EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Davison	**AND**	Just Costs Limited

Heard at: London Central **On**: 7-9 November 2016

23 February 2017 (In Chambers)

Before: Employment Judge Glennie
Mr G Bishop
Mrs J Webber

Representation
For the Claimant: Mr A Mellis, of Counsel
For the Respondent: Ms S Bowen, of Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that the complaints of unfair dismissal and of failure to deal with a request for flexible working in a reasonable manner are dismissed.

REASONS

1. By his claim to the Tribunal the Claimant, Mr Davison, made complaints of unfair dismissal (on the basis that the reason or the principal reason for his dismissal was that he had made a flexible working request) and of a failure contrary to section 80G(1) of the Employment Rights Act 1996 to deal with a flexible working request in a reasonable manner. The Respondent by its response disputed those complaints.

2. The Tribunal is unanimous in the reasons that follow.

Preliminary and Procedural Matters

3. Both parties made applications at the commencement of the hearing. The Claimant applied to amend the claim to add a complaint of breach of contract (notice pay) and the Respondent applied for permission to call Mr Paul Shenton to give evidence, permission being needed because a witness statement from him had not been provided when statements were exchanged on 28 October 2016.

4. The Claimant's application to amend was put on the basis that his notice pay was calculated on the assumption that he was still within the probationary period of his employment, and that his contention that this period had ended on 20 November 2015 was already pleaded. Mr Mellis therefore submitted that the facts relevant to a complaint that a longer notice period was applicable under the contract had already been pleaded, and that this amounted to a re-labelling exercise of the sort identified in the well-known case of **Selkent** and in the Presidential Guidance. He said that the application had arisen from his reading of the papers and identifying the potential head of claim.

5. Ms Bowen submitted that this was a new cause of action and, had it been the subject of a new claim, would be out of time. There had already been an application to amend the claim at the Preliminary Hearing, and the Claimant had been legally represented at all times. She contended that there was prejudice to the Respondent as the case had not been prepared with a breach of contract claim in mind and later observed that, if the amendment were allowed, she would seek an adjournment of the hearing in order to deal with it.

6. The Tribunal decided not to allow the application to amend. Although it did not involve a particularly large sum of money (around £2,000), there was potential prejudice to the Respondent in requiring it to deal with the breach of contract complaint within the scope of the present listing; alternatively there would be a disproportionate delay and loss of the Tribunal's time allocated to the present hearing if an adjournment were granted. There had been ample opportunity for the application to have been made earlier, and the complaint would have been out of time if raised in a new claim.

7. The Respondent's application for permission to call Mr Shenton also arose as a result of Counsel's preparations for the hearing. His statement, which was disclosed on day 1 of the hearing, dealt with the Claimant's contention that he and Mr Shenton had reached an agreement about flexible working at the interview on 18 March 2015 and with a complaint about the Claimant's work that would be relevant to the principle in **Polkey**, if that became material.

8. Mr Mellis stated that the 18 March 2015 interview was a matter of background evidence and was not directly in issue in the case. He submitted that the complaint referred to was already pleaded in the grounds of resistance, and said that if the witness statement were allowed in, he would need time to take instructions on it. Ms Bowen subsequently stated that, if admitting the statement would lead to an adjournment, the Respondent would not press its application.

9. The Tribunal decided not to allow Mr Shenton's statement to be admitted. In part, it addressed matters that were not directly in issue. The **Polkey** issue could have been addressed at the time that witness statements were exchanged. If it was allowed in, the Claimant would have to be allowed time to consider it, and to give further oral evidence (whether in chief, or in cross-examination, or both) in relation to it. Even if that did not require an adjournment, completion of the hearing within the time allocated would be jeopardised.

10. At the commencement of day 2 of the hearing, the Respondent applied to put in additional documents that had not previously been disclosed. These related to a complaint made by a client about the Claimant's work. Ms Bowen said that, regrettably, these had previously been overlooked.

11. The Tribunal agreed with Mr Mellis' submission that the Tribunal was not charged with determining the merits of any complaints about the Claimant's work, and that the fact that the complaint in question was made was not in dispute. We did not therefore allow the late submission of these documents.

12. In part as a result of the time taken by the interlocutory matters described above, the Tribunal was unable to complete the hearing within the time allocated. We therefore adjourned after hearing all of the evidence, and the parties sent written submissions on all issues. The Tribunal had intended to deliberate in Chambers on 23 December 2016, but in the event on that date one of the lay members was recuperating from an operation and was unable to attend. The Tribunal in fact met and deliberated on 23 February 2017.

The issues

13. The issues therefore remained as defined in the Preliminary Hearing held on 17 August 2016 in the following terms:

> 6.1 Unfair dismissal: What was the reason for the dismissal? In particular, was the sole or, if more than one, the principal reason that the Claimant had made a request for flexible working? The Respondent asserts that it was for the reason that the Claimant's performance was unsatisfactory.
>
> 6.2 Flexible working: Did the Respondent deal with the request for flexible working on 21 December 2015 in a reasonable manner, in particular, was it unreasonable not to give a decision on the request within two months, as stated in the letter to the Claimant dated 22 December 2015, rather than the three months provided by the statute?
>
> 6.3 Remedies: The issues did not arise for decision given the Tribunal's judgment on liability.

