EMPLOYMENT TRIBUNALS

Heard at: London South **On:** 18 October 2023

Claimant: Mrs J Rendell

Respondent: Sainsbury's Supermarkets Ltd

Before: Employment Judge Ramsden

Representation:

Claimant Mr Rendell, her husband

Respondent Ms C Howells, Counsel

RESERVED JUDGMENT

1. The Claimant's complaint of unfair dismissal is not well-founded and is dismissed.

REASONS

Background

2. The Claimant worked for the Respondent for 20 years, latterly as a Store Assistant (i.e., checkout operator) at the Respondent's store in Whitstable.

3. She was dismissed by the Respondent when she refused to agree to a change to her working hours, and was offered re-engagement on a contract reflecting those changed working hours, which she did not accept.

4. She avers that her dismissal was unfair, a claim the Respondent denies.

Facts

Agreed facts

5. The Claimant had worked in a variety of roles over her 20 years of employment at the Respondent's store in Whitstable. As noted above, her final position was

that of a Store Assistant in the Customer Experience team. Over that time, she had also worked a variety of different shift patterns.

6. Following an amendment to contractual arrangements made in 2019, the Claimant was engaged on a two-week rota, working shifts on a Sunday and Monday one week, and the Thursday and Friday of the following week. The Claimant's life, including her work for her husband's business, her attendance at church, the care she provided for her aging mother, and her social life with family and friends, was scheduled around that working pattern.

7. The Respondent is a well-known supermarket operator, employing approximately 162,000 employees in Great Britain. It faces stiff competition from numerous other retailers.

8. The Respondent operates a policy called "We're Working When Our Customers Need Us" (the **Policy**), which sets out the principle that the Respondent needs to be responsive to when customers come to the store in order to remain competitive, i.e., to ensure that the staffing of its stores compliments the shopping habits of its customers. The Respondent's view is that failure to do so could have a detrimental impact on its sales, profitability and the long-term success of its business.

9. A review related to the Policy was conducted in relation to the Whitstable store by the Store Manager, Fiona Cockerill, and Duncan Lewis, Lead Customer Experience Manager (the **Review**). The conclusion of that Review, finalised in the summer of 2021, was that the hours when store employees were contracted to work did not adequately match the data the store had collated about when customers were shopping. In particular, the Review noted that there was a shortfall of staff members on a Saturday and Sunday, and in the evenings. This led to a proposal to seek the agreement of staff to amend their hours of work to better-match customer needs (the **Proposal**). In the case of the 13 members of the Customer Experience staff at the store, the Proposal involved:

    a) All members of staff working on a weekend day or an-any day evening shift; and

    b) A change in the rota system to a one-week rather than (for most of them) a two-week system.

10. The Respondent did not deem it appropriate to recruit to provide more cover for the busy times, as the data it gathered indicated that a rejigging of its existing resource would be appropriate – enough hours were being worked to meet the needs of the Whitstable store customers, just not at the right times.

11. The Review identified that there were different mismatches for different teams, so the Food Delivery team, for example, faced different challenges to the Customer Experience team. The Proposal was tailored to rectifying those different mismatches.

12. Collective consultation began in relation to the Review and the Proposal in July 2021 and two collective consultation meetings were held. Individual consultation followed thereafter, starting (in the Claimant's case) on 20 September 2021 and ending (after three individual consultation meetings) on 29 October 2021. Mr Lewis conducted the individual consultation with all 13 members of the Customer Experience team.

13. The Claimant experienced difficulties with the consultation process, which she says stem from an educational disability which means she finds it difficult to process and write information. The Claimant requested that she:

    a) Be permitted to record the meetings;

    b) Be provided with the notes from the meetings; and/or

    c) Be permitted to be accompanied by her husband (who does not work for the Respondent).

    These requests were refused as apparently not fitting within the applicable policy of the Respondent, but Mr Lewis emphasised that the Claimant could take her time in the meetings, and she was given the opportunity at the close of each meeting to ask any questions she had, and any such questions would either be given there-and-then, or Mr Lewis committed to get back to her after making the requisite enquiries. The parties agree that the Claimant did not say at the time that her difficulties processing information derived from an educational disability.

14. The Claimant says that Mr Lewis did tell her of her right to be accompanied by a trade union representative or a work colleague, but that:

    a) he did not say that she need not be a member of the union for a union representative to be able to represent her – this was not challenged by the Respondent, and

    b) he said that any representative would only be able to observe the meeting, not permitted to say anything. Mr Lewis did not disagree with this assertion by the Claimant, but said that he could not recall what he said on this point at the time.

15. The Claimant described three challenges the Proposal had for her:

    a) She had social and church events that she wanted to attend on alternate Sundays;

    b) She worked part-time in her husband's business; and

    c) She provided care to her elderly mother,

    and she had already worked those matters around her existing rota of work hours with the Respondent. To agree to the changes the Respondent was seeking was not, the Claimant said, an option in light of those commitments.

16. The Claimant agrees that, in one or more of her consultation meeting with Mr Lewis, he explained the Review and the Proposal, and what the Proposal would mean for her, and she understood that information.

