EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr K Nelapati	**v**	**Swissport Cargo Services UK Limited**

Heard at: Watford **On**: 9, 10, 11 August 2017

Before: Employment Judge McNeill QC

Appearances

For the Claimant: Miss A Ahmad, Counsel
For the Respondent: Mr D Flood, Counsel

JUDGMENT

1. The claimant's claim for unfair dismissal is dismissed.

2. The claimant's claim for unlawful deductions is dismissed.

3. The claimant's claim for pay in lieu of annual leave is dismissed.

4. The claimant's claim pursuant to s.4(1) of the Employment Rights Act 1996 is dismissed.

REASONS

1. The claimant in this case, Mr Nelapati, brings claims for:
   i. unfair dismissal;
   ii. an unlawful deduction from his wages; and
   iii. a payment in lieu of annual leave which he alleges that he was unable to take in 2015 because of pressure of work and extended sickness absence.

2. The liability issues to be determined by the tribunal were set out at paragraphs 3-8 of a Case Management Summary prepared following a hearing in front of Employment Judge Hill on 21 October 2016. The liability

issues included at paragraph 5 a section headed "Public Interest Disclosure Claims". On 15 November 2016 a claimant's amended claim was sent to the employment tribunal and served on the respondent. In that amended claim it was stated that the claimant had withdrawn his claim of whistle blowing against the respondent. At the hearing before me it was confirmed that the claimant was no longer contending that he had made a protected disclosure and that the making of a protected disclosure was the reason for his dismissal. It was further confirmed by both parties that there were no live time limit issues between the parties as referred to in paragraph 6 of the Case Management Summary.

3. On the second day of the hearing, the claimant amended his claim, with the respondent's consent, to add a claim for a failure to provide a written statement containing particulars of changes in his terms of employment pursuant to s.4(1) of the Employment Rights Act 1996 (the ERA). Neither party, in closing, made any submissions on this claim. The claim appeared to rest on whether the claimant made out his allegation that his contract of employment was varied.

Findings of Fact

4. The claimant was employed by the respondent in October 2008, initially as a cargo reception agent at a basic salary of just under £15,500 a year plus some shift pay, an entitlement to a company bonus and an entitlement to paid holidays as set out in a Conditions of Employment handbook.

5. The claimant achieved significant promotions with the respondent. By December 2013 he had been promoted to Assistant Finance Business Partner, as evidenced by a document headed 'Changes to Terms and Conditions' dated 5 December 2013. He reported to the Finance Business Partner. His place of work was Bedfont Road, London Heathrow, although there might be occasions when he would be required to work in other Swissport 'stations' (airports).

6. The claimant's salary effective from 1 December 2013 was £47,400. He was eligible for a bonus scheme based on a combination of cargo financial performance in the UK and personal objectives. The maximum potential bonus was 20% of his annual salary. Bonus payments were subject to the final approval of the UK CEO and could be withdrawn at any time. The claimant had a car allowance of £4,800 per annum and an entitlement to paid holiday of 27 days. He was only allowed to carry over 37.5 hours' holiday, such hours to be used by the end of March in the following year.

7. The respondent provided freight cargo services at London Heathrow and Manchester airports. The company's head office was originally located at Newcastle Airport and the operation at Heathrow operated out of the Bedfont Road site.

8. In December 2013 the respondent's parent company, Swissport Ltd., acquired Servisair UK Ltd (Servisair). The head office of Servisair was located in Runcorn. Servisair was a larger company than Swissport Ltd in

terms of head count and turnover and the head office of the new and enlarged Swissport group of companies was moved to Runcorn following the takeover. Swissport then embarked on a rationalisation and integration process. The head office support functions being carried out by the various companies throughout the group - including HR, IT and finance - were in due course transferred to Runcorn. In May 2014 all of the company's employees based at the Bedfont Road site, save for the finance team, were placed at risk of compulsory redundancy.

9. In line with the rationalisation and integration process, the company's finance administration function based at Bedfont Road was transferred to Runcorn in early 2015. That meant in practice that all of the company's finance team, apart from the claimant, were placed at risk of compulsory redundancy in early 2015. The exercise was completed by March 2015 and all members of the company's finance team had left by mid 2015.

10. In the summer of 2014 the claimant's line manager was Mr Giles Beattie. He decided to leave the respondent following the takeover. On 15 August 2014 there was a meeting between the claimant and Mr Beattie. There is no note of what was said at that meeting. The only written record of the meeting is an email of the same date from Mr Beattie to the claimant saying: "further to our short discussion please find attached finance staff job descriptions for your reference". That is a reference to finance staff who would report directly to the claimant following the departure of Mr Beattie. The email went on: "if you would like to re-arrange their responsibilities please let me know and we can discuss this. For taking the additional responsibility you will be compensated accordingly."

