RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr M Thorp**

Respondent: **Hayter Limited**

Heard at: **East London Hearing Centre**

On: **12 & 13 July 2017**

Before: **Employment Judge Foxwell**

Representation

Claimant: Mr R Clement (Counsel)

Respondent: Mr G Griffiths-Jones (Solicitor)

JUDGMENT having been sent to the parties on 14 July 2017 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1 The Claimant, Mr Mark Thorp had presented a complaint of unfair dismissal (and other claims to which I shall come) to the Tribunal following his dismissal from his employment with the Respondent, Hayter Limited. Hayter is the well-known manufacturer of grass-cutting equipment.

2 The Claimant's employment commenced on 2 April 1990 and transferred to the Respondent in 1992. His employment ended on 4 August 2016 and he presented this claim on 3 December 2016, having gone through early conciliation.

3 I can say at the outset that this case has nothing to do with the quality of the Claimant's work whilst employed by the Respondent or their relationship with one another in general terms. Everything I have seen and read leads me to the conclusion that Mr Thorp was a capable employee who was well regarded by the Respondent. This case concerns pensions, more particularly changes to the Respondent's pension arrangements introduced on 5 April 2016.

4 A pension represents future security for a worker and his family. It is something which is rightly valued and can stir strong emotions. While the emotional aspect is not something I can take into account in determining this claim, I wish to say at the outset that I am conscious of it.

5 The Claimant's employment history is of limited relevance in this case. He was issued with particulars of employment in April 1992 shortly after his transfer to Hayter. He has not been provided with any subsequent comprehensive statement of his particulars of employment. In 2003 he was issued with the employee handbook which appears at pages 84 – 95 of the bundle. Apart from this there is very little documentary evidence of the Claimant's contract of employment.

6 The particulars of employment and the handbook are not detailed about pension provision; each provides simply that the Claimant is entitled as an employee to participate in the Respondent's pension scheme. The Respondent operated a final salary pension scheme; this is now a rare arrangement in the private sector, though was once commonplace.

7 In September 2004, the Claimant and other active members of the scheme agreed to changes to it, including a reduction in the accrual rate from 1/60 to 1/80. Shortly after these changes were agreed the Respondent was acquired by Toro, an American company. As I understand it this was not a TUPE transfer but a share-sale so that the Respondent retained its own distinct legal identity. Nevertheless, it was now part of a large, multi-national group of grass-cutting equipment manufacturers and suppliers.

8 In 2013 the Respondent's final salary pension scheme was closed to new members. Employees taken on after that date were offered a defined contributions scheme which is generally regarded as less valuable than a defined benefits scheme. At the time I am concerned with, 2015 to the date of the Claimant's dismissal, there were 49 active members remaining in the defined benefit scheme.

9 In the autumn of 2015 the Respondent decided that changes needed to be made to its final salary pension scheme. On 16 October 2015 Victoria Hoskins, the Respondent's Financial Director wrote to the trustees of the pension scheme stating that the company proposed to close the plan and to amend the calculation of benefits. The second aspect, the amendment of benefits has been referred to in correspondence and in this hearing as *"de-linking"*. What this means is that the value of members' benefits is based on their final salary at the date of closure of the scheme (up-rated for inflation) not their final salary at the date of their retirement from the company. This would make little practical difference to members nearing retirement but for others with many years of service ahead this would make a significant difference to the value of their benefits. The Claimant is in the latter category; he is a relatively young man, despite his many years of service, who has no prospect of retiring for 15 years or more.

