EMPLOYMENT TRIBUNALS

Claimant: **Trudi Eagles**

Respondent: **Safehands Day Nursery Ltd**

Heard at: **Leeds** **On:** **7th September 2017**

Before: **Employment Judge Eeley**

Representation

Claimant: In person
Respondent: Mr P Morgan, counsel

RESERVED JUDGMENT

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

2. The Claimant's claims in respect of unpaid wages and unpaid holiday pay are dismissed upon withdrawal by the Claimant.

REASONS

The issues

1. The Claimant brings a claim of unfair dismissal arising out of her employment with the Respondent. The Respondent having admitted that it dismissed the Claimant the legal issues which fall to be determined are:

   (a) What was the reason for the dismissal? Is it a potentially fair reason within the meaning of section 98 of the Employment Rights Act 1996? The Respondent contends that the Claimant was dismissed for 'some other substantial reason' within the meaning of section 98(1)(b) of the 1996 Act.
   (b) Was the dismissal fair, particularly within the meaning of section 98(4) of the Employment Rights Act 1996:
      (i) Was the dismissal procedurally fair?
      (ii) Was the dismissal within the band of reasonable responses?

2. At the outset of the hearing the Claimant clarified that there was no outstanding claim for unpaid holidays or unpaid wages for the Tribunal to consider. Those claims are therefore dismissed upon withdrawal by the Claimant.

The evidence

3. The Tribunal considered the pages it was referred to from an agreed bundle of documents. The Tribunal received witness evidence from the following witnesses by way of written witness statement supplemented by oral evidence including cross examination:
   (a) Trudi Eagles (the Claimant).
   (b) Fiona Stevens (Director of the Respondent and dismissing officer in this case)
   (c) Andrew Kinnear (Director of the Respondent and appeals officer in this case)
   Unless otherwise indicated, page references within these reasons are references to pages within the agreed bundle.

4. The Tribunal heard oral submissions from the Claimant and from counsel for the Respondent. Following those submissions the Tribunal reserved its decision. In the intervening period between the Tribunal hearing and the Tribunal's deliberations the Claimant wrote to the Tribunal via email dated 11th September 2017 providing further closing submissions in relation to her case. The Tribunal has read and taken the contents of that document into consideration in arriving at its decision.

The facts

5. Having considered all the evidence including documents, witness statements and oral witness evidence the Tribunal makes the findings of fact set out in the following paragraphs.

6. The Respondent is a private day nursery which provides care for up to 70 children aged between 3 months and 5 years. The Claimant started work with the Respondent as a cook on 17th April 2007. Her signed contract of employment was at pages 26-30 of the bundle. She was contracted to work 9.30am to 2pm during term time. She therefore worked 39 weeks out of 52 possible weeks of the year (although her pay was paid in 12, monthly instalments). The Respondent business operates during the full year and is not term time only.

7. The Respondent serves snacks and meals to the children at 10am, 12 midday and 4pm and caters for up to 59 children per day. Most of the food is made from scratch. There is a morning snack of fruit, lunch is a homemade hot meal that includes pudding of a homemade cake or biscuit.

All children (except those with allergies) will eat the same meal, although babies will have it mashed or pureed. The Respondent also caters for up to 6 children with allergies per day and any cook employed by the Respondent would have to be able to cater appropriately for these needs. For tea the Respondent provides items such as homemade scones, sausage rolls, fruit loaf or a fruit pudding.

8. When the nursery first opened the cooking duties were shared between Fiona Stevens and Maureen Kinnear (one of the Respondent's Directors and also Mrs Stevens' mother). Mrs Stevens became pregnant with her first child in 2006 and Maureen Kinnear became seriously ill. Consequently, it became apparent that the Respondent needed to recruit a further employee to cover the cooking duties. When the Claimant was initially recruited in 2007 she was the only person to apply for the role. She would not accept the position unless it was 9.30am to 2pm, term time only as this was what she was used to working. As the Respondent needed to recruit a cook it agreed to those working hours despite the fact that it was not a term time only business and the solution was not ideal.

9. The Claimant was the only cook employed by the business and she worked alone in the kitchen during term time. She was the only 'term time only' employee within the business. Her duties included the preparation of the meals and the serving of the food. She had to ensure that all of the children's dietary requirements were catered for. She was also responsible for preparing stock orders and ensuring proper stock rotation. The role of cook was a skilled one and it was important that it was carried out properly both for health and safety reasons and also to preserve the Respondent's reputation. It was essential that anyone carrying out the role had had the necessary allergy training and that the meals provided were balanced and nutritious. The Respondent also viewed it as necessary to maintain a level of continuity in the food provided as the children were used to the meals that they were given and did not eat well if the meals provided differed greatly from week to week.

10. Once the Claimant was recruited the meal preparation during school holidays was initially covered by Fiona Stevens but this became more difficult as she went on to have three children in total and needed to have time off herself during school holidays in order to care for them. Consequently, Rachel Ridson, the Respondent's General Manager, started to help with the out of term cooking. Fiona Stevens developed severe medical complications in her third pregnancy which led to an extended period away from the business and a return to the business for only two days per week. Ms Ridson therefore took over full responsibility for cooking during school holidays at this point. One of Mrs Stevens' children was also diagnosed with autism such that he could not tolerate change easily and could not be sent to holiday clubs during school holidays. This was another reason why it became increasingly difficult for Mrs Stevens to cover the cooking duties during school holidays. If Ms Ridson was ever off work during school holidays Mrs Stevens would have to go into work to cook but her husband would have to take a day's holiday

from his job in order to look after their children. There was nobody else on the Respondent's staff who was capable of, or willing to do, the cooking. It was therefore the continued help of Rachel Ridson which facilitated provision of the children's meals when the Claimant was not working.

