RM

EMPLOYMENT TRIBUNALS

Claimant: Mr Olivier Guerindon

Respondent: The Financial Ombudsman Service

Heard at: East London Hearing Centre **On:** 15-16 February 2018

Before: Employment Judge Ferguson (sitting alone)

Representation

Claimant: In person

Respondent: Mr J Milford (Counsel)

RESERVED JUDGMENT

It is the judgment of the Tribunal that:-

1. **The Claimant's complaint of unfair dismissal succeeds.**

2. **The Claimant's claim for a contractual redundancy payment succeeds.**

3. **The Respondent shall confirm within 21 days of the date on which this judgment is sent to the parties whether it contests the sums claimed by the Claimant by way of remedy and if so on what basis.**

REASONS

INTRODUCTION

1. The Claimant (DOB: 21/10/69) worked for the Respondent as an Adjudicator from September 2008 until 4 September 2017. By an ET1 presented on 6 October 2017 he brought a claim for unfair dismissal and a redundancy payment.

2. The issues to be determined were agreed as follows:

Unfair dismissal

2.1 Was the Claimant dismissed by the Respondent? The Claimant contends that the effect of requiring him to work in the "Mass Claims" area was to terminate the contract of employment.

2.2 If not, was the Claimant constructively dismissed?

2.2.1 Was the Respondent in repudiatory breach of contract? In particular:

2.2.1.1 Did the Respondent breach an implied term that the Claimant would only be required to work as an Adjudicator in the area of "portfolio management"?

2.2.1.2 Alternatively, did the Respondent, by requiring the Claimant to work in the Mass Claims area, conduct itself in a manner that was calculated or likely to destroy or seriously damage the relationship of trust and confidence which should exist between employer and employee?

2.2.1.3 If so, was there reasonable and proper cause for the Respondent's conduct?

2.2.2 If the Respondent was in repudiatory breach of contract, was that breach a cause of the Claimant's resignation?

2.2.3 Did the Claimant affirm the contract following the breach?

2.2.4 If the Claimant was dismissed (actually or constructively), was the dismissal unfair under s.98 of the Employment Rights Act 1996 ("ERA")?

2.2.4.1 Has the Respondent shown the reason for dismissal? The Respondent contends that the business reorganisation amounted to "some other substantial reason".

2.2.4.2 Was the reason for dismissal a potentially fair one?

2.2.4.3 Did the Respondent act reasonably within the meaning of s.98(4) ERA?

<u>Statutory redundancy payment</u>

2.3 Was the Claimant dismissed by reason of redundancy?

2.4 If so, did he unreasonably refuse an offer of the same or suitable alternative employment?

<u>Contractual redundancy payment</u>

2.5 Was the Claimant entitled to an enhanced redundancy payment under the terms of his contract? It was agreed that the conditions for entitlement to the contractual redundancy payment were the same as for a statutory redundancy payment, except that there is no entitlement where the same or suitable alternative employment is offered and rejected (whether reasonably or not).

3. I heard evidence from the Claimant and, on his behalf, from Paul Todman and two further witnesses for whom the Claimant had obtained witness orders: Richard Whinder and Roger Yeomans. On behalf of the Respondent I heard from Warren Wilson, Charlie Sweeney, Helene Pantelli, Kelly Thompson and Ian Smith.

FACTS

4. The following facts were not in dispute. The only areas of factual disagreement related to the differences between the Claimant's role as an Adjudicator working on portfolio management ("PM") cases and the role to which he was transferred, an Adjudicator in the Mass Claims department, and the extent to which Adjudicators were, in practice, transferred between product areas. These disputes are addressed separately below.

5. The Respondent is an independent organisation providing a free service to consumers in order to settle complaints between consumers and businesses providing financial services.

6. The Claimant was employed by the Respondent as an Adjudicator. The following is a description of his role and the structure of the Respondent before the restructure in 2016/17. In very broad terms, the Adjudicator's role is to consider the complaint made by the consumer and the response of the business, gather any evidence required, and produce an "adjudication" which proposes a fair and reasonable resolution. If the resolution is accepted by both parties the matter is closed. Otherwise the matter is referred to an Ombudsman for a "decision".

7. Adjudicators work in teams, under a team manager. Teams operate within a particular product area. The Respondent has a dedicated department for "Mass Claims", which arise from the types of issues that generate large volumes of complaints (PPI currently being the most common). This is separate from "General Casework", which is divided into three broad areas: "banking and credit", "insurance" and "investment and pensions".

8. One of the differences between the work of Adjudicators in General Casework and those in Mass Claims is that the former do not act as the first point of contact for members of the public. The tasks of taking telephone calls from the public and setting up new cases on the system are known as "pre-conversion" tasks and are carried out by the Customer Contact Division ("CCD"). Adjudicators only work on existing cases ("post-conversion"). By contrast Mass Claims Adjudicators carry out both pre- and post-conversion tasks. Incoming calls from the public are handled on a shift system and each Adjudicator is assigned a one-hour shift every day.

9. The Claimant had a written contract, which in Part A specified his job title as "Adjudicator". Clause 2 of Part C of the contract states, under the heading "Job Title":

"Your job title is specified in Part A. The precise description and nature of your job may need to be varied from time to time, and you may be required to carry out other duties as necessary to meet the needs of the FOS."

10. Throughout his employment with the Respondent the Claimant worked exclusively on PM cases. With the exception of the last few months of his employment, the Claimant worked within the PM team, in the "investment and pensions" area of General Casework.

11. The Claimant initially worked for the Respondent full time. By the end of his employment he had reduced his hours to 14 hours a week and he had progressed to the level of "Grade 3", the highest level for Adjudicators. His annual salary was £16,300.