11. In his ET1 the claimant did not refer in any detail to that meeting. Under the section for "what compensation or remedy are you seeking?" the claimant, who was representing himself, referred to "JV [Joint Venture] Company work outstanding pay = £18,000. 18 months work as I was promised that I will be paid."

12. In his witness statement, the claimant mentioned the meeting of 15 August. He said that prior to Mr Beattie leaving, he asked the claimant to take up the additional responsibility of the joint venture company, Bradford Swissport Ltd and also Mr Beattie's work (responsibilities). The claimant said that Mr Beattie confirmed that the company would pay him for the work done.

13. In additional particulars of his claim, provided following the preliminary hearing in October 2016, the claimant said that in August 2014 Mr Beattie approached him to take up his responsibilities as he was migrating to Australia.

> "He assured me I will be compensated accordingly for taking up additional responsibilities. I accepted my line manager's proposal and we had a joint meeting with our outgoing CFO, Richard Priestley, to finalise this additional responsibilities and agreed my wages will be increased accordingly. They also agreed my job title will be amended from Assistant Finance Business Partner to Finance Business Partner. As both my line manager and CFO could not increase my wages or change my job title at

> that time as they had both resigned their jobs hence could not implement the changes immediately but assured me that they will forward the proposal to the new CFO, Phil Foster."

14. In cross examination, the claimant stated that he had used the word "proposal" in error in his additional particulars. In fact, he said, there was an agreement and not just a proposal. Mr Beattie agreed that the claimant would have the same salary package and job title as Mr Beattie as he would be taking over Mr Beattie's responsibilities. He said that he had asked what his compensation would be and Mr Beattie had said: "to my level". Mr Beattie's pay and benefits included £60,000 basic pay plus a 30% bonus and some health insurance that was more beneficial than the claimant's health insurance as it covered family members.

15. The claimant alleged that the agreement to his new terms and conditions was concluded on 15 August 2014. He said that "the proposal" was to be agreed by Mr Priestley, who was Mr Beattie's line manager, but that if there had been only a proposal he would not have taken up the role. Whatever Mr Beattie agreed had to be approved by Mr Priestley.

16. Mr Priestley, the claimant said, had also given in his notice at the relevant time. He therefore could not confirm the agreement in writing. Mr Priestley could not issue "a paper document". The claimant was adamant that he would not have agreed to undertake the additional responsibilities without an agreement that he would be appropriately recompensed.

17. Shortly before leaving the respondent Mr Beattie wrote an email on 16 October 2014 to Mr Phil Foster, the new Chief Finance Officer (CFO). He said that the claimant would be taking over from him as the lead finance contact for Bedfont Road and that his job title would need to change from Assistant Finance Business Partner on the basis that there was no direct replacement for Mr Beattie at London Heathrow. In effect, the claimant would be performing a Finance Business Partner role as well as his current duties at Bedfont Road. Mr Beattie referred to the claimant taking over the lead finance contact for Bradford Swissport, which included elements of Mr Beattie's role and elements of the role of finance manager. He then said this: "in light of his extra responsibilities and the savings made by not directly replacing my role and the BSL finance manager role I would propose that he receives an increase in his salary of between £5,000 and £10,000. He is effectively performing the same role as I have been doing but would still be on a lot less than the market rate for this sort of multi-site senior finance manager role". He said that the claimant was an asset to the finance team and he was concerned that he would be head hunted. If he did not feel he was being appropriately recognised he might question his loyalty to Swissport. He went on: "obviously the final decision is yours but I wanted to put forward my recommendation before leaving having worked through this with Richard prior to his departure." Mr Beattie had told the claimant that he would be drafting a proposal for Mr Foster before he left.

18. In December 2014 the claimant's line manager, Mr Foster, came to Heathrow from Runcorn head office and had a meeting with the claimant. The claimant raised the issue of his pay rise as he felt he was performing the responsibilities of three staff. Mr Foster said he was currently restructuring ground handling and once that was completed he was also going to restructure cargo. He reassured the claimant, saying he should be patient and that he would definitely do his best for him. The claimant took that on trust.

19. In a document headed "Email summary on increment", the claimant described his meeting on 15 August as follows: "myself and Giles [Beattie] had discussion on taking over additional responsibilities. Giles assured that additional work will be compensated. I have agreed to take up BSL responsibilities." He then referred to Mr Beattie's email of 16 October 2014.

