EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr P Horne	**v**	JEM Packaging Ltd

Heard at: Cambridge (via CVP) **On**: 31 May 2023

Before: Employment Judge Conley

Appearances
For the claimant: Mr C Milsom (Counsel)
For the respondent: Ms S Kamal (Counsel)

RESERVED JUDGMENT

1. The claimant's claim of unfair dismissal is well founded and succeeds.

The respondent is ordered to pay compensation to the claimant in the sum of £9,421.00 (gross) for unfair dismissal.

2. The claimant's claim of wrongful dismissal is well founded and succeeds.

The respondent is ordered to pay compensation to the claimant in the sum of £4,788.00 (net).

3. The claimant's claim that the respondent failed to provide a Statement of Terms and Conditions of Employment is well founded and succeeds.

The respondent is ordered to pay compensation to the claimant in the sum of £3,540.00 (gross).

REASONS

BACKGROUND

1. By a claim form presented to the Employment Tribunals on 20 October 2022, following a period of early conciliation between 29 August 2022 and 2 September 2022, the claimant sought to pursue a complaint of unfair dismissal against the respondent, togethe Amended details of complaint

were served by the claimant on 14 February 2023. In addition to the original unfair dismissal claim, he also seeks compensation for wrongful dismissal (insofar as he was paid 4 weeks notice as opposed to 11 weeks to which he claims he was entitled), and an ancillary claim in relation to the failure of the respondent to provide a statement of terms of employment.

2. The Claim was resisted by the respondent and on 18 November 2022 they presented a Response which included comprehensive Grounds of Resistance to the Claim.

3. In summary, the claim related to the decision by the respondent to dismiss the claimant due to his (the claimant's) refusal to accept all of the terms of a new contract issued by the respondent. The respondent's position was that it was reasonable to expect all employees to agree to the terms, as drawn, of a new contract which was issued following a review of all of the company's contracts in order to be compliant with all necessary employment legislation. The respondent asserts that the claimant's refusal to do so justified dismissal in that it amounted to a substantial reason of a kind such as to justify the dismissal of the claimant, and was 'reasonably carried out in furtherance of the respondent's commercial objectives and in the interests of economy and efficiency.'

4. There is also a secondary issue to be determined which is relevant primarily to the question of remedy in relation to the unfair dismissal claim, named the length of the period of continuity of the claimant's employment with the respondent. Whilst it is common ground that the claimant first began to work for the respondent from 2010 (albeit without a written contract in place for the first two years), the respondent asserts that there was a break in the period of continuity following the decision by the claimant to resign in order to set up his own business in 2016, returning to work with the respondent full time in 2017. The claimant however asserts that, despite his resignation and subsequent absences from work, in reality his employment continued by arrangement or custom and that any absences during this period should be disregarded in calculating the overall period of employment.

THE ISSUES

5. The issues that the Tribunal had to determine in relation to each of these claims are as follows:

6. In relation to the claim for unfair dismissal:

   a) If the claimant was dismissed, what was the reason or principal reason for dismissal? The respondent asserts that the reason was a substantial reason capable of justifying dismissal, namely, the claimant's refusal to accept contractual changes which for which there was, according to the respondent, a sound business reason.
   b) Was it a potentially fair reason?
   c) Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

7. In relation to the issue of continuity of employment:
   a) When did the claimant's employment with the respondent commence?
   b) Was there a break in the continuity of the claimant's employment between September 2016 and June 2017, or
   c) Were any periods of absence from work during this period work in circumstances such that, by arrangement or custom, he was to be regarded as continuing in the employment of the respondent?

THE EVIDENCE

8. The evidence in this case came from the following sources:

   a) The written and oral evidence of Roland Page (known as 'Bill') Managing Director of the respondent;
   b) The written and oral evidence of the claimant;
   c) An agreed Bundle of Documents amounting to 140 pages.

