THE EMPLOYMENT TRIBUNALS

Claimant: **Ms A Khatun**

Respondent: **Winn Solicitors Ltd**

Heard at: **Newcastle Hearing Centre (by CVP)** **On: 10 and 11 February 2021**

Before: **Employment Judge Morris (sitting alone)**

Representation:

Claimant: **Miss L Millin of Counsel**
Respondent: **Ms D Henning, solicitor**

RESERVED JUDGMENT ON LIABILITY

The judgment of the Employment Tribunal is that the claimant's complaint that her dismissal by the respondent was unfair, being contrary to sections 94 and 98 of the Employment Rights Act 1996, is well-founded.

This case will now be listed for a one-day remedy hearing.

REASONS

Representation and evidence

1. The claimant was represented by Miss L Millin of Counsel, who called the claimant to give evidence. The respondent was represented by Ms D Henning, one of its employed solicitors, who called four employees of the respondent to give evidence on its behalf: namely, Ms D Catchpole, Legal Executive; Mr D Dewar, Solicitor and Associate Director; Ms R Colby Solicitor and Deputy Head of the Vehicle Damage Litigation Department; Mr C Birkett, Director and Chief Operating Officer.

2. The evidence in chief of or on behalf of the parties was given by way of written witness statements, which had been exchanged between them. I also had before me a bundle of agreed documents comprising some 546 pages. The

numbers shown in parenthesis in these Reasons refer to page numbers or the first page number of a large document in that bundle.

The claimant's complaint

3. The claimant's complaint was that her dismissal by the respondent was unfair, being contrary to Section 94 of the Employment Rights Act 1996 ("the ERA") in that (at the risk of over-simplification) while she accepted that the reason for her dismissal was "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held", as contained in section 98(1)(b) of the ERA, the respondent had not acted reasonably in relation to her dismissal as more particularly set out in section 98(4) of that Act.

The issues

4. Although this case had been listed to determine any remedy as well as liability, primarily for want of time it was agreed that I would consider only matters relating to liability. As such, as the respondent accepted that it had dismissed the claimant, the issues in this case are as follows:

    4.1 Has the respondent shown what was the reason or principal reason for the claimant's dismissal and, if so, was that a potentially fair reason within section 98(1) of the ERA?

    The respondent says that the reason was "some other substantial reason" justifying the claimant's dismissal ("SOSR") namely that she had declined to agree to a variation to the terms of her contract of employment, which was necessary in the interests of the respondent's business. The claimant did not dispute that that was the reason for her dismissal, which is a potentially fair reason dismissal.

    4.2 If the reason was SOSR, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

Consideration and findings of fact

5. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made on behalf of the parties at the Hearing and the relevant statutory and case law (notwithstanding the fact that, in pursuit of some conciseness, every aspect might not be specifically mentioned below), I record the following facts either as agreed between the parties or found by me on the balance of probabilities.

    5.1 The respondent is a solicitors' practice. Its main source of work arises from those who have been involved in a road traffic accident ("RTA"). It is a large employer of some 250 employees with significant resources including a dedicated HR Department. It operates within a group of

associated companies ("the Group") which together employ some 365 employees.

5.2 The claimant had been employed by the respondent as a solicitor. Her employment commenced on 13 April 2015 and was terminated on 26 March 2020 (50).

5.3 The claimant worked within what was known as the respondent's Part 7 Department, which comprises a number of teams handling contested RTA litigation. At the time material to the claimant's claim Mr Dewar and Ms Colby were respectively head and deputy head of that department. The claimant worked in the Intermediate Hire Team. She was well-regarded as a capable solicitor who earned good fees and achieved her targets with ease.

5.4 In light of the developing Covid 19 pandemic in early 2020 the respondent recognised that the way in which it worked could dramatically change and established a steering committee to monitor developments and propose solutions. Employees were kept up-to-date through a series of Covid 19 Staff Updates, the first of which was distributed on 12 March 2020 and advised, amongst other things, that the respondent was reviewing and enhancing the capabilities for an increased number of staff to work remotely from home (179). In this respect Mr Dewar proposed a home working contingency of 20 persons within his team (53).

5.5 The Covid 19 Staff Update of 16 March (184) informed employees that from Monday 23 March 50% of employees would work remotely on a seven-day rotation basis. Mr Dewar gave effect to that decision in relation to the Part 7 Department in his emails dated 17 March 2020 (59, 65 and 66), and relevant guides were produced in this respect (76 and 81).

5.6 On 23 March 2020 Mr Winn and Mr Birkett convened a meeting of all managers the note of which (49) explains its purpose as being "to discuss emergency measures to deal with the corona virus". The outcome of the meeting was unanimous agreement in respect two principal measures set out below. It was also agreed that there was a need to move fast as "we could be in lockdown by Wednesday or Thursday". Little did they know that the Prime Minister would announce the first national lockdown that evening.

5.6.1 The first measure was to aim to furlough 50% of staff from Monday, 30 March 2020, the reason for this being, "the reduction in new work coming in that we have already seen and expect further deterioration". If anyone did not agree "they would have to have their contract terminated."

