THE INDUSTRIAL TRIBUNALS

CASE REF: 683/19

CLAIMANT: **David Carmichael**

RESPONDENT: **Larsen Building Products Ltd**

DECISION

The decision of the tribunal is that the claimant's claim of unfair dismissal is dismissed.

Constitution of Tribunal:

Employment Judge: **Employment Judge Wimpress**

Members: **Mr B Collins**
Mr I Atcheson

Appearances:

The claimant represented himself.

The respondent was represented by Mr Andrew Woodside of the Company.

Title of Proceedings

1. An issue arose at a Case Management Discussion on 22 March 2019 as to the proper identity of the respondent. The claim was originally brought against Larsen Building Products and Larsen Building Products Ltd was joined as an additional respondent on the basis that the correct identity of the respondent would be determined at the substantive hearing. Having considered the claimant's contract of employment it is clear that the respondent is one of a group of companies and we are therefore satisfied that Larsen Building Products Ltd is the correct respondent.

Sources of Evidence

2. The tribunal received witness statements from Mr Andrew Woodside and Mr Declan Wright and heard oral evidence from them by way of cross-examination. The claimant did not provide a witness statement and instead was permitted to give oral evidence in compliance with a direction given at a Case Management

Discussion on 17 May 2019. The respondent provided a small bundle of relevant documents which was supplemented with additional documents during the course of the hearing.

The Claim and the Response

3. The claimant lodged a claim form on 10 December 2018 in which he claimed unfair dismissal. The claimant claimed that he was asked to change his hours and that the new hours were not suitable for his responsibilities at home. The claim form went on to state that the claimant had an elderly mother whom he looked after her in the evening and that when he explained this to Mr Woodside he replied that he was sorry to see him leave to which the claimant replied that it was not his intention to leave his job. The claimant further alleged that the respondent had not acted reasonably as it had not offered him an alternative post at his existing hours until a suitable post became available. The claimant also complained that the supervisor was allowed to continue to work his previous hours but that this option was not offered to him. Finally, the claimant alleged that the respondent had not acted as a reasonable employer would do by dismissing him.

4. In its response of 30 January 2019 the respondent contended that the claimant was fairly dismissed for some other substantial reason on the basis that he had refused to agree a new rolling shift pattern and that it was necessary to proceed with the change in the interests of the business and that it proposed to dismiss the claimant and immediately re-engage him on revised terms and conditions of employment. The response set out the history of the dispute in some detail and rejected the claimant's contention that he had informed the respondent that the reason for refusing the new shift pattern was because he cared for his elderly mother. The respondent further contended that it had complied with the statutory dismissal procedure and had offered the claimant the right of appeal but that it was not exercised by the claimant.

5. At a Case Management Discussion on 22 March 2019 the claimant withdrew the contention that he had caring responsibilities.

The Issues

6. The Tribunal considers that the main legal issues in this case are as follows:

   (1) Whether the claimant was unfairly dismissed.

   (2) Whether the respondent was entitled to unilaterally vary the claimant's terms and conditions of service.

   (3) What was the reason for the claimant's dismissal?

   (4) If, as asserted by the respondent, the dismissal was for some other substantial reason, namely the claimant's failure to accept a necessary change in his hours, did the respondent act reasonably in dismissing the claimant for this reason.

(5) Whether the respondent complied with the statutory dismissal and disciplinary procedure.

The Facts

7. The claimant was first employed by the respondent as a Shift Production Operative at its Powder Plant at McCaughey Road Belfast where he commenced work on 18 April 2016. The respondent business supplied various powders used in the building and construction trade. The claimant's main role was to load pallets holding such material onto lorries using a forklift truck.

8. On commencement of his employment the claimant was provided with a contract of employment which made provision for the normal hours of work at section 8 in terms of standard early shifts, late shifts, continental shifts. The day and night shifts were rotated. The claimant's early shift was 6.00 am to 3.00 pm (Monday to Thursday) and 6.00 am to 2.00 pm on Fridays. The claimant's late shift was 3.00 pm to 12.00 midnight (Monday to Thursday) and 2.00 pm to 10.00 pm on Fridays.