FINDINGS OF FACT

9. The respondent is a small family-run printing company, established by Mr Page in around 2005 (in his witness statement dated 2023 he stated that he founded the business about 18 years earlier).

10. As of 2022, the business employed around 22 people in total; 4 of which were members of Mr Page's family, with the remainder having been employed externally.

11. The claimant was first employed by the respondent as an assistant printer in December 2010. He was promoted to the position of press minder in early 2011; a position which he held for a number of years before once again being promoted to artwork manager.

12. He was not issued with a contract of employment until 10 January 2012, which gives his title as 'Printer'. The contract was inaccurate in a number of key areas and was not compliant with section 1 of the Employment Rights Act 1996 in that:
    i. The contract indicates that the start date of employment was 3 January 2012 when it is common ground between the parties that the claimant's employment commenced in 2010, and consequently does not correctly identify the period of continuous employment;
    ii. The contract does not state the scale, rate or method of calculating remuneration;
    iii. The contract does not state the days on which the claimant was required to work;
    iv. The contract is silent as to accrued holiday on termination;
    v. The contract did not contain the note as to disciplinary and grievance procedures required pursuant to s3 ERA 1996.

13. Although the contract was silent as to the claimant's working hours, his regular hours of work were from 8am to 4pm from Monday to Friday; however, over time it became customary to start and finish earlier on Fridays.

14. On 16 September 2016 the claimant submitted his resignation by letter, addressed to 'Bill', in which he confirmed an earlier conversation between himself and Mr Page to the effect that it was his intention to set up his own business (namely a cafe); but that he should be happy to 'lend a hand' to Mr Page and the respondent should the need arise.

15. The letter does not specify the date on which the original conversation took place between the claimant and Mr Page regarding his decision to resign.

16. It is clear that the claimant and Mr Page parted company on very amicable terms, and that the claimant was a very highly valued employee whose loss to the respondent was keenly felt.

17. The claimant was issued with a P45 indicating that the claimant's leaving date was 28 September 2016. There is no basis for concluding that this is anything other than an authentic document and I accept the evidence of Mr Page that it was properly issued to the claimant along with his final payslip

18. The claimant incorporated a company, William's@Twenty Eight Limited, on 17 December 2016, for the purposes of operating his new business as a cafe. However, the business struggled and in due course, on 28 August 2018, the company was dissolved due to the business being financially unviable.

19. Whilst running his own business, the claimant would frequently undertake ad hoc paid employment with the respondent, and continued to be paid PAYE via the respondent's payroll on the same terms as when he had been employed full time. This arrangement persisted for the duration of the hiatus between the claimant's resignation and his re-employment.

20. Mr Page made it known that he wished the claimant to return to the respondent on a full time basis, and he did so on 24 July 2017, having negotiated an improved salary with Mr Page and his daughter Ellen Collison, who was the respondent's Operations Director.

21. His position upon his return was as a Printer but he was promoted to Print Manager in 2018. He was not issued with a new written contract. At around the same time, he began working as a nightclub bouncer on Friday and Saturday

22. The respondent experienced a significant increase in demand for its products during the Covid pandemic, having secured sizable contracts for the provision of packaging from, in particular, British Airways, as a result of which the staff were requested to increase their hours considerably, working double shifts and up to 14 hour days in order to meet the extraordinary demand.

23. During the course of this busy period, in October 2020, the claimant agreed a variation to his terms as regards working hours. The terms of the contract

issued in 2012 were varied accordingly. At around the same time, another employee left without notice due to the deficiencies in the firm's contracts of employment. This caused the respondent considerable difficulty and led to a decision to seek advice in relation to its contracts. The respondent contacted the Federation of Small Businesses who supplied a template which the respondent decided to adopt and deploy across its workforce.

24. Due to the upheaval of the Covid pandemic, the respondent's plans to introduce these new contracts stalled, and was not resurrected until March 2022 when the issue was raised with staff and draft contracts provided.