17. In the second individual consultation meeting on 4 October 2021, the Claimant raised the possibility of her entering into a "job share" arrangement with a colleague, Elaine, so that they would each have two shifts a week, one on a Sunday and Monday, and the other on a Thursday and Friday, with them alternating which of them worked each set of shifts so as to replicate the Claimant's then-current fortnightly rota. This was not something that Mr Lewis would consider, because by the time the Claimant had raised this with him Elaine had already signed up to the new one-weekly rota terms, and she had not indicated to him any interest in a job share. Moreover, the job share proposed by the Claimant would not have furthered the Proposal's objective – the point of the Proposal was to ensure that working hours were rejigged so that more working hours were worked at time when customer demands were the highest. The Claimant's suggested "job share" would have preserved her status quo. Both of these points were accepted by the Claimant under cross-examination.

18. Mr Lewis discussed then-current vacancies at the Whitstable store with the Claimant, as well as vacancies in nearby stores, in the first individual consultation meeting on 20 September, and the third meeting on 29 October 2021. He says he also suggested that the Claimant look at the Respondent's intranet, where vacancies are listed, but the Claimant does not recall him saying that. What is agreed is that this intranet webpage and the vacancy list was pointed out in a later letter.

19. Ultimately, 11 out of the 13 Customer Experience team members agreed to the changes. The Claimant did not, and she was given notice of dismissal on 29 October 2021. That letter did not set out the reason for her dismissal, or her right to appeal the decision made.

20. The Claimant was then offered re-engagement on the revised terms on 12 November 2021, which she refused. The 12 November letter also referred the Claimant to the Respondent's job vacancy website. There is no mention in either letter of the factors that Mr Lewis took into account in reaching his decision to dismiss the Claimant. That letter did outline the Claimant's ability to appeal the decision to dismiss her.

21. The Claimant appealed the decision to dismiss her, and that appeal was heard by Robert Lyne, the Store Manager of the Respondent's Dartford Store. Mr Lyne upheld Mr Lewis' decision to dismiss the Claimant on 13 December 2021, after meeting and discussing that with her on the same date.

22. Again, the Claimant says that she struggled to fully participate in this meeting, due to her educational disability, and again the Claimant requested that she:

    a) Be permitted to record the meetings;

b) Be provided with the notes from the meetings; and

c) Be permitted to be accompanied by her husband, who does not work for the Respondent.

Mr Lyne, like Mr Lewis, refused these requests as being outside of the Respondent's policy. Mr Lyne says that he asked the Claimant if she had any special needs that needed to be taken into consideration and that the Claimant said 'no'. The Claimant did not dispute this.

23. In her appeal, the Claimant had raised the three issues she had raised with Mr Lewis as part of the consultation process, that she could not agree to the amended rota due to the fact that:

a) She had social and church events that she wanted to attend on alternate Sundays;

b) She worked part-time in her husband's business; and

c) She provided care to her elderly mother.

24. The Claimant raised these points by presenting Mr Lyne with a pre-prepared written statement setting out the points she wanted him to consider, and he adjourned the appeal meeting to read and consider those.

25. Mr Lyne confirmed his decision to uphold the decision to dismiss the Claimant in writing to her on 21 December 2021, saying that, in relation to a), she could use annual leave to book days off when she wanted to attend these, and that as b) and c) had been flexible enough to work around her existing fortnightly rota, he saw no reason why that could not also occur in relation to the revised working pattern.

26. The Claimant made a flexible working request on 31 December 2021, and that was refused on 13 January 2022, although alternative working hours were suggested to her – the Claimant refused those.

27. The Claimant's employment terminated on 22 January 2022. Early conciliation was conducted through ACAS in the period 24 January to 6 March 2022, and the Claimant filed her Claim Form on 16 March 2022.

<u>Disputed facts</u>

28. There were two facts of significance in dispute between the parties by the end of oral evidence:

a) Whether any of the Claimant's colleagues in the Customer Experience team were permitted to job-share on a two-week rota, and to not work weekends; and

b) Whether Mr Lewis indicated that the Respondent was looking to reduce the number of employees at the Whitstable store.

29. On the first of those, the Claimant said that she has become aware of eight colleagues who were allowed to job share on a two-week rota, and who were not required to work on the weekend – which is what she was seeking. When this was put to Mr Lewis (who conducted the individual consultation with all 13 of the Claimant's Customer Experience team), his evidence was that none of the 11 colleagues in the Claimant's team who agreed to the revised terms were part of a job-share arrangement, and that while not everyone was required to work on the weekend, everyone was required to work either on the weekend or an evening, and that possibility was offered to the Claimant as part of the consultation process also.

30. Whether any of the Customer Experience team were permitted to job share so as to replicate a two-week rota is a factual dispute which the Tribunal needs to resolve, because if colleagues in the Claimant's Customer Experience team had been permitted to do that but the Claimant had not, that would go to the reasonableness of the Claimant's dismissal.

31. On balance, the Tribunal prefers Mr Lewis' account. His evidence was definite: he conducted consultation with all 13 of the Customer Experience team members, and all bar the Claimant and one other agreed to move to a one-week rota, and none job-shared. The other employee who was not prepared to sign up to the new terms was, Mr Lewis said, already on a one-week rota. By contrast, the Claimant's evidence was less clear – saying under cross-examination that the eight colleagues she was referring to were not in the Customer Experience team, and then saying something equivalent but then contradicting herself in response to the Tribunal's questions. Her last answer on this question was words to the effect that "*My understanding is that there were Customer Experience colleagues who didn't work the weekends, and who were allowed to job-share on two-week rotas*".

