tribunal can understand why in view of the nature of the business, that step was taken. It accepts the evidence of Mr Jones and Ms Crook that that was a usual step for the Respondent to take even if it may not have been a contractual provision. The Claimant did not contact the Respondent again until 25th February when he emailed Mr Franklin. He stated in that email he considered the dismissal to be "inappropriate, disproportionate and vindictive". He said he had been dismissed for "tearing up a piece of paper". He said he had not been given the opportunity to come to his senses and sign the new contract. What he did not say expressly in that email was that he wished to accept those

new terms. Mr Franklin replied stating that as in the letter of 2nd February Mr Jones was the Claimant's contact point.

20. The Claimant did not write again until the 10th March 2016. What can be seen in the Claimant's second witness statement with regard to mitigation is that following the termination of employment he had "immediately begun my search for work" and in a list disclosed by him he made three job applications between the 11th and 18th February 2016.

21. The Claimant wrote to Mr Jones on the 10th March stating "I would like to discuss a return to work on the amended terms that my colleagues have had the opportunity to sign up to please".

22. The Tribunal saw that the addendum that it is told the two other employees signed was as the addendum given to the Claimant, however it then added into the body of the new contract provision "that will consist of a team of 3 full time employees". That is the only change which it is understood came about by the other employees' concern that they were now a team of 2 on the Claimant's departure.

23. By email of 24th March, Mr Jones stated that he was not prepared to reconsider the Claimant's rejection of the original offer and on the 26th March the Claimant asked for the appeals procedure and stated "I have not rejected your offer in my opinion. I have simply had an emotional and not an expected response to a confusingly worded addendum. It was my understanding from that letter that a full "new contract" would be presented including said addendum for signature by the end of the month". That was the first time the Claimant had said that and that is approximately two months from the date of the January letter.

24. By further email on 21st April Mr Jones confirmed that the Claimant had clearly rejected the offer and his employment had terminated. There was no appeals procedure in those circumstances.

Relevant Law

25. The Respondent relies on 'some other substantial reason of a kind such as to justify the dismissal of an employee' (SOSR) a potentially fair reason within the meaning of section 98(1)(b) Employment Rights Act 1996 (ERA)

26. It is well established from the authorities that this provision may cover the reorganisation of the business and/or changes to terms and conditions.

27. If the Respondent satisfies the tribunal as to the potentially fair reason for dismissal the tribunal must determine whether it acted fairly within the meaning of section 98(4) ERA. This involves taking all circumstances into account and 'equity and the substantial merits of the case'. The tribunal must not substitute its view for that of the employer.

28. The Claimant seeks to rely on the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015). The Code states at paragraph 1 that it is designed to help employers and employees deal with 'disciplinary and grievance situations in the workplace'. In *Phoenix House v Stockman and Lambis* UKEAT/0264/15 the EAT stated that the Code 'does not in terms apply to dismissals for some other substantial reason'.

Submissions

For the Claimant

29. Ms Bradbury relied on her written opening note but also addressed the tribunal orally. The Claimant does not accept that the reason for dismissal was SOSR, submitting that the Respondent was 'fed up after months of discussions and communications. The Respondent seized upon an isolated and impulsive act by the Claimant (the tearing up of the letter) and gave it an exaggerated and disproportionate significance in order to justify dismissal.'

30. An extract from Tolley's Employment Law Service was relied upon which stated within section [U5072]:

> *The principle that emerges can be stated: the mere refusal of an offer of new terms will not of itself justify a dismissal and something more is needed to make the dismissal fair. The question of the reasonableness of the offer is to be judged at the date of dismissal and other relevant factors may be the acceptance level of other members of the workforce and the importance of the changes. Catamaran cruisers ([1994] IRLR 386) suggests that if the changes are essential then it will be easier to show an unreasonable refusal…*

31. An extract from Harvey on Industrial Relations and Employment Law was also relied upon at paragraph [1922.01] in which it was suggest that the ACAS Code can apply to a dismissal for SOSR 'at least where the employee is facing disciplinary measures'. In paragraph [1924] reference was made to *Alboni v Ind Coope Retail Ltd* [1998] IRLR 31 in which the Court of Appeal had stated that 'in determining whether an employer has acted fairly it is necessary to have regard to both the reason for dismissal and the whole process of dismissal from the giving of notice to its expiry'. It was submitted this was very important on the facts of this case in view of the Claimant's 'efforts and wishes to be included in further negotiations and to be given the opportunity to sign the changes to the terms and conditions'

32. It was submitted that the Respondent cannot establish SOSR on the facts as the terms finally agreed by the other employees were not the terms torn up by the Claimant. Whilst the Respondent states there was only a slight difference the fact is that the Claimant had not rejected the final terms.

33. The Claimant it was submitted was really dismissed for conduct in tearing up the letter. Sue Crook was given an exaggerated view of the situation.

34. Procedurally the Respondent did not follow any procedure at all. It goes against all principles of natural justice. There was no warning as to the consequences of refusing to accept that changes. A reasonable employer would have handed the Claimant the letter of 28 January and explained the consequences at a meeting. They would not have placed the Claimant on garden leave which was effectively a suspension.