14. In relation to the flexible working complaint, in her closing submissions Ms Bowen suggested that the Claimant's case was being put on a wider basis than that envisaged in the list of issues. The Tribunal was not convinced that this was

the case, but held that in any event the Claimant was bound by the issues as defined at the Preliminary Hearing, especially as the flexible working complaint depended on an amendment which had been allowed in the specific terms set out in the list of issues.

Evidence and findings of fact

15. The Tribunal heard evidence on behalf of the Respondent from Ms Elizabeth Jones (Regional Manager) and Mr Nicholas McDonnell (Director and Costs Lawyer). The Claimant gave evidence on his own behalf. There was an agreed bundle of documents and page numbers that follow refer to that bundle.

16. Some of the evidence concerned clients of the Respondent. These will be referred to by initials, with a view to the parties being able to understand which client is being referred to, but without their names being revealed to any members of the public who may read these reasons.

17. The Claimant is a Costs Lawyer (previously a Law Costs Draftsman) and has worked as such since leaving full-time education in 1971. His work involves preparing Bills of Costs for detailed assessment and conducting detailed assessment hearings on behalf of the party concerned. He has expertise in complex, high value, commercial matters and had worked for leading City firms of solicitors before becoming a self-employed independent consultant, in which capacity he practised for around 20 years. In about 2015 he decided to seek an in-house position and on 20 May 2015 commenced employment with the Respondent as a Senior Associate in its London office.

18. The Respondent is a law firm that, as its name suggests, deals exclusively with costs matters. It does so on instructions from professional clients (i.e. other law firms) and from litigants themselves. At the material time its head office was in Manchester and it had regional offices in London, Leeds and Chesterfield.

19. The Claimant was initially interviewed for the role of Senior Associate by Ms Jones. His second interview, on 18 March 2015, was with Mr Shenton. The Claimant took to the interview an aide-memoire of matters to raise with Mr Shenton, and his annotated copy was at page 60. Against the question "how does the chargeable hours system / requirements per day work", he recorded an average of 5.5 hours per day.

20. Question 5 on the Claimant's list related to flexible working. He noted that there was a remote access capability. His aide-memoire recorded: "work at weekends in lieu of weekdays – on average once a month (ability to have some time with my Partner). Quality of life and work / domestic balance." The Claimant's note of the discussion with Mr Shenton was as follows:

"Company policy for same set out in staff handbook to be provided at induction. PS mentioned his view that home/family life as important to working life. Generally flexible working no problem subject to working out same with London Regional Manager."

21. When asked about this in cross-examination the Claimant accepted that no formal agreement was reached with Mr Shenton on flexible working, and that the latter had said that working from home would be all right, with the approval of the London Regional Manager (namely Ms Jones). The Claimant said that his view of the discussion with Mr Shenton was that it would be all right to work from home.

22. The Claimant commenced employment on 20 May 2015, initially under a probationary period of 6 months. He brought with him into the Respondent's practice four of his pre-existing clients.

23. On 14 May 2015 Ms Jones sent a general email to those in the London office concerning working from home, stating requirements such as being available to clients by email and phone. On 23 July 2015 at page 134 the Claimant sent an email to Ms Jones about Christmas arrangements, and asking for a Monday and Tuesday off work in August, to be replaced by working at home on two Saturdays that month. He said that this was with a view to spending a long weekend with his partner, who he did not see much of otherwise, and stated that he had mentioned this sort of arrangement to Mr Shenton, who did not think it would be a problem. On 28 July at page 137 Ms Jones raised this with Mr Shenton, who replied: "We didn't agree anything as such. I said we would be prepared to be flexible, as the work permitted and that to raise it direct with you…." Ms Jones subsequently authorised this request.

24. On 18 August 2015 the Claimant informed Ms Jones by email that he would be working from home on the Wednesday of that week, and this apparently passed without comment. The Claimant's evidence was that the first indication he had of there being any problem with flexible working came on 10 September 2015. On the previous day he had sent an email (at page 153) to Ms Jones saying that he was unwell and would work from home. Ms Jones replied saying that if the Claimant was unwell, he should not be working. She then continued:

"I do need to have you in the office working though – we don't have authority for this client offsite [files could only be taken away from the office with the client's consent] and also I am concerned that you have a caseload that will also require attention ……..Finally, when people work from home it puts added pressure on those in the office to cover phones / deal with queries etc. Whilst I can afford some flexibility it can't be to the detriment of other matters and those in the office. I had hoped to have a chat with you today to explain this rather than through email."

25. The Claimant responded on the same day (at page 152) explaining what work he was doing and saying that although unwell with a cold, he was not bedridden. He continued:

"I was taken on at JC at a high level, as a Senior Associate which is a trusted position. We have discussed flexibility before. In fact I specifically discussed it with Paul on my second interview, so I thought there was clarity on this point. I have endeavoured to follow this responsibly. Again if I am wrong I will be happy

to do whatever I am told. If I am restricted form working from home when it is efficient and expedient to do so, then it will surely have a detrimental influence on my ability to produce suitable and acceptable results!"

