Case Number: 3324916/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr A Gosling	v	Field Sales Solutions Limited

Heard at: Watford

On: 22-25 October 2018
and, in private, 31 October 2018

Before: Employment Judge Hyams

Members: Ms A Brosnan
Ms J Smith

Appearances:

For the Claimant: In person

For the Respondent: Mr Deshpal Panesar, of Counsel

RESERVED JUDGMENT

(1) The claimant's dismissal was for redundancy. He is therefore entitled to a redundancy payment calculated in accordance with Part XI of the Employment Rights Act 1996.

(2) The claimant's dismissal was not unfair.

(3) The claimant was not discriminated against because of his age.

(4) At the start of the hearing, the respondent owed the claimant unpaid holiday in the sum of £127.50 which it has now paid the claimant. The respondent otherwise owed the claimant nothing by way of unpaid wages or expenses.

REASONS

Introduction; the claims which were before us

1 In these proceedings, the claimant claims that he was dismissed unfairly, that he was discriminated against because of his age, and that the respondent owes him unpaid wages and expenses of various sorts. The claimant's employment with the respondent ended on 3 March 2017, and the respondent accepted that it had dismissed the claimant. Its case was that he had been dismissed for some other substantial reason within the meaning of section 98(1)(a) of the Employment Rights Act 1996 ("ERA 1996"), after a reorganisation of the part of the respondent's business in which he worked. We return to the claims and state them as they stood by the end of the hearing before us on 22-25 October 2018 in more detail below, after stating our findings of fact.

2 We heard oral evidence from the claimant on his own behalf and from the following witnesses on behalf of the respondent: (1) Mr Luke Sandy, Account Manager; (2) Mrs Aisling Green, the respondent's Human Resources ("HR") Director; (3) Mrs Kirstie Adams, Regional Field Manager; (4) Ms Louise James, who was an Account Director for the respondent until 2018; and (5) Mr Paul Spicer, Group Finance Director. We had before us in addition a bundle which, by 25 October 2018, had 970 pages. The claimant put before us in addition several documents described by him as witness statements, sometimes in the form of emails, at other times in the form of a response to a questionnaire which he had written. There was also a transcript made by the respondent of a telephone conversation that the claimant had had with Ms James in October 2016 and which he had, without Ms James' knowledge, recorded on his mobile telephone.

3 Having heard that evidence and seen those documents, we made the following findings of fact. Where there was a material conflict of evidence, we refer to it below and state how we resolved it. We do not refer to all of the facts, merely those which it was necessary to find in order to arrive at our conclusions on the claims as they stood at the end of the hearing on 25 October 2018.

The facts

(1) The events in sequence

4 The claimant worked for the respondent for a period until 2008, when he resigned from his employment as a Team Manager. He worked elsewhere before returning to the respondent's employment, to work as a Regional Manager, working for one of the respondent's clients, The Health Lottery ("THL"). That employment commenced on 23 June 2014.

5 The respondent provides a range of sales and related services (such as in relation to lottery tickets) to businesses. Those services are provided by

employees who might in the past have been called sales representatives, but given the development of national and local lotteries whose tickets are sold in a number of retail outlets around the country and the fact that the sale of such tickets is regulated by the United Kingdom Gambling Commission, the respondent used the term "Brand Ambassador" ("BA") to describe the role of the employees who provide those services "in the field".

6 The work done by the respondent for THL was a mixture of sales and regulatory work. The claimant, as a Regional Manager, managed a team of BAs who provided the services for which THL had contracted with the respondent. He did not have any manager to assist him in doing so.

7 THL is, according to the evidence of Mr Sandy (in paragraph 3 of his witness statement), "made up of 51 different local society lotteries, each representing at least one local authority within England, Scotland and Wales". As Mr Sandy continued:

> "Each society lottery is licen[s]ed by the Gambling Commission and operates as an individual Community Interest Company. This means THL is subject to stringent licence conditions from the Gambling Commission and relies heavily on Brand Ambassadors to visit store locations to ensure that they are compliant with the conditions of its licence."

We accepted that evidence of Mr Sandy.

8 Until the end of 2015, THL paid the respondent a fee for the work done by the respondent for THL. As from the beginning of 2016, however, THL paid the respondent per call actually made by a BA to a retail outlet at which THL tickets were sold. The respondent at that time carried out a reorganisation of the workforce dedicated to servicing the respondent's contract with THL. That reorganisation led to a reduction in the number of Regional Managers. When the claimant was appointed to that role, there were five such managers. At the beginning of 2016, the respondent reduced the number of such managers to three. The number of regions was also reduced, from five to three. As part of the reorganisation, the post of Team Leader was introduced. The Team Leaders were appointed to spend four days per week as a BA, and one day per week assisting the Regional Manager. There were four Team Leaders. The software which the respondent used for determining the routes that BAs should follow in making their calls to retail outlets was called CACI, and that software also identified ideal locations for the placements of the Team Leaders and Regional Managers under the new structure. Those locations were shown in the email at page 125A of the bundle. The ideal locations for the Regional Managers were Manchester, Nottingham and Basingstoke. For the Team Leader post, they were Glasgow, Crewe, Braintree and Bristol.

9 The hourly rate of pay for a Regional Manager was £12.15. The hourly rate of pay for a BA was £8.00. The hourly rate of pay for a Team Leader was (it was

clear from page 162) £10.70. As an additional difference between the pay and conditions of a BA and a Regional Manager, a Regional Manager had a right to 25 days' holiday per year over and above bank and other public holidays, but a BA had only 20 such days of holiday in addition to bank and other public holidays.

10 The claimant and one other manager, Ms Gira Morar, who was younger than the claimant, were selected to be dismissed from their post of Regional Manager. There was a conflict of evidence about whether or not the claimant was told that he could not apply for the post of Team Leader. The claimant's evidence was that he was told that he could not apply for it. The respondent's evidence on this issue was given by Mr Sandy and Mrs Green. The latter's evidence was in paragraph 79 of her witness statement:

> "Whilst I don't remember the details of the Claimant's request to be made a Team Leader as part of the 2016 restructure I know that the role was discussed in his individual consultation meeting held with Mr Sandy on 29 January 2016 (minutes of which can be found at page 140-146 of the bundle). The THL restructure at that time did not have a Team Leader role based in the Claimant's geographical location. The only Team Leader vacancies were in Glasgow, Crewe, Braintree and Bristol (please see the email which can be found at page 125A of the bundle which demonstrates this) and it was for this reason that the Claimant was not offered the role."

11 Mr Sandy's evidence on this was in paragraph 8 of his witness statement:

> 'I understand that the Claimant alleges that, at the time, he had asked whether he could take on the role of Team Leader and that I had "flatly" refused. I do not recall having a conversation regarding a Team Leader role, but all employees would have been able to apply and would have undergone the same interview process.'

12 The handwritten notes at pages 140-146 of the bundle showed that Mr Sandy had in fact discussed the issue of the Team Leader post with the claimant during their meeting of 29 January 2016. On page 144 there was this note:

> "TG: Kirstie's area so big. How can she manage that area with 2 team leaders?
>
> LS: There would be a T/Leader in Scotland.
>
> TG: What would they do then?
>
> LS: Explains the role of the T/L."

13 The discussion then moved on, it appeared from the notes. We resolve this conflict of evidence below, when stating our conclusions.

14 The claimant then opted to become a BA "if the territories could be adjusted in [his] area" (as recorded in the document at page 156). Mr Sandy sent the claimant the email at pages 154-155, showing that the respondent had designed an area which would fit with the other BAs' areas and be reasonably accessible from the claimant's home address. The postcodes were stated, after which this was said: "Please note that some tweaking of the area may be possible if you choose to accept the role." On 11 February 2016, Mrs Green sent the claimant the letter at page 160, which included this passage:

> "During the consultation period you were provided with a copy of the proposed re-structure. As a result of this re-structure the following post was created, as stated below:
>
> - Brand Ambassador to work within the DL, YO, TS HG and YO postcodes
>
> You were invited to apply for this position; you were also asked to actively look at any other alternative vacancies within Activate Group of Companies.
>
> I am pleased to confirm that you were successful in your application for the role of Brand Ambassador. To allow for a period of handover and planning the Brand Ambassador role will commence on Monday 29th February 2016. Confirmation of this change will follow.
>
> Please be aware that you are entitled to a 4 week trial period in your new role, this is an opportunity for you and the business to determine whether this role is suitable for you. During this time should either party feel that this role is not suitable then this should be communicated as soon as possible, at which point the redundancy situation will apply."