10 The Claimant learned of these proposals in a meeting on 15 December 2015 called at short notice by Mr Raghu Das who is the Respondent's Managing Director. Mr Das made a PowerPoint presentation at the meeting concerning the pension proposals. The slides for the presentation are at pages 159 – 165. The Claimant's evidence is that the projector malfunctioned and some of the slides had to be displayed on a laptop computer but one way or another they were shown to those present. Mr Das told the

meeting of the proposal to close the final salary scheme with effect from 5 April 2016. He said that all members would retain their benefits accrued to the 5 April 2016 based on pensionable service to that date but that these would be calculated by reference to pensionable salary at that date. He said that the members' written consent would be required to achieve this. He told the attendees that there would be a formal consultation on the proposals starting on 2 January 2016 and closing on 1 March 2016, a period of 60 days. He also explained the business reasons for this decision: he said that there was a significant deficit in the scheme which had been put at £2million in 2010 and that the scheme was impacting on company profits which had been reduced by £700,000 in the 2015 financial statements because of the deficit. He said that the company was having to make monthly cash injections of about £23,000 into the scheme and that this might increase to £50,000 to meet the deficit. The implication was that the company could not afford to carry these liabilities into the future. He explained that what would be offered in place of the final salary scheme was a defined contributions scheme. He also explained that there would be an opportunity to speak to the Respondent's financial advisers as part of the consultation process.

11 It has been suggested in evidence by the Claimant and by his witness, Mr Glindon, that Mr Das was aggressive in this meeting. I have no doubt that Mr Das knew that his news would be unpalatable to the active members of the final salary scheme and that it came as a shock and concern to them. I find that that is reflected in their perception of the meeting but I also find that what Mr Das did was to convey a significant amount of unwelcome news in a matter of fact way.

12 The meeting was followed up in writing by a letter dated 15 December 2015 which appears at page 166 in the bundle. This set out the points that had been made in the PowerPoint presentation. It explained the effect of delinking (page 168) and gave details of the next steps in the process (page 170) which included the opportunity to speak to advisers to the scheme in the week commencing 25 January. A "frequently asked questions" document was also attached to the letter. One of the questions was whether the outcome of the consultation had already been decided (page 175) and the printed answer was no. The Claimant is understandably sceptical about whether this was correct.

13 The consultation process began on 2 January 2016. During this process the Claimant had at least one meeting with the financial advisers referred to in the company's letter. He had no meetings with Mr Das, Ms Hoskin or any other of the senior managers within the Respondent.

14 Mr Das's evidence was that the consultation period was an opportunity for members of staff to ask questions. From my perusal of the bundle it appears that the Claimant asked a number of questions by email and received some answers either from the financial advisers or HR. Not all of his questions were answered, however; for example, there was an occasion when he asked for a copy of his contract and this went unanswered.

15 The consultation period closed on 1 March 2016. It has been drawn to my attention that the period of consultation was fixed at a minimum of 60 days under Regulation 15 of the Pension Schemes Consultation of Employees etc Regulations 2006 and that one of the duties under this is that parties should work in the spirit of cooperation, taking into account the interests of both sides.

16 On 15 March 2016 Mr Das wrote to members of the scheme informing them that the company had decided to continue with its proposal to amend the final salary scheme with effect from 5 April (pages 205 to 206) and that this would lead to them being enrolled automatically in the defined contributions scheme. Following this the Claimant had a meeting with Mr Das and Ms Hoskin on 16 March 2016 in which he was asked whether he consented to the delinking proposal. It is fair to record that the Claimant did not oppose the closure of the scheme but he made it clear that he did not agree to the breaking of the final salary link. There is a transcript of a recording of this meeting at pages 202 – 204 which I find is accurate. The Claimant said that he had a good understanding of pensions. It is clear to me from this and other evidence in the bundle that the Claimant was well aware of the implications in the Respondent's proposals and how they would affect him. He was not told in the meeting that a possible consequence of failing to consent to delinking might be dismissal nor had anyone mentioned this in the course of the earlier 60 day consultation.

17 The Claimant repeated his stance on delinking in an email on 17 March 2016 (page 208). On 18 March 2016 Ms Hoskin wrote to the Claimant inviting him to a meeting to discuss this. She described his decision not to consent to the delinking as "unfortunate".

