EMPLOYMENT TRIBUNALS

Claimant: Mrs M Resztak-Dobrowolski

Respondent: Northern Foods Grocery Group Limited t/a Fox's Biscuits

HELD AT: Manchester **ON:** 2 December 2016

BEFORE: Employment Judge Tom Ryan

REPRESENTATION:

Claimant: In person
Respondent: Mr J Symons, Solicitor

JUDGMENT

The claim of unfair dismissal is not founded and is dismissed.

REASONS

1. This is a claim presented on 1 August 2016 by the claimant against her former employers, who trade as Fox's Biscuits, for whom she worked from 2011 at their premises in Kirkham where that well-known brand of biscuits is produced.

2. The claim is for unfair dismissal arising out of a dismissal which it is admitted took effect on 18 June 2016. The only complaint made by the claimant is unfair dismissal but, as part of advancing that case, she asserts that there was some form of indirect discrimination against those in her group and perhaps another lower paid group in the respondent, that there was a breach of her contract of employment and that the respondent made unauthorised deductions from wages.

3. The respondent defended the claim on the basis that the dismissal, which was the only complaint specifically pleaded, was not unfair.

4. This is one of those comparatively rare cases where the respondent asserts, under section 98 of the Employment Rights Act 1996, that the dismissal was for a substantial reason of a kind to justify dismissing the claimant. The respondent, as I shall relate in due course, has in its written closing submissions helpfully set out the authorities which elucidate the relevant principles in this sort of case.

5. In summary, it is a case where the respondent argues it needed to change terms and conditions of employees. It attempted to do so, it says, by agreement and when employees did not agree to the change, it gave notice of termination with an offer to re-engage on the new terms.

6. The claimant's case is that this process was unfair. To be accurate she does not say that the way in which the respondent consulted with her in particular at a number of meetings was unfair. She does not criticise the respondent about the manner of consultation. She describes the meetings as friendly and that she was given an opportunity to put her case in opposition to the proposed changes. Her case, simply put, is that at the end of the meetings the respondent did not agree with her view.

7. I heard the evidence of Miss Amanda Knowles, HR Manager, and Mr Matthew Lees, the General Manager and from the claimant. I have seen witness statements from all three witnesses from whom I heard. I was provided with a small bundle of documents. I received written submissions on behalf of the respondent.

Findings of Fact

8. The relevant facts as I find are these. The facts were largely not in dispute.

9. The claimant had been employed since 2011 on Grade 1 in the packing and stacking of biscuits in the respondent's factory in Kirkham.

10. The respondent's grading structure, for this part at least of the business, includes a starter rate of pay followed by Grades 1-5. Some of those employees, as the claimant did, worked on what is called an alternating shift pattern.

11. The claimant's pay, prior to the matters with which the case was concerned, was made up, along with the other workers, of a basic hourly rate, and at the start of January 2016 that was £6.86 per hour, and a 20% shift premium applied to the basic hourly rate to give a total remuneration for each hour of work of £8.23.

12. The respondent recognises and has entered into collective agreements with the relevant union, the Bakers, Food and Allied Workers Union ("BFAWU"). The claimant was not a member of the union.

13. In the latter part of 2015, in October, the respondent began negotiations with the BFAWU in relation to two matters: a negotiation on pay rates and a negotiation on the proposal to simplify the pay rates by removing shift premiums and consolidating pay into a single hourly rate.

14. The respondent's reason for doing this was not an intent to decrease the levels of pay workers would receive, but a need for the respondent, who typically awarded

a 1%-2% pay rise on a annual basis, to protect its pay model because of the impending implementation of the National Living Wage. It was necessary, the respondent considered, to maintain the pay differential between the grades and to control wage costs to protect financial performance on the site and ultimately jobs.

15. By way of explanation of that rationale there was included in the bundle a document (35) which identifies the rates of pay at the material time. It comprises part of a letter to employees. Looking just at the hourly rates of pay, that is without the 20% alternating shift premium which would apply to each of the following rates, the rates for Grades 1-5 were respectively £6.86, £7.02. £7.26, £7.74 and £8.25. Those were the hourly rates at the beginning of the year.