5.6.2 The second was that everyone who remained, "would sign to agree to go into furlough or reduced hours as needed by the business"; the reason being said to be the need for "flexibility to reduce the workforce on an ongoing basis to meet the volume of work coming

in". Although not referred to in the note, the evidence of the respondent's witnesses was that the reduced hours would equate to a 20% reduction in salary and that legal advice had been obtained that anybody who refused to engage with this process could be fairly dismissed.

5.7 Mr Dewar's approach to deciding who could be placed on furlough was that the most experienced staff should be retained as they were capable of working on their own at home with minimal supervision. Mr Dewar never had any doubt that the claimant would be retained as she had consistently demonstrated the ability to settle cases and bring in fees, and her experience meant that she could take the issues that would present in doubling-up caseload in her stride.

5.8 Mr Dewar and Ms Colby met the claimant together with another solicitor that afternoon. There is a dispute between the parties as to what precisely was conveyed by Mr Dewar at this meeting. His evidence, which was corroborated by Ms Colby, is that he explained the respondent's approach as set out above including that 50% of the team would be placed on furlough. That would not include the claimant or the other solicitor but, like all other retained solicitors, they would need to sign a variation to their contracts of employment agreeing to go into furlough or accept reduced hours, although he did not have the finalised form of words for the contract variation. There would, however, be no immediate change to the contract of employment other than home working. The claimant's evidence was to confirm that she was told that she would be retained to work at home while other colleagues were placed on furlough but she said that Mr Dewar also told them that there would be no other changes to their contracts of employment. The parties are agreed, however, that Mr Dewar said that the position was non-negotiable and that if they did not agree they would be dismissed immediately. That begs the question of what was non-negotiable: the claimant maintains that that referred to the decision that she and colleagues would be retained but assigned the full caseload of a furloughed colleague; Mr Dewar and Ms Colby maintain that it referred, in addition, to the requirement to sign the contract variation agreement. On balance, I accept the evidence of Mr Dewar and Ms Colby given that the one corroborated the other and noting, additionally, that the claimant's evidence is that she "left the meeting a little dazed" and, perhaps more importantly, in Ms Colby's email to Mr Dewar of 25 March (125) (by which time the termination of the claimant's employment had become likely) she states, "We did explain the situation to her on Monday and were fairly clear. If she won't agree we can deal with the termination…". That said, nothing particularly turns on this point.

5.9 The parties are agreed that at the meeting Mr Dewar explained that retained solicitors would be assigned what he referred to as "a furloughed buddy's caseload to babysit". At the hearing Mr Dewar explained that this meant that each retained solicitor would have assigned to them the caseload of one of the employees who had been placed on furlough and although that would represent doubling-up in that sense it would not result

in double the workload as the intake of new work would slow as would work on existing case load as their opponents in the litigation would be taking similar measures. Additionally, the retained solicitors' approach to both their own caseload and the cover provided to the buddy's caseload would be limited to identifying cases that could be settled and generate cash income while doing the bare minimum to meet deadlines etc on the remaining cases. The retained solicitors were initially to deal with urgent matters only but as they settled cases they would be free to spend more time on a buddy's cases. Although Mr Dewar gave this explanation at the hearing, in an email of 25 March relating to another employee he used the phrase "double or triple the graft for the same cash as those watching Netflix in the garden is a very bitter pill". In evidence he explained that he did not accept that there would actually be twice or thrice the workload coupled with a 20% reduction in salary but that could be the perception of the retained solicitors if they compared themselves with their colleagues who were on furlough.

5.10 Although he is no longer employed by the respondent, at the time Mr Warmington was an Associate Director and Head of HR. On 24 March 2020 he wrote to all employees in the Part 7 Department who had not been placed on furlough (128). Amongst other things, he explained as follows: the pandemic had resulted in reduced work; there was "a need to preserve cash to help the business survive through the next few months and to flourish once this is over"; the decision had been taken to furlough a significant number of staff who would not be needed for the volume of work coming in over the next three months. Importantly in the context of this case he explained as follows:

> "To continue to work full-time we need to put in place now contractual changes which allow us to furlough other staff or reduced hours if we need to mainly if the Government decides to lock down the country or some areas of the country.
>
> In the circumstances, we attach a form for your agreement to amend your contract to allow us to do this moving forward. Please sign and return within 24 hours. Be aware, that if the variation is not granted it is highly likely that your employment would be terminated as we need the flexibility to meet this challenge moving forward."

5.11 There is no dispute between the parties that at this time there was still plenty of work to keep employees in the Part 7 Department busy. The issues for the respondent, however, were as follows. First, there was a need to reduce the salary overhead across the whole Group in order to marshal and preserve resources so that it could emerge from the pandemic in the best possible shape to meet the post-pandemic challenges, it being recognised that loss of revenue would not be felt for a number of months and that savings needed to be made while they could. Secondly, the work of the Part 7 Department arose some 8 to 12 weeks after a RTA at which time claims where liability was denied moved to that Department from the respondent's First Response Team.

5.12 In this connection, the respondent relied upon a table showing new cases coming into the respondent (47). In respect of March 2020, that table shows as follows:

	2nd to 6th	**9th to 13th**	**16th to 20th**	**23rd to 27**
Personal injury	198	163	131	46
Non-personal injury	185	185	137	52
Respondent total	**383**	**348**	**268**	**98**

Self-evidently, the figures for 23 to 27 March were unknown when decisions were made leading to Mr Warmington's email of 24 March. I note from fuller table that the total for March showed a reduction compared with February and that total figures for new cases continued to be low throughout April but rallied slightly during May. In the event, case numbers did not reduce as had been anticipated and employees who had been placed on furlough began to return on 26 May with all remaining staff returning from furlough by the second week in October 2020.

