# EMPLOYMENT TRIBUNALS

**Claimants:** **Mrs S Mortlock**

**Respondent:** **Clarion Housing Group**

**Heard at:** **London South (Ashford)** **On:** **4 April 2019**

**Before:** **Employment Judge John Crosfill**

**Representation**

Claimant: Mr D Gibson-Lee of Counsel

Respondent: Ms C Musgrove

# JUDGMENT

The Claimant's claim for unfair dismissal is not well founded and is dismissed.

# REASONS

1. The Respondent is a substantial housing association operating on a not for profit basis as a landlord of residential properties. The Claimant has worked for the Respondent (or more precisely housing associations later incorporated into the Respondent) since 9 December 2002. By 2013 she had a settled working pattern of 36 hours across 4 days (referred to as a compressed week) as an 'Accounts Officer'. The Respondent decided to embark on a major re-organisation. As a consequence, it decided to require staff alter their working hours to work within a shorter working day. The Respondent says that, when no agreement could be reached with the Claimant about her hours of work, she was dismissed. The Claimant says that the dismissal was unfair.

**The hearing**

2. At the outset of the hearing the parties agreed that the draft list of issues produced by the Respondent properly encapsulated the issues that the Tribunal needed to decide. The agreed issues were:

    2.1. *"Did the Respondent have a potentially fair reason for dismissing the Claimant within S98 of the ERA 1996? The Respondent relies on 'some other substantial reason'*

*2.2. was the dismissal fair or unfair in all the circumstances having regard to the size and administrative resources of the Respondent?*

*2.3. In considering the fairness of the dismissal, did the Respondent follow a fair procedure prior to the dismissal?*

*2.4. Should the Claimant be found to have been unfairly dismissed:*

*2.4.1. What compensation is just and equitable in all the circumstances?*

*2.4.2. Has the Claimant recently mitigated her loss?*

*2.4.3. Would the claimant have been dismissed despite the alleged procedural unfairness such that compensation should be reduced and if so, by what percentage or by reference to what period (Polkey)"*

*2.4.4. Does the ACAS Code of Conduct Disciplinary & Grievance apply [sic]?*

*2.4.4.1. If so, has been a breach of the Code and should compensation be adjusted?"*

3. Having read the witness statements prepared by the parties and the documents that were referred to within them I proceeded to hear from:

3.1. Mrs Tanya Porter a manager in the department in which the Claimant worked and the person who discussed the impact of the changes upon her; and

3.2. Miss Catrin Jones who was at the time the Director of Customer Services and was the person responsible for implementing many of the changes introduced by the Respondent and who heard the Claimant's appeal against her dismissal; and

3.3. From the Claimant herself.

4. At the conclusion of the evidence the advocates made oral submissions those of Ms Musgrove being supplemented by written submissions. I have regard to those submissions in making my decision below and address the competing positions in my discussion and conclusions.

## Findings of fact

5. The Respondent is a housing association formed after various mergers with other smaller housing associations. Broomleigh Housing Association merged with Affinity Sutton. Affinity Sutton then merged with Circle Anglia Ltd to form Clarion, the Respondent. The Respondent has some hundred and 25,000 properties nationwide. It acts on a not-for-profit basis reinvesting its income in order to provide housing.

6. The Claimant was initially employed as what used to be referred to as a housing officer. She was primarily responsible for dealing with tenants chasing arrears of rent and dealing with court proceedings. The role has developed and the job title changed over time to Customer Services Officer. She started working on 9 December 2002 for Broomleigh Housing Association initially working just 25 hours per week Monday to Friday. The contract of employment was then varied on three separate occasions by

2 September 2013 she was working 36 hours per week spread over four days working from 8:30 in the morning until 18:00 Tuesday to Friday.

7. Following the merger of Affinity Sutton with Circle Anglia the Respondent commenced a programme which was internally referred to as FF2. That involved purchasing and implementing and Enterprise Resource Planning System based on a new software platform. This was designed to replace the existing software systems across the business. Catrin Jones, then the Director of Customer Services was instructed to implement the new systems along with looking at new methods of working across the business.

