EMPLOYMENT TRIBUNALS

Claimant: **Mr Jordan Gutang**

Respondent: **Simtom Food Products Limited**

Heard at: **Leicester** **On:** **6 June 2017**

Before: **Employment Judge Evans (sitting alone)**

Representation
Claimant: **Mr Alford (Counsel)**
Respondent: **Mr Jenkins (Counsel)**

JUDGMENT

1. The Claimant was unfairly dismissed. However if the Respondent had followed a fair procedure there is a 90% chance that the Claimant would have been dismissed in any event.

2. The Claimant was not as a result of his dismissal entitled to a statutory redundancy payment.

3. The Respondent breached the Claimant's contract of employment by failing to pay him quarterly bonuses from the second quarter of 2013. The Respondent is ordered to pay the Claimant damages for breach of contract of £3588.

REASONS

Preamble

1. The Claimant was employed by the Respondent from 1991 until he was dismissed with effect from 26 August 2016. Following his dismissal, the Claimant presented claims of unfair dismissal, for a statutory redundancy payment and for unlawful deductions from wages. Subsequently his claims were amended to include a claim for breach of contract.

2. The hearing of the claims took place on 6 June 2017 in Leicester. The Claimant was represented by Mr Alford of Counsel. The Respondent was represented by Mr Jenkins of Counsel.

3. Ms Jane Critchley (HR Manager) and Ms Jyoti Chandarana (Operations Director) gave evidence on behalf of the Respondent. The Claimant gave evidence himself and called Mr Bincemon George as a witness. In the event, the Respondent agreed Mr George's evidence as set out in his witness statement and so he did not give live evidence.

4. At the beginning of the hearing the Tribunal had before it an agreed bundle of 91 pages. Page 92 was added with the agreement of all parties at the beginning of the hearing.

Issues

5. At the beginning of the hearing there was a discussion of the issues that I would need to determine in order to decide the claims. It was agreed that these were as follows (by reference in part to a list of issues that Mr Alford had prepared in advance of the hearing):

Unfair dismissal

1) Was the Claimant dismissed for a potentially fair reason under section 98(1) and (2) of the Employment Rights Act 1996 ("the 1996 Act")?

   (The Respondent contended that the reason for dismissal was "some other substantial reason" and the Claimant contended that it was "redundancy".)

2) If the Respondent can show that dismissal was for a fair reason, was the dismissal fair or unfair (having regard to the reason shown by the employer): in the circumstances (including the size and administrative resources of the employer's undertaking) did the Respondent act reasonably or unreasonably in treating the decision for dismissal as sufficient reason for dismissing the employee, determined in accordance with equity and substantial merits of the case?

3) If the reason is shown to be redundancy, did the Respondent adopt a fair procedure, in relation to consultation, selection and seeking suitable alternative employment?

   (At the beginning of the hearing there was some discussion of how such issues fitted with the facts of the case. Subsequently, in his closing submissions, Mr Alford for the Claimant indicated that in fact the Claimant would not argue that his dismissal was unfair if I found that the reason for it to have been redundancy.)

4) If the reason is shown to be some other substantial reason, was the dismissal fair in all the circumstances of the case including the procedure adopted by the employer?

5) If the dismissal was unfair, should any compensatory award be reduced under section 123(1) of the 1996 Act as a result of the application of the principle derived from the case of Polkey v AE Dayton Services Ltd 1988 ICR 142 ("the Polkey Principle")?

6) If the dismissal was unfair, should compensation be reduced under section 123(6) or section 122(2) of the 1996 Act as a result of the Claimant's conduct?

Statutory redundancy payment

1) The Claimant contended that there was a redundancy situation pursuant to section 139(1)(b) of the 1996 Act. Therefore, was the Claimant's dismissal wholly or mainly attributable to the fact that the requirements of the Respondent:

   a) for employees to carry out work of a particular kind; or

   b) for employees to carry out work of a particular kind in the place where the employee was employed by the employer

   had ceased or diminished or were expected to cease of diminish?

