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EMPLOYMENT TRIBUNALS

Claimants: Mr I Yousaf
Ms Y-N Wang

Respondent: Merrill Corporation Limited

Heard at: London Central **On:** 13-15 June 2017

Before: Employment Judge Goodman

Representation

Claimants: in person
Respondent: Miss I Ferber, Counsel

JUDGMENT having been sent to the parties on 16 June 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. These claims for are claims for unfair dismissal. The dismissals occurred when the Respondent sought to renegotiate the term of the Claimants' contract as to holiday. Negotiations broke down, and notice of dismissal was given, with an offer of re-engagement on the new terms which was not accepted.

2. At the outset of the hearing, I explored with the Respondent whether it was conceded that an oral variation of the term as to holiday which had come to light during the process was accepted by the Respondent as a variation of the contractual term, or whether that had to be proved. The Respondent

accepted that it was a contractual term, though not reduced to writing. That is important, because it was not always clear in the process that the Respondent at the time accepted that the contract had been varied.

3. So the issues the Tribunal had to decide were (1) whether the Respondent's reason for dismissal was a potentially fair reason -some other substantial reason justifying dismissal was the reason asserted - and (2) the section 98(4) question whether it was fair to dismiss for that reason. Issues of remedy had not been canvassed.

Evidence

4. The Tribunal heard evidence from:

Matthew Cambridge, the Respondent's Operations Director for the DataSite Division where the Claimants were employed; he had five project supervisors reporting to him, including the Claimants' line managers. Mr Cambridge made the decision to dismiss.

Nicholas Conway, who is no longer employed by the Respondent but at the time was the Service Delivery Director for the Transaction and Compliance division; he heard the Claimant's appeals against dismissal.

Abdul Bari, a project manager like the Claimants, was called under witness order without a witness statement. He had ultimately accepted the offer of re-engagement on new terms and remains in the Respondent's employment; he gave evidence about the origin of the variation of the contract term as to bank holiday entitlement.

Imran Yousaf, the first Claimant. The Second Claimant did not give evidence herself, but added a short submission about the appeal process. Each Claimant had accompanied the other to their respective consultation meetings. It was accepted by all parties that although there were some differences as to dates, the process and the substantial decision making were the same in both cases.

5. There was a hearing bundle of documents of up to 500 pages, containing company policies and relevant correspondence.

Findings of fact

6. The Respondent employs 2,978 people worldwide, of whom 140 are in the UK. It provides back office services to companies in the financial sector. There were two relevant divisions, Transactions and Compliance, which was at the time doing less well and had been making redundancies, and DataSite, a virtual print room, which appears to have been flourishing. DataSite was established in about 2006, and its unique selling point was that its 24/7 service.

7. Both Claimants were employed as a Project Managers in DataSite within a team of 5 covering the weekends. The Claimants themselves worked nights on Friday, Saturday and Sunday, each 12 hour shift starting at 8pm and with a 30 minute break, so that in effect they worked three shifts of 11½ hours, or 34½ hours a week. The other three in the team also worked 12 hour shifts but during daytime hours - two worked Friday to Sunday and one worked Saturday to Monday.

8. Both Claimants had started as agency workers working 37½ hours on weekdays, later moving to the weekend shift with the 34½ hour work provision.

9. Mr Yousaf signed a weekend shift contract dated 23 December 2011. There are some handwritten changes, initialled by him, which corrected thetyped total hours of work and the annual leave provision. Ms Wang had a similar contract signed on 15 January 2015. She had previously been working a weekday shift from 3-11 p.m..

10. The terms of the contract, as signed at that time, provide that normal hours of work were Friday to Sunday 7.30 p.m. – 7.30 a.m. with 30 minutes for lunch, and then, as regards leave, it says: “you are entitled to 25 (crossed out and 15 substituted) days annual leave, in addition to public holidays”. It then said: “other than as varied by this provision, the provisions on annual leave contained in the contractual section of staff handbook will be applicable to you”.

11. The relevant provision of the staff handbook is that the company's policy was:

> "to provide pro rata holiday entitlement in respect of bank and public holidays to employees who work part-time, if you work part time your annual leave for each holiday year will be adjusted up or down to reflect the number of bank or public holidays that follow in your normal working days that year, subject to the company's policy in force from time to time. If any bank or public holiday falls on one of your normal workings days, you will normally be required to take annual leave on that day."

12. The Claimants' evidence to the Respondent in the process of consultation leading to dismissal was that this term had been already varied, and was worked by all the weekend team as varied. Mr Bari, whose employment predates either Claimant, has explained its origin: the company had wanted to ensure adequate cover over the weekend, because it was their sales pitch to customers that there was help available at any time, day or night. It was provided that if the bank holiday fell on a working day they must work it, unless cover could be arranged. Because they were struggling to recruit, they were not going to pro-rate the bank holiday entitlement, so, as can be seen from the written contract, the normal annual entitlement of 25 days for a full-time 5 day a week worker, had been pro rated to 15 days for a 3 day a week part-time worker, but the "in addition to bank holidays" was not going to be pro-rated as provided in the handbook.