8. During the planning process consideration is given to the opening hours of each of the contact centres available to the tenants of the housing association. Circle Anglia had opened its contact centres only between 8:30 to 17:00 whereas Affinity Sutton had been open from 8:00 to 20:00. Where a tenant contact to a Customer Services Officer, the Customer Services Officer might need to liaise with other operational teams such as Finance, Repairs and Housing. Those other operational teams work predominantly between 9 AM and 5 PM and were not available after 6 PM. A report was commissioned by Catrin Jones into the alignment of opening hours and was prepared by Paul Bradley the Head of Contact Centres on 26 July 2017. Under a heading 'Rationale' he wrote:

   *"The current Contact Centre operating model is inconsistent between and within brands. This is most visible to the customers in our hours of operation which vary considerably between 08:00 and 20:00.*

   *Our ability to offer a consistent customer service experience after 15:00 hours is greatly impacted by the hours are Operational teams work which is typically 09:00 and 17:00 albeit with a few exceptions. This variance in operational hours greatly impacts experience our customers receive, often preventing same-day resolution of the customers issue and can require the customer to contact us again the next day or await a response from a call back request.*

   *As we progress with the development of our integration strategy the benefits must be felt by our customers and staff aligning our Contact Centre opening hours is an important first step in this journey."*

9. The trade union recognised by the Respondent for collective bargaining purposes was Unison. In December 2017 the Staff Council including Unison were provided with a copy of a briefing paper which set out proposed changes to the Contact Centre opening hours. What was proposed was to align the Affinity Sutton opening hours with those of Circle Anglia and to open only between 08:30 and 17:00. A Staff Council meeting took place on 8 December 2017. A section of the minutes of this meeting, under a heading 'Flexible Working Requests' are inconsistent with the proposals that had been made in that they suggest that there was a discussion about moving to two different shift patterns. I find it is unlikely that there was a suggestion that there was a move to two different shift patterns when the proposals were to move from two different opening hours patterns.

10. The Respondent decided to act on its proposals to align the working hours across the Customer Service teams. Tanya Porter was the Regional Manager Customer Accounts, and who managed Richard Hay, who in turn manage the Claimant. Tanya Porter was given the task of introducing the proposed changes to the Customer

Accounts team of which the Claimant was a member. The consultation process commenced with a meeting on 10 January 2018 with a team meeting led by Tanya Porter. She explained the various changes which were proposed as a consequence of the FF2 project which included the proposal to reduce the working hours to 8:30 to 17:00. She informed the Customer Accounts team that work outside those hours would no longer be permitted. Following the meeting under cover of an email sent on 12 January 2018 Tanya Porter sent each team member a 'briefing note' which set out the proposed changes and set out the rationale for them. Under a heading working hours was the following:

> *We are also proposing to align working hours across the Customer Service teams. This will allow us to focus all our resource when our customers require our service the most. This follows a pilot in the Bromley Contact Centre to assess the impact of reduced opening hours for telephone answering. We propose that all staff will cover our core hours of 08:30 – 17:00. This is proposed to commence from 12 February to allow us to best plan the extensive training required for FF2."*

11. At the consultation meeting Tanya Porter offered the team members the opportunity of a 1-2-1 consultation. This offer was repeated in Tanya Porter's email of 12 January 2018. That email invited general feedback during the 30 day consultation period in addition to the offer of 1-2-meetings. The Claimant replied to Tanya Porter's email. In her email the Claimant simply asked who she should contact *'about the proposed change to my working hours and pattern'.* Tanya Porter responded as follows:

> *"you can provide feedback to the email address below - I will also be in the office on Monday if you want to speak to me too. Or you can give me a call on my work mobile today?"*

12. The Claimant then sent an email to the feedback address that she had been given by Tanya Porter. She did not at that stage either contact Tanya Porter nor did she take up the offer of a meeting. Her email to the feedback address asked:

> *"I have been working a 36 hours week over four days Tuesday to Friday since 02/09/13. The proposed hours of working do not accommodate my work pattern please advise how this will be addressed".*

13. The Head of Customer Accounts became aware of the Claimant's concerns and on 5 February 2018 sent her an email inviting her to book a 1-2-1 meeting with Tanya Porter. The Claimant responded the following day and suggested that it was necessary for a member of the human resources team to be present at any meeting and for formal minutes to be taken. Tanya Porter responded to the Claimant on 9 February 2018 suggesting that this was to be an informal chat to discuss the options going forward and offering to provide a written summary following the meeting.

14. The meeting between the Claimant and Tanya Porter took place on 13 February 2018. Almost immediately following that meeting Tanya Porter sent the Claimant an email in which she summarised what had been discussed by reference to 9 bullet points. The Claimant responded that email confirming that Tanya Porter had properly summarised the meeting. It is clear from that summary and I accept that Tanya Porter explained the proposals and informed the Claimant that due to the new working hours it would be impossible for her to complete her existing 36 hours within four working days. She put forward two alternatives the first being to work 36 hours over a five day week with the majority of the hours in the first four days and the balance on the final

day. The second proposal was that the Claimant reduced her hours to 30 hours over a four-day week. The Claimant acknowledged that if she reduced her hours then her pay and benefits would be reduced pro rata.