16. In April 2016 the minimum rate of the National Living Wage which was then to be implemented was £7.20 per hour. It would be necessary for employers to comply with the legislation. For the respondent it would mean that they would be required to increase the wages of Grades 1 and 2 to £7.20. If the respondent had made no other pay adjustments at that stage that increase would have wiped out the differential between Grades 1 and 2 as between one another and it would have markedly reduced the differential between Grades 1 and 2 and Grade 3 and similarly, but to a lesser extent, the differential between those grades and Grades 4 and 5.

17. The respondent took the view that it simply could not increase the grade rates proportionately from a starting point of £7.20 an hour and then going up from there. The evidence of Ms Knowles was that taking into account the wage bill at Kirkham and at their other sites at Batley in Yorkshire and at Uttoxeter and Distribution Centres, to make such increases would have reflected a £1.3million per annum increase in wages. That would represent something in the order of a 5% increase across the board. According to Mr Lees' evidence, which I accept, that would have made the company uncompetitive and it would have put its financial performance at such risk that ultimately jobs might have been lost. Those underlying facts I elicited recited by questions to Mr Lees and Ms Knowles and the claimant did not seek to challenge them.

18. It is against that basis that the respondent, in October 2015, had a series of meetings with the representatives of the BFAWU. There was a workplace ballot which was rejected because agreement could not be reached. Had the ballot been accepted the total remuneration that the claimant would have received under the revised arrangement would have been £8.394 per hour which was effectively a 2% increase, on the existing rate of £8.23. That 2% increase was broadly in line, as I have said, with increases in preceding years.

19. There was then a process of collective consultation because of the failure to agree and that took place in the following months. No criticism is made by the claimant as I understand it of the consultation process with the union, and in parallel with that the respondent consulted with affected employees, including the claimant, on an individual basis.

20. That began with the claimant in this way. There was a letter to her on 27 January 2016 (41) which set out the respondent's proposal and invited voluntary

agreement to the changes then proposed. The letter explained, in addition to the proposed changes that, if the changes were agreed the employees would receive an increase on the overtime rate.

21. For those employees who did not confirm voluntary agreement to the changes a follow up letter was sent (45), and because she did not agree the claimant was invited to a meeting on 9 February. The respondent's proposal was explained in detail.

22. It is right to say that at one stage it was being suggested that whereas at the beginning of April 2016 the basic rate for the claimant would go up to £7.20 an hour, which with the 20% shift premium would take her hourly rate to £8.64, it was suggested at an earlier stage that as at 9 May 2016 the hourly rate would revert to £8.23. That proposal was not in the event implemented.

23. It is common ground that from the beginning of April 2016 through until the conclusion of her employment the claimant was remunerated at the rate of £8.64. But what the claimant was being asked to agree to was that upon implementation of the new pay structure her hourly rate would reduce from £8.64 in effect to £8.39. That rate of £8.64 effectively applied to all those at Grade 1 or 2 for the reasons that they were affected by the National Living Wage. It did not apply to the employees at Grades 3, 4 and 5.

24. Effectively then what the claimant was being offered, was a temporary pay increase from £8.23 an hour to £8.64 an hour, but then for her pay to revert to a middle range figure of £8.39 which on the preceding year's pay rate represented a 2% pay increase to which I have referred.

25. The claimant throughout considered this proposal to be immoral, to be disadvantageous to her and to those in her group. The consultation continued in that the claimant replied on 29 January 2016 refuting the respondent's argument. She had a meeting, as I say, on 9 February 2016. She submitted a letter of objection on 8 March 2016 (66).

26. The respondent then wrote to all the employees on 18 March 2016 (68) and then the claimant had a second meeting on 24 March 2016 with Ian Jackson and Ms Knowles.

27. As a result of that meeting, and the claimant's unwillingness to accept the proposal, the respondent wrote to the claimant on 25 March 2016 (74) indicating that they were giving notice to terminate her employment on her existing terms and conditions, but with an offer to re-engage her immediately upon her notice period expiring at the new rate. The claimant was advised that she was being given 12 weeks' notice as of 25 March 2016. It said in terms that she was offered a contract with new terms and conditions which would come into effect on 19 June 2016.