2) Considering the factual and geographical situation (as set out by the Court of Appeal in High Table v Horst [1997] IRLR 513) what was the 'place' where the Claimant was employed by the Respondent?

3) Did the Respondent's need for employees to carry out work of a particular kind in that place cease or diminish?

4) Was the Claimant's dismissal wholly or mainly attributable to such a cessation or diminution?

5) Did the Claimant turn down an offer from the Respondent of suitable alternative employment?

(In fact in his closing submissions Mr Jenkins accepted that, if the answers in relation to issues 1 to 4 were in the Claimant's favour, then the Claimant was entitled to a statutory redundancy payment. The Respondent would not in those circumstances argue that the Claimant was not entitled to a statutory redundancy payment on the grounds that he had unreasonably refused an offer of suitable alternative employment.)

Breach of contract/unlawful deductions from wages

6. The Respondent conceded that the Claimant was contractually entitled to a bonus in the terms alleged. The Respondent also conceded that it had withdrawn the bonus scheme by making a unilateral variation to the Claimant's contract which was not permitted by its terms. The Respondent further accepted that it had not paid the Claimant all the bonus payments it should have paid him before the bonus scheme was withdrawn.

7. The terms alleged were that the Claimant would be paid a bonus of £400 (gross) in respect of every three month period during which he worked more than a certain number of hours. It was accepted by the Respondent that the Claimant had worked the requisite number of hours throughout the periods in question.

8. In these circumstances the issues for me were agreed to be:

1) Whether the Claimant agreed to varied terms of employment which did not include a bonus entitlement by continuing in the Respondent's employment after the bonus scheme was withdrawn.

2) How many bonus payments were due to the Claimant in respect of the period prior to the bonus scheme being withdrawn.

9. Mr Alford for the Claimant also argued that if the Claimant succeeded in his breach of contract claim he was entitled to a further two to four weeks' pay by virtue of section 38 of the Employment Act 2002 ("the 2002 Act").

Remedy issues

10. It was agreed that I would deal with any amounts due to the Claimant:

10.1. in the event that his claim for breach of contract/unlawful deductions were successful; and
10.2. in respect of any statutory redundancy payment due to him

without the need for a further hearing.

11. At the end of the hearing the parties agreed that if the reason for the Claimant's dismissal was redundancy (which the Respondent denied), the statutory redundancy payment due to the Claimant would be £14,370.

12. At the end of the hearing the parties also agreed that the net amount due to the Claimant in respect of his bonus in respect of any quarter when it should have been paid but was not was £276.

13. Finally, it was agreed that if I found that he had been unfairly dismissed, there would be a separate hearing to determine the amount of compensation payable in respect of the unfair dismissal claim. A remedy hearing was therefore contingently listed for **Friday 15 September 2017.**

The Law

Unfair dismissal

14. Section 94 of the 1996 Act gives an employee the right not to be unfairly dismissed.

15. Section 98(1) of the 1996 Act provides that when a Tribunal has to determine whether a dismissal is fair or unfair it is for the employer to show the reason for the dismissal and that such reason is a potentially fair reason because it falls within section 98(1)(b) or section 98(2). The burden of proof to show the reason and that it was a potentially fair reason is on the employer. A reason for dismissal is a set of facts known to, or beliefs held by, the employer which cause him to dismiss the employee.

16. If the Respondent persuades the Tribunal that the reason for dismissal was a potentially fair reason, the Tribunal must go on to consider whether the dismissal is fair or unfair within the meaning of section 98(4) of the 1996 Act. This requires the Tribunal to consider whether the decision to dismiss was within the band of reasonable responses and shall be determined in accordance with equity and the substantial merits of the case.

17. Section 98(4) applies not only to the actual decision to dismiss but also to the procedure by which the decision is reached. The burden of proof is neutral under section 98(4).

18. In considering this question the Tribunal must not put itself in the position of the Respondent and consider what it would have done in the circumstances. That is to say it must not substitute its own judgment for that of the Respondent. Rather it must decide whether the decision to dismiss the Claimant fell within the band of reasonable responses which a reasonable employer might have adopted.