9. Section 8 of the claimant's contract of employment made provision for changes in shift hours and patterns as follows:-

> *"Shift hours and patterns may be varied as workloads demand."*

10. The contract also made provision for changes in terms and conditions at section 23:-

> *"From time to time your main terms and conditions of employment may be subject to change (i.e. by mutual consent). Should any change be agreed, this will be confirmed within one month from the change taking effect, by individual written notification."*

11. In and around December 2016/January 2017 the claimant was successful in an internal recruitment process for the post of Warehousing and Despatch Operative and as a result his hours of work were changed to 8.00 am to 5.00 pm (Monday to Thursday) and 8.00 am to 4.00 pm on Fridays. The change to the claimant's shifts was made by agreement. The claimant does not appear to have received a new or amended contract.

12. In 2018 the respondent decided to make changes to its operations. Mr Woodside gave evidence about this none of which was disputed by the claimant. A number of factors influenced this decision. These included the growth in the number of pallets being despatched which was compounded by traffic delays; inexperienced production team personnel having responsibility for loading and paperwork after 5.00 pm; the risk of errors in order despatches due to limited warehouse capacity; the requirement to transfer goods early in the morning before the warehouse staff came on site with associated overtime costs; the claimant being unable to keep on top of housekeeping duties due to pressure of work and pressure on the Despatch Controller due to him having to assist the claimant with loading trailers or offloading raw materials which had a detrimental impact on his own work. As a result the respondent decided to recruit another warehouse operative and seek to alter the

claimant's shift pattern. The respondent wished to extend the shift hours slightly by moving to a weekly rotating shift pattern: Week 1 - 7.00 am to 16.00 pm; Week 2 – 10.00 am to 7.00 pm. This represented an overall increase of three hours.

13. On 22 June 2018 Mr Woodside met with the Despatch Controller, Czarek Zieleniewicz, and the claimant and informed them of the plans to improve the despatch process. During the meeting the claimant said that he was not keen to work the late shift and asked Mr Woodside whether he could get the new person to work a permanent 10.00 - 19.00 shift. Mr Woodside in response explained that he would be advertising the role internally without specifying those hours but would ask the successful candidate if they would be interested in working those hours.

14. On 11 July 2018 Mr Woodside held a consultation meeting with the claimant during which he advised him of the identity of the new member of the despatch team and that that person was keen on rotational shifts and not working a permanent late shift. Mr Woodside also gave the claimant a letter in which he set out the proposed new shift pattern commencing on 11 August 2018.

15. On 30 July 2018 Mr Woodside held a further consultation meeting with the claimant in order to establish what the claimant's difficulties were with working a little later in the evenings every other week. Mr Woodside went through the business case behind the proposed changes but the claimant did not give a reason for not being able to work late and simply said that he could not do it. Mr Woodside offered the claimant an extra day's holiday as an incentive to move unto the new shift pattern but to no avail.

16. On 6 August 2018 Mr Woodside held a further consultation meeting with the claimant in which he offered the claimant a six week trial period on the new shift pattern. The claimant refused the offer of a trial period. In light of the claimant's refusal Mr Woodside agreed that he could continue working his normal 8.00 -17.00 shift until September at which point a new contract would be offered to him with the revised working hours and that his current shift pattern would no longer be available.

17. On Monday 14 August 2018 the new warehouse operator commenced work as scheduled on the early 7.00 am shift. The claimant also turned up at 7.00 am to work the early shift and refused to change his start time to 8.00 am and as a result the new operative was moved to an 8.00 am start for the rest of the week. Mr Woodside found the claimant's behaviour bizarre in view of his point blank refusal to go unto the new shift pattern.