25. The claimant indicated that he was amenable in principle to a variation in terms, but took objection to two clauses in particular: clauses 5.3 and 21.2 which read as follows:

    5.3 The Company reserves the right to require you to work different hours or according to the needs of the business, whether on a temporary or permanent basis. This may involve shorter or longer hours of work, or working on different days of the week or at different times of the day in accordance with operational requirements. It is a condition of your employment that you agree to work different hours if requested to do so by the Company.

    21.2 During the period of your employment you will not, without the prior written consent of the Company, undertake any work or other activity which may prejudicially affect your ability properly and efficiently to discharge your duties and responsibilities. The decision as to whether or not an activity would have a prejudicial effect shall be in the absolute discretion of the Company.

26. On 17 March 2022 Mr Page discussed the contracts with staff. As stated in the Grounds of Resistance, 'only' four employees out of the workforce raised any objection; however, it should be noted that of the entire workforce, only 16 were not members of Mr Page's family. The four members of staff that raised concerns did in fact represent 25% of the external workforce, a not inconsiderable proportion.

27. Only the claimant and one other member of staff, Mr Steve Langstaff persisted with their objections. Mr Langstaff ultimately did sign but only, as he said in his letter to Mr Page of 26 May 2022 "under duress"; he, like the claimant, was particularly opposed to clause 5.3. His letter went on to say that he was "prepared to work with this wording as you have implied that you would not enforce changes to hours or working days without reasonable consultation and agreement with employees." However, he resigned shortly afterwards.

28. There followed a consultation period during which a series of written communications and a number of meetings took place between the claimant and Mr Page in relation to the objection taken by the claimant to the two clauses set out above. In essence, the claimant's objection was to the fact that the clauses gave the respondent the absolute discretion to unilaterally change his

working conditions and ability to take other work outside the firm; he accepted the clauses in principle but sought some form of amendment in order to require that the respondent should only exercise that discretion reasonably and with some degree of consultation. It is possible to infer from the content of Mr Langstaff's letter that this was the nub of his objection also. As with Mr Langstaff, Mr Page gave the respondent assurances that the claimant would be permitted to continue in his work as a doorman, and that there would not be an enforced change in hours of work without consultation. Despite the assurances, which were in essence what the claimant wanted to be enshrined in the contract in some way, the respondent refused to make any amendment to the wording of the two clauses.

29. Prior to each of these meetings, the respondent wrote to the claimant explaining that refusal to accept the terms of the new contract could lead to dismissal.

30. On 25 May 2022, having taken legal advice, the claimant suggested two amendments which would satisfy his concerns as to unilateral variation of working hours or an refusal to allow the continuation of his additional employment.

31. On 27 May 2022 the claimant was told that his proposals had been refused and was presented with an ultimatum to sign the amended terms or face dismissal. He asked for more time but the request was refused. On 30 May 2022, Mr Page asked the claimant whether he had changed his mind; upon confirming that he had not, the claimant was dismissed by letter which gave him an effective date of termination of 28 June 2022.

32. Although it is recorded in the minutes of the meeting of the 27 May 2022 that the respondent would progress to a dismissal followed by an offer of re-engagement on new terms (or 'fire and re-hire'), in fact there was no formal offer of re-engagement made. The letter did however set out an appeal procedure but the claimant decided not to lodge an appeal against the decision.

THE LAW AND CONCLUSIONS

Unfair Dismissal

33. Subject to any relevant qualifying period of employment (two years in this case) an employee has the right not to be unfairly dismissed by his employer (Employment Rights Act 1996, section 94). The claimant plainly has served the relevant period and therefore has acquired that statutory right.

34. The legislative basis for 'conduct' being a potentially fair reason for dismissal stems from s98 of the ERA 1996 which reads:

    s.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)…
(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 issue.