19. If the Respondent contends that "some other substantial reason" was (as in this case) a business re-organisation, it will establish that reason if it can show that there was a sound, good business reason for the re-organisation. It must be able to demonstrate some discernible advantage to the business. If it succeeds in this respect, when considering the issues to which section 98(4) of the 1996 Act gives rise, factors that can be taken into account are matters such as (1) the extent of consultation; (2) whether the employer acted reasonably in deciding that advantage to it outweighed the disadvantage to employee(s); (3) the number of employees who actually agreed to the changes; (4) the financial effect of the changes on all employees.

20. Turning to the "Polkey principle" section 123(1) of the 1996 Act provides that:-

> *... the amount of the compensatory award shall be such an amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence to the dismissal in so far as that loss is attributable to action taken by the employer.*

21. Consequently if the Tribunal concludes that the Claimant was unfairly dismissed it must also consider in assessing the amount of any compensatory award whether he would have been dismissed fairly at a later date or if a fair procedure had been followed.

22. Turning to the issue of Claimant's conduct, section 123(6) of the 1996 Act provides that:

> *Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers it just and equitable having regard to that finding.*

23. In addition, section 122(2) of the Employment Rights Act 1996 provides as follows in relation to the basic award:

> *Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly*

Statutory redundancy payment

24. Section 135 of the 1996 Act requires an employee to pay a statutory redundancy payment when the employee is dismissed by the employer by reason of redundancy.

25. Section 139 sets out the circumstances in which an employee is dismissed by reason of redundancy. So far as relevant, an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to

> *The fact the requirements of that business –*
>
> *(i) for employees to carry out work of a particular kind, or*
> *(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer*
>
> *have ceased or diminished or are expect to cease or diminish.*

The Employment Act 2002

26. Section 38(2) of the 2002 Act provides as follows:

> *If in the case of proceedings to which this section applies –*
>
> *(a) the employment tribunal finds in favour of the employee, but makes no award to him in respect of the claim to which the proceedings relate, and*
> *(b) when the proceedings were begun the employer was in breach of his duty to the employer under section 1(1) or 4(1) of the Employment Rights Act 1996…*
>
> *… the Tribunal must, subjection to subsection (5), make an award of the minimum amount to be paid by the employer to the employee and may, if it considers it just and equitable in all the circumstances award the higher amount instead.*

27. Section 38(2) applies to breach of contract claims brought in the Employment Tribunal (by virtue of Schedule 5 to the 2002 Act). The "minimum amount" is two weeks' pay and the "higher amount" is four weeks' pay (section 38(4) of the 2002 Act).

Breach of contract

28. The Respondent accepts in this case that it made a unilateral change to the Claimant's contract of employment by withdrawing a contractual bonus scheme in 2013. The Respondent accepts that the Claimant did not expressly agree to the change.

29. In respect of pay or matters which are immediately reflected in the employee's pocket, such as in the current case when the Respondent stopped paying a bonus which was payable every three months, the employee will be held to have accepted the change by acquiescence unless some relevant protest is made.

Findings of Fact

30. I am bound to be selective in my references to the evidence when setting out my findings of fact. However, I wish to emphasise that I considered all the evidence in the round and have taken account of all of it.

31. The Respondent produces and supplies a variety of Indian foods to supermarkets and other organisations. The Claimant was employed by the Respondent from 1991 until his dismissal which took effect on 26 August 2016.

32. At the date of his dismissal the Claimant was employed under the terms of a contract dated 1 April 2011. This stated that he was employed as a "production operative" and that his usual place of work was "Unit 17, Merry Lees Industrial Estate, Leeside". It described his hours of work as 09.00 to 18.30 (Monday to Thursday) and 09.00 to 13.00 (Friday).

33. The Respondent's business expanded rapidly in 2013. This resulted in the Respondent having two production lines. Line B was the newer and larger production line and the greater part of the Respondent's production came from it. Line A was the smaller production line. The Claimant worked on Line A.