11. The Respondent also had a Deputy General Manager, Hayley Thatch, who would essentially 'hold the fort' away from the kitchen when Ms Ridson was covering the Claimant's cooking role. However, she was not able to cover all of Ms Ridson's managerial duties as well as her own deputy manager role during these periods. This was essentially a compromise solution to the circumstances the Respondent found itself in. Ms Thatch did not do any cooking herself and there was no suggestion that she was trained or competent to do so.

12. The Respondent operated the system described above for many years as a compromise which facilitated the recruitment of the Claimant whilst still ensuring that the Respondent was able to provide the necessary meals to the children outside of term time. In December 2016 Ms Ridson informed Mrs Stevens that she was leaving the business. Her formal notice was handed in on 9th January 2017. Her last date working in the business was 24th February 2017.

13. At around the same time Ms Thatch, the deputy manager, also told Mrs Stevens that she was actively seeking a new position. She handed in her resignation on 23rd February and her notice was due to expire on 24th March. It appears that she rescinded her notice about a week before she was due to leave, possibly as early as 10th March. She stayed with the business longer than originally intended. However, she was suffering from acute stress and spent several weeks off work on sick leave before subsequently leaving the business later in the year, after the Claimant's dismissal had taken effect. In the weeks leading up to Ms Thatch rescinding her notice Mrs Stevens was under the impression that she was going to lose not one but two members of staff. Her initial planning and consultation therefore had to take account of this. In any event, once Ms Thatch rescinded her notice she spent some weeks off work on sick leave. She had made it clear that she did not want to take on the manager role in place of Rachel Ridson and there was no suggestion that she would be able to carry out the necessary cooking duties. Thus, even once her notice was rescinded it made no material difference to the options available to cover the managerial and cook's duties within the business.

14. The loss of Ms Ridson left the Respondent with a staffing problem as there would now be nobody to cover the Claimant's work during school holidays. A new solution would have to be found. Mrs Stevens decided to return to the business on a full-time basis as de facto manager. She decided to take over Ms Ridson's managerial duties alongside the duties that she was already carrying out as owner during her two working days each week. In

order to facilitate this her husband gave up his career to look after their children. Mrs Stevens decided to recruit a new Deputy Manager to be trained up to work alongside her once Ms Thatch left the business.

15. Mrs Stevens reviewed Ms Ridson's duties and noted that in most similar businesses a manager would not normally be asked to carry out cooking duties. Ms Ridson had been juggling these duties with the assistance of Ms Thatch. When Ms Ridson was in the kitchen she was unable to perform a number of her managerial roles such as showing prospective parents around the nursery; carrying out staff supervision or inductions; meeting parents; dealing with enquiries; dealing with first aid incidents; dealing with staff sickness and covering other rooms to keep appropriate staff to child ratios and other general paper work required of a manager. Although Ms Ridson had clearly done her best when covering the cooking duties Mrs Stevens noted that she had frequently been behind with her work and appeared stressed when covering both roles. On a number of occasions it had been necessary to employ agency staff to work in the rooms looking after the children as Rachel Ridson was unable to help out. Agency staff in that role cost £120 per day. The Respondent had had to employ agency staff for October half term 2016 at a cost of £480 and for three days over Christmas 2016 at a cost of £360. These additional costs were not sustainable for the business to continue.

16. Given the above factors the Tribunal finds that, whilst the arrangement using Rachel Ridson as holiday-time cook had just about worked for a number of years, it was far from ideal and did result in a lower standard of management within the nursery during those times when Ms Ridson was effectively covering two roles. This is not to criticise Ms Ridson's abilities or performance but is rather a reflection of the fact that she was essentially attempting to do two jobs at once.

17. Having reviewed the position Mrs Stevens realised that whilst she could take over Ms Ridson's managerial role alongside her own as owner of the business she could not also cope with cooking during the school holidays. This would be one role too many in all the circumstances. In addition, at the outset of the consultation/reorganisation process it was thought that she would not have an experienced deputy manager to support the nursery if she was in the kitchen for extended periods of time (due to Ms Thatch's resignation). This was an exacerbating factor. Even with Ms Thatch in place Mrs Stevens would be attempting to do two and a half roles at once (manager, cook and owner). Mrs Stevens therefore came to the conclusion that she wanted to change the Claimant's working weeks so that she would work throughout the year and have the same holiday entitlement as other staff. The proposal was therefore that the Claimant would work 52 weeks per year but with a 5.6 week holiday entitlement. Eight of those holidays would fall on bank holidays when the Respondent business was closed leaving the Respondent only having to cover 20 days' holiday in the kitchen as opposed to 57.

18. Mrs Stevens gave evidence (which the Tribunal accepted) that she had considered alternatives to changing the Claimant's working pattern before she began to consult with her but that the alternatives she considered were not satisfactory for the business. She considered using agency staff to cover the 13 week school holiday period. She contacted agencies to discuss this and was informed that this would not work for the following reasons:

    a. It would be difficult to get staff with the right experience and qualifications (food hygiene certificate and DBS check). As the agency worker would be working alone Mrs Stevens would need to be in the kitchen for the first few days in any event to ensure that they were performing adequately. They would need to have experience of catering for children and have an appropriate understanding of allergies.
    b. Even if there was a suitable worker on the agency's books there would be no guarantee that the worker would be available at the relevant time as they could be placed elsewhere (or indeed be unwilling to work during school holidays themselves).

    Using agency staff would therefore leave the Respondent in a state of considerable uncertainty as to whether it would be able to cover meal provision over any given school holiday. In addition, it would mean training each new person each time they came to the nursery and spending time with them ensuring that they were providing the right meals. Mrs Stevens concluded that this would be very time consuming, impractical and commercially unviable.