26. On 8 October 2015 there took place a 3-month review of the Claimant's probationary period (somewhat delayed as he reached 3 months employment on 20 August 2015). This was attended by the Claimant, Ms Jones and Ms Rachel Riggs of the Respondent's HR department. Ms Riggs took notes which are at pages 171-175 and sent to the Claimant an email summarising the discussion at pages 176-177: the Claimant added his comments at pages 183A-B.

27. The notes record that the Claimant raised a concern about reaching his daily targets and billings given the level of work he was being asked to do. There followed discussion of other matters, and then at page 172-3 matters related to flexible working were canvassed. Ms Jones said that she had wanted to see the Claimant before he went away in order to explain her perspective. She repeated her view that if the Claimant was not well, he should not be working, and said that she was trying to build a team working together 5 days a week, and that the Claimant sharing his experience and expertise was key to that. The Claimant said that he might need the same from others. He continued that he needed flexibility because of his partner's working hours and that this was vital to his preservation. He said that he thought Mr Shenton had agreed to this, to which Ms Jones said that she understood this to be subject to the needs of the business, and that her expectations might be different.

28 The note continued: "understand and respect your home life. Doesn't match this environment. Where we find that balance will be difficult. Happy to ad hoc." Ms Jones added that the Claimant had 27 days annual leave available to him. On this point, she concluded: "look at this at 6 month probation mark again – review". The Claimant echoed this last point in his comments, recording that the whole question of working from home was to be reviewed nearer the end of the probation period. He maintained that he thought his position on working from home had been accepted and stated that he was being treated differently from other colleagues.

29 It was evident to the Tribunal that by this stage the Claimant was seeking, or maintaining that there was already agreement to, a guarantee of a certain level of working from home, while Ms Jones was seeking to retain control of where the Claimant was working and to deal with requests on an ad hoc basis.

28. The Respondent's case was that the Claimant was given a document at page 164 in the course of the meeting on 8 October. This set out billing targets of £12,500 for each of July, August and September 2015 and actual billings of £400, £23,000 and £455 respectively. There was also a CT (chargeable time) target for each month which had been exceeded in August but not met in June, July or September. When cross-examined about this, the Claimant said that he had no recollection of being given the document on 8 October, or of having seen it before. He said that he never knew what his targets were, although he accepted that he did not tell Ms Jones this. When it was put to the Claimant that in the 8 October meeting he accepted that it was his responsibility to "reach daily

targets and billing" and that it would be curious to accept this without knowing what the targets were, he said that he did not ask because he felt vulnerable in his role. The Claimant responded to the suggestion that in 2015 he had achieved billing of around £48,000 by saying that he recalled seeing a figure of around £98,000 before any internal write-off at around the end of 2015.

29. The Tribunal noted that in January 2016 Ms Jones sent an email to the Respondent's directors at pages 250-251 referring to the Claimant having achieved billing of £48,175 in 2015. The Tribunal therefore found as a matter of probability that the Claimant had achieved around £48,000 and that his recollection of a figure of £98,000 was mistaken. The Tribunal also considered that the Claimant would not have referred to his targets in the way that he did if he was unaware of what they were, and concluded that as a matter of probability he did know them, at least by 8 October 2015.

30. At page 183C(i) there was a note of a Senior Management Team meeting on 19 October 2015, which included the entry: "EJ [Ms Jones] – AD [the Claimant] performing poorly. CT not very good and complaint. Don't feel confident in his performance." Ms Jones did not mention this document or the meeting in her witness statement, but she did refer to a complaint received from a client, ML, before the 8 October meeting. Ms Jones referred to this in an email of 27 October 2015 to various colleagues, not including the Claimant, at page 183E. She stated that when drafting the bill, the Claimant had failed to include the previous solicitors' costs (meaning that the solicitors who were the Respondent's clients were potentially liable to pay these to their predecessors). Ms Jones had written of the Respondents' fee of £721.97, and said that the clients had asked that their work should not be passed to the Claimant in future.

31. The Claimant's account of this matter, as set out in paragraphs 61-63 of his witness statement, was that he accepted that there had been a small error, and that he had offered to Ms Jones to be personally responsible for any loss suffered to the client, she saying that this would not be necessary. He said that the draft bill sent to the client for approval had indicated that a particular element had been excluded. He continued: "the client had a duty to read the document to satisfy themselves before signing, it was a fundamental requirement and ultimately their responsibility to do so"; and later "In my whole experience and legal career and dealing with solicitors I have never come across an instance whereby they signed a document without first having read it through thoroughly. I categorically refute the allegation that I was responsible."

32. Pausing there, the Tribunal considered that, although the sums involved may have been relatively modest, this mistake was more serious than the Claimant maintained. It is true that the clients were solicitors, but they were using the Respondent's services (and therefore the Claimant's) because they were costs specialists. In those circumstances, it was not reasonable to say, in effect, that if the Claimant made an error, the clients should have spotted it.