15. The email summarising the meeting records that the Claimant rejected both of the proposals that had been made. The Claimant is recorded as saying that she did not want to resign. There was some dispute as to whether Tanya Porter had said that if the Claimant did not accept one of the proposals the only alternative was to resign or whether, as the email tends to suggest, that recognition came from the Claimant. Whilst I find it unnecessary to resolve this dispute I find it more likely that the Claimant would have used the language of resignation rather than Tanya Porter. What is clear is that the Claimant recognised that unless a resolution was reached it was possible that her employment would be terminated. In her e-mail Tanya Porter advised the Claimant, that after the new core hours were introduced, and whilst in the absence of any agreement the Claimant continued to work her existing hours, a supervisor would be asked to work with the Claimant in order to avoid her working alone for health and safety reasons.

16. The Claimant believed, incorrectly, that the meeting with Tanya Porter would be followed by some formal process conducted by the Human Resources Department. In fact, no such steps were taken.

17. On 15 February 2018 the Claimant received an email from Steve Moody inviting her to a meeting should take place on 16 February 2018. The Claimant says that the email did not explain the purpose of the meeting. There was no reference in the email to any right to be accompanied at the meeting and whilst the Claimant receive an offer from a colleague to accompany her she turned that down in the belief that it was not permitted.

18. The Respondent did not call Steve Moody to give evidence and I broadly accept the Claimant's account of that meeting. She says that almost sooner she sat down she was asked whether she had made any decision following her meeting with Tanya Porter. Having regard to what the Claimant said in her later grievance I find that there was a brief, or perhaps very brief, discussion about whether the Claimant would accept the options proposed by Tanya Porter. She says that Steve Moody told her he had to pre-prepared letters. The first being a letter of dismissal and the second with a new contract of employment. She says that he told her unless she signed the new contract of employment she would be dismissed.

19. The Claimant protested that any dismissal would be unlawful but Steve Moody told her that the Respondent believed what it was doing was lawful. I find that Steve Moody had attended that meeting on the basis of a decision that unless the Claimant was prepared to accept one of the two proposals made by Tanya Porter her existing contractual arrangements would be terminated. I do not consider it likely that Steve Moody gave any independent consideration to the decision that this ultimatum would be put to the Claimant as that decision appears to have been taken by others in advance of the meeting. It is clear from paragraph 49 of Catrin Jones witness statement that the position of the Claimant was widely discussed in advance of the decision to dismiss her and it seems the decision was principally taken by Catrin Jones herself.

20. At the conclusion of the meeting the Claimant was given a letter giving her notice in accordance with the terms of her contract. The notice expired on 11 May 2018. The

letter stated that the decision to dismiss had been taken as a consequence of failing to reach agreement to vary the Claimant's hours and was a 'last resort'. It made it clear that the offer of new contractual terms remained on the table and that the Claimant could accept those terms by signing is attached new contract of employment. The contract provided for the Claimant to work 36 hours per week (which was a standard working week). There was no express mention of the alternative option that the Claimant could reduce her hours to 30 hours spread over four days.

21. The Claimant then spoke to her trade union representative Mr S. Between the Claimant and Mr S they prepared a notice of appeal against the decision to dismiss her. The notice of appeal to the following points:

    21.1. the Claimant complained of a lack of consultation principally stating that her meeting with Tanya Porter took place after the change in operating times had already been implemented; and

    21.2. she complained that there had been no follow-up formal process after the meeting with Tanya Porter where she would be advised of her options; and

    21.3. she complains that it was unreasonable to expect her to reduce her salary close to retirement and that her four-day working week assisted her to maintain a positive attitude; and

    21.4. she argued that she had duties far more extensive than taking telephone calls and that she could undertake those duties outside of the core hours when the phone lines would be open; and

    21.5. she complained generally that bullying tactics had been used to force her to change her work pattern.

22. I note that the notice of appeal did not suggest that the Claimant was prepared to reduce her hours and work a 4 day week as proposed by Tanya Porter.

23. By an email dated 28 February 2018 the Claimant was invited to an appeal meeting by Jenny Stark the Head of Employee Relations. The appeal was to be heard by Catrin Jones on 6 March 2018. The Claimant attend that meeting along with her trade union representative Mr S. As GS did not give evidence and as I have had to make findings as to the reliability of a note taken by him I refer to him simply as Mr S. During the meeting, Jenny Stark made notes to record what was said. At the heading of those notes is a warning that they are not a verbatim record. In the course of these proceedings the Claimant has produced notes purporting to be made contemporaneously by Mr S. There is one significant discrepancy or conflict between those notes and that concerns the question of whether or not the option given to the Claimant by Tanya Porter to reduce her hours to 30 over four days had been removed.