13. The unchallenged evidence was that all weekend workers had thereafter taken their pro-rated holiday as 15 days, plus the 8 bank holidays in full. Holiday actually taken was booked on the absence management system ("ADP"), and managers were well aware of it. For night shift workers, bank holiday working meant a shift that began on a bank holiday, not a shift that ended on one.

14. According to Mr Bari, only once or twice was a weekend worker compelled to work a bank holiday because there was no cover for him. Mr Cambridge and the First Claimant could not in fact recall any episode when a weekend

worker was unable to take annual leave on a bank holiday if he or she wanted to, because it had always been possible to get cover.

15. Cover had to be arranged for weekday shifts too when they fell on a bank holiday. The First Claimant usually worked on New Year's Day and Christmas Day if they occurred on his weekend shift, but he also volunteered for these days if they fell on a weekday, so he provided cover for weekday workers wishing to take leave on bank holiday. If people covered for others, then they were paid overtime, which at the weekend was double time. The Second Claimant did not work on Christmas Day because she lived in Kent and there was no public transport then. Her evidence was the cost to the company of paying for a taxi to get her from home to work on a public holiday was not much different to the cost of paying overtime to someone covering for her. At any rate, it gave rise to no dispute.

16. In January 2015, the company began an overhaul of the staff handbook to make it a globally consistent document, although it was to have local sections to allow for individual country practice.

17. By October 2015, it seems the wording of the handbook was largely agreed, and the Human Resources department began a review of individual contracts to check for consistency between the paperwork, individual terms, and the handbook. There is an email from December 2015 showing a Human Resources adviser contacting Mr Cambridge to query the First Claimant's hours of work and the length of his break. It seems she had seen the typed original, but not the signed version with the handwritten amendment. Mr Cambridge confirmed the hours of work, but also said that he thought the break was one hour rather than half an hour. As the unchallenged evidence was that the weekend shift in fact worked a half hour break, this suggests that Mr Cambridge, who worked weekdays, had little direct knowledge.

18. In January 2016, Ms Wang's supervisor discussed with her the fact that new contracts were coming up, suggesting there would be more pay and less holiday. It is interesting that the immediate line manager appreciated

that what was coming up would be a change in the terms of the weekend worker, contrary the HR department's assertion that there was no change. It is not known whether the Human Resources Department consulted with the immediate line managers about whether the new contracts changed or did not change what had been agreed.

19. On 5 February, the Respondent's Human Resources Department sent a letter with the new contract to the weekend team's members. The letter stated that the contract involved no change, and they were asked to sign and return it. In fact when this was handed to the First Claimant by his supervisor, Daniel Walker, Mr Walker pointed out that in fact it meant there was a reduction in the number of bank holidays, because it while it was provided in the new contract that the hours of work were 34½ hours over 3 days, 7.30 – 7.30 with a 30 minute break, on annual leave it said: "you are entitled to 22 days paid annual leave on each holiday year including public holidays, comprised of 17 annual leave days including 2 addition service recognition days and 5 public holidays. Should a public holiday fall on those scheduled work days, you will be required to work or to request holiday".

20. The annual leave entitlement had increased to 17 from 15 by irtue of length of service; Mr Yousaf had accrued those 2 days since his original contract. This was not an addition to his contractual entitlement.

21. The Claimant of course noticed, as Mr Walker had pointed out to him, that this involved a cut in his public (bank) holiday entitlement from 8 days to 5 days, a loss of 3 days, and as he was a 3 day a week worker, this was in effect a cut of one week in his holiday entitlement.

22. The First Claimant protested in writing on 22 February 2016 about the change in the terms, and explained that they had previously been entitled to full public holidays, not pro-rated, and that therefore when the covering letter said that this involved no change to their terms and conditions, it was untrue. The Respondent's Human Resources department, responded by Victoria Savage next day saying that the handbook "had not been accurately implemented and some had been receiving additional days off to that which they would otherwise be entitled". In other words, the Human

Resources Department did not recognise that there had been a contract variation, but saw this as a local practice which exceeded the contractual entitlement.

23. The Claimants wrote, on 13 and 21 March respectively, explaining that they would not sign, explaining that the practice, was a deliberate and known policy agreed by the company.

24. The eventual response from the Human Resources Department was that there would be a consultation meeting to discuss it. The consultation process began with a meeting on 10 June with Victoria Savage from Human Resources department and Daniel Walker the line manager. The two Claimants explained the origin of the arrangement and their understanding of it.