5.13 The contract variation agreement (143) attached to Mr Warmington's email of 24 March proposed a temporary variation to contracts of employment "to meet the needs of the business and thereby protect all of our employees and their continued employment in the short and longer term." It was explained that there might be a need to implement either one or both of two actions, albeit only one would be applicable per employee. Employees were asked to agree to include one of the following variations to the terms of their contracts: to become a furloughed worker or, "The Company can ask you to reduce your current hours and salary level by 20% should the business need arises". In respect of each alternative it was explained that it would not take immediate effect and employees would be given five working days' notice of the intention to implement the change. Agreement to the second alternative would be effective until 1 October 2020 but if necessary for business reasons it could be extended for a maximum of three further months following which the employee would return to normal full pay and hours with any further change only being effected by further agreement.

5.14 The claimant replied to Mr Warmington at 08:25 on the morning of 25 March (126) stating as follows:

> "I am sorry but I cannot agree to a variation of my contract. I feel that I am continuing to do deliver the job that I am contracted to, if not more as I now have double the work to as I have to cover a 'buddy'.
>
> These are uncertain times and I do not feel comfortable allowing Winns to effectively reduce my pay.
>
> In the event that I am furloughed or any other unexpected situation arises, I will of course consider a variation at that point.

5.15 At 08:35 Mr Warmington forwarded the claimant's email to Mr Dewar noting, "The option here is to terminate if non-agreement is put forward". Before he replied to the claimant he asked Mr Dewar to consider the furlough option (125). Mr Dewar then involved Ms Colby, to whom he wrote almost immediately noting, amongst other things, "if she does not sign her employment will be terminated on Friday".

5.16 At 09:14 on 25 March Mr Warmington replied to the claimant reinforcing the point that any change in terms would be advised on five days' notice and commenting, "At this point I would ask you to sign the agreement and take a view upon any changes introduced." In oral evidence the claimant rightly noted that at that stage it would be too late to object to any unilateral variation that could be contractually imposed on her on five days' notice. Mr Warmington asked claimant to sign the agreement and suggested that if she wished to discuss matters with Mr Dewar she should feel free to do so. He concluded his email, "I urge you to agree" (127).

5.17 The claimant replied at 10:50 (129):

> "I had given the matter some thought before emailing you this morning and I cannot agree to terms because I find them to be unfair.
>
> I am happy to continuing working under the terms of my current contract. If the business needs change that I trust that discussions will be had with affected employees."

5.18 Mr Warmington forwarded the above email to Mr Dewar at 10:54 (129) commenting as follows:

> "This is not acceptable and per Directors notice, termination is the alternative.
>
> David do you wish to contact Aysha prior to HR doing so, as consultation and termination will follow.
>
> This is not unfair because of the substantial business reason to meet the pandemic and lack of work. Other people can do her work."

5.19 Mr Dewar then duly telephoned the claimant at 11:17 on 25 March. He recorded their call, which lasted 4:47 minutes, a transcript of which was later produced (136). Mr Dewar also prepared a summary of their call (135). Amongst other things the transcript records that Mr Dewar informed the claimant that he had not been involved in any of the discussions but the Executive Directors had "taken the decision that if anyone doesn't agree to it then they will basically proceed straight down the, the dismissal route now as I understand it they have received advice that its not unfair to do so in the circumstances of the pandemic". The claimant informed Mr Dewar that she thought it entirely unfair. She continued, "I'm willing to

engage and have discussions and if the business needs changes then obviously I'll rethink my position at that point but I feel to sign this document now I'm totally excluding myself from a furlough option …" Mr Dewar informed the claimant that there were no exceptions and if the variation was not signed, "then as of Friday you will be dismissed". The claimant continued to say that she did not think it was fair, she had not had the opportunity to take legal advice and if she was dismissed she was going to have to deal with the consequences. She commented that she hated being awkward but confirmed that she could not really move from her decision. Mr Dewar drew the conversation to an end commenting, "if matters are as draconian as they are then .… I wish you the very best if we don't get an opportunity to speak before that" and thanked claimant for her efforts so far.

5.20 On Thursday 26 March Mr Birkett wrote to Mr Dewar and others at 13:09 noting that only one person in the whole Group had refused to sign the change in contract letter and, "I've instructed Michael Warmington to terminate her contract of employment with immediate effect" (152).

5.21 At 13:32 Mr Birkett instructed a colleague in the IT department to stop the claimant's remote access to the respondent's systems as soon as possible (166). This occurred at approximately 14:00 and caused the claimant to contact the IT Helpdesk whereupon she was told to ring Mr Dewar, which she did. He then had what he describes in his email at 15:31 on 26 March 2020 as "the unfortunate tasks of telling her she was dismissed" (159).