35. The employer bears the burden of proving the reason for dismissal whereas the burden of proving the fairness of the dismissal is neutral. It is not in dispute that the reason for dismissal in this case was the claimant's refusal to agree to two specific clauses in the new contract and to being re-engaged on those amended terms following dismissal, which the respondent asserts to be 'some other substantial reason' justifying dismissal.

36. A "substantial" reason must be just that and thus not frivolous or trivial: *Willow Oak Developments Ltd t/a Windsor Recruitment v Silverwood and ors* [2016] ICR 1552. To amount to a substantial reason to dismiss, there must be a finding that the reason could — but not necessarily does — justify dismissal: *Mercia Rubber Mouldings Ltd v Lingwood* [1974] ICR 256.

37. Although an ET will not second-guess the employer's rationale, the employer must do more than simply assert that there was a 'good business reason' for a reorganisation involving dismissals. A tribunal must be satisfied that changes in terms and conditions were not imposed for arbitrary reasons: *Catamaran Cruisers Ltd v Williams and ors* [1974] IRLR 386.

38. When considering fairness, regard should be had to whether the employer has a sound business reason for imposing changes and whether the dismissal was equitable in practice: *Garside and Laycock Ltd v Booth* [2011] IRLR 735. This necessarily entails assessment of the number of employees who ultimately agree to accept the changes: *St John of God (Care Services) Ltd v Brooks and ors* . It also requires an ET to consider whether the employer has reasonable explored all alternatives to dismissal: *Copsey v WWB Devon Clays Ltd; Sandford and anor v Newcastle upon Tyne Hospitals NHS Foundation Trust.*

39. The decision of the EAT in *Chubb Fire Security Ltd v Harper* [1983] IRLR 311, makes it plain that it does *not* follow (as the EAT had stated in *Evans v Elemeta Holdings Ltd* [1982] IRLR 143), that if the employee is acting reasonably in refusing a change, the employer must be acting unreasonably in imposing it. Both may be acting perfectly reasonably from their own vantage points. It is relevant to ask whether the employer is acting reasonably in deciding that the

advantage to him of implementing the reorganisation outweighs any disadvantage which the employee might suffer. Even this is only one of the factors to be considered—albeit, it is submitted, an important one—and is not the sole question to be asked (*Richmond Precision Engineering Ltd v Pearce* [1985] IRLR 179). This approach (and the judgment in *Chubb Fire Security* which cited the equivalent passage in this work in 1983 to the effect that the fact that one party was behaving reasonably does not mean that the other was acting unreasonably) was approved and applied by the EAT in *Garside & Laycock Ltd v Booth* [2011] IRLR 735, EAT in holding fair the dismissal of 2 employees out of 88 who refused to agree a cut in wages when the employer was in economic difficulties.

<u>'Fire and re-hire'</u>

40. On 29 March 2022 the Government announced its intention to publish a statutory code of practice on dismissal and re-engagement. The draft statutory Code followed on 24 January 2023. It must be noted that the Code is not currently in force and is included here as being advisory only.

41. The Code contains practical guidance for the scenario of "fire and rehire." The paramountcy of genuine consultation is emphasised: "(C)onsultation must be meaningful and conducted in good faith, with the intention of seeking an agreed resolution. In order to ensure that consultation is meaningful, it is important that employees and their representatives understand the employer's objectives and the nature of its proposals. It is also important that the employer is honest and transparent about the fact that it is prepared, if negotiations fail and agreement cannot be reached, to attempt to unilaterally impose changes or to dismiss employees in order to force changes through. However, a threat of dismissal should never be used only as a negotiating tactic in circumstances where the employer is not, in fact, contemplating dismissal as a means of achieving its objectives. Both parties should listen to one another and seek to respond openly and in good faith to questions and concerns. The employer should consider whether it has explained clearly its reasons for the changes. It should listen carefully to objections raised, and seek to understand the reasons for those objections, and the impact of its proposals on employees. It should also consider any alternative proposals which are made and be prepared to engage in a genuine exploration of whether they are workable or will meet the employer's objectives."