32. In light of her confusion and Mr Lewis' confidence and consistency, his evidence on this point is preferred. The Tribunal finds, on the balance of probabilities, that none of the 13 Customer Experience colleagues were job-sharing so as to replicate a two-week rota, and that each of them worked either a weekend shift or a late night shift (or more).

33. On the second point, the Claimant's oral evidence was, first of all, that Mr Lewis said, in relation to the Customer Experience team, that "*people have got to go*", i.e., that the Respondent was looking to reduce the number of staff working in that team. She then revised her position to say that that was the clear implication of what Mr Lewis said. Mr Rendell pointed to the fact that the Respondent's notes of the first collective consultation meeting record that "*The store is over contracted by 434 hours which means we are unable to recruit to fulfil these shortfalls*".

34. Mr Lewis denied saying this, and he said that the existing staff working hours needed rejigging, but that they did not need to increase or decrease.

35. If there was a diminished need for the work the Claimant did, that could have amounted to a redundancy situation, and offering the Claimant unfavourable working hours could have been a ruse to achieve that without incurring the cost of a redundancy payment (probably a costly one, given the Claimant's length of service and age). However, Mr Lewis, who was not only the manager who consulted with the Claimant but also the co-author of the Review for the Whitstable store, was clear that the reference to over-contracting was a reference to hours being worked at times of lesser customer needs, and that there was a corresponding under-contracting at the peak times, which is why Customer Experience staff were each required to work a weekend or a late night shift. He was also adamant that he had never said words to the effect that "*people have got to go*" to the Claimant or anyone else.

36. On balance, Mr Lewis' evidence of the factual position of the Respondent's resource need is preferred. He had carried out the review with the Ms Cockerill, the Store Manager, and so he was better-placed to understand what the Proposal was designed to achieve. As to the Claimant's sense that Mr Lewis was saying words to the effect that "*people have got to go*", the Claimant's evidence is that she struggled to take in information properly. Mr Rendell wrote some points endorsed by the Claimant in her witness statement, and those included: "*5 or 10 minutes into the meeting Jackie felt bullied and pressurised because of the lack of concern to take into account her needs and from this point on Mr Lewis could have been talking about anything because she had lost the attention to take in the information properly*". This lends more credence to Mr Lewis' position on this point.

The claim

37. The Claimant brings a claim of unfair dismissal. In essence, her position is that:

    a) *It was unreasonable to impose the revised working hours on her*;

    b) *There was an alternative to dismissing her which the Respondent did not consider adequately*. While she was not willing to alter her days of work, she was prepared to alter her hours of work on the days in her-then-current two-week rota. She also considered that her needs and the needs of the Respondent could be met if she were to be part of a job share to replicate her two-week rota. Her colleague, Elaine, was willing to do this with her; and

    c) *The process that was conducted was not fair*, in that:

        (i) she was disadvantaged in the consultation process by her educational needs, and she had made three reasonable requests to facilitate her effective participation which had been refused (described above).

The Claimant says that she struggles to record and recall information, and specifically to write, in front of other people;

(ii) the dismissal letter sent to her did not set out her right of appeal;

(iii) the Respondent went into the apparent consultation process with a closed mind as to the outcome;

(iv) the Claimant's appeal should have been heard by an HR professional rather than Mr Lyne;

(v) My Lyne did not remain independent in his decision-making, because he discussed what the Claimant had raised in the appeal hearing with Mr Cockerill;

(vi) the Claimant was only directed to the Respondent's job vacancies website after the letter giving her notice to terminate her employment had been sent;

(vii) Mr Lewis failed to tell the Claimant that she could bring a trade union representative as her companion even though she was not a member of the union; and

(viii) Mr Lewis erroneously told the Claimant that any companion she brought would only be able to observe meetings, rather than more actively participate by, for example, asking questions.

38. The Respondent disputes that the Claimant was unfairly dismissed. It says that:

a) *It had a potentially fair reason to dismiss her* – a business reorganisation can amount to a fair reason to dismiss;

b) *It was in fact reasonable in the Respondent's case to dismiss her* – it needed to reorganise the working hours of employees at its Whitstable store to respond to business need, and it was reasonable for it to pursue that business reorganisation; and

c) *The Claimant's dismissal was within the range of reasonable responses open to the Respondent*. As part of this position the Respondent avers that it followed a fair and reasonable process. The Respondent says:

(i) It sought employees' agreement to amend their contracts to respond to that business need;

(ii) Only if employees did not agree were they dismissed, after a thorough information and consultation process, and they were offered re-engagement on the revised terms;

(iii) In the Claimant's case, the Respondent did consider the job share she proposed, but that proposal was not workable both because Elaine had already agreed to the new terms, and because the Claimant's suggestion would not provide for both Elaine and the

Claimant to work on Sundays, which is what the Review had identified was necessary; and

(iv) The Respondent spoke to the Claimant about redeployment options, but none of them were deemed suitable by the Claimant.

d) Specifically in relation to the Claimant's allegations that the Respondent did not conduct a fair process, the Respondent says that it did. In particular, the Respondent says:

(i) the Claimant did not identify her educational needs as a disability, the Respondent's policy did not permit the adjustments the Claimant sought, and consultation was, in any event, meaningful;

(ii) a letter setting out the Claimant's right to appeal the decision to dismiss her was sent on 12 November 2021, and the Claimant did in fact appeal;

(iii) it considered and responded to the suggested alternative raised by the Claimant (the job share), but it genuinely was not a viable one; and

(iv) Mr Lewis did tell the Claimant about the job vacancies website.