19. Mrs Stevens also considered whether the Respondent could outsource the catering for the weeks that the Claimant was not there but discovered that it was cost prohibitive. She found only one company that would deliver frozen meals to the nursery at a cost of £429.60 for 5 days' meals, plus the additional cost of puddings (as these were not included in the price). She took the view that pre-prepared frozen meals were not a solution either nutritionally or commercially.

20. Mrs Stevens also looked at the rest of her workforce and found that none of them were capable of covering the cooking. She could not remove anyone from the rooms as this would affect child/staff ratios. Mrs Stevens was the only other person able to cover the cooking and was also the only person capable of running the nursery as manager. She could not do both for 13 weeks of the year.

21. Having determined that there was no reasonably viable alternative Mrs Stevens pursued a process of consultation with the Claimant to try to get her to agree to change her working pattern.

22. Mrs Stevens had an informal meeting with the Claimant on 12th January 2017 (minutes p36). The Tribunal finds, in line with the Respondent's contemporaneous minutes, that she explained the changes to the management structure entailed by Rachel and Hayley leaving and explained that she could not cover 13 weeks of cooking during school holidays. There was a discussion of the problems of using agency staff or ordering pre-prepared meals. She explained that she was looking to discuss with the Claimant the prospect of the Claimant working the full year and having the same holiday entitlement as everyone else. There was a discussion about the holidays which the Claimant had already booked for that year. The Claimant told her that she had already booked three and a half weeks over the summer. The Claimant asked if she could still take holidays during the school holidays. Mrs Stevens' position was that she could, but not four weeks all together and that the proposal was that she would be included in the staff holiday scheme so that she would have to make a request for time off in the same way as everyone else. Mrs Stevens confirmed that the Claimant could have time to consider the proposal and asked her to confirm which dates she still required off as annual leave that year. The Claimant gave her a written note of the holidays that she said she needed in 2017 (p37). She advised that she needed 31 days off in total which did not include the statutory bank holidays. In addition, she indicated that she also wanted February half term off as she had plans for a family visit. The other days requested included 2 weeks' holiday in the school summer holiday and some time off at Easter and during the October half term.

23. There was a further informal meeting between the Claimant and Mrs Stevens on 31st January. There are no formal minutes of this meeting albeit Mrs Stevens made a note soon after the meeting as part of the typed log at p42. The Tribunal finds that during this meeting Mrs Stevens asked the Claimant to review her request for annual leave (p37) as this exceeded what her allowance would be and many of the requested days fell within the school holidays. She told the Claimant that Hayley Thatch had also now formally handed in her notice. After this meeting the Claimant gave Mrs Stevens a revised holiday request form (p38). In it she said "*These are the dates I require for me to continue working for yourselves".* She requested a total of 22 days paid holiday including time in the summer and autumn school holidays. In addition, she said that she had accrued time to take February half term off unpaid. Given the contents of this note the Tribunal finds that it is clear that at this stage the Claimant had not yet agreed to move from the 39 week contract to a 52 week contract as proposed by the Respondent. She was looking for confirmation of her holiday bookings for 2017 before she would agree to vary her contract formally. It was a precondition in order for her to agree to vary the contract. The clear implication was that if she did not receive a response

regarding her holiday request which was satisfactory to her then she would not be agreeing to work for more than 39 weeks per year.

24. The Claimant in her witness evidence maintains that she said she was willing to work 52 weeks of the year as requested but she would require holidays in 2017 alongside her family as her son was still in full time education and she was unable to take holidays in term time because of this. She says that she explained that she would only need school holidays in 2017 and 2018 because of this. Given the contents of her own note at p38 the Tribunal finds that the Claimant had not said to the Respondent that she was willing to work 52 weeks a year at this stage in the chronology. The Tribunal also finds that she had not limited her holiday demands to 2017 and 2018 as this is not mentioned in her note nor in the Respondent's log but appears for the first time in her witness statement to the Tribunal.

25. There was a further meeting between Mrs Stevens and the Claimant on 10th February. Rachel Ridson took notes of the meeting (p41). Mrs Stevens explained to the Claimant that, on reflection, she wanted the Claimant not to take her holidays within school holidays going forwards. She had reasoned that it would be easier for her to cover holidays in those circumstances as she would not need to organise childcare for her own children. If the Claimant took holidays in term time then the Claimant's husband would be able to cover the kitchen as his own children would be in school. (He had previously helped out in the kitchen). This would mean that Mrs Stevens would be able to continue doing her normal managerial role and would not have to work in the kitchen instead. Clearly, if the Claimant was off in school holidays her husband would be looking after his own children and would not be able to assist the nursery in this way.

26. The Tribunal accepts Mrs Stevens' evidence that this was put to the Claimant solely as a proposal at this stage and that it was still open for discussion. The Claimant became angry and walked out of the meeting, essentially because she felt that the goalposts had moved as it was now being suggested that she could not take any of her holidays during the school holidays whereas in the previous discussions there had been some flexibility about this. She also felt that her holiday requests (p38) had all been declined. The Tribunal finds that the requests had not been declined at that stage. Rather, the parties were still in discussion about how holidays in 2017 would be managed and how the Claimant would arrange her holidays going forwards after 2017 if she agreed to move to a 52 week working pattern. By the end of the 10th February meeting the parties had still not reached agreement about changing from a 39 week contract to a 52 week contract or about what specific holidays the Claimant would take in 2017. The consultation or negotiation was still in process albeit the Claimant was upset by the Respondent's latest proposal.