42. "Once it is clear to the employer that employees are not prepared to accept without further negotiations the contractual changes which it has proposed, but the employer decides that it still needs to implement those changes, and that this may require either the unilateral imposition of new terms or dismissal and re-engagement, the first step is for the employer to re-examine its business strategy and plans in light of the potentially serious consequences for employees."

43. The Code makes plain that "fire and rehire" should be viewed as a matter of last resort. "An employer who has participated in a thorough and open information and consultation process; has listened carefully to and explored fully any alternative proposals; and has concluded that it still needs to make the

changes to the employment contracts, might at this point, as a last resort, decide to dismiss the employees and offer to re-engage them on the new terms (or engage new employees for the same roles on those new terms). Before making that decision to dismiss, the employer should take some time to reassess its analysis and consider carefully again:

a) if it is truly necessary to impose these new terms on its employees to achieve its objectives;
b) if there are any alternative options, whether these are revealed by the employer's own analysis, or are suggested by employees or their representatives, which could achieve those same objectives; and
c) if the changes could have a greater impact on one group of employees who share protected characteristics, compared to others."

44. "The decision to dismiss and re-engage the employees should be treated by an employer as an option of last resort, if the employer considers it can't achieve its objectives in any other way."

<u>'Sound business reason'</u>

45. In my judgment, the respondent *has* established that there was a sound business reason for introducing the new contracts as a whole, given the fact that the family business had clearly grown organically over a period of time without necessarily ensuring that it was compliant with the requirements of employment law, not least the fact that it had been for a period of several years employing staff using a contract which was defective in a number of crucial areas.

46. The respondent has further established a sound business reason for ensuring a degree of flexibility in its working practices in order to be able to meet the ever changing needs of business which had plainly become more apparent as a result of (in particular) the British Airways contract which had exposed the business's inability to adapt rapidly to sudden changes in demand. The company had found it very difficult to cope with some of the stresses arising from new orders during the Covid pandemic and plainly had learned the difficult lessons from that experience, and sought to introduce measures to address the fact that they were in the main 'reactive'. There is plainly nothing wrong in this.

<u>Clause 5.3</u>

47. For the reasons stated above, I am satisfied that the respondent had a sound business reason for introducing clause 5.3 into the claimant's contract and that a refusal on the part of the claimant to agree to the variation could (but not necessarily does) justify dismissal in accordance with s98(1)(b) of the ERA and the ruling in *Mercia Rubber Mouldings Ltd v Lingwood.*

48. However, that is not the end of it. It then becomes necessary to consider the reasonableness of the decision to dismiss. This is much more difficult decision

because, as I indicated in the course of the hearing, this is a case in which both the claimant and Mr Page had stubbornly adopted entrenched positions in relation to this clause when in fact, taking a step back, they were so close to being in agreement that one really must question why it was that each of them felt it necessary to make such a significant sacrifice.

49. During the course of negotiations, the claimant indicated, so far as this clause was concerned, that he agreed in principle with the need for the respondent to vary his working hours (and that of the staff as a whole) in accordance with the needs of the business. His only objection was to the final sentence of the clause, namely: ‘It is a condition of your employment that you agree to work different hours if requested to do so by the Company’.

50. The reason given by the claimant was that this sentence was ‘onerous and superfluous/unnecessary’.

51. In my judgment there is force in the claimant’s assessment of this clause. The clause as drawn absent the final sentence still would be capable of meeting the business objective which led the respondent to introduce the clause: it would still require the claimant to work additional hours on different days, either temporarily or permanently.

52. Whilst it could be said that emphasising the fact that it would become a contractual requirement to work such amended hours might assist the respondent in enforcement through disciplinary procedures in the event of refusal, it is difficult to see why the respondent felt that the very modest amendment to this clause proposed by the claimant during the course of negotiations was felt to be a reason to proceed with dismissal and to embark upon a ‘hire and refire’ when to do so ought really to have been a last resort.