12. In December 2015 the Respondent commenced an organisational restructure. This involved the creation of a new department known as "Investigations", to take over work previously falling within General Casework. Within the Investigations department a new post of "Investigator" was created. The role involves a combination of adjudication, administrative work and functions previously carried out by CCD employees. Investigators do not specialise in a particular area. The intention was to make the Respondent more responsive to complaints by moving away from the traditional adjudication role described above, towards a more telephone-based role, solving problems immediately where possible.

13. CCD employees were subject to a redundancy exercise.

14. The Respondent's CEO, Caroline Wayman, described the difference between the Adjudicator and Investigator roles during her evidence to a House of Commons Treasury Sub-Committee on 15 January 2018:

> "The investigator role is quite different [to the adjudicator role]… The vision of what we want to provide for people is that, when they phone up, if we are able to spot that it is something we can help with straightaway, we can do that. We recognised a few years ago that some of the complaints that we deal with, needing to say, "I'm going to tell the business about your complaint and then I am going to need to put you through a bit of a process", was not really meeting the needs of our customers… We recognise that what informality means today is very different from what it meant when we were established back in 2001.
> … Traditionally, an adjudicator role would have been on the phone a lot less. In general, our processes are much more about written correspondence, exchanging long letters and things. Of course, in some of our cases that will be necessary."

15. Adjudicators within General Casework were offered the option of either applying for the Investigator role or moving to be Adjudicators in Mass Claims. The Mass Claims department had expanded to deal with a new influx of complaints.

16. The Claimant did not apply for the Investigator role. His evidence was that the role did not suit his skills and experience and also represented a change of the terms of his employment. In particular he considered that the tasks previously undertaken by CCD employees, taking unscreened calls from members of the public and setting up

complaints on the system, as well as working shifts, was not commensurate with his skills, knowledge and status in the organisation.

17. On 16 December 2016 all Adjudicators who had not successfully applied to become Investigators, including the Claimant, were informed by email that they would be moved into a Mass Claims team early in 2017, although they would continue to work on their General Casework cases until April. Mass Claims training would begin from April.

18. On 21 December 2016 the Claimant lodged a formal grievance about his planned transfer to Mass Claims. The letter concluded as follows:

> "I consider myself to be clearly over-qualified for the role of PPI adjudicator.
>
> It could be argued that the generic job description (and generic job title) which I agreed to eight years ago are out of date and that I have developed through custom and practice over more than eight years into a specialist adjudicator in the complex investments and portfolio management areas.
>
> I have taken advice and the proposed transfer could amount to a breach of contract leading to a claim for constructive dismissal.
>
> I need to add that most other adjudicators in the PM area resent the transfer to the PPI area and also associate it with de-skilling and loss of status.
>
> In sum, a transfer to the PPI area would represent a de facto demotion and a change mainly to my detriment…."

The letter also alleged that the changes represented a redundancy situation and that the role of PPI adjudicator did not constitute suitable alternative employment.

19. A grievance hearing took place on 31 January 2017, conducted by Ian Smith, Head of Casework, Mass Claims.

20. The Claimant was transferred into a Mass Claims team on 13 February 2017, but as planned he continued to work exclusively on PM cases.

21. On 17 February 2017 Mr Smith wrote to the Claimant to inform him that his grievance was not upheld. On the issue of the Claimant's existing role, it was not accepted that the Claimant had become a "specialist adjudicator". The move to Mass Claims/PPI was within the terms of his contract. Further, it was not agreed that the move represented a de facto demotion or loss of status. It was not accepted that there was a redundancy situation because the work of an adjudicator will continue to exist within the FOS and the work of resolving PM complaints will also continue within the Investigation pods.

22. The Claimant appealed and following a hearing on 21 March 2017, conducted by Mark Sceeney, Ombudsman Leader, the appeal was dismissed by letter dated 4 April 2017. The letter stated that there had been no material change to the Claimant's role by moving him into Mass Claims/PPI. It was also not accepted that there was a redundancy situation. Responding to arguments made by the Claimant based on the

Court of Appeal case of *Murphy v Epsom College*, the letter stated:

> "Here at the Financial Ombudsman Service, we are not reducting the numbers of adjudicators or employing a different type of person; nor are we asking them to undertake work beyond their qualifications, skills or competence. The change programme has employed or redeployed a number of people as investigators, which is a wider role that handles cases from start to end to provide a more joined-up and cost-effective customer experience. But there is no corresponding reduction in adjudicators because the overall level of work in all areas is increasing not diminishing. In other words, there's plenty of casework needed to be done – and casework for which you and other adjudicators are amply skilled and qualified. Indeed, on your own version of events, you are more than qualified for it."

23. On 7 August 2017 the Claimant was told by email that he would start training to deal with PPI cases on 4 September 2017. By this stage the Respondent had also confirmed that once the Claimant had completed the training he would work solely on Mass Claims cases.

24. On the same date the Claimant sent an email to his line manager, Warren Wilson, stating that he considered the "radical change of duties" imposed on him represented a fundamental breach of contract. The email continues:

> "I will undergo training as an adjudicator dealing with PPI/mass claims cases, under protest…
>
> This should not however be construed as an affirmation of the contract. I am considering my position and options.
>
> I reserve the right to accept FOS' repudiation of the contract (in the legal sense)."