27. By letter dated 12th February 2017 (p43) the Claimant asked for the Respondent to provide, in writing, the business reasons why the Respondent had decided to change her contract. The Respondent provided a reply by letter dated 17th February 2017 (p45). It was explained that once Rachel had left she would not be able to cover the Claimant's holiday and there were no currently suitable staff to take over the role of manager and cook. Hayley Thatch's departure was also mentioned. Mrs Stevens confirmed that these changes had led to her having to return to the business full time to cover the positions and her husband having to give up his career to look after their children. She explained that she would not be able to cover the cooking herself for 13 weeks per year and also confirmed that following her earlier pregnancy complications she was physically unable to work in the kitchen as she is unable to stand for long periods of time or lift heavy objects. The letter also summarised why agency cover and pre-prepared meals were not reasonably viable options. It pointed out that pre-prepared foods would still have to be heated and served by someone with the dishes having to be washed up afterwards. She confirmed that having a cook who could work for 52 weeks was what the business needed and that her husband would be able to help cover holidays taken during term time. The letter finished by giving the Claimant further time to consider the proposal, giving her until 1st March to give her agreement or otherwise and warning that if the Claimant continued to refuse the changes Mrs Stevens might have no option but to consider moving to terminate her employment.

28. The Respondent received a response from the Claimant referring to stress and bullying and asking the Respondent how it would support her by reducing her employment related stress (p47). The Respondent's response of 20th February (p48) was from Andrew Kinnear offering to discuss options to reduce stress and enclosing the Respondent's grievance procedure should the Claimant wish to take it further. The Claimant's response was that she was not sure at that stage that she had a grievance (p49). No separate grievance procedure was pursued.

29. In the meantime, Mrs Stevens carried out a trial using outsourced pre-prepared meals during the February half term. (The Claimant had been granted paid holiday leave during the February half term school holiday.) The trial was not a success. There was a lot of food delivered at once which needed to be stored. The order had to be placed so far in advance that the Respondent still had to pay for it even if the children were off and did not require a meal. Serving the meals and washing up was virtually as labour intensive as cooking them from scratch and Rachel still spent four hours per day in the kitchen as a result. In addition, the Respondent still had to provide a separate pudding as this was not included in the pre-prepared meals. The food was not particularly palatable and many children did not eat it. Mrs Stevens concluded that this was not a viable option going forwards.

30. The Claimant emailed the Respondent on 25th February (p53). In that email she asserted that the needs of the business were a matter for the company and that she was not responsible for the 13 weeks that she was not working. She complained that the ages of her children (16 and 18) had been mentioned by the Respondent and asserted that this had nothing to do with her statutory rights and asserted that if this was mentioned again the Respondent would be discriminating against her. She asserted that the personal circumstances and health of other individuals and issues relating to skills, agency workers and DBS checks had no bearing on her statutory rights. She said that it was the company who had the responsibility for providing sufficient cover. She concluded by stating:

> *"I will not be agreeing to change my contract. The reasons you have given have no bearing on my statutory rights and standard hours. I am a committed employee, and this process with the threat of a termination of my employment is unreasonable. All employees have the same statutory rights irrespective of the size of the organisation. After analysing all the communications to date, any termination of my employment I consider to be unlawful. I have taken professional advice, and request that you forward all communication and correspondence on this issue in writing, to detail where you can legally challenge my contract without my agreement. I accept that I am in your hands and I would like to continue my employment. I cannot prevent you terminating my employment, and I am of the opinion that any such action would be an unfair dismissal."*

It is clear from the contents of this email that the Claimant had not, at this stage, agreed to any variation of her contract or any change from 39 weeks to 52 weeks working.

31. Mrs Stevens then invited the Claimant to a formal meeting by letter dated 27th February. The letter made clear that the purpose of the meeting was to discuss the need to change the terms and conditions of the Claimant's employment and to hopefully get her agreement to that. It warned that if the Claimant could not agree to the changes then the outcome of the meeting could result in the termination of her contract. She was offered the right to be accompanied at the meeting by either a work colleague or a trade union official. The meeting itself was postponed and took place on 6th March. There was a further exchange of correspondence prior to this meeting wherein the Claimant sought clarification of any package she would receive if her contract were terminated. The Respondent confirmed that she would be entitled to her statutory notice and any outstanding holiday pay. In a letter dated 28th February it was also confirmed that the purpose of the meeting would be to discuss the business rationale for the proposed changes to the Claimant's role, whether or not the Claimant was willing to change her mind and work the requested revised hours and to review the Claimant's correspondence surrounding a 'package' or the redundancy of her role.

32. The Claimant sent a further email on 28th February. In it she stated:

"You want me to increase my working weeks. I am not going to do this. You could agree to let me continue to work my contracted standard hours under my statutory rights… As a compromise I had agreed to work the 52 weeks as requested, with 20 days holiday and all statutory bank holidays, but I still need to be able to take holidays alongside my family…not be made to take my holidays when you dictate in term time….I will not be changing my working pattern (to allow me no holidays in the school holidays)…"

It is clear from this correspondence that the Claimant had not agreed to the Respondent's proposal at this stage. Whatever the Claimant says about having actually agreed a compromise it is clear that any change to a 52 week working year was conditional upon her receiving some guarantee that she would be able to take at least some of her holidays during the school holidays. It was therefore a proposal with a precondition put forward by the Claimant. It had certainly not been agreed between both parties at that stage.

33. On 2nd March Mrs Stevens responded to confirm that if the Claimant were to work 52 weeks a year she would be entitled to 20 days' holiday plus bank holidays. It was confirmed that covering leave during term time is more manageable for the Respondent. However, crucially, she went on to confirm that leave during the [school] holidays would be considered but this would need to be requested in the same way as for all other staff and Mrs Stevens could not guarantee that she would always be able to accommodate the Claimant's request, in which case the holiday would be refused. Taking holidays during term time would be preferable for the business.