20. In an email to Kimberley Ormerod dated 12 January 2016, the claimant referred to the fact that he had been told he would be compensated accordingly for supporting the business by taking up additional responsibilities. He said he had been shouldering these additional responsibilities which created a lot of stress. He referred to having brought to the attention of Mr Andy Cowie, responsible for HR in February 2015, his grievance about not being paid an additional amount and was assured this could be sorted out amicably. He referred to reminding Mr Cowie several times that he had not "reached any agreement of my outstanding pay settlement." He said he was promised that he would be compensated for taking up additional responsibilities but that this was denied by his line manager who said that these two ex-employees' responsibilities were absorbed into his current role. A number of matters were referred to including stress which the claimant said had damaged his health.

21. From October 2014, the claimant effectively undertook Mr Beattie's role. He worked very hard and for long hours. He line managed additional staff and took up additional responsibilities in relation to the joint venture company Bradford Swissport. Understandably, he became increasingly frustrated by the respondent's failure to address the issue of his terms and conditions. He was discouraged from bringing a grievance with an assurance that matters would be sorted out and they were not. The respondent's failure to address this matter did it little credit and I was sympathetic to the claimant's very real sense of grievance. It was plain that he was given assurances that his situation would be looked at but no priority was given to this.

22. The respondent did not, however, either through Mr Beattie or Mr Priestley, tell the claimant that revised terms and conditions had been agreed. The contemporaneous documentation clearly indicates that no firm agreement was reached as to any revised terms and conditions. Mr Beattie did say that the claimant would be compensated for taking on increased duties and responsibilities but he did not give any detail of what that increased compensation would be. The claimant knew, as stated in his additional particulars, that Mr Beattie and Mr Priestley could not increase his wages or change his job title in August 2014. They had both resigned from their

respective jobs. The claimant's reference to a proposal in his additional particulars properly characterised the facts: there were proposals to better the claimant's terms and conditions to reflect his additional responsibilities but there was no agreement.

23. The claimant knew that the authority to vary his terms and conditions lay with the new CFO, Mr Foster. Mr Foster, however, never proposed nor agreed any revised terms and conditions.

24. By March 2015, the four remaining staff in the finance team at Bedfont Road had been made redundant. Their previous roles were undertaken by staff in Runcorn, some of whom were new, and they reported to the claimant. That placed a particular burden on the claimant because previously he had been working with staff who he knew and who knew their roles: now he was dealing with staff who were new, or at least new to him.

25. In May 2015, the claimant was encouraged by his line manager to apply for a position as Divisional Financial Controller based in Runcorn. The claimant applied but was unsuccessful. Instead, a Mr Greg Connor was selected. The claimant suspected that his race may have played a part. Later in May 2015 the claimant went off sick. He was diagnosed with low calcium levels and vitamin D deficiency. The claimant attributed his illness to the stress caused by the respondent but there was no medical evidence before me which could support such a conclusion. The claimant did find his work situation stressful, not least as a result of the respondent's failure to deal with his repeated requests to address the question of his pay.

26. While he was off sick, the claimant continued to work remotely for the respondent and even to attend board meetings at Bradford Swissport. He was asked, but not ordered to work. When he did work, he asked his line manager if the days when he worked could be treated as working days rather than sick days. This request was refused.

27. The claimant resumed work on 31 August 2015. In September 2015 Mr Connor visited his office and asked the claimant for help in his new role. The claimant declined to support him as he was still recovering from ill health and had no space for additional responsibilities.

28. In August 2015. there was some correspondence in relation to a Mr George Kulasingham undertaking work for the respondent. Mr Connor referred to the expiry of the claimant's sick note and asked about "the latest position" in relation to Mr Kulasingham. Mr Kulasingham had previously worked for Servisair. The correspondence indicated that Mr Gaskell had spoken to Mr Kulasingham who had said he would consider a six month contract; his salary expectation was high based on what he was then earning.

29. Mr Kulasingham responded to some correspondence in early September 2015 and on 19 October 2015 there was an email from Mr Connor to Ms Ormerod stating: "I would like to formally make a job offer to George Kulasingham. George will effectively replace the claimant but will be on an

integration project as I will be moving the SCS finances up into Runcorn. It will be for a six month fixed term contract with a provisional start date of 9 November". He then mentioned salary which he said that Mr Foster, had verbally approved and asked for approval for the claimant's offer "for SAP project/settlement if applicable".