25. On 30 June the Respondent wrote that the line manager acknowledged that there had been a variation on bank holiday working. The proposed solution was that the company would give notice to discontinue the verbal agreement from 1 January 2017. They would no longer be required to work bank holidays falling on scheduled work days. Bank holiday entitlement would be calculated pro rata, based on the number of days worked per week. They would be paid overtime rates if they agreed to work on a bank holiday. Pro-rated, they would now get 5 days bank holiday over and above their pro-rated 17 days annual leave entitlement. Their holiday must be used for any bank holiday that fell on a working.

26. Enclosed with the letter was another contract to sign. The Claimants did not agree to sign it.

27. On 19 July, Ms Wang wrote to the Respondent to say that she considered herself a full-time worker (her concern was with terminology rather than the calculation of hours worked, and related to her permit to work in this country). On 24 July, Mr Yousaf wrote to the Respondent protesting that the practice of taking non-pro-rated 8 days bank holiday added to the pro-rated 15 day entitlement had gone on over a decade, and had covered a dozen staff on the weekend shift.

28. On 5 August, they were invited to a second consultation meeting. They were warned that one of the options that the Respondent would have to consider if agreement could not be reached would be giving notice to dismiss on the existing terms with an offer of re-engagement on new terms.

29. By way of evidence of the respondent's reasons for requiring the chnages, Immediately before the meeting took place, on 18 August, Victoria Savage sent a memo to the US Human Resources Department setting out her understanding of the position with regard to the weekend team. She said that an inconsistency in the taking of bank holidays had come to light on the weekend shift; she described it as an "error", and the company approach was not being applied. She said there was no record of the agreement that the Claimants said had been reached with the former managers Barry Clancy and Elaine Strong, who had left, and that the arrangement for extra bank holiday entitlement contradicted the actual contractual terms. This suggest that Ms Savage did not accept there had been a contractual variation. Ms Savage went on to say that the Claimants had "rarely provided this service" of working on bank holidays, so others were paid to cover for them at double time. Taking four weekend workers each with three extra bank holidays, this cost £6,500 per annum. She referred to the disruption of having to arrange cover for the weekend shift workers' extra three days. She said it was unfair relative to the rest of the full-timers, as these part-timers got proportionately more holiday. The respondent had offered to change the terms so as not to require working on the bank holiday, and offered to pay the Claimants a one-off payment 3 days pay for 2017, so that in effect they were not disadvantaged until 2018, but in reply both Claimants said they wanted a permanent salary increase of 3 days. Ms Savage reported that the company proposed to reject this offer and proceed with the "only option remaining to enact this change", an allusion to dismissal and re-engagement.

30. A schedule with a calculation of costs was attached. This calculation appears not to have been discussed with the employees at the consultation meeting next day, or thereafter, and in when giving evidence Mr Cambridge

was unfamiliar with the calculation and had difficulty explaining it. It is calculated that the cost of paying bank holiday pay to the weekend team for the extra 3 days, together with the overtime paid to other staff for cover on those 3 days amounted to £7,630 per annum. The document only came to the attention of the claimants in disclosure after proceedings began. The First Claimant argues that this is overstated because in practice only the Saturdays are covered.

31. The contemporary thinking of the HR Department is also apparent in an earlier exchange of memos between Ms Savage, Mr Cambridge and another in June. The view is expressed that the workers were hardly ever made to work the bank holidays, "they get the extra benefit but we still have to pay overtime to cover", Mr Cambridge's evidence was that at this point, immediately prior to 30 June when the letter with the amended contract was sent, his concern was firstly that it was not *fair* that the weekend team should have an extra 3 days bank holiday compared to others across the business as a whole, and secondly that there was a risk to the business that they might not get cover for the weekend shift, given these extra days entitlement leading to an increased need for cover at the weekend.

32. In the second consultation meeting, which was on 19 August for Mr Yousaf, the Respondent conceded that management knew about the extra bank holidays, but did not go as far as to say that it was a term of the contract, so there was much discussion, with the Claimant representing that it was not an error or inconsistency, as the Respondent said, as it was a conscious decision by DataSite management nearly a decade before. Ms Savage, on behalf of the Respondent, said "once we became aware of the inconsistency, it did become an issue of inconsistency and fairness", but went on to say that there were other aspects, like costs, as well. Another note of the meeting refers to the costs implications, business disruption and that changes happened in the business, but is apparent from comparing the notes and from the evidence of Mr Cambridge, that although reference was made to costs implications and business disruption, this aspect was not explained to the claimant or explored with him.