39. If her claim is made out, the Claimant seeks reinstatement, or alternatively re-engagement. If neither of those is deemed suitable by the Tribunal, the Claimant seeks compensation.

40. In the course of these proceedings, the Claimant referred to her caring responsibilities for her elderly mother, and to her own educational needs. The Claimant has not put her case as one of disability discrimination, and these points were understood by the Tribunal to be part of the Claimant's case about the fairness of her dismissal.

The hearing

41. The Respondent was represented in the hearing by Miss Howells, Counsel. The Claimant was represented by her husband, Mr Rendell, as a lay representative.

42. The Respondent served an agreed hearing bundle of 237 pages.

43. Mr Lewis and Mr Lyne gave evidence on behalf of the Respondent, and the Claimant gave evidence in support of her claim.

Law

Unfair dismissal: generally

44. The protection of employees from unfair dismissal is set out in section 94 of the Employment Rights Act 1996 (the **1996 Act**).

45. Section 98(1) sets out that that an employer may only dismiss an employee if it has a **fair reason** (or principal reason) for that dismissal:

> "*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.*"

46. Subsection (4) of section 98 provides:

> "*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.*"

47. In other words, when the employer has been shown to have a potentially fair reason for dismissal, a further enquiry follows as to whether, looked at 'in the round', the dismissal was fair or unfair.

48. The test in section 98(4) is an objective one. When the employment tribunal considers the fairness of the dismissal, it must assess the fairness of what the employer in fact did, and not substitute its decision as to what was the right course for that employer to have adopted (*British Leyland v Swift* [1981] IRLR 91).

49. In many (though not all) cases, there is a band of reasonable responses to the situation within which one employer might reasonably take one view, another quite reasonably take another. The correct approach is for the tribunal to focus on the particular circumstances of each case and determine whether the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted in light of those circumstances. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair (*Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439).

50. Section 98(4) (i.e., the fourth question referred to above) requires a tribunal to "*consider the fairness of procedural issues together with the reason for the dismissal and decide whether, in all the circumstances, the employer had acted reasonably in treating it as a sufficient reason to dismiss*" (*Taylor v OCS Group* [2006] EWCA Civ 702). As Smith LJ, giving the judgment of the Court, said in (paragraph 48 of) that case: "*it may appear that we are suggesting that employment tribunals should consider procedural fairness separately from other issues arising. We are not… the employment tribunal … should consider the procedural issues together with the reason for the dismissal, as it has found it to be. The two impact upon each other and the employment tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason it has found as a sufficient reason to dismiss. So, for example, where the misconduct which founds the reason for the dismissal is serious, an employment tribunal might well decide (after considering equity and the substantial merits of the case) that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee.*"

51. Consequently, not every procedural defect will render a dismissal unfair. As Mr Justice Langstaff (President) stated, in the EAT case of *Sharkey v Lloyds Bank Plc* UKEATS/0005/15/SM:

> "*It will almost inevitably be the case that in any alleged unfair dismissal a Claimant will be able to identify a flaw, small or large, in the employer's process. It will be and is for the Tribunal to evaluate whether that is so significant as to amount to unfairness*".

52. If there has been a procedural flaw at the 'decision to dismiss' stage, but that stage is followed by an appeal brought by the employee against that decision, it is the entirety of the employer's process (together with its reasons for dismissal) that should be assessed when considering whether the employer acted fairly in dismissing the employee (*Taylor*).

53. Moreover, the assessment of the fairness of the dismissal required by section 98(4) takes account of the particular factual circumstances, including the "*size and resources of the employer*".

<u>Dismissal for 'some other substantial reason'</u>

54. The language of section 98(1)(b) provides a bit of a 'catch-all' – recognising that dismissals for reasons other than those specified section 98(2) may potentially be for a fair reason.

55. The case law requires the Tribunal to ask and answer a series of questions to determine the fairness or otherwise of a dismissal for some other substantial reason:

Question 1: Was the reason for dismissal a reason other than one of those specified in section 98(2)?

Question 2: If so, was the reason for dismissal of a kind that could justify dismissal of an employee holding the job in question?

Question 3: If so, considering equity and all the circumstances of the case, did dismissal fall within the range of reasonable responses?

56. Looking at each of those questions in turn:

Question 1: Was the reason for dismissal a reason other than one of those specified in section 98(2)?

57. This question is answered by looking at the employer's reason, or principal reason, for dismissal, and seeing whether it falls in the list in section 98(2) (being capability, conduct, redundancy and infringement of legislation).

Question 2: If the reason does fall outside that list, was it a reason of a kind that could justify dismissal of an employee holding the job in question?

58. A business reorganisation undertaken for "*a sound, good business reason*" is capable of amounting to some other substantial reason (*Hollister v National Farmers' Union* [1979] IRLR 238), and this is not confined to situations where the survival of the employer's business is at stake (*Catamaran Cruisers Ltd v Williams* [1994] IRLR 386).