33. On 20 November 2015 at pages 193-4 the Claimant sent an email to Ms Jones, copied to Ms Riggs, referring to the issue about working from home and saying that he felt highly concerned and hurt by the fact that there had been no

discussion of this. He said that he felt that Ms Jones had failed him as an employee, and asked for a short meeting about the subject.

34. Then on 22 November 2015 at pages 194A-B, a client, Ms E, made a complaint to the Claimant about his handling of a matter for her. It is not necessary to explain the complaint in detail, but essentially the client said that the Claimant had made offers to settle the costs claim against her to which she had not agreed and which had been ineffectual, with the result that the dispute had been prolonged and her costs liability had increased.

35. A further meeting between the Claimant, Ms Jones and Ms Riggs, with Ms Ravi Mittal as note taker, took place by way of a conference call on 23 November 2015. Ms Mittal's notes are at pages 197-212. The meeting began with the Claimant saying that he wished to have further discussion about working from home, and he explained his position on that matter. He said that he had not been aware that this was an issue until he received Ms Jones' email of 10 September. Ms Jones then set out her position, which included saying that she had allowed the Claimant to work at clients' offices and had given "good grace" on 19 August when he had advised that he would be working from home without having made a prior request. She said that working from home could cause difficulty if a client wished to make contact.

36. The discussion then moved (at page 205) to the matter of client complaints. Ms Jones said there had been three of these, being ML and Ms E already mentioned, and a complaint from another client, HM. This last was described as a "Top 10" client for the Respondent, and the complaint involved a delay in completing the points of reply and about concessions that were made therein. The complaint resulted in the Respondent writing off fees of £3,941. Ms Jones said that these complaints would be discussed at the 6 month probation review.

37. The conversation then returned to working from home. Ms Riggs stated that the Claimant had taken more annual leave than he had so far accrued, and questioned whether he had understood the adjustment needed from self-employed to employed work. Ms Jones emphasised that Mr Shenton had said that any flexible working would be subject to her approval. She said that the subject would have to be discussed at the 6 month review and that she could not understand why the Claimant was saying that she had failed him when she had allowed the requests that he had made.

38. The Claimant then refererred to his email of 20 November and said that he had no intention of insulting or upsetting Ms Jones. He said that if he had upset her, he could only apologise, and he withdrew certain comments in the email. Towards the end of the meeting, the Claimant said that he had wanted a conciliatory meeting, that it was not his intention for his email to be inflammatory, and that he would review it.

39. The Claimant then left the meeting, and Ms Jones and Ms Riggs continued to discuss the situation in his absence. At page 212 the note records

that there was a problem with the Claimant only being able to work on his "own" work and referred to the complaints. It continued:

"All times auth'd wfh [work from home] & many when not & done it.
They will say keep him [because] brings in work from [2 clients]
If so [then] wfh wd have to be agreed 1 day.
Can't work in office bottom line.
Will make excuses. Manipulate longer hrs/days from home.
Real reason for wfh is to have all benefits of employment but perks of being self employed.
No wider value if can't work on other work in office……."

40. When asked about these entries in cross-examination, Ms Jones said that the Claimant wanted an approach that fitted with his personal life, that it was not the case that a formal arrangement would cause difficulties, and that whenever the Claimant had asked for flexibility of working, he had received it. The Tribunal considered that the observation "they will say keep him" suggested that Ms Jones was contemplating the opposite, i.e. that the Claimant's employment should be terminated.

41. On 24 November 2015 at pages 195-6 the Claimant sent an email to Ms Jones repeating his apology and withdrawal of certain comments in his earlier email. He stated that he was awaiting hearing about a meeting to deal with his probation end review, and asked Ms Jones to let him know if she wished him to make a formal or at least written application for flexible working before the next meeting.

42. Ms Jones responded on 30 November, also striking a conciliatory note over the earlier email, and suggesting that the 6 month probation review could be conducted in the second week of January, with particular reference to Ms E's complaint and the hope that this could be resolved by then. The Claimant replied on 4 December 2015 at page 215, saying that he assumed that his probation period had come to an end as it expired on 20 November, and that he had no problem with a belated review in January. He said that he would formulate his request to work from home.

43. Meanwhile, there had been further emails between the Claimant and Ms E regarding her complaint over 24-25 November. On 26 November the Claimant forwarded to Ms Jones an email from Ms E, saying that in view of "her serious and unfounded allegations" he was inclined to do no more than say that he had passed the matter to his principal. Ms Jones replied on 3 December saying that the Claimant still had to manage the client and conclude the matter, and asking for a draft of his reply to her. At page 218A in an email of 4 December to Ms Jones the Claimant said that he would prepare a draft response, but that in addition he had sought preliminary independent advice and was minded to "obtain a legal opinion to support me in demanding from Ms E a complete retraction and apology" of what he described as her "serious and wholly unjustified and scurrilous remarks" in an email of 25 November.