33. On 23 August, a letter was sent to the Claimants with a further contract, saying that it was in keeping and in line with practices across the rest of the organisation. The copy of the contract sent on 23 August was not in the bundle. Mr Yousaf thought that it contained no material changes, though it seems from reading the notes of Ms Wang's appeal meeting, that in her case there was a material change (though not material to this hearing) because it altered the proposal on paying overtime for bank holiday working, apparently conceding that overtime rates would after all be paid.

34. On 9 September, there was a third consultation meeting with Mr Yousaf and a parallel meeting for Ms Wang. This time Mr Cambridge was chairing, and it was this meeting that immediately preceded the decision to dismiss. The Claimant complained again that the proposed changes had been introduced in February with no initial discussion, and had at first presented as there being no change. He said that since the initial letter other reasons for changing the terms had been mentioned, so he was not sure what the actual reason was. The Respondent now acknowledged that the varied term of additional bank holiday working for the weekend workers was a term of the contract. The justification for reducing it was said to be a matter of internal equity, as well as the costs. The Claimants explained the hardship of being weekend worker, working, as he put it to the Tribunal, "the ultimate unsocial hours", and it was not a trivial or minor change as far as he was concerned as 3 days was a week's holiday. The Respondent said there was no longer US support for the additional days.

35. The meeting notes also record that the *weekday* staff were not accepting public holidays being bolted onto annual leave, which would apparently mean they would now be required to work bank holidays without getting overtime for it. Newly hired staff were being engaged on the new terms on the weekday shift, but existing weekday staff were still on their existing terms. This is interesting given the respondent's concern for equity between staff as a reason for enforcing the change to the claimants' terms.

36. Mr Cambridge gave evidence about what he saw as the reasons for making this change, and why it was necessary as of September, when he

decided the claimants should be dismissed. He said that the principal reason, and he estimated that as 75% of his reasoning, was internal equity, by which he meant equity across the business, say for example with the weekday shift, and in other divisions; it was not fair to other employees where part-time workers had pro-rated bank holiday entitlement, that the weekend shift in DataSite got full entitlement to bank holiday. Weekend already had a 25% shift premium to reflect their unsocial working hours. It could cause resentment amongst some staff if it were known. There was no evidence that it did cause resentment among other staff; managers saw it as a potential risk.

37. The other factors in the decision were the risk of not getting cover for weekend shifts, and the trouble of arranging cover. Although, as noted, weekend shifts had never not been covered, and certainly while the two Claimants had been on weekend shift no one had ever been obliged to work a bank holiday because cover could not be found, in principle it could occur. The Claimants' point, that as they were by their contracts obliged to work bank holidays if there was no cover, that removed the risk and was the solution to his problem, did not sway him.

38. Arranging cover was also troublesome. For every shift that needed to be covered, whether weekday or weekend, he had to email all to ask for volunteers, then had to shuffle through the responses and make the arrangements - all took up time. In 2014, 58 shifts had to be covered, in 2015 there were 70. He conceded that out of these totals the extra three bank holidays for weekend workers was only 15 shifts each year; even though a small proportion, it added to mangers' workload.

39. As for cost, he made clear that this was a subsidiary matter - 75% of his reason for wanting the change was internal equity. Nevertheless, at the time the Respondent was seeking to reduce costs. The travel and expenses policy was being trimmed. The Tribunal was taken to an email sent to him by HR on 18 August 2016, in principle seeking confirmation that he was leaving some posts unfilled, so make a saving, but commenting generally that "numbers were not looking great for the company" and that further savings might needed from any source. There was a message from the

CEO to the whole company (25 August) about reductions in physical conference space across the organisation which referred to global weakness and volatility putting pressure on finance results. There had also been two town hall meetings about the respondent's financial performance - although Ms Wang had the impression from the one she had attended that the Respondent was in fact doing quite well.

40. At the last consultation meetings with the Claimants in September both complained again that they had been asked to sign the contract in February as if there were no change, and that when they disagreed they were told it was going to happen even if they did not sign. The Respondent pointed out they were now consulting to change the contract. There was dispute about the cost, the Claimants saying that only the Saturday night shift was cover required. On operational disruption both Claimants said weekdays were the most trouble because there were so many more of them. The Respondent say they tried to alter weekday terms, but they had not agreed.

41. On 13 and 23 September the Respondent gave notice to the two Claimants respectively to terminate the contract and re-engage them on new terms. The letters summarised the discussion at the meeting in September and the history of what had gone on so far, denied that the company had been evasive or defensive, stated that they had engaged in discussion with the Claimants, acknowledged that the Claimant had explained the significance of additional days' holiday for his family life and expressed Mr Cambridge's view that holiday is as important for people working 5 days as for 3 days.