53. To use the words of the draft Code, was it truly necessary to impose these new term to achieve its objectives, and were there are any alternative options, which could achieve those same objectives? I am driven to the conclusion that the answer to these questions are no and yes respectively; and that accordingly the dismissal was unreasonable and unfair.

54. In reaching this decision I have given careful consideration as to whether this is a *Chubb Fire Security Ltd v Harper* situation in which the positions of both the claimant and respondent were reasonable from their own standpoints. If that were there case then I should have reached the decision that the dismissal was reasonable and therefore fair. In fact, I have reached the converse conclusion. The positions of both men were equally *unreasonable* and obdurate. On the one hand the claimant refused to accept a contract that in all probability would not have affected his future conditions of work in the slightest. Mr Page had given him assurances of this and there was no reason to suppose that he would renege on those assurances. Indeed, Mr Langstaff had agreed to sign the contract under similar circumstances.

55. On the other hand, the respondent was not prepared to make very minor amendments to the contract clauses despite the fact that their position was that they would not enforce the clauses unreasonably or without consultation.

56. In reality the parties were in agreement but neither would back down on the question of how that agreement would be reduced to writing.

57. In these circumstances the decision to dismiss was unreasonable and therefore unfair, but the stance adopted by the claimant will be reflected in the remedy awarded.

Clause 21.2

58. In relation to this clause, I am bound to say that I cannot agree that the respondent has established a sound business reason for imposing this as a blanket policy across the firm.

59. The evidence is that the claimant was the only person in the firm that had a second job, that the respondent was well aware of it, and that it had never impeded his ability to perform his job with the respondent.

60. Furthermore, there was no reason to suppose that the claimant's hours with the security job were going to increase, or if they were that the increase would impact upon the respondent in any way. Likewise there was no reason to suppose the the claimant would be seeking any other additional employment that would interfere with his duties with the respondent.

61. The respondent's evidence was also that he indicated to the claimant during their discussions that the firm would continue to allow the claimant to retain his security job and would continue to show the same degree of flexibility that they had previously.

62. Against that background, it seems to me that either the proposed change was arbitrary (in that it came as part of the template contract of employment provided to the respondent by the Federation of Small Businesses but did not have any direct applicability to the specific needs of the respondent), or in the alternative, Mr Page was being disingenuous and that in fact he resented the claimant for having a second job and this was a first step towards seeking to require him to give up the security job.

63. Whatever the true reason, I am not persuaded that this clause amounted to a substantial reason justifying dismissal; but even if I am wrong about that, I would also find that it was unreasonable to dismiss, given that (as with clause 5.3) the claimant sought only a very minor amendment to the clause, namely that the respondent should not have an absolute discretion on this issue but should only refuse or delay consent 'unreasonably'.

Continuity of Employment

64. Section 210(5) of ERA 1996 states

> A person's employment during any period shall, unless the contrary is shown, be presumed to have been continuous.

65. Section 212(3) of ERA 1996 states

    …any week (not within subsection (1)) during the whole or part of which an employee is—

    (a)…

    (b)…

    (c) absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose, counts in computing the employee's period of employment.

66. ERA 1996 s 212(3)(c) applies where the employee is 'absent from work'. The meaning of this was restated by the House of Lords in *Ford v Warwickshire County Council* [1983] IRLR 126, [1983] ICR 273; 'absent from work' means no more than 'not at work'. Section 212(3) assumes that the employee has had two successive contracts separated by an interval of time during which there was no contract, or (less commonly) a contract which, having been terminated, is subsequently resurrected, but not retrospectively. 'Absent from work' is descriptive of that interval, and no more is to be read into the expression than that. The only important question is whether during that interval the employee was by arrangement or custom, treated as an employee for one or more purposes.