28. The claimant was notified of her right to appeal to Mr Lees, and she exercised that appeal by a letter of 31 March 2016 (75). She accepted in that letter that the company had a right to combine her basic rate with the shift allowance and made no objection to that, but she did not agree with what she considered to be a

deduction of 4% from her shift allowance in comparison with other members of the higher grades, and that was based upon the higher rate of pay of £8.64 that was implemented from April. She said that she considered the dismissal and re-engagement unfair to her as a Grade 1 worker as other grades would not be affected by the changes proposed. She said that she considered the contract required giving her a 20% shift premium was a right that she was entitled to assert, and to remove that she considered to be a breach of her contract, and she said, "That is the reason that I have not signed this proposal". She did not consider that it was fair, just or correct that this would occur and that as a Grade 1 worker she was being discriminated against for being on a lower grade.

29. The claimant is an intelligent person and she has identified that group disadvantage may give rise to an allegation which might amount in certain circumstances to indirect discrimination. But I note here that there is no allegation of discrimination by the claimant of an act made unlawful by the Equality Act 2010. That was not the claimant's case before me today. She considered that being threatened with dismissal for the reason of her rejection of changes proposed to her terms and conditions amounts to unfair dismissal.

30. The appeal was acknowledged. The appeal hearing was conducted by Mr Lees on 8 April 2016. By his outcome letter (77-78) Mr Lees rejected the appeal and set out in the letter the rationale for doing so. He said that it had been explained to the claimant that the decision to create one hourly rate "was to allow the company to absorb the cost of the National Living Wage and for that reason the new contract does not detail a shift premium but one rate which will be paid hourly" and there was no alteration in the value that the claimant would receive because of the calculations. Pre-consolidation the basic rate of £6.9952 per hour and 20% shift pay would result in the same figure as the £8.3942 per hour as evidenced by the new contract.

31. Mr Lees explained that because of the notice period all Grade 1 and Grade 2 employees would be paid £7.20 plus shift premium to comply with both contractual and legal obligations until 18 June. He understood that the claimant believed the transition from 19 June was unfair, but he pointed out that the value of the claimant's hourly rate after that date was above the National Living Wage and allowed the differential of grades to remain in the pay structure. For that reason he considered that no deductions would be made to the wages. He said that everybody had been subject to the same process. For that reason he though that there had been no discrimination in respect of the claimant being a Grade 1 worker. He said this:

> "To address your final point of appeal, it is your belief that the company does not have the right to issue a new contract. The contract between an employee and employer can be varied by either party with mutual consent. In this case mutual consent has not been reached and that is why the company issued you with notice of dismissal on 25 March 2916 in line with the notice period required by your contract. This notice period is 12 weeks. You have been offered re-engagement on new terms as of 19 June 2016."

32. On 15 June 2016 the claimant wrote again rejecting the proposal. On 16 June 2016 Ms Knowles wrote to the workforce as a whole making some point on the

hours of work clause clear that had not been made clear, although the claimant refers to this in her witness statement, in my judgment it does not take either case any further.

33. Thus the claimant's employment ended on 18 June 2016 when her notice expired. Since then she has been unemployed.

34. Considering the workforce as a whole, I find as a fact, upon the respondent's unchallenged evidence, that 433 employees were affected by the proposals. 425 employees voluntarily accepted the changes. Only 8 employees were served notice at the end of the consultation process, of whom of course the claimant was one. Of that group of 8 only the claimant was dismissed.

Relevant Law

35. The relevant statutory provision section 98 of the Employment Rights Act 1996. Where an employee has a right to complain of unfair dismissal is dismissed, the employer must show that the reason for dismissal was a potentially fair reason. In this case the respondent asserts that it was "a substantial reason of a kind such as to justify the dismissal of the employee from holding the position" which she held. If that reason is established then the Tribunal has to decide whether the respondent acted reasonably in treating that reason as sufficient to dismiss taking account of the circumstances and equity and the substantial merits of the case.

36. As to the reason for dismissal, Mr Symons submits that the Tribunals have long recognised the rights of employers to dismiss employees who refuse to go along with a business reorganisation, and he referred me to a quotation from paragraph 11 of the judgment of Lord Denning in **Lesney Products and Co Limited v Nolan and others [1977] IRLR 77**:

> "It is important that nothing should be done to impair the ability of employers to reorganise their workforce and their terms and conditions of work so as to improve efficiency."