15 At pages 165-170 there was a copy of the letter appointing the claimant to the role of BA. Among other things, at page 165, this was stated:

> "Your employment will be based at your home but you will carry out the duties in relation to whichever territory may be assigned to you from time to time. Your current territory is as set out in Appendix 1. The Company may require you to carry out your duties on a temporary or permanent basis from any other location and in relation to such other territories as the needs of the Company's business reasonably require, provided that you will not be required to carry out your duties from any location outside the territory assigned to you which is not within a reasonable commuting distance from your home without your express consent."

16 Appendix 1 (page 171) stated the claimant's territory to be "Base014". It also stated this in relation to expenses:

> "All reasonable expenses will be reimbursed at cost where supported by the

appropriate receipts. The Company does not accept responsibility for parking fines. All business mileage will be reimbursed at the current Company rate. The Company reserves the right to change business mileage rates from time to time in line with business requirements."

17 The business mileage rate for a BA was 27 pence per mile. The business mileage rate for a Regional Manager was 29 pence per mile. The business mileage rate for a Team Leader was 27 pence per mile. The normal working hours for a BA were (as stated at page 171) 37.5 per week.

18 At page 166, the letter appointing the claimant to the role of BA stated that if he was absent from work because of sickness or injury then he would be paid statutory sick pay only.

19 Ms Morar was (as could be seen from page 162 and as stated by the claimant) appointed to the post of Team Leader.

20 The claimant's first week of employment as a BA was as stated in the letter at page 160, namely the week commencing on 29 February 2016. He was given what the respondent referred to as a call file, i.e. a list of retail outlets to visit on each day of the week, and in what order, by Mrs Adams. There was a 6-week cycle for each area covered by a BA, and that week was the last of the then-current 6-week period. Call files were usually compiled by an employee whose first name was Chris, and whose function was to work with the CACI software to plan journeys. The call files could be amended by the Regional Manager during the 6-week cycle as the needs of the business dictated, subject, of course, to the volume of calls being reasonable and capable of being completed during the employee's normal working hours. In the sixth week of any cycle, it was possible and necessary to pick up any calls that had not been made and create a route plan for each day by reference to the calls that needed to be completed at that time.

21 Mrs Adams therefore put together a journey plan by email on 27 February 2016 (pages 181-184). The claimant refused to undertake the calls because they were not in the postcode areas that were stated in the letter at page 160. Instead of communicating that to Mrs Adams, the claimant spoke to Mr Sandy, who was Mrs Adams' line manager. Mr Sandy then authorised the claimant to work during that week "covering back checks" (see page 185). The claimant's conduct in that regard was severely undermining of Mrs Adams and, as she indicated in paragraph 19 of her witness statement, disrespectful of her.

22 Mrs Adams' witness statement contained these relevant paragraphs about what happened next:

> "20 On 7 March 2016 the next full six week cycle began whereby the Claimant's call files were in relation to specific postcode areas rather than covering adjacent territories.

21 I should explain that all of the Claimant's call files had been devised in accordance with CACI, which is a journey planning programme used across the business to plan the calls for mileage purposes. Given that the Claimant was appointed in a field based position as a Brand Ambassador, he was entitled to receive mileage expenses in addition to a base salary. In order to manage the Respondent's budget, it is necessary to plan journeys via CACI.

22 The Claimant was well aware of the need to adhere to all journey plans and that mileage expenses would be paid in line with the CACI routes, save where prior authority to divert from this had been obtained from a line manager. I had emailed the team (including the Claimant) on 5 March 2016 (page 201 of the bundle) to confirm that the new call files had the correct mileage on them and would be used to check any future expenses claims. I also reminded the team (including the Claimant) that they are all paid by the number of calls completed and they need to complete all of the calls allocated to them each week (page 206 of the bundle).

23 I was responsible for comparing the mileage claims submitted at the start of each week against the number of calls completed and the call file for all members of the team. I am permitted to allow for a 5% tolerance in respect of mileage claims to cover unexpected circumstances, such as traffic or road accidents which lead to the Brand Ambassadors having to make diversions from the journey (as mapped out by the CACI system). I was also able to sign off additional mileage claims if the Brand Ambassador was able to provide specific reasons for the additional mileage for example, if they explained that they had to take a diversion around road closure on the A1/M on a particular day which caused them to travel an additional 12 miles, I could sign that off. In the event that there were substantial differences between the journey planner, and/or the number of calls that the Brand Ambassador could action in a day, I was expected to immediately notify, to take instruction from, and to obtain authority from my Manager (Mr Sandy) on how to proceed.

24 During the first few weeks of line managing the Claimant within his new Brand Ambassador role, it became apparent that he was regularly failing to complete all calls on his call file, and/or his mileage claims were in excess of the CACI journey planner. The Claimant's call files were devised to accord with his contractual working hours of 7.5 hours per day, and time was built in to the Claimant's call file to account for delays that the Claimant may encounter.

25 By way of example, during the week commencing 21 March 2016 the Claimant had 74 calls allocated to him, of which he had completed 63. Despite not completing all calls on his call file, he submitted a claim for 1

hour of overtime. During the week commencing 28 March 2016 the Claimant had 69 calls allocated to him, of which he had completed 61. His mileage according to CACI should have been 190 miles however the Claimant submitted a mileage claim for a significantly greater amount of 479 miles.

26 I would add that I did not only notice mileage issues with the Claimant. Other individuals were also found to be claiming excessive mileage and were challenged on this. Interestingly, it was often individuals who had previously been in the Claimant's team when he was a Regional Manager, who would claim excessive mileage. Examples of me querying wage claims brought by other members of staff can be found at pages 207, 302 and 362 of the bundle, in addition the notes in my personal diary also show that I was recording this kind of concern about other members of my team too and can be found at page 269 of the bundle.

27 This was part of my role. I had to keep on top of my team's performance by monitoring how many calls were completed but I also had to consider their financial performance by ensuring that any wage claims were reasonable and within permissible limits. I would also use a colour coded spreadsheet so that people could visibly see where they were up to. I had to complete accompaniment forms, backcheck forms and keep on top of the team's total mileage."

23 We accepted those paragraphs of Mrs Adams' witness statement, which so far as relevant were borne out by the documents to which we refer below.

24 Mr Sandy's evidence on this was in paragraphs 24-30 of his witness statement.

"24 I received an email directly from the Claimant on 28 February 2016 which said that he considered Ms Adams had made a mistake on his call area as it did not match the postcodes I had discussed with him as part of the redundancy exercise. This email can be found at pages 185 - 186 of the bundle.

25 I thought that this was an odd approach. The Claimant did not seek to query the call log with his line manager, rather, he went 'over her head' to tell me that she had "made a mistake". That was plainly not the case. Had the Claimant read Ms Adams' email thoroughly he would have seen that she had explained to him that his new area would not be planned until the new cycle and that his call log was in other areas to maximise coverage. I explained this rationale to the Claimant by email on 29 February 2016 and advised that I would have Ms Adams call him to discuss this further (as found at page 187 of the bundle).

26 The Claimant's response was that he wanted to talk to me as this hadn't been agreed with him in his consultation meeting (as per his email which

can be found at page 188 of the bundle).

27 I called the Claimant to discuss this further on the morning of 29 February 2016 and as a compromise I agreed that, rather than completing the call list he had been assigned, he could complete some calls, which had been included in call logs in the previous 2 weeks, as 'back checks'. 'Back checks' are essentially quality checks in stores to ensure that the visits have been conducted by a Brand Ambassador to a high standard. The Claimant would have been familiar with this task from his previous experience as a Regional Manager. I followed our conversation up by email which can be found at page 185 of the bundle."

25 We accepted Mr Sandy's evidence in those paragraphs.

26 There were two weeks in particular in respect of which the claimant made (in his schedule of loss, at pages 64a-64b) claims for overtime and unpaid mileage. They were the weeks commencing on 21 and 28 March 2016. The claim for the first of those weeks was submitted by the claimant in the email at the bottom of page 216. That email was sent at 8:49pm on 24 March 2016. The claim form was at page 214 and stated a claim for 153 miles and an hour's overtime. It recorded that the claimant had made 63 calls. Mrs Adams wrote to Mr Sandy at 14:55 on the next day (25 March; it was in fact Good Friday):

"Hi Luke

I'm looking for some advice here. Tony has submitted his wage claim for this week, claiming one hour over time and 63 calls made. His call file had 74 calls on it. Things are obviously delicate with Tony and this is his first week working for me as a BA. I was thinking of replying to his email and querying the overtime claim and number of calls he's done, especially as these calls are the closest ones he has to home. I don't want to just approve this and set a precedent as I [c]an see the days he's further away from home he will do even less calls. Can you offer me any advice on how to handle this?"

27 The next working day was Tuesday 29 March 2016, and Mr Sandy responded at 9:42am, saying that he would look at the matter that morning. Evidently, the next communication between Mrs Adams and Mr Sandy was by telephone as, at 14:49 on that day, he wrote to her in the following terms (page 215):

"Just picked up your message, I hope it goes ok for you this afternoon.