5.22 The respondent did not offer the claimant the opportunity to appeal against the decision that she was dismissed.

5.23 At 13:38 that afternoon respondent's Finance Director wrote to Mr Birkett enquiring whether the claimant was to be paid three months' salary. Mr Birkett responded at 14:30 as follows:

> "Only pay her the salary she earns up to Friday.
>
> No extra, ie. redundancy or contract etc.. at this time" (166)

5.24 In an email exchange between Ms Colby and Mr Birkett that afternoon she referred to the claimant that being "the only one causing a problem" and he described her as being "Absolutely selfish" in saying "it's unfair" (164). Mr Birkett repeated this point about the claimant being absolutely selfish in his witness statement confirming, "To put it bluntly, I was fuming."

5.25 Formal confirmation of her dismissal was sent to the claimant in a letter dated 26 March 2020 from Mr Warmington (50). He explained that the respondent had asked staff "to agree flexibility for a temporary period", which it believed was a "reasonable request made to protect the business and employees alike". This, he said, constituted a substantial reason for the request for flexibility and the claimant had been notified that in the

absence of agreement it was "highly likely your employment may be terminated." He stated that the respondent had considered the claimant's comments, but the changes were essential and concluded, therefore,

> "I regret to inform you that there is no other option but to terminate your employment on the grounds of some other substantial reason.
>
> This dismissal will take effect immediately".

5.26 In light of Mr Birkett's instruction recorded above only pay the claimant the salary she earned up to Friday 27 March, Mr Warmington wrote to him advising that if effect were to be given to that instruction, "We are immediately in breach of contract if we do not meet the terms of the contract upon termination", and set out the claimant's entitlements under her contract to 3 months' notice and 6 days' holiday pay accrued but untaken. On 1 April Mr Birkett replied as follows:

> "What's the worst scenario for breaching the contract?
>
> We've always been clear that whilst bee may owe her, she ain't getting it straight away?
>
> She's been inflexible and clearly not someone interested in the firm or her colleagues
>
> Also if she owes money for practising certificates this should be deducted." (168)

5.27 Understandably, the claimant pursued her contractual entitlements, which were eventually paid to her on 17 June 2020 (173) over 11 weeks after her dismissal. In Further and Better Particulars submitted in response to orders of the Tribunal the respondent accepted that it was in breach of contract by not paying the claimant's contractual entitlement immediately.

Submissions

6. After the evidence had been concluded the parties' representatives made submissions which addressed the matters that had been identified as the issues in this case; both by reference to written skeleton arguments, which I took into account along with the statutory and case law they cited. It is not necessary for me to set out the representatives' submissions in detail here because they are a matter of record and the salient points will be obvious from my findings and conclusions below. Suffice it to say that I fully considered all the submissions made and the parties can be assured that they were all taken into account into coming to my decision.

7. That said, the key points made by Miss Millin on behalf of the claimant included as set out below.

7.1 Where dismissal with the offer of re-engagement is essential as a result of a reorganisation, that is a substantial reason of a kind such as to justify dismissal. There is no requirement that there must always be consultation (Hollister v National Farmers' Union [1979] IRLR 238) but in the present case there should have been some consultation. Instead there was just threats of dismissal.

7.2 The respondent had produced some figures for March, April and May 2020 but it was still busy at the time the claimant was dismissed. The respondent had misapplied the government's coronavirus job retention scheme, which was designed to help employees whose operations had been severely affected by the virus. It was not essential to reorganise the business at the end of March and this cannot be seen as a sound good business reason and cannot justify a dismissal under SOSR for refusal to sign a contractual variation.

7.3 No evidence had been produced that the business had to take the steps it took: Banerjee v City and East London AHA [1979] IRLR 147.

7.4 The usual considerations of procedural fairness with regard to section 98(4) of the ERA must be considered including that an appeal is virtually universal (Afzal v East London Pizza Ltd (t/a Domino's Pizza) [2019] IRLR 119) and in this case an appeal would have allowed the reasons for variation and reasons for rejection to be examined. This is not a case where consultations, meetings and at least an appeal could be seen to be unreasonable: Polkey v AE Dayton Services Ltd [1987] IRLR 503. Dismissal was not within the range of reasonable responses of a reasonable employer.

8. The key points made by Ms Henning on behalf of the respondent included as follows:

8.1 Refusal to a change to terms and conditions of employment has historically been held to be a potentially fair reason. In Hollister it was held that SOSR was not limited to where the business came absolutely to a standstill but to where there was some sound, good business reason for the reorganisation, and there was no reason to consult the claimant specifically.

8.2 A dismissal may be fair even though the claimant may be perfectly reasonable in not wanting to agree the changes: St John of God (Care Services) Ltd v Brooks [1992] IR LR 546. Both sides might be perfectly reasonable but the focus of the Tribunal is required to be "on the reasoning and reasonableness of the employer": Laycock v Booth UKEAT/0003/11/CEA.

8.3 The respondent was in a situation of stress and quick decisions had to be made to save the business. To wait did not make sound business sense; better to build a 'war chest' to keep people in jobs when the economy revived.

8.4 It was not unfair to give a fair warning as to the prospect of dismissal if the agreement was not signed: St John of God.

8.5 It was not rights to suggest that the respondent had undermined employment law right because although the claimant had been asked to sign a variation it had never been acted upon.

8.6 To give one employee special and differential treatment would have caused immense unrest: see Laycock and the reference therein to Grampian Country Food Group Limited v McNally 2004 EAT/0035.04. The claimant had not asked for more time and was the only employee in the Group to reject the variation, and in St John of God it was stated that fairness was affected by the number who accepted the new contract.