37. In a similar form of reorganisation in the case of **Hollister v National Farmers Union [1979] ICR 542** the Court of Appeal held that a "sound, good business reason" for reorganisation was sufficient to establish some other substantial reason for dismissing an employee who refused to accept a change in terms and conditions.

38. In the case of **Scott and Co v Richardson EAT 0074/04** it was held that the reason is not one that the Tribunal considers sound but one which the respondent considers sound provided that it was not "whimsical, unworthy or trivial".

39. The business reasons in this case that the respondent relied upon, and which I accept were their reasons, were to protect the respondent's pay model against future increases in the wage, to maintain the pay differential between grades, to control wage costs and ultimately to save jobs. It is of course not for me to make my own assessment of the advantages to the respondent's business of the changes. I need only to be satisfied that there were "sound good business

reasons" for introducing the changes that were not "whimsical, unworthy or trivial". In my view, and applying the approach in later authorities and employer will probably satisfy this test unless the tribunal concludes that no reasonable employer could reasonably have proposed the changes for the reasons that they have established. Given the unchallenged figures about the company's business and the evidence given by Mr Lees it would be hard to argue to the contrary. For that reason I conclude that the respondent has established a substantial reason of a kind which might justify dismissal of an employee who does not accept the changes.

40. The question then becomes one of whether I determine that the dismissal was fair or unfair. The case of **Catamaran Cruisers Ltd v Williams and others [1994 IRLR 386** at paragraphs 27 and 28 shows that the assessment of reasonableness requires a balance usually between the reasonableness of the employer in dismissing the employee and the reasonableness of the employee in refusing to accept the change.

41. I note, of course, that it is an open test, that is to say there is no burden of proof on either party. It is clear that the interests of the employer and employee may conflict and be irreconcilable. It may indeed be reasonable for an employee to refuse to accept certain changes but nonetheless reasonable for the respondent to seek to engage the employee in making those changes with the giving of notice of termination.

42. Again I am reminded that it is not for me to substitute my own view of what is reasonable in this context, and the overarching question is whether the decision was within the range of reasonable decisions which a reasonable employer acting reasonably could reach. The authority for that is **William Cook (Sheffield) Limited v Bramhall and others EAT 0899/03**.

43. The respondent's submissions on this point are that there was a lengthy collective consultation process with the recognised union, an attempt to ascertain agreement for the changes before seeking to reach agreement with the workforce itself, the business reasons for change were outlined to the union and to the employees, and the claimant and other employees were given a reasonable warning of the changes. To be fair the claimant does not suggest otherwise. There was, the respondent argues, meaningful and extensive consultation with the union, genuinely engaging with the proposals and feeding back on them during the consultation process. It is not suggested to me that this is a case in which the union itself has sought to take action against the company by way of a claim for a protective award. It seems to me that that is a fact which provide some support for the respondent's position.

44. The consultation with the claimant herself was meaningful and extensive as I have described it in my findings of fact. She accepts that the effects of the proposed changes were clearly explained to her. She accepted that she was offered a right of appeal and it is clear that her appeal was considered genuinely by Mr Lees. The claimant made no argument to the contrary.

45. The respondent submits it is relevant for me to consider also both the claimant's pay position at the commencement of consultation and what it would have been

had she accepted the changes to terms and conditions. On the facts prior to consultation she was receiving in effect a wage of £8.23 an hour and if she had accepted a change to terms she would have had an effective rate of pay of £8.39 an hour. It is right that in the meantime she had an enhanced rate of £8.64 an hour but that was, I am satisfied, only ever afforded to her temporarily and there was no contractual obligation that the respondent should pay this permanently.

46. The respondent had considered the position of the claimant and all of the affected employees. The effect of the proposed changes did not and would not have resulted in any employee receiving a decrease in pay between January and June 2016. It is right that those at Grade 1 and 2 would in June have a decrease from the temporarily enhanced rate of pay implemented in April under the National Living Wage but would then still receive more than they had received under the previous contractual provision.

47. It was reasonable, submitted the respondent, for the respondent to wish to mitigate the effect of the implementation of the national living wage in the manner in which it did. It based that submission on the fact the claimant had received an effective rate significantly above the new living wage prior to its implementation. It was reasonable, it was submitted, for the respondent to wish to remove shift premiums given the ever increasing rates of national minimum wage and the compounded effect on those increases that fixed percentage shift premiums would have. The new terms and conditions included a general 2% wage increase and included as well an increased overtime rate.