42. Reference was made to a proposal by the Claimants to accept the change for an additional year's salary. The Respondent was unable to agree as the purpose for the change was to bring them in line with their peers and reduce the ongoing costs and disruption associated with the current bank holiday arrangement. Paying increased salary would continue the cost and maintain the inconsistent approach between himself and colleagues. The changes to bank holiday arrangements needed to be made for commercial operational reasons and to bring working arrangements into line with the rest of the business. With regret, 4 weeks notice to terminate was given.

They could appeal. The new contract was enclosed - the substantive change was the reduction in bank holiday from 8 days to 5, he was invited to sign and return it before 27 September if he did wish to continue, and if so they would also make a one off payment of 3 days pay for 2017. Ms Wang's letter was similar with added reference to concern expressed by her on part time status and a work visa.

43. The Claimants appealed. Mr Conway, who came from a different division and was new to the dispute, heard the appeal. He made it clear in his evidence that he was more conscious than Mr Cambridge of the cost pressures on the Respondent, not least because at the time he had recently been engaged in making 15 people redundant, eventually including himself, and that before leaving he had made a plan to make 9 more redundant. He had attended Town Hall meetings with the CEO, when it had been clear that the company was 'struggling to reach its numbers', though he accepted that the message may have been more ambiguous to some employees. Before the hearing he understood that the main thrust of the required change was to bring the payments and benefit package in line with what it ought to have been with a 3 day week working. He conceded that DataSite as a division was profitable, but the company as a whole was struggling.

44. The Claimant explained to him in the meeting that it unfair decision and there had been an inadequate process; he referred to the ACAS guidelines on meaningful consultation. Mr Conway's view, as recorded in a memo at the time, was that the business "is now undergoing a process of transformation in order to maintain the consistent approach to the way in which all employees are compensated based upon their employment status"; he recognised that the Claimant had not understood the shift in the Human Resources' knowledge of the term of his contract, so that the Claimants saw it as one process of underhand dealing in seeking to change the contract without recognising that that was what they were doing. There an unfairness in this team having an additional bank holiday. The change was being made to bring them into line with other part-time workers across the business. The Claimants ought to recognise that it was inconsistent that the annual leave entitlement had been pro rated for 3 day a week working

and not the bank holiday entitlement. The Claimants had been given adequate notice of the changes, they were being offered a financial cushion for 2017, so would not be affected until 2018. The First Claimant's counter proposal of 1 year's salary though reduced to two-thirds salary at appeal stage, was unreasonable.

45. In his letter of 10 October, given the outcome, Mr Conway said that there was a business reason for making the change: internal equity, disruption, and additional cost of the additional 3 days bank holiday. It was inconsistent and unfair to continue the arrangement.

46. The Second Claimant at her meeting represented that there was internal inconsistency with the weekend team if the other 3 were working on different hours; it was not a mistake that the whole team had additional public holidays. She complained that cost had never been given as a reason at the outset of the process, but only made explicit in Septembe.

47. Neither appeal was successful.

48. As for other members of the weekend team, one member, Bianca, accepted the revised contract more or less immediately in February. The Claimants and two others resisted the changes; of those, one, Alfred accepted changes at some point midway, while Mr Bari accepted the changes much later and in return for a payment of £1,000, slightly more than 3 days pay. The remaining two Claimants did not accept and were dismissed. The Respondent recruited one replacement for the two Claimants.

49. It is instructive to review the Respondent's reasons for variation as they progressed. The first email of 9 December identified an inconsistency in the typed version, in that Mr Yousaf appeared to be working half an hour longer than anyone else, so it is clear that inconsistency caused concern then. Next, the letter of 4 February 2016, about changes in the handbook and the old contracts referred to changes specific towards the handbook, saying there were no changes to terms and conditions, which both line managers spotted was not true, and it was this of course that upset both Claimants.

50. When Ms Savage told the Claimants of 23 February: "we are not proposing any changes", but bank holiday arrangements had not been accurately implemented consistently across the organisation, consistency is the reason, but equity is not mentioned. In the letter of 30 June, giving notice to discontinue the verbal agreement as to additional bank holidays, equity is introduced, as in "we believe this is a consistent and fair approach to all employees across Merrill and provides you with an enhanced bank holiday entitlement". Querying what was meant by enhanced, it appears that she meant as compared to the handbook. The Human Resources Department did not recognise that there *had* been an oral variation, even following the consultation meeting on 10 June.

51. Equity is the reason given by Mr Cambridge in his June exchange with HR - the team were getting an extra 3 hours bank holiday, not unfairness compared to other staff, but unfairness to the company in not giving quid pro quo - hardly ever having to work their bank holidays - so they were getting something for which they did not seem to be giving anything in exchange.