8.7 There cannot be any dispute that the respondent has established a potentially fair SOSR and it is for the Tribunal to decide whether the respondent acted reasonably or unreasonably in all the circumstances including a global pandemic resulting in a national lockdown and the dramatic fall-off in cases for the respondent and the loss of revenue to its business.

8.8 The ACAS Code of Practice does not apply to SOSR dismissals: see Phoenix House Ltd v Stockman UKEAT/0264/15/dm disagreeing with the earlier decision in Hussain v Jury's Inn Group UKEAT 2016 0283.

The Law

9. The principal statutory provisions that are relevant to the issues in this case are to be found in the ERA and are as follows:

"94 The right.

(1) An employee has the right not to be unfairly dismissed by his employer."

"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.

.....

(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."

Application of the facts and the law to determine the issues

10. The above are the salient facts and submissions relevant to and upon which I based my judgment. As indicated above, the claimant has brought a single complaint of unfair dismissal. The issues arising from the statutory and case law referred to above that are relevant to the determination of that complaint are summarised at paragraph 4 of these Reasons in relation to which I considered and applied section 98 of the ERA and the relevant precedents in this area of law as more fully set out below.

11. The first questions for the Tribunal to consider are what was the reason for the dismissal of the claimant and was that a potentially fair reason within section 98(1) of the ERA? It is for the respondent to show the reason for the dismissal and that that reason is a potentially fair reason for dismissal. By reference to the long-established guidance in Abernethy v Mott Hay and Anderson [1974] IRLR 213, the reason is the facts and beliefs known to and held by the respondent at the time of its dismissal of the claimant.

12. The claimant did not challenge the respondent's position that the reason for her dismissal was, "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held". In any event, on the evidence before me, I am satisfied for the following reasons that the respondent had what is referred to in Hollister as "sound, good business reasons" for seeking to require its employees to agree to the variation to their contracts of employment.

13. The situation faced by the respondent in March 2020 is well-summarised in the evidence of Mr Dewar and Mr Birkett. The respondent had sensibly established a steering committee to monitor developments in relation to the coronavirus both in the UK and elsewhere such as in Spain. As Mr Dewar put it, it became increasingly clear that the way the respondent worked could dramatically change in the very near future and, as such, it was looking to adopt agile and flexible working practices to minimise disruption.

14. In that context the monthly figures report showed a reduction in business, which the Directors considered not to be surprising given that the respondent's main source of work resulted from RTAs and there was a reduction in traffic on the roads as a consequence of people responding to the government's

encouragement to work from home. The fact that the Prime Minister announced the first national lockdown on the evening of 23 March 2020 (that being the date upon which the respondent had notified its managers of the two measures to furlough 50% of staff from Monday, 30 March 2020 and require the remainder to sign the variation agreement) would only serve to heighten concern and reinforce the decision to implement those two measures.

15. As such, I am satisfied, contrary to the submission of Miss Millin, that it was reasonable and not premature for the respondent to plan for the worst and take the steps that it did when it did. In these circumstances the claimant's refusal to sign the contract variation agreement amounted to some other substantial reason of a kind to justify her dismissal; and for this reason Mr Birkett, took the decision to instruct Mr Warmington to dismiss her.

16. Thus I am satisfied that the respondent has discharged the burden of proof to show that that was the reason for the claimant's dismissal, which is a potentially fair reason.

17. Having thus been satisfied as to the reason for the dismissal, I move on to consider the second aspect of whether the respondent acted reasonably in dismissing the claimant for that reason with reference to section 98(4) of the ERA. In doing so, I observe that the respondent's witnesses and its representative did tend to blur, somewhat, the distinction between the reason under 98(1) of the ERA and the issue of reasonableness under 98(4) of that Act. By way of example, as set out above, Mr Dewar had informed the claimant during their telephone conversation on 25 March that the Executive Directors had "taken the decision that if anyone doesn't agree to it then they will basically proceed straight down the, the dismissal route now as I understand it they have received advice that its not unfair to do so in the circumstances of the pandemic" and, more particularly, in Mr Warmington's email to Mr Dewar of 25 March 2020 (10:58) having referred to the prospect of the claimant's dismissal he stated, "This is not unfair because of the substantial business reason to meet the pandemic and lack of work. Other people can do her work." Thus, the focus is entirely on the reason without regard to acting reasonably in treating that reason as a sufficient reason for dismissing the claimant.

18. Section 98(4) of the ERA requires consideration of three overlapping elements, each of which I must bring into account:

    18.1 first, whether, in the circumstances, the respondent acted reasonably or unreasonably;

    18.2 secondly, the size and administrative resources of the respondent;

    18.3 thirdly, the question "shall be determined in accordance with equity and the substantive merits of the case".

19. In this regard I remind myself of the following important considerations:

    19.1 Neither party now has a burden of proof in this respect.

19.2 My focus is to assess the reasonableness of the respondent and not the unfairness or injustice to the claimant, although not completely ignoring the latter.