48. As to overtime, I should say that the claimant acknowledged that the increase to the overtime rate was 8.23% and whilst she had performed overtime in the past in the last year or so she said that outside of her normal working time, which was 40 hours a week, she devoted her other time to voluntary work and therefore the fact that there was overtime available at an enhanced rate was not of any particular relevance to her.

49. The claimant agreed that during the process and the negotiation with her no viable alternatives were advanced by her. She said that she was waiting for the respondent to come up with a compromise and it did not do so. It was not suggested that the BFAWU or any other employee had put forward viable alternatives whereby the respondent could control wage costs either in the short or the long-term.

50. The final evidential fact on which the respondent relied is that of the 433 employees who were affected, 425 of them accepted the changes. Only 8 employees were served notice at the end of the consultation process, of whom of course the claimant was one. Of that group of 8 only the claimant refused to accept the new terms on re-engagement. She was the only employee who lost her job in this process. The claimant said that she had stood up for what she believed was right and she was proud that she had done so, and I can understand from one perspective why she should feel that.

51. The claimant also said to me in submissions, and I do not have any difficulty accepting this, that some other employees felt threatened by the proposal with which they did not agree but felt they had to keep their jobs. I recognise that in an

exercise such as this that may well be a factor in play for some part, perhaps a large part, of the workforce, but that itself does not render the process unfair. The economic balance between employer and employee is that the employee is usually far more dependent upon the employer providing employment on an individual basis than the employer is dependent upon that particular employee. In a largely unionised employment the bargaining power of the workforce collectively may be that much the greater but will not necessarily be equal to that of the employer.

52. Taking those matters into account I have to ask myself the question whether the decision was fair or unfair taking into account the claimant's argument. The claimant's argument was threefold.

53. The claimant argues that because the proposal only affected Grade 1 employees such as her it was unfair. I do not accept that argument. I do not consider it to be factually sound. I accept that Grades 1 and 2 were advantaged for a short period of timeand thereafter reverted to the position they would have been in had they gone along with the other grades, for the reasons that I have outlined. I do not accept that the process only affected Grades 1 and 2. The overall result affected all employees, but it affected some more than others. What I have noted is that the new pay scales retained the differentials between grades and that the increase to the resulting rates of pay across the board, within a few hundredths of a percentage point was effectively 2% for all employees.

54. The claimant next argue that it was unfair to remove the shift allowance. The claimant is right to say that her contract provided for a 20% shift allowance. The respondent accepts that they could not unilaterally vary that. It is right that the effect of the changes was to reduce the claimant's shift allowance below 20% if in fact the starting rate of pay was £7.20, but the mere fact that the Government by legislation has required employers to change wages as it does year by year, either in relation to the National Minimum Wage or now the National Living Wage, does not necessarily mean that the respondent in responding to that has acted unreasonably. Of course by changing terms unilaterally there is in law a breach of contract.

55. Finally, the claimant's argument is that she has suffered an unlawful deduction from wages. In my judgment neither historically nor, as it were, for the foreseeable future after the changes were implemented, if they had been implemented and the claimant had accepted them, would she have suffered an unlawful deduction from wages as defined by statute. The respondent made no deductions, nor at any stage paid the claimant less than she was entitled to under her contract of employment.

56. Thus taking into account the competing arguments of claimant and respondent I cannot reach the conclusion that the process leading to the claimant's dismissal or the decision to dismiss itself were decisions which no reasonable employer could reasonably have made in the circumstances.

57. When an employer is faced with this situation, that it needs to change terms and conditions for good reason, if such good reasons exist, the proper course for it is to consult, to give notice of termination in the effect of the consultation not

reaching agreement, and to allow the opportunity for people to make representations in the process and decide for themselves whether to accept or not the terms that are then being offered.

58. In my judgment that is exactly what this employer did and so for all those reasons, whilst I am satisfied that the claimant was dismissed, I find that the reason for her dismissal was a substantial reason of a kind such as to justify the employer's actions, and that the employer acted fairly having regard to section 98(4).

59. For those reasons I dismiss the claim.

Employment Judge Tom Ryan 17 February 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

22 February 2017

FOR THE TRIBUNAL OFFICE