18 On 4 April Mr Das wrote to the Claimant (pages 212 – 213): he said that the company had announced the closure of the defined benefit scheme and he set out the business rationale for this decision. The final paragraph of this letter reads as follows:

> *"You should be aware however that one possible outcome of the meeting may be to issue you with contractual notice with immediate re-employment with the new terms and conditions which will be identical to the present terms but will serve to implement the proposal as discussed above."*

This was the first occasion when the possibility of dismissal followed by re-engagement on new terms was raised with the Claimant in writing.

19 On 7 April 2016 the Claimant attended a meeting with Mr Das, Marie Chinnery and Mr Van Aerschot (by telephone). The Claimant was accompanied by his colleague Loraine Hiles. There are various notes of this meeting between pages 216 and 226 and at pages 230 – 231. All the versions show that the Claimant was told that a possible consequence of not consenting to delinking would be dismissal followed by re-engagement on new terms. For example, at page 220 Mr Das is recorded as saying "*listen - review but -dependent on what both parties agree or terminate and re-employ with new terms and conditions."* Towards the end of the meeting the Claimant said that he wished to raise a grievance about how this had been communicated. I have not seen any written grievance presented at that time.

20 Mr Das wrote to the Claimant again on 15 April 2016 (page 234), heading his letter *"Member Letter - Invitation to Final Consultation"*. He invited the Claimant to a meeting with himself, Marie Chinnery and Mr Van Aerschot scheduled for 21 April. He said that this was to discuss the proposals and to give the Claimant a further opportunity to state his position. Mr Das also said that he would also like to address the Claimant's grievances in the meeting. At the end of this letter he wrote: *"you should be aware however that one possible outcome of the meeting may be to issue you with contractual*

notice and immediate re-employment with the new terms and conditions which will be identical to the present terms but will serve to implement the proposal as discussed above." This was the second time that the possibility of dismissal and re-engagement upon new terms was raised in writing.

21 The meeting of 21 April 2016 went ahead as planned. There are notes of it at pages 248 – 249. In essence the Claimant was told that he needed to either consent to delinking or his contract would be terminated with an offer of re-employment on new terms incorporating the Respondent's proposed changes to the pension scheme. Mr Das put it this way (page 248): *"The scheme is closed. The decision to delink has been made. You either consent or terminate your employment. Notice will be 12 weeks unless you resign! The pension is done and dusted. This is employment law now!"* So the position was set out in stark terms.

22 The Claimant did not consent to the change and on 4 May 2016 Mr Van Aerschot wrote to him giving notice of dismissal, pages 259 – 260. The letter set out the history of consultation and then stated in the penultimate paragraph that the Claimant could accept a new contract which would be the same in all material respects as his current one with the exception that he would no longer be entitled to the same benefits under the defined benefit scheme as he had previously, in other words incorporating the delinking proposal. The letter also confirmed that his continuity of employment would be unaffected by this change.

23 There was some conflict in the evidence about whether a new set of terms and conditions were enclosed with this letter. I find on the balance of probabilities that they were not but what was enclosed was a form or acceptance as appears at page 261. The Claimant did not sign the form.

24 By this time 47 of the 49 active members of the scheme had consented to the change. The other employee who was holding out eventually gave his consent at the end of June 2016.

25 The Claimant was told of a right of appeal in the dismissal letter; this was to the Toro Corporation's senior HR officer based in the United States, Pam Cady. The Claimant exercised this right by letter dated 31 May 2016 (page 270). He gave four grounds (described as non-exhaustive) for appealing. The first was that his dismissal was procedurally unfair and that information and consultation had been carried out improperly. Secondly, that it was unfair on automatic grounds as he had made protected disclosures and that it was discriminatory because of disability. Thirdly, he suggested that there was no fair reason for his dismissal under the ordinary principles of unfair dismissal. Fourthly, he said that the process had been handled wrongly, unfairly and unlawfully too and he wanted this concern addressed by way of a grievance under the company's internal grievance procedure and as a complaint under its pension scheme's complaints procedure.

26 The appeal was acknowledged on 6 June 2016 by email and the Claimant was told that he had a right to be accompanied at the appeal meeting by a representative (page 274). There was further email correspondence in which the Claimant sought permission to be accompanied by a lawyer but this was refused. He regards this as unfair because Ms Cady had a lawyer with her when the appeal meeting actually took place.