44. On 7 November the Claimant sent to Ms Jones his draft reply to Ms E (at pages 218D-E). This included the assertion that her email (which had been copied to a third party) was defamatory and that without a retraction, he "would need to consider whether I should seek a remedy elsewhere through legal process". The Tribunal found that this was intended to be understood as a threat to sue Ms E, or at least to consider doing so.

45. The Claimant then completed a formal Flexible Working Request (pages 220-224) and emailed this to Ms Jones on 21 December 2015. He set out the reasons for making the request, and sought an arrangement whereby approximately every fourth week he would work from home on a Saturday and/or a Sunday, in lieu of working in the office during normal hours, generally a Monday and Tuesday.

46. Pausing there, the Tribunal comments that this is not the same as simple request to work from home instead of in the office on a weekday. Under the proposed arrangement, the Claimant would not be contactable on the Monday and/or Tuesday concerned as these would be his days off; he might be contactable on the Saturday and/or Sunday, but these would of course be the weekend so far as the clients were concerned.

47. Ms Charlene Banda of the Respondent's HR department responded to the request on 22 December at pages 227-8. She proposed a meeting on 13 January 2016 with herself and Ms Jones. She wrote: "Your flexible working request will be considered and decided on within a period of two months from first receipt, unless an agreement is made with you to extend this period." The Claimant's evidence, which the Tribunal had no reason to doubt, was that he did not receive this letter by post, and first saw it as an attachment to an email on January 2016.

48. There was also on 22 December an email from Ms Jones to Ms Banda at page 228B suggesting that any agreement about flexible working was usually reached on an informal basis "so that we can withdrawn if necessary". Ms Banda replied that as the Claimant had made a formal request, the response should be formal. Then on 23 December Ms Riggs sent an email to Ms Jones and Ms Banda saying: "What I think we need to do is drill into the detail of the statutory grounds for refusing that might be brought into play as they specifically relate to Alan's request" and then made other observations.

49. On 11 January 2016 Ms Jones informed the Claimant that the Respondent's directors had received a complaint from Ms E. On the following day, at pages 250-251, Ms Jones sent an email to the directors stating that the Claimant's 6 month review was to take place on 13 January. She said that she could not recommend that the Claimant pass that review, so that the decision was whether his employment should be concluded or the probationary period extended for another 3 months. Ms Jones said that the Claimant's billing target to December 2015 was £73,750, and that he had achieved £48,175. She referred to the complaints received, while accepting that he had brought in work from his previous clients. She continued:

"He has not adjusted to life as an employee either, which I accept can be difficult when you've worked for the length he has for himself. Refusing to help on cases or provide other FE's with advice. He will deal with things as he sees fit irrespective of the client or business needs. Where he has been given advice / training, he has ignored and proceeded in the way he thinks fit. In all honesty, I would delay his probation review until next week and then conclude his employment….."

50. The Claimant and Ms Jones met on 13 January for the end of probation review, completing between them a document at pages 252-259. Ms Jones recorded concern about cases being "parked" when a big matter came in and expressed disappointment about the level of billings, commenting that part of the problem was the need to write off fees in the light of complaints. There were areas where Ms Jones had no complaints or expressed satisfaction, but she said that nearly every case that the Claimant had worked on for the Respondent's clients (as opposed to his own) had resulted in a serious complaint. At page 257 she commented that the Claimant had had difficulty adjusting to life as an employee and at page 258 that he struggled with authority. She concluded by recommending that the Claimant's probation be extended by 3 months.

51. The Claimant responded to the review in an email of 17 February 2016 at page 261, explaining that he had not had the opportunity to do so before then. He expressed disagreement with the decision to extend his probation, and said that in any event this could not be done once the probationary period had expired. He said that:

"….extending my probation period 2 months after the expiration of my initial probation period is erroneous, null and void, and that on or immediately (timeously) after 20 November 2015 (the end of my primary probation period) I passed same by default."

52. Returning to the chronological sequence of events, on 21 January 2016 at page 261 the Claimant sent an email to Ms Jones about his flexible working request, setting out the dates that he was requesting as Mondays and Tuesdays off during January to April, and saying that thereafter there would be a repeating 4 week cycle. Ms Jones replied on the same date saying that she and Ms Banda would consider this further and advise in due course.

53. Meanwhile, also on 21 January 2016 Ms Banda had sent an email to Ms Jones at page 264A referring to an attached letter for the Claimant and asking "When shall I come down next week for Alan's Dismissal meeting?" Ms Jones' explanation for this was that the decision to dismiss the Claimant was made at a meeting on 19 January 2016 (although, as will be explained, Mr McDonnell's evidence was contrary to this).

54. Mr McDonnell sent an email to the Claimant and Ms Jones about Ms E's complaint on 29 January 2016 (at page 266B). He identified the areas that he thought were problematic and recommended that the Respondent should admit that matters were ambiguous, look to negotiate the costs of assessment, and

look to split the costs of assessment and set off the remainder of the Respondent's fees against their portion.