34. It appears, therefore, that as of 2nd March 2017 the Respondent's proposal was for a 52 week year with 20 days holiday plus bank holidays with no outright ban on holiday leave during school holidays. Instead, the holidays would have to be requested and authorised in the same way as other members of staff had to do. Thus, school holiday leave could not be guaranteed but could be requested and considered on its own merits. This reflected a softening of the Respondent's position from its earlier suggestion of no leave during school holidays.

35. The parties met for a formal meeting on 6th March. There are three sets of notes from the meeting: the Respondent's typed minutes (p62), the Claimant's own notes (p63), and the Claimant's colleague's notes (p65). Having considered those notes and the parties' witness evidence the Tribunal finds that Mrs Stevens reiterated the business case for the proposed changes. In relation to the 2017 holiday year she confirmed that, in the event that the Claimant were to move to a 52 week a year contract, the Respondent would honour the holiday that the Claimant had already booked for August 2017 but could not necessarily accommodate any of the other 2017 holidays which fell in the school holidays. It follows that by the end of this meeting it should have been clear to the Claimant that her

August 2017 2 week holiday had been granted by the Respondent. She could be in no reasonable doubt about that.

36. The Tribunal finds that Mrs Stevens explained that in the future (i.e. after the pre-booked holidays had been honoured) the Claimant would have to make a formal request for holidays and this would be considered by the Respondent on its own merits according to the needs and circumstances of the business at the relevant time. (Hence, the Claimant's previous request for holiday during the October 2017 half term would have to be made again as a formal request to be considered on its merits when received.) The Respondent would try to accommodate holidays during the school holidays if possible but there could be no guarantee of that. A request could be refused, for example, if other staff were already off at the same time.

37. The Claimant asked for confirmation that two weeks could be taken during the seven week school summer holiday. The Respondent confirmed that in principle this could be granted but it would be subject to availability and a formal request: there would be no guarantee. (This arrangement would apply to summer school holiday requests for 2018 and subsequent years given that the 2017 August holiday had already been confirmed.) The expectation was that the Claimant's other two holiday weeks would be taken in term time. The Claimant was then asked if she would agree to the 52 week contract based on those proposed holiday arrangements. The Claimant asked for time to think about it and to speak to her advisor. Mrs Stevens then confirmed that as a matter of formality she would give formal notice of dismissal to expire after 9 weeks but that the dismissal letter would allow a period of time for the Claimant to change her mind and to confirm acceptance of the new terms if she wished to continue in her employment with the Respondent. The Claimant was subsequently given until 24th March to confirm that she would agree to the changes otherwise her dismissal would take effect with a termination date of 8th May 2017. This was confirmed in a letter dated 6th March 2017 (p67).

38. The Claimant did not confirm her agreement to the changes to her contract and so her dismissal took effect. She appealed against her dismissal by email dated 9th March (p69). She made it clear within the appeal letter that as she saw it she had tried to compromise by suggesting that if she could have two weeks' guaranteed leave within the summer holidays she would consider changing her contract. She stated that she believed that the company refusing to guarantee this request for 2 weeks' annual leave in the summer holidays was unreasonable. She contended that her dismissal was an unfair dismissal. Her letter also contained a section headed "grievance". However, the matters complained of therein all related to the Respondent's decision to dismiss the Claimant and concluded with an assertion that it constituted sex discrimination. Although referred to as a grievance, these matters essentially formed further grounds of appeal against the decision to dismiss.

39. Andrew Kinnear heard the Claimant's appeal on 14th March. The Respondent's minutes of the meeting were at p78-79, the Claimant's notes at p80 and her colleague's notes at p82. (The Claimant further provided an amended version of the Respondent's typed minutes at p85). The Claimant was advised of her right to be accompanied.

40. In advance of the appeal hearing the Claimant queried why her grievance was not mentioned in the Respondent's letter inviting her to the appeal. Mr Kinnear sought advice from his legal adviser Darren MacKenzie. Unfortunately, Mr McKenzie sent his reply directly to the Claimant instead of to Mr Kinnear. He advised that the issues raised in the grievance related to the termination of her employment and would be dealt with under the appeal process. If she wished to pursue a complaint regarding overtime then this could be dealt with under a separate grievance procedure and she should let the Respondent know about this. There then followed some correspondence where the Claimant queried Mr McKenzie's role. She did not, however, pursue her request for a separate grievance process in addition to the formal appeal against the decision to terminate her employment.

41. At the outset of the appeal hearing Mr Kinnear clarified Mr McKenzie's role as legal adviser. The Claimant was then asked to talk through her grounds of appeal. She confirmed that she felt she was a victim of indirect sex discrimination. She said that she felt that the main part of the appeal was that there was no guarantee of holiday during the school holidays. She felt that she needed time off as a mother.

42. Mr Kinnear adjourned the hearing to consider his decision which was sent out in a letter found at p87. He upheld the decision to dismiss. He set out his reasoning in the letter. He concluded that the there was a strong and fair business case to make the proposed changes to the Claimant's contract. He could not find any evidence of bullying or that the Claimant had been treated unfairly. At the Claimant's instigation communication had been commenced via email rather than face to face and the only meetings that subsequently took place were those that were necessary to resolve matters. He concluded that this was done to try and alleviate the stress that the Claimant was feeling. He confirmed that the company could not change the Claimant's contract without her agreement and that she continued to work under her old terms and conditions. The decision to terminate the contract was because the Claimant would not agree to a contractual change. He noted that the Claimant was willing to compromise and change to a full year contract if the Respondent could guarantee 2 weeks leave in the summer holidays. However, Mrs Stevens had indicated in her letter of 6th March that a guarantee was not possible (and this applied to all staff). He confirmed that he believed that the business rationale for not being able to guarantee annual leave for any members of staff was fair, correct and necessary. He agreed that the age of the

Claimant's children was not relevant but the business reason for terminating her employment was not in any way connected with her personal circumstances. He understood her wish to have guaranteed school holiday time but this was not something the company could be expected to accommodate. (Mr Kinnear also responded to the Claimant's query regarding overtime which is not relevant for the purposes of determining the claim of unfair dismissal that is before the Tribunal).