18. On 15 August 2018 the claimant approached Mr Wright and told him that he could not work the 10.00-19.00 shift but would not elaborate why. The claimant did however indicate that he felt aggrieved that Mr Zieleniewicz was not having to move into the new shift pattern. Mr Wright mentioned this to Mr Woodside the following week and he pointed out that Mr Zieleniewicz's role required him to be on site between 08.00 and 17.00 as he needed to be available to deal with any queries from sales administration staff who worked those hours, that Mr Zieleniewicz was responsible for ordering daily sand deliveries which needed to be done between 8.00 and 9.00 and that he processed all orders and decided which haulier it would be sent with. Mr Woodside also tried to upskill the claimant several times so that he

could do more in the way of order processing but the claimant said that he didn't like computers and was just happy to load lorries.

19. On 16 August 2018 the claimant sent a message to Mr Woodside via Facebook that he was taking the next day off and all of the following week. Mr Woodside received this message on 17 August 2018 and was annoyed that the claimant had not given sufficient notice and had left him without adequate cover for the following week.

20. On 28 August 2018 Mr Woodside gave the claimant a letter inviting him to a meeting to discuss the proposed variation to his contract at 10.00 am on 31 August 2018. The letter set out the proposed variation, the reasons for the change and the proposed implementation date of 14 September 2018. The letter further advised that if the variation was not agreed the claimant would be given notice of dismissal together with an offer of re-engagement on the proposed new terms and conditions to take effect on 17 September 2018, subject to a right of appeal. The claimant was also advised that Mr David Baxter, Manufacturing Manager, would be attending as a note-taker and that the claimant had the right to be accompanied by a work colleague or trade union official.

21. The meeting took place on 31 August 2018 as arranged although the claimant was 30 minutes late and only arrived after being contacted by phone. When the meeting began Mr Woodside outlined the proposed changes and the claimant replied that he could not do the late shift because of personal reasons. The claimant refused to elaborate further as to what those reasons were. The claimant asked Mr Woodside for a copy of the internal advertisement for his post and queried why there was no reference to shift hours. Mr Woodside explained that this was a matter for discussion at interview and that the despatch job carried an amount of flexibility as one of the main factors of the role was to get orders out to customers as soon as possible.

22. On 12 September 2018 Mr Woodside had a final meeting with the claimant and provided him with a letter finalising the variation of contract, giving the claimant notice of dismissal and advising him of his right of appeal to Mr Wright. The letter also set out in full the reasons for the changes to the claimant's shift patterns. Mr Woodside asked the claimant if he had anything else lined up and he replied that he hadn't and that he planned to take a break for a while. Mr Woodside asked him whether he was sure that he had made the correct decision and did he not want to change his mind. The claimant replied that he did not want to change his mind.

23. The claimant did not appeal against the respondent's decision because he did not believe that the decision would be changed given that he had already raised his objection with senior managers and the co-owner of the respondent business.

24. Mr Woodside gave evidence that the respondent obtained human resources advice from an independent consultant who guided it through the process of seeking to vary the claimant's shift pattern. The independent consultant pointed him in the direction of the guidance issued by the Labour Relations Agency in relation to the variation of contracts which indicated that in the absence of agreement an employer could dismiss an employee and immediately re-engage him on the new terms. The respondent adhered to this advice throughout. We have no reason to disbelieve this evidence.

THE LAW

25. Article 127(1) of the Employment Rights (Northern Ireland) Order 1996 ("the 1996 Order") provides as follows:-

> *"127.—(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to paragraph (2) only if):-*
>
> *(a) the contract under which he is employed is terminated by the employer (whether with or without notice),*
>
> *(b) he is employed under a limited-term contract that terminates by virtue of the limiting event without being renewed, or*
>
> *(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*

26. Article 130 of the 1996 Order insofar as relevant provides as follows:-

> *"130. - (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 paragraph (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) A reason falls within this paragraph if it –*
>
> *(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do;*
>
> *(b) relates to the conduct of the employee;*
>
> *(c) is that the employee was redundant; or*
>
> *(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under a statutory provision.*
>
> *…*

(4) Where the employer has fulfilled the requirements of paragraph (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."