34. In the middle of 2015 the Respondent decided that in order to satisfy increased demand for its products it needed to move to 24 hour production seven days a week on Line B. This would result in there being four shifts: two day shifts and two night shifts. Each shift would work a pattern of four days on, four days off. The Respondent undertook a consultation exercise with its existing employees about the new shift system. It also recruited further staff to work on Line B. The new shift patterns on Line B came into effect on 1 January 2016.

35. By early 2016 there were only three employees still working on Line A: the Claimant, Naison Shomai and Bincement George. Mr George resigned on 26 February 2016. At this point, the Respondent reviewed its production processes. It decided to "streamline" them by moving production from Line A to Line B and closing Line A. This was not intended to result in a reduction in the production of what had up to that date been "Line A products" or a reduction in the number of employees. The intention was that all of the production and both the Claimant and Mr Shomai would move from Line A to Line B.

36. I was not provided with detailed evidence in relation to the production techniques, equipment or employee roles for Line A and Line B. I find that both lines were engaged in the production of Indian foods but that different foods were produced on the two lines. I find in accordance with Ms Chandarana's evidence that Line A was a little less automated than Line B and that a little more manual work was carried out on it. I find that the manufacture of foods which were produced on Line A prior to its closure was at that point transferred to Line B. I find that although limited training was required for employees to operate different parts of the production process on Line A or Line B (because different machines were involved) employees could (and were) asked to carry out a variety of tasks on their respective production lines. I find that all relevant employees were simply employed as "production operatives".

37. Line A and Line B were in adjacent rooms at Unit 17 of the Merry Lees site. I find that the Respondent's level of production of the foods made on Line A did not reduce following the production of foods being moved from Line A to Line B. I also find that Claimant's dismissal did not result from any reduction in the needs of the Respondent for employees generally. To the contrary, at the time of the Claimant's dismissal it had a number of vacancies but there were all on Line B which was working the four days on four days off shift system.

38. The Claimant was asked to attend a meeting with Ms Chandarana and Ms Critchley on 29 April 2016. I find that at that meeting Ms Chandarana and Ms Critchley told the Claimant that he would have to move to a 4 on 4 off shift system. He could chose to

work days or nights. All shifts were 6 a.m. or p.m. to 6 p.m. or a.m. He could choose either of the two 4 on 4 off rotations – the significance of that being that the dates on which each of the 4 shifts would work over the next year were available. Ms Chandarana said that she had completed the form at pages 54 and 55 during this meeting. I find that the tenor of the meeting is reflected in the text written on the second page of the form (which the Claimant signed at the end of the meeting):

> *If by the end of the consultation period you are not willing to change to the new shift pattern, then your employment will be terminated on contractual/statutory notice and a new contract will be issued to you.*
>
> *You will then have the choice of accepting the new contract of your contract of employing being terminated.*
>
> *We sincerely hope that any issues can be resolved before this stage.*

39. That is to say that the Claimant had no choice but to move onto one of the four shifts of the four on four off shift system. I find that the box on the form which stated "Do you have any extenuating circumstances that will prevent you from working the new shift system" had (as Ms Chandarana explained) been included when the introduction of the new shift system had been introduced for all Line B employees so that they could raise issues in relation to which of the four shifts they had been pre-allocated to. So, for example, if someone had been pre-allocated to nights but preferred to work days, consideration would have been given to whether that was possible.

40. The Claimant's evidence was that he had said at the first consultation meeting that the new shift system was incompatible with his childcare obligations. Ms Chandarana and Ms Critchley said that he had not raised it at the first meeting but instead had raised it at the second meeting on 6 May 2016. On balance, I prefer the evidence of the Respondent's witnesses in relation to this issue because I find that if the Claimant had raised issues at the first meeting then Ms Chandarana would not have ticked the box on the consultation form indicating that there were circumstances which would prevent him from working the new shift system. However I also find that the Claimant did not <u>say</u> anything at the meeting on 29 April which suggested that he would agree to the new shift pattern: rather he listened to what was said to him and said little. I find that there is no real significance in the fact that the Claimant did not raise specific objections to the new shift system at this meeting. He was aware that there would be a further consultation meeting. The Respondent did not at the hearing dispute that he had raised childcare issues at the second meeting a week later. I further note that the Respondent did not dispute at the hearing that the Claimant's childcare obligations were incompatible with weekend working, although its witnesses said he had also raised the issue of part-time weekend work at a Chinese restaurant.