24. Jenny Stark's notes record the following exchange in the middle of the meeting:

    *'SM asked why it acceptable for her to work 4 days and CJ said that it wouldn't but it would be a compromise. CJ said that wouldn't be her desired outcome at all.*

    *CJ said that the four-day outcome would be one of very few exceptions'*

25. At the closing parts of the meeting this further exchange is noted by Jenny Stark:

> *'JS asked if, based on what CJ had now explained, SM would like to consider any alternative options.*
>
> *SM said no*
>
> *JS asked SM if she understood what this could mean for her going forward.*
>
> *SM said she did'.*

26. Mr S records an exchange similar to that of Jenny Stark in the middle of the meeting but his notes record a completely different conclusion to the meeting. His notes suggest that the Claimant indicated that she would have accepted a 30 hour 4-day week contract and would sign a contract to that effect. The notes suggest that Mr S protested that this option had been taken away. In her evidence before the Tribunal the Claimant maintained that the option to work fewer hours across a 4-day week had been taken away and that she and Mr S had protested about that.

27. In the appeal hearing Catrin Jones explained to the Claimant that once the FF2 changes had settled down then the question of working outside the core hours would be reviewed. As such, the position was not 'set in stone'.

28. The Claimant's appeal was dismissed. On 27 March 2018 Catrin Jones wrote to the Claimant setting out her decision and the reasons for it. That letter included the following passage:

> *'You said you didn't feel that you'd been consulted effectively and that the options presented to you was simply that you accept the proposed change, reduce your hours leave our employment. You said it had never been explained to you that the revised working hours wouldn't be set in stone and that, had the situation been explained to you more clearly, you might have felt differently about it.*
>
> *I asked whether, with the benefit of this additional information, you felt you could revisit your position. I explained that I never expected that we'd actually have to dismiss anyone through this process and I really hope that a compromise would be reached with everyone. You said that your position remained the same'*

29. On 8 May 2018 the Claimant lodged a grievance which was essentially a complaint about the fact that she had been dismissed. In her grievance she set out a number of complaints about the process that had been followed. She did not expressly say that she would have accepted the 4 day a week option offered by Tanya Porter in that letter. A grievance meeting was convened and chaired by Michelle Reynolds the Group Commercial Director. Minutes were taken of that meeting by Helen Parker, the Head of Employee Relations, and were in the agreed bundle. Those minutes disclose that in the course of the grievance meeting that followed the Claimant did allege that an option to work four days a week 'seemed to have disappeared'. Mr S it is recorded as having said that Jenny Stark's notes of the meeting were 'made up'. In the notes that followed it is clear that Michelle Reynolds asked Mr S if he had a copy of his own notes to resolve the dispute. Mr S refused to disclose his notes at that stage. In the course of the grievance meeting the Claimant was asked whether she would except reinstatement. The Claimant said that she did not believe that be an option due to her financial situation as she had elected to take her pension early.

30. The Claimant's grievance was not upheld by Michelle Reynolds who concluded that the process that had been followed was fair and reasonable. The Claimant Ben exercised her right to appeal that grievance outcome and the matter was revisited on appeal. In her email setting out her grounds of appeal the Claimant again alleged that Catrin Jones had confirmed that the suggestion of reduced hours over four days was "never an option". In a later letter dated 10 July 2018 the Claimant expanded upon her grounds of appeal and included both the suggestion that the four-day week option had been taken away and that there were inaccuracies and omissions in both the appeal and grievance notes.

31. The Claimant's grievance appeal was heard at a meeting that took place on 13 August 2018 and was conducted by Neil McCall the Group Operations Director. In the course of that meeting the Claimant repeated her suggestion that the option to work four days a week offered by Tanya Porter had been taken away by Catrin Jones. Having heard from the Claimant Neil McCall dismissed the grievance appeal. He concluded but a fair and reasonable process had been followed and that in particular the Claimant had been given other options to work an adjusted working pattern within the core hours.

32. I do not accept that the either the closing passages of Mr S notes are accurate or the Claimant's recollection of exactly what was said during that meeting. I have reached that conclusion for the following reasons:

    32.1. It would be surprising if Tanya Porter, who met with the Claimant expressly to agree a compromise, would have put forward a proposal, reduced to writing, if that proposal was unavailable.