52. Not until the August consultation meeting, were other aspects like costs were mentioned to the Claimants, though without the detailed discussion or analysis of Ms Savage's memo of 18 August. Mr Cambridge himself was unfamiliar with the cost calculation. His evidence to the Tribunal that fairness was still the 75% concern about internal equity, meaning across the teams, rather than within the weekend team. The letter of 23 August spoke of keeping in line with practices across the rest of the organisation, so that fairness between employees was the principal consideration presented to the Claimants.

53. Finally, although at dismissal Mr Cambridge had equity as 75% and the rest of it being costs and disruption, by the time of the appeal the cost pressures on Merrill seem to have been uppermost for Mr Conway.

Relevant law

54. Section 98 of the Employment Rights Act 1996 provides that in unfair dismissal it is for the Respondent to establish the reason for the dismissal

and that it was potentially fair. The Respondent argues that the changes in the contract, and the need to re-engage the Claimants on new terms when they would not agree to change, were "some other substantial reason justifying dismissal" which is one of the section 98 potentially fair reasons.

55. When a Respondent has proved a potentially fair reason for dismissal, it is for the Tribunal to consider, under Section 98(4), whether the employer acted fairly or reasonably or unreasonably in dismissing for that reason, having regard to the respondent's size and administrative resources and to equity and the substantial merits of the case. Employment Tribunals must not substitute their own view of that of a reasonable employer, and must recognise that reasonable employers may have a range of responses to any particular set of facts.

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56. Under *Abernethy v Mott Hay and Anderson*, the employer's reason is "a set of facts or beliefs known to him". It is the employer's reason that must be examined by the Tribunal and decided as a matter of fact.

57. On "some other substantial reason", where an employer wants to change the terms on which the employee is engaged, *Garside & Laycock v Booth 2001 IRLR 735* made it clear that it is about the employer's reasons for requiring a change, and not about the Claimant's reasons for not agreeing to change the terms on which he worked.

58. As to what is a *substantial* reason justifying dismissal, *Hollister v National Farmers Union [1979] ICR 542* made it clear that a "sound business reason" could be sufficient to establish some other substantial reason: in that case, the Claimant had complained about the pay and terms, the employer reorganised work arrangements so that he would be taken on by a different insurance company for commission payments which resulted in better pay but less favourable pension. When the employee refused to accept, it was deemed the dismissal was fair as this reorganisation in response to his request was a sound business reason. Similarly in *Willow Developments v Silverwood*, the need to introduce post employment restrictive covenants after a number of employees had left and set up in competition was deemed

to be a reasonable business need which would justify dismissing employees who refused to sign amendments to their contracts introducing such terms. In *Kerry Foods v Lynch [2005] IRLR 680* it was held that there was a clear advantage to the employer of introducing a new rota for managers. The employer need not show the quantitive improvement gained by this rota; it was sufficient to show that they had a problem with supervision at the weekend which would be remedied by introducing a rota so that more managers were on duty then; there was no need for the employer to produce evidence to show the impact.

59. In *Catamaran Cruises v Williams [1994] IRLR 386*, it was held that the Tribunal must examine the Respondent's motives, and that there was sound reason for making the changes, and that they were not arbitrary actions. There was no rule of law that there must be a pressing reason before the reason was substantial enough to dismiss, but the Tribunal must examine the motives for the change, and they were not imposed for arbitrary reasons. It was also said that the Tribunal must look at the balance between the harm to the employee of the proposed changes and the employer's business need.

60. In *Scot v Richardson* organising shifts in a way which reduced pay rates overall, was recognised to be as a sound good business reason and that the profit motive of employers is a sound commercial reason. The employer must have but need not prove, the quantum of improvement, must introduce some evidence of their reasons and in *Banerjee v City and East London Area Health Authority [1979] IRLR 147* where there is a policy of losing part time contracts and recruiting full time consultants instead, which resulted in the Claimant's dismissal when another part timer retired. It was held that there was no evidence to the advantages of the policy of the importance attached to it and that this was not sufficient to show that it was sufficient to show that it was a substantial reason for dismissing. Simply to assert the policy was insufficient.

61. As regards the fairness of dismissing for that reason, the Respondent relies on *St John of God (Care Services) Limited v Brooks [1992] ICR 715* where

a hospital facing a cash crisis asked 170 employees to accept changes in their contracts resulting in pay reductions. 140 accepted and the remaining 30 were dismissed. The relatively small number refusing to accept was enough to justify dismissal of those who refused.

Submissions

62. The Respondent submits that this was some other substantial reason, and that the reasons advanced concerned fairness and consistency; costs and disruption was subsidiary. In response to a question from the Tribunal about whether the employee's reason had changed before and after recognition that the bank holiday extension for weekend workers was not a local, and extra- contractual, practice but in fact a contractual variation, it was asserted that whatever Ms Savage had thought about the variation, the Respondent had always wanted consistency. This particular inconsistency was one of many which had come to light in the contract review process. On fairness, it is asserted that the Respondent had consulted with the Claimants, and had done so adequately, and that with only two out of the team of five holding out, *St John of God* was relevant. The process had been conducted in good faith and was not underhand as the Claimants had suggested, although it was recognised that they had grounds for suspicion. Once the Respondent, they had been fair and open from the outset about dismissal as an outcome, this was not a threat, and they were always open to further meeting the Claimants for further discussion at each stage.