41. There was a further meeting on 6 May 2016 attended by the same people. I find that at that meeting and at a further meeting on 3 June 2016 the Claimant said that he could not work the new shift system because his wife worked at weekends and so he was responsible for looking after their two children. I also find that the Claimant referred to evening work he sometimes performed at the weekend for a Chinese restaurant. I find that the Claimant made a counter proposal at the meeting on 6 May 2016 which would have resulted in him working 6 a.m. to 6 p.m. Monday to Thursday each week.

42. I find that the Respondent did not give any genuine consideration to the Claimant's personal circumstances or to the proposal that he be allowed to work 6 a.m. to 6 p.m. Monday to Thursday. So far as his proposal was concerned, I find that the Respondent dismissed it as soon as it had been made on 6 May 2016. I make these findings for the following reasons:

    42.1. The text of the form suggested that really the offer made was a "take it or leave it offer".

42.2. The Respondent's witnesses did not give any significant evidence that they had given genuine consideration to the Claimant's personal circumstances. The witness statements of Ms Critchley and Ms Chandarana both referred to him raising childcare obligations but do not suggest that there was any real discussion or consideration of these.

42.3. The witness statements of Ms Critchley and Ms Chandarana, and their oral evidence to the Tribunal, did not suggest that any real consideration had been given to the Claimant's alternative proposal. For example, the witness statements of Ms Critchley and Ms Chandarana did not contain either an accurate summary of what the Claimant had proposed or suggest that there had been any consideration of it:

42.3.1. Ms Critchley's statement said:

The Claimant stated that he could continue to work his current hours of work and was informed by Ms Jyoti Chandarana that all production staff were working a four on four off pattern and that the business needs had dictated this change.

This is not an accurate summary because I have found above (and Ms Chandarana accepted in cross-examination) that the Claimant had indicated that he could work 12 hours a day Monday to Thursday - those were not his "current hours of work". Further, it does not suggest that there was any serious consideration of the Claimant's counter proposal.

42.3.2. Ms Chandarana's statement does not even describe the Claimant's counter proposal at all. It stated:

The Claimant was unwilling to accept the new shift pattern, therefore the business was left with no alternative but to terminate his employment. The Claimant was given a letter, dated 3 June 2016 giving him 12 weeks' notice.

42.4. Even in Ms Chandarana's oral evidence, when the danger posed by the lack of consideration of these issues in her witness statement was clear, and which I find to some extent to have been given in light of that, her evidence was that she had dismissed the Claimant's proposal straight after it had been raised on 6 May as "not viable" for the business.

43. I find that after the meeting on 3 June 2016 there were a number of further informal conversations with the Claimant about whether he would change his mind and agree to the new terms. I find that the Respondent's preference was that the Claimant remain in its employment working the new shift system. However I find that those further conversations were limited to whether the Claimant would change his mind: they did not involve any discussion of how his personal circumstances and the new hours of work might be reconciled.

44. Finally, in relation to the issue of the dismissal, I find that the reason for it was clear: the Respondent wished the Claimant to work a four on four off shift system but the Claimant would not agree to this because of his weekend childcare obligations.

45. Turning to factual matters relevant to the breach of contract claim, I find – in accordance with the Claimant's unchallenged evidence - that the last time had had been paid the bonus was in April 2013 in respect of the period January to March 2013. I find – again in accordance with the Claimant's unchallenged evidence – that after the next payment had not been made he had asked Mr Chandarana when it would be paid. Mr Chandarana told the Claimant that it would be paid in the holiday but it was not. The Claimant then asked Mr Chandarana again when he would be paid and Mr Chandarana told him that the bonus had been withdrawn. The Claimant replied to Mr Chandarana that he could not withdraw the bonus because it was "in his contract". Mr Chandarana then walked away and they did not speak about the bonus again.