The meeting itself occurred on 14 June 2016 by telephone but prior to this the Claimant's then solicitors submitted a 12-page letter setting out a variety of allegations (pages 303 – 314). The appeal notes (pages 277 onwards) show that Ms Cady had received the letter when the meeting started but had not read it. I am unsurprised by this given the length of the letter and the timing of its sending, the day before the appeal hearing. I was not taken to any specific passages in the appeal minutes in evidence.

27 Prior to the appeal decision, which was communicated by letter dated 24 June 2016, the Claimant's then solicitor sent a second letter to Ms Cady dated 17 June 2016 (page 332). The solicitors summarised the Respondent's position as seeking to obtain the Claimant's consent to the withdrawal of the dismissal and the delinking of pension benefits from final salary. The context of this letter was that 17 June was the then deadline for the Claimant to accept delinking and with it the withdrawal of the notice of dismissal. It suffices to state that the Claimant did not provide that consent then or subsequently.

28 The appeal decision letter is at page 336. It did not address the detail of the solicitor's letter of 14 June but Ms Cady concluded that the decision to make the pension changes was a reasonable one and that dismissal because of the Claimant's unwillingness to accept the change had been a last resort. She concluded the letter by stating that the Claimant still had the opportunity to consent and to accept an offer of re-employment by 1 July. It was in that context that the Claimant's colleague, who had also appealed, decided to accept the offer of reengagement on the new terms.

29 The Claimant's solicitors' letters did not go unanswered as on 22 August 2016 the Respondent's solicitors wrote a detailed response (page 343). By this stage the Claimant's employment had ended.

30 So, those are the relevant facts as I find them to be on the balance of probabilities having regard to the evidence that I heard from the two witnesses called by the Respondent, Mr Das. the Managing Director and Mr Van Aerschot, Toro's Head of HR for its European Divisions and from the Claimant and his former colleague, Mr Glindon. I have also had regard to the documents to which I was taken in an agreed bundle in reaching these findings.

31 I turn then to the principles I need to apply when deciding a case of this nature. Where an employee has been dismissed it is for the employer to establish the reason for dismissal and that it is a potentially fair reason within the categories set out in Section 98 Employment Rights Act 1996. In this case the Respondent relies on the category known as "some other substantial reason". This is a residual category of potentially fair reason for dismissal separate from the named grounds under Section 98(2) of the Act. It is for the employer to establish the reason for dismissal which is said to be substantial and that it is substantial. In this case the Respondent contends that it had a pressing business reason to dismiss because of a need to restructure the final salary pension scheme. If established, I am satisfied that such a reason can be substantial for these purposes and in reaching that view I have had regard to *Hollister v National Farmers Union [1979] IRLR 238*.

32 If the Tribunal is satisfied that the employer has established a potentially fair reason for dismissal it is for the Tribunal to decide whether it was in fact fair to dismiss for that reason by applying the test of fairness contained in Section 98(4) of the Act. This test

does not permit a Tribunal to substitute its own view for that of the employer rather it requires an assessment of the reasonableness of the employer's decision having regard to the range of decisions open to employers acting reasonably. There is no burden of proof on either party in respect of the test of fairness. The Employment Appeal Tribunal has suggested that the correct approach in considering this is to balance the advantages to the employer of a re-organisation and the disadvantages to the employee (*Chubb Fire Security Ltd v Harper [1983] IRLR 311*). Ultimately, however, the former factor is dominant and the approach in *Chubb* is only guidance for a Tribunal in applying the range of reasonable responses test to this class of case (see *Richmond Precision Engineering Ltd v Pearce [1985] IRLR 179*). Moreover, the test is not whether the terms offered by the employer are reasonable rather the Tribunal has to look at the reasonableness of the employer's reaction to the situation at the time of the dismissal (see *St John of God Care Services Ltd v Brooks [1992] IRLR 546*); a relevant factor identified in that case is the number of other employees who have consented to a change.