67. In the case of *Booth v United States of America* [1999] IRLR 16 the EAT held that an 'arrangement' for these purposes requires that, in advance of the break, there must have been some discussion or agreement to the effect that the parties regarded the employment relationship as continuing, despite the termination of the contract of employment. The content of the letter of resignation in this case clearly records that such a discussion had taken place between the claimant and Mr Page prior to his decision to set up his own business.

68. But it must be remembered that s212(3) operates precisely when there is no contract of employment in operation. Had the contract remained in force, there would be no reason to consider s212(3) at all; the period of employment would have continued by virtue of s212(1) which states that

    'Any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment.'

69. In my judgment the respondent has not succeeded in rebutting the presumption in s210(5). The existence of a letter of resignation and a P45 issued to the claimant which I have no doubt is authentic (whether or not the claimant ever received it) is clear evidence of a termination of the contract of employment issued to the claimant in 2012; but it did not bring to an end his period of continuous employment. It is immaterial to this decision whether or not the claimant in fact received the P45.

70. What in fact happened, and is clearly demonstrated by both the content of the letter of resignation, and the facts of what transpired, was that it was the intention of both parties that occasional work would be available to the claimant when required. This work would be in accordance with the terms of the pre-existing contract, and remunerated in the same way, and that he would remain 'on the books' for reasons of convenience to both parties.The claimant essentially accepted this in the course of his evidence.

Remedy

71. This has been a sad and frustrating case - the respondent has lost a highly valued employee and the claimant has lost a good job. Both Mr Page and Mr Horne were each as stubborn as the other in refusing to back down. It is a very great shame for both of them.

72. Whilst I have come to the conclusion that the very minor (almost insignificant) amendments to the new contractual terms sought be the claimant in the course of negotiations did could not reasonably justify dismissal in this case, I equally cannot ignore the fact that, whilst the respondent unreasonably insisted upon the imposition of the new conditions, I am also of the view that the claimant was equally unreasonable in refusing to accept such changes, and I must weigh this in the balance when deciding upon the level of compensation to award. In my judgment the rigid position adopted by the claimant in resisting these clauses which in all likelihood would have had little or no bearing upon his future employment with the respondent amounts to significant contributory fault on his part.

73. Clearly having found that the dismissal was unfair, I must calculate the Basic Award. As stated above, I have concluded that there was no break in the continuity of employment between September 2016 and July 2017 and therefore, as set out in the Statement of Loss, there were 11 complete years of employment. The calculation of the basic award is therefore 11 x 1.5 x £571 = £9,421.00

74. I also award an additional 7 weeks wages (net) to reflect what ought to have been the notice period had the claimant's length of service been correctly calculated: 7 x £684 = £4,788.

75. Additionally, I award 4 weeks wages in compensation for the failure to provide a statement of terms and conditions of employment, contrary to section 1 of the ERA 1996. I do accept that this was a particularly serious breach given the length of time under which the claimant was working either without terms at all and then the subsequent, even longer, period during which the terms were defective. It is for this reason that I award the enhanced sum of 4 weeks pay: 4 x £885 = £3,540

76. In relation to granting a compensatory award, I must have regard to the section 123 of the ERA, the relevant parts of which read as follows:

123 Compensatory award.

(1) Subject to the provisions of this section and sections 124 the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.
(2)…
(3)…
(4)…
(5)…
(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

77. In my judgment the dismissal was contributed to by the actions of the claimant to such an extent that I have decided to exercise my discretion not to make a compensatory award in this case. It would not be just or equitable to do so in the circumstances. The compensation sought by the claimant is significant because, unfortunately for him, he has not been able to find comparable employment in the months since his dismissal. That is a very great shame for him, a man who was very experienced and plainly very good at his job. But I cannot award that level of compensation in a case such as this where his financial hardship has been brought about as a result of his own decision to take the stand that he did.

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Employment Judge Conley

Date: 16 August 2023……………….

Sent to the parties on: 22 August 2023.

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For the Tribunal Office