35. The Claimant had not rejected the changes. He did not realise it would mean the termination of his employment. He believed it the intention of the employer and would then be incorporated into a contract for him to sign. That is the conclusion he came to. The Claimant had the right to be treated fairly to the end of the notice period. He wrote on the 25 February before the deadline and again on 10 March when he knew his colleagues had signed. These are not the actions of a man rejecting the terms.

For the Respondent

36. It was submitted that the Respondent has established that the dismissal was SOSR. The Respondent after months of negotiation saw fit to administer the change be termination and re - engagement.

37. With regard to the fairness of the dismissal the Respondent had made it very clear how it proposed to deal with the situation.

38. The letter of the 28 January was clear and it is not as if the outcome came as a shock. There were two letters setting out the possibility. The Claimant accepted that he had the opportunity to take advice. The Claimant says he was confused by the letter and in cross examination that he thought the Respondent would provide a final version of the contract of employment. That assertion was not in his witness statement or ET1. The letter of 28 January was perfectly clear. Tearing it up is about as clear a rejection of those terms as you can get. On the 2 February the Claimant was told that his actions amounted to a rejection. It also made it crystal clear that the reason for dismissal relates to the offer made. It referred to the right to take other disciplinary process but conduct was not the issue for the Respondent who interpreted the Claimants actions as a clear rejection.

39. Security was paramount which is why the Claimant was escorted off site. He took the 2 February letter with him and had plenty of opportunity to reflect on it. There was no communication from him though for 3 weeks. He was clearly making efforts to secure alternative employment before writing to the Respondent. That further cements his rejection of the offer.

40. Once the offer was rejected it was rejected. The Claimant had made it clear he would not be playing a part in the new rota. The others had concerns connected to fact the Claimant would no longer be on the rota and how it affected their workload. They were different positions.

41. The Respondent followed a lengthy consultation process. The dismissal was fair for SOSR.

Conclusions

42. The Tribunal is satisfied that the Claimant was dismissed for some other substantial reason, namely the Respondent's need to change the on call rota. The Respondent's business case for requiring that change has not been challenged. The Tribunal accepts, however, that there clearly was a need to make a change when the Respondent's figures demonstrated that the secondary on call was rarely utilised but employees were being paid to provide that level of cover.

43. The Respondent embarked on extensive discussions with the affected employees and their Union. The Claimant made it clear from the start he wanted to be taken out of the on call rota completely. An impasse was reached. The Respondent then for the first time on 5th November made it clear that if the matter could not be resolved they would implement the change by termination and immediate reengagement on new terms with continuity of employment being maintained.

44. The new rota was trialed from 2nd November to 31st December to monitor its effectiveness but the on call payments of two weeks in three continued until 31st December after which the employees would be paid in line with the new rota. After further email exchanges the Respondent made its position clear again in the letter of 18th December.

45. After the meeting on 6th January at which the Claimant was accompanied by a Trade Union representative, the letter of 28th January was sent. This was clearly notice of the change in terms and conditions with effect from the 1st May 2016. The Claimant did not accept that change and demonstrated that by tearing up the letter and leaving it in HR. This did not terminate his contract it referred to termination at the expiry of the notice period given. The letter of the 2nd February terminated the contract as at 26th April.

46. The Claimant was put on garden leave which the Tribunal accepts was a permissible response in view of the nature of the work undertaken by the Respondent. Any suggestion of disciplinary action was never pursued.

47. The Claimant did not respond immediately to that letter but waited until 25th February and during that time commenced his search for alternative employment. He did nothing to demonstrate to the Respondent that he

wanted to accept the revised terms. Even when he did write on the 25th February he did not make clear that he would accept those terms but argued against his dismissal. It must be remembered the Claimant continued to have Trade Union support if required for advice and assistance. This was not a disciplinary situation. The Claimant had not been dismissed for conduct reasons.

48. The Tribunal is satisfied there was no obligation on the Respondent to follow the ACAS code. Ms Bradbury handed up extracts from *Harvey's paragraph 1922 to 1924* but not the actual authorities referred to. The Tribunal has considered the cases mentioned and in particular *Phoenix House -v- Stockman* which held that the code does not in terms apply to dismissal for some other substantial reason.

49. The Tribunal is satisfied that there was no requirement on the Respondent to offer the Claimant an appeal in all of the circumstances of this case. Ms Bradbury suggested that the Respondent, through Mr Jones, rather over laboured the point in evidence that negotiations had been going on for 7 months. That is, however, the fact of the matter. The Respondent had endeavoured to resolve the situation by negotiation but had not been able to do so. Its reaction in January must be seen against that factual background.

50. The Tribunal is therefore satisfied, having considered all the circumstances in the case, that the Respondent acted fairly within the meaning of S:98(4) and the Claimant's claim of unfair dismissal must therefore fail and is dismissed.

_____

Employment Judge Laidler, Bury St Edmunds

JUDGMENT SENT TO THE PARTIES ON

21 February 2017.....

.....

FOR THE SECRETARY TO THE TRIBUNALS