33 Against that background I turn to the issues that had been raised in this case.

34 The first question is the reason for dismissal. The Respondent plainly advances a need to change the pension as a substantial business reason. The Claimant does not accept that this is the reason for his dismissal and I must decide that question. The second issue relates to the adequacy of consultation. The Claimant argues that he was not told that delinking of benefits under the pension was a contractual matter at all and yet correspondence refers to changes to his contract. He says too that he was not told during consultation that dismissal was a likely consequence of refusal to consent. More fundamentally, he says that consultation was not genuine in that the decision to make these changes had been made before consultation took place. He also argues that his dismissal was unfair because on a correct construction of the pension scheme his consent was not required and that change would be imposed. This was a new argument developed in evidence and closing submissions and was not something which was presaged on the pleadings or in the contemporaneous correspondence which proceeded on the basis that consent <u>was</u> required. Other aspects of unfairness the Claimant raises are that no consideration was given to making an exception for those who did not wish to consent by continuing to link their pension benefits to final salary; that insufficient weight was given to his 26 years of service and/or to a serious medical condition from which he suffers and which make these pension benefits particularly valuable to him. A further element of his argument on fairness is that he says that the Respondent had not addressed his grievances prior to making a decision to dismiss. He also contends that the appeal process was inadequate because it did not deal with his grievances either or address the detail of his solicitors' letter dated 14 June.

35 I turn then to my conclusions on these issues having regard to the legal principles and findings of fact set out above.

36 Firstly, the reason for dismissal. There has been no evidence of some other reason than the changes proposed to the pension scheme. The significance of those changes cannot be understated as they concerned the closure of the defined benefit scheme and the delinking of benefits. I find on the balance of probabilities that the reason for the Claimant's dismissal were changes to the pension scheme and more particularly the requirement or, at least, genuine belief in a requirement for him to consent to one aspect of those changes, delinking.

37 I am also satisfied on the evidence that there was a genuine business reason for these changes which was substantial. The documents show that the defined benefit scheme was operating in deficit. Ms Cady said in her appeal decision that this stood at £3.3million in 2015 and she also referred to costs of £35,000 a month to sustain the scheme. By this time the scheme had fewer than 50 active members. The clear implication of the financial arguments advanced was that the situation had to change or the company's future would be at stake. I am satisfied that in those circumstances the reason for dismissal was a substantial one relating to the need for a reorganisation of the company's pension arrangements. Accordingly, the Respondent has satisfied the initial burden of proof placed on it.

38 I turn then to the test of fairness under Section 98(4). The first point is whether the decision to make these changes was a *fait accompli*. Sometimes there are situations where there is only one option and, whilst consultation must be undertaken, most looking at the situation will see that there is no real choice. In this case I have not been provided with any evidence of viable alternatives being advanced by the Claimant or others to the proposed changes. Such alternatives would have to address the very substantial deficit and high monthly costs. So, while I have some sympathy with the Claimant's view that this all seemed to be a "done deal", I suspect that there was no other choice for the company or the remaining active members of the defined benefit pension scheme. I do not find therefore that that is something which goes to the fundamental fairness of this decision nor do I find that there was a failure to consult genuinely because of this.

39 With that in mind I turn then to the issue of consultation. There were two aspects to consultation: the first related to changes to the pension and was not with a view to dismissing anyone. This appears to have been conducted in accordance with Regulation 15 of the 2006 Regulations; it lasted 60 days. The Claimant complains that there was a lack of engagement by senior managers and, once again, I have some sympathy with this view but on the other hand the position had been explained with clarity (perhaps even brutality from the active members' perspective) in the meeting on 15 December 2015 and in the letter of the same date. The Claimant had a good understanding of the implications of the proposed changes as he explained in subsequent meetings with managers.