59. It is not sufficient for the employer to simply assert that it would be advantageous to it to implement the reorganisation – it must provide some evidence that the reorganisation brings some discernible advantage to the business (*Banerjee v City & East London Area Health Authority* [1979] IRLR 147). The employer is not required, though, to quantify the benefit to it of effecting the reorganisation, or the detriment of failing to do so (*Ladbroke Courage Holidays Ltd v Asten* [1981] IRLR 59).

Question 3: If so, considering equity and all the circumstances of the case, did dismissal fall within the range of reasonable responses?

60. This involves considering whether, in all the circumstances, including the employer's size and administrative resources, the employer has acted reasonably in treating that reason as a sufficient reason for dismissing the employee. The fairness of the procedure followed by the employer is part of what should be considered here.

61. Some principles that aid the exercise of determining the range of reasonable responses emerge from the case law:

    a) In a case of a refusal to accept a change in contractual terms the tribunal has to weigh the business reasons for imposing the changes against the advantage and disadvantage of them for the employees (*Catamaran Cruisers*) – but this is only part of the assessment – reasonableness needs

to be assessed 'in the round' (*Richmond Precision Engineering Ltd v Pearce* [1985] IRLR 179);

b) If there is a sound good business reason for the reorganisation, the unreasonableness or reasonableness of the employer's conduct has to be looked at in the context of that reorganisation (*St. John of God (Care Services) Ltd. v Brooks* [1992] ICR 715);

c) One of the factors relevant to reasonableness may be the number of employees who ultimately agreed to accept the changes to terms and conditions (*St. John of God*); and

d) Another will be whether the employer had reasonably explored all alternatives to dismissal (*Copsey v WBB Devon Clays Ltd* [2005] EWCA Civ 932), which is part of the overall assessment of the fairness of the employer's procedure, which also includes whether there was meaningful consultation.

Good practice guidance

62. Unlike the ACAS Code of Practice on disciplinary and grievance procedures, employment tribunals are not required to have regard to ACAS guidance, including its guidance entitled "Changing your employees' contracts" (**ACAS CEC Guidance**).

63. The ACAS CEC Guidance includes the following:

a) "*Consultation is when you talk and listen to affected employees or workers and any trade union or other relevant employee representatives, to:*

- *help them understand the reasons for the proposed changes*
- *ask for their feedback on the proposed changes*
- *answer any questions*
- *respond to any concerns*
- *listen to any reasons people may have to object to the proposed changes*
- *consider any other proposals they may put forward*
- *consider if you should make any revisions to the proposed changes to address any points raised*";

b) "*Consultation must always be a genuine and meaningful two-way discussion about whether a change is needed and what kind of change is appropriate. You must listen openly to any concerns or suggestions and seriously consider them before you make a decision about the change*"; and

c) "*You should be prepared to reconsider your original proposal, for example if:*

- *there's something you may have overlooked*
- *another proposal is put forward that might work better*".

Application of the law to the claims here

Question 1: Was the reason for dismissal a reason other than one of those specified in section 98(2)?

64. Yes, the Respondent's reason here was its business need to reorganise the working hours of its staff at its Whitstable store to better-match its data about its customers' shopping habits.

Question 2: If so, was the reason for dismissal of a kind that could justify dismissal of an employee holding the job in question?

65. In this case, the Respondent had "*a sound, good business reason*" for the Proposal (as per *Hollister*). While the Review did not claim that the implementation of the Proposal was necessary for the survival of the Respondent's business, nor was that required in order for the Respondent to establish that it had a reason that could justify dismissal (*Catamaran Cruisers*). The Respondent believed that failure to implement the Proposal could be detrimental to its business – negatively impacting its sales and profitability, and consequently its long-term success. Moreover, the fact that some of its Customer Experience team had, when faced with this evidence and this request from the Respondent, agreed to amend their working patterns created the likelihood of a negative impact on staff morale if some of their colleagues were able to avoid working evenings or weekends when they had agreed to do so because they believed it was necessary for them all to work these hours.

66. The Respondent's analysis mapped the scheduled habits of its customers against the scheduled hours of its workforce, and considered the provision of local competitors. Although the data and methodology behind its conclusions were not shown to the Tribunal, the output was one with a fair degree of precision, specifying comparisons of 'like for like sales' by percentage points accurate to two decimal places, and reaching conclusions such as: "*Our store contracted hours data show that the store is currently 434 over contracted.*" This is sufficient to satisfy the principle in *Banerjee* that the Respondent must provide some evidence that the reorganisation brings some discernible advantage to its business. The Respondent is not required to quantify the benefit to it of effecting the reorganisation, or the detriment of failing to do so (*Ladbroke Courage Holidays*).

67. The Tribunal consequently finds that the Respondent's reason for dismissing the Claimant was of a kind that could justify dismissal of the Claimant.

Question 3: Considering equity and all the circumstances of the case, did dismissal fall within the range of reasonable responses?

68. As per the decision in the *Iceland Frozen Foods* case, the task for the Tribunal here is to focus on the particular circumstances of this case and determine whether the decision to dismiss the Claimant fell within the band of reasonable responses which a reasonable employer might have adopted in light of those circumstances.