Submissions

46. I have not set out the parties' submissions in full here. A complete record of them is on the Tribunal's file in the record of proceedings. However their submissions can reasonably be summarised as set out below.

47. Mr Alford for the Claimant first addressed the issue of breach of contract. He said that the Respondent relied on a brief conversation in which Mr Chandarana (who had not attended the Tribunal to give evidence) had told the Claimant that the bonus was withdrawn. The Claimant had objected at the time and had raised the issue again in 2016. In all the circumstances, the Respondent had failed to demonstrate that the Claimant had impliedly consented to the variation.

48. Further, the Respondent had failed to issue a statement of changes under section 4 of the 1996 Act or a revised statement of particulars under section 1 and so the Claimant should be awarded an additional four weeks' pay under section 38 of the 2002 Act.

49. Turning to the issue of unfair dismissal, Mr Alford submitted that if I concluded that the reason for dismissal was "some other substantial reason" then the Claimant's dismissal was not within the band of reasonable responses. This was because: (1) the changes to the working hours that the Respondent proposed were incompatible with the Claimant's children care obligations; (2) the Respondent could have permitted the Claimant to continue working his old hours by recruiting other employees to slot in around the Claimant's hours; (3) the consultation which had been carried out had not been genuine because the Respondent had not approached matters with an open mind; (4) insufficient account had been taken of his 25 years' service. Overall, the fact that he could not work the 4 on 4 off shift pattern was insufficient reason to dismiss him.

50. So far as redundancy was concerned, Mr Alford's primary submission was that the closure of Line A amounted to the closure of the place where the Claimant was employed. Line B was a different place. Consequently the Respondent had had a reduced requirement for employees to carry out work of a particular kind in the place where the Claimant was employed, his dismissal was attributable to that state of affairs and so the reason for his dismissal was redundancy. Alternatively, his dismissal was attributable to there being a diminution in the requirement of the Respondent for employees to carry out work of a particular kind and so again the reason for dismissal was redundancy.

51. Mr Jenkins first addressed the issue of breach of contract. He said that the unilateral variation effected when it was withdrawn was communicated clearly to the Claimant by Mr Chandarana. The Claimant had subsequently worked without complaint and that was sufficient for him to have impliedly agreed to the change.

52. So far as the issue of redundancy was concerned, Mr Jenkins submitted that it was "ludicrous" to suggest that Line A was a separate location to Line B when they were in adjacent rooms. It was clear that the Claimant's place of work had not changed. It was Unit 17. His work was the general work done by a production operative. The need for it had not diminished. Throughout the relevant period the Respondent had been recruiting. Indeed, the Respondent had not wanted the Claimant to leave its employment.

53. Turning to the unfair dismissal claim, Mr Jenkins submitted that the Respondent had approached the consultation process with an open mind and had held no fewer than three meetings with the Claimant prior to his dismissal. The Respondent had explained to the Claimant why the shift pattern had to be as it was. The Respondent's re-organisation of its shift patterns was a reasonable business decision. The dismissal of the Claimant was an unfortunate side effect of it. The Respondent had wanted him to remain an employee but ultimately his personal circumstances were not consistent with the needs of the business. The decision to dismiss clearly feel within the band of reasonable responses. Further, if there was any defect in the Respondent's process (which was

denied), there should be a 100% Polkey reduction because the Claimant simply could not fit his personal life around the new shift system.

54. Both representatives referred me to the case of High Table v Horst but, perhaps surprisingly, I was not referred to any other authorities.

Conclusions

55. It seemed logical to me to consider first whether the Claimant is entitled to a statutory redundancy payment and so I have considered the issues in a different order to that in which they are set out above.