27. An employee may respond to a unilateral variation of his contract in a number of ways:-

(1) The employee may acquiesce in the breach by continuing to work under the revised terms.

(2) The employee may resign and claim constructive dismissal.

(3) The employee may bring a claim for breach of contract either (a) to an industrial tribunal if it arises or is outstanding on the termination of his/her employment, or (b) to the High Court or County Court if his employment is continuing. This is sometimes described as the 'stand and sue' option and may be used where the employee decides to work 'under protest'.

(4) The employee may refuse to accept the change. The onus will then be on the employer to react to the employee's decision and this may include dismissal.

(5) The employee may pursue a claim for unlawful deduction from wages if the changes results in a loss of pay.

28. If the employee refuses to accept the change the employer may either drop the matter or decide to dismiss the claimant and seek to re-engage him on a new contract of employment. In such circumstances the employer must first offer re-engagement on the revised terms before or upon the date of termination and the appropriate period of notice must be given.

29. The employer must also adhere to the statutory dismissal and disciplinary procedure as set out in Schedule 1 Part 1 of the Employment (Northern Ireland) Order 2003. The standard procedure applies in the present case and its requirements are as follows:-

"Step 1: statement of grounds for action and invitation to meeting.

1. - (1) The employer must set out in writing the employee's alleged conduct or characteristics, or other circumstances, which lead him

to contemplate dismissing or taking disciplinary action against the employee.

(2) The employer must send the statement or a copy of it to the employee and invite the employee to attend a meeting to discuss the matter.

Step 2: meeting

2. - (1) The meeting must take place before action is taken, except in the case where the disciplinary action consists of suspension.

(2) The meeting must not take place unless -

(a) the employer has informed the employee what the basis was for including in the statement under paragraph 1(1) the ground or grounds given in it, and

(b) the employee has had a reasonable opportunity to consider his response to that information.

(3) The employee must take all reasonable steps to attend the meeting

(4) After the meeting, the employer must inform the employee of his decision and notify him of the right to appeal against the decision if he is not satisfied with it.

Step 3: appeal

3. - (1) If the employee does wish to appeal, he must inform the employer.

(2) If the employee informs the employer of his wish to appeal, the employer must invite him to attend a further meeting.

(3) The employee must take all reasonable steps to attend the meeting.

(4) The appeal meeting need not take place before the dismissal or disciplinary action takes effect.

(5) After the appeal meeting, the employer must inform the employee of his final decision."

30. There is relatively little case law in relation to dismissal for "some other substantial reason" in the context of business re-organisations. However, the law on this subject is not in dispute and is set out by the Master of the Rolls in the leading case of ***Hollister v The National Farmers' Union [1979] IRLR 238*** at paragraph 12 where he says as follows:-

"The question which is being discussed in this case is whether the reorganisation of the business, which the National Farmers' Union felt they had to undertake in 1976, coupled with Mr Hollister's refusal to accept the new agreement, was a substantial reason of such a kind as to justify the dismissal of the employee. Upon that there have only been one or two cases. One we were particularly referred to was the case of Ellis v Brighton Co-operative Society Ltd [1976] IRLR 419 where it was recognised by the Court that reorganisation of business may on occasion be a sufficient reason justifying the dismissal of an employee. They went on to say: 'Where there has been a properly consulted-upon reorganisation which, if it is not done, is going to bring the whole business to a standstill, a failure to go along with the new arrangements may well - it is not bound to put it may well - constitute "some other substantial reason". Certainly I think, everyone would agree with that. But in the present case Mr Justice Arnold expanded it a little so as not to limit it to where it came absolutely to a standstill but to where there was some sound, good business reason for that reorganisation. I must say I see no reason to differ from Mr Justice Arnold's view on that. It must depend in all the circumstances whether the reorganisation was such that the only sensible thing to do was to terminate the employee's contract unless he would agree to a new arrangement. It seems to me that that paragraph may well be satisfied, and indeed was satisfied, in this case, having regard to the commercial necessity of rearrangements being made and the termination of the relationship with the Cornish Mutual, and the setting up of a new relationship via the National Farmers' Union Mutual Insurance Limited. On that rearrangement being made, it was absolutely essential for new contracts to be made with the existing group secretaries: and the only way to deal with it was to terminate the agreements and offer them reasonable new ones. It seems to me that that would be, and was, a substantial reason of a kind sufficient to justify this kind of dismissal. I stress the word 'kind' as it would not justify the act of dismissal."