30. Mr Kulasingham's role was to assist in the transition of the company's finance function from London Heathrow to Runcorn. He took up his role on 1 March 2016 and he finished on 30 June 2016. His role was partly based at London Heathrow but as time progressed he was working increasingly from Runcorn. The claimant gave him considerable assistance, in learning his role and in the transition process, between 1 March and 31 March 2016. The claimant was not told in advance about the recruitment of Mr Kulasingham and the job that he was engaged to do, nor indeed was he offered the opportunity to apply for that position himself.

31. On 26 October 2015 the claimant received a phone call from his line manager saying that his job was at risk due to the amalgamation of the finance department into the Runcorn office. He was offered voluntary redundancy. There was reference to a six months' SAP project role which he said he would be happy to do if it did not break his service and he was told that HR would be contacting him.

32. By letter dated 13 November 2015 the claimant was invited to a first consultation meeting in Runcorn on 18 November 2015. He was told that his role had been identified as being potentially at risk of redundancy. It was proposed that the Assistant Finance Business Partner role would re-locate from Bedfont Road to Runcorn. In the light of that proposal, if it were to go ahead and the claimant was not able to re-locate and no suitable alternative proposals or positions could be found, it would result in the claimant's role potentially being made redundant. The claimant indicated that he could not attend a meeting in Runcorn and that it was appropriate to hold the meeting at London Heathrow where his appointment was based. The meeting was therefore re-arranged to take place at London Heathrow.

33. The first consultation meeting took place with Mr Phil Foster, CFO. The claimant confirmed that he was not interested in voluntary redundancy. It was explained to him that his job would be moved to Runcorn. The duties would change slightly given the amalgamation. His reporting line would change but his role would remain. The claimant explained that he thought he could work for three days a week in Runcorn. Mr Foster said that the role was a full-time role based out of Runcorn. That was where finance was based and Runcorn was centrally located for Swissport UK. It was explained that the proposal was to move the role that the claimant did to Runcorn and that the job would transfer to a new place of work. The role would change slightly in terms of integration with the existing finance team and the responsibilities and duties would change slightly with process changing but not the job. The claimant asked about vacancies and was told there were none within the finance team at the moment but there were vacancies in different job functions. Mr Foster explained that the proposal

was to remove the role from London Heathrow to Runcorn to sit with the finance team from the UK. The job would change as Runcorn had a big finance team. There were more specialist roles more resources and better support for finance and operations. The claimant asked for a job description which was sent to him.

34. On 4 January 2016, the claimant was invited to a second consultation meeting. He had a copy of the job description which indicated the job title was Assistant Financial Controller Cargo UK and Ireland and the location of the job was Runcorn head office. It was made clear that due to work commitments Mr Foster was unable to travel to Heathrow and therefore in order not to delay the process, Mr Benwell would be conducting the second consultation meeting. That took place on 7 January 2016. Mr Benwell explained that the reason was to discuss the proposal to move the SCS finance role to Runcorn and to have it sit with the group finance GB team. Ms Morgan (HR) explained that the current job of Assistant Finance Business Partner would be moved to Runcorn on existing terms and conditions. Mr Foster had advised that due to the role sitting with the wider finance team, the duties and reporting processes would change slightly and the up to date job description had been provided. There was then discussion about certain other roles.

35. Mr Gill, the claimant's trade union representative, asked if the Assistant Finance Business Partner role would move to Runcorn. Mr Benwell said "Yes that's why we are consulting". Mr Gill asked if the company would offer a re-location package. Ms Morgan asked if the claimant had researched the area or looked to visit Runcorn. The claimant replied that he had not. Mr Benwell asked the claimant if he thought he might be interested in moving and the claimant said he had not thought about it. He was told that there could be a trial period with maximum of twelve weeks. There was then reference to the fact that he had asked if he could work there for three out of five days and that Mr Foster had explained why he could not. It was agreed with Mr Gill and the claimant that they did not need to re-visit that. The claimant was then given a list of vacancies.

36. In relation to the role that was going to be moved to Runcorn, Mr Gill asked if the claimant would have to apply for that role. Mr Benwell confirmed that he would not. It was the same role transferring and the claimant was being asked if he would transfer with it. Mr Gill asked if the claimant moved, would he get the job. Mr Benwell replied "yes". Just to follow the chronology, in January 2016 the claimant brought a grievance in relation to pay and various other matters. I shall come back to that.