63. The Claimmannt's case was that they had been bad faith on the part of the Respondents from the outset. At least from January 2015, the UK Human Resources Department was looking to change the bank holiday term. The fact that both line managers knew about the extra bank holidays meant that it was inconceivable that the Human Resources Department did not know, so that when they purported to say in February that there was no change, that they were acting in bad faith as they knew full well that the weekend team were taking additional bank holidays. They submitted that cost and disruption only became a reason for making the change once it was clear that the additional bank holidays were a term of the Claimants' contracts. This was not the real reason, and was being bolted on. The cost and

disruption reasons were flimsy and not founded in fact; the costs calculation had not been put to the Claimants to challenge, only now in the Employment Tribunal process had they seen the figures; it would probably cost a lot more to cover weekday holiday working than weekend working, given the disparity of numbers involved. As for the appeal process, they held that Mr Conway had exercised no real independent judgment, but simply followed the Human Resources line. They said the consultation process was going through the motions, that the outcome had been predetermined; they rely on the ACAS guidance (August 2005) "Employee Communications and Consultation", which states: "consultation involves taking account of, as well as listening to, the views of employees, and must therefore take place before decisions are made. Making a pretence of consulting on issues that have already been decided is unproductive and goes on to say that this "does not mean that employees' views always have to be acted on since there may be good practical and financial reasons for not doing so".

Discussion and Conclusion

64. Was the employer's reason for dismissing the Claimants (refusing to accept a cut of 3 days in their annual leave entitlement), was a substantial reason justifying dismissal? It has been troubling throughout the case that despite the acceptance from the Respondent at the outset of the hearing, that the Claimants did have a varied term in their contracts as to holiday, the Respondent's managers did not accept that until late in the process, well after dismissal had come onto the table, perhaps as late as September, or not at all, that the standard term on pro-rating holiday had in fact been varied. The terms of Ms Savage's August memo to the US, at the time of the second consultation meeting, express scepticism, noting there had been no record of the discussion, which suggests that in the mind of HR decision makers, this was a local practice, out of line, perhaps unauthorised and perhaps not formally agreed at all, where the Claimants must be brought back into line. This attitude meant that the Claimants' representations on any matter connected with their bank holidays being cut were not being taken very seriously. There is certainly some evidence that the decision that the Respondent was not getting value for money in terms of the extra 3

days was formed as early as June, at the time of, or perhaps just following, the meeting where the Claimants made their representations about the term having been agreed, at a time when the HR Department still did not recognise that there had in fact been a variation. If so, consistency and cost were held important without recognising or balancing that the Claimants had an entitlement to 3 more days as a matter of contract.

65. The Human Resources Department's project of reviewing of the global handbook, followed by the review of paper contracts, was designed to ensure that the Respondent's paperwork conformed to the reality of contract terms. There was no evidence that the policy behind the project was ensure that agreed terms worked across the organisation conformed to a standard model. In other words, what happened when the weekend night shift's holiday anomaly was discovered was that rather than making sure that the paperwork matched the real contractual terms, instead the terms must be altered to conform to a standard model. *Banerjee* is important, in that there was no evidence that internal equity of terms between groups of workers was driving the changes. This reason was not expressed until June.

66. Of the reasons given, first is consistency. As noted consistency of paperwork with actual terms moved to a policy of contract terms the same for all workers across the business. Was this was a sound business reason? There was no evidence before the Tribunal that the fact that weekend shift got an extra 3 days bank holiday compared with part-timers working anywhere else in the organisation caused trouble or resentment. There was also some evidence, unchallenged, that the practice of extra bank holiday working on the DataSite Division had been introduced on the basis of practice elsewhere in the organisation. There is also some evidence from the Tribunal, from the notes of the consultation meeting, that the Respondent was getting inconsistency of contracts on the weekday shifts, whose staff were being asked to sign new contracts with changed terms, and refusing, such that there would be inconsistency between old and new contract workers there. There was no evidence that the weekday shift workers were being dismissed and reengaged.

67. Nevertheless the issue of fairness across the organisation was clearly in the mind of Mr Cambridge and Human Resources Department as of June. They had in mind equity between DataSite weekend workers and anywhere else in the organisation - not equity within the weekend team, which of course started with everyone having 8 day bank holidays and ended, at the time of the Claimant's dismissal, with three of the five having accepted a reduction on different terms as compromise and with the Claimants refusing, so that had the Claimants carried on working there would have been inequity within that team. This inequity was not the stated reason of Mr Cambridge and Mr Conway.

68. The cost reason, as explained, was not tested with the Claimants: £7,600 per annum seems to have been the maximum cost, based on overtime with additional bank holidays. The Claimants say the actual cost of cover may have been less, as only Saturdays in practice were covered; there was some added cost to paying an extra 3 days leave, but whether it was £1,000, £2,000, £5,000 or £7,000 was not clear. Mr Cambridge was unable to help. That he was unfamiliar with figures suggests that cost was not the driving force for this change.

69. The risk to the business of not being able to cover the shift was in Mr Cambridge's mind, but does not seem to have been founded on much evidence, and, as the Claimants argued, it is possible that making the change increased the risk of not getting cover, because the Claimants were no longer *required* to work bank holidays if cover for leave on those days was not available. The risk of not getting cover was, on Mr Cambridge's evidence, more theoretical than actual. The disruption of arranging cover was also small, he agreed, when compared with having to cover weekday shifts. That is why he rated fairness as 75% of his reasons for proceeding as he did.

70. Undoubtedly the Respondent's need to make savings large and small across the board was in the background: it was identified by the First Claimant as the real reason when he asserted as early as February that HR was seeking to remove the additional bank holidays as a cost saving

measure, and it certainly operated on the mind of Mr Conway in hearing the appeal. As for the altered needs of the business, the fact that they did not always work bank holidays was a factor, as evidenced by the June email, but was only about Ms Wang not working on Christmas day. There was no other reference to this, and it seems to have been a make-weight reason after the decision had been made.

71. Concluding that the principal reason for insisting on the change was equity among part-time staff, it falls to assess whether this was a sound business reason. Having regard to *Hollister*, and *Kerry Foods*, the fairness argument seems a weak business reason. It took root at a time when the Respondent believed that there was no contractual entitlement. It began as consistency between paperwork and actual terms, then changed to standardising contractual terms; later use of the word "equity" slid to meaning the employees were not working the bank holidays for which they got the extra entitlement. The other factors: disruption, and cost (and there were cost pressures at the time) were in the background, but presented as the reason for needing to make the changes. Finally, the fact that at appeal, costs was thought to be the justification for the changes. This switch suggests that equity was not seen even by the respondent as a sound business reason. The Respondent's changing ground for the contract change suggests that even the Respondent was not certain that their reasons were compelling.

72. While it cannot be said (as in Banerjee) that there is *no* evidence that fairness and consistency were sound business reasons, there is scant evidence that fairness and consistency were sound business reasons for removing the Claimant's entitlement to 3 days pay. This case comes close to arbitrary reasons.

73. The Tribunal does not accept that the Claimants' claim that the Human Resources Team knew all along that there had been contractual variations, and attempted in an underhand way to cut costs without saying so. By September, the contractual change was accepted, although as late as August the Human Resources Department seemed doubtful. The Claimants are also mistaken that by internal equity the Respondent meant within the

weekend team: the Respondent meant across Merrill, not within the team, though they have not dealt with the inequity in the weekday team.

74. As for the volume of the team of five, two out of five is a substantial minority, and taken with the Respondent's toleration of different terms on the weekday shifts does not suggest a reason substantial enough to justify dismissal.

75. The Tribunal concludes that the Respondent has not established that their reason for dismissing the Claimants (fairness and consistency across Merrill) was a sound business reason. The business case for making this change has not been established. Whatever costs reasons were in the mind of Mr Conway (and possibly Mr Cambridge), they were not the principal reason for insisting on dismissal and re-engagement.

76. As for fairness of process, the Respondents did consult, and did adapt their offer by changing terms on 30 June, and slightly on 23 August. They did make some concession but not very much. They did provide a warning of the risks the Claimants faced by maintaining their position. It was presented as an option, and should not have been viewed as a threat. The Claimants were given a chance to change their mind and sign the contract even after notice of dismissal was given. Consultation on the fairness reason was meaningful, in that the Respondent did listen and discuss this with the Claimants. However there was no meaningful consultation on whatever costs reasons were in the Respondent's mind - probably because, as found, this was not the real reason but an add-on. If cost was a reason, the two Claimants were not able to mount an effective challenge to any costs argument that may have been advanced because it was only mentioned, and not discussed with them. Had equity been a substantial business reason, the process would have been fair.

77. Nevertheless, the conclusion of the Tribunal is that this was not a substantial reason justifying dismissal. A reasonable employer would not have sought to remove a week's holiday from the weekend workers in the interests of fairness across the board.

78. There will be a further hearing to determine remedy.

Employment Judge Goodman
28 July 2017