69. Starting with the reason for dismissal, the case of *Catamaran Cruisers* points the Tribunal to weigh the Respondent's business reasons for imposing the change against the advantages and disadvantages to the Claimant. It is clear to the Tribunal that the Respondent had a sound and good reason for reorganising. It feared that its business would suffer and lose market share to competitors if it did not make the changes. It considered making the changes to some, but not all, members of the Customer Experience team's terms and conditions, but – in the Tribunal's view, with some justification – determined that imposing the requirement to work on weekends/evenings on some but not all team members would be damaging to morale.

70. Comparing this to the disadvantages to the Claimant, the Tribunal can see that the Claimant simply did not want to spend more of her weekends or evenings working for the Respondent, and that it would have required rescheduling her other commitments. It is understandable that she did not want to do that, but the Respondent's business needs clearly outweighed the disadvantage to the Claimant. The Tribunal considers this approach to be endorsed by the decision of the Employment Appeal Tribunal in *St. John of God*.

71. Another factor that points in favour of the reasonableness of the Respondent's decision to dismiss the Claimant is the fact that 11 out of 13 of the Customer Experience team in the Whitstable store agreed to it – a very significant proportion (*St. John of God*).

72. The other part of the consideration of the range of reasonable responses involves looking at the fairness of the procedure adopted by the Respondent (*Taylor*).

73. On the facts here, it is not disputed that:

    a) The Respondent made clear the key tenets of the Policy, and the Review that had been undertaken, and those were understood by the Claimant;

    b) Two collective, and three individual consultation meetings were held which the Claimant was represented at and/or participated in;

    c) There was opportunity provided for the Claimant's questions to be asked and answered by the Respondent – and this occurred;

d) The Claimant had the opportunity to make alternative suggestions, such as the job share with Elaine, which she did; and

e) Vacancies in-store and in other Respondent stores in the vicinity were discussed with her (*Copsey*), but none was identified that was suitable.

74. All of these aspects of the Respondent's process align with good consultation practice. There are three points of concern in relation to the Respondent's procedure:

a) Whether the Claimant was able to meaningfully engage with the consultation process given her educational needs without any of the three adjustments she proposed;

b) The dismissal letter sent to her did not refer to her right of appeal; and

c) Whether the Respondent went into the consultation process with a 'closed mind' to any solution other than the new shift pattern it put to her.

Enabling the Claimant to participate meaningfully

75. On the first concern, the Tribunal notes Mr Lewis' and Mr Lyne's insistence that the adjustments sought by the Claimant were each outside of the Respondent's "policy". The Tribunal has not been directed to any particular policy, but in any event, the purpose of consultation is to enable meaningful two-way discussion. The Claimant's evidence was that she struggled "*with writing things down and taking things in*", and her demeanour in these proceedings suggests that she would likely have been very emotional in those consultation meetings, which would have made that more difficult.

76. Furthermore, she said that when she told Mr Lewis of her difficulties he handed her a piece of paper, presumably so she could take notes, "*which made [her] feel even worse*".

77. A reasonable employer would have given greater consideration to the Claimant's requests. That would have had an advantage for the Respondent as well, as enabling the Claimant to more easily participate in the consultation process may have helped her understand better the Respondent's rationale, perhaps facilitating a means to reaching agreement, or at least an improved understanding of why her wishes could not be accommodated. It also would have shown greater care for an employee of nearly 20 years' service who, even in the course of these proceedings, has expressed a desire to return to work for an organisation for which she feels tremendous loyalty, and great distress at being dismissed.

78. Regardless of whether the Claimant's educational needs amount to a disability for the purposes of the Equality Act 2010 (which was not a matter that was required to be decided here, as the Claimant's case was not brought on that basis), the Respondent should have gone to more efforts to help the Claimant

participate. The Tribunal considers it would have been a simple matter to permit her husband to accompany her, for example.

79. However, what is clear is that the Claimant understood and accepted the Review and what it was trying to achieve, and was able to question the Proposal as regards her work rota. She did suggest an alternative (the job share) that was considered by the Respondent (though it was concluded not to be viable). The Claimant's notes of points she wanted the Respondent to consider at the appeal hearing (with which she may have had some assistance from her husband) were engaged with by Mr Lyne. There are no new points that the Claimant has raised in these proceedings to those that were considered by the Respondent. These are indicators of participation, and consequently, while the Respondent could and should have done more to make her engagement easier, it is clear that she was able to engage in meaningful consultation, albeit that she did not persuade the Respondent to retain her pre-existing working pattern.

The dismissal letter

80. The Respondent's Line Manager Guide to the Policy refers to the fact that employees dismissed because they have refused to agree to the amended working hours/patterns imposed as a result of the Policy have the right to appeal that decision – it unfortunately does not say when that should be communicated.

81. Good industry practice holds that the right of appeal should be communicated at the same time as the decision to dismiss is communicated to the employee concerned in writing. It is also appropriate (though not always legally-required) to set out the reason for dismissal. The benefits of doing so include ensuring that the employee understands what is happening and why, and providing an opportunity for any errors or misunderstandings to be identified by the employee and swiftly corrected by the employer.

82. In this case, the right of appeal was subsequently communicated to the Claimant, and given she did raise an appeal, she does not appear to have been disadvantaged by the time lag between the 29 October and 12 November 2021 letters.