Statutory redundancy payment

56. Mr Alford was unable to identify any authority supporting his proposition that the "place" (for the purpose of section 139(1) of the 1996 Act) where the Claimant was employed was Line A and that Line B was another place. He did, however, draw my attention to High Table v Horst. The headnote of the IRLR report (that being the version provided at the hearing) states:

> *The Court of Appeal held… The place where an employee was employed for the purpose of the employer's business in terms of s.81(2) [of the Employment Protection (Consolidation) Act 1978] is to be determined by a consideration of the factual circumstances which obtained until the dismissal. The question is one that can safely be left to the good sense of the industrial tribunal.*

57. It goes on to reject the suggestion that the place is extended by the existence of a mobility clause to every place where the employee could have been required to work (that being the main issue in that case).

58. Throughout his employment with the Respondent the Claimant had worked at Unit 17 on the Merry Lees Industrial Estate. That is described as his place of work in his contract of employment. I find that that was the "place" where he was employed by the Respondent. I reject the Claimant's contention that the place where he was employed by the Respondent was in fact the physical location Line A. As a matter of good sense adjacent rooms in the same building on the same site are not different "places".

59. I further find that there was no reduction in the requirements of the Respondent to carry out work of a particular kind. In light of my findings above in relation to the nature of the work carried out by employees of the Respondent on Line A and Line B, I find that the "work of a particular kind" was work as a production operative working on the Respondent's production lines. There was no diminution in the needs of the Respondent for employees to carry out such work at all when the Claimant was dismissed. Indeed the Respondent had vacancies for employees to do work of this particular kind. What had diminished was the requirement of the Respondent for employees to work the hours that the Claimant worked Monday to Friday. However working those particular hours was not "work of a particular kind" in these circumstances.

60. Consequently, the Claimant's claim for a statutory redundancy payment fails and is dismissed. The answers to the questions posed by issues 1) to 5) set out above in the issue section of this judgment are:

1) No.
2) Unit 17 on the Merry Lees Industrial Estate.
3) No.
4) n/a
5) n/a.

Unfair dismissal

61. The Respondent contended that the dismissal was for "some other substantial reason". I have found above that the reason for the Claimant's dismissal was his refusal to change his hours of work. He worked Monday to Thursday from 09.00 to 18.30 and on Fridays from 09.00 to 13.00. The Respondent wanted him to work 12 hours shifts, four days on and four days off, either days (06.00 to 18.00) or nights (18.00 to 06.00).

62. The Respondent's evidence was that the change in hours was introduced because Line A was to be closed and Line B operated 24 hours a day 7 days a week. Consequently, employees working on Line B needed to work a shift system which was compatible with that and the shift system used by the Respondent since the beginning of 2016 was two 12 hour shifts per 24 hour period with each shift working four days on and four days off.

63. I conclude that a reasonable employer would consider that there was a sound business reason for the closure of Line A and the consequent change to the hours of work of the Claimant. There were discernible advantages to the Respondent in consolidating all of its production into Line B and in the Claimant fitting in with the existing shift systems on Line B. Consequently I find that the Claimant was dismissed for some other substantial reason.

64. The next question for me, therefore, is whether the dismissal was reasonable in all the circumstances of the case. This is to be determined in accordance with equity and the substantial merits of the case.

65. I find that the dismissal was in these terms unfair for the following reasons:

    65.1. There was no reasonable and genuine consultation process with the Claimant. This would have included listening carefully to his reasons for rejecting the changes and responding reasonably to them. I have made findings above about what his objections were. The principal and most serious one was that it would leave him with difficulties when he was required to work at the weekends: his wife worked and he provided the childcare for his two children. I conclude that the Respondent did not approach the consultation exercise with an open mind. I conclude that the Respondent approached the consultation exercise on the basis that there was absolutely no alternative to the Claimant working the four on four off shift system. Consequently I conclude that the Respondent gave no genuine consideration either to the difficulties which the new hours of work posed to the Claimant or to his alternative proposal or to any possible "third way" of dealing with his difficulties. The Respondent's position was from 29 April that it was a "take it or leave it" offer.