37. On 11 January 2016 the claimant was invited to a final consultation meeting. There was mention of the move to Runcorn and the potential 12 week trial period was confirmed. The claimant was told that the meeting was going to be a formal meeting and it could result in the decision being made to "terminate your employment on grounds of redundancy". The final consultation meeting took place on 15 January. The claimant asked the company to re-consider his request to work three days a week in Runcorn

and two days a week at Heathrow. He said that all the resources he needed were available online. He suggested he attend Runcorn when needed; otherwise, he could be based at Heathrow. He said, if needed, he could be in Runcorn three times a week when reporting was needed. He explained that due to family responsibilities he could initially do two days a week in Runcorn and then maybe work in Runcorn for up to three days a week. He said that if the company paid for accommodation and mileage to Runcorn, it would not be a problem. He was told that the role was being moved to Runcorn and the base would be Runcorn. His union representative said a permanent move would not work for the claimant but he would consider travelling back and forth to Runcorn regularly. Ms Morgan asked the claimant about his proposal to work two out of five days at Runcorn and three out of five in London and then increased days in Runcorn. The claimant explained that when needed he could do three days in Runcorn.

38. There was an adjournment to allow Mr Benwell to consider this request and, having considered the request, he stated that splitting the work would "fault the objective" of merging it with the GB team. The job was a job which required the relevant person to work in Runcorn five days a week. It was explained that the role would re-locate on 1 April. It was then recorded that leave already booked was mentioned. It was confirmed that leave booked within the leave entitlement would be honoured and would not impact on the retention payment.

39. I heard oral evidence from Mr Gill, the claimant's trade union representative. He said that he asked if all of the claimant's leave would be paid and was told that it would be. He said that he had referred to leave in 2015 as well as in 2016 and that he mentioned sick leave. Mr Benwell said that any entitlement that the claimant had to payment for annual leave would be met.

40. The claimant was then informed of his redundancy by a letter dated 18 January 2016. He submitted an appeal by letter dated 20 January 2016. On 25 February 2016 the appeal took place and Ms Morgan confirmed at the appeal hearing that the respondent did not plan to replace the claimant at London Heathrow. During the course of the appeal there was reference by the claimant to two emails that were written in relation to Mr Kulasingham dated 13 October 2015 and 19 October 2015. In one of the emails, it was stated that Mr Kulasingham would effectively replace the claimant. Mr Whiteley, who heard the appeal, had not seen these emails before.

41. In his witness statement, Mr Whiteley referred to these emails only briefly. . In his oral evidence, he said the emails were a matter of "prime concern" to him. If there was any like for like replacement, he would have prevented the respondent from appointing Mr Kulasingham. If the claimant was being directly replaced in the guise of redundancy that would be wrong. He gave oral evidence as to who he spoke to in relation to Mr Kulasingham's appointment and what they told him. He said that he was told that the finance department was in a state of flux and in the longer term the aim was to have all finance managers involved in cargo based in Runcorn; Mr

Kulasingham's role was a temporary role to support transition finance tasks, done locally at London Heathrow, to Runcorn.

42. I gave this evidence particular scrutiny. Given that this was a matter of "prime concern" to Mr Whiteley, it was surprising that he had not dealt with it in detail in his statement. However, having assessed Mr Whiteley as a witness, I found he was telling the truth about the enquiries he made and what he was told. It was regrettable that he did not set out these matters in his witness statement. In the event the appeal was dismissed.

43. At both the dismissal stage and the appeal stage, the relevant managers considered whether the claimant could work on a three/two basis: partly in Runcorn and partly in Heathrow. They concluded that the role was one which must be full time in Runcorn, having consulted with Mr Phil Foster.

44. The claimant was given details of vacant roles throughout the process. He did not apply for any other jobs. Jobs advertised were at a more junior level, save for a Business Controller job which was advertised in February 2016 when the claimant was on holiday. The claimant did not apply for that job. It was at Stansted airport which was 70 miles away from his home. There was also another Financial Controller job advertised that was 200 miles away from his home for which he did not apply.

45. Returning to the grievance, on 7 December 2015 Mr Foster advised the claimant that he was not entitled to any additional remuneration as the work he had undertaken had been absorbed into his current workload. The claimant invoked the grievance process on 21 December 2015 and set out details in a document of 12 January 2016 in relation to outstanding pay and other matters. The grievance was heard by a person referred to in this judgment as Mrs Catherine Black. The grievances included grievances about unlawful deductions and unpaid bonus. Mrs Black rejected the grievance in full. She accepted in oral evidence, when she was referred to the email of 15 August 2014 that any employee getting this email would believe that they would be getting more money for the additional responsibilities undertaken. She did not uphold even that part of the claimant's grievance which referred to not being compensated for taking up additional responsibilities, however. There was no acknowledgement of the claimant's legitimate sense of grievance. Mrs Black considered the matter of bonus. She concluded, having carried out some investigation, that with the exception of the commercial department, no employees employed in the cargo division received a bonus for the 2014/2015 financial year.