19.3 I must not substitute my own view for that of the respondent. This principle has been maintained over the years in decisions including Iceland Frozen Foods Limited -v- Jones [1982] IRLR 439 (re-confirmed in Midland Bank v Madden [2000] IRLR 288) and J Sainsbury plc v Hitt [2003] ICR 111. In UCATT v Brain [1981] IRLR 224 it was put thus:

> "*Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, "Would a reasonable employer in those circumstances dismiss", seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question "Would we dismiss", because you sometimes have a situation in which one reasonable employer would and one would not*."

19.4 The decision in Polkey v AE Dayton Services Ltd [1988] ICR 142 firmly establishes procedural fairness as an integral part of the issue of reasonableness, including as to the procedure an employer has followed regarding such matters as engaging in discussions with the employee.

19.5 My consideration of whether the claimant's dismissal was fair or unfair is a single issue involving the substantive and procedural elements of the dismissal decision.

19.6 The 'range of reasonable responses test' (referred to in the guidance in Iceland Frozen Foods Limited and Post Office v Foley [2000] IRLR 827), which will apply to my decision as to whether the decision of the respondent to dismiss the claimant fell within the band of reasonable responses of a reasonable employer acting reasonably, applies equally to the procedure that was followed in reaching that decision: see, Hitt.

20. Regarding the general consideration of fairness, I record that I brought into consideration of the issues considered below and my ultimate decision regarding the fairness of the claimant's dismissal, relevant factors including the fairly significant size of the respondent and its administrative resources (that being a specific element in section 98(4)); the unprecedented times that all were facing in preparing to respond to the pandemic; the genuine need, in the interests of all concerned, to preserve the respondent's business for when it emerged from the effects of the pandemic.

21. Against that background I bring into account the following principles that I draw from the case law referred to below:

21.1 My having been satisfied that there were sound business reasons for the respondent's decision to seek a contractual variation, the reasonableness

of its subsequent conduct must be judged in that context: St John of God (Care Services) Ltd.

21.2 My task includes balancing the needs of the respondent and the claimant: see Catamaran Cruises Ltd v Williams [1994] IRLR 386. It is not a simple matter of determining the reasonableness of the respondent in seeking to introduce the variation or, alternatively, the reasonableness of the claimant in refusing to agree it. In Richmond Precision Engineering Ltd v Pearce [1985] IRLR 179, for example, it was held that the tribunal had wrongly considered the sole question of whether the employer had acted reasonably in deciding that the advantages to the employer in implementing the proposed reorganisation outweighed any disadvantage the employee might suffer, which the EAT held was merely one factor to be considered in the circumstances.

21.3 Consultation with an employee is an important but not a crucial factor and the degree of consultation will vary with the circumstances. It is, nevertheless, usually important that employees have an opportunity to be involved in the process in a meaningful way. In the well-known passage in Polkey Lord Bridge of Harwich observed as follows:

> "Employers contesting a claim of unfair dismissal will commonly advance as their reason for dismissal one of the reasons specifically recognised as valid by [*section 98(2)(a), (b) and (c) of the ERA*] . These, put shortly, are: (a) that the employee could not do his job properly; (b) that he had been guilty of misconduct; (c) that he was redundant. But an employer having prima facie grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as "procedural," which are necessary in the circumstances of the case to justify that course of action.

While Lord Bridge focused upon those three potentially fair reasons, I am satisfied that his general observation that in the great majority of cases an employer will not act reasonably unless and until it has taken necessary procedural steps applies equally to a case where the potentially fair reason is "some other substantial reason".

21.4 A further factor is the number of employees who ultimately agreed to accept the changes to their contracts of employment: see St John of God (Care Services) Ltd, Catamaran Cruises Ltd and Sandford v Newcastle upon Tyne Hospitals NHS Foundation Trust EAT 0324/12.

21.5 A final factor is whether the employer had reasonably explored all alternatives to dismissal: see Copsey v WWB Devon Clays Ltd [2005] ICR 1789, CA and Sandford.

22. I bring all the above factors into account in relation to my decision in respect of the question of reasonableness under 98(4) of the ERA and in doing so seek to balance the competing interests of the respondent and the claimant as referred to above. In this case, certain of the above factors are clear (for example, although on 25 March there were seven employees in the Part 7 Department who had not signed the variation to their contracts of employment (148), by the following day the claimant was the only employee who was still refusing to do so (152)) but others are less so.

23. Ms Henning submitted, with reference to the decision in, Hollister that there was no reason to consult the claimant specifically. That might be strictly correct given that (to paraphrase the decision of the Court of Appeal) it does not say anything about "consultation" or "negotiation" in section 98(4). On that basis it was held that there was no requirement, "that there must always be consultation. Consultation is only one of the factors which has to be taken into account when looking at the circumstances of the case and considering whether a dismissal is fair or unfair." Given that guidance I repeat, therefore, that this is one of the relevant factors to which I am satisfied that I should give weight; this being reinforced by the excerpt from Polkey set out above, not least given that that case was subsequent to that of Hollister.

24. I also note that in Hollister there had been discussion in the nature of correspondence over several months between the employee and the employer before he was given the ultimatum to accept the new contract or be dismissed. The respondent might suggest that in this case it did not have "several months" and I accept that. I am nevertheless satisfied that it had available to it more than the 48 hours or so that it allowed within which time a reasonable employer would have been expected to have engaged meaningfully with the claimant in an attempt to address her concerns and reasonably explore all alternatives to dismissal as referred to above. Instead, Mr Warmington in his emails and Mr Dewar in his telephone conversation did little more than restate the respondent's position that in the absence of agreement dismissal would follow.