    32.2. However brief the meeting was with Steve Moody, it was common ground that he asked the Claimant if she would accept the options discussed with Tanya Porter. Had one option been removed that would have been the time to do it.

    32.3. Jenny Stark's notes of the appeal meeting are consistent with the letter sent a few days later by Catrin Jones which expressly refers to options including a reduction in hours and records the fact that the Claimant had said in the appeal meeting that her position remained the same.

    32.4. The Claimant's grievance letter does not expressly state that an option offered by Tanya Porter had been withdrawn nor does it suggest that the appeal outcome letter was inaccurate.

    32.5. I consider that when the issue of the accuracy of Jenny Stark's notes was raised as an issue during the grievance process Mr S had an opportunity to provide his own notes of the meeting to evidence the Claimant's position but refused to do so. If his contemporaneous notes supported the Claimant that omission is surprising. I find it more likely that the notes have been written up much later and are the product of hindsight.

    32.6. Finally, I note that in Mr S notes he records Catrin Jones as shouting during the meeting. Had that been the case I would have expected to see such a complaint at the very forefront of the Claimant's subsequent grievance. Her grievance letter makes no mention of this. That in my view indicates a propensity to exaggerate what actually happened (whether consciously or not).

33. I should make it clear that I have reached the conclusion that the 4 day working option was not withdrawn at the appeal meeting applying the standard of the balance of probabilities and having regard to all of the evidence I have heard and read. I have not heard from Mr S and do not suggest that either he or the Claimant have attempted to mislead me. It is perfectly possible for parties to a meeting to have different recollections or even to make notes that differ. However, on balance I do not think it likely that Catrin Jones would have referred to the option of a reduction in hours in her outcome letter had that not been a live option at the meeting.

34. Between the Claimant's dismissal and her final day of work the Claimant says that she observed team members in the office after 17:00 in the evenings. Tanya Porter suggested that that was very much the exception. I find that once the changes were implemented it was the norm that the Customer Services teams finished work at 17:00 although there would be exceptions to that on some occasions.

35. The introduction of the new systems as part of the FF2 project was not as smooth as anticipated and on occasions did require the Respondent to offer overtime to some employees.

**The legal framework – unfair dismissal**

36. The right not to be unfairly dismissed is conferred by Section 94 of the Employment Rights Act 1996. Where, as here, there is no dispute that an employee was dismissed the question of whether any such dismissal was unfair turns upon the application of the test in Section 98 of the Employment Rights Act 1996. The material parts of that section are as follows:

> 98 General.
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held
>
> (2) A reason falls within this subsection if it—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee
>
> (c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) …..

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

37. It can be seen that Section 98 provides that it is for the Respondent to show that the reason, or if more than one the principle reason, for the dismissal was potentially fair. The Respondent here relies upon their business needs to change the terms and conditions. It has been recognised that a genuine business need to change terms might amount to 'some other substantial reason' for a dismissal and therefore amount to a potentially fair reason for a dismissal see ***Hollister v National Farmers' Union*** **[1979] IRLR 238**. It is not essential that an employer establishes that the survival of its business is at stake see ***Catamaran Cruisers Ltd v Williams*** **[1994] IRLR 386**.

38. If the employer can establish a potentially fair reason for the dismissal, then the tribunal must apply the statutory test of fairness set out in sub-section 98(4) of the Employment Rights Act. The burden of proof is neutral. The proper question is to ask whether the employer acted reasonably, not whether the tribunal would have come to the same decision or followed the same process itself. In many cases there will be a 'range of reasonable responses', so that, provided that the employer acted as a reasonable employer could have acted, the dismissal will be fair: ***Iceland Frozen Foods Ltd v Jones*** **[1982] IRLR 439**. That test recognises that two employers faced with the same circumstances may arrive at different decisions but both of those decisions might be reasonable.

39. Where an employer relies upon business needs to enforce changes to terms and conditions then fairness would usually require the employer to consult with the employees as to the need for any changes ***Ellis v Brighton Co-operative Society Ltd*** **[1976] IRLR 419**.

40. Generally, it is necessary for the tribunal to consider the relative advantages to the employer as well as having regard to the disadvantages of the employees. That said the fact that an employee might act reasonably in refusing a proposed change does not mean that the employer is to be taken to be acting unreasonably in imposing it ***Garside & Laycock Ltd v Booth*** **[2011] IRLR 735**. Ultimately the question is whether the employer acted reasonably.

41. It will be a relevant matter to consider the proportion of employees dismissed in comparison to the numbers who accepted the changes - see ***Garside & Laycock Ltd v Booth***.

Discussion and Conclusions – Unfair dismissal

42. As set out above the first matter that I need to deal with is whether or not the Respondent has shown a potentially fair reason for the dismissal. There was no suggestion before me that the decision to dismiss the Claimant was for any reason other than a desire to vary the core hours across all Customer Services teams (together with making other changes none of which were controversial). As such the issue is whether those reasons are 'substantial'.

43. The test of whether business reasons requiring changes in terms and conditions of employment are 'substantial' is not a test of necessity ***Catamaran Cruisers Ltd v Williams***. That said the word substantial must require the reasons to be capable of justifying a dismissal and as such sound business reasons would be necessary before an employer could establish a potentially fair reason for any dismissal as a consequence.

44. I am satisfied that there were sound business reasons for introducing the reduced core hours. I note that the benefits of the proposal were examined in depth. Where two organisations merge there are commonly good reasons for seeking alignment. I accept that there was a real benefit in aligning the hours worked by the Customer Services teams with those of other teams that they liaised with. The benefits of having customer facing staff available during the periods of peak demand only would be a sensible use of resources.

45. I am satisfied that the reasons behind aligning the core hours across all of the Customer Services teams meets the threshold of being 'substantial' and therefore turn to whether the decision to dismiss the Claimant as a consequence of that business reason was fair or unfair applying the test set out in Section 98(4) of the Employment Rights Act 1996. I remind myself that it is not a question of what I would have done faced with the same circumstances but whether the decisions made and procedure followed fell within a band of reasonable responses.

46. One matter referred to by the Claimant during the internal process was whether the insistence on a variation to her contractual hours was a breach of contract. Mr Gibson-Lee did not pursue this point recognising that it is not a breach of contract to bring any existing contractual obligation to an end provided that lawful notice is given. That was the mechanism that was proposed by the Respondent. It attempted to seek a consensual variation but when that failed it brought the existing arrangements to an end whilst offering replacement terms if they were acceptable. As such there was no breach of contract nor was there any proposal to breach the Claimant's contract.

47. The Claimant suggested that the consultation process was inadequate both collectively and on an individual basis. I shall deal with those questions separately.

48. I am satisfied that the proposals were discussed at meetings between the Respondent's Managers, the Staff Council and Unison, the recognised Trade Union. I consider that the briefing paper that was prepared fairly explained the proposals and the rational for them. There was no evidence that the Management team were not approaching this consultation with an open mind although it is likely that a strong provisional view had already been formed. Making an additional finding of fact here I accept the Respondent's evidence that there was little resistance to the changes with many employees welcoming the change. Overall I am satisfied that there was adequate consultation at a collective level.

49. I do not accept that during the collective consultation meeting there was a general agreement to preserve all patterns of flexible working even those which fell outside of the core hours. That would have been entirely inconsistent with the proposals.

50. The proposals were then cascaded to the teams affected by the changes. A revised briefing note was prepared and again I am satisfied that his properly set out the proposed changes and the reasons for them. It is clear that the Claimant understood that there was scope for individual concerns to be raised as she asked Tanya Porter how this might be done. Before me there was a dispute as to who, if anybody, was to blame for not immediately arranging a meeting between the Claimant and Tanya Porter. I do not consider that this materially affected the process. The Claimant raised her particular concerns with HR who, recognising that those were individual as opposed to collective concerns passed them on for the purposes of organising a 1-2-1 meeting. I do not think that the fact that that meeting took place after the end of the announced 30-day consultation process was of any material effect. The concerned were individual and no changes were imposed on the Claimant in advance of that meeting.

51. I am satisfied that Tanya Porter's account of the meeting with the Claimant is accurate. The Claimant wanted to retain the working pattern that she had. Tanya Porter considered that she was constrained by the introduction of the new core hours to squeeze any flexibility to working within those hours. She offered two compromises. One where the number of hours was preserved at the expense of working part at least of a fifth day and the other maintained a 4-day pattern but resulted in a loss of 6 hours per week. I am satisfied that at this meeting the Claimant expressed the view that neither option was acceptable but that she understood that the termination of her contract was a possibility if no agreement was reached.

52. I accept that the Claimant believed that there would be some further discussion with the HR department before any decision was taken. There was not in fact any reassurance to that effect. I consider that it would have been good practice to spell out in writing the available options and warn the Claimant that any failure to reach agreement might result in her dismissal.