43. On 20th April 2017 the Claimant was put on garden leave for the remainder of her notice period.

44. The Respondent advertised the Claimant's position after her dismissal but before her appeal had been heard. A formal job advert was produced because Mrs Stevens had approached an agency for help with finding cover for the Claimant but they would not take the Respondent onto their books. The agency was not interested in nursery work as it considered it too high risk with children with allergies. Mrs Stevens' evidence was that, had the Claimant's appeal succeeded, the job advert would have been taken down. Mrs Stevens was a credible witness and the Tribunal accepts her evidence in that regard. The advertising of the Claimant's role did not indicate that the outcome of the appeal was pre-determined and had no impact upon the fairness of the dismissal procedure. In any event, the Respondent struggled to recruit a cook following the Claimant's departure. After the Claimant's dismissal Mrs Stevens attempted to cover the role of cook on top of her managerial role. She worked 12 hour days to try and keep on top of the work. Hayley Thatch was off on sick leave for seven weeks which also highlighted the impossibility of running the nursery without a deputy whilst also cooking. Mrs Stevens found that her health began to suffer. The Claimant's role had initially been advertised as a part time post but in order to get a better response it was subsequently advertised as a full-time role. The Claimant's replacement was finally recruited on 10th July 2017 on a full-time basis. The successful applicant said that he would not have applied for the position if it had been part time. Rachel Ridson was not replaced and Mrs Stevens continues to carry out the role of general manager in addition to her duties as owner of the business.

The law

45. It is for the Respondent employer to demonstrate the reason for the dismissal. In accordance with Abernethy v Mott Hay and Anderson [1974] IRLR 213 "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee".

46. In order for a dismissal to be fair the reason for the dismissal must be one of the potentially fair reasons set out in the Employment Rights Act 1996.

Section 98(1)(b) indicates that "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held" is a potentially fair reason for dismissal.

47. A business reorganisation can fall within section 98(1)(b) as "some other substantial reason". There will need to be a sound, good, business reason for the reorganisation (Hollister v National Farmers' Union [1979] IRLR 238). It would be wrong to say that significant changes can only be made if the survival of the business is threatened (Catamaran Cruisers Ltd v Williams [1994] IRLR 386 and Garside & Laycock Ltd v Booth [2011] IRLR 735).

48. Once a potentially fair reason for the dismissal has been established it is necessary to consider whether the dismissal is itself fair within the meaning of section 98(4) of the Employment Rights Act 1996. The Tribunal must not substitute its own view for that of the employer and must instead apply the band of reasonable responses test (Iceland Frozen Foods v Jones [1982] IRLR 439, Post Office v Foley and others [2000] IRLR 827). The band of reasonable responses test applies equally to the fairness of the procedure as to the fairness of the decision to dismiss itself (Whitbread plc v Hall [2001] IRLR 275).

49. In considering fairness pursuant to section 98(4) the Tribunal is required to consider the size and administrative resources of the Respondent's undertaking and shall determine the matter in accordance with equity and the substantial merits of the case.

50. In determining the fairness of the dismissal in a business reorganisation "some other substantial reason" case it does not follow that if the employee is acting reasonably in refusing a change, the employer must be acting unreasonably in imposing it. 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. This is only one of the factors to be considered and is not the sole question to be asked (Chubb Fire Security Ltd v Harper [1983] IRLR 311, Richmond Precision Engineering Ltd v Pearce [1985] IRLR 179, Garside & Laycock Ltd v Booth [2011] IRLR 735).

Application of the law to the facts.

51. The Tribunal is satisfied, based on the facts found, that the reason for dismissal in this case was a potentially fair reason, namely "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the [claimant] held". The Tribunal is satisfied that the Respondent has provided a reasonable explanation and demonstrated a sufficient business case for the reorganisation such that it

could constitute a potentially fair reason for dismissal. The Respondent had been able to accommodate the Claimant's working patterns for 10 years through the help and assistance of another employee, Rachel Ridson. When she resigned this help and assistance was no longer available and the Respondent had to consider how it would provide children's meals going forward. It had to reorganise its business and staffing. It was entitled to decide that it needed a cook who would be able to work 52 weeks of the year with 20 days holiday plus bank holidays in order to minimise the periods during which cover in the kitchen would be required. Furthermore, leave during school holidays could not be guaranteed but would be subject to the holiday leave booking procedure applied to the Respondent's other staff. At most, 2 weeks' leave in the summer school holiday would be deemed appropriate.

52. Having determined that the reason for dismissal was a potentially fair one the Tribunal must consider whether the dismissal was actually fair within the meaning of section 98(4) of the Employment Rights Act 1996. In doing this the Tribunal reminds itself that it is to apply the band of reasonable responses to the decision to dismiss and that it should not substitute its own judgment for that of a reasonable employer.

53. Having applied that test the Tribunal concludes that the decision to dismiss was indeed fair and within the band of reasonable responses. There is no dispute that the Respondent was faced with the need to make changes in its business following Rachel Ridson's departure. The system which had worked up until that point had itself not been ideal but had worked through the good offices and co-operation of Ms Ridson.