I'm not in the office today, so when I'm back tomorrow morning I will take a better look at what Tony is claiming and call you to chat it through, although at the moment I am in agreement with you - I don't understand why he would only have completed 63 of 74 calls or claimed an hours overtime if the calls were all reasonable to complete within the 30 working hours he had available for the week? I'm assuming he did not communicate any issues

with the number of calls or hours in advance of submitting his wage claim, which I would expect anyone to do if there [sic] foresaw an issue with completing the calls?

Let's chat it through tomorrow, but in the meantime I think you're perfectly entitled to query both the number of calls he's done and the additional hour he's looking to charge for, so that he can explain the reasons behind this for us."

28 Mrs Adams then wrote to the claimant on 30 March 2016 at 9:56am in the following terms (page 218):

"Hi Tony

Thanks for the queries and requests, I'll get those dealt with.

Can you please explain why you've only completed 63 of the 74 allocated calls and why you've claimed an hours overtime? I can't authorise these wages without a full explanation to send to the office as all variances on number of calls is queried."

29 The claimant did not reply to that email.

30 On Saturday 2 April 2016, the claimant submitted a further claim for expenses and pay; he claimed for 3 hours of overtime and mileage of 479 in respect of the week commencing on 28 March 2016. The claim form recorded that he had completed 61 calls during that week. On 5 April 2016, Mrs Adams wrote by email (page 222):

"Hi Tony

I have some queries on your wage claim but as I'm at the hospital today please could you respond to Luke (copying me in if you reply by email)

Your wage claim shows that you have completed 61 calls but there were 69 on the call file so can you explain why all calls weren't completed? Also you have claimed overtime but again there is no explanation and I didn't authorise it and again as your calls weren't completed overtime would not be appropriate. Finally you have claimed 479 miles but the CACI mileage should be 191.

These wages won't be authorised for payment without the queries being answered and we are still holding last weeks wage claim for payment as I didn't receive a response to the queries I raised over that one."

31 On 6 April 2016, Mr Sandy wrote to the claimant an email in the following terms (page 232):

"Hi Tony,

We're just looking for the answers to the following queries:

-Why less calls were completed than we allocated for both W/c 21st and 28th March (without any issues being raised with Kirstie at the time)

-Why overtime was claimed during both weeks (despite less calls being completed than were scheduled and without prior agreement from Kirstie)

- Why there is a significant difference between the mileage being claimed for W/c 28th March and the route planning distances we have calculated

I'll give you a call a little later to discuss the answers to these questions."

32 The claimant's evidence was that he had discussed the issues with Mr Sandy on the telephone. That was borne out by the document at page 252b, which he emailed to Mr Sandy, copying it to Mrs Adams. The document did not contain an explanation for the additional mileage and hours claims which was acceptable to the respondent, and the claimant did not give Mr Sandy such an explanation, so those claims were not paid. Instead, the claimant received pay for his ordinary working week and only for the mileage which the respondent considered to be reasonable.

33 The claimant continued to claim for what the respondent regarded as excessive mileage, and he worked only a 7.5 hour day. As he wrote on 18 April 2016 (at page 255):

"Moving forward keeping everyone happy I will in future keep to the mileage CACI states, also within the 7.5 hours per day ..... what calls are completed within that criteria, will be completed."

34 The claimant then on a number of occasions did not complete all of his allotted calls and continued to claim excessive mileage without providing what Mr Sandy or Mrs Adams regarded as an acceptable or adequate explanation for doing so. They therefore took advice from Mrs Green about the possibility of commencing formal capability action, or disciplinary proceedings in respect of misconduct, against the claimant. The claimant was then absent from work on account of sickness from 9-25 May 2016 inclusive. It was his evidence that that sickness was caused by stress and anxiety, and it was his evidence that that stress and anxiety was caused by the manner in which he had been treated by Mr Sandy and Mrs Adams.

35 Mrs Green proposed having an informal review meeting with the claimant and giving him a recorded verbal warning. That was not quite what Mr Sandy had in

mind, so he simply asked the claimant to attend an informal review meeting. We noted that on 1 June 2016, in her email to Mr Sandy at page 336, Mrs Green wrote about the claimant that "we haven't had issues with him before he became a BA". On 2 June 2016, Mr Sandy wrote the email at page 338, saying:

> "Further to our recent telephone conversations, I think it would be a good idea if we met in person for an informal review meeting, where we can discuss any questions or concerns together further."

36 The meeting occurred. The hotel at which it took place (in Wakefield) did not provide the refreshments that it had been asked to provide. Mrs Adams made some handwritten notes (of which there was a copy at pages 340-341). In them, she recorded these things:

> "Age/fitness/struggling to complete calls – wanted to know average age of BAs
> 22 calls – too much
> Lunchbreak. / Health + Safety./ Too tiring
>
> Team Leader - out in trade - doesn't want this
> Feels bullied + intimidated
> Mission impossible.
>
> No time to sort POS/read emails
>
> I'm not a people person
> I wouldn't be able to do the BA role with my health issues.
>
> Doesn't think job can be done in time allowed"

37 The claimant accepted that he had referred to Mrs Adams' "health issues", but he said that it was not done in a critical way: rather, he said, it was done in a supportive way.

38 The claimant denied having referred to his own age and fitness, and that he had asked about the average age of BAs. However, we noted that in his ET1 claim form, he had written this:

> "There is no apparent consideration for Health & Safety or an individual's well being, age, or consideration for an individual's abilities, currently being considered where retailer call expectations is high and 100% coverage is expected or else ! At the time I was 66 almost 67 years old, much younger personnel were given the same work load (some less) that an elderly person had."

39 By the time of the hearing before us, the claimant was saying that he was discriminated against simply because of his age, i.e. as we understood it, that he

was discriminated against directly within the meaning of section 13 of the Equality Act 2010 ("EqA 2010").

40 We concluded that the claimant did indeed say the things that Mrs Adams recorded at page 340 (and said to us orally) he had said at the meeting of 7 June 2016, not least because they were consistent with what he had written in his ET1.

41 The notes at page 341 showed that during the meeting of 7 June 2016, Mrs Adams and Mr Sandy discussed with the claimant his mileage and overtime claims for the weeks commencing 21 and 28 March 2016.

42 On the next day, the claimant wrote a long letter to Mr Sandy, enclosing it under cover of the email at page 349 (the letter was at pages 342-345), and a long letter in similar (in some respects identical) terms to Mrs Green (pages 346-348). The latter letter was a formal complaint about Mr Sandy and Mrs Adams. The letters both claimed (among other things) that the claimant had been bullied and intimidated. However, at the heart of the letters was an assertion by the claimant that the requirements imposed on him as a BA could not be met within his contracted hours and that he could not complete his allotted calls within the mileage allowed by the CACI software.

43 Ms Green then appointed Ms James to deal with that grievance. Ms James took advice from Ms Green, and arranged to see the claimant in what Ms James described in paragraph 15 of her witness statement as "an initial investigatory meeting", during which she "intended to allow the Claimant to elaborate upon the points raised in his grievance letter."

44 Ms James was Mr Sandy's line manager. In paragraphs 3-11 of her witness statement, she said this:

"**Background**

3 On 8 June 2016 I was copied into an email that Luke Sandy, Account Manager, had sent to Aisling Green, HR Director (a copy of which can be found at page 349 of the bundle). Mr Sandy explained that he had received an email and feedback from the Claimant (found at pages 342 - 345 of the bundle) earlier that day in respect of a meeting that had been held in Wakefield with the Claimant and Kirstie Adams, Regional Manager, the previous day.

4 I understand that the meeting of 7 June 2016 was convened as there had been some concern that the Claimant was not hitting his target number of calls. The meeting was intended to be informal and was designed to allow Ms Adams (the Claimant's line manager) and Mr Sandy (the account manager for THL), an opportunity to catch up with the Claimant, to see if he was experiencing any particular issues and to

ask whether he required any help in order to hit his target.

5 In addition to these performance concerns, I was aware that the Claimant had claimed certain expenses which were considered to be excessive. I understand that this was also something which was discussed during this meeting. I was aware of the circumstances leading to this meeting as I had previously met with Ms Adams and Mr Sandy in Birmingham to discuss general operational and management issues regarding THL contract. Ms Adams informed me that she had been in touch with each member of her team to set clear expectations and that, in response, the Claimant had said *"you keep off my back and I'll keep off yours*". As a result we discussed her concerns regarding the Claimant's conduct and performance and agreed that the best way to manage the situation would be by having an informal, face to face meeting in the first instance.

6 My understanding is that this meeting was only ever intended to be an informal process. It is important to bear in mind that the Claimant is field based and as such it would have been rare for him to see either Ms Adams or Mr Sandy as part of his day to day duties.

7 In Mr Sandy's email to Ms Green he explained that the Claimant's 'feedback' of the meeting was not completely accurate and that the wording the Claimant had chosen to use was very strong.

8 I understand that as a consequence and after having sought advice from Ms Green about how to manage the situation, Mr Sandy wrote to the Claimant to explain that if he wanted to pursue his complaints regarding "bullying" and "intimidation" he should direct them to the HR Department for their assistance. Mr Sandy then forwarded a copy of his email to the Claimant to both me and Ms Green. A copy of which can be found at page 356 of the bundle.

9 On 13 June 2016 the Respondent received a letter from the Claimant dated 8 June 2016. The letter was addressed to Ms Green and included complaints about Ms Adams and Mr Sandy's management but centred largely on their actions in the meeting of 7 June 2016. The letter can be found at pages 346 - 348 of the bundle.

10 Given the nature of the Claimant's complaints, it was determined that it would be best to consider the letter as a grievance. Given my seniority within the Respondent's business, I was appointed to manage the Claimant's grievance. As a first step, Ms Green suggested that I arrange to meet with the Claimant to discuss his complaints.

11 I should explain that this was my first experience in dealing with a grievance, so I made sure that I was fully briefed (particularly by my

colleagues in the HR department) on how I should conduct matters and progress the grievance."

45 The claimant cross-examined Ms James about what she said in paragraph 5 of her witness statement. He did not in terms say to her that he had not said to Mrs Adams: "you keep off my back and I'll keep off yours". In part for that reason, but mainly because we accepted that Ms James was telling the truth in paragraphs 3-11 of her witness statement, we accepted her evidence in those paragraphs.

46 Ms James met with the claimant on 14 July 2016. Ms James was accompanied by Ms Louise Pedler, as the note-taker. The outcome of the meeting was that Ms James and the claimant agreed that Ms James would, from then onwards, manage the claimant instead of Mrs Adams (or Mr Sandy). At no time during the meeting did the claimant indicate in any way that he had been discriminated against because of his age. The notes of the meeting were at pages 398-408. They were signed by the claimant as a true record of the meeting. At the bottom of page 406, there was this exchange:

"LJ: How do you want this resolved.

Leave me alone to do job – will do a good job but do not be on my back + do what you have done with other people."

47 During this period, the claimant applied for the post of Retail Development Manager for Ferrero (i.e. to provide services on behalf of the respondent to Ferrero). Mrs Green's evidence on this was in paragraph 81 of her witness statement and was that the claimant was interviewed for that post by the Account Director and the client. She said that the interview would have involved a series of competency based questions, that the client had the deciding vote, and that an external candidate was appointed to the post. She said that (by implication she was informed that) "the Claimant had performed to a reasonable standard during the interview but that he was not exceptional." We accepted that evidence.

48 Ms James thought that she had resolved the claimant's grievance informally and in a way that was satisfactory to him. Her witness statement contained the following further paragraphs:

"30 As a result of the Claimant's grievance, I continued in my role as the Claimant's line manager. I exchanged various correspondences with the Claimant between 21 July and 11 August 2016 to clarify certain issues in relation to his call files, territory and some of his expenses claims (found at pages 410 - 438 of the bundle).

31 I found managing the Claimant very difficult. He was inflexible and frankly, at times, plainly insubordinate. He refused to work areas that were not within what he determined to be his territory, he refused to

work more than 7.5 hours per day (even if that was reasonably required for the proper performance of his duties) and he continued to make excessive claims for mileage.

32 By way of example, the Claimant was asked to cover some calls which were within reasonable travelling distance of his usual area and yet, he refused to do so (see our email correspondence which appears at pages 436 - 437 of the bundle). This was a reasonable management request and in line with the terms of the Claimant's contract of employment. I made this plain in my response to the Claimant and explained that if he refused to cover the calls it would be assumed that he was refusing to work and the matter would be taken forward "*formally*'' (found at page 442 of the bundle).

33 This is how I would have managed any one of my subordinates had I found myself in a similar position. It was not a threat I used lightly, rather, I was hoping to make the Claimant realise that his refusal to carry out a reasonable management request was a serious issue (and one actually I believed amounted to an act of insubordination). I did not make this comment to the Claimant because of his age (as is now alleged) and I must say; I was shocked to hear that the Claimant now claims that this was somehow an act of age discrimination.

34 The Claimant then emailed me on 12 August 2016 informing me that he was not fit for work. In addition he set out a number of complaints in what I consider to be a profoundly unprofessional manner. It seemed to me that the Claimant was alleging that I was incapable of conducting my role simply because he did not agree with my decision to have him work some additional calls. A copy of this correspondence can be found at pages 448 - 449 of the bundle.

35 I provided this email to Ms Green for her advice, a copy of which can be found at page 456 of the bundle. I discussed this with Ms Green and agreed that I would respond to the Claimant by email and explain the rationale behind my decisions (so as to help the Claimant understand why he had been asked to cover the areas in his call file). A copy of which may be found at pages 468- 470 of the bundle.

36 In response the Claimant asked which call post codes he would be required to cover in 'his' territory. He did not seem to take on board any of my comments so I responded attaching his call file (found at page 476 of the bundle) to say that any post codes he was asked to cover would be within a reasonable travelling distance. Copies of this correspondence may be found at page 468 of the bundle.

37 This is just one of numerous conduct and performance issues which I had to manage with the Claimant. In fact I even met with the Claimant in

October 2016 to discuss the postcode areas which he did not want to work in order to try to resolve the issues. The fundamental issue I had, on behalf of the Respondent, was that there were simply not enough calls within the Claimant's desired postcode areas to make up a full 6 week cycle. In order to ensure the Claimant had enough work to carry out, his call logs were made up of his preferred postcode areas and some other nearby postcodes which were within reasonable travelling distance. The fact that the Claimant did not want to do work these postcodes was, in my mind, a conduct issue. As set out above, there were concerns about the Claimant's conduct and about his performance but no formal capability or disciplinary process was completed. Instead he was advised on an ongoing basis of his need to improve / the conduct which was considered appropriate.

38 These concerns were entirely separate to the consultation process and the Claimant's ultimate dismissal."

49 We accepted that evidence of Ms James in its entirety. The claimant pointed out to us that at the bottom of page 448, he had written this:

"The fact that I have two grievances on going with two of my line managers which I made on the 8th June which were discussed with you on the 14th July, that has still not been resolved, part of my grievance I raised was not being reimbursed for company business. Now for you to change my terms and conditions of work while this investigation is ongoing by insisting I work as a mobile BA covering the vacant THL107 area as part of Base014, I find very strange. It would appear that the tactics you are using with me are in some ways very similar and replicate some used on me that the other management team have used. I feel that I am now being discriminated against as others had the option of refusing to work that area without any consequences."

50 Ms James said that she had not noticed that reference to the claimant's grievances. In that regard she said this in paragraph 56 of her witness statement:

"The Claimant did not bring his grievance up in any conversation he had with me after we had met to discuss it in July 2016, nor did he request any sort of update or demand a formal outcome (except at the foot of one email he had sent me in August 2018 [clearly an error; it should have been 2016] which can be found at page 448, a request which I have to confess I do not recall noticing at the time given the numerous other issues which were occurring with the Claimant at the time and the volume of other work matters I was juggling). With this in mind I was astonished that the Claimant was trying to allege that his grievance had somehow not been resolved to his satisfaction."

51 We accepted that evidence in its entirety. In fact, we noted that the claimant's own email at pages 448-449 ended with this passage:

> To summarise ..... .
> I have not refused to work at any time and have been ready for work each day to cover calls on the agreed Base014 area.
> To send a call file for week 5 late on Monday afternoon is bad planning and organisation.
> To not have weeks 5 or 6 planned is poor management.
> I have not been consulted about calls for my area, which I could have been doing
> I cannot go on funding business mileage as you are not reimbursing the business mileage I incur.
> I expect to be paid for this week up to Thursday afternoon and have submitted this within this week's wage claim."

52 The claimant's reference to expecting to be paid was made because if on any day (or weeks) he refused to undertake calls on the call file allocated to him, then he was not paid by the respondent for that day or week.

53 The tension which we describe above between the claimant and Ms James continued until the respondent proposed a reorganisation of the way in which its services were provided in meeting the contract with THL. The reasons for that reorganisation were described by Mr Sandy in paragraphs 74-86 of his witness statement. The claimant did not challenge that description of the reasons for the reorganisation, saying that he was not in a position to do so. The reasons for the reorganisation were that

53.1 THL invited the respondent to re-tender for the contract with it;

53.2 the respondent was successful in that re-tendering, but the amount paid by THL to the respondent was reduced from £1.8m to £1.5m;

53.3 the respondent was paid 4% less for each call that it carried out; and

53.4 there was a need to achieve and exceed a minimum coverage level of 95% (rather than 89%) averaged across the team in order to meet the key performance indicators stipulated by THL, and to maintain profitability.

54 Before the contract re-tendering process, the respondent had 1 BA working 1 day per week; 6 working 2 days per week; 14 working 3 days per week; 15 working 4 days per week; and 25 working a full, 5-day week.

55 The respondent proposed to require all BAs to work 3 days and 3 days only per week, with smaller territorial areas to cover than a full-time BA would have had.

56 It was recognised by the respondent that this was a situation in which there was a need for collective consultation (given the definition, for the purposes of Chapter II of Part IV of the Trade Union and Labour Relations (Consolidation) Act 1992, of redundancy in section 195(1) of that Act). It therefore caused employee representative elections to be conducted. The claimant was elected as one such representative.

57 As part of the reorganisation, the respondent proposed to increase the number of regional managers by two. The claimant applied for one of the new posts of Regional Manager. He and Mr Derek Cuthbert, who had been appointed to the post of Team Leader created in the 2015/16 reorganisation (we refer to the creation of that post in paragraphs 10-12 above) were among the interviewees for the post of Regional Manager of Region 1, in the North of England. Mr Cuthbert was successful in that application. Mr Cuthbert was, said the claimant (without being contradicted by the respondent) in his 40s. Ms James and Ms Green carried out the interviews for post. Ms James was cross-examined about it. Ms Green was not. Ms James' clear evidence was that, viewed objectively, Mr Cuthbert's application was better than that of the claimant. Ms James' evidence on this was in paragraphs 61-62 of her witness statement. We accepted that evidence of Ms James in its entirety. In addition, Ms James said, (and the claimant did not challenge her on this), when Mrs Adams was absent from work for a lengthy period on account of sickness, Mr Cuthbert deputised for her.

58 At the end of the consultation process (about which the claimant made no complaint), the claimant wrote the email at page 745. It summed up the respondent's position, namely that the claimant was told on the day before, i.e. 2 March 2017, that he had until 4pm on that day, 3 March 2017, to accept the new terms offered to him (i.e. a new contract on the basis stated in paragraph 55 above, and that if he did not do so then he would be dismissed. It then continued:

> "However I would like to draw your attention to the grievances that were lodged on the 8th June 2016. I have still yet to have a formal response to those grievances and for those to be investigated and secondly to have a formal response to that effect. Until such time as I have those formal responses from you I am unable to review whether I sign or decline signing the new contract. Therefore I respectfully ask that this consultation period is extended until such time as they have been completed, had a full review and provided me with a formal response and outcome to my grievances."

59 That email was sent at 12:07pm; Ms Green responded at 2:17pm:

> "As discussed in your meeting yesterday, when Louise originally met you in relation to the grievance she was under the impression they had been satisfactorily resolved informally. However you confirmed yesterday that this was not the case and I assured you that these would continue to be investigated, and when an outcome has been reached we will communicate

> this to you. The grievance process is not pertinent to the dismissal and re-engagement process. The grievances will continue to be investigated however this investigation will not impact the timelines and process set for the dismissal and re-engagement process."

60 The claimant's dismissal at 4pm on that day then took effect. It was recorded formally in the letter dated 6 March 2017 at page 752.

61 The claimant appealed against that dismissal. He did so in the letter dated 9 March 2017 at pages 755-757. It contained 26 numbered paragraphs. Only in paragraph 16 was there a reference to "discrimination", but only in this context:

> "I have previously been treated abysmally by the company which has included bullying tactics, intimidation, threatened; money stopped, ignored, undervalued, blanked and discriminated against all which have been well documented with no formal investigation or formal response."

62 In addition, the claimant wrote this in paragraph 17 of that letter:

> "The reason(s) why I was never offered the position that I had previously held with the company as Regional Manager for the Health Lottery ..... is because the job had been promised to Derek Cuthbert. The reason also is the on-going grievance with the account manager Luke Sandy. The only reason I had an interview for the position of Regional Manager for the Health Lottery was just to follow procedure and protocol to make things look good on the surface for the company and for Luke. After all I had previously been a very successful Regional Manager with FSS on 2 accounts,., .. the 'Cadbury Trident' account as well as the 'Health Lottery' account having happy teams recording exceedingly good successful figures (results) coverage etc .... proving that I didn't just do the talk but could also do the walk."

63 Mr Spicer heard the claimant's appeal. The notes of the appeal hearing were at pages 773-774. The claimant put before Mr Spicer the document at pages 769-772. The only outcome that the claimant wanted was (see the top of page 774) to be "[kept] quiet actually". The nub of the claimant's appeal was at page 772, in the following passage:

> "There is no apparent consideration for Health & Safety or an individual's well being, age, or consideration for an individual's abilities, none are being considered where retailer call expectations is high and 100% coverage is expected. The company decided with the new re-structure that they would once again have a manager on my old area – with no team leaders – I was not even asked if I would like my old job back or asked to apply for the position. I applied for the vacant Regional Managers job on my own initiative, which was the position I had previously before the first restructure, where I had successfully managed the region and team for over 18 months without

> any complaints or problems. I failed to get the job because it was suggested although my interview was good, that my plans for 'team training needs' were not as good as the person they selected which is a lot of nonsense and baloney. The person they did select had no previous management experience, qualifications or training experience, the reason I didn't get offered the position is obvious, because of the outstanding ongoing grievance with Luke Sandy the account manager which has not been resolved and which should have been resolved months previous."

64 Mr Spicer dismissed the claimant's appeal for the reasons stated in paragraphs 19-21 of his witness statement. The reasons were stated rather more summarily in the letter dismissing the appeal at page 777. We accepted Mr Spicer's evidence as to the reasons in his mind for dismissing the claimant's appeal.

(2) The specific factual matters relied on by the claimant in support of the claim of age discrimination

65 The claimant said in the document accompanying his ET1 claim form (with the heading "CLAIM FOR Constructive DISMISSAL"), at page 14 of the bundle:

> "It was explained to me that the business would appoint Team Leaders to assist managers. However when I asked about me taking on the Team Leader role I was flatly refused. I had the impression that the company wanted to get rid of me as there was no offer of any other position available or position with any other FSS account. I remembered Luke raising his eyes when he discovered that I was over the age of 65 and feel that had some bearing in his and the companies decision."

66 The claimant put it to Mr Sandy that the conversation about the claimant being 65 took place on 31 March 2015 when he and Mr Sandy were having a drink in a bar, when Mr Sandy wished him a happy birthday. Mr Sandy accepted that he had wished the claimant a happy birthday. The claimant said that Mr Sandy had mentioned that it was his (the claimant's) 65th birthday, and Mr Sandy said that he did not recall doing so and that he had said "Happy Birthday" because a colleague of his had said that it was the claimant's birthday. The claimant said that he and Mr Sandy had discussed football teams (Mr Sandy being a Tottenham supporter and the claimant being a Middlesbrough supporter) and how good Harry Kane was as a player, and that Mr Sandy had said that the Middlesbrough football team members were "a bunch of old has-beens". Mr Sandy did not recall that conversation.

67 The only other evidence of the claimant of consciousness of his age on the part of the respondent's witnesses was the assertion that he put to Mrs Adams (not foreshadowed anywhere in the bundle or otherwise) that she had said to him at the handover meeting between him and her when she became Regional Manager in February 2016: "I am surprised that you are taking the BA role and not a pension." She did not recall saying that. He said that she had mentioned

his age, and she said that she had not known his age until she read through the bundle for hearing before us.

68 The respondent put before us, and the claimant accepted as accurate, some evidence as the ages of the respondent's BA workforce. When the claimant ceased to be employed by the respondent, there were 66 BAs. Of them, 8 were over the age of 66 (2 being 76, and 3 further BAs being over the age of 70). Of the rest, two were aged 65 and three were aged 64.

The claimant's claims and the respondent's response to those claims

69 The case was the subject of a preliminary hearing held by Employment Judge Gumbiti-Zimuto on 2 January 2018. The issues were listed by the respondent in a long document the first part of which was drawn from (but was an expansion of) the case management summary. At the end of the hearing, after discussion with the claimant and Mr Panesar, the respondent agreed to permit the claimant to add to his existing claims a claim for a redundancy payment.

70 Ultimately, the claimant claimed

70.1 that his dismissal was unfair;

70.2 that he was owed a redundancy payment;

70.3 that he was owed the sums claimed in the schedule of loss at pages 64a-64b; and

70.4 that he was discriminated against because of his age.

71 The claim of age discrimination was advanced by the claimant at the hearing before us as a claim only to the effect that there was a conspiracy to get rid of him because of his age. The claim of age discrimination was stated by Employment Judge Gumbiti-Zimuto in this way (at page 57):

> '9. Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act 2010?
>
> 9.1 By Kirsty Adams managing the claimant in such a way to secure his dismissal or termination of his employment with the respondent;
> 9.2 By dismissing the claimant;
> 9.3 By the respondent agreeing matters with the claimant during consultation in 2016 and then the respondent failing to carry out that which was agreed.
> 9.4 Failing to consider the claimant for alternative roles, in particular refusing the claimant's applications for the following posts: Manager with Ferrero Rocher North England (July 2016); Retail Development Manager; Team Leader (March 2016); Regional Manager (a) North

Of England/Scotland or (b) North England/North West (February-March 2017).

9.5 Threatening to deal with the claimant "formally" if he did not cover other areas as a BA in North England.'

72 It was clarified by the claimant that the reference to "March 2016" in paragraph 9.4 of that passage should have been to "July 2016". In fact, page 409 showed that the claimant (as recorded in his own handwriting on the email dated 15 July 2016 of which that page was a copy) had in July 2016 "applied for 2 positions [with the respondent, doing work for Ferrero Rocher] (1) Rep Darlington/York/Harrogate Area's, (2) Regional Sales Managers position". In the email of 15 July 2016 at page 409, the claimant was informed that he had not been successful in his application for the post of "Retail Development Manager for Ferrero".

73 It was the respondent's case that the claimant's dismissal was for SOSR, but if not, then it was for redundancy.

74 It was the respondent's case that the claimant's dismissal was fair, that he had not been discriminated against because of his age, and (initially) that he was owed no wages. However, during the hearing, after discussion with us, the respondent accepted that it had underpaid the claimant by £127.50 in respect of the holiday that he took in the weeks commencing 7 and 14 March 2016. It accordingly paid that money to the claimant during the hearing, and apologised for not having paid him in full at the time. The claimant accepted that payment as meeting the respondent's obligation to him in respect of his holiday for those two weeks.

75 In addition, the respondent denied that it owed the claimant a redundancy payment, but asserted that if the claimant had been entitled to a redundancy payment, then he had lost that entitlement by refusing to accept the new contract, under which he would have had the right only to 60% of his former wages. That was asserted on the basis that that new contract constituted an offer of suitable alternative employment which it was unreasonable of him to refuse.

The relevant law

76 Before dealing with those claims, it is necessary to refer to the relevant legal tests.

The law of unfair dismissal

77 The right to claim unfair dismissal arises only in favour of an employee who has sufficient continuous employment at the time of his or her dismissal, i.e. two years' such employment.

78 As for the fairness of the dismissal, section 98(1) of the ERA 1996 provides:

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

79 Subsection (2) provides so far as relevant:

> "A reason falls within this subsection if it— ... (c) is that the employee was redundant".

80 The term "redundant" is defined for the purposes of the ERA 1996 in section 139 of that Act, subsection (1) of which provides:

> "(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
>
> (a) the fact that his employer has ceased or intends to cease—
> (i) to carry on the business for the purposes of which the employee was employed by him, or
>
> (ii) to carry on that business in the place where the employee was so employed, or
>
> (b) the fact that 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 expected to cease or diminish."

81 Section 6 of the Interpretation Act 1978 provides:

> "In any Act, unless the contrary intention appears,— ...
>
> (c) words in the singular include the plural and words in the plural include the singular."

82 Section 98(4) of the ERA 1996 provides:

> "Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

83 Where a dismissal is for redundancy, a reasonable employer will warn and consult the employee about the proposal to dismiss him or her. A reasonable employer will also make reasonable efforts to redeploy the employee. There is no reason why the fairness of a dismissal for some other substantial reason within the meaning of section 98(1)(b) of the ERA 1996 ("SOSR") where the employer has carried out a reorganisation should be subjected to any different approach or analysis. Nevertheless, different questions may arise when determining the fairness of a dismissal for redundancy as compared with a dismissal for SOSR.

84 By way of illustration, an employer may force on its employees a change to their terms and conditions. If there is a sound, good business reason for the change then (according to *Hollister v National Farmers' Union* [1979] ICR 542, at 551A-B) that may be SOSR for the dismissal. Nevertheless, the decision to dismiss must be fair within the meaning of section 98(4) of the ERA 1996 and therefore it must fall within the range of reasonable responses of a reasonable employer: it is not for an employment tribunal to put itself in the shoes of the employer and decide whether it would have dismissed the employee.

85 In one sense in contrast, it was said by the Court of Appeal in *James W Cook Ltd v Tipper* [1990] ICR 716 that it is not open to an employment tribunal to investigate the commercial and economic reasons which led to a decision to dismiss for redundancy.

86 The obligation to make reasonable efforts to redeploy an employee does not require the employer to "slot" an employee into a promotional post. In the circumstances discussed in *Morgan v Welsh Rugby Union* [2011] IRLR 377, it was decided (see the headnote) that "when making an internal appointment, there is no rule requiring an employer to adhere to the job description or person specification. The employer is entitled to interview internal candidates even if they did not precisely meet the job description; and it is entitled to appoint a candidate who did not precisely meet the person specification. The employer is entitled, at the end of the process, to appoint a candidate which it considers able

to fulfil the role."

Redundancy

87 There is a series of cases in which the question whether or not a reduction in the hours of an employee can give rise to what is commonly loosely called a redundancy situation, i.e. whether or not a dismissal of an employee for refusing to accept an imposed cut in hours can give rise to a right to a redundancy payment, has been considered. Most of the time, that question has been considered in passing. In two cases in the Employment Appeal Tribunal ("EAT"), it was considered directly. The first of those is *Aylward v Glamorgan Holiday Home Ltd (trading as Glamorgan Holiday Hotel)* (unreported) 5 February 2003. The second *is Packman (trading as Packman Lucas Associates) v Fauchon* UKEAT/17/12 [2012] ICR 1362. In the latter, the EAT (with Langstaff P presiding) came to a different conclusion from that of the EAT in *Aylward* (Judge Ansell presiding). The conclusion of the EAT in *Packman* was that the employment tribunal in that case ("the ET") had wrongly declined to apply *Aylward*, because it was bound by that decision, but that the ET's decision in *Packman* was correct. There, an employee was a bookkeeper. Only she did the work of a bookkeeper. Her employer proposed to reduce her working hours. She refused to accept that reduction, and her employer dismissed her on notice. She claimed a redundancy payment.

88 Several passages in *Packman* were of particular assistance to us. Paragraphs 7-9 were helpful in making it clear that section 139's focus is in part on the business's requirements for work of a particular kind to have ceased or diminished:

> '9 Some observations: first, the whole wording of the section must be taken into account. The section is concerned with dismissal; it is not concerned with identifying a "redundancy situation", which, though it can be a useful label, can sometimes be a misleading misnomer. Any question of whether a dismissal is by reason of redundancy must be approached by looking to see whether what has happened fits the words of the statute and not by asking intuitively if the situation created is a "redundancy situation" and then torturing the words of the statute so as to fit the result that might be suggested by that phrase. The phrase "wholly or mainly attributable to" applies a causation test. There thus has to be a dismissal that will be as defined by section 95 of the 1996 Act, and in this case Mr Watson was constrained to accept during the course of his submissions that section 95(1)(a) applied: that the claimant was dismissed by her employer because the contract under which she was employed had been terminated by the employer.
>
> 10 Thus it was common ground that there was a dismissal; the question is whether it is wholly or mainly attributable—that is, caused by—the state of affairs set out in section 139(1)(b). That makes reference to the

requirements of the business; that is, the business for the purposes of which the employee was employed by the employer: see section 139(1)(a)(i). So the first focus has to be upon what the business needs. The needs are for employees—although that is in the plural, it is common ground before us that it does not preclude one employee being made redundant, or for a redundancy simply affecting one employee only, as where the job of an employee who is the only person performing work of a particular kind disappears.

11 The need, however, is not just a need for employees in a vacuum: it is associated with work. The sub-clause does not cease after "employees". The requirements of the business for employees are linked by the statute to those employees carrying out work of a particular kind. The reference is to work of a particular kind and not, for instance, to work of a particular duration; but the relevant clause continues "have ceased or diminished"; that is, the requirements of the business have ceased or diminished. Thus, if the business need for work of a particular kind has diminished—that is, less work of that sort needs to be done—there will be a redundancy situation, bearing in mind the need to give value to each word in the statutory section. Mr Watson would argue that it is an error to focus only upon the requirements of the business that work of a particular kind should be carried out without including the reference to the need for employees to carry it out.'

89 That last sentence reflected the focus of Mr Panesar in his written and oral submissions on the question which we had to decide. The discussion in *Packman* on the question whether there had to be a reduction in the number of employees carrying out work before there could be a dismissal for redundancy was illuminating and helpful, but it did not answer the question that we had to answer. Nevertheless, paragraphs 34 and 36 of the judgment in *Packman* were also helpful:

'34 We see no reason artificially to introduce into the statute words that do not appear or to eliminate words that do appear, and it seems to us that the argument of Mr Watson would seek to emphasise only "employees" as if the words "to carry out work of a particular kind" did not appear in section 139(1)(b)(i). But they do. The situation that this tribunal was examining in *Burrell* [i.e. *Safeway Stores plc v Burrell* [1997] ICR 523], both factually and legally, was a different situation from that which comes before us. It did not, therefore, in our view justify the decision to which this tribunal came in the *Aylward* case. The reasoning, in para 14 of that decision, begins by adopting the words from *Burrell*: "From time to time the mistake is made of focusing on a diminution in the work to be done, not the employees who do it." Although the example, we think, makes clear what is meant and is entirely consistent with our reading of the statute, the error, as it seems, respectfully, to us, in the analysis of the appeal tribunal here was to take the words as having a wider impact

than they did. Judge Peter Clark was making clear that it would be a mistake to focus only upon part of the requirement of the subsection—that is, work of a particular kind—and not to give full weight to the whole of the provision.'

'36 We note in passing that at section 135 of the 1996 Act the draftsman of the statute thought that a redundancy payment would not only be payable in event of dismissal by reason of redundancy but where there was eligibility for a redundancy payment by reason of being laid off or kept on short time. It is unnecessary to explore in detail the situations in which that will be so, but the point is that it was plainly anticipated by the draftsman that the expression "redundancy" would be applicable in situations where there was no difference to the number in the workforce but merely to the hours that they were working. The *Johnson and Lesney Products* cases are decided as they were because the hours and the employees were both no different; this situation is one in which on the facts the hours that the business required to be worked were fewer, and therefore this case sits within the definition of redundancy just as those cases did not.'

90 What we had to decide was whether or not an employee who was dismissed for refusing to accept a new contract under which he or she would be obliged to work fewer hours than under the original contract, so that he or she would be entitled to less pay, where the overall requirements of the employer for employees to do the same sort of work increased, and the employer required more employees to do it, could be said to have been dismissed for redundancy within the meaning of section 139 of the ERA 1996.

91 We noted the following potential reading of the words of section 139(1) (with the words on which reliance could be placed underlined by us, expanded in accordance with section 6 of the Interpretation Act 1978 by insertion of words in square brackets):

"(1) <u>For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to</u>—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) <u>the fact that the requirements of that business</u>—

(i) for [an employee or] 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 expected to cease or diminish."

92 Taking out the irrelevant words, and by substituting for the words "that business" the words "the business for the purposes of which the employee was employed", the provision can be seen to apply as follows where relevant, i.e. in situations such as the one with which we were concerned and that which occurred in *Packman*:

> "For the purposes of this Act 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 that the requirements of the business for the purposes of which the employee was employed for an employee to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish."

93 In fact, in our view the clear purpose of section 139 of the ERA 1996 read as part of Part XI of that Act is to give rise to an entitlement to a redundancy payment (subject to exceptions) where the employer dismisses the employee in question because the employer decides to reduce the hours of work which the employee is required to do and therefore the entitlement of the employee to be paid. The exceptions in Part XI give considerable protection to the employer in that if the employee accepts the new contract, then, by reason of section 138(1) of the Act, the employee will not have a right to a redundancy payment, and in that if the employer increases the hourly rate of pay so that the employee's pay is not diminished, then the employer can decline to give the employee a redundancy payment on the basis that the employee has unreasonably declined an offer of suitable alternative employment.

94 We note that the lay members of the EAT in *Packman* were pleased that the EAT was able to arrive at its conclusion in that case, for the reasons stated in paragraph 39 of its judgment, which were as follows:

> "Finally, this observation: that the lay members in particular of this tribunal are glad that the result of the appeal is as it is, not least because from an industrial background one would approach the question of hours and number of employees by adopting a full-time equivalent (FTE) approach. Essentially, as the extract from *Harvey* [i.e. *Harvey on Industrial Relations and Employment Law*] suggests, the full-time equivalent workforce in that example is cut from two to one, even though the number of employees actually working remains the same. There is a real reduction in headcount, measured by FTE. It is therefore, they consider, entirely consistent with actual industrial approach that the statute should have the interpretation

> which we think in law properly belongs to it; the consequences of another interpretation would, as it seems to them, have significant adverse effects upon the employment market."

95 While we agreed with that statement, we could see that it could be relied on in support of the proposition that there has to be a "real reduction in headcount", which there was not in this case. However, that statement was made against the background of a reduction of hours required of one employee. In any event, in our view the entitlement of an employee to a redundancy payment should not be determined by reference to the employer's overall requirements, but instead by reference to the employer's requirements for work to be done by the dismissed employee.

Entitlement to pay

96 An employee cannot insist on his or her own interpretation of a contract of employment and refuse to do what the contract actually enables the employer to require the employee to do, and still expect to be paid his or her wages. The discussion in paragraphs BI[6]-[10.05] in *Harvey* bears this out. Lord Templeman (not, as stated in paragraph BI[6] of *Harvey*, Lord Bridge) put it in *Miles v Wakefield Metropolitan District Council* [1987] ICR 368, at 391D-E:

> "In a contract of employment wages and work go together. The employer pays for work and the worker works for his wages. If the employer declines to pay, the worker need not work. If the worker declines to work, the employer need not pay. In an action by a worker to recover his pay he must allege and be ready to prove that he worked or was willing to work."

97 What Lord Bridge said, which was to the same effect, was this (at page 383):

> "My Lords, for the reasons so convincingly expressed by my noble and learned friends Lord Templeman and Lord Oliver of Aylmerton in their speeches, which I have had the privilege of reading in draft, I agree that the plaintiff's action was rightly dismissed by the trial judge. It was rightly dismissed because in an action by an employee to recover his pay it must be proved or admitted that the employee worked or was willing to work in accordance with his contract of employment, or that such service as was given by the employee, if falling short of his contractual obligations, was accepted by the employer as a sufficient performance of his contract. I leave out of account a failure to work or work efficiently as a result of illness or other unavoidable impediment, to which special considerations apply."

98 The following passage in *Harvey* (which we accepted is an accurate statement of the effect of the case law) is of particular relevance:

> '***(iii) Deliberate refusal to work***

[10]
Whilst the precise scope of the phrase 'willing to work' remains uncertain, it has long been established that employees who deliberately or unreasonably refuse to do any work – and so are clearly not willing to work – lose the right to be paid: see *Cuckson v Stones* (1858) 1 E & E 248, [1843-60] All ER Rep 390; *Marrison v Bell* [1939] 2 KB 187, [1939] 1 All ER 745, CA; and *Miles v Wakefield* [1987] IRLR 193, [1987] ICR 368, HL. Many of the relevant cases dealing with this issue arise in the context of industrial action, to the effect that where there is a complete withdrawal of labour, such as a strike, then there will be no right to remuneration for the relevant period. Conversely, if the industrial action falls short of a strike and does not involve a breach of contract, the employee will be entitled to his full pay. (The intermediate position – where there is action falling short of a strike but which nonetheless amounts to a breach of contract – is considered at para [14] below in the discussion on part performance.)

[10.01]
An interesting example of a deliberate refusal to work which entitled the employer to withhold pay is provided by *Cresswell v Board of Inland Revenue* [1984] IRLR 190. The case involved a dispute between unions and management arising out of the introduction of computerised methods of working. The claimants, who were clerks and tax officers, refused to operate the new system, although they were willing to continue working using the old manual methods. This was unacceptable to the Revenue and the claimants were therefore sent home and told that they would not be paid whilst they refused to operate the new computerised system. The Revenue also stated that it was not ending the claimants' contracts and they were free to return to work at any moment provided they adopted the new working methods. An impasse was reached and so the claimants applied to the High Court for a declaration that the Revenue was acting in breach of contract by effectively suspending them without pay.

[10.02]
Mr Justice Walton gave that argument short shrift. Although computerisation involved some change to the claimant's duties, on the facts it was not on such a scale as to alter the claimants' contractual roles. As a result, the Revenue was not in breach of contract in requiring them to work the new system. Applying the principle of 'no work no pay' he therefore decided that the Revenue was within its rights to withhold pay in these circumstances and there was no question of its having to suspend the claimants under the disciplinary procedure before doing so. As he put it:

> "'the promises of pay and work are mutually dependent. No work (or at any rate, readiness to perform whatever work it is the employee ought to be willing to perform if physically able to do so) – no pay… Accordingly there is nothing at all in any suggestion that the Revenue was somehow obliged to resort to suspension… before it was free of any obligation to

> pay the [claimants'] wages. I think any suggestion to the contrary is really shocking to common sense."
>
> Of course in one sense the claimants in *Cresswell* were ready and willing to work, *but only on their own terms*. They were not willing to do what the contract required and in the end that was fatal to their claim.' (Original emphasis.)