    65.2. I conclude that any reasonable employer would have consulted properly with the Claimant given that he had been a loyal employee of the Respondent for twenty-five years. Proper consultation would in this case have involved the Respondent having an open mind to at least the possibility of other working hours for the Claimant at the outset of the process, discussing the difficulties he had with the new shift system with him with a view to finding solutions, and giving genuine consideration to his alternative proposal. In light of my findings of fact above, I find that the Respondent did none of these things. That is not how any reasonable employer would deal with an employee who has worked for it for 25 years.

66. I therefore conclude that the Claimant's dismissal was unfair. However, turning to the Polkey principle, I also conclude that given the size and limited scale of the Respondent's business there is a 90% chance that if it had followed a fair procedure it would nevertheless have dismissed the Claimant. I so conclude because it would have been within the band of reasonable responses for the Respondent to dismiss if the only alternative to the Claimant's dismissal had been for the Respondent to employ a further three people to work on the opposite shift to him and on the opposite shift rota. Such a solution would have made the Respondent's shift system clumsy, would have reduced the cohesion within teams (because their membership would have been constantly

shifting) and might well have generated resentment within the workforce (because some employees would have been excluded from the requirement to work weekends). However I have concluded that there is a 10% chance that a genuine consultation process in which the Respondent had applied its mind to the problems faced by the Claimant might have resulted in the Respondent finding a way that was acceptable to it of accommodating the Claimant's difficulties with working at weekends in light of his long service and usefulness as an employee. The fact is that when consultation takes place, with both parties engaging properly in it, it is often the case that possible solutions will be found in circumstances where at the outset this did not seem probable or even possible.

67. Turning to the issue of contribution, I have concluded that the Claimant was not guilty of any culpable or blameworthy conduct. Consequently his compensatory award should not be reduced under section 123(6) of the 1996 Act. So far as the basic award is concerned, I conclude that the Claimant's conduct prior to dismissal was not such that it would be just and equitable to reduce it.

68. The Claimant's claim of unfair dismissal therefore succeeds and the answers to the questions set out in the relevant part of the issues section above are as follows:

    1) Yes – some other substantial reason.
    2) No
    3) n/a
    4) No
    5) yes, by 90%.
    6) No

    Breach of contract

69. The Respondent accepted that the Claimant had not expressly agreed to the unilateral variation to his contract of employment imposed when Mr Chandarana told him that the bonus had been withdrawn in 2013. I conclude that the Claimant did not impliedly consent to it either. This is because the Claimant registered his objection to the bonus being withdrawn by telling Mr Chandarana that he could not withdraw it as he purported to do because it was a term of his contract. I accept the Claimant's unchallenged evidence contained in his witness statement that Mr Chandarana is an irascible man who had in the past shouted at the Claimant. I find that if the Claimant had gone back to him a third time (or on further occasions) to demand the payment of his bonus he would have not been paid anything. I further find that the Claimant knew that. I conclude that the Claimant cannot be said to have impliedly agreed to the change on the grounds that he did not revisit the issue.

70. I find that the Respondent therefore failed to pay the bonus three times in 2013, four times in 2014, four times in 2015 and twice in 2016. The net bonus due to the Claimant is therefore 13 x £276 = £3588.

71. The Claimant's claim for breach of contract therefore succeeds and the answers to the questions set out in the relevant part of the issues section above are as follows:

    1) No.
    2) 13.

72. Finally, I conclude that the Claimant is not entitled to any additional amount under section 38 of the 2002 Act. There are two reasons for this: (1) an award has been made to the Claimant in respect of the breach of contract claim; and (2) the Respondent was not in breach of either of the duties referred to in section 38(2)(b) "when the proceedings were begun".

73. There will be a remedy hearing on **15 September 2017** in Leicester to decide the amount of the compensatory and basic awards payable to the Claimant in respect of his

successful unfair dismissal claim in the event that those matters cannot be resolved before then between the parties.

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Employment Judge Evans

Date: 23 June 2017

JUDGMENT SENT TO THE PARTIES ON
12.8.17
.....

.S.Cresswell.....
FOR THE TRIBUNAL OFFICE