54. Taking into account the evidence the Respondent had no choice but to make changes. The question is what those changes would be and whether they could reasonably lead to the dismissal of the Claimant.

55. Prior to consulting with the Claimant the Respondent looked at alternatives to changing the Claimant's working patterns. It looked to see whether the 13 weeks of school holidays could be covered in some other way. The information they obtained from the agency indicated that agency cover would not provide a reasonable and workable alternative. They were entitled to conclude that covering the Claimant's role with agency workers was not appropriate.

56. The Respondent looked at getting deliveries of frozen meals. Its initial view was that this was not an appropriate, reasonable, workable or cost effective alternative to the freshly prepared meals provided by an in-house cook. The Respondent went even further and actually trialled this service for a week before the Claimant's dismissal. It did not make the necessary time savings, was more expensive and was considered not to be a suitable replacement. This was an assessment that the Respondent was reasonably entitled to make.

57. The Respondent looked to see who else within its existing workforce could cover the Claimant's absence. Once Ms Ridson left Mrs Stevens would be covering her own role (as owner) and that of a manager whilst training up a replacement deputy manager. It was reasonable for her to conclude that she would not be able to manage the cooking duties in addition for 13 weeks of every year, even if she was physically fit to do so (which was disputed by the Respondent).

58. In the event, Hayley Thatch did not leave until after the Claimant's dismissal and it could be argued on the Claimant's behalf that with Ms Thatch's help Mrs Stevens could somehow have managed the cooking duties and the owner/manager role. However, as a matter of fact Ms Thatch went off sick for several weeks and subsequently left the business so would not have provided a long-term solution. Even if Ms Thatch had remained in the business the Tribunal concludes that it was reasonable for the Respondent to decide that it needed both Mrs Stevens and Ms Thatch to cover the managerial roles within the business. There were two full-time managerial roles within the business. Ms Thatch did not want the manager's role. Furthermore, there was no suggestion in the evidence that Ms Thatch was competent and fit to do the cooking herself. The most that she could potentially do would be to cover some (but not all) managerial duties whilst Mrs Stevens worked in the kitchen. This would still leave Mrs Stevens trying to complete the equivalent of more than one full time role during the weeks when she was cooking (managerial role, cook's role and owner's role). She would be wearing three 'hats', so to speak. The Tribunal reminds itself that it is not to substitute its own judgment for that of the Respondent. The Respondent need not show that the reorganisation it undertook was the only one which was physically possible, just that it was within a reasonable range of responses open to a reasonable employer in the circumstances. In running its business the Respondent was entitled to conclude that it needed both a Manager and a Deputy Manager working full time on managerial duties and not carrying out cooking duties. The Respondent was entitled to conclude that it did not want Mrs Stevens carrying out three roles for extended periods of time and is entitled to conclude that she would not be able to manage this to a reasonable standard, even if other employers might come to a different conclusion. In the event, the Respondent's conclusion was borne out by the difficulties Mrs Stevens experienced in trying to cover the Claimant's role whilst she sourced a replacement. This lends credence to the suggestion that this was not a long-term solution which could be deployed for the foreseeable future. The Respondent was entitled to look for a long term solution rather than to continue with the short term solution for an extended period. Furthermore, the suggestion that Mrs Stevens should cover the Claimant's holidays does not take into account Mrs Stevens' own ongoing health issues or the fact that she too would want to spend some of the school holidays with her own children.

59. As at the date that the decision to dismiss was made the Respondent had come up with the solution that it needed to have the Claimant working for 52 weeks a year with holiday leave of 20 days plus bank holidays. Two of

those weeks should be taken during term time when the Mrs Stevens' husband would be able to cover them (as his children would be at school). The Claimant could request the remaining two in the school holidays but this would be subject to a proper request and cover being available. Given the Respondent's staffing resources and the needs of its business this was a reasonable position for the Respondent to take to minimise the impact of the Claimant's holidays upon the business and to facilitate proper cover of her holiday absences. It also reflected a level of compromise on the Respondent's part in that it no longer insisted that all four weeks holiday should be taken in term time even if holidays during school holiday time could not be guaranteed. Whilst the Respondent conceded that any holidays taken by the Claimant during school holidays were likely to be covered by Mrs Stevens this represented a reasonable compromise on the Respondent's part. Just because it might be able to cover 2 weeks' leave in the school holidays on occasion does not mean that it should be forced to guarantee this every year. It was reasonable of the Respondent to retain some flexibility in managing its business. Its refusal to guarantee 2 weeks' holiday during the school holidays did not take the decision to dismiss outside the range of reasonable responses.

60. The Claimant asserts that she had already compromised her initial position by the date the decision to dismiss was taken and that this made the decision unfair. It is true to say that she had started to accept that she would not have 13 weeks off per year. A compromise had been arrived at whereby her 2017 summer holiday would be honoured. However, she had not agreed to the variation which the Respondent was proposing. Unless she was guaranteed at least 2 weeks' holiday in the summer holidays each year she would not agree to the variation. It was therefore clear that there was no agreed variation to the contract at the date of dismissal. The fact that the Claimant had started to make some compromises does not, in the Tribunal's view, take the Respondent's decision to dismiss her outside the range of reasonable responses. If the Claimant would not compromise to the extent necessary to fit with the Respondent's reasonable business reorganisation then the Respondent was still entitled to dismiss her. It is the reasonableness of the Respondent's decision to dismiss which is in question and not the reasonableness of the Claimant's compromises. Taking into account the Claimant's position as at the date of dismissal the Respondent acted reasonably in treating it as a sufficient reason for dismissal taking into account the needs of the business, its size and administrative resources.