53. I have broadly accepted the Claimant's account of her meeting with Steve Moody. I accept that it was brief and that the Claimant was simply asked whether she was prepared to accept Tanya Porter's proposals and when she said she was not was told that she would be dismissed. It was not disputed that the Claimant was not advised that she might be accompanied at that meeting.

54. There is a statutory right to be accompanied at a disciplinary meeting. That does not extend to every meeting where an employee is dismissed. That said it is certainly good practice to offer an employee faced with dismissal the right to be accompanied. There is no reason why it could not have been offered here.

55. Where, as is often the case an employee is to be given an ultimatum to accept new terms of employment or face dismissal, a reasonable employer could be expected to spell out the options and to explain the consequences of any refusal. I have found that the Claimant was loosely aware of the fact that unless agreement was reached dismissal was a possibility but that this had not been spelt out in terms. This could have been done in a letter inviting the Claimant to the meeting and setting out its purpose. That said, whilst unexpected and perfunctory I accept that an ultimatum was

given and the Claimant was given the chance to accept the options discussed with Tanya Porter. Overall the meeting was not handled well.

56. The Claimant argued that it was inappropriate that Catrin Jones heard her appeal against her dismissal because she was the person responsible for implementing the changes. Ms Musgrove answered that particular point by saying that there was a material difference between being responsible for the changes that introduced new terms and conditions and deciding whether it was appropriate that the Claimant was dismissed in consequence of those changes. Had Catrin Jones taken no part on the decision to dismiss the Claimant I would have accepted that it was not necessarily inappropriate for Catrin Jones to have heard the appeal. However, that is not the case here. As I have found above the decision to impose the changes was not taken by Steve Moody. He was the messenger and not the decision maker. The decision to dismiss the Claimant (in the absence of agreement to one of the proposals made by Tanya Porter) was a collective decision and on her own evidence Catrin Jones was involved in that decision. On the facts of this case it is right that Catrin Jones, when hearing the appeal, was revisiting a decision that she had partially taken that in the absence of any acceptance of Tanya Porter's proposals the Claimant should be dismissed.

57. The principle point taken by the Claimant in suggesting that the dismissal was unfair was that some accommodation should have been made for her that permitted her to maintain her hours and 4 day working pattern or as near as possible to that. She had suggested that it would have been perfectly possible to permit her to work after 17:00 as she had tasks beyond dealing with tenants. The Respondent did not dispute that the Claimant had duties which were not customer facing. Catrin Jones explained that the rational for the 'core hours' decision was that it wanted to maximise the number of employees available within those hours. In addition, if an exception were made for the Claimant then others would no doubt question why no exception could be made for them. Finally, there was the difficulty of lone working which was raised apparently by the Claimant during the meeting with Tanya Porter and whether or not that was the case was a genuine concern.

58. The Claimant further suggested that if she could not complete her additional hours in the office she could work from home. The Respondent argued that this would risk breaches of data protection law and was not something that they could reasonably contemplate.

59. In the course of the hearing Mr Gibson-Lee suggested to Catrin Jones that a potential resolution was to permit the Claimant to work 4 days one week and 5 days the next. Catrin Jones agreed that that would have been perfectly workable. This was not a matter that occurred either to the Claimant or to the Respondent at the time. I have to assess whether or not the Respondent acted reasonably in deciding to dismiss the Claimant. I consider that an employer can be expected to look for solutions to an apparent impasse where contractual changes are proposed. It should have regard for obvious solutions and be prepared to discuss the issue with the employee. In the present case there was a meeting to address this between the Claimant and Tanya Porter. There were further opportunities to put forward alternatives during the appeal and grievance processes. I do not accept that it was unreasonable for the Respondent to have come up with the solution proposed by Mr Gibson-Lee when nobody thought of that at the time.

60. A further suggestion was made that it would have been reasonable to have maintained the Claimant's pay despite reducing her hours. I do not consider the failure to offer this (it was not raised) fell outside the band of reasonable responses. Paying one employee more than others for the same work is likely to cause significant disquiet. The Respondent is a charity and must properly account for its expenditure. This would not have been a proper use of its resources.

61. There has been considerable progress in recognising the benefits of flexible working. It is now open to all employees to make a flexible working request and a refusal to grant such a request will always require justification on sound business grounds. That is not to say that every flexible working request needs to be granted or that a flexible working arrangement can never be taken away if there are sound business reasons to do so.