25. On 4 September 2017 the Claimant resigned by a letter to HR in the following terms:

> "I write to inform you that I am resigning from my position of adjudicator at Financial Ombudsman Service ('FOS') with immediate effect.
>
> This is my formal letter of resignation.
>
> I am left with no choice but to resign in light of the fundamental breach of contract by FOS. There is also a redundancy situation in law.
>
> The reason for the resignation is the unacceptable radical change of employment duties imposed b FOS on me (a unilateral variation of the terms of my employment contract), from those of a specialist/general casework adjudicator dealing with portfolio management cases to those of an adjudicator training in and then dealing with PPI/mass claims cases.
>
> My employment duties were changed on 4 September 2017 (i.e. today).

I consider this to be a fundamental breach by FOS, which goes to the root of the contract.

FOS has breached several implied terms of my contract of employment, including the duty of mutual trust and confidence.

I am in this letter accepting the repudiatory breach committed by FOS and communicating this acceptance to you…

I have been dismissed by FOS.

There is a redundancy situation in law even if this is not acknowledged by FOS (in error). The role of adjudicator dealing with PPI/mass claims cases does not represent a suitable alternative employment for me in this redundancy situation.
…"

26. The Claimant commenced part-time employment with an employer in Paris on 3 October 2017. He had begun looking for other work in September 2016 and first made contact with this employer soon afterwards. On 25 July 2017 he was offered a part-time contract working 88 days a year on a salary of 30,000 EUR. He accepted this offer in late July or early August 2017. It was put to the Claimant in cross-examination that once this offer had been made, at a much higher salary than he was receiving at the Respondent, he was always going to take it, regardless of what happened to his job as an Adjudicator. The Claimant said he did not know whether he would have resigned but for the Respondent's breach of contract and said it was possible he could have done both jobs because he was not required to be physically present in Paris.

27. The Respondent accepts that there have been problems with the new structure. The evidence of Charlie Sweeney, a Lead Ombudsman and Director of Casework, was that of the 300 Adjudicators moved from General Casework to Mass Claims, 90% have moved back into "transition pods", effectively doing exactly the same work that they were doing before the restructure. This is principally because it materialised that some Investigators did not have sufficient knowledge or expertise to deal with all of the complaints. Mr Sweeney described this as a temporary solution and said it was still the Respondent's intention to train Investigators so that they could deal with all types of case.

<u>Comparison of the Claimant's role and the role to which he was transferred</u>

28. The Claimant contended that he was effectively recruited as a specialist, or "high calibre" Adjudicator because his qualifications and experience were above average and he had specific industry experience of investment products. He accepts, however, that nothing was said about the area to which he would be assigned until the end of his 2-3 week induction period, when he was assigned to the PM team. I do not accept that there was any agreement at the outset that the Claimant was employed exclusively to do PM work or work of an equivalent level. It is clear from his written contract and the "job profile" that applied at the time that he was recruited as a general Adjudicator. I accept the Claimant's assertion that if he had been assigned to Mass Claims at the outset he would have left, but that does not mean that there was a contractual agreement that he would be assigned to any particular area of work.

29. In October 2012 the Respondent issued a new job description for Adjudicators. It includes the following:

> "**about the job**
>
> You will be resolving disputes between financial businesses and their customers – so you will be the face of the ombudsman service, speaking to customers over the phone and communicating with them in writing.
>
> Some consumers will have already complained, not got the answer they were hoping for, and be looking for help on what they can do next. Some will be unsure where to turn to, and may be in need of urgent help. Some might want to know if what the financial business is offering them is fair. Or some might simply be checking how their case is going.
>
> When we take on a consumer's case, your job is to work out what really happened – and to make a fair and reasonable decision on the outcome…
>
> …
>
> **about you**
>
> …
>
> You won't have to know about any specific aspect of financial services – our experts will train and support you throughout your time with us."

30. The Claimant recalls seeing this document at the time, but he says that he took the view that it did not apply to him and he simply ignored it.

31. The Respondent does not argue that the document has contractual status as such, but does argue that the Respondent was entitled to "revise" the Claimant's job description in this way pursuant to clause 2 of the contact. I find that it does not accurately reflect the reality of the Claimant's role, or for that matter any of the Adjudicators in General Casework. It clearly envisages that Adjudicators will do pre-conversion work. As noted above, until the reorganisation this was not part of the role of Adjudicators working in General Casework. The document therefore represented a significant change to the Claimant's duties, but given that nothing changed in practice for those working in General Casework until the restructure, more than four years later, I find that it had no effect as regards their contractual duties.

32. Most of the questioning of witnesses during the hearing addressed the issue of how PM work compared to PPI work. In his skeleton argument prepared for closing submissions, Mr Milford on behalf of the Respondent said, "For the avoidance of doubt, R accepts that as a general proposition, complaints in portfolio management may on average (though not by any means universally) be more complex than complaints in Mass Claims." Even that limited concession, however, was not made by any of the Respondent's witnesses. Overall I consider that the Respondent has, at least until closing submissions, been very reluctant to accept an obvious fact – that of course there will be a range of complexity in every area, but in general terms PM work is

considerably more complex than PPI work.

33. Mr Smith's response to the Claimant's grievance, for example, failed to address the essential contention that PM work is inherently more complicated:

> "I accept that the sheer volume of PPI complaints (e.g. 3,000 or so a week) means that the Financial Ombudsman Service needs to process such cases in a slightly different way, using tools and techniques that are particularly suited to the very large volumes. Many of the cases do involve similar issues; and there are clearly-defined policy issues and redress formulae that are capable of being captured in a knowledge tool (Navigator) for more efficient processing. And it's true that most PPI cases involve smaller files and, thus, attract higher performance targets. But this doesn't stop adjudicators from applying their common sense and sound judgment to the varying facts and individual circumstances; nor does it stop them from exercising their forensic and mediation skills – or choosing the most appropriate means of communicating answers for the case in hand. I'm also mindful that adjudicators such as you use similar knowledge tools for aspects of investment work (e.g. redress in *Compass*). I think it's too simplistic to conclude that lower targets in investment connote a specialist status or more esoteric role. I don't think the facts speak for themselves."

34. That was a response to two specific issues raised by the Claimant as indicators of the difference in complexity: the fact that a decision-making tool (Navigator) is used in PPI work, and the fact that Adjudicators are expected to deal with a far higher number of cases within the same time. While it may be true that those facts do not *necessarily* demonstrate a difference in complexity, they are reasonable indicators, and Mr Smith did not address the fundamental point that the work in PM is more complex.

35. The most useful evidence I heard as to the differences between the *nature* of the work in the two areas came from Richard Whinder, an experienced Team Manager who was the Claimant's line manager in PM for two and a half years and is now a manager of a PPI team. He agreed with the proposition that in general terms PM cases are complex and PPI cases are not. Describing the work of adjudicators in the two areas, he said:

> "There are differences between how PM and PPI adjudicators handle cases. With PM cases the adjudicator would only receive the case once converted. They had case ownership. "View letters" would have a standard introduction paragraph. They'd have to complete the background circumstances and complaint from scratch. They keep case until closed or passed to an ombudsman. If it went to an ombudsman, the adjudicator would draft the final decision for the ombudsman. In PPI historically there was virtually no case ownership, but that began to change and some case ownership was encouraged. The adjudicator would often just deal with the next stage of the case, e.g. just look at jurisdiction then pass to someone else. If it goes to a decision they would just pass it to the decision queue. For mortgage and credit card cases [PPI], we would get key documents from the consumer and the business. The adjudicator would enter it into Navigator, which gives a suggested outcome. I have not seen a case yet where the adjudicator disagreed with the outcome. I assume it's an accurate system. It then

> produces suggested paragraphs, which may require some tailoring. If it went to a decision, would go to decision queue. I believe decisions are drafted by the ombudsman."

36. Mr Whinder also said that PM Adjudicators would be expected to deal with one or two cases a week, whereas PPI Adjudicators would be expected to complete 10 to 15 cases in a week.

37. Helene Pantelli, an Ombudsman Leader, confirmed that she was aware that PM Adjudicators drafted decisions for the ombudsmen. She said that this possibly also happened in pensions, but not in other areas as far as she knew. She always wrote her own decisions.

38. As to the use of decision-making tools, it was not in dispute that the Navigator tool was used for most PPI cases. Although I accept that there would be an element of judgement required in order to enter some of the information into the system, this does represent a marked difference to the way in which PM cases are dealt with. Indeed the whole point of a separate Mass Claims department is to achieve efficiency in dealing with a very large volume of cases raising the same issues. It is self-evident that the level of intellectual input from Adjudicators using Navigator will be lower than in cases where they are required to make an assessment and draft adjudication letters from scratch.

39. Contrary to the suggestion in Mr Smith's letter that similar tools are used in other areas, it was accepted that the "Compass" tool is rarely, if ever, used in PM cases. The evidence of Roger Yeomans, an extremely experienced ombudsman who worked very closely with the Claimant for many years, was that the type of work the Claimant did in PM was very complex and was certainly not suitable for a decision-making tool. He described the Claimant's work as follows:

> "Not all of the cases you [the Claimant] dealt with involved a portfolio but many did. You would be looking at several investments, need to understand them all, how they interrelate in the portfolio, what was the risk appetite of investor, etc. There's a lot going on. The complainants are also well clued up. They will certainly often think they know more about it than you do. They sometimes present complex arguments. You have that to cope with that as well. To do the job properly you have to grapple with quite complex arguments. Also from the financial firms themselves."

40. Another example of the Respondent's reluctance to accept the obvious point about PPI cases being more straightforward than PM cases was the frequent mention of the Supreme Court decision in *Plevin v Paragon Financial Ltd* [2017] UKSC 23. It was suggested by a number of the Respondent's witnesses that this judgment, which effectively created a new ground of complaint for consumers in PPI cases where high rates of commission applied, illustrated the actual and potential complexity of PPI work. In fact it was clear from Mr Sweeney's evidence that although the issues in the *Plevin* case itself were no doubt complex, and there would have been high level policy discussions within the Respondent to decide how to process complaints raising these issues, that did not translate into any additional difficulty or complexity in the work of PPI Adjudicators. If anything, the cases in which "Plevin" issues were raised were usually more straightforward than others.

41. Both parties included in the bundle examples of decisions as a means of demonstrating the types of issues that arise in PPI and PM. It is very difficult to deduce anything about the nature of the work of Adjudicators from such decisions, so I have given them very little weight, but it is of some note that the Respondent included only two PPI decisions, one from 2008, when PPI was a relatively new area and before the FSA had published guidelines on such cases, and a recent decision from late 2017 which extends to 34 pages, and which its witnesses accepted was not at all reflective of typical PPI work.

42. One of the Respondent's arguments was that the Claimant resigned before he had experienced PPI work and, had he stayed, it is likely that he would have been allocated cases at the more complicated end of the spectrum. Although the Claimant could reasonably have assumed that he would be recognised as an experienced and highly capable Adjudicator, so that he might in time be allocated more complicated PPI cases, there was nothing in the correspondence about the transfer to indicate that he would be treated any differently to any other PPI Adjudicator. There were certainly no guarantees that he would not be doing the type of cases that are suitable for Navigator for the foreseeable future. As it happens, if the Claimant had stayed, the high likelihood is that he would have moved back to PM work in one of the "transition pods".

43. A final area of dispute was the extent to which Adjudicators were transferred from one product area to another. The Respondent said that all Adjudicators were required to be flexible and that transfers between product areas were common. The Claimant accepted that transfers between other areas took place, but his evidence was that it hardly ever happened within the PM team. He said that only two PM Adjudicators were moved to another area during his nine years of working for the Respondent. That evidence was not challenged. Importantly, there was no evidence of any Adjudicators having being moved from General Casework to Mass Claims or vice versa before the 2017 reorganisation. Ms Pantelli said that there was an occasion when ombudsmen were temporarily "borrowed" from Mass Claims to help with a queue of cases in General Casework, but no examples were given of Adjudicators being moved in the same way, other than the very recent transfer back to the "transition pods" of those moved from General Casework to Mass Claims.

THE LAW

44. Section 95(1)(c) of the ERA provides:

> **95 Circumstances in which an employee is dismissed**
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if)—
> …
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

Dismissals pursuant to section 95(1)(c) are known as constructive dismissals.

45. Four conditions must be met in order for an employee to establish that he or she has been constructively dismissed:

45.1 There must be a breach of contract by the employer. This may be either an actual or anticipatory breach.
45.2 The breach must be repudiatory, i.e. a fundamental breach of the contract which entitles the employee to treat the contract as terminated.
45.3 The employee must leave in response to the breach.
45.4 The employee must not delay too long before resigning, otherwise he or she may be deemed to have affirmed the contract.

(*Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221 and subsequent cases)

46. An employer owes an implied duty of trust and confidence to its employees. The terms of the duty were set out by the House of Lords in *Mahmud v Bank of Credit and Commerce International SA* [1997] ICR 606 and clarified in subsequent case-law as follows:

> "The employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

Any breach of this term is necessarily fundamental and entitles an employee to resign in response to it (*Morrow v Safeway Stores Ltd* [2002] IRLR 9).

47. Pursuant to section 98 ERA it is for the employer to show that the reason for dismissal is either a reason falling within subsection (2) (capability, conduct, redundancy, breach of statutory duty) or "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held". According to section 98(4) the determination of the question whether the dismissal is fair or unfair "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 "shall be determined in accordance with equity and the substantial merits of the case."

48. Part XI of the ERA provides, so far as relevant:

136 Circumstances in which an employee is dismissed

(1) Subject to the provisions of this section and sections 137 and 138, for the purposes of this Part an employee is dismissed by his employer if (and only if)—

(a) the contract under which he is employed by the employer is terminated by the employer (whether with or without notice),
…
(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

…

139 Redundancy

(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

(iii) place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.
…
(6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.

…

141 Renewal of contract or re-engagement

(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 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 and place in which the employee would 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) those 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.

…

CONCLUSIONS

Unfair dismissal

49. It is convenient to address the issue of the reason for the Claimant's resignation and the Respondent's arguments about affirmation of the contract first. Although in his ET1 and at various points in the hearing the Claimant referred to a number of other alleged breaches of the contract, including for example an alleged failure to consult, he has always maintained that the reason for his resignation was the fact that he was transferred to the Mass Claims/PPI department. The resignation letter is absolutely clear, that the reason was "the unacceptable radical change of employment duties imposed by FOS", and it was asserted that those duties were changed on 4 September 2017. The Respondent argues that the Claimant cannot rely on an actual breach on 4 September 2017 because by then he had already lined up a replacement job in Paris at a much higher salary. He was always going to leave once he had found that job. Insofar as the Claimant relies on an anticipatory breach of contract, i.e. the threatened move to Mass Claims, the Respondent argues that the Claimant affirmed the contract, relying on the principles in *W E Cox Toner Ltd v Crook* [1981] ICR 823.

50. In *Cox Toner*, the breach relied upon by the employee was a threat of dismissal. Some six months after the original threat the employee's solicitors wrote to the employers stating that the employee would resign unless the allegations were retracted. The employers refused to withdraw the allegations and the employee resigned approximately one month later. The EAT found that the employee had affirmed the contract by continuing to work and draw his salary during the final one-month period, without saying that he was doing so "without prejudice" to his right to treat the contract as repudiated. Browne-Wilkinson J referred to the solicitors' ultimatum and said, "When that ultimatum was rejected, what possible justification can there have been for a further delay of nearly one month?". The EAT did not resolve the "difficult" question of whether the employee had affirmed the contract during the first six-month period.

51. The general principles to be applied were summarised by Browne-Wilkinson J as follows:

> "If one party ("the guilty party") commits a repudiatory breach of the contract, the other party ("the innocent party") can choose one of two courses: he can affirm the contract and insist on its further performance or he can accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses: if he once affirms the contract, his right to accept the repudiation is at an end. But he is not bound to elect within a reasonable or any other time. Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation: *Allen v Robles* [1969] 1 WLR 1193. Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with

the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation." (828F – 829A)

52. In the present case the Claimant first asserted an anticipatory breach of contract ("the proposed transfer could amount to a breach of contract") in his grievance submitted on 21 December 2016. Although his grievance appeal was rejected on 4 April 2017, by then there had still not been any actual change to his duties. He had formally moved to a Mass Claims team, but he continued to work on PM cases, doing precisely the same work that he had been doing throughout his employment, until 4 September 2017. The Claimant said that he was very conscious throughout this period of the difficult situation he was in. He did not want to resign before there was a clear breach, but he was also conscious of the need not to affirm the contract. He must have decided to resign by late July or early August, when he accepted the position in Paris. Although he said that the two jobs could have coexisted it is reasonably clear that the Paris job was sought as a replacement for his job with the Respondent. The decision to resign was in response to the threatened change of duties, although the Claimant did not at that stage know the date on which he would have to stop doing PM work and commence PPI training. The date was communicated to him on 7 August 2017 and on the same date he said that he would undergo the training "under protest" and that this should not be construed as affirmation of the contract. He also expressly reserved the right to accept the alleged repudiation.

53. This case therefore differs from *Cox Toner* in two material respects. First, it is a case of anticipatory, not actual, breach of contract. Secondly, the Claimant expressly reserved his position on the alleged breach. Of course an employee cannot avoid affirming the contract indefinitely simply by saying that he reserves his position, but on the facts of this case I consider that there was no affirmation. The Claimant was genuinely considering his options, at least until he accepted the Paris job, and he always made that clear to the Respondent. He remained in employment until the point at which his duties were actually changed. He communicated his decision to resign on the day on which the alleged breach took effect. The fact that he might have resigned even if the Respondent had changed its mind and not required him to carry out PPI work is not relevant. If the Respondent had changed its mind, he would have lost the right to resign and treat himself as constructively dismissed (*Harrison v Norwest Holst Group Administration Ltd* [1985] ICR 668), but it did not – it carried out its intention to change the Claimant's duties against his wishes and he resigned at that point.

54. The next question, then, is whether the Respondent's conduct in transferring the Claimant to the Mass Claims area amounted to a fundamental breach of the contract of employment. I will consider the implied term of trust and confidence first.

55. The Respondent's principal argument rests solely on a point of law. Mr Milford argued that the scope of the implied term of trust and confidence cannot contradict the express terms of the Claimant's contract. Because the express terms permitted him to be moved to Mass Claims, where he would have remained an "Adjudicator", the

Claimant cannot claim that the same transfer breached the trust and confidence term. Mr Milford relied on the case of *Reda v Flag Limited* [2002] IRLR 747.

56. *Reda v Flag* concerned two employees whose contracts said that they could be dismissed without cause at any time. They were dismissed without cause on a particular date in order to avoid having to grant them stock options pursuant to a scheme that was approved soon afterwards. The employees argued that the employer thereby acted in breach of the implied obligation of trust and confidence. The Privy Council rejected that argument:

> "Their Lordships accept that the appellants' contracts of employment contained [the implied term of trust and confidence]… But in common with other implied terms, it must yield to the express provisions of the contract. As Lord Millett observed in *Johnson v Unisys* it cannot sensibly be used to extent the relationship beyond its agreed duration; and, their Lordships would add, it cannot sensibly be used to circumscribe an express power of dismissal without cause. This would run counter to the general principle that an express and unrestricted power cannot in the ordinary way be circumscribed by an implied qualification…" (Para 45)

57. I queried during Mr Milford's closing submissions whether his argument was compatible with cases concerning the application of the implied term to mobility clauses. He said he believed it was, although no such case was produced by either party so the point could not be examined in any detail. I also asked hypothetically what the position would be if the employer accepted that there was a substantial loss of status in a transfer to a role that fell within a generic job title. Mr Milford's submission was that this would make no difference. If the role comes within the duties set out in the express terms of the contract then there can be no breach of the trust and confidence term in requiring the employee to perform it.

58. Having now reminded myself of the authorities on mobility clauses, I am not persuaded by that submission. In *United Bank Ltd v Akhtar* [1989] IRLR 507 the EAT upheld a finding that the employer breached the trust and confidence term by requiring the employee to transfer from the Leeds branch to the Birmingham branch with less than one week's notice. This was despite the fact that such a transfer was permitted according to a literal reading of the terms of the contract.

59. Addressing the employer's argument that it is erroneous in law to imply a term which contradicts an express term of the contract, the EAT held:

> "It seems to us that there is a clear distinction between implying a term which negatives a provision which is expressly stated in the contract and implying a term which controls the exercise of a discretion which is expressly conferred in a contract. The first is, of course, impermissible. We were referred to authority for that proposition but authority is hardly needed for it. The second, in our judgment, is not impermissible because there may well be circumstances where discretions are conferred but, nevertheless, they are not unfettered discretions, which can be exercised in a capricious way." (Para 44)

60. The EAT also specifically considered the implied term of trust and confidence, citing the formulation of Browne-Wilkinson J in *Woods v W M Car Services*

(Peterborough) Ltd [1981] IRLR 347:

> "[T]here is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: *Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it." (Cited at para 37 of *Akhtar*)

61. As for the interplay between that implied term and the express terms of a contract of employment, the EAT held:

> "[T]here may well be conduct which is either calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee, which a literal interpretation of the written words of the contract might appear to justify, and it is in this sense that we consider that in the field of employment law it is proper to imply an over-riding obligation in the terms used by Mr Justice Browne-Wilkinson, which is independent of, and in addition to, the literal interpretation of the actions which are permitted to the employer under the terms of the contract. On that aspect of the matter, we have the Industrial Tribunal's finding that the situation here was that the bank's conduct, in which we include inactivity rather than activity, was such that if one looks at it reasonably and sensibly, it was such that the employee could not be expected to put up with it." (Para 50)

62. There is no contradiction between that analysis and *Reda v Flag* because what the employees were arguing for in *Reda v Flag* would have nullified the contractual right to dismiss without cause. The proposed implied term did not control the exercise of a discretion, but rather "negatived" an express provision.

63. I therefore do not accept the Respondent's argument that, as a matter of law, there could be no breach of the trust and confidence term in the present case. I consider the proper approach is to look at all of the circumstances of the transfer and determine whether it was such that the Claimant could not be expected to put up with it.

64. I have concluded that there was a breach of the trust and confidence term in the circumstances of this case. The role of Adjudicators working in Mass Claims has always differed substantially to the role of Adjudicators working in General Casework. I have found that the work was significantly less complex than PM work. There was no evidence before me on which to compare it with the work in other product areas within General Casework, but it is self-evident that Mass Claims work is intended to be processed much more quickly than other work. That is the whole point of having a dedicated department for such cases – to maximise efficiency and ensure that multiple cases involving the same or very similar issues can be disposed of without unnecessary duplication of work. In PPI cases that is achieved by using the Navigator tool, which produces standard paragraphs for an adjudication letter. It is inevitable that

the intellectual input of Adjudicators in that area will be considerably lower than in General Casework. This is consistent with the historical lack of case ownership and the fact that Adjudicators in Mass Claims have a wider range of duties, including receiving calls from members of the public.

65. It is very significant that there was no evidence of any Adjudicators having been transferred from General Casework to Mass Claims prior to the 2017 reorganisation, despite the repeated assertion of the Respondents' witnesses that flexibility was an essential aspect of the Adjudicator role. The evidence suggested that when additional resource was needed in Mass Claims, the Respondent would recruit Adjudicators specifically for that department. I accept that within General Casework Adjudicators were sometimes required to move from one product area to another, but it is significant that the Claimant worked exclusively on PM cases for the entirety of his nine years of employment. I have already found above that the job description issued in October 2012 did not accurately reflect the Claimant's role.

66. Although the Claimant had been recruited as a generic "Adjudicator", the effect of that background was that the Claimant was entitled to assume that he would not be indefinitely deployed to the Mass Claims department, conducting the same type of work as the existing Mass Claims Adjudicators. That is not the same as saying that the Claimant was contractually entitled to work in the PM team permanently or that he could only have been transferred to another team within General Casework that deals with work at a similar level of complexity (he suggested that the pensions would have been equivalent), but Mass Claims was viewed as, and in reality it was, different and lower status work. Nor do I consider that the Respondent was not entitled to require the Claimant to carry out additional functions, such as answering calls from members of the public. This would have been permitted under clause 2 of Part C of the contract of employment ("you may be required to carry out other duties as necessary to meet the needs of the FOS"). The important factors are that the Respondent has always distinguished between Mass Claims and General Casework Adjudicators, has never required a General Casework Adjudicator to transfer to Mass Claims before, and there was a significant loss of status involved in such a transfer.

67. I find that, in requiring the Claimant to move to Mass Claims against his will, the Respondent conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between it and the Claimant.

68. The Respondent argued that even if that were the case, the Respondent had "reasonable and proper cause" for changing the Claimant's work area, in circumstances where the Respondent had good business reasons for reorganising and the Claimant had decided not to apply for the Investigator role, and therefore there was no breach of the implied term.

69. The Claimant's position has always been that if the Respondent wished to reorganise in this way, it should have conducted a redundancy exercise for General Casework Adjudicators. He says that by transferring Adjudicators to Mass Claims without acknowledging a redundancy situation, the Respondent acted unreasonably. I agree that if there was a redundancy situation, the Respondent could not be said to have had "reasonable and proper cause" for its conduct.

70. For the reasons given below, I consider that there was a redundancy situation. The Respondent always disputed that. Whether or not there was a deliberate attempt to avoid making redundancy payments is not relevant. There cannot have been “reasonable and proper cause” for the Respondent’s conduct in circumstances where Adjudicators, including the Claimant, were required either to apply for a newly created role or be moved to a different and lower status role, without acknowledging a redundancy situation (with all that that requires in terms of consultation and potentially payments to individuals who are dismissed by reason of redundancy). Regardless of the merits of the reorganisation, the Respondent’s failure to acknowledge the redundancy situation was not reasonable.

71. I therefore conclude that the Respondent was in repudiatory breach of the contract, that that was a cause of the Claimant’s resignation, and that he did not affirm the contract. He was therefore constructively dismissed.

72. Since I have found a breach of the trust and confidence term it is unnecessary to determine whether there was an implied term in the Claimant’s contract that he was a “specialist PM” (or “high calibre”, as he put it in closing submissions) Adjudicator and would only be required to carry out PM or equivalent work.

73. It is also unnecessary to consider the Claimant’s argument that the move to Mass Claims constituted an actual dismissal.

74. The Respondent argues that even if the Claimant was dismissed, constructively or actually, the dismissal was for “some other substantial reason” and was fair. Again, I consider that the redundancy issue is determinative. Because the Claimant was dismissed by reason of redundancy (see below), the Respondent cannot establish that there was “some other substantial reason”.

75. The Claimant’s dismissal was therefore unfair.

<u>Contractual redundancy payment</u>

76. Because the requirements for entitlement to the contractual redundancy payment are narrower than for a statutory redundancy payment, I address that complaint first.

77. As noted above, it was agreed that the conditions for entitlement to the contractual redundancy payment were the same as for a statutory redundancy payment, except that there is no entitlement where the same or suitable alternative employment has been offered and rejected (whether reasonably or not).

78. The first question is whether the Claimant was dismissed by reason of redundancy. According to s.139 ERA an employee 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 employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish”. Subsection (6) confirms that “cease” and “diminish” mean cease and diminish either permanently or temporarily and for whatever reason.

79. The Respondent relied on *Home Office v Evans* [2008] ICR 302 and suggested that the statutory test is not met unless there is a proposal to dismiss by reason of redundancy. But that case concerned a different question, namely whether a the employer was bound to follow a contractual redundancy procedure that applied where there was a redundancy situation <u>and</u> a duty to consult under s.188 of the Trade Union and Labour Relations (Consolidation) Act 1992. That duty only arises where there is a proposal to dismiss 20 or more of employees.