61. The Claimant has repeatedly asserted that the reasons provided by the Respondent for wanting to change her contract were reasons which were connected to the business and nothing to do with her. That may be so but there is no requirement that the business needs and reorganisation be linked to her personal circumstances. The very nature of a 'some other substantial reason' dismissal is that it will be for reasons connected with the business's needs and not necessarily the personal characteristics of the individual employee who is dismissed.

62. Likewise, the Claimant criticises the Respondent for suggesting a variation to suit the personal and child care needs of Mrs Stevens and her family. However, a business is entitled to review what staff it has available and what they can reasonably be expected to do to cover the necessary work when deciding on a reorganisation. The Respondent's business is a small business, effectively a family business. The Tribunal is required to consider the size and administrative resources of the Respondent. Mrs Stevens is the owner and director. To some extent her personal and family circumstances were bound to impact upon the needs and circumstances of the business. They were linked. She had reasonable and good grounds for concluding that she could not guarantee 2 weeks' school holiday leave for the Claimant and commit to always covering it herself. Given her wider responsibilities within the business, her health and her childcare commitments, the Tribunal would be substituting its own view for that of the reasonable employer if it were to conclude that it was unfair of Mrs Stevens to refuse to guarantee the Claimant 2 weeks leave in the school holidays and to refuse to cover a minimum of 2 weeks cooking herself.

63. It should also be noted that the final proposition put to the Claimant was in line with that applied to all other members of staff. No other member of staff was guaranteed a particular portion of leave during school holidays from year to year. All of them had to apply for leave and have it approved on a case by case basis subject to availability. It is within the range of reasonable responses to apply the same principle to the Claimant in the circumstances. There was no claim of sex discrimination before the Tribunal and so it is not necessary to consider whether there was any form of indirect discrimination in applying the same practice to the Claimant as to her colleagues. In any event, there was no evidence before the Tribunal to suggest that working parents were treated any differently in practice to other employees or that they were any more likely to have leave requests turned down during school holidays or to be put at a particular disadvantage by the Respondent's holiday procedures.

64. The Claimant asserted in her evidence to the Tribunal that the Respondent should have attempted to find a job share partner to facilitate her continuation on a 39 week contract. There is no contemporaneous evidence to suggest that this suggestion was ever raised by the Claimant during the Respondent's internal consultation procedure. It appears for the first time in her witness statement to the Tribunal. She says that she mentioned it at the 31st January meeting but the Tribunal finds that she did not. Mrs Stevens says that she did not and, in addition, if this was a proposal put forward by the Claimant one would expect to see reference to it at some point later in the procedure either in the notes of the meeting, in one of the Claimant's pieces of correspondence or in her appeal against dismissal. There is no mention of it and the Tribunal concludes that it was not raised with the Respondent during the dismissal and appeal procedure. Even if it had been raised with the Respondent, the Tribunal accepts Mrs Stevens' evidence that it would have been difficult to find someone to work only during the school holidays in the same way that it was difficult to find an agency worker to work during the school holidays only. The Tribunal does not consider that the Respondent's failure to try

and implement a job share rendered the decision to dismiss unfair in all the circumstances.

65. The Claimant asserted that on 31st January she told the Respondent that she only needed to have guaranteed school holidays in 2017 and 2018 whilst her youngest child was still in full time education and that this had a bearing on the fairness of the decision to dismiss. The implication was that the Respondent could and should have accommodated her wishes in the short term (2017 and 2018) in order to preserve her employment in the long term. The Respondent denied that the Claimant had said this and the Tribunal prefers the Respondent's account. If this was genuinely the Claimant's position the Tribunal would have expected to see further reference to it in either the minutes of the later meetings, the Claimant's correspondence or her grounds of appeal. Instead the clear impression given by all the documentation is that by the time the decision to dismiss was taken the Claimant's settled position was that she needed two weeks' guaranteed leave during the summer holidays going forward without any limitation to just 2017/2018. She wanted this guarantee for the remainder of her employment. Furthermore, in cross examination the Claimant conceded that the problem in relation to the failure to guarantee some school holiday leave related not only to 2017 but also to subsequent years. In re-examination she confirmed again that the problem was twofold: a failure to give all the holidays she wanted in 2017 and a failure to guarantee some leave during school holidays every year thereafter. She confirmed that both were factors in her decision not to agree to the variation of her contract. The Respondent's decision to dismiss therefore has to be assessed against the Claimant's insistence on 2 weeks' guaranteed summer holiday leave even after 2018. For the reasons already set out the Tribunal finds that the Respondent's decision was within the band of reasonable responses.

66. Turning to the procedure adopted by the Respondent the Tribunal notes that there were several informal meetings where various proposals were discussed. The Claimant was then invited to a formal meeting. She was given clear notice of the proposal and the potential for dismissal if she did not agree to vary her contract. She was allowed to be accompanied at the meeting and had every opportunity to put forward her case against dismissal. She was allowed an appeal which was heard by someone not previously involved in the decision to dismiss. Again, she had the opportunity to be accompanied and the opportunity to put her case. The Tribunal accepts that the Respondent would have withdrawn the job advert had the appeal succeeded and that it was only posted because of the anticipated difficulties in getting a quick replacement for the Claimant. The Tribunal therefore does not consider that the outcome of the appeal was predetermined in any way. The Respondent's procedure was fair overall and the decision to dismiss was procedurally fair. No unfairness arose out of the failure to have a separate grievance procedure as the matters complained of as a grievance were in fact matters properly to be considered as part of an appeal against dismissal.

67. There was evidence in the documentation of a dispute about overtime pay but this was not connected to the decision to dismiss and in the absence of a live wages claim is of no further relevance to the Tribunal's judgment in these proceedings.

Employment Judge Eeley

Date 22nd September 2017