Our conclusions

99 We concluded that the claimant's dismissal was for redundancy and was fair. While the respondent thought that it was dismissing the claimant for SOSR, it was in fact in our view, dismissing him for redundancy. It warned and consulted him sufficiently about the proposal to dismiss him, and it made reasonable efforts to redeploy him. In that regard, we noted that the only alternative posts were managerial posts, and that the claimant was guaranteed an interview for them. We also concluded that it was within the range of reasonable responses of a reasonable employer to interview both the claimant and Mr Cuthbert for the post of Regional Manager, and to appoint Mr Cuthbert rather than the claimant to that post. We noted in this regard that, in addition to it being in accordance with the general approach sanctioned by the EAT in *Morgan*, here, Mr Cuthbert was himself at risk of redundancy, as the Team Leader post was being deleted from the respondent's organisation.

100 We concluded that there was no conspiracy against the claimant, whether because of his age or for any other reason. In fact, the claimant's own case was that he was not appointed to the role of Regional Manager in February 2017 because he had unresolved grievances outstanding. Irrespective of that factor, we concluded that

100.1 Mr Sandy did not refer to the claimant's age on 31 March 2015, although he did wish the claimant a happy birthday.

100.2 Even if Mr Sandy did refer to the Middlesbrough football team as being "a bunch of old has-beens", that was not evidence of age discrimination on the part of Mr Sandy.

100.3 Mrs Adams did not, as the claimant alleged as we describe in paragraph 67 above, at their handover meeting ask why the claimant was not taking his pension. Nor did she refer to his age.

100.4 The claimant was not told by Mr Sandy in February 2016 that he could not apply for the role of Team Leader. This was because it was, on the facts as we found them, highly unlikely that that would have been said, and in any event it was contrary to the rest of the evidence before us about the respondent's approach to applying for new posts, namely that it was open to employees at risk of redundancy to do so. It is possible

that it was said that the ideal location for the post-holder was Scotland, but that would have had nothing to do with the claimant's age.

101 In those circumstances, there was nothing which would have justified drawing the inference of discrimination because of age. In addition and in any event, we were satisfied on the balance of probabilities that neither Mr Sandy nor Mrs Adams were hostile to any extent towards the claimant because of his age, and that no other witness who gave evidence on behalf of the respondent was to any extent motivated in their actions towards the claimant by his age.

102 Indeed, the only person who, we found, mentioned age was the claimant: see paragraphs 36, 38, 63 and 100 above. While the claimant in several places in the documents referred to discrimination as such, he did not refer to age except as recorded in paragraphs 36, 38 and 63 above

103 Furthermore, we concluded that Mrs Adams did not manage the claimant in such a way as to secure his dismissal or the termination of his employment with the respondent. Rather, we concluded that Mrs Adams was more tolerant of the claimant's insubordination than she could have been, as was Mr Sandy, and as was Ms James.

104 In our view the respondent's genuine reason for dismissing the claimant was the reorganisation of the work done by BAs: it was not in any way affected by his age. We noted in this regard that the claimant's own evidence was that he would have remained in his employment if he had not concluded that his grievances had not been resolved to his satisfaction. We also took into account the range of ages of BAs, and the fact (recorded in paragraph 68 above) that over 10% of them were over the age of 66.

105 We also concluded that the assertion of the claimant that the respondent had departed from what it had agreed with him during consultation with him in 2016 was fundamentally mistaken. What it had agreed with him was the postcodes which were within his normal area for visiting retail outlets. The contract of employment at pages 164-171 provided in paragraph 1.2 on page 165, in terms which were in our view wholly reasonable, that the claimant could be required to work outside that area. In our view the claimant could not reasonably have thought that there had been a departure from what was agreed with him in the consultation of 2016, especially because, as Regional Manager, he will have been well aware that a BA could not reasonably insist on being given calls to make only in his or her designated area.

106 Furthermore, Ms James' threatening to the deal with the claimant "formally" if he did not cover other areas as a BA in North England was wholly warranted and, we concluded, having heard Ms James' evidence, had nothing to do with the claimant's age.

107 For all of the above reasons, we concluded that the claimant's claim of age

discrimination was not well-founded.

108 As for the money claimed by the claimant in the schedule of loss at pages 64a-64b, our conclusions were as follows (following the numbering on those pages):

108.1 We have dealt in paragraph 74 above with the claim for pro-rata holiday pay. That claim was in part well-founded and has been agreed and paid by the respondent.

108.2 The claimant was entitled to be paid in the week commencing 29 February 2016 as a BA only. The fact that he was permitted by Mr Sandy to carry out back-checks of the sort that he had previously, as a Regional Manager, been required to carry out, was the result of a lenient and sympathetic approach by Mr Sandy when the claimant went over Mrs Adams' head and contacted Mr Sandy. Mr Sandy could have required the claimant to carry out the calls that the claimant refused to carry out and, if the claimant refused to do so, decline to authorise the payment of anything by way of wages to the claimant for that week. Thus, there was no underpayment by the respondent of the claimant's wages for the week commencing 29 February 2016.

108.3 The third heading on page 64a was about the same situation as that which was the subject of the first heading, and was in any event mistakenly formulated. The claimant received holiday pay for the weeks starting on 7 and 14 March 2016, but at the wrong rate, as we concluded and the respondent, after discussion with us, agreed, as we record in paragraph 108.1 above.

108.4 The claim for business mileage of 360 miles for the week commencing on 21 March 2016 was wholly unfounded. The claimant was unable to point to anything concrete to justify it, and we accepted the respondent's evidence (both that of Mr Sandy and that of Mrs Adams) that (1) the CACI software calculated a reasonable route to follow in the making of the calls on a call list, and (2) allowing for a margin of 5% extra only unless the claimant could justify by concrete evidence the amount above that 5% extra was a reasonable way of ensuring that BAs were properly compensated for their mileage expenses, i.e. in accordance with their contracts of employment. Thus, the claim for £92.20 was unfounded. The same was true, for the same reasons, of the claim for £5.67. In addition, we accepted Mr Sandy's and Mrs Adams' evidence that the CACI software calculated the routes' likely duration (allowing for a reasonable period for each stop) with a reasonable degree of accuracy, and that overtime was payable only if the claimant could reasonably justify spending longer than his normal working day of 7.5 hours on the route. Since the claimant had not given Mrs Adams or Mr Sandy any such justification, neither claim for overtime (of 1 hour and 3 hours respectively) for the weeks commencing 21 and 28 March 2016 was

justified.

108.5 The claim for loss of earnings by reason of sickness "as a direct result of work related stress & anxiety" was outside our jurisdiction, given that (1) we concluded that the claimant had not been discriminated against because of his age by Mr Sandy or Mrs Adams in the period before 11 May 2016, (2) the claim was a claim for damages for personal injury, and (3) such a claim is outside the jurisdiction of an employment tribunal by reason of Article 4 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, SI 1994/1623.

108.6 The claimant was not entitled to any salary for 8-11 August 2016 because he did not do any work pursuant to his contract of employment, and was not ready and willing to do so. He was ready and willing only to do what he asserted his contract of employment required him to do, and not what in fact he could be, and was being, required by the respondent to do.

108.7 The claim for loss of earnings due to sick leave during the period from 12 August to 23 September 2016 could not succeed given that (1) we concluded that the claimant had not been discriminated against because of his age by Ms James threatening to deal with his refusal to go on the calls that the respondent required of him formally (or in any other way), and (2) such a claim is outside the jurisdiction of an employment tribunal by reason of Article 4 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, SI 1994/1623.

108.8 We heard no evidence of any accident at work as asserted under heading number 8 on page 64b, but in any event, that was evidently a claim which was precluded by Article 4 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

108.9 The rest of the claims of the claimant stated in the schedule of loss at pages 64a onwards were predicated on the proposition that he was unfairly dismissed and/or discriminated against because of his age. Accordingly, given our above conclusions, those claims were not sustained.

109 Finally, we record here that the claimant's redundancy payment will be readily calculated, and that we do not expect that the parties will need to ask us to determine any further matter. If they do, however, then they must write to the Tribunal, stating what further determination they seek from us.

Case Number: 3324916/2017

Employment Judge Hyams

Date:____16.11.18_____

JUDGMENT SENT TO THE PARTIES ON

.....22.11.18.....

.....
FOR THE TRIBUNAL OFFICE