31. In **Harper v National Coal Board** [1980] IRLR 260, the Employment Appeal Tribunal at paragraph 8 stated as follows:-

*"It was argued before us that it was not sufficient to bring a case within this category simply to show that the employer for reasons of his own regarded the reason as a substantial one. There must, it was said, be facts which indicated that the employer was entitled to regard the reason as being substantial. We were referred in this connection to Hollister v the National Farmers' Union [1979] IRLR 238. This again may be correct but within certain limits. Obviously an employer cannot claim that a reason for dismissal is substantial if it is a whimsical or capricious reason which no person of ordinary sense would entertain. But if the employer can show that he had a fair reason in his mind at the time when he decided on dismissal and he genuinely believed it to be fair this would bring the case within the category of another substantial reason. Where the belief is one which is genuinely held, and particularly is one which most employers would be expected to adopt, it may be a substantial reason even where modern sophisticated opinion can be adduced to suggest that it has no scientific foundation (**Saunders v Scottish National Camps Association Ltd [1980] IRLR 174**)."*

32. In ***Kent County Council v Gilham: [1985] IRLR 18, CA, [1985] ICR 233*** Lord Justice Griffiths stated that if on the face of it the reason given by the employer could justify the dismissal, then it is a substantial reason and the tribunal's enquiry should then move on to consider the fairness of the dismissal. Lord Justice Griffiths went on to say that at the stage of considering whether an employer has established some other substantial reason for dismissal. 'The hurdle over which the employer had to jump at this stage of an enquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the enquiry moves on to s.57(3) [the equivalent of Article 130(4)], and the question of reasonableness.'

SUBMISSIONS

33. The claimant did not avail of the opportunity to make oral submissions at the conclusion of the hearing and indicated that he had nothing to add. We appreciate the difficulties faced by unrepresented parties such as the claimant in such circumstances and having heard the claimant's evidence and the issues raised by him during the course of the hearing we are confident that we understand the main thrust of his case which was that the respondent did not act reasonably in dismissing him and that he could not be compelled to change shifts without his agreement. The claimant also maintained he was entitled not to disclose his personal reasons for not wanting to change shifts.

34. On behalf of the respondent Mr Woodside submitted that the respondent had acted reasonably and fairly in dismissing the claimant for some other substantial reason. Mr Woodside submitted that the respondent had a business need for seeking to change the claimant's working pattern and had engaged in a long period of consultation in the hope of securing the claimant's agreement to the change. Mr Woodside submitted that the respondent had adhered to Labour Relations Agency guidance on "Agreeing and Changing Contracts of Employment" and only when no agreement proved possible had it initiated the process of dismissal and offering re-engagement on new terms. In doing so the respondent had fully adhered to the statutory disciplinary and dismissal procedure including affording the claimant the right of appeal. Mr Woodside also drew attention to the claimant's failure to avail of the right of appeal or to raise a grievance in relation to the proposed change to his contract of employment.

CONCLUSIONS

35. It is clear that the changes made to the claimant's working pattern without agreement constituted a unilateral variation of his contract. The claimant acted entirely within his rights in refusing to accept the change. The respondent was also within its rights to dismiss the claimant with notice on 12 September 2018 and seek to re-engage him immediately on a new contract of employment. The claimant did not accept the new contract and left the respondent's employment. Thereafter the claimant brought a claim of unfair dismissal against the respondent as he was entitled to do. The respondent resisted the claim on the basis that it was necessary to proceed with the change in the interests of the business and the decision was

substantively and procedurally fair. In relation to substantive fairness the respondent contended that the dismissal fell within Article 130 (1) (b) of the 1996 Order as it constituted some other substantial reason of a kind such as to justify the dismissal of an employee and that it acted fairly and reasonably in doing so. In essence the respondent's case was that there were good, sound business reasons for the change in shift pattern.

