Case Number 2500206 /20

THE EMPLOYMENT TRIBUNALS

Claimant **Respondent**
Mrs Ruth Margaret Barrett **Yorkshire Endeavour Academy Trust ("the Trust")**

REASONS OF THE EMPLOYMENT TRIBUNAL

HELD AT NEWCASTLE (by CVP) **ON 8-9 October 2020.**
EMPLOYMENT JUDGE GARNON (sitting alone)
Appearances
For Claimant **Mr N. Barrett Solicitor**
For Respondent **Ms R. Levene of Counsel**

REASONS (bold print is my emphasis and italics quotations)

1. Introduction and Issues

1.1. The claim was presented on 25 November 2019 after Early Conciliation from 24 September to 6 November. The claimant, born 5 March 1963, was employed from 1 September 2007 to 31 August 2019. She claims unfair dismissal (actual or constructive) and a redundancy payment.

1.2. The issues, broadly framed, are: -
1.2.1. Did the words or acts of the Trust constitute (a) a termination of the claimant's contract of employment by it or (b) a fundamental breach its express contractual obligations to her ?
1.2.2. If not, did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of mutual confidence and trust between itself and the claimant?
1.2.3. If it did breach any express or implied terms of the claimant's employment contract, were such breaches fundamental?
1.2.4. If so, did the claimant resign, at least in part, in response to such breach?
1.2.5. In any event, does the Trust show a potentially fair reason for dismissal?
1.2.6. If so, was the dismissal fair applying s 98(4) of Employment Rights Act 1996 (the Act)?
1.2.7. What remedy should be awarded?
1.2.8. Was dismissal wholly or mainly due to a redundancy situation?

2. Relevant Law

2.1. Section 95 of the Act includes:
(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—
(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

2.2. An employee is "entitled" so to terminate the contract only if the employer has committed a fundamental breach of contract, one of such gravity as to discharge the employee from the obligation to continue to perform it, Western Excavating (ECC) Ltd-v-Sharpe 1978 IRLR 27. The conduct must be more than just unreasonable. Martin-v-MBS Fastenings held whatever the respective words and actions of the employer and employee at the time, the question remains" *Who really terminated the contract?"* If the respondent's words and conduct show **it** did, that will be dismissal under 95(1)(a). Section 95(1)(c) is commonly called constructive dismissal.

2.3. Where words are ambiguous, it is neither the subjective intention of the person using them nor the subjective interpretation of the person to whom they are addressed which is determinative. It is what objectively an onlooker with knowledge of the facts and background would have taken the words to mean (J&J Stern-v-Simpson 1983 IRLR 52). Hogg-v-Dover College 1990 ICR 39 and Alcan Extrusions-v-Yates held where an employer by words or conduct terminates one contract and imposes, or offers, another the terms of which are radically different (usually but not necessarily less favourable to the employee), it amounts to, in the words of s.95, termination of " *the contract under which he is employed*" notwithstanding another contract comes into being immediately.

2.4. A unilateral cut in pay is nearly always a fundamental breach. A breach may be ***actual or anticipatory***. An actual breach arises when the employer refuses or fails to carry out an obligation imposed by the contract **at a time when performance is due.** For example, a reduction in an employee's monthly pay cheque is an actual breach. An anticipatory breach arises when, **before performance is due,** the employer intimates to the employee, by words or conduct, she will be paid less when the time for performance arrives. A letter at the beginning of the month stating 'With effect from the end of this month your salary will be reduced " would be an anticipatory breach.

2.5. The employer's motive is irrelevant to whether or not there has been a breach. In Wadham Stringer Commercials Ltd-v-Brown 1983 IRLR 46, the employer argued economic circumstances impelled it to make changes, but the EAT stressed the test is a purely contractual one and the surrounding reasons are not relevant, **at that stage**.

2.6. If the employer has not breached any express or other implied term, an employee may rely on the implied term of mutual trust and confidence. Breach of it is always fundamental. Woods-v-WM Car Services (Peterborough) Ltd 1981 IRLR 347 held: -
"*It is clearly established that there is implied in a contract of employment a term that the employer would not, without reasonable and proper cause, conduct themselves in a manner, calculated or likely to destroy or seriously damage the relationship of confidence and trust between an employer and an employee. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The Employment Tribunals function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it any longer. Any breach of that implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract."*

2.7. A breach of the implied term may result from a number of actions over a period of time. This often called " last straw doctrine was explored in London Borough of Waltham Forest-v-Omilaju 2005 IRLR 35. The last straw does not in itself have to be a breach of contract or of the same character as the earlier acts. It must contribute something to the breach, although what it adds may be relatively insignificant. An entirely innocuous act on the part of the employer cannot be taken as the last straw, even if the employee genuinely interprets it as hurtful and destructive of trust and confidence .

2.8 There is a lengthy explanation of the principles of "affirmation " of the contract following a breach in WE Cox Toner (International) Ltd-v-Crook 1981 IRLR 443 which the Court of Appeal confirmed as correct in Henry-v-London General Transport 2002 IRLR 472. Delay, in itself, is not affirmation. In Cantor Fitzgerald-v-Bird 2002 IRLR 267, the employees had not affirmed their contracts by waiting more than two months before resigning. They had clearly indicated their discontent and given clear signs of their intention to leave. The court said the doctrine of affirmation was essentially the legal embodiment of the idiom " *letting bygones be bygones*".

2.9. Even if there has been a fundamental breach, if it is not an effective cause of the employee's resignation, there is no dismissal, Jones-v-F.Sirl Furnishing Ltd and Wright-v-North Ayreshire Council. There is no obligation on an employee to use the grievance procedure before resigning, Seligman and Latz-v-McHugh 1979 IRLR 130.

2.10. Section 98 of the Act provides:
"(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 dismissal
(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 is… that the employee is redundant."

2.11.The reason for constructive dismissal is explained in Berriman-v-Delabole Slate Company 1985 ICR 546: *"even in a case of constructive dismissal section 57*(now section 98 of the Act) *imposes on the employer the burden of showing the reason for dismissal notwithstanding it was the employee not the employer who actually decided to terminate the contract. In our judgment the only way in which the statutory requirements of the Act can be made to fit the case of constructive dismissal is to read section 57 as requiring the employer to show the reason for their conduct which entitled the employee to terminate the contract thereby giving rise to a deemed dismissal by the employer*."

2.12. Redundancy is defined in s 139 of the Act which says dismissal shall be taken to be by reason of redundancy if it is wholly or mainly attributable to, inter alia, the fact the requirement for employees to carry out work of a particular kind, either generally or in a particular place, have ceased or diminished or are expected to cease or diminish, permanently or temporarily and **for whatever reason**. The emboldened part comes from ss(6) and means the employer **does not have to justify its business decisions**. Safeway Stores-v-Burrell, affirmed by the House of Lords in Murray-v-Foyle Meats explains how, if there was (a) dismissal (actual or constructive) and (b) a "redundancy situation" (shorthand for one of the sets of facts in s 139) the only remaining question under s 98(1) is whether (b) was the principal reason for the happening of (a). Whether the dismissal was fair or not, the employee is then entitled to a redundancy payment.

2.13. Chapman-v-Goonvean and Rostowrack China Clay Co 1973 ICR 310 held where an employee is dismissed because the employer seeks to alter existing terms and conditions to less favourable ones, it is not, without more**,** dismissal by reason of redundancy. Hollister-v-National Farmers Union 1979 IRLR 238 and Kerry Foods-v-Lynch 2005 IRLR 680 say where there is a sound business reason for imposing a reasonable change on an employee's terms and conditions and, **after fair consultation**,she refuses to agree to change it may be some other substantial reason for dismissal.

2.14. Section 98(4) of the Act says:
"*Where an 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 all 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
(b) shall be determined in accordance with equity and the substantial merits of the case."

2.15. The test under s 98(4) has a neutral burden of proof. A dismissal by reason of redundancy or some other substantial reason may be unfair if there is inadequate consultation. In R-v-British Coal Corporation ex parte Price 1994 IRLR 72 fair consultation was defined as (a) discussion while proposals are still at a formative stage (b) adequate information on which to respond (c) adequate time in which to respond and (d) conscientious consideration of the response. The Court said *"Fair consultation involves giving .. a* ***fair and proper opportunity*** *to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly"* . In Samsung Electronics U K Ltd-v-Monte De Cruz EAT/0039/11 Underhill P. said : "***The merits of the reorganisation as such were not a matter for consultation****. What the claimant was entitled to be consulted about was how it affected him".*In Thomas-v-BNP Paribas EAT/1034/16, Wilkie J said where consultation was " *perfunctory and Insensitive* " that should have resulted in a finding of unfairness unless there was a well reasoned explanation for it.

2.16. Iceland Frozen Foods-v-Jonesand Sainsburys-v-Hitt, held a Tribunal must not substitute its own view for that of the employer unless that view falls outside the band of reasonableness and this applies to procedural matters as well as substantive. If the employer had a good business reason for changing contracts, but acted unfairly procedurally, Polkey-v-AE Dayton requires a Tribunal to decide what was likely to have happened if a fair procedure had been followed. This may result in a reduced or no compensatory award but she would still receive a "basic award" for unfair dismissal which is calculated exactly like a redundancy payment.

2.17. Some language used in documents and evidence in this case was not clearly understood by the claimant or by the respondent's witnesses but would have been between people, such as HR officers and Union representatives. In Samsung Underhill LJ said "*lawyers must be wary of assuming terms that look to them like mere management–speak have no meaning to their regular users. Most large modern businesses have adopted systems .. often with the active co-operation of employee organisations, which, it must be assumed, they find valuable but whose language would not score highly in an essay competition. Tribunals must not allow a disdain for such terminology to lead them into treating such systems as necessarily worthless****.***

3 Findings of Fact (numbers in brackets are of pages in the bundle)

3.1. The claimant was employed in 2007 as a part-time Teaching Assistant . She progressed to an Advanced Teaching Assistant(ATA) in 2009 and was paid under a Full Time Equivalent (FTE) salary contract. When she started they were normal and meant she was paid during all school holidays.

3.2 The Trust formed in 2018 runs 5 schools: West Cliff Primary (West Cliff), Airy Hill Primary (Airy Hill) and three run together Castleton, Lealholme & Glaisdale (CLG). Ms Helen Ward is Headteacher of CLG where the claimant worked, Ms Catherine Matthewman of Airy Hill and Ms Christina Louise Zanelli of West Cliff. Ms Zanelli is also CEO of the Trust. She, Ms Ward and Mr Matthew Simon Brown Chair of Governors at West Cliff gave evidence for the respondent. I had evidence from the claimant and her husband Mr Noel Barratt a solicitor, not an employment law specialist, a Company Director and her representative at the hearing. I had an agreed document bundle.

3.3. A "restructure" was started by January 2019 to ensure "consistency" across all of the Trust's support staff by putting all on to Term Time Only (TTO) Contracts which meant they were not paid through all school holidays resulting in a reduction in pay, It would lead to significant savings across the Trust. The Trust says it was primarily to ensure fairness and equality.

3.4. ATA's across the Trust would be subject to either redundancy or changes to their terms and conditions of employment. At Airy Hill pupil numbers had dropped and its financial situation impelled a need for cuts. At CLG the claimant was the only employee affected and this would involve a change to her terms and conditions only as the need for her post remained. There were two affected at West Cliff and several at Airy Hill. The aim of saving money is perfectly legitimate Bringing ATAs on historical FTE contracts in line with others would, but in my view, it was also to avoid other risks

3.5. Unions were advised of the proposals on 18 January 2019 and the claimant was told her contract **would** become TTO from 1 September 2019. Mr Brown was Chair of what was called the "Selection Committee" (SC) which comprised 3 governors: himself from West Cliff; Ms Deborah Hall from Airy Hill and Ms Ray Hopwood from CGT.They are all volunteers.Their remit was to "*oversee the proposed restructuring of support roles*", attend the initial meeting with all staff affected, review, all written requests/suggestions and respond giving the rationale for any decisions taken. Such responses were to be checked by HR advisors in North Yorkshire County Council (NYCC). In reality they dictated the process. The SC would "select" which staff at Airy Hill would be made redundant (a task which proved unnecessary because some left) meet informally staff who preferred to speak directly with them, provide a committee to hear representations and any appeal.

3.6. Mr Brown was initially reticent about saying the SC may have to decide who to dismiss at Airy Hill, not in my view because he was trying to hide anything but because, as with others in the case, he was reluctant to use terms which have an unpleasant connotation. This tendency to avoid straight talking in favour of more veiled terminology permeated the evidence.

3.7. A meeting took place on 7 February at Airy Hill "*to explore ways of addressing this situation".* I find the change to TTO contracts was not an option to be negotiated. The claimant attended as did a representative for Unison and a representative from NYCC HR team The respondent's case is staff were taken through this "***proposal*** " and it was explained if the **only** change to their contact was to make it TTO, they would not be eligible for redundancy.This was questioned by a member of staff and it was confirmed by the HR representative and the Union representative that was so. Staff were given a copy of 'Proposal of Staff Consultation' (120-130), and told to ask their headteacher, the union representative or HR if they had any queries. The generic Q&A document said at point 13 " *You*

cannot take VR at this point. If the post offered to you is a reasonable alternative and you don't want to take it then you will not be entitled to any redundancy payment" It was explained the SC would be guided by HR. A timetable was attached with the consultation period ending on 19 March. The main part of the meeting covered the Airy Hill reduction in support staff numbers. Following this meeting there was to be a 'consultation process'. After about 15 minutes of meeting all staff, one from West Cliff and all from Airy Hill had a separate meeting so they could be given details relevant to them. The claimant and one from West Cliff were told if they had any questions or wished to discuss anything , they could wait until the end to speak to their union or HR. The claimant did not stay.

3.8. Running two "consultations" together was doomed to lead to confusion. When later a colleague mentioned to the claimant voluntary redundancy (VR) had been offered to staff when contracts were changed a few years earlier, she contacted her Union Representative who advised her to write to her Headteacher, which she did on 13 February asking for details of the change to her wage and *'if I don't wish to accept the change, is redundancy an alternative and if so, what would the terms be*?"

3.9. On 14 February, she received this reply *'I gained this information for you so far. Your length of service is 13 years, so you would be paid 45.5 weeks TTO. The maximum for TTO staff is 46.5 weeks per year (over 15 years' service),* ***On your current salary you would lose £780 gross pay per year.*** *I will forward your email to selection committee* ' The Trust says the answer from her headteacher did not address the redundancy question - only how many weeks she would be paid in her new contract and what her salary loss would be. **The claimant misunderstood it due to the reference to length of service**. Ms Ward knew the answer to the second question was "no" but instead of giving it said someone would get back to her. As she said repeatedly "*to ensure that I was following the correct procedure*" she emailed the Trust's other headteachers and SC for advice on how they wished her to respond. I find she did not understand why the answers were as they were and was afraid to say anything in case it was wrong.

3.10. At the hearing, well before I had seen a document at page 100 from NYCC HR which mentioned a "settlement payment " I asked whether any discussion had taken place , particularly between the claimant and her union about two possibilities, both common in situations like this of (a) a "one off " payment to employees for agreeing to stay on changed terms or (b) a payment of some sum **equivalent to** or less than a redundancy payment to leave and enable a replacement to be employed on a TTO contract. There had not been. The Trust was open to such matters being discussed during the " consultation " with the SC, **if the claimant, or her union, had raised it**.

3.11. The claimant decided to "***take"*** VR rather than work at the reduced salary and sent a letter on 11 March confirming her wish to apply for VR. Ms Ward emailed Mr Brown and Ms Hopwood for advice "*to ensure that the correct procedure was followed* (75)", acknowledged the letter on 17 March 2019 and said she would ensure a reply would be sent. The SC replied on 17 March saying they would consider her email on 19 March when they met.

3.12. Mr Brown on 18 March 2019 asked Ms Ward for the original of the claimant's letter , to give his apologies for the delay and said he would be in touch formally after the SC meeting the next day. Ms Ward told the claimant and says "*We also briefly discussed that the situation was a challenge*." Mr Brown says the Committee reviewed her request for VR at the meeting on 19 March (in attendance: CEO, HTs, NYCC HR). The obvious answer was no-one can have VR if no redundancy situation exists. The situation would have been less of *a challenge* if that straight answer had been given even if the claimant had found it disappointing

3.13. On 24 March 2019 the claimant emailed she had not received a reply (80). Ms Ward responded the following day saying letters were in the process of being sent out and she should have one by the

end of the week (80). The Easter holidays were due to start on 12 April, the claimant planned togo away and needed to know where she stood. On 8 April 2019 she emailed Mr Brown saying she had atill not received a response (81). He sent a draft letter to Ms Ward that evening which she amended to go to the claimant on 9 April 2019 (82) directly from the SC. There had been an error in that SC thought HR were sending the decision. Once clarification had been received from NYCC, the SC wrote to the claimant detailing the reasons why her request for VR was denied (83).

3.14. Ms Zanelli, Mr Brown and Ms Hopwood were all contacted by phone after 4 pm on 12 April by Mr Barrett who was very angry no reply had been received . Ms Zanelli assured him the letter had gone out in the post and I accept she believed it had.She told Mr Barrett the outcome The claimant received it on 15th saying there was no "redundancy scenario" as her work was not diminishing, and she needed to sign a form confirming her agreement to the contract changes. Ms Zanelli arranged to meet Mr Barrett on 29 April (first day back after the holidays) He did not attend this meeting. In an email he had suggested the business was "*run by amateurs*", **which it is** in the non-pejorative sense of them not understanding the legal imperatives for and consequences of what they were doing.

3.15. The claimant felt she had been "***led to believe"*** VR was available, and been left " *in limbo*" for 2 months from 14 February. She had been told on numerous occasions she was a valued and capable member of staff and yet not given e courtesy of a timely response. She says if redundancy was never an option, at the very least she could have been told so in March. I agree that would have been the decent way to deal with a lady who, as everyone from the respondent accepts, was loyal and industrious beyond the call of duty. However, I find she had not been "led to" believe VR was available **by the respondent** . It gave all the correct information first to the Union then to staff and left it to them to interpret it correctly or ask questions . I will return in my conclusions to why the claimant did not. After such an unsettling time she did not wish to sign the letter of acceptance of change.

3.16. As the letter in April stated redundancy was not an option there seemed **to her** little point meeting or appealing. She felt pressured to consider just leaving the job and bringing an end to the uncertainty. She did not think to attend any consultation during the 'consultation period' as she had the information she needed, **or thought she had** . She could not argue their position was wrong, in her words " *only the way I'd been treated - waiting over 2 months!".* After the Easter break, Ms Ward asked her how she was feeling about the situation and explained, although it was a difficult time, she was a valued member of the staff team. Here again, I see compassionate talk but not enough explanation of **why** it had come to this which no headteacher could be expected know.

3.17. No employer can impose unilateral change (at least without an express term entitling it to do so in certain circumstance) but if the change is reasonably necessary it may risk giving notice to terminate the more favourable contract and offer an alternative one. That is a dismissal as defined in s95. The claimant was entitled to12 weeks notice so the Trust needed to give it by early June to effect change on 1 September. On 6 June Mr Brown emailed the claimant to ask if she wanted to meet as they had not received her response. He suggested she may want to bring someone with her for support. She replied on 10 June asking what would happen if she did not accept a TTO contract as this would help her decide whether to attend. Mr Brown replied with details of representation meetings and appeals, not saying in terms "You will be dismissed" but the absence of a straight answer, taken with what had been said and written earlier, would leave a reader, objectively, with no doubt that would happen. The claimant on 16 June wrote an email saying he had confirmed the Trust proposed to cancel her existing contract in September and as it needed to know her intentions "*In order to assist the Academy with recruitment and to comply with your request for clarity in a timely manner, I would be prepared to give you advance notice now of my intention not to return to work at the beginning of September, provided that my pay and other benefits are paid in full through until 1 September 2019, when my existing Contract is due to be terminated. Can you please let me know if this is agreed?"*

3.18. On 22 June 2019 Ms Hopwood signed a letter and tried the next day to hand it to the claimant who would not take it . There were issues across Microsoft so her 16 June email had not reached Mr Brown She re-sent it on 25 June. On 28 June he replied her "resignation" would have to go to her headteacher but her pay would continue until 1 September under her old contract. She sent the email to Mr Ward and never said " I am not resigning". In my judgment on an objective reading it was a resignation and was in response to an anticipatory fundamental breach of contract in the sense of a clear indication her pay after 1 September would be 13% less than under her current contract

3.19. She received a response from Ms Ward accepting this as her resignation and confirming her employment would end on 31 August 2019, She now says the words 'I would be prepared to', does not mean not that she was giving notice of resignation. I find that is how it would objectively be read

3.20. The respondent says she was invited to discuss options on many occasions but did not. I accept she was given such opportunities but the relationship had soured so much she saw no point in talking further. Mr Brown said in his statement "*Throughout the process we recognised and empathised with the challenges and concerns employees faced and happily considered several suggestions from the non-teaching staff at Airy Hill Primary School. Their engagement with the process facilitated a mutually satisfactory resolution. I myself met with a member of support staff from Airy Hill and, whilst the decision to uphold the restructure proposal was ultimately upheld, this provided an opportunity for concerns to be expressed and a strategy for moving forward to be put in place by the HT*.**"** On first reading it occurred to me some staff may have been given a benefit for giving up their old contracts and accepting new ones. He assured me no-one had. Ms Zanelli said most ATA's on FTE contracts gave them up recognising they had been fortunate to have them for so long while all those who started comparatively recently had TTO contracts. One of her affected ATA's was offered, but did not accept, extra hours of paid work during the holidays (in effect, overtime) to mitigate her loss of income but that would not have been a benefit for giving up the right to paid holiday rather a payment for work she had never been obliged to do, ie more money for more work.

4. Conclusions

4.1. I have great sympathy for the claimant and understand Mr Barrett's anger on 12 April but I must decide the case on the legal issues set out above not the emotional impact of what was done. Early in the case Mr Barrett made a point in cross examination which revealed his legal background in the private commercial sector. as was mine, so I understand him well. He said many employees have older contracts with more beneficial terms, such as final salary pensions, which cannot be given to new starters, but loyal hardworking employees such as the claimant **deserve** to be left on such contracts and there is no reason why they should not be . In his eyes individuals deserve to have their efforts recognised , different terms for people doing the same job is a fact of life and he asked why the drive to equalise terms was viewed as so important. The respondent's witnesses did not really explain, but I would not expect them to be able to. I gave a brief explanation orally when delivering judgment but the fuller one I give now may help all parties realise this was , to use a platitude " nothing personal".

4.2. One has to think as a public sector employer and its unions, who act for all members including those already on the less favourable TTO contracts , would think. Section 1 of the Equality Act 2010 (EqA), which applies to local councils and schools, sets out the "Public sector duty regarding socio-economic inequalities". Although the legal obligations are limited,uniformity in pay structures is a valid goal. The parties may have been puzzled why I asked the respondent's witnesses if there were any male ATA's. There are not but, if there were, one on a TTO contract he could bring an equal pay claim naming as his comparator any woman doing "like work" on a FTE contract. Other women on TTO contracts could bring a contingent (often called " piggy back") claim naming him as their comparator. It

would then be for the school to show a “defence of material factor” based on the historic difference. I can even envisage a claim being made of indirect age discrimination. All this may appear to the witnesses in this case be a far fetched and theoretical risk but to a local authority advisor a risk which could , and should, be avoided if all staff doing the same job are paid on the same basis. Ms Levene did not put it in such terms but emphasised the pursuit of equality was a **substantial**, not minor or trivial, reason for change. She is right, and also in saying the Trust does not have to justify it.

4.3. If that results in a minority “losing“ an existing benefit, one way of persuading them to accept is to offer a “one off” payment in consideration of them agreeing a change or leaving without bringing a claim. As NYCC’s HR advisor said in an email at page 100, unions have approved such “settlement payments“ in the past. Provided they do not exceed £30000 to an individual they are free of tax under s401 ff of the Income Tax (Earnings and Pensions) Act 2003. Such payment could have been sought in this case by the claimant or her Union. It would be anathema to any public sector employer or Union to make such payments to one employee but not to others in the same circumstances. I asked the claimant if, in the early weeks after the meeting she attended on 7 February, she had gone back to her Union. She said the representative had told her if the loss of pay was less than 20% the Union would not support any action. Where the “pot” of money is not unlimited, those on better terms have to give up benefits so those on lesser terms can become equal. Employers and Unions representing all of them have to achieve the best compromise they can. It is not part of the employer’s duty to offer an wmployee who will lose a benefit some compensation for which she has not asked .

4.4. Both representatives put their arguments well, but I respectfully take a short cut to the main issues. The claimant does not need to rely on the implied term of mutual trust and confidence. The words and acts of the Trust were an anticipatory breach its express contractual obligations to the claimant as to her pay. I reject Ms Levene’s submission this is like Kerry Foods-v-Lynch because I view a 13 % pay reduction as fundamental breach. The claimant resigned in response to that breach without first affirming the contract, so there was a dismissal. The Trust does show a potentially fair reason for it under s 98(1)(b). It was substantial for all the reasons I have given above. Referring back to paragraph 2.15 above, applying s 98(4) and Sainsbury’s-v-Hitt ,what the Trust did procedurally was well within the band of reasonableness. I cannot find fault with the adequacy of information given to employees or the time afforded to them to respond. The fact the claimant, and others, did not make the right representations and demands when they had the **opportunity** to do so, does not render the dismissal unfair. Dismissal was not wholly or mainly due to a redundancy situation, because none existed Chapman-v-Goonvean .Therefore both claims fail.

Employment Judge TM Garnon

Reasons written by the Employment Judge on 13 October 2020