25. More particularly, in addition to the email correspondence that I have set out above, there was only one meeting and one telephone conversation between Mr Dewar and the claimant.

26. I consider first the meeting on 23 March. I am satisfied that that meeting (at which another employee solicitor was also present) was limited to Mr Dewar informing the two solicitors what was going to be the respondent's approach. This is borne out by Mr Dewar's witness statement in which he refers several times to having "explained" the situation (which he repeated in oral evidence) and does not suggest any discussion as such. I do not suggest anything should have taken place with formalities such as might have accorded with the guidance given in British Coal Corporation and Secretary of State for Trade and Industry ex parte Price and others [1994] IRLR 72, which I accept would not be appropriate, but I am satisfied that it would have been reasonable for something in the nature of a discussion and consideration of the claimant's position to have occurred. The one-sided nature of this meeting is reinforced by Mr Dewar's evidence that amongst other things he explained that, "the position of agreeing

the variation was not negotiable and that anyone who refused would be dismissed"; I did not detect even a hint of any reasonable process being followed. Indeed, when I asked Mr Dewar whether his evidence was just that, there would be no process before dismissal, he answered, "Yes – if they didn't agree the sanction would be applied".

27. Mr Dewar's evidence was that "the business simply could not spend time negotiating with 300+ individual staff" and this was a time for everyone "to put our shoulders to the wheel and do our best". While this might go some way to establishing the some other substantial reason for dismissal I am not satisfied that it sufficiently establishes the reasonableness of the decision. In the event, it appears that it would only have been necessary, not necessarily to negotiate, but to engage in a meaningful discussion with the claimant and not the other 300+ staff who accepted the variation. I find it surprising, especially in a firm of solicitors, that so little regard should have been had by the respondent throughout this process to the fact that the claimant's existing terms and conditions were contained in a legally binding contract. That is not to suggest that a contract of employment cannot be varied, but only by agreement, or that the respondent could not have dismissed and re-engaged recalcitrant employees on different terms and conditions of employment but it would have been reasonable for due process to be followed and I am not satisfied that that was followed in this case. I make two further points in this connection. First, I find somewhat remarkable Mr Dewar's evidence that the respondent could not have people "causing a fuss" when all the claimant was seeking to do was to protect her contractual position at that time and twice (in her email to Mr Warmington at 08:25 on 25 March and during her conversation with Mr Dewar later that morning) indicated that she would consider the variation should the need arise in the future. Secondly, I reject the submission of Ms Henning that it is relevant that although the claimant had been asked to sign a variation it had never been acted upon.

28. Also at the meeting on 23 March Mr Dewar accepted that he advised the two solicitors that there would be no immediate change to their contracts of employment other than home working. I do not accept that that was accurate given the clear decision earlier that day, of which he was aware, that everyone who remained, "would sign to agree to go into furlough or reduced hours as needed by the business". Neither do I accept Mr Dewar's evidence that that would amount to "an agreement to agree or decline a contract variation if the needs of the business changed". It was not. It was an agreement to change the contract of employment so as to entitle the respondent unilaterally to impose, on five days' notice, either the claimant being placed on furlough (which would normally require agreement at the time) or having her pay reduced by 20%. She might have made representations at that point but ultimately she could be dismissed for failure to comply with a reasonable instruction given in accordance with the varied contract of employment, which would have been a fair reason for dismissal. At the time at which the respondent might have relied upon the variation there was no option for its employees "to agree or decline".

29. I next consider the telephone conversation between Mr Dewar and the claimant on 25 March. I accept that was more in the nature of a consultation in that it was

not limited to Mr Dewar explaining respondent's position to her. The context for that conversation is, however, important. By the time Mr Dewar telephoned the claimant Mr Warmington had told him, "The option here is to terminate if non-agreement is put forward", and Mr Dewar had written to Ms Colby, "if she does not sign her employment will be terminated on Friday". Similarly, despite the claimant having written to Mr Warmington to the effect that she could not agree the terms because she found them to be unfair but, "If the business needs change that I trust that discussions will be had with affected employees" he wrote again to Mr Dewar, "This is not acceptable and per Directors notice, termination is the alternative". In this context I am satisfied that Mr Dewar conducted his conversation with far from the open mind that would have been appropriate in any meaningful discussion.

30. In this regard also, in that email to Mr Dewar Mr Warmington stated, "David do you wish to contact Aysha prior to HR doing so, as consultation and termination will follow". It is clear, therefore, that Mr Warmington recognised the need for "consultation", which he told Mr Dewar would follow but, in oral evidence, he confirmed that there had been no such consultation. It is also evident from his email that even if there had been such consultation, termination would follow regardless. That cannot represent a meaningful discussion.

31. As to the telephone conversation itself I am again not satisfied that there was actually any meaningful discussion. Instead, as set out above, Mr Dewar simply informed the claimant that the Executive Directors had "taken the decision that if anyone doesn't agree to it then they will basically proceed straight down the, the dismissal route now". Echoing what she had written to Mr Warmington that she would reconsider the position if the business needs changed the claimant informed Mr Dewar, "I'm willing to engage and have discussions and if the business needs changes then obviously I'll rethink my position at that point but I feel to sign this document now I'm totally excluding myself from a furlough option …" but rather than exploring that Mr Dewar simply informed her that there were no exceptions and if she did not sign the variation she would be dismissed that Friday; seemingly accepting himself that that would be a Draconian step.