36. We do not accept the claimant's contention that section 23 of his contract of employment prevented the respondent from changing his shift patterns without his agreement. The requirement for mutual consent in section 23 does not sit well with section 8 which provides that shift hours and patterns may be varied as workloads demand. This suggests to us that the mutual consent provision is not as watertight as it might first appear. However, it was unwise to include a provision such as section 23 in an employment contract as it has the capacity to mislead. We also consider that the claimant should also have been provided with revised terms and conditions of employment when he moved to the post of Warehousing and Despatch Operative. The respondent did not however seek to suggest that this change had any impact on the contractual provisions with which we are concerned. Nonetheless, it is clear that the respondent, while quite properly seeking consent, was ultimately prepared to impose the changes unilaterally in the absence of consent.

37. We have some difficulty with the claimant's stance particularly as his claim form specifically referred to him having caring responsibilities for his elderly mother and then subsequently withdrawing this claim at a Case Management Discussion. The claimant's explanation for this was that someone else wrote out the claim form for him and included the reference to his caring responsibilities without his approval. Given that the claimant signed the claim form himself this seems implausible at best. The claimant ought to have said why he had difficulty with the change and if he had put forward a good reason the respondent in compliance with its obligations would have been bound to have given it proper consideration. We believe that the respondent would have been hard pressed not to agree a suitable compromise solution if the claimant had given a good reason for not wanting to change. While the claimant is of course entitled to his privacy he cannot simply rely on unspecified personal reasons and expect the respondent to acquiesce.

38. Having carefully considered the evidence put forward by the respondent in relation to the business reasons for the shift changes we are satisfied that it has established a potentially fair reason for dismissal. No evidence has been adduced that would suggest that the reason given by the respondent was either whimsical or capricious.

39. Our enquiry then moves on to consider reasonableness. The employer must show that the substantial reason justifies dismissal. The respondent did not want to lose the claimant who was a valued employee and tried its best to persuade him to change his shift pattern but to no avail. The respondent therefore decided to seek to enforce the change by dismissing the claimant and re-engaging him on new terms. This is an entirely legitimate and well-trodden route but leaves the employer at risk of the employee claiming unfair dismissal. Conventionally the question of reasonableness is addressed on the basis of whether an employer acted within a band of available decisions for a reasonable employer even if it was not the decision the Tribunal would have made. In ***Connolly (Caroline) v Western Health***

and Social Care Trust [2017] NICA 61 the Court of Appeal held that it is necessary for tribunals to read Article 130(4)(a) of the 1996 Order alongside Article 130(4)(b) which provides that the decision "shall be determined in accordance with equity and the substantial merits of the case". We are satisfied that on either approach the respondent was justified in dismissing the claimant.

40. The employer must also show that it followed a fair procedure before dismissing the employee including the minimum statutory procedure. It is common case that the respondent engaged in a series of consultation meetings with the claimant in order to try to secure his agreement to the new shift including offering him a trial period and an extra day's leave as an incentive. Ultimately the claimant could not be persuaded to do so and refused to divulge his reasons for not wanting to change shifts.

41. There was no suggestion by the claimant that there were any flaws in the procedure adopted by the respondent and we have not detected any failings. The three step statutory procedure was fully adhered to by the respondent. The claimant was offered the right to appeal but did not avail of it.

42. We are therefore satisfied that the respondent's decision to dismiss the claimant was for a substantial reason and was both substantively and procedurally fair. The claimant's claim is therefore dismissed.

Employment Judge:

Date and place of hearing: 29 May 2019, Belfast.

Date decision recorded in register and issued to parties: