EMPLOYMENT TRIBUNALS

Claimant: Mrs D White

Respondent: Just Give It A Go

HELD AT: Manchester **ON:** 16 January 2018

BEFORE: Employment Judge Feeney

REPRESENTATION:

Claimant: In person
Respondent: Mr A Korolczuk

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim for a redundancy payment succeeds. The claimant is awarded and the respondent ordered to pay to the claimant £454.50.

2. The claimants claim for notice pay fails and is dismissed.

REASONS

1. The claimant brings a claim for a redundancy payment and for her notice pay. She also claims for six weeks for when she was unemployed but she agreed today that as she has not brought an unfair dismissal claim, that claim cannot be pursued.

Claimant's Submissions

2. The claimant submitted that the respondent closed their shop in Lees and that consequently she was made redundant and the alternative job she was offered was clearly unsuitable.

Respondent's Submissions

3. The respondent submitted that the claimant had been offered suitable alternative employment and that a better situation may have been negotiated if the claimant had engaged with the respondent.

Witnesses

4. The claimant gave evidence for herself and Mr Korolczuk for the respondent. Both parties had brought their own documents.

Findings of Fact

The Tribunal's findings of fact are as follows:

5. The claimant began working for the respondent in December 2013. The respondent runs two shops selling electronic cigarettes, one in Lees and one in Oldham itself. She worked 13 and a half hours a week. The business was owned by Mr Korolczuk and his wife Tracey.

6. On 24th August 2017 Mr Korolczuk, who is one of the owners and managers of the respondent's business along with his wife, Tracy, advised staff that the Lees shop would have to close as they were not making enough money; in fact they were making a loss.

7. The claimant's evidence was that initially it looked like all members of staff would be able to transfer to Oldham on a reasonable number of hours, as it was discussed between the claimant and another senior member of staff, "Shirley", that there was a thought of making another member of staff, Zoe Houghton, redundant. Shirley had been told this by Tracy. This would leave enough hours for the remaining members of staff, and that Shirley was to draw up a rota showing this. The claimant was aware of this and therefore at first was content that on this basis she would obtain about ten hours. (Note: the claimant had been working. However, in the end Tracy said there were going to be no redundancies but the hours would be shared out between all existing members of staff. The claimant then says she was offered five hours. The respondent said that she was never offered five hours: the minimum she was offered was seven hours.

8. The respondent agreed that the claimant was offered seven hours. Their letter of 29 September 2017 to the claimant stated:

> "It saddened Tracy and I to inform you on 24th August 2017 that the Lees Road shop in Oldham had been losing money for a couple of months and we were faced with no alternative but to close the shop on Saturday 30 September 2017.
>
> To minimise the impact this would have on staff we intentionally did not recruit for the vacant position in Oldham, allowing us to redistribute the available hours.

> We discussed that there would be a reduction in hours but in the event that more hours became available we would offer them to all staff and try to increase the hours worked by agreement.
>
> Your standard hours were thirteen and a half per week whilst at the Lees Road, Oldham shop and we offered you seven and a half hours per week at the town centre shop in Oldham. By doing so we believe we have given you suitable alternative employment and avoid any redundancy situation."

9. Mr Korolczuk then went on to say that he tried to call the claimant on five occasions and that he had only managed to speak to her once, but nothing had been decided. He wanted to meet with her to consult with her further and said he expected that she would continue to work at the town centre shop.

10. The claimant produced a text message which pre-dated this letter of 29th September 2017 which said:

> "As my contracted hours are set at 13½ per week and stated 'Lees branch, only seven hours offered in Oldham' is not substantial. As I am not contracted to Oldham I will take the previous offer of redundancy."

11. The respondent believed that the claimant had worked many times at the Oldham shop, although it is not clear why he believed this. The claimant's evidence, which I accept, was that she had worked there a couple of times whilst the respondent was on holiday and had cashed up everyday for them during that period, which was a maximum of three weeks. It is possible that he details were still on the till in the Oldham shop but she had never worked there since, and that had occurred in 2014.

12. The claimant's contract of employment indicated that she worked at the Lees shop. Under "you are required/permitted to work at the following places" it said "not applicable"

13. Due to the respondent not having any further feedback from the claimant, on 9 October 2017 they sent a letter to the claimant saying they were going to investigate her reasons for not attending work, and arranged a meeting for Saturday 28 October 2017 at the old Lees shop. The claimant failed to attend. She said she was advised by ACAS that she did not need to and she was concerned as it was in a closed shop. She did speak to the respondent that day on the telephone and advised him she was not attending. He felt she was abusive.

14. The claimant said she had not intention of working in the Oldham shop. In her opinion her place of work was always Lees and she had no longer got a place of work.

15. The respondent said he advised her he had taken advice and that the reduction in part-time hours was not significant and therefore it did not equate to a redundancy situation. Everyone else had accepted their hours and moved to Oldham.

16. The claimant at this point stated she had sent a recorded delivery letter which was at the Post Office and the respondent should have been advised that a delivery had been attempted but had not occurred. The claimant pointed out that Mrs Korolczuk worked at that Post Office, and in fact ran it. The respondent said they could not find it. They asked her to send the letter again or explain what was in it, but she said she would not do that and said they should just read the letter. Mr Korolczuk said he hung up the phone as the claimant started to swear. They never received a copy of the letter. The letter was sent on 27 September 2017 and stated:

> "Today I have taken advice from ACAS, part of the Government website on employees' rights. As you have specified you will not be paying out redundancies I have checked my rights. They have informed me that it must be offered as the shop will be closing. My contract specifies 13½ hours in the Lees shop only. The offer you have made is seven hours per week in Oldham. This is declined as I will need to pay for parking, extra petrol, travel further and a loss of 6½ hours weekly. As this is a totally unacceptable offer I will take redundancy. ACAS have calculated that this comprises of 4.5 weeks' redundancy pay as well as a further three weeks' pay for the notice period. As this cannot be worked it needs to be paid. This amount equates to £759.37. As you run a small business ACAS have suggested a reasonable amount of time for you to make me redundant should be decided in writing within a week. If this is not the case I will have to contact ACAS for the next steps."

17. The claimant produced evidence that she had sent this letter and that it had been re-sent but it had never been collected. The respondent had no explanation for why they would not have collected it.

18. The respondent then continued with their disciplinary procedure, ending with a letter on 19 November 2017 dismissing the claimant for not attending work since 2 October and failing to give any explanation for her absence, advising her that she could appeal against it within 14 days. The respondent sent a P45 saying her leaving was 1 December 2017.

19. The respondent said that if they had been aware that the parking fee was a difficulty they would have been able to advise the claimant that there was free parking at the Oldham Street shop. The claimant disputed this saying that there had been but it had been withdrawn, and she was aware of this as Tracy had been complaining about it prior to the termination of her employment.

20. The respondent also stated that the claimant was offered an increase to ten hours. The claimant denied this and she said that had she been offered ten hours from the start she would have accepted this. There was no documentary evidence whatsoever of the claimant being offered ten hours, and the respondent advised this arose via "Shirley" advising the claimant that the hours could be increased to ten. In the absence of any evidence from "Shirley" and the claimant's denial I could not accept that the claimant had ever been offered ten hours. The letter of 29 September 2017 clearly said seven hours.

21. It was the claimant's position that she had been dismissed with effect from 30 September 2017 when the shop had closed, and therefore she was entitled to her redundancy pay and payment in lieu of notice.

22. The respondent's position was that she was offered suitable alternative employment and therefore her redundancy payment claim should not succeed.

The Law

23. A claimant in a redundancy payment claim normally has to show first that they have been dismissed. The basic definition of "dismissal" for the purposes of a statutory redundancy scheme is set out in section 136(1) of the Employment Rights Act 1996 ("1996") which states that:

> "An employee will be treated as dismissed if –
>
> (1) His or her contract of employment is terminated by the employer either with or without notice.
>
> (2) He or she is employed under a limited term contract…..
>
> (3) He or she has been constructively dismissed."

24. A constructive dismissal occurs when an employee resigns with or without notice because of a repudiatory breach of contract by the employer. However, this does not apply where the employee terminates the contract without notice in circumstances in which she is entitled to do so by reason of a lockout by the employer.

25. It is also a dismissal where –

> (1) The resignation of an employee under notice of dismissal;
>
> (2) Termination of a contract by operation of law consequent on an act of the employer or an event affecting the employee.

26. The burden of proof is on an employee to prove on the balance of probabilities that there has been a dismissal.

<u>Redundancy</u>

27. Section 39(1) states that:

> "For the purposes of this Act an employee who is dismissed shall be taken to be dismissal 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 an employee to carry out work of a particular kind; or

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

have ceased or diminished or are expected to cease of diminished."

28. In considering whether this section applies, two issues have got to be considered:

(1) where the employee was employed to work; and

(2) any offer of suitable alternative employment at another workplace.

If the employee unreasonably refuses such an offer from the employer he or she will not be entitled to a redundancy payment.

29. In relation to the first issue, in many cases this is straightforward: it is where the claimant reports each day for work. Issues have arisen over mobility clauses. A contract was produced in this case; however it did identify the place of work and there was no mobility clause .

30. In **High Table Limited v Horst [1998]** Court of Appeal, the Court of Appeal stated that they rejected the argument that the statute imposed a contractual test for the purpose of determining whether a redundancy situation had arisen. They acknowledged that if the employee's work involved a change of location then the contract of employment may be of assistance in determining the extent of the place where the employee was employed. However, it could not be right to let the contract be the sole determinant regardless of where the employee actually worked. If an employee has worked in only one location during his or her employment then there is no reason to widen the extent of the place where he or she was employed merely because of the existence of a mobility clause.

31. Section 141 headed "Renewal of Contract of Re-Engagement" states:

"(1) This section applies where an offer (whether in writing or not) is made to an employee before the end of his employment –

(a) to renew his contract of employment; or

(b) to re-engage him under a new contract of employment, with the renewal or re-engagement to take effect either immediately on or after an interval of not more than four weeks after the end of his employment.

(2) Where subsection (3) is satisfied the employee is not entitled to a redundancy payment if he unreasonably refuses the offer.

(3) This subsection is satisfied where –

(a) The provisions of the contract as renewed or of the new contract as to –

(i) the capacity in place in which the employee will be employed; and

(ii) the other terms and conditions of his employment would not differ from the corresponding provisions of the previous contract; or

(b) The provisions of the contract as renewed or of the new contract would differ from the corresponding provisions of the previous contract, but the offer constitutes an offer of suitable employment in relation to the employee."

32. The suitability of an offer is assessed objectively but the reason is assessed subjectively from the point of view of the claimant at the time of refusal. The things to be considered in judging suitability and reasonableness are:

- Job content.
- Status.
- Pay, including fringe benefits.
- Hours,
- Workplace.
- Job prospects.
- Timing of the offer.

Conclusion

33. I find that the respondent's letter of 29 September 2017 reflects that on 24 August 2017 they gave notice that the shop would be closing on 30 September 2017, and that orally, as recorded in this letter, there was an offer prior to 30 September for the claimant to work 7½ hours at the town centre shop in Oldham. This was identified as suitable alternative employment to avoid any redundancy situation. The announcement on the 24th August was notice of termination for the purposes of section 136 of the 1996 Act

34. I therefore consider that the claimant was dismissed with notice on 24 August 2017, the notice ending on 30 September 2017, and at this stage she was dismissed for redundancy, the location of the business having changed. The question is

whether the offer that was made was suitable alternative employment within the provisions of section 141. I find it was not suitable alternative employment because:

(1) Because of the location – the claimant had advised she had previously on occasion been able to walk to work and it was further to drive to Oldham.

(2) In addition the claimant would incur parking charges. I am aware that the respondent was not aware of this and asserted that there was free parking. However, I accept the claimant's evidence that this was not the case. There was no mention in the letter of this either,

(3) The most important factor was the fact that the claimant's hours were significantly reduced, almost halved, and as I find there was no offer of ten hours I find that the offer of alternative employment was not suitable and the claimant was reasonable in turning it down.

35. Accordingly the claimant is entitled to a redundancy payment.

36. In relation to notice pay, as I have found the claimant was in fact given notice of five weeks, accordingly her claim for notice pay fails and is dismissed.

37. I award the claimant four and a half weeks' redundancy payment, which is £101 [gross take home pay] x 4.5, namely £454.50.

Employment Judge Feeney

Date: 25th January 2018

RESERVED JUDGMENT AND REASONS

SENT TO THE PARTIES ON

2 February 2018

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): 2423658/2017

Name of case(s): Mrs D White v Just Give It A Go Ltd

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 2 February 2018

"the calculation day" is: **3 February 2018**

"the stipulated rate of interest" is: 8%

MR I STOCKTON
For the Employment Tribunal Office