55. Mr McDonnell also referred to a matter identified as S v K, where he had become involved in an appeal following a hearing conducted by the Claimant. His evidence, based on the transcripts from the original hearing, was that the Claimant had not fought a preliminary issue particularly hard, and then had agreed a high figure for the other party's costs. The Claimant in his witness statement disputed Mr McDonnell's assessment of his performance in this case. All of this, however, was somewhat after the event, as Mr McDonnell had not raised this particular matter with the Claimant during his employment.

56. There were then at pages 286D-A emails on 15 February 2016 between Ms Banda and Ms Jones which clearly anticipated the Claimant being dismissed; for example, Ms Banda enquiring whether Ms Jones was confident that she could give the Claimant notice on Friday, and whether she should mark him as a leaver on the payroll.

57. A Senior Management Team meeting took place on 17 February 2016, a manuscript note of this being at page 289A. Mr McDonnell's evidence was that some dates that appeared at the top of the page as "start 30.11.15" and "end 5.2.16" related to another matter. With regard to the Claimant, the note recorded:

"Discussed AD – performance very poor and complaints
NM mentioned [Ms E] case.
Recently reviewed
Decision to dismiss".

Mr McDonnell stated that this note reflected the decision that took place (although as has been stated, Ms Jones' evidence was that this discussion took place on a different occasion).

58. The Tribunal found Mr McDonnell's evidence about what happened at the meeting somewhat vague. In paragraphs 19 and 20 of his witness statement he said that, from what he had seen of the cases of Ms E and S v K, he felt that the Claimant's performance had fallen well below the standard to be expected, and that this and Ms Jones' views led the Board to conclude that he should be dismissed. When cross-examined, Mr McDonnell said that it was not the case that ms Jones said that the Claimant should be dismissed, but rather that she suggested that or gave her view on it. He was not challenged on the evidence in his witness statement that he did not know of the Claimant's flexible working request at the time that the decision to dismiss him was made.

59. In answer to the Tribunal, Mr McDonnell said that he did not recall exactly how the decision was made, such as by way of a proposal or a vote, then added that probably Mr Shenton would have formed a view and said that the Claimant should be dismissed, that there would have been a consensus, and that Mr Shenton would have asked whether the other members agreed or disagreed.

60. On 18 February 2016 Ms Jones invited the Claimant to a meeting on 22 February. The Claimant asked the purpose of the meeting and Ms Jones responded that it was to discuss his probation and DAH (detailed assessment hearings). In the event, Ms Jones informed the Claimant that he was being dismissed and handed him a letter from Ms Banda dated 22 February 2016 at page 302 confirming that he had been given 1 week's notice of termination of his employment. The letter included the following:

"Your employment with Just Costs was subject to a satisfactory probationary period. Following regular reviews, your performance, unfortunately, has not reached a satisfactory standard. It has therefore been decided to terminate your employment at this point".

61. On 3 March 2016 by way of a letter at page 306 the Claimant sought to appeal the decision to dismiss him. At page 306A there was an email exchange of 4 March 2016 between Ms Jones and Ms Banda, in which the former asked whether it was correct that the Claimant had no right of appeal, and Ms Banda said that it was. It appears that no response to the appeal was ever given.

62. On 25 May 2016 solicitors instructed by the Claimant sent a letter to the Respondent at pages 308-309 asserting the complaints of automatic unfair dismissal and failure to deal reasonably with a flexible working request that have been the subject of the present proceedings. The Respondent replied through Ms Banda on 10 June 2016 at pages 313-315 asserting that the Claimant had been dismissed for reasons related to performance.

63. The Tribunal has already mentioned Ms Jones' recollection of the occasion when the decision to dismiss the Claimant was made. Her evidence on this point was reflected in an email of 9 June 2016 to Ms Banda at page 310, in which she said that the decision was made at a Senior Management Team meeting on 19 January 2016, and that the reasons for the decision were failure to reach target and client complaints.

The applicable law and conclusions

64. Mr Mellis began his submissions with consideration of the flexible working request, and it seemed to the Tribunal this was an appropriate starting point.

65. Section 80F of the Employment Rights Act 1996 provides for the right of an employee to make such a request. Section 80G(1) provides that an employer to whom an application under section 80F is made -

(a) shall deal with the application in a reasonable manner,

(b) shall notify the employee of the decision on the application within the decision period….[which under subsection 1B is a period of 3 months from the date of the application or such longer period as may be agreed]

66. The Claimant made his flexible working request on 21 December 2015. Before that date, he had raise the issue of flexible working informally a number of

times, including at the second interview with Mr Shenton and on a number of occasions with Ms Jones as described above. The Tribunal accepted that the issue was important to him, for the reasons that he gave at the time.

67. Mr Mellis submitted that Ms Jones looked unfavourably on the prospect of the Claimant working flexibly in the terms that he sought, and that this was apparent from the discussion between her and Ms Riggs after the meeting on 23 November 2015 after the meeting with the Claimant. The Tribunal concluded that this was correct to the extent that flexible working was an aspect of Ms Jones' view that the Claimant had not adjusted to the change from self-employment to employment, and that the Claimant's seeking it reflected a broader wish to have the benefits of both employment and self-employment.

68. Thereafter, Ms Jones' email to Ms Banda of 22 December following receipt of the formal flexible working request expressed a preference for keeping any arrangement informal so that it could be withdrawn if necessary, and Ms Riggs' email of 23 December referred to the request in terms of how it might be refused. The Tribunal found that these showed that Ms Jones, at least, took a negative view of the request, and that Ms Riggs was supportive of that.

69. The Tribunal will deal subsequently with its findings on the question whether the Respondent failed to deal with the request in a reasonable manner as required by section 80G. At this point, we turned to the question of the reason for the Claimant's dismissal. Section 104C of the Employment Rights Act 1996 provides as follows:

An employee who is dismissed shall be regarded….as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee –

(a) made (or proposed to make) an application under section 80F [i.e. an application for flexible working].

70. Counsel differed in their submissions about the burden of proof. Mr Mellis submitted that the initial burden was on the Respondent to show the reason for the dismissal, and that if the Respondent failed to prove that reason, the Tribunal should use the primary facts and appropriate inferences to be drawn from them to determine the reason for the dismissal. Ms Bowen, relying on **Smith v Hayle Town Council [1978] ICR 996** and **Ross v Eddie Stobart Limited EAT/0068/13**, submitted that where (as here) the employee lacked sufficient service to claim ordinary unfair dismissal, he had the burden of proving that the reason for the dismissal was the automatically unfair one.

71. The Tribunal concluded that Ms Bowen's submission was correct on the issue as to the burden of proof. Our decision did not turn on that, however, as we were able to make a finding, on balance of probabilities, as to what was the Respondent's reason for the dismissal.

72. Counsel were agreed, having regard to **Kuzel v Roche Products Limited [2008] ICR 799**, that the determination of the true reason for dismissal was not a

straightforward "either or" matter: the evidence might show that the true reason was not advanced by either side. However, in the present case the Claimant contended that the true reason was his flexible working request, and it is necessary to have that in mind as well as the Respondent's stated reason of concerns about his performance.

73. It was a curious feature of the Respondent's evidence that this was self-contradictory on the matter of when the decision to dismiss the Claimant was taken. Mr McDonnell (supported by the note at page 289A) said that this occurred at a meeting on 17 February 2016, while Ms Jones (supported to at least some extent by the reference to a dismissal meeting in Ms Banda's email of 21 January 2016 at page 264A) said that this was at a meeting on 19 January 2016.

74. The Tribunal concluded that, as a matter of probability, Mr McDonnell was correct about the date of the relevant meeting. Not only was his recollection supported by the note at page 289A, but a meeting on 17 February was consistent with a notification of dismissal on 22 February. If the decision was made on 19 January, it was difficult to see why there would have been a delay of over one month in communicating it.

75. Mr Mellis submitted that this point, and the "internal contradiction" in Ms Jones' evidence whereby she extended the Claimant's probation on13 January 2016 but then by 21January was discussing the Claimant with Ms Banda in terms of his dismissal, meant that the Tribunal should treat her evidence with great caution. We did not, however, find that these matters had as much significance as Mr Mellis suggested. It was clear from the email of 11 January 2016 at pages 250-251 that Ms Jones had by that date formed the view that the Claimant should be dismissed; indeed, she at least hinted at that to Ms Riggs in the meeting of 20 November 2015. Whatever the reason for there being an extension of the Claimant's probation on 13 January 2016, it was not the case that between then and 21 January Ms Jones had undergone a change of mind. Throughout that period she was saying (although not to the Claimant) that he ought to be dismissed.

76. Although he commented on Mr McDonnell's vagueness about the 17 February meeting, Mr Mellis did not suggest that this did not take place, but instead submitted that the Tribunal should conclude that Ms Jones was the driving force behind the decision to dismiss the Claimant. To some extent, this was the evidence of Ms Jones herself, as in paragraph 26 of her witness statement she referred to "…..my decision, subject to Board approval, was to dismiss the Claimant." The Tribunal found this unsurprising, as Ms Jones was the Claimant's line manager and would naturally take the lead in decisions relating to him.

77. The Tribunal therefore found that:

73.1 Ms Jones took the lead in recommending that the Claimant should be dismissed.

73.2 Mr McDonnell independently formed the view that the Claimant's performance was not of the standard he expected.

73.3 The Senior Management Team took a collective decision, in one way or another, that the Claimant should be dismissed.

78. Returning to the reason for the dismissal, the initial question is, what was the reason that the individuals present at the meeting of 17 February had for dismissing the Claimant? Mr Mellis also submitted that the de facto decision maker was Ms Jones, such that the Tribunal should consider what was her reason for the decision; or in the alternative that her reason for wishing to dismiss the Claimant "infected" the decision of the meeting.