62. I accept that it was reasonable (in the sense that it was a decision open to a reasonable employer) for the Respondent to decline to allow working outside the hours when other team members were working. I consider that the Respondent had good reasons for introducing those new hours and having done so it would have been difficult to have made an exception for the Claimant. Where the majority of a workforce accept imposed changes making an exception is often going to be difficult. I accept that the Respondent had good reasons for not wishing to allow the Claimant to be the only person working in the office after the rest of her team had left and for not wishing to provide a supervisor solely for her. I further accept that there were good business reasons for not permitting the Claimant to work from home.

63. In the present case the Respondent was prepared to alter its ordinary practice to accommodate the Claimant to a degree. I have found that the offer to permit 4 day a week working was not withdrawn at the appeal meeting or at any time. The decision not to permit working outside those core hours effectively gave very few options. Mr Gibson-Lee's 4/5 working pattern was a viable option but nobody thought of it at the time. In the same regard I do not think it affects the fairness of the dismissal that some unforeseen overtime was necessary. An employer is to be judged on what it reasonably believes at the time and not what transpires later and with the benefit of hindsight.

64. On the substantive point as to whether it was reasonable to dismiss the Claimant for declining to accept the changed working hours I find that that decision did not fall outside the band of reasonable responses. I find that the decision to require all work to be done within the new core hours was for sound business reasons and that all of the solutions that occurred to the Claimant and Tanya Porter were declined by the Claimant.

65. Where I am troubled in this case is whether or not (a) the failure to follow up the meeting with Tanya Porter with a letter that spelt out that the proposals made were the only alternatives to a dismissal; and (b) the failure to let the Claimant know in clear terms what was going to happen at her meeting with Steve Moody; and (c) the perfunctory manner in which that meeting was conducted (including the fact that no opportunity to be accompanied was offered even as a matter of good practice); and (d) the fact that Catrin Jones in conducting the appeal was revisiting a decision she had made; gave rise to such unfairness that the process as a whole falls outside the band of reasonable responses.

66. It was suggested by the Claimant (not necessarily put with any enthusiasm by Mr Gibson Lee) that there was a breach of the ACAS code of practice on Discipline and Grievances at Work. I do not consider that that code applies. This was not a disciplinary matter. There was no suggestion of any fault of failing by the Claimant. The closest analogy would be to a redundancy situation where the code certainly does not apply. The right to be accompanied is a statutory right for the purpose of disciplinary proceedings (at any meeting where a dismissal might take place). It is also recommended where a flexible working request is made as 'good practice'. There was no refusal to permit the Claimant to be accompanied at the meeting with Steve Moody but as the Claimant did not know that her employment might be terminated she had no reason to ask anybody to come with her.

67. I consider it appropriate to have regard to the grievance process as that process effectively revisited the procedure and decision making of the dismissal process. I find that the grievance process as a whole enabled the entire decision making process to be reviewed afresh. It fulfilled all of the requirements of an appeal process even if by accident rather than by design. That said, the Claimant did not commence the grievance process until she was dismissed. When she made it clear for the first time that she was prepared to reduce her hours of work and work for 4 days, she was offered reinstatement on those terms. She declined that offer having referring to the fact that she had been given a leaving present and made arrangements to retire early and receive her pension.

68. Whilst I have criticised the process I consider that the Claimant was aware that the alternative to her accepting Tanya Porter's proposals was the termination of her contract. However, brutal the meeting with Steve Moody the substance was not unexpected and the Claimant knew that the options proposed to her were available as an alternative to her dismissal. I have found above that it was made clear to the Claimant by Catrin Jones that, exceptionally, she would be permitted to reduce her hours and work a 4 day week within the core hours of work. In other words the compromise proposed by Tanya Porter remained on the table.

69. The process was not in any sense perfect. I completely understand the Claimant's distress at being rushed into a decision by Steve Moody. However, had the Claimant accepted the only alternatives that anybody had thought of during the meeting with Catrin Jones or at any time up to the termination of her employment (some months later) then she could have remained employed. I have found that her decision to accept the 4 day a week proposal was not made until sometime later and was not communicated to the Respondent until the grievance process (when it was met with an offer to reinstate her on those terms). Despite the failings that I have identified I am unable to say that the decision to dismiss the Claimant, both in substance and in procedure, was one which fell outside the band of reasonable responses and on that basis I find that the dismissal was fair.

70. For completeness I should add that had the procedural failings I have identified not taken place I find that the Claimant would still have declined the options given to her by Tanya Porter. She may well have changed her mind later as I find she did in the process that was followed but that any change of heart came too late to prevent her dismissal taking effect. As such had I found the dismissal unfair it would not have been just and equitable to make any compensatory award in any event.

71. I therefore dismiss the Claimant's claim of unfair dismissal.

Employment Judge John Crosfill

Date 2 May 2019