46. The claimant repeatedly protested about his situation and the stress it was causing to him: in particular, the failure to provide appropriate compensation for his additional responsibilities. Those protests date mainly from early 2016 when the claimant began to see that he might have to fight for the additional remuneration which he was expecting to receive.

Law

47. Both parties' counsel provided written submissions which were then developed in oral argument.

48. In relation to unfair dismissal, the reason or principal reason for dismissal relied on by the respondent was redundancy, which is a potentially fair reason under s.98(2)(a) of the ERA; alternatively some other substantial reason - a business re-organisation - within s.98(1)(b). It was for the respondent to make out one of those reasons. The claimant alleged that the redundancy was a sham: not the re-organisation itself but the particular situation in relation to the claimant's own role, it was submitted.

49. If the reason was redundancy or some other substantial reason, the question of whether the dismissal fair or unfair fell to be determined in accordance with s.98(4)of the ERA. The respondent referred in its written submissions to the case of James W Cook v Tipper [1990] ICR 716 and to the general and uncontroversial principle that the tribunal cannot look behind an employer's genuine commercial decisions.

50. The claim for unlawful deductions was brought under s.13 of the ERA. The parties agreed that this turned on whether there was a legally binding agreement on 15 August 2014 that the claimant would be given the same pay and benefits as Mr Beattie with effect from that date. The parties agreed that one of the relevant matters to be considered was whether the agreement was sufficiently certain to create a legally binding agreement. Was there a clear agreement with certain terms or a clear offer to which the claimant indicated his acceptance by taking over Mr Beattie's duties?

51. The common law rules applying to the formation of a contract apply equally to the variation of a contract. The claimant referred me to the case of Attril v Dresdner Kleinwort [2013] ICR D30. The unlawful deductions claim here, as there, included a claim for bonus. I was referred to paragraphs 109-110 of the Court of Appeal judgment addressing the question of whether an announcement (in the current case, a representation) amounted to a promise giving rise to a contractual obligation or whether it was simply a statement of future intent and, insofar as it amounted to a promise, binding in honour only. I was then referred to the four questions at paragraph 110. The claimant submitted that I should give a positive answer to each of those questions in the current case. The first question was whether the announcement was sufficiently certain to create legally binding obligations.

52. The unlawful deductions claim included a claim for bonus. The claim was not clearly spelt out in the claim or further particulars. In the schedule of loss the bonus was claimed as part of the compensation for unfair dismissal. In the amended claim, it was claimed as part of the unlawful deductions claim. Bonus was dealt with in the evidence of Mrs Black. Ultimately, the claim seemed to come down to this: if there was an agreement that the claimant was employed on Mr Beattie's terms and conditions, was he contractually entitled to the same bonus entitlement as Mr Beattie and would he have got a bonus in the relevant year? If not, was he contractually entitled to bonus under his existing terms and conditions? It was common

ground that there was a bonus scheme and that bonus was discretionary. Applying Clark v Nomura [2000] IRLR 766, would any reasonable employer have exercised its discretion as the respondent did? The test is one of rationality or perversity.

53. In relation to holiday pay, the claim as defined by the parties and set out in the case management summary rested on whether there was there an agreement between the claimant and the respondent that the claimant should be paid for annual leave that he had been unable to take during the course of 2015 owing to pressure of work and his extended sickness absence. On the basis that he made out such an agreement and that he had been unable take holiday for those reasons, was the respondent liable to pay holiday pay over and above the amount paid in respect of 2016?

54. The holiday year was the calendar year and there was no dispute that the claimant had been paid his full entitlements in respect of 2016, including in respect of 37.5 hours holiday carried over from 2015.

55. The claimant confirmed in submissions that his claim was brought for a payment in lieu of leave under regulation 14 of the Working Time Regulations 1998 (the WTR). No claim under regulation 31(a) of the WTR for being prevented from taking leave was brought.

56. I was referred to NHS Leeds v Larner [2012] ICR 1389 in support of the proposition that an employee who was unable to take paid annual leave in a year because of sickness should be permitted to carry over that leave into the next leave year and should be paid in respect of that leave if his employment was terminated during the course of the leave year and before the leave was taken. I was also referred to paragraphs 30-36 of King v Sash Window Workshop Ltd [2015] IRLR 348.[1]. The claimant submitted that a claimant who was unable or unwilling because of reasons beyond his control to take annual leave and as a consequence did not exercise his right to annual leave, should be able to carry that leave forward to the next leave year.