32. The following day Mr Birkett instructed, first, Mr Warmington to terminate the claimant's contract of employment and to do so summarily and, secondly, the respondent's IT department to disconnect the claimant's remote access, which led to Mr Dewar having to tell her that she had been dismissed. I have commented above that I am not satisfied that the respondent gave due weight to the contractual relationship between the parties and I find that Mr Birkett's description of the claimant as being "Absolutely selfish" in saying that the respondent was being unfair similarly does not give appropriate weight to the existence of the contract of employment. His actions that afternoon and subsequently deciding to breach that contract of employment by not allowing the claimant to work her notice or make a payment in lieu of that notice or to pay her compensation in respect of accrued but untaken holiday (despite the warning he received from the Warmington) does demonstrate, to use his own word, that he was "fuming", which tends to militate against a fair and reasonable approach as is referred to in section 98(4) of the ERA.

33. In the letter of dismissal from Mr Warmington dated 26 March 2020 he explained that the circumstances constituted a substantial reason for the dismissal (which I have accepted) and, as to the reasonableness issue, suggested that the respondent had considered the claimant's comments. For the above reasons, I do not find that observation to be supported by the evidence before me.

34. A final aspect of process is that the respondent failed to offer the claimant the opportunity to appeal against her dismissal. Whether or not the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) applies to dismissals for some other substantial reason (and I am inclined to agree with Ms Henning that it does not) I agree with Miss Millin that an appeal is a relevant consideration in determining the reasonableness of a dismissal. In this case, Ms Henning suggested that any appeal would have been pointless given the respective positions of the parties. I do not necessarily agree with that suggestion. By the stage when any appeal came to be heard the attitude of the respondent might have cooled somewhat from the fuming attitude described by Mr Birkett, and in cross-examination he accepted that an appeal in this case could possibly have helped resolve the differences between the parties and it was a shame for both that there had been no appeal; albeit adding that the claimant had not asked for an appeal. Perhaps more importantly, by the time of any appeal the situation was no longer that the claimant faced the prospect of dismissal; rather she had been dismissed with all that would mean in terms of loss of security and income at a time when the Country had entered 'lockdown', a number of employees had been placed on furlough and others had been dismissed for redundancy. She might have been more amenable to agreeing the contract variation, which might have been acceptable to the respondent given that Mr Dewar regarded her as being "a capable solicitor that achieved her targets with ease".

35. The final factor that I have set out above is whether the respondent reasonably explored all alternatives to dismissal. Self-evidently, on the evidence of its own witnesses, it did not. Mr Dewar was clear that the Directors' decision was that if the claimant did not agree they would proceed straight down the dismissal route without any process being followed, "if they didn't agree the sanction would be applied". It is not my function to suggest what alternatives to dismissal there might have been, the question for me is whether the respondent reasonably explored all alternatives (which I repeat it did not), but placing the claimant on furlough might have been one possibility.

36. In summary thus far, adverting to what I have described above as being my task of balancing the needs of the respondent and the claimant rather than focusing on whether the advantages to the respondent outweighed any disadvantage to the claimant I have drawn together the factors that I have set out above including the reasonableness of the engagement that the respondent had with claimant, that every other employee apparently accepted the variation and that alternatives to dismissal were not considered.

37. Before concluding my consideration of the reasonableness issue by reference to section 98(4) of the ERA I address the question of the reasonableness or otherwise of the decision that the claimant should be dismissed. Referring to established case law such as Iceland Frozen Foods there is, in many cases, a

range or band of reasonable responses to the situation of the employee within which one employer might reasonably take one view and another quite reasonably take another view. My function is to determine in the circumstances of this case whether the decision of this respondent fell within the band of reasonable responses that a reasonable employer might have adopted. In this regard the issue is not that the claimant repeatedly stated she considered it unfair that she should be dismissed, which is quite understandable. That is often the case if the dismissal is for some other substantial reason, but it has long been established that the test of fairness directs "the tribunal to focus its attention on the conduct of the employer and not on whether the employee in fact suffered any injustice": W Devis & Sons Ltd v Atkins [1977] IRLR 314 HL.

38. In the circumstances, focusing on the conduct of the respondent and given my findings relating to the considerations in the relevant case law, which are addressed above, I am not satisfied that the dismissal of the claimant was a decision that fell within the band of reasonable responses of a reasonable employer in these circumstances.

39. Stepping back and considering all the evidence before me (written and oral) in the round, in summary of my consideration of section 98(4) of the ERA, on the basis of my findings of fact and for the reasons set out above I am not satisfied that the respondent acted reasonably in treating the reason of some other substantial reason as a sufficient reason for the dismissal of the claimant.

Conclusion

40. In conclusion, my judgment is that in the above circumstances I am satisfied that the claimant's complaint that her dismissal by the respondent was unfair is well-founded.

41. This case will now be listed for a one-day remedy hearing.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENTJUDGE ON 22 March 2021