79. Ms Bowen submitted that no authority had been cited for the notion of a decision to dismiss being tainted in this sort of case. Although it was true that Mr Mellis had not referred to any authority on the point, the Tribunal was aware of the observation of the Court of Appeal in **Co-operative Group v Baddeley [2014] EWCA Civ 658** to the effect that a decision to dismiss could be unfair if the decision make had been manipulated into the decision by someone who, unbeknown to the decision maker, was motivated by unfair reasons.

80. This point, however, did not affect the outcome of the present case, because the Tribunal reached the following conclusions:

80.1 The Claimant had not reached the level of billing that the Respondent wished.

80.2 The complaints about his work were undoubtedly genuine.

80.3 Except for an early matter identified as GH (which was presented as a test case to enable the Claimant to gain experience with the Respondent's systems and where some writing off of time was to be expected) the complaints were, in the Tribunal's judgment fairly serious. We have already commented on the ML matter. In the HM matter there was a complaint of delay and, more seriously, of making concessions that should not have been made. In both cases, the Claimant made what the Tribunal regards as the bad point that the client should have checked the documents that he had prepared. Ms E was clearly very dissatisfied, and the Claimant had become side-tracked into a proposal to sue her for what she had written about him. In S v K Mr McDonnell's concern included a similar point to that arising in HM about making concessions. All of these complaints arose in the context of a specialist costs practice, and the Tribunal found that they gave the Respondent good reason to be concerned.

80.4 The only reason put to the 17 February meeting for dismissing the Claimant was his performance. There was no evidence that anyone present at that meeting other than Ms Jones knew that the

Claimant had made a flexible working request, and there was evidence that Mr McDonnell did not know that.

80.5 The Tribunal therefore concluded that the sole reason for the dismissal in the minds of those present at the 17 February meeting, except Ms Jones, was the Claimant's performance.

80.6 In Ms Jones' case, the question of flexible working was of some relevance to her dissatisfaction with the Claimant and was related to the wider issues that she detected with adjusting to working life as an employee.

80.7 However, the principal reason that Ms Jones had for deciding that the Claimant ought to be dismissed and putting that view forward at the meeting, or for deciding to dismiss the Claimant (if that is the correct analysis of the situation), was his performance. The Tribunal found that this was her principal reason because of the following matters:

80.7.1 In the Tribunal's judgment it was inherently likely that performance issues of the nature identified here (i.e. a substantial falling short of the billings target, and serious complaints from clients) would be more important in Ms Jones' mind than issues about flexible working.

80.7.2 Ms Jones raised concerns about the Claimant's performance at a Senior Management Team meeting on 19 October 2015, a month before the Claimant sent an email on 20 November complaining about the working from home issue.

80.7.3 Ms Riggs' note of the discussion on 23 November 2015 suggests that Ms Jones' concern was not so much flexible working as a wider concern about the Claimant's ability to work in the office and in the manner of an employee rather than a self-employed individual.

80.7.4 Ms Jones' comment of 22 December 2015 about flexible working arrangements being informal so that they could be withdrawn suggests a view about how such requests should be dealt with, but does not mean that she thought that the Claimant should be dismissed if he made a request.

80.7.5 Ms Jones' email of 12 January 2016 to the directors referred to the Claimant's billing, the complaints and his perceived failure to adjust to life as an employee in support of the recommendation that his employment should be terminated. It did not refer to the flexible working request as such, although issues around flexible working had a part

in her perception of a failure to adjust to life as an employee.

80.8 Although it was the case that Ms Jones purported to recommend that the Claimant's probation be extended on 13 January 2016, having previously recommended dismissal to the directors on 11 January, there was no obvious causal link between this apparent anomaly and the flexible working request, which was made before either of these events and which had been drawn to Ms Jones' attention by 22 December 2015

81. The Tribunal therefore concluded that, however it approached the matter, it found that the reason, or principal reason, for the Claimant's dismissal was his performance. The complaint of automatic unfair dismissal therefore failed.

82. There remains the question whether the flexible working request was dealt with in a reasonable manner. As indicated in relation to the issues in the case, the complaint here was that it was unreasonable not to give the decision within two months, as stated in Ms Banda's letter of 22 December 2015.

83. Two months from 22 December expired on around 21 February 2016. Ms Banda knew by 21 January 2016 that Ms Jones was proposing that the Claimant should be dismissed, and the decision to that effect was made on 17 February 2016. The Tribunal considered that it was reasonable not to take that request any further once it was apparent that the Claimant was going to be, or probably was going to be, dismissed. Considering the flexible working request would have been a purely academic exercise in the circumstances. Ms Banda could have complied with her own proposed timetable by giving a decision on (say) 21 February: in the Tribunal's judgment it would have been an unnecessary (and possibly unkind, because misleading) step to take when by then it was known that the Claimant was to be dismissed at the meeting to be held on 22 February.

84. In any event, the Tribunal noted that the statutory requirement is for the request to be considered within three months of being made (or a longer period by agreement) and considered that failing to deal with it within in a shorter period that had been indicated did not in itself amount to failing to deal with the request in a reasonable manner.

85. The complaint under section 80G(1) therefore also failed, and both complaints are dismissed.

Employment Judge Glennie
28 April 2017