80. The Claimant's claim for a redundancy payment has nothing to do with the duty to consult or the statutory requirements for that duty to apply. I have found that the Claimant was dismissed. The only question (at the first stage of the analysis) is whether that dismissal was wholly or mainly attributable to the fact that the requirements of the business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish.

81. The Respondent argues that there was no diminution in the work of "Adjudicators" generally, since all of those who did not become Investigators were retained as Adjudicators (albeit in the Mass Claims department). Alternatively it argues that there was no diminution in the <u>work</u> of resolving disputes. There was a continuing need for that to be done and under the new structure it would simply be carried out by Investigators or Mass Claims Adjudicators.

82. In light of my findings above, I do not consider that the work of Mass Claims Adjudicators comes within the same category as the work of General Casework Adjudicators. It is not the same "work of a particular kind". The first argument fails on that basis.

83. As to the second argument, clearly the effect of the reorganisation (or at least the intention of it) was that there would be no General Casework Adjudicators in the new structure. That does not necessarily mean that there was a cessation or diminution of work of a particular kind. What must be considered is the work, not the job title. But in this case I consider that the best way of describing the "work of a particular kind" is *the work of General Casework Adjudicators*. The work is described in the factual findings above and incorporates a number of different stages of the adjudication process. It is almost entirely paper based. It is neither necessary nor helpful to define the work in any other way.

84. So the question is whether the work of General Casework Adjudicators ceased or diminished, or was expected to do so. I find that one of the purposes of the reorganisation was to reduce the overall time spent on that work. The CEO's evidence to the Treasury Sub-Committee suggests that the "traditional" adjudicator tasks of seeking the views of each party (in writing), gathering the necessary documents and producing an adjudication letter were considered to be unnecessary in many cases. The intention was that Investigators would resolve at least some complaints with very little paperwork at all. In words of the CEO the role is "quite different" to the role of an Adjudicator.

85. It may be that there was no expected diminution in the number of General Casework complaints received by the Respondent, and therefore requiring resolution, but the whole idea behind the restructure was to deal with those cases more efficiently,

with less time spent on traditional adjudication tasks.

86. I conclude that the Claimant's dismissal was wholly or mainly attributable to the fact that the Respondent's requirements for employees to carry out the work of General Casework adjudicators diminished or was expected to do so.

87. The next question is whether the role of Mass Claims Adjudicator met the requirements of s.141 ERA.

88. It was unnecessary for the unfair dismissal complaint to determine whether the Claimant's contract contained an implied term that he would only be required to carry out PM work or work of a similar level of complexity, but for the purpose of the analysis under s.141 it is necessary to consider what the terms of his contract were as to "capacity" in which he was employed. In light of my findings above I consider that the Claimant was employed as a General Casework Adjudicator. Although the generic title of "Adjudicator" may have been sufficient to describe the capacity in which the Claimant was initially employed, by 2016 it was not. The conduct of the parties as described above, notably the Respondent distinguishing in practice between General Casework and Mass Claims Adjudicators, was such that there was an implied term that the Claimant was employed in the General Casework department and could not be deployed to Mass Claims without his agreement.

89. The Respondent argues (albeit in the context of the unfair dismissal complaint) that implying any limitation on the Claimant's job title in this way is impermissible in law because it is contrary to the express provisions of the contract, namely the express job title and the flexibility clause. It relies on *Nelson v BBC (No.1)* [1977] ICR 649, in which the Court of Appeal held that it was impermissible to imply a term that a broadcaster was employed in a particular geographical area when his contract contained an express mobility clause.

90. I do not accept, however, that there is any inconsistency with the express terms of the Claimant's contract by implying a term that he was employed as a General Casework Adjudicator. In *Nelson v BBC* the implied term contended for would have deprived a mobility clause of any meaning. Here, the implied qualification in the Claimant's job title has no bearing on any of the other terms of his contract. The "flexibility" clause relates only to the "precise description" of the job, so it still has meaning. I consider that it is necessary to imply such a term to explain the true nature of the employment relationship.

91. The "capacity" in which the Claimant would be employed as a Mass Claims Adjudicator would therefore differ from the corresponding provisions of his previous contract, so s.141(3)(a) is not satisfied.

92. The next question is whether the offer to work as a Mass Claims Adjudicator constituted an offer of suitable employment in relation to the employee. I have already found that the proposed transfer to Mass Claims entailed a significant loss of status. That alone would be sufficient to find that it was not "suitable". But I also consider that the job did not suit the Claimant's skills, aptitudes and experience. In short, he is overqualified for the role, having worked for nine years in a more intellectually demanding and higher status job.

93. It follows that the Claimant is entitled to a redundancy payment pursuant to the Respondent's contractual redundancy policy. This incorporates his entitlement to a statutory redundancy payment.

Remedy

94. There was not enough time during the hearing for evidence or submissions on remedy. The Claimant's Schedule of Loss sets out a calculation of the contractual redundancy payment and he claims one month's loss of earnings by way of compensatory award for unfair dismissal. The total claimed is £8,096. It was not clear whether there are any issues in dispute on remedy. I therefore direct that the Respondent confirms within 21 days of the date on which this judgment is sent to the parties whether it contests the sums claimed, and if so on what basis. If it does, a remedy hearing will be listed with a time estimate of three hours. Otherwise a further judgment will be issued awarding the Claimant the amount claimed.

Employment Judge Ferguson

15 March 2018