Consultation: a sham?

83. The question of whether the Respondent went into the consultation process with a 'closed mind' goes to whether the consultation was a 'sham', and consequently the reasonableness of its actions thereafter.

84. There is some evidence that supports the Claimant's contention that the Respondent entered the consultation with a closed mind:

    a) The Claimant's witness statement contrasts Mr Lewis' approach to consultation with that of other managers: "*Mr Lewis seemed under*

pressure as a young inexperienced manager to complete the process. Other more experienced managers dealing with their staff had completed the process by negotiating with staff to reach a satisfactory compromise";

b) The notes from the second collective consultation meeting summarising feedback include: "*Some felt there was no comprise* [sic] *on the hours being offered*"; and

c) The documents shown to the Tribunal indicate that the Respondent did ask for ideas and solutions to the issues, but indicated that its expectation was that everyone would be required to agree to the Proposal, e.g., "*If the colleague does not agree* [to change their contractual hours in accordance with the Proposal] *they will be served notice and dismissed from the company.*" This text appeared under a heading "*Potential outcome if informal voluntary process is not successful*" or "*Potential outcome if formal process is going ahead*" in the notes of each of the two collective consultation meetings. While the word "*potential*" in the heading indicates what follows is not a 'fait accompli', the language of "*<u>will</u> be served notice*" (the Tribunal's emphasis) that follows does not appear to be open to the potential for employees to suggest alternative ways the Policy aims could be achieved that would avoid dismissal.

85. Other evidence suggests that the Respondent was open to alternative ways to achieve the Policy aim:

a) The invitation sent to the Claimant to attend a third individual consultation meeting included the following: "*if we are unable to reach an agreement, I may have to consider dismissing you with contractual notice and offering you a new contract*". The use of the word "may" indicates that it is not a certainty;

b) Similarly, the scripted notes for the first individual consultation meeting include the following prompt: "*Explain that… if no agreement is reached … this <u>may</u> result in a new contract being issued to them, their notice being served and their dismissal from the company*" (again, the Tribunal's emphasis); and

c) The Respondent did suggest three alternative work patterns to the Claimant in response to her flexible working request – and one of those did not involve any weekend shifts (but did involve working a late shift on a Monday). The Claimant rejected those alternatives.

86. As for evidence which goes either way, while the template notes for the first individual meeting included a box "*Can a compromise be reached?*", Mr Lewis has written "*Not applicable*" – which could indicate that the Respondent or the Claimant was not willing to compromise, it is not clear. The Tribunal cannot read what Mr Lewis has written in respect of this question in the notes of the second or third individual consultation meetings.

87. The oral evidence before the Tribunal was that the only alternatives the Claimant suggested to the Respondent were:

    a) The job share with Elaine – which, as discussed above, was not viable (Mr Lyne explored this with the Store Manager as part of the appeal process as well); and

    b) That she could change the time of day she worked on her pre-existing working days, but she was wedded to a two-week rota and working on those particular days.

88. It is difficult, therefore, to understand if the Respondent was willing to be flexible as to how the Policy aims were to be achieved, given the Claimant was not proposing a solution that achieved that. The Tribunal can see that it was not practical for the Claimant to work a two-week rota with all other members of her team (including the other individual who didn't accept the new terms, and who was therefore working out her notice period) working a one-week rota.

89. On balance, the evidence points to some willingness on the part of the Respondent to consider alternative ways its Policy aim could be achieved. It is natural, when devising a plan for achieving a particular purpose, for an employer to anticipate that that plan is the one that will be implemented, because that's the default expectation barring something being raised in the consultation process that has not been thought of. A necessary feature of effective consultation, though, is a willingness to listen to other people's ideas in case they have come up with an alternative workable solution that fulfils the Policy aim while avoiding some of the disadvantages of the 'straw man' solution. The response to the Claimant's flexible working request in particular, shows that the Respondent was open to consider other solutions. Unfortunately, it seems that what the Respondent's business needed was ultimately incompatible with the Claimant's commitments and lifestyle choices.

90. Mr Rendell, on the Claimant's behalf, made some other criticisms of the Respondent's process:

    a) He considered that the Claimant's appeal should have been heard by an HR professional rather than Mr Lyne;

    b) He criticised Mr Lyne for discussing the Claimant's suggestion of a job share with Elaine with Ms Cockerill. Mr Rendell says that breached a duty of confidentiality to the Claimant;

    c) He observed that while the Claimant had been directed to look at the Respondent's website of job vacancies, that suggestion was not made until the 12 November 2021, some two weeks after the decision to dismiss the Claimant had been communicated to her;

d) He says that the Respondent should have told the Claimant that she did not need to be a trade union member to be represented by the union in consultation;

e) He says that Mr Lewis misled the Claimant when he told the Claimant that any companion she brought to any of the meetings could only be a silent observer; and

f) He says that Mr Lewis did not consider the three points raised by the Claimant in coming to his decision to dismiss her.