Conclusions

Unfair Dismissal

57. There was a genuine rationalisation of the respondent's resources following the respondent's acquisition of Servisair. There was a genuine business decision, not challenged by the claimant, to move the respondent's cargo finance function to Runcorn.

58. In terms of the claimant's specific Assistant Finance Business Role, the job offered at Runcorn was ring-fenced for the claimant and offered on his existing terms and conditions. This was not a sham.

[1] I note that I was not referred to the Advocate General's Opinion in this case, delivered on 8 June 2017.

59. The job offered to Mr Kulasingham was not the claimant's job. It was a short term contract to assist with the transition of the finance function from London Heathrow to Runcorn.

60. In short, I concluded that the respondent's requirement for employees to carry out the work carried out by the claimant at Bedfont Road had ceased or diminished. There was a genuine redundancy and this was the reason for the claimant's dismissal.

61. Did the respondent follow a fair procedure in determining that the claimant should be dismissed for redundancy? I considered this question applying a range of reasonable responses test and by reference to the arguments advanced by the claimant's counsel in submissions.

62. It was submitted that the claimant should have been offered the role which was offered to Mr Kulasingham. I concluded that this was a temporary role. It was additional to the claimant's role and Mr Kulasingham was not a like for like replacement for the claimant. In a perfect world, this role should have been mentioned to the claimant before Mr Kulasingham was recruited. If the respondent had been more open about Mr Kulasingham's appointment, this may have eliminated some of the claimant's feeling of distrust in the respondent. The emails of 13 and 19 October 2015, as Mr Whiteley very properly accepted, were unfortunate and have aggravated the claimant's feeling of distrust. However, the reference to replacing the claimant did not in fact accurately represent the position. The failure to tell the claimant about Mr Kulasingham's potential recruitment was unfortunate but this failure did not fall outside the range of reasonable responses. Given the specific and limited nature of Mr Kulasingham's role, it was not unreasonable not to offer this job to the claimant.

63. In the context of a suggestion that the respondent believed that the claimant was unwilling to move to Runcorn, which the claimant said was incorrect, my attention was drawn following closing submissions to a document at page 203 of the bundle. No-one was asked about this document in their evidence and I have put it out of my mind. I cannot find a basis for a conclusion that the claimant was wholly unwilling to re-locate to Runcorn. The reason the claimant was not offered the job offered to Mr Kulasingham was because nobody appears to have considered that this short-term job, which was geared to the transition from Bedfont Rd to Runcorn, was appropriate to be offered to the claimant, rather than because of the claimant's willingness or otherwise to move to Runcorn.

64. The claimant then submitted that the consultation meetings after the first meeting should not have been conducted by Mr Benwell, who had no first hand knowledge of the claimant's role. I note that the claimant was initially invited to attend the first consultation meeting in Runcorn. He said that he could not make it to Runcorn and this was accommodated. Mr Benwell conducted the subsequent consultation meetings because Mr Foster could not travel to Heathrow because of work commitments. Having read the minutes, or the notes of the meeting and having seen and heard Mr Benwell

give evidence, I considered that he conducted proper consultation meetings in which matters raised by the claimant were properly and appropriately considered. I did not find that this was just a rubber stamping of Mr Foster's view and I did not find that it was unfair for Mr Benwell to deal with these meetings.

65. It was then said that the claimant should have been offered a pay increase for going to Runcorn because the job was a bigger job. The pay offered was a commercial matter for the respondent. The pay was what the claimant was already receiving and it was not outside the range of reasonable responses not to offer more. In any event, this was not put to any of the respondent's witnesses for their comment and was a very small part of the claimant's case.

66. There was then criticism of the failure to offer a trial of a 3/2 split. I considered this with care. Plainly the respondent wished to retain the claimant and perhaps some flexibility could have been shown. However, the respondent, as employer, was entitled to say that it needed the senior manager at the location where his reports were situated on a five day week basis. Even if some of the work, in particular the Bradford Swissport work, remained based at London Heathrow, it was not always possible to predict what management functions were required at Runcorn on a day-to-day basis. It was not unreasonable for the respondent to take the view that the senior manager should be present on site for the ordinary five day week in Runcorn.

67. The claimant referred to the respondent's expectation that the claimant would refuse to work in Runcorn. There was substance in that submission. However, the respondent did offer the claimant the ring-fenced job in Runcorn. This was a genuine offer which the claimant could choose whether to accept or refuse.