40 As far as the alleged failure to give a warning of dismissal as part of the pension changes consultation is concerned I regard this criticism as misconceived. If one puts it the other way round so that in the course of pension consultations the employer were to have said, *"if you don't consent to this we will dismiss you"* it would have been giving an ultimatum to consultees rather than allowing other proposals to emerge. I do not accept that failure to consult is a matter which affects the fairness of this dismissal at all because when we get to the second stage of consultation, that is consultation with the Claimant individually after the decision has been announced, it is explained to him unequivocally on multiple occasions that a consequence of not consenting to this change is that the employer will have to effect it by dismissal and offering re-engagement. This was notified to the Claimant in writing on 4 and 15 April and was referred to in meetings on 7 and 21 April. I have no doubt that the Claimant was well aware that the issue was delinking and that he knew that he either had to consent to it or that he would not continue to be employed on those terms. So, as far as consultation is concerned, I am satisfied that there was adequate consultation prior to notice of termination being given.

41 Another aspect of the Claimant's case on fairness is that no consideration was

given to making an exception for him. Mr Das's response was that this would have been unfair in the sense that everyone had to be treated the same. I bear in mind that many others consented in circumstances where they were not told that there might be the possibility of continuing in the pension scheme on the same terms. It would have created a real sense of unfairness in my judgment if those who had not consented were permitted to carry on receiving much more valuable benefits. Furthermore, it has not been demonstrated to me in evidence that this was a real possibility under the terms of the pension scheme (which had closed) or something which trustees under the scheme could agree to bearing in mind their obligation to all of the beneficiaries. By the time that the Claimant's employment came to an end every affected employee other than himself had consented to this change. I do not find in those circumstances that it was unreasonable in the sense provided for in Section 98(4) for the Respondent to fail to make an exception for the Claimant. I fully recognise that the Claimant was probably the person hardest hit by these changes as a relatively young man with long service who additionally because of his health condition was keen to have the security of a final salary pension but the reality in this case was that the benefit that no longer there to be had.

42 It was suggested that insufficient weight was given to length of service and the Claimant's health. I reject this because the option of accepting re-engagement was always on the table and, indeed, the option was extended from deadline to deadline, the final one being 1 July 2016. On no occasion did the Claimant accept it. In my judgment the Claimant knew what the consequences were and accepted them.

43 Finally, I turn to the appeal. It was based on the Claimant having an opportunity to make submissions and Ms Cady then providing a written decision. There is no ACAS Code of Practice which applies to dismissals for some other substantial reason nor do they fall within the ambit of Section 10 of the Employment Relations Act 1999. It is nevertheless good practice and consistent with natural justice to permit a right of appeal. That is what occurred here and the Claimant was given a right to be accompanied. I note his sense of injustice that he did not have a lawyer with him whereas Ms Cady did but I cannot say that this goes to the heart of fairness in this case. From everything that I have seen and read it looks to be the case that he had an unfetted opportunity to put the points he wished to make and that these were considered but rejected. I do not find that it is a real point of substantial criticism that Ms Cady failed to address the issues raised in an extremely long letter from the Claimant's solicitors which was sent at the very last moment.

44 The Claimant has touched on grievances which he had raised with his immediate manager. There were several elements to this, allegations of bullying, the allocation of work, performance appraisals and the process which led to his dismissal. As far as the last of these is concerned this was, of course, part and parcel of the dismissal process and did not require to be considered in a separate grievance process. The other matters had nothing to do with the pension issue. In my judgment this allegation is of no consequence to the fairness of this dismissal.

45 So, having regard to all of these factors I am satisfied that the Claimant was fairly dismissed irrespective of the fact that he had extremely long service which was loyal and, I am sure, valuable.

46 During the course of the hearing it was confirmed that a separate claim for breach

of contract was no longer pursued and I therefore dismissed that on withdrawal. A claim of discrimination was withdrawn some while ago and I formally dismiss that. The claim in respect of employment particulars under the Employment Act 2002 is a parasitic one and therefore, whilst Mr Griffiths-Jones conceded that the employment particulars did not comply fully with the requirements of Part I of the Employment Rights Act 1996, there can be no remedy in respect of this given that the other claims have failed. So, for those reasons I dismiss these claims.

Employment Judge Foxwell

3rd August 2017