91. The Tribunal comments on those as follows:

a) The reason for implementing the Proposal was to make changes to the operation of the Whitstable store to implement the Policy. Those of the Respondent staff in managerial positions able to engage with the practicalities of doing so, whether they be store managers or HR professionals, could determine appeals about decisions such as Mr Lewis'. The key point is that they are decision-makers able to assess the Claimant's appeal fairly. Mr Lyne was able to do that here.

b) Mr Lyne's independence from the initial decision taken by Mr Lewis was well-demonstrated by the fact that he did not quickly dismiss the Claimant's suggestions about the job share with Elaine. Rather, he explored the practicality of its implementation and whether it would meet the Policy needs identified (which, unfortunately, it didn't). He needed to discuss that with someone in a position to tell him why it did or did not work from that perspective, and Ms Cockerill was able to do so. The Tribunal did not consider that Mr Lyne deferred the appeal decision to Ms Cockerill, but more that he needed to understand the practicalities around it (or 'fact find', as he put it) so as to determine whether the appeal should be upheld or dismissed.

c) Mr Lewis' evidence was that he had pointed the Claimant to the Respondent job vacancy website during the consultation meetings. Both the Claimant and Mr Rendell indicated that the Claimant would have struggled to take all information in, and so the Claimant's denial that she was told of the website is not reliable. Moreover, even if she was only pointed to that website late-in-the-day, there was still opportunity for her to use that website and apply for vacancies before her employment ended. Given the Claimant had a very particular working pattern that she was looking to replicate and she would not countenance much of an adjustment to that, it seems to the Tribunal highly unlikely that any vacancy on that website suitable for the Claimant would have been filled in the time between the consultation meetings and the Respondent's letter of 12 November 2021.

d) It is typically a matter of discretion for the trade union concerned as to whether it will field a trade union representative to accompany a non-member in consultation meetings. Mr Lewis could have said this to the Claimant, but it was not in the Respondent's gift to commit the union to doing this, and the Claimant could have made enquiries on the point. The Tribunal makes no criticism of the Respondent on this ground.

e) Mr Lewis said that he could not remember if he said this or not. The events in question occurred nearly two years ago, so this is not surprising. Equally, the Claimant and Mr Rendell have said that the Claimant would not have recalled all the information conveyed to her in the meetings, and so does not have sufficient confidence that this occurred to level criticism at the Respondent.

f) It would have been better if the letter setting out the decision to dismiss the Claimant had cited the points raised by her and explained, as Mr Lewis did in oral evidence, that he had taken them into account when reaching his decision, but that his conclusion was that the Respondent's business needs outweighed them. Mr Lyne *did* communicate how he had considered those factors when concluding that dismissal was the appropriate outcome. It would have been better if Mr Lewis had similarly, but his failure to do so in the context of an overall process where the Claimant was clear this had happened did not take dismissal outside the range of reasonable responses.

Overall assessment: was dismissal within the range of reasonable responses?

92. As noted above, the Tribunal considers that the Respondent had a fair reason for dismissal. The process it followed was not perfect, but as observed in the decision in *Sharkey*, a flaw in the process does not necessarily render it unfair – it is for the Tribunal to evaluate the significance of any procedural flaw.

93. Here, the Respondent:

a) Should have made the Claimant's engagement in the consultation process easier, for example, by allowing her husband to accompany her;

b) Should have consistently presented dismissal as not being an automatic consequence of a failure by the Claimant to agree to amend her working pattern (even if those communications emphasised that dismissal was the Respondent's *expected* outcome should agreement not be reached); and

c) Should have set out the Claimant's right to appeal the decision to dismiss her in the letter communicating her dismissal – and that letter should also have reiterated the reason for her dismissal,

but, looking at the Respondent's process overall (as per the decision in *Taylor*), the Claimant did raise all the points she wanted to raise (i.e., the proposed job

share with Elaine), and those were meaningfully considered by the Respondent (as shown by Mr Lyne's discussions with Ms Cockerill) before the conclusion of her appeal against dismissal. The Tribunal does not consider that the decision to dismiss was outside the range of reasonable responses open to the Respondent. It was entitled to pursue the Policy, and it did so after (overall) meaningful consultation and discussion with the Claimant.

94. Its size and resources both mean it was more justified in pursuing the Policy – its impact was significant to the Respondent's c162,000 employees in Great Britain, but especially to its employees at the Whitstable store. Its size and resources also meant that it should have the resources to operate a consultation process for a business reorganisation without the flaws the Tribunal has found in this one – but considering the Respondent's size and resources does not alter the Tribunal's conclusion that dismissal of the Claimant was within the range of reasonable responses open to the Respondent.

95. Unfortunately, the parties reached an impasse. The Respondent had a sound, good business reason for looking to amend the working patterns of all members of its Customer Experience team in the Whitstable store. The Claimant could have rejigged her conflicting commitments, but she understandably did not want to. That left a situation where:

    a) as Ms Howells put it, it was "*Not within Mr Lewis' power to create suitable vacancies for the Claimant*", and nor does the law require him to have done so; and

    b) the Claimant was not obliged to agree to amend her contractual hours.

96. Sadly (for both parties), that meant that the Claimant's employment could not continue. It is a highly-regrettable situation that a loyal employee of 20 years' service, who clearly cared about and took pride in her job, was dismissed from the Respondent's employment through no fault of her own – but that does not render her dismissal unfair.

Conclusions

97. For all of the above reasons, the Claimant's claim for unfair dismissal fails.

Employment Judge Ramsden

Date 20 October 2023