68. It was then submitted that the claimant was not offered any alternative work. There was reference to a job that was undertaken by Mr Manraj Panesar in February 2015. That was well before the claimant's job was put at risk of redundancy. There was very scant evidence in relation to the job undertaken by Mr Panesar: only a document indicating that Mr Panesar did a job which the claimant said might have been suitable for him from February 2015.

69. In all the circumstances I did not consider that this was a procedure which fell outside the range of reasonable procedures which an employer could implement.

70. The unfair dismissal claim was therefore dismissed.

71. In relation to the unlawful deductions I have already made findings of fact. Mr Beattie did say that the claimant would receive compensation in accordance with his greater responsibilities. That was not carried through. It was a statement of intent made at a time when Mr Beattie had no power to

increase the claimant's pay. The respondent's conduct was an example of poor employment practice which was unimpressive, particularly in an organisation of the respondent's size and with its resources. However, that does not affect the fact that there was no agreement concluded. No terms were ever agreed. There has to be certainty in order for there to be a contract as both parties accept and there was never any certainty as to an increased pay package. The proposal for the claimant's improved pay and terms and conditions was put on the back burner by Mr Foster. In the circumstances I could not uphold the claim for unlawful deductions. There simply was no agreed variation to the contract.

72. The claim under s4(1) of the ERA fell away and was dismissed.

73. I looked at bonus separately, bearing in mind that any claim for bonus linked to any variation in the claimant's agreed terms and conditions must fail for the reasons already stated. Could it be said that the respondent's failure to pay bonus was an irrational or perverse exercise of discretion? I took into account the commendations of the claimant's work in previous years and the previous payments of bonus but I also took into account the evidence given by Mrs Black, in particular that with the exception of the commercial department, no employees employed in cargo divisions received a bonus for 2014/2015 financial year. I could not in those circumstances conclude on the evidence that it was irrational or perverse not to give the claimant a bonus even though I recognised that he did carry out additional work and this was a discretionary scheme.

74. Finally, in relation to holiday pay, it was agreed at the final consultation meeting that the claimant would be paid for all his accrued outstanding leave. 2015 was mentioned. As a matter of ordinary meaning, the respondent was agreeing that the claimant would be paid all the holiday pay to which he was entitled: contractual and statutory. His contractual entitlement included an entitlement to carry over 37.5 hours of leave from 2015. The claimant was paid for these hours and for his outstanding entitlement for 2016. This was not in dispute. The figures were worked out in detail.

75. I first considered whether the claimant had any domestic law contractual entitlement to further holiday pay for 2015. In order for there to be such a contractual entitlement, there had to be clear and certain agreement that the claimant would be paid for holiday not taken in 2015, beyond his contractual entitlement to 37.5 hours' pay. The mention of 2015 holiday and the agreement to pay the holiday pay to which the claimant was entitled did not constitute an agreement to pay for holiday not taken, over and above the 37.5 hours which it was agreed could be carried over.

76. It terms of any European law or statutory entitlement, the claimant submitted that he had an entitlement to pay in lieu of annual leave that he had not taken and could not take in 2015, over and above the agreed 37.5 hours. The claimant's case was not particularly clear. This was not a case where the claimant had been unable to take holiday because he was off sick. Indeed in 2015 he was only off sick for three months from 28 May to 22

August. In addition, he had been paid his ordinary contractual pay when working throughout 2015. As Simler J said in King v Sash Window Workshop Ltd: "even if the claimant was as a matter of fact prevented from taking annual leave, it is clear he worked the periods in question and was paid in full. To receive holiday pay for the same period is double recovery and not consistent with that legislative purpose."

77. The claimant sought to draw an analogy with Larner and with HMRC v Stringer [2009] UKHL 31. But in contrast to Larner and Stringer, the claimant in the current case had not been prevented from taking holiday because of long-term sickness. The claimant was absent from work on sick leave for only three months. Although the claimant sought to rely also on his inability to take holiday because of pressure of work, this was not analogous to sick leave.

78. In all the circumstances, his claim for payment in lieu of annual leave for 2015 (over and above the 37.5 hours carried over) was not made out.

79. The claimant submitted that the failure to make this payment was a breach of the term of mutual trust and confidence in the contract of employment but it was accepted that a claim for breach of the term of mutual trust and confidence was not part of the claimant's claim and could not be pursued.

80. The claim for pay in lieu of annual leave was therefore dismissed.

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Employment Judge McNeill QC

Date: …13 October 2017……..

Sent to the parties